



Public-Private Cooperation in Transnational Regulation

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Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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This thesis has been submitted for language correction.

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ABSTRACT

This thesis examines the emergence of transnational regulatory cooperation between public and private actors. It inquires why a private regulator and an international organisation may enter into a cooperation agreement in order to regulate particular issues, and what this tells us about the relationship between ‘expertise,’ ‘authority’ and ‘legitimacy’ in particular domains of global governance. The argument put forward in the thesis is that different types of regulators cooperate because, in an unsettled global space with no hierarchical framework, it is necessary for them to acquire sufficient authority to secure compliance with their regulatory agenda. In order to acquire and maintain such authority, regulators must be perceived as legitimate and their regulation as effective. Cooperation can open venues for participation and deliberation and for the exchange of necessary competences (particularly expertise); and thus ultimately can help regulators establish and strengthen their authority.

Another important finding of this research is that cooperation can develop into more long-lasting network structures. These networks are often of a multi-level nature. As such, they traverse local, national, and international spaces. The thesis then develops the idea of ‘networks of constitutionalization’ to describe the observation that bilateral arrangements as examined here generate ordering effects which extend beyond the two parties. Consequently they become the basis for norm creation and adoption for different types of actors located in the networks formed around the issue area. Thus, even in pluralistic structures, eventually a certain kind of constitutionalization can emerge putting into question sharp divisions between ‘pluralist’ and ‘constitutionalist’ interpretations of a developing global (legal) order.

This work also encompasses two case studies: the ISO 26000 process, whereby the ‘private’ technical standard setter ISO concluded separate cooperation agreements with the ILO, the OECD and the UN Global Compact; and a case study on ‘Sport and Environment’ that focuses on the long-standing cooperation between the IOC and the UN Environmental Programme.

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INTRODUCTION

1. INTRODUCTION AND OUTLINE OF THE MAIN RESEARCH QUESTION

This work examines formal forms of cooperation between public international organisations and ‘private regulators’. The emergence of cooperation between international organisations and private regulators through agreements has to be analysed in the context of at least two decades of considerable economic, social and cultural globalisation.¹ The interconnection between markets and societies, the spread and expansion of businesses and trade around the globe, as well as the functional differentiation of society has presented traditional regulators with challenges that are impossible to address by acting alone.² To elaborate, on the one hand we have witnessed the rise of different public actors exercising governance activities with global, regional or cross-border effects.³ On the other hand there has been a noticeable rise in private regulation made and adopted by both commercial entities and civil society actors.⁴ We are now faced with a pluralistic landscape made up of different types of regulators performing a variety of activities in different geographical and thematic areas.⁵ Much has been written regarding these developments and there is also a significant body of literature on the transformation of law and the global legal order more generally.⁶ One can also find some work, predominantly in political science, dealing with forms of transnational cooperation between different types of actors, such as international organisations and private actors.⁷ However, what is missing is an analysis which links the transformations in the global sphere with a phenomenon such as regulatory cooperation, and

¹ B de Sousa Santos, ‘The Processes of Globalization’, in *Eurozine* 2002, 2 ff.

² P F Kjaer, ‘Post-Hegelian Networks, Comments on the Chapter by Simon Deaking’, in: M Amstutz & G Teubner, *Networks: Legal Issues of Multilateral Co-Operation* (Hart Publishing, 2009) 75 ff.

³ See for instance B Kingsbury, N Krisch & R B Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) 15, at 20.

⁴ R B Hall & T J Biersteker, ‘The Emergence of Private Authority in the International System’, in R B Hall & T J Biersteker (eds), *The Emergence of Private Authority in Global Governance* (CUP, 2002) 3, and the different contributions therein; F Cafaggi, ‘New Foundations of Transnational Private Regulation’, 38 *Journal of Law and Society* (2011) 20 ff.

⁵ See, eg P S Berman, ‘Global Legal Pluralism’, 80 *Southern California Law Review* (2007) 1155 ff.

⁶ See for more on this topic Chapter 2.

⁷ For examples of legal literature on public private partnerships see K Abbott, ‘Public Private Partnerships’, in: *Max Planck Encyclopedia of Public International Law* (OUP, 2008), available at: <http://opil.ouplaw.com/home/EPIL> (last accessed 19 December 2014); and D Azis, ‘Global Public-Private Partnerships in International Law’ 2 *Asian Journal of International Law* (2012) 9 ff.

which ask why regulatory cooperation emerges. This thesis proposes that regulatory cooperation can be seen as an illustration of something more – namely as a change in the way (political) authority is devolved from the traditional centres of power to a more heterogeneous set of actors (including formal private entities). The main argument will be that authority is not equally distributed between the different types of actors in the global realm. This is true for functionally specified entities (such as public international organisations and private regulators) and also for states. Moreover this devolution of authority is unstable and an actor considered authoritative today may see this authority challenged tomorrow. In this context, cooperation functions as a means to gain access to the authority necessary to achieve regulatory goals. Furthermore, it can also function as a venue to stabilise authority and make it more robust against challenges from internal or external challenges.

Very much related to the issue of stabilisation, the second research question seeks to examine how regulatory cooperation is framed and to assess the structures within which it develops. It is argued that regulatory cooperation can lead to more integrated network structures. Such structures are interesting from a legal perspective for a variety of reasons. In particular, from a legal theoretical point of view, networks raise questions as to how to understand the global legal order. In general terms, some commentators have argued there exist factors which point towards the development of a more integrated global legal order, framed by a number of universal principles such as human rights (including constitutionalists and universalists). Others deny this development and see instead a fragmentation of society into different functionally separated units (pluralists). The thesis argues that a network approach can add to an understanding of a political and legal order beyond the dichotomy between pluralism and universalism. Networks are spaces in which different independent regimes achieve a certain level of stability and uniformity in terms of normative values and structure – a development which in this thesis is termed constitutionalisation effects.

2. METHODOLOGY

As such, the thesis takes as its starting point the interface between legal and political theory. The main method is conceptual analysis with the goal of providing a better account of aspects of

regulation in a globalized context. This analysis is driven by several qualitative empirical case studies. The objective of the case studies is to first point out the shortcomings of conventional understandings of law and regulation beyond the nation state, for which they were constructed. Subsequently the case studies aim to explain and map different, novel transnational forms of regulation such as cooperative approaches and multilevel regulatory networks. The findings of this exercise in turn help reconstruct a more adequate conception of regulation in a transnational context. For the case studies the thesis relies on organisational documents and interviews which were conducted with representatives of the respective public and private organisations. The thesis then analyses the organisational documents in an attempt to better understand the structures of cooperation and draws upon the interviews in seeking to understand what motivates organisations to engage into cooperation vis-à-vis taking a conflicting or autonomous position.

3. STRUCTURE

The thesis consists of a theoretical and an empirical part and is divided into five chapters. The first chapter provides context and preliminary clarifications of the main concepts. The following two chapters lay out the theoretical argument and the two final chapters each contain a case study.

Chapter 1 first depicts changes in the general global framework which have led to the emergence of public private cooperation. Chapter 1 looks at literature on globalisation and the transformation of the nation state. The second part of the Chapter I presents some of the commonly used terms such as cooperation and distinctions such as public/private, transnational regulation/governance. Rather than providing fixed definitions this chapter aims to set out the context in which these terms emerged and are applied. Chapter 1 then offers a set of preliminary clarifications which will facilitate the subsequent analysis in the following chapters.

Chapter 2 then deals with the ‘why’ question put forward above. Thus, Chapter 2 poses the question of why cooperation takes place and why it emerges between formally distinct actors. The main claim made in this Chapter is that different types of organisations cooperate because in the fragmented, pluralistic context of the global legal order, transnational regulators convey over

incomplete authority. Cooperation becomes necessary for individual regulators in order to gain the authority necessary to effectively regulate. In addition to giving a general account of authority in the transnational context, Chapter 2 looks in particular at different regulatory competences which actors exchange in the course of the cooperative processes. This is termed ‘regulatory commodity exchange’. Chapter 2 also focuses on different understandings of legitimacy and how they play out between different types of actors in a transnational context. It is argued that in particular origin and tradition based rationales and considerations play an important role for considering transnational actors and their regulation as legitimate. For this reason states and international organisations, which are supported by states and have their own established traditions, have an advantage. Chapter 2 also looks at epistemic authority and how the increase in expertise-driven governance makes private actors important partners in regulatory cooperation.

The **Third Chapter** focuses on the structure of public private regulatory cooperation. It is argued that regulatory cooperation can develop into network structures, which are in general terms more integrated forms of cooperation. Networks are often discussed in relation to two other forms of organisation: market and hierarchy. A market structure is characterised by individual transactions governed by contracts without any further relationship existing between the participants. In the hierarchical model all transactions take place under the umbrella of one entity (the firm) which is characterised by central organisation.⁸ Transposed to the political and legal sphere networks constitute more consolidated structures which nevertheless do not fit into traditional hierarchical models.

However, as indicated above, this chapter seeks to go beyond regulatory networks and asks a broader question, namely what the development of regulatory networks tells us about our understanding of the global legal order. Chapter 3 does not simply take regulatory networks as evidence for a network structure in the global legal realm. Rather, it engages in a translation exercise. First it is shown how cooperative networks create spaces wherein independent regimes are stabilised. This is combined with the harmonisation of certain normative values and structural

⁸ See W W Powell, ‘Neither Market Nor Hierarchy: Network Forms of Organization’, 12 *Research in Organizational Behavior*, (1990) 295 ff. and O E Williamson, *The Economic Institutions of Capitalism* (Free Press, 1985).

settings. This is termed constitutionalisation effects. Transposed into the general debate on the global legal order the thesis joins the chorus of those arguing for a third way beyond a rather far-reaching conception of pluralism and all-embracing universalism. A network approach, it is argued, allows for a general pluralist understanding of the global realm but at the same time pays attention to the connections between the different independent orders and spaces of harmonisation and integration.

Chapter 4 contains the first case study of the thesis. Chapter 4 examines the cooperation between three international organisations – the ILO, UN, and OECD – and ISO in the ISO 26000 process. ISO 26000 constitutes a so-called management standard in the area of social responsibility regulation. This area is highly fragmented with several dozen different initiatives addressing one or several sectors of social responsibility regulation. ISO originally being a technical, mainly industry-based, standard-setter needed the legitimacy and expertise of the international organisations involved, given the many public policy questions the standard had to deal with. Cooperation was a venue for ISO to access both. On the other side the international organisations saw an opportunity to benefit from the special ties ISO had with the industry in order to further spread both their own instruments but also the message of responsible business behaviour more generally. It is argued that this was intended to achieving constitutionalisation effects by harmonising existing regulatory frameworks and by creating a consistent message which could be spread to the business community.

The second case study provided in **Chapter 5** focuses on environmental protection in the sports realm. Chapter 5 concentrate specifically on the cooperation between the IOC and UNEP. The study however expands beyond these two organisations and looks at the broader network that established parts of the sports industry, including different local and transnational sports associations, as well as local, regional and national governments. This case study shows how the initial collaborative project started between the two organisations over time led to more stabilised structures through which environmental protection requirements where fostered. Particular focus in the study is put on the interplay between the transnational level and the regional or national one. The thesis uses social science literature on so-called ‘mega-events’ to depict how political and cultural transformations are inspired and accelerated by an event such as

the Olympic Games. Commitments by the local organisers as formalised in host city contracts often require significant (legal) transformations, and investments into environmental related (infrastructural) projects. As such the Games can function as a catalyst for increased environmental protection. On the other hand transformations can also take place at the transnational level, inspired by the local developments. The chapter will pay significant attention on this interplay.

CHAPTER 1

PUBLIC PRIVATE REGULATORY COOPERATION – CONTEXT AND PRELIMINARY CLARIFICATIONS

1. INTRODUCTION

This Chapter aims to provide a framework within which the subsequent analysis of public private regulatory cooperation can be carried out. As outlined above, a core inspiration for this work was the empirical observation that throughout the last decades there has been a significant increase in cooperation between international organisations and private actors. One recurring term used in this context is to describe these events, which could be considered as having triggered many of the legal developments outside traditional state borders is globalisation. Even though the term is not uncontroversial, it is nonetheless most commonly used when describing the changes which have taken place since the end of the Cold War (and to a greater or lesser extent even before). They include economic, cultural and social transformations, which have had (and continue to have) a significant impact on the regulatory state and our preconceptions of the law. The first part of this Chapter, therefore, engages with the extensive literature on this issue and provides a short summary. It then subsequently looks into the changing role of the nation state (2).

The second part of the thesis tries to provide some preliminary clarifications regarding some of the recurring terms in this thesis and provides a demarcation between commonly used concepts. The thesis will focus on the distinction between public and private in section 3. This is followed by section 4 where a first understanding of some of the commonly used terms such as translational law, regulation and governance is provided. The final section of this chapter (5) looks at understandings of cooperation in different contexts.

2. THE CONTEXT – GLOBALISATION AND THE TRANSFORMATION OF THE NATION STATE

Before assessing the distinction between public and private actors or giving a working definition of transnational regulation, it is a useful exercise to identify the actual events which have contributed to the difficulties now felt in establishing clear borders or providing precise definitions. Such events also underlie many of the issues addressed in the following chapters. As such, it is necessary to shed some light on the phenomenon so ambitiously coined globalisation,⁹ as well as a related topic – the transformation of the nation state.

2.1 Globalisation

The literature on this topic is both vast and diverse, containing very different appraisals and predictions.¹⁰ Accordingly, globalisation is not a predominantly legal or even political event. Instead, it is a ‘multifaceted phenomenon containing economic, social, political, cultural, religious and legal dimensions’,¹¹ which are characterized by complexity, fluidity and elusiveness;¹² or, in other words, by a ‘time – space compression’¹³.

In terms of the present study, it is necessary to determine those developments and effects induced by globalisation which have had such an impact on law and regulation in triggering public private cooperation. Therefore, the thesis will not provide an extensive overview over the different theoretical approaches and categorisations of the myriad aspects of globalisation; rather

⁹ Globalisation as elaborated in the following is what is usually referred to as ‘contemporary globalization’. This term includes predominantly the post-cold war period, but acknowledges that there have been different historical époques characterized by different waves of globalisation, see F Mégret, ‘Globalization’ in: *Max Planck Encyclopaedia of Public International Law* (OUP, 2009) available at: <http://opil.ouplaw.com/home/epil> (last accessed 19 December 2014), para. 3.

¹⁰ B de Sousa Santos, ‘The Process of Globalisation’, in: Eurozine 2002, available at: <http://www.eurozine.com/articles/2002-08-22-santos-en.html> (last accessed 19 December 2014) at 1, lists a few different perspectives taken to describe enhanced global interaction, such as ‘globalisation, global formation, global culture, global system, global modernity, global process, globalisation cultures or global cities’. See, furthermore S Huntington, ‘The Clash of Civilization’, 72 (3) *Foreign Affairs* (1993) 3-12; F Fukuyama, *The End of History and the Last Man* (The Free Press, 1992).

¹¹ Santos, *supra* note 2, at 2.

¹² W Twining, *Globalization & Legal Theory* (Butterworths, 2000), at 196.

¹³ See D Harvey, *The Conditions of Postmodernity: An Inquiry into the Origins of Cultural Change* (Blackwell, 1990), Chapter 17, at 284.

the following paragraphs will be limited to the most prominent transformations and those most relevant for this work.

The first ones to name in this context are technical innovation and economic globalisation; in particular technical progress and innovation in production processes, which have led to major transformations of the global economy.¹⁴ Production has become globalised, being increasingly interlinked through transnational supply chains. International trade has expanded accompanied by increased and enhanced international capital flows, growing financial markets and foreign investment.¹⁵ Another crucial and interlinked event was the development of the internet and the access of broader sections of the population (at least in developing countries) to it.¹⁶ Such developments necessarily required regulatory structures which extend beyond national borders and accommodate transnational and digital activities.

Apart from those technical and factual changes in economic processes globalisation is often said to be accompanied by a particular *political* agenda, the so-called Washington Consensus,¹⁷ or neo-liberal economic consensus.¹⁸ The term refers to the creation and proliferation of international economic organisations and institutions as a means to respond to the economic developments and the policies pursued to achieve them at least during the early post-Cold War period. Particularly important institutions to mention are the World Bank, the IMF, the WTO and regional trade organisations, as well as ICSID. There has also been an increase of less formal or even private institutions, such as IOSCO, the Basel Committee or Credit Rating Agencies. Most of these institutions followed a policy that supported or demanded countries to open their national economies to the world market, privatisation, deregulation, strong protection of foreign investments, and strict fiscal policies. Little attention was said to have been awarded on the deep impacts those policies and developments had on social and national political realms.¹⁹

¹⁴ R J Gilson, C F Sabel & R E Scott, 'Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration', 109 *Columbia Law Review* (2009) at 431 ff.; Mégret, *supra* note 1, para. 9.

¹⁵ See Mégret, *supra* note 1, para. 10.

¹⁶ Ibid para 11.

¹⁷ Referring to the support by US Politics and multilateral agencies seated in Washington such as the World Bank and the IMF; J Williamson, *The Political Economy of Policy Reform* (Institute for International Economics, 1994) at 17; W Twining, *General Jurisprudence, Understanding Law from a Global Perspective* (CUP, 2009) at 13 and 336 ff.

¹⁸ Sousa Santos, *supra* note 2, at 5.

¹⁹ Ibid.

More generally and on a more theoretical level Boaventura de Sousa Santos distinguishes between four forms of globalisation. These are: globalised localism, localized globalism, cosmopolitanism, and the common inheritance of humanity.²⁰ The first form refers to a particular local phenomenon which is globally adapted and successful. Examples of this include fast food and the English language as well as the spread of intellectual property laws. Localized globalism refers to the impact of global events on local structures. These are changes in local economic relations ('elimination of neighbouring commerce'²¹) and the opening up of cultural resources to tourism, for example. Unsurprisingly such developments can also be observed with regard to regulation or law. In fact we will revisit both forms of globalisation in later chapters of this thesis when either local forms of regulation inspire global actors and developments, and when such practices are taken up by a globally operating entity which implements it locally.²² Since the developments just described are often accused of causing new social inequalities and an unequal distribution of wealth,²³ they have inspired numerous anti-globalisation and global justice movements (some of which will be addressed in the sports case study).

The two final expressions of globalisation can therefore be seen as responses to the negative externalities of globalised localism and localized globalism. Cosmopolitanism stands for forms of organised resistance of nation states, regions and social groups against the developments described above. The venues used for this resistance are those created through globalisation, such as technology and advancements in communications. The last form of globalisation is the idea of a common heritage of humanity and reflects 'transnational struggles to protect and decommodify resources, entities, artifacts and environments considered essential for the dignified survival of humanity, whose sustainability can only be guaranteed on a planetary scale'.²⁴

²⁰ Ibid at 25 ff.; B de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Routledge, 1995) at 262 ff.; See also W Twining, *supra* note 4, at 221 ff.

²¹ Sousa Santos, *supra* note 2, at 26.

²² See particularly Chapter 5.

²³ Sousa Santos, *supra* note 2, at 5, who provides references to further studies on the topic.

²⁴ Ibid at 28.

2.2 The Changing Role of the State in a Globalised World

As illustrated in the previous section, globalisation has had numerous ‘global’ effects which have caused significant changes to one particular construct which until relatively recently had been the centre of regulatory and legal supremacy – the nation state. This is most visible in the terminology often used in literature dealing with effects of globalisation. Expressions such as ‘post national’,²⁵ or ‘transnational’²⁶ all allude to the fact that our traditional understanding of the nature of the nation state may need to be reconsidered.

This ‘traditional’ understanding of the state, based on theories by Thomas Hobbes or Jean Bodin, only emerged in Europe in the 16th and 17th century.²⁷ In accordance with this classical ‘Westphalian’²⁸ view, and in the state-centric conceptions of the nineteenth and early twentieth century, the central focus was placed on the nation state. The nation state consisted of a specific territory, was the sole holder of authority and was the sole creator and executer of rules. Today, in a globalised and digitalised world territoriality is in fact often perceived as an obstacle to the effective exercise of those tasks.²⁹ The question then emerges as to how to view the state in light of the developments described above. Did the state lose its role as ‘the sole, or in some instances even principal source of authority, in either the domestic arena or in the international system’,³⁰

²⁵ J Habermas, *The Postnational Constellation* (MIT Press, 2001).

²⁶ Philip C. Jessup, *Transnational Law* (New Haven, 1956); or G-P Calliess & P Zumbansen, *Rough Consensus and Running Code – A Theory of Transnational Private Law* (Hart, 2010).

²⁷ See N Jansen, *The Making of Legal Authority, Non-legislative Codifications in Historical and Comparative Perspective* (OUP, 2010) at 13.

²⁸ The Westphalian concept refers to the international order created in the 17th century in the aftermath of the Thirty Year War in Osnabrück and Münster. Core of this order were territorially defined nation states, equally as subjects of this new order, which coordinated their interaction through a new body of law, the law of nations or international law. Contrasted is the horizontally aligned Westphalian concept with the hierarchical order of the Middle Ages that was characterized by a the ‘idea of a Christian commonwealth’ lead by universal, superior authority – the papacy and the Holy Roman Empire’. See, R Grote, ‘Westphalian System’, in: *Max Planck Encyclopaedia of Public International Law* (OUP, 2006), available at: <http://opil.ouplaw.com/home/epil> (last accessed 19 December 2014), para 4. See L Gross, ‘The Peace of Westphalia, 1648-1948’, 42 *American Journal of International Law* (1948) 20ff; A Nussbaum, *A Concise History of the Law of Nations* (The Macmillan Company, 1954) Chapter V starting at 115, as well as chapter IV, starting at 61.

²⁹ See, e.g., P F Kjaer, *Post-Hegelian Networks – Comments on the Chapter by Simon Deakin*, in: M Amstutz & G Teubner (eds), *Networks, Legal Issues of Multilateral Cooperation* (Hart Publishing, 2009) 75, at 83 f. outlines areas, where ‘the territorially-based state experiences difficulties in providing the necessary protection, thereby forcing economic entities to find alternative, and largely private, modes of protection’. See furthermore, S Sassen, *A Sociology of Globalization* (W W Norton & Company, 2007) in particular Chapter 3: *The State Confronts the Global Economy and Digital Networks*, at 45 ff.

³⁰ RB Hall & TJ Biersteker, *The Emergence of Private Authority* (CUP, 2003) at 5.

or to put it in even stronger terms, has the traditional concept of the nation state become obsolete? Is it today just one player among many in the business of regulating the global economy?

There are strong tendencies in the literature to interpret the role of the state as a declining one. As the state, under the pressure of economic globalisation, deregulates and privatises it contributes to its own loss of significance.³¹ This development, it is argued, has led to a shift in governance activities from public to private actors.³² Gunther Teubner for instance states that ‘globalization of law creates a multitude of decentered law-making processes in various sectors of civil society, independently of nation states’.³³ Thus, according to such commentators there is a functional differentiation taking place where new authoritative bodies are created in various different economic and civil society sectors – a process in which the influence of the state is non-existent or marginal.³⁴

Others, however, argue that the processes taking place are merely a continuation of a change that is inherent in history but does not necessary lead to a general distortion of state primacy as such.³⁵ According to this view neither empirical evidence nor theoretical considerations lead to the assumption that state power is reduced. Instead states are in a continuous process of adaptation to new (economic) circumstances, which very often actually originate from their own

³¹ See for an overview over the different positions: Sassen, *supra* note 21, at 47 ff. who refers to L Panitch, ‘Rethinking the Role of the State’, in: J H Mittelman (ed), *Globalization and Critical Reflections* (Lynne Rienner Publishers, 1996), at 83 ff.; as well as, S Gill, ‘Globalization, Democratization, and the Politics of Indifference’, in: J H Mittelman (ed), *Globalization and Critical Reflections* (Lynne Rienner Publishers, 1996) 205 ff.

³² Hall & Bierstecker, *supra* note 22, at 3ff., C Cutler, V Haufler & T Porter (eds), *Private Authority and International Affairs* (State University of New York Press, 1999).

³³ See, G Teubner, ‘Foreword: Legal Regimes of Global Non-State Actors’, in: G. Teubner (ed), *Global Law Without the State* (Dartmouth Publishing, 1997) at xiii. See furthermore, A Fischer-Lescano & G Teubner, ‘Regime –Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, 25 *Michigan Journal of International Law* (2004) 999 ff, at 1008 they state that ‘[t]he final break with such conceptions (national legal orders) was only signalled in the last century with the rapidly accelerating expansion of international organizations and regulatory regimes, which, in sharp contrast to their genesis within international treaties, established themselves as autonomous legal orders. The national differentiation of law is now overlain by sectoral fragmentation’.

³⁴ G Teubner, ‘Global Bukowina’: Legal Pluralism in the World Society’, in: G. Teubner (ed), *Global Law without the State* (Dartmouth Publishing, 1997) at 3.

³⁵ See for an overview over this position Sassen, *supra* note 21, at 47 who refers to M Mann, ‘Has Globalization Ended the Rise and Rise of the Nation-State?’ 4 *Review of International Political Economy* (1997) 472 ff.; or SD Krasner, ‘Globalization, Power, and Authority’, in: E D Mansfield & R Sisson (eds), *The Evolution of Political Knowledge, Democracy, Autonomy, and Conflict in Comparative and International Politics* (Ohio State University, 2004) 60 ff particularly at 80.

incentives.³⁶ Again others stress the dominant role that states retain in the organisation and administration of economic globalisation.³⁷ At the very least they will continue to constitute an important actor in ‘a complex system of power from the global to the local level’.³⁸

Saskia Sassen has provided a very appealing description of the role of the state in a globalised context, emphasising that the state has not become obsolete. Rather, she observes it to be constantly adapting to changing processes and in doing so continuing to be an important player in the creation of global (economic) structures. These internal transformations of the state, she argues, become ‘the strategic site’ for the general transformations on a global scale, a development labelled as a ‘denationalization dynamic’.³⁹ Concretely, the argument is that even though the state might participate in and adapt to global processes due to outside influences; in a lot of other instances the ‘components of the national state and of the larger nation-state [that] are themselves strategic sites for the structuring of the global and in this process undergo foundational change’.⁴⁰ Hence the state cannot be perceived as passive in the face of global influences. On the contrary the state actively participates as the initiator and executor of globalisation processes. To illustrate this she uses the example of the US and the UK, countries which

are producing the design for many of these new legalities-i.e. items derived from Anglo-American commercial law and accounting standards-and are hence imposing these on other states through the interdependencies at the heart of the current phase of globalization. This creates and imposes a set of specific constraints on the other participating states.⁴¹

³⁶ For a general overview see S Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006), at 225

³⁷ See Sassen, *supra* note 28, at 225 who refers to R Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press, 1990), and M Mann, *The Sources of Social Power* (CUP, 1993) as representatives of this position.

³⁸ Ibid at 225 who refers to P Hirst & G Thomson, ‘Globalization and the Future of the Nation State’, 24 *Economy and Society* (1995) 408 ff., or P F Kelly, ‘The Geographies and Politics of Globalization’, 23 *Progress in Human Geography* (1999) 379ff. as representatives of this position. See furthermore Kjaer, *supra* note 21, at 82.

³⁹ Sassen, *supra* note 28, at 228 ff.

⁴⁰ Ibid at 229.

⁴¹ S Sassen, ‘The Participation of States and Citizens in Global Governance’, 10 *Indiana Journal of Global Legal Studies* (2003) 5, at 14.

Yet, despite this rather optimistic outlook on the state's role in a globalised world she also cautions that on-going changes

[...] have the capacity to alter possibly crucial conditions for the liberal state and for the organizational architecture of international public law, its scope, and its exclusivity. In this sense they have the capacity to alter the scope of formal authority of states and of the interstate system, the crucial institutional domains through which the "rule of law" is implemented.⁴²

From this one can distil that a one dimensional focus on the 'decline of the state' is too simplistic. States have not become obsolete as a result of globalisation processes but in fact actively engage in them and often even are responsible for bringing them into existence. Even if one sees the authority of the state challenged by functional transnational legal orders, due to their unique character states have the ability to engage on an equal footing or even oppose entities which do not act in accordance with their interests. States (or at least powerful states) have a universal approach, and their functional discretion remains largely unfettered within their territory and therefore usually possess at least minimum capacities in most areas of regulatory importance. Even though their exclusivity is challenged they still enjoy a dominant position within their respective territory.

3. THE PUBLIC PRIVATE DISTINCTION – DOES IT STILL HOLD?

The preceding sections have described how a seemingly clearly defined entity – the nation state - changed in the course of globalisation; how it shaped global processes and at the same time adapted to them. A different, more general issue is that of the public private distinction. This distinction is part of the title of the thesis 'public private cooperation'. However, against the backdrop described in the previous sections, the question then arises what is understood as public; and what constitutes a private entity. Moreover, even if there are some identifiable entities considered public or private, is it still possible to make such a distinction in the context described above? Is an actor automatically to be considered public if it is connected to the state?

⁴² Sassen, *supra* note 28, at 224, for more information regarding the issue of democracy and the role of the state, see: K-H Ladeur, 'Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?' in K-H Ladeur (ed) *Public Governance in the Age of Globalization* (Ashgate, 2004) 89.

Or need such a categorisation be based on other aspects of its origin, its member structure, or the function it exercises? And if an actor is public, do the activities it pursues automatically fall within the public sphere? The same set of questions can of course be posed regarding ‘the private’ and similar uncertainties arise.

It is readily apparent from this set of questions that there are two levels which play a role in the public private distinction: The input level – whether the actors involved in a certain legislative or regulatory activity are of a public or private nature; and the output level – concerned with the results of these activities and how they can be categorised (dependent or independent of the former distinction). In addition, an even more fundamental question also has to be asked: can one actually talk of ‘the public’ or ‘the private’ in a general sense – or is such a distinction not much more a context depended notion, whose delineations depend on the concrete social environment. The next few paragraphs will approach these issues by briefly reflecting on the matter from a legal and political science perspective.

In legal science depending on the historical context or the specific legal system one finds at least general theories of distinction on the ‘public or private nature’ of laws.⁴³ Roman law for instance based its distinction on the so-called ‘interest theory’ whereby public law serves public interests whilst private law serves private interests.⁴⁴ Countries influenced by the Roman legal tradition, such as Germany, adopted this distinction. However this distinction was adapted in later years to meet the particular requirements of the modern nation state with its separation of state and citizen. Therefore the so-called ‘subordination theory’ emerged, which refers to the relationship between the different actors. Hence, public law is characterised by a hierarchy between the state and citizens whereas private law is characterised by equality between the individuals. Public law works through directives and orders whereas the primary private law instrument is the contract.⁴⁵ A final theory distinguishes formally between law directed at the state (when acting in its

⁴³ See H Maurer, *Staatsrecht I* (3rd ed, CH Beck, 2003) at 7. However, there were times and legal system such as the Common Law system in England where a distinct public law could be argued to not have been existent. See ‘Common Law’ *Encyclopaedia Britannica. Encyclopaedia Britannica Online Academic Edition*. (2014), available at: <http://www.britannica.com/EBchecked/topic/128386/common-law/280077/Public-law?anchor=ref1023189> (last accessed 19 December 2014).

⁴⁴ H Maurer, *Allgemeines Verwaltungsrecht* (16th ed, CH Beck, 2006) at 49, referring to the Roman jurist Ulpian’s famous expression: ‘Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem’.

⁴⁵ Ibid.

sovereign capacity) and private law which in contrast is directed towards ‘everyone’ (including the state when acting in a ‘private capacity’).⁴⁶ Public international law is traditionally concerned with inter-state relations and therefore states, or institutions set up by states are its habitual subjects. Activities carried out by states in the international context are considered public (or more precisely – sovereign) acts and under certain circumstances they crystallise into public international law.⁴⁷

As stated above, these distinctions only apply to certain legal systems in particular contexts, and even within systems which once represented rather clear examples of this distinction the borders are blurring. In many states, public law fields such as administrative law have been supplemented by an array of different instruments often inspired by or directly following private law examples (such as administrative contract and public private partnerships for example).⁴⁸ In international law there has not only been an expansion of the actors who can be considered international subjects, the traditional subjects have also started to adopt or be subjected to private law instruments.⁴⁹ Consequently, it is almost impossible to provide a distinction based on any of the above given theories alone.

Political scientists and in particular international relation scholars have on the whole long followed the general dichotomies found in legal science. Jaqueline Best and Alexandra Gheciu depict different streams in global governance scholarship – private authority, public sphere and public goods scholarship. They detect in all of these directions a tendency towards an input driven, relatively static, distinction, which is to some degree comparable to the ‘subordination’ (and a narrower formalistic) approach found in legal scholarship. Thus, they state that:

The literatures [...] all exhibit certain similar weaknesses. Each tends to treat the public as a coherent space or site, thereby reproducing the liberal tendency to think about public/private as

⁴⁶ Ibid at 49-50.

⁴⁷ See Article 38 (1) ICJ Statute, and for a more detailed overview M N Shaw, *International Law* (6th ed, CUP, 2008) at 69ff.

⁴⁸ See examples in the new governance literature presented below, Section 4.2.

⁴⁹ See below in this Chapter, Section 4.1.

ontologically separate domains of social life, marked by their distinct (pre-given) logics and associated with specific institutional locations.⁵⁰

As an alternative to this Best and Gheciu suggest a ‘practice based approach’. Accordingly, public are ‘those goods, actors, or processes that are recognized by the community in which they are carried out as being of common concern.’ Public actors act ‘on behalf of the common (rather than a particular) interest’ And furthermore, ‘a public process is one that allows the general public or demos (and not a selected group) to understand and participate in debates about those issues that concern them’.⁵¹ Public practices are then ‘actions that involve an understanding in a given society at a particular moment in time that something is of common concern’⁵² Thus, rather than providing general and fixed distinctions, Best and Gheciu opt for a more flexible distinction which takes into consideration particular societies and specific contexts. There are a number of merits of this approach. As indicated above, it is very difficult to draw clear distinctions between public and private actors or instruments on general classifications. This becomes even clearer when looking at the examples which will be used in the case studies below. Both the IOC and the ISO are formally by membership and modes of incorporation private organisations. However, they could be said to perform a number of public functions. If one believes the IOC’s self-understanding and the relevance of sport as outlined in the Charta, it is contributing to a more peaceful, more environmental consciousness and more equal humankind.⁵³ Similarly, the ISO fulfils a function which has a broader public value since standards facilitate trade and help to make products and production processes safer and more sustainable.⁵⁴

These examples show that the public private distinction is a rather context dependent notion which has to be established on an individual case by case basis. Nonetheless, as a working definition the thesis will adopt a formalist approach and make distinction between public and private by mode of membership (as documented in the founding treaty or other mode of

⁵⁰ See J Best & A Gheciu, ‘Theorizing the Public as Practices: Transformations of the Public in Historical Contexts, in: J Best & A Gheciu, *The Return of the Public in Global Governance* (CUP, 2014) 15, at 25

⁵¹ Ibid at 32.

⁵² Ibid at 33.

⁵³ See Chapter 5.

⁵⁴ See Chapter 4.

incorporation or foundational document), or respectively the origin of a legislative or regulatory action.

Yet, as stated above, this is a working definition and as such its purpose is not to directly reflect a formalistic standpoint. Rather the thesis adopts this definition in order to better be able to depict exactly the subtleties and the shifts of boundaries referred to above in the examples of ISO and the IOC. It is argued that there is particular value in drawing this distinction as it shows how conflicts and cooperation transcend old borders, and how even more traditional players need to arrange themselves with the multiplicity of regimes and individual regulators in the transnational context. Thus, by formally upholding the distinction it is easier to challenge it in its nuances. It also facilitates the examination of certain traditional ‘public’ or ‘private’ standards and the assessment of how those are safeguarded (or not) in changing environments. Therefore, in the following chapters, a public actor is one which is either a state, or was established by states or state entities acting in their official capacity; or is directly linkable to a state or state entities. A private actor is any individual or entity which does not fall under the former definition. In the present context they usually comprise transnationally operating organisations which are however incorporated as private associations in a particular national jurisdiction.

4. TRANSNATIONAL REGULATION, GLOBAL GOVERNANCE AND ADMINISTRATIVE LAW

The following sections will attempt to provide an overview and some lines of demarcation between terms commonly used when talking about political practices and structures in a globalised context. This section first of all sets out the origin and common use of the term ‘transnational’ and assesses the relationship between two common terms: regulation and governance. To properly capture these rather broad developments in short definitions is however a rather difficult if not impossible. Therefore, a broader, more contextual and nuanced illustration of the different developments within international law is provided first of all. This will then be followed by a short depiction of the use of the terms ‘transnational, regulation and governance’ in different contexts. Finally, two particular aspects often cited as examples for transnational law

and private regulation and governance – *lex mercatoria* and transnational private regulation will be examined.

4.1 Challenges to Traditional International Law

Public international law, at first glance, appears to be the ideal venue for providing a framework or infrastructure to organise an ever-coalescing world as described in the first section of this chapter. However, this is less the case than one might assume. The prevailing ‘post-Westphalian’, and particularly 19th century, understanding of international law prescribes high state centrality. According to this conception, states make the rules, either through negotiations with each other and formalised in a treaty or through their practice and convictions which crystallise into customary international law. In this context non-state actors were not seen as subjects of international law⁵⁵ and thus any actions, customs and rules stemming from them were not directly relevant to the international legal framework. However, this has always been an idealised account; in fact states were never the sole actors on the international stage. Throughout history different groups of greater or lesser importance shared the international space. In the Middle Ages states (to the regard that they could be considered as such) had a close relationship with another dominant actor– the Church. Moreover, economic activities, especially when taking place cross-border, were often organized by guilds.⁵⁶ Later, powerful entities such as the British East India Company actively participated in colonisation and exercised at times significant state-like power over parts of occupied territory.⁵⁷ Even at the peak of the nation state, in the 19th and early 20th century, actors such as the free cities, the Holy See, the Sovereign Order of Malta, the International Committee of the Red Cross and those international organisations which had

⁵⁵ See, e.g. E Lauterpacht (ed), *Hersch Lauterpacht – International Law – Collected Papers*, 2. *The Law of Peace, Part I International Law in General* (CUP, 1975) at 489 and see also references in fn 1; M Wagner, ‘Non-State Actors’, in: *Max Planck Encyclopaedia of Public International Law* (OUP, 2013), available at: <http://opil.oup.com/home/EPIL> (last accessed 19 December 2014).

⁵⁶ See, eg S Deakin, ‘The Return of the Guild? Network Relations in Historical Perspective’, in M Amstutz & G Teubner, *Networks: Legal Issues of Multilateral Co-Operation* (Hart Publishing, 2009) 53-73 and Kjaer, *supra* note 21, 77 who refers to the North European Hanseatic League, an association of guild members from different Northern European cities.

⁵⁷ See Wagner, *supra* note 47, para 8.

already emerged enjoyed rights and obligations under international law and were consequently endowed with international legal personality.⁵⁸

Nonetheless, international law did not immediately address the challenges of globalisation. Rather, even today (at least formally) international law rests very much in state-centricity.

Despite or perhaps because of this background, many saw the need to expand existing boundaries. As early as 1956 Philip C Jessup, who later became judge at the International Court of Justice, coined the term ‘Transnational Law’.⁵⁹ This expression was chosen as a means of distinguishing it from traditional international law. The transnational approach was supposed to also take ‘individuals, corporations, states, organizations of states, or other groups’,⁶⁰ which to an increasing degree were becoming influential on the international sphere, into account. With the advent of an accelerated globalisation and its impact on the nation state the tendencies outlined by Jessup manifested themselves to an even greater extent. Apart from additional subjects, the objects of international law and the modes through which it operated also expanded.⁶¹ The following sections will depict these changes in the three main areas.

Regarding the first (the subjects of international law), the most important change was the growing importance of three additional categories of actors. Those were international organisations (IOs), individuals, and at a later stage transnational corporations (TNCs). IOs, as stated, emerged in the late 19th century, yet in the context of globalisation their operation changed from being predominantly fora for states to meet and deliberate to become independent actors with broad mandates. Furthermore, the number of IOs increased significantly in the late 20th century. Both developments were often ascribed to a need for regulation which addresses the structures and consequences of globalisation.⁶² Furthermore, individuals became recognised subjects of international law in the aftermath of WWII, which manifested itself in several stages. One of the first ones was the introduction of international criminal law and the acknowledgement

⁵⁸ See, e.g. I Brownlie, *Principles of Public International Law* (7th ed, OUP, 2008) 58 ff; see also, C Walter, ‘Subjects of International Law’, in: *Max Planck Encyclopedia of Public International Law* (OUP, 2007) available at: <http://opil.ouplaw.com/home/EPIL> (last accessed 19 December 2014).

⁵⁹ Jessup, *supra* note 18.

⁶⁰ Ibid at 3.

⁶¹ See Mégret, *supra* note 1.

⁶² See *ibid* para 21.

of international responsibility of individuals for major atrocities.⁶³ This was complemented by the continuing development of human rights, with individuals as rights holders at the centre.⁶⁴ A number of human rights conventions grant individuals access to international courts (such as the European Court of Human Rights and the Inter-American Court of Human Rights). Furthermore, an organisation such as the ILO, with its tripartite structure (workers, employers and government) both includes and also protects individuals.⁶⁵ Finally, a fairly new type of actors in the international law arena, are transnational corporations (TNC). Until recently business activities were predominantly understood as interactions between free and equal private actors which had little or no relevance for international law. However, as early as the 1960s the ICSID Convention established under international law allowed TNCs to bring claims against states in an international forum. Later a number of environmental treaties and corporate social responsibility initiatives emerged, imposing duties on TNCs to either abstain from polluting the environment and violating human rights or to even actively contribute to an improvement of the latter.⁶⁶ Consequently even though some parts of international legal doctrine still has difficulty in accepting individuals as proper subjects of international law⁶⁷ it is safe to say that their role both as rights' holders and rights' bearers has increased steadily.

Secondly, apart from a growing number of subjects of international law, one can also observe a variety of additional fields or objects covered by it. Whereas originally international law was perceived as an area within which the parameters for war and peace were set, it has evolved into an area that manages all kind of human activity. In particular, regulation of the global economy and its externalities (such as labour and environmental issues) has become a central concern of

⁶³ See for instance C Kress, 'International Criminal Law', in *Max Planck Encyclopedia of Public International Law* (OUP, 2009), available at: <http://opil.ouplaw.com/home/EPIL> (last accessed 19 December 2014), para 22 ff.

⁶⁴ See eg the Universal Declaration of Human Rights, UNGA Res 217 A (III), adopted 10 December 1948; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended); American Convention on Human Rights 1969, 1144 UNTS 123; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

⁶⁵ See for an overview over the ILO: <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (accessed 10 November 2014) and below Chapter 4.

⁶⁶ See Chapter V.

⁶⁷ See eg Brownlie, *supra* note 50, at 65, who does not deny 'that the individual [can] be a "subject of international law"' yet he sees this categorization as 'unhelpful'.

international law.⁶⁸ As such, international law today to a large extent deals with issues of international trade and investment regulation, environmental protection, fishing or climate change.

Third and finally, the instruments of international law have changed, or more accurately, they have increased in variety. Traditionally the primary sources of international law were treaties, custom and general principles, and these were supplemented by a limited number of secondary sources.⁶⁹ Today, international law is complemented by a countless number of so called soft law instruments. Soft law has often been described as the twilight between law and politics.⁷⁰ With regard to the characteristics of soft law it can be said that it ‘shares a certain proximity to law’ and has a ‘certain legal relevance’ yet it is not strictly binding as is the case with the sources enumerated in Article 38 of the ICJ Statute.⁷¹ Soft law instruments are for instance:

resolutions of international organizations, [...] programmes of action, the texts of treaties which are not yet in force or are not binding for a particular actor, interpretative declarations to international conventions interpretative declarations to international conventions [...], non-binding agreements, [...] codes of conduct, recommendations, and reports adopted by international agencies or within international conferences.⁷²

One result of these developments it is argued is the ‘emergence of a ‘global administrative space’,⁷³ characterised as:

A space in which the strict dichotomy between domestic and international has largely broken down, in which administrative functions are performed in often complex interplays between

⁶⁸ This development is illustrated by the creation of the WTO, the ICSID, numerous environmental treaties, and corporate social responsibility initiatives as those presented above.

⁶⁹ See Art 38 (1) Statute of the International Court of Justice, including furthermore ‘judicial decisions and the teachings of the most highly qualified publicists...’.

⁷⁰ D Thürer, ‘Soft Law’, in *Max Planck Encyclopedia of Public International Law* (OUP, 2009), available at: <http://opil.oup.com/home/EPIL> (last accessed 19 December 2014). See furthermore, K W Abbott & D Snidal, ‘Hard and Soft Law in International Governance’, 54 *International Organization* (2000) 421 ff who describe the factors that determine whether hard or soft law instruments are chosen.

⁷¹ Thürer, *supra* note 62.

⁷² Ibid.

⁷³ N Krisch & B Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’, 17 *EJIL* (2006) 1.

officials and institutions on different levels, and in which regulation may be highly effective despite its predominantly non-binding forms.⁷⁴

However, this does not come about without problems. First there are questions regarding the legitimacy and accountability within this space, an issue which will be addressed in greater detail in the next chapter. Furthermore, the increase in areas, instruments and actors has led to another prominent issue in this context – fragmentation and the emergence of conflicts between different (international) legal regimes. The matter has been addressed in significant detail by legal scholarship (and we will in fact return to this issue at a later stage in this thesis).⁷⁵ A short overview can however be provided here. The International Law Commission identified several types of conflicts: between general and special international law, with regard to successive norms, and concerning special relations (Article 103 UN Charter, obligations *erga omnes* and the concept of *ius cogens*).⁷⁶ Whereas the debate subject of the ILC Report predominantly focuses on fragmentation caused by conflicts between classical international law regimes, recently other forms of conflicts (including the whole scope of transnational governance activities) were also taken into consideration.⁷⁷ The motivation behind including such issues is the aforementioned broad approach to international law. Accordingly many scholars argue that the fragmentation debate as led by the ILC does not reflect the ‘full spectrum of international law making’.⁷⁸ The classical conflicts of norms debate often only captures an excerpt of the actual fragmentation and the divergences resulting from it, namely the post-implementation stage regarding conflicting treaty provisions addressed to states. Underlying political conflicts, conflicts between different

⁷⁴ Ibid.

⁷⁵ For a few examples: International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* – Report of the Study Group of the International Law Commission, finalized by Martti Koskeniemi, 58th Session, U.N. Doc. A/CN.4/L.682, April 13, 2006. See furthermore J Pauwelyn, *Conflicts of Norms in Public International Law* (CUP, 2013); id, ‘Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands’, 25 *Michigan Journal of International Law* (2003) 903 ff; Fischer-Lescano & Teubner, *supra* note 25; E Benvenisti & G W Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’, 60 *Stanford Law Review* (2007) 595 ff. For a case law example see, eg, the diverging definitions of effective control between the ICJ and the ICTY, *ICJ, Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, 14, para.115 ff.; ICTY, *Prosecutor v. Dusko Tadic, Judgement*, Case No. IT-94-I-A, 15 July 1999, at 49-50.

⁷⁶ International Law Commission, *supra* note 67.

⁷⁷ Here the term transnational is chosen in order to reflect the renunciation from classical international law with its actors (states and IOs) and its body of law (as defined by Article 38 of the ICJ statute) to such law regulating beyond national borders and involving states, IOs as much as corporations, NGOs, individuals and other groups.

⁷⁸ M A Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (CUP, 2011) at 17.

organisational practices, or conflicts regarding soft law regimes are not considered. A further issue is that the traditional debate focuses to a large extent on conflicts between different fields of international law (trade and environment), whereas today some areas of international law are very much fragmented in themselves, such as the area of international environmental law for example.⁷⁹

Finally, linking back to the first paragraphs of this section, with the advent of actors such as non-governmental organisations (NGOs), or TNCs, epistemic communities and individuals, all pushing their normative agendas into in the realm of international law, an even broader understanding of fragmentation might become necessary. An illustrative example is the Internet Corporation for Assigned Names and Numbers (ICANN), a California non-profit corporation. This organisation has been vested with the authority to globally coordinate the assignment of the technical parameters ‘necessary for stable and secure operation of the Internet's unique identifier systems’.⁸⁰ Private food safety standards such as GlobalGAP have led to complaints within the WTO framework, as they are considered by some countries as trade barriers created with the intention to circumvent officially created rules on how to handle those issues internationally.⁸¹

International lawyers, predominantly scholars but also practitioners, have slowly begun to better accommodate these developments in their debates and decision making processes; but they have not yet articulated a coherent plan to address these challenges of globalisation.

⁷⁹ For further information see below Chapter III, V and VI.

⁸⁰ See ICANN, Strategic Plan, July 2011 – June 2014, Draft, available at: <http://www.icann.org/en/news/announcements/announcement-7-21feb11-en.htm> (last accessed 19 December 2014).

⁸¹ There have been official complaints concerning private requirement for bananas with regard to the access European market: Committee on Sanitary and Phytosanitary Measures, Private Industry Standards. Communication from Saint Vincent and the Grenadines, G/SPS/GEN/766, 28 February 2007(supported by Jamaica, Peru, Ecuador, and Argentina); and Committee on Sanitary and Phytosanitary Measures, Report by the Commonwealth of the Bahamas to the WTO-SPS Committee on Private Standards and the SPS Agreement: The Bahamas Experience, Communication from the Bahamas, G/SPS/GEN/764, 28 February 2007. See furthermore J Wouters, A Marx & N Hachez, ‘In Search of a Balanced Relationship: Public and Private Food Safety Standards and International Law’, *Working Paper No. 29 - June 2009*.

4.2 Transnational Law, Governance and Regulation

Given the challenges classical international law faces in accommodating the different developments in the global realm outlined above, a number of suggestions with regard to how to achieve a better, or at least more nuanced, understanding of the phenomena have emerged. The terms introduced in the title of this subsection – transnational law, governance and regulation – represent some such of these suggestions. However, they are often broadly applied across different contexts and it is difficult to provide a conclusive understanding. Therefore, rather than trying to offer fixed definitions the following sections will provide a short overview of the different ways in which these terms are applied in different contexts.

Referred to above, Philip C Jessup endeavoured to expand the borders of more traditional international law by introducing the term transnational law. The term has since then been used in many different contexts. It has become ‘a series of contemplations about the form of legal regulation with regard to border-crossing transactions and fact patterns transgressing jurisdictional boundaries that involve a mixture of public and private norms.’⁸² As such it also comprises ‘contemplations’ about activities often summarised under equally vague terms such as transnational regulation or governance.

In political science the rise of the term ‘governance’ can ‘primarily be explained by the emergence of a multiplicity of phenomena of cooperation beyond traditional forms of decision-making’.⁸³ Traditional forms of decision-making in this context stem from national governments as well as international inter-state cooperation. (Global) governance embraces the plurality of actors engaged in decision-making processes. Private actors usually participate in the latter although they can also form purely private ‘transborder coalitions’ engaged in standard setting and other types of regulatory activities.⁸⁴ The parallels with ‘transnational law’ are apparent and

⁸² See P Zumbansen, ‘Evolving Transnational Law’ in J M Smits, *Elgar Encyclopedia of Comparative Law* (2nd ed, Edward Elgar, 2012) at 898.

⁸³ K-H Ladeur, ‘Theory of Governance’ in: *Max Planck Encyclopedia of Public International Law* (OUP, 2010) available at: <http://opil.ouplaw.com/home/EPIL> (last accessed 19 December 2014), para 5. See also, P Zumbansen, ‘Defining the Space of Transnational Law: Legal Theory’, *Global Governance & Legal Pluralism, Osgoode Hall Law School Research Paper No. 21/2011*, at 3

⁸⁴ Ladeur, *supra* note 75, para 14 and 15.

in fact it is very common to speak about ‘transnational governance’ when focusing on the more political aspects of ‘global regulation’.⁸⁵

‘Regulation’ can very generally be defined as ‘governing by rule’,⁸⁶ and is most commonly associated with the national level, with laws and rules stemming from the executive as well as with particular regulatory agencies, implementing and in some limited form creating rules (such as the postal regulatory commission, to use an example where regulation is within the name). At the national level significant developments in the approach to regulation have taken place over the last thirty years. As a result of movements advocating deregulation in the 1970s and 1980s, ‘better regulation’ became dominant on the political agenda. In the course of this development different regulatory strategies were implemented which led to a variety of regulatory forms and practices.⁸⁷ For instance, experimentalist forms of regulation set general goals but left the means of achieving these goals open,⁸⁸ as well as market based regulatory strategies such as trade regimes or franchising.⁸⁹ In this context regulation also went beyond the national realm in many cases and was carried out at the supra-national or transnational level. Walter Mattli and Ngaire Woods define (transnational) regulation as ‘[...] the organization and control of economic, political, and social activities by means of making, implementing, monitoring, and enforcing rules’.⁹⁰ Mattli and Woods actually refer to a whole range of actors; state, non-state, public and private who can implement or enforce regulatory rules. This plurality leads to fragmentation of regulatory regimes. Consequently ‘public, private and (increasingly) hybrid organisations often share regulatory authority.’ As such ‘a sole focus on regulatory agencies’ is in fact ‘rather

⁸⁵ See *ibid* at para 15.

⁸⁶ R Baldwin, M Cave & M Lodge, ‘Introduction: Regulation – The Field and the Developing Agenda’, in: R Baldwin, M Cave & M Lodge (eds) *Oxford Handbook of Regulation* (OUP, 2010) 3, at 6 ff.

⁸⁷ *Ibid*, who state that there was a ‘a long-standing interest in introducing ‘rational planning’ tools into regulatory policy-making and thereby limiting the scope for bureaucratic and political knee-jerk regulation. One key example of such rationalist tendencies in the practice of regulation has been the spread of ‘regulatory impact assessments’ and ‘cost–benefit analysis’ (at 8).

⁸⁸ C F Sabel & J Zeitlin, ‘Learning From Difference: The New Architecture of Experimentalist Governance in the EU’, in C F Sabel & J Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP, 2010) 1; and C F Sabel & J Zeitlin, ‘Experimentalist Governance’ in: David Levi-Faur (ed), *The Oxford Handbook of Governance* (OUP, 2012) 169.

⁸⁹ Baldwin, Cave & Lodge, *supra* note 78, at 8 ff.

⁹⁰ W Mattli & N Woods, ‘In Whose Benefit? Explaining Regulatory Change in Global Politics’, in: W Mattli & N Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) 1.

limited'.⁹¹ This is also where 'regulatory' literature links with what has been said above about transnational law and global governance. What all three have in common is that they stand for a transformation of traditional structures, outlined in the previous section. Authority once clearly located within the nation state now extends transnationally and spreads over a plurality of actors. All three terms capture this development from slightly different angles. The following sections will look at two phenomena often given as examples of private transnational regulation. These are *lex mercatoria* and transnational private regulation.

Lex Mercatoria in the historical sense describes forms of commercial laws which were developed in the 11th and 12th century by European merchants. Their emergence was due 'to the shortcomings of the law of the Middle Ages in protecting foreign traders'. These rules also 'responded to the need of merchants from different jurisdictions to rely on a neutral, stable, and predictable legal framework to structure their commercial relations and to resolve disputes in a neutral forum'.⁹² How independent the *lex mercatoria* actually was from domestic public law is disputed as well as the extent of its uniformity across Europe. Nevertheless the *lex mercatoria* as a distinct, even if not completely uniform, set of rules for merchants with trans-boundary reach was applied until the rise of nation states and the codification of private law in the 18th and 19th century.⁹³

In the mid-20th century the concept was 'rediscovered' by scholars in their attempts to understand and assess established forms of self-regulation by the international business community. These comprised instruments such as model contracts, standard clauses and international arbitration as a means of dispute settlement.⁹⁴ Again the actual extent and content

⁹¹ Baldwin, Cave & Lodge, *supra* note 78, at 9; referring to J Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World', 54 *Current Legal Problems* (2001) at 103 ff; and L Hancher & M Moran, 'Organising Regulatory Space', in: L Hancher and M Moran (eds.), *Capitalism, Culture and Economic Regulation* (OUP, 1989) 1 ff.

⁹² See S W Schill, 'Lex Mercatoria', in: *Max Planck Encyclopedia of Public International Law* (OUP, 2011), available at: <http://opil.ouplaw.com/home/EPIL> (last accessed 19 December 2014), para 6. See furthermore, H J Berman, 'The Law of International Commercial Transactions (Lex Mercatoria)' 2 *Emory Journal of International Dispute Resolution* (1987) 235 ff.

⁹³ Schill, *supra* note 84, para 7 and 8.

⁹⁴ *Ibid* at 9 and 10; Schill refers to Berthold Goldmann and Clive Schmitthoff as the heads of the two dominant schools which advanced the concept: Dijon School (Goldmann) and in the common law context London (Schmitthoff). See C M Schmitthoff, 'Das Neue Recht des Welthandels' 28 *The Rabel Journal of Comparative and*

of this new *lex mercatoria* is very much disputed, with both narrow and broad readings of its extent espoused. The broad reading of the new *lex mercatoria* encompasses ‘all instruments governing international transactions between private parties independent of their source’, which also includes public law instruments such as international treaties.⁹⁵ The narrower reading only covers rules ‘emanating from the private rule-making power and self-organization of the international business community in the strict sense’, thus excluding any kind of public participation.⁹⁶ This latter interpretation is highly contested as is the position of those who argue for a high degree of autonomy for the *lex mercatoria*. Traditionalists deny the possibility of an autonomous legal order and stress the roots of *lex mercatoria* and its dependence on national legal orders for things such as contract enforcement, for example.⁹⁷ In addition to this particular controversy many disputes over the concept have arisen regarding ‘its justification, its legal quality, its methodological basis, the terminology used, and its practical importance’.⁹⁸

However, despite these disputes the *lex mercatoria* remained central in private law scholarship and has attracted new attention in the debate on transnational law.⁹⁹ Thus, ‘new new lex mercatoria’¹⁰⁰ does not only describe the consolidation of the law of merchant through arbitral institutions and codified rules such as the UNIDROIT Principles of International Commercial Law,¹⁰¹ but also its contribution to the general debate on transnational law and law in a globalised context.¹⁰² Graf-Peter Calliess and Peer Zumbansen, who dedicate a significant amount of attention to the concept, stress that they are less concerned with disputes outlined in the previous paragraph but that they ‘find its most promising elements to be those concerned

International Private Law (1964) 47; and B Goldman ‘Frontières du Droit et “Lex Mercatoria”’ 9 *Archives de Philosophie du Droit* (1964) 177.

⁹⁵ Schill, *supra* note 84, para 17.

⁹⁶ Ibid para 18.

⁹⁷ Ibid para 29.

⁹⁸ Ibid.

⁹⁹ Teubner, *supra* note 26. Calliess & Zumbansen, *supra* note 18, at 28 ff; R Michaels, ‘The True Lex Mercatoria: Law Beyond the State’, 14 *Indiana Journal of Global Legal Studies* (2007) 447; referring to R Goode, Usage and its Reception in Transnational Commercial Law, 46 *International and Comparative Law Quarterly* (1997) 1; and R Cranston, Theorizing Transnational Commercial Law, 42 *Texas International Law Journal* (2007) 597.

¹⁰⁰ See L Y Fortier, ‘The New, New Lex Mercatoria, or, Back to the Future’, 17 *Arbitration International* (2001) 121.

¹⁰¹ Ibid, as referred to by Michaels, *supra* note 91, at 448.

¹⁰² Callies & Zumbansen, *supra* note 18, at 28 ff.

with *lex mercatoria* as a *methodological* problem'¹⁰³. As such it is 'asking us to reflect on the possibility – but also the politics – of 'law', which can be but *need not* be state-originating, which can be but *need not* be privately created or resulting from a complex interaction between official and un-official norm-creation.'¹⁰⁴ Thus, what the authors are most interested in is the impact such norm-creation has on our ('legal sociological, as well as political perspective') conceptualisation of law-making and legal order.¹⁰⁵ These issues are then followed by questions regarding the accountability, legitimacy, and democratic control of such forms of 'private law making'.¹⁰⁶

Transnational Private Regulation: Lex mercatoria, developed largely by merchants to regulate their trans-border trade was adapted to serve the needs of a globalised economy. Nonetheless it remains, contested as it may be, a self-regulatory tool for the business community. Transnational private regulation (TPR) however, goes beyond the simple extension of established private law frameworks. In contrast it tries to combine two concepts, which were for a long time considered mutually exclusive – private and regulation. Thus, Calliess and Zumbansen portray the traditional public private distinction as outlined above as only having a coordinative function. Moreover, this distinction, at least in the legal context, accounted for law originating from the state (whether private or public), and did not consider 'law' originating from private non-state sources. Callies and Zumbansen then demonstrate how this distinction was never entirely clear; private law always contained regulatory elements and could not be reduced to merely coordinative functions.¹⁰⁷ And especially since the 1980s, when new governance models were introduced in nation states, administrations, private actors (respectively business actors) were increasingly required to engage in the (self)regulation, whereas public administration started experimenting with private law tools (such as administrative contracts and public private partnerships).¹⁰⁸

¹⁰³ Ibid at 31.

¹⁰⁴ Ibid at 32, italics in original.

¹⁰⁵ Ibid at 33.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid at 97 ff.

¹⁰⁸ See above and eg I Ayers & J Braithewaite, *Responsive Regulation – Transcending the Deregulation Debate* (OUP, 1992). See furthermore Callies & Zumbansen, *supra* note 18, at 105.

On the international level, private forms of (self-)regulation have existed for a significant period of time, as the example of *lex mercatoria* provided above illustrates. As *lex mercatoria*, transnational private regulation is not based on state rule-making and not necessarily dependent on its enforcement, even though in many cases there are strong links between public and private regulation.¹⁰⁹ Transnational private regulation, however, exceeds *lex mercatoria* both in quantity and in quality.

First and foremost it exceeds traditional fields of business self-regulation and includes or sometimes even focuses specifically on the protection of public goods. Various fields such as forestry protection, corporate social responsibility (CSR) and food safety illustrate this. Furthermore it uses a broad definition of the private which, apart from business actors, also includes ‘NGO-led and multi-stakeholder organizations’.¹¹⁰ Most importantly however, TPR departs from mere self-regulation and increasingly creates third party effects.¹¹¹ In summary one can define TPR as follows:

[Coalitions of nonstate actors ... [which] are transnational, rather than international, in the sense that their effects cross borders, but [that they] are not constituted through the cooperation of states as reflected in treaties (the latter being the principal territory of international law). They are nonstate (or private, as we prefer) in the sense that key actors in such regimes include both civil society or non-governmental organizations (NGOs) and firms (both individually and in associations).¹¹²

One question which quickly emerges in this context concerns the legitimacy of such private forms of governance.¹¹³ In particular if one adopts ‘more state-centered conceptions of constitutional governance’¹¹⁴ the link to the electorate through democratic mechanisms are of vital importance. However a more pluralist approach is said to ‘[have] the potential not only to embrace the activities of private actors, but also the instruments of private law and, in particular,

¹⁰⁹ F Cafaggi, ‘New Foundations of Transnational Private Regulation’, 38 *Journal of Law and Society* (2011) 20, at 21.

¹¹⁰ Ibid.

¹¹¹ Ibid and at 22.

¹¹² C Scott, F Cafaggi, & L Senden, ‘The Conceptual and Constitutional Challenge of Transnational Private Regulation’, 38 *Journal of Law and Society* (2011) 1, at 3.

¹¹³ Ibid.

¹¹⁴ Ibid at 2.

the contracts upon which much of this regulatory activity is dependent for its normative effects.’¹¹⁵ That having been said, these differing approaches should not be addressed at this point but fall to be considered in the next section of this chapter.

4.3 Summary

This section of Chapter 1 illustrates both developments in different areas of the law as well as scholarly conceptions of the law. Formerly rather distinct areas - public international and private commercial law - are today much more aligned than they were fifty or even twenty years ago. This is so in terms of the everyday reality of legal practice, where ‘hybrid-areas’ such as investment arbitration or international trade law have steadily gained importance; and for the actors driving the processes: states, NGOs and transnational corporations in particular. Not surprisingly this development is also reflected in legal literature, generally under the term ‘transnational law’. Whereas public law scholars are increasingly recognising and consequently analysing the importance of private actors in transnational law; private law scholars have started to reflect on the ways in which their discipline can contribute to better regulation of the global economy and support cosmopolitan goals, such as the protection of public goods.

5. SOME PRELIMINARY REMARKS ABOUT COOPERATION

The central theme of this thesis is cooperation. There are different ways to achieve a more profound understanding of cooperation. One is to distinguish it from other types of relationships such as deference or conflict. The thesis will consider these distinctions in the next chapter in the context of different authority relationships.¹¹⁶ At this stage it is necessary to present different ways in which the term is understood in different (legal) contexts. As such, in the following sections the thesis does not aim to provide a conclusive definition, particularly since much of the understanding adopted in this work will only be developed in the later chapters. Rather a preliminary working definition of cooperation will be provided first of all (5.1). The following section will then look into cooperation as applied in different (legal) contexts (5.2) before in the

¹¹⁵ Ibid, who refer to O Perez, ‘Using Private-Public Linkages to Regulate Environmental Conflicts: The Case of International Construction Contracts, 29 *Journal of Law and Society* (2002) 77ff.

¹¹⁶ Chapter 2, at 3.1.

final part the type of cooperation at issue here, public private regulatory cooperation will be introduced and examined in greater detail (5.3).

5.1 Introductory Understanding of Cooperation

On a more philosophical level cooperation has been characterised as consisting of the following features: mutual responsiveness, commitment to a joint activity and commitment to mutual support.¹¹⁷ Concretely this means that each participant in a corporative endeavour is ‘responsive to the intentions and actions of the other’; both are committed to the joint activity and both support each other in their individual roles in this commitment.¹¹⁸ Translated into the realm of cooperation between different (political) authorities Nicole Roughan has defined cooperation as entailing ‘an intention held by two or more agents to work together towards common goals, either through the pursuit of a single shared activity or different by complementary activities that are part of a shared plan or ‘joint action’.¹¹⁹ She stresses less the aspect of ‘mutual support’ than the philosophical account does¹²⁰ and the current thesis will also adopt the broader approach. Therefore in the following sections cooperation shall very roughly be understood as any joint activity between two or more parties, which is voluntarily and intentionally entered into, which has a common goal and is characterised at least by a minimum degree of mutual responsiveness and support. The term joint activity is thereby to be understood in a broad sense, including any kind of interaction whether it is a common project which is initiated and executed by the parties together or simply the aligning of individual projects in order to avoid conflicts and to create synergies.¹²¹

¹¹⁷ M E Bratman, ‘Shared Cooperative Activity’ 101 *The Philosophical Review* (1992) 327, at 328.

¹¹⁸ Ibid at 328.

¹¹⁹ N Roughan, *Authorities – Conflicts, Cooperation, and Transnational Legal Theory* (OUP, 2013), at 51.

¹²⁰ Though in a footnote she refers to this distinction stating: ‘A more precise analysis would use Bratman’s distinction between ‘joint intentional action’, which is cooperative only in the sense of participants intending to act together and ‘mesh’ their sub-plans, and ‘shared cooperative activity’, in which participants also intend to mutually support one another (Ibid at 51 fn 17).

¹²¹ Compare also the definition provided by Roughan, ibid at 51; who refers further to Bratman, *supra* note 109, 327 ff.

5.2 Cooperation in Different Contexts: National Administrative Law and International Law

Cooperation is an (increasingly common) instrument used in the exercise or facilitation of governance activities in national contexts. National administrations are not only working through top-down approaches but also in cooperative forms. Administrative contracts, where citizen and state meet on equal as opposed to on hierarchically organised terms have long been in use in national contexts.¹²² Forms of ‘new governance’ are of course much more dependent on cooperative or at least coordinative forms of interaction between different levels of administration or between administration and citizen.¹²³

In international law cooperation between states is a crucial if not central issue. Though international law traditionally follows an ‘individualistic approach’ (‘rules of abstentions, adjustment, and delimitation between different sovereignties’), it foresees cooperation in many areas and on many levels.¹²⁴ The UN Charter for instance states as one purpose of the UN

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;¹²⁵

More generally Rüdiger Wolfrum provides a definition of cooperation for the international context based on the 1970 Friendly Relations Declaration. Accordingly, cooperation is

‘the voluntary co-ordinated action of two or more States which takes place under a legal regime and serves a specific objective. To this extend it marks the effort of States to accomplish an objective by joint action, where the activity of a single State cannot achieve the same result.’¹²⁶

¹²² See A Abegg, *Die Evolution des Verwaltungsvertrags zwischen Staatsverwaltung und Privaten – Der Kontrahierende Staat in Deutschland, Frankreich und der Schweiz seit dem 18. Jahrhundert* (Stämpfli Verlag, 2010), although sometimes such meetings do involve a certain degree of subordination.

¹²³ See for instance, Ayers & Braithwaite, *supra* note 100; Sabel & Zeitlin, ‘Experimentalist Governance’, *supra* note 80; R Baldwin & J Black, ‘Really Responsive Regulation’, *LSE Legal Studies Working Paper No. 15/2007*.

¹²⁴ R Wolfrum, ‘International Law of Cooperation’, in: *Max Planck Encyclopedia of Public International Law* (OUP, 2010) available at: <http://opil.ouplaw.com/home/epil> (last accessed 19 December 2014), para 7.

¹²⁵ Article 1 (3) Charter of the United Nations, 1 UNTS XVI, 24 October 1945.

There is some debate on whether international law provides a general obligation to cooperate, particularly in socio-economic matters.¹²⁷ Though disputed on this more general level, certainly in many individual areas of international law such as international environmental law, human rights law or law governing common spaces interstate cooperation is foreseen and provided for.¹²⁸

In light of the debate on the fragmentation of international law one can observe an increasing interest in cooperation as a form of conflict prevention or solution between different types of international regimes. Notably Margaret Young stresses the importance of regime interaction *vis-à-vis* conventional hierarchical models of conflict resolution.¹²⁹ As fragmentation and conflicts do not only arise at the *ex-post* conflict resolution stage but already play an important role at the law making stage,¹³⁰ there is significant room to look at the potential of different regimes for ‘collaboration or cohesion’. Young’s approach shifts the focus of the debate away from pure *ex-post* conflict resolution to a more flexible one, which targets different stages of the regulatory processes. However, her approach is limited to the interaction between different regimes (trade, environment, and law of the sea) but pays less attention to conflicts within one regime. It furthermore does not directly include private actors but stays within the more traditional international law framework.¹³¹

This is different in literature on public private partnerships on the international level. Here, private actors are of course included. Although there is no fixed definition of what constitutes a public private partnership, they are usually applied by international organisations to ‘describe a wide range of interactions with business, non-governmental organizations (‘NGOs’) and other

¹²⁶ Wolfrum, *supra* note 116, para 2.

¹²⁷ Ibid para 9.

¹²⁸ See *ibid* para 7 ff regarding a general obligation; and para 26 ff regarding specific areas of international law.

¹²⁹ Young, *supra* note 70; M Young, ‘Fragmentation or Interaction: The WTO, Fisheries Subsidies, and International Law’, 8 *World Trade Review* (2009) 477. While investigating regime interactions between the WTO and other regimes such as FAO regarding fisheries subsidies she distinguishes between two forms of interaction: ‘[T]he need to learn about existing regimes [...] and the need to entrench inter-regime linkages in the proposed disciplines’ (at 491).

¹³⁰ Young, ‘Fragmentation or Interaction’, *supra* note 121, 477, at 481.

¹³¹ Though the later work edited by her gives room to various interdisciplinary approaches: See M Young (ed), *Regime Interaction in International Law – Facing Fragmentation* (CUP, 2012).

civil society organizations ('CSOs')'.¹³² Generally, they are extremely broadly defined. Kenneth Abbott for instance refers to an ECOSOC Resolution as well as a UN Secretary General Report wherein partnerships are described as:

voluntary and collaborative relationships between various parties, both State and non-State, in which all participants agree to work together to achieve a common purpose or undertake a specific task and to share risks, responsibilities, resources, competencies and benefits.¹³³

Distinctions are usually made between the functions the partnerships are supposed to fulfil. Thus, some partnerships are indeed intended to facilitate norm creation (soft law), whilst others are more concerned with the implementation of existing international law and others have more of an operational function, such as the Global Fund to Fight AIDS, Tuberculosis and Malaria.¹³⁴ The following section will outline the particularities of public private cooperation at the transnational level in more detail. It will then also look at the frameworks created to govern these kind of partnerships.

5.3 Transnational Public Private Cooperation under Analysis

The following paragraphs seek to map in a more detailed way the different forms of regulatory cooperation between public and private organisations. To this end this section sets out a variety of forms of public private cooperation which will exceed regulatory cooperation as more narrowly conceived. However, it will mainly rely on the organisations to be analysed in the case studies of this thesis, which are mostly UN-related.

First of all it has to be said that regulatory cooperation agreements fall within the realm of *acta iure imperii* of international organisations. Generally, regulatory cooperation belongs to their

¹³² K W Abbott, 'Public Private Partnerships', in: *Max Planck Encyclopedia of Public International Law* (OUP, 2008), available at: <http://opil.ouplaw.com/home/EPIL> (last accessed 19 December 2014), para 1.

¹³³ General Assembly, Report of the Secretary General, Enhanced Cooperation between the United Nations and All Relevant Partners, in Particular the Private Sector, A/58/227, 18 August 2003 para 9; quote from Abbott, *supra* note 124, para 9. See furthermore 'Future Programme, Organization and Methods of Work of the Commission on Sustainable Development ECOSOC Res 2003/61, 25 July 2003.

¹³⁴ Abbott, *supra* note 124, para 18 ff. See furthermore D Azis, 'Global Public-Private Partnerships in International Law' 2 *Asian Journal of International Law* (2012) 9 ff.

governance functions and goes beyond simple *acta iure gestionis* such as buying office materials for example. This does not, however, mean that regulatory cooperation might not also involve elements which fall within the latter category.¹³⁵

Having clarified this issue, the next step is to look at the different instruments framing regulatory cooperation and to see whether it is possible to discern a pattern in their application. The UN, which has a general framework regarding cooperation with the business sector, distinguishes between the following categories: core business operation and value chain; social investment and philanthropy; and advocacy and policy dialogue.¹³⁶ Under the first it summarises the mobilisation of business-specific activities for the creation of wealth and employment as well as for the facilitation of access to goods and services for the purpose of reducing poverty.¹³⁷ Social investments and philanthropy refer to any kind of contributions to a particular project which originate from business. Those could be ‘financial support [...] pro-bono goods and services, corporate volunteers as well as technical expertise and support’.¹³⁸ Finally the Guidelines mention cooperation regarding advocacy and policy dialogue. This category involves all kinds of forms of cooperation which are related to different UN standards affecting business. It includes multi-stakeholder dialogues, promoting corporate responsibility either by changing internal business practices so that they align with UN goals or by ‘developing norms or guidelines to engage stakeholders in support of UN goals’.¹³⁹

Looking at the Guidelines one can clearly recognise that distinctions are made between the types of contribution the private side is intended to make. In the first case emphasis is put on regular business activities, thus the private party is supposed to use or adapt parts of its regular business practices in such a way so that they are aligned with UN goals. The second case as the term

¹³⁵ See UNEP Programme Manual, May 2013, available at: http://www.unep.org/QAS/Documents/UNEP_Programme_Manual_May_2013.pdf (last accessed 19 December 2014), which draws attention to the possibility that ‘partnership programs’ (under which regulatory agreements fall) may well include commercial elements in which case the general procurement procedures have to be followed. See at 87.

¹³⁶ UN, Guidelines on Cooperation Between the United Nations and the Business Sector, 20 November 2009, at 6.

¹³⁷ Note that this type of cooperation resembles most the classic public private partnership model in the national context, whereby the private is providing business specific capacities (e.g. the production of goods, the delivery of a particular service) and the public fulfils a kind of financing/oversight function.

¹³⁸ UN Guidelines, *supra* note 128, at 7.

¹³⁹ Ibid.

‘philanthropy’ indicates involves the kinds of donations that the private sector puts at the public’s disposal for the benefit of the public good. Finally, in the last category one finds actual regulatory cooperation. This is, in other words, cooperation that is not predominantly based on giving and receiving certain resources for special projects but on the creation and implementation of policies relevant to a (business) community.

As stated above the categories included in the general UN Guidelines ‘are intended to serve as a common framework for all organizations of the UN system...’. Those organisations are however also ‘encouraged to develop more specific guidelines in accordance with their particular mandates and activities.’¹⁴⁰ Furthermore, the Guidelines focus on cooperation with the business sector and they go beyond what would be defined as ‘partnership activities’ as they also involve donations and other short-term contributions which do not ‘draw on the core competencies of each party’.¹⁴¹

A number of separate frameworks for public-private cooperation have emerged within the UN system. Usually, those frameworks create a clear relationship between the instrument used and the type of cooperation anticipated. FAO, for instance, lists Memoranda of Understanding (MoUs), exchange of letters, letters of agreement, formal relations, partnership agreements, partnership committee for review of financial and other agreements and multi-donor trust funds as examples of forms of public private cooperation.¹⁴² The first are used when establishing ‘a framework of collaboration of significant importance’;¹⁴³ exchange of letters are used for ‘collaboration [...] limited to a reduced period of time, or if its scope is more limited’; letters of agreement are involved if money transfers from FAO, whereas partnership agreements are used

¹⁴⁰ Ibid at 2.

¹⁴¹ United Nations Foundation, *Understanding Public-Private Partnerships* (2003), available at: http://www.globalproblems-globalsolutions-files.org/unf_website/PDF/understand_public_private_partner.pdf (last accessed 19 December 2014), at 3.

¹⁴² See FAO Council, Hundred and Forty-Sixth Session, FAO Strategy for Partnership with Civil Society Organizations, CL 146/8, February 2013, section D (hereinafter: FAO Civil Society); as well as FAO, Hundred and Thirteenth Session of the Programme Committee and Hundred Forty –seventh Session of the Finance Committee, FAO Strategy for Partnership with the Private Sector, JM 2013.1/2, March 2013, Section V (only listing MoUs, partnership agreements and exchange of letters) (hereinafter: FAO Private Sector).

¹⁴³ Ibid regarding the private sector MoUs are particularly used when no financial commitment is foreseen.

when FAO receives money from the private sector; finally FAO can engage into formal relations with civil society organisations, which are further specified by FAO's Basic Texts.¹⁴⁴

UNEP uses similar categories but with slightly different meanings regarding the actual type of cooperation governed by those instruments. Thus it distinguishes between letters of intent, used for the initiation process of a partnership and there is an exchange of letters, which is said to be a '[d]eclaration of interest to use as point of entry for cooperation which will lead to formal/legal instrument[s]'. Further there are letters of agreement, used for different types of partnership with other UN organisations and MoUs which are used for cooperation with non-UN partners, when no transfer of funds are involved. Furthermore, there are 'Small-Scale Funding-', and 'Project Cooperation Agreements'. The former is used if not-for-profit, non-UN organisations are assigned implementation activities with less than \$200.000 in funding involved. Project Cooperation Agreements are then used when more than \$ 200.000 are involved. Finally, if UNEP receives funds than Donation Agreements are used.¹⁴⁵

More generic are the categories that the ILO applies.¹⁴⁶ It distinguishes between funding or donations, development and implementation of projects or other activities, organisation of meetings and other events, campaigning or advocacy, temporary placement of personnel, publication and research projects and exchange and pooling of knowledge and information.¹⁴⁷

As the UN Framework is general in nature there is no contradiction between the individual organisations' categories and the ones provided for in the Framework. The instruments of UNEP or FAO mentioned above are drafted with regards to the specific needs of these organisations. Yet, what also becomes clear is that as such there is little uniformity between the different public organisations regarding their approach to cooperation with private entities. Most revealing is the use of three instruments: Exchange of Letters, MoUs and Letter of Agreements. Whereas the latter is used by the UNEP for cooperation with UN organisations, the FAO sees them as a 'useful administrative tool for contracting services from civil society organizations'. MoUs are

¹⁴⁴ Ibid.

¹⁴⁵ UNEP Partnership Policy and Procedures, Policy Outline No.1/2011, 21 October 2011.

¹⁴⁶ Even though it appears that they are currently working on a more elaborated framework, see ILO Governing Body, 316 Session, Public Private Partnerships: The way forward, GB.316/POL/6, 5 October 2012, at 6.

¹⁴⁷ ILO, Director-General's Announcement, IGDS Number 81, 14 July 2009 at 1.

also applied very differently. For UNEP they are the instrument of choice for any kind of formal relations with private partners, involving financial commitment. For the FAO on the other hand they constitute the instrument of choice for the most preliminary stage.¹⁴⁸

What this passage shows is that public private cooperation has become a common venue for public international organisations, not only regarding access to project funding but also regarding the creation and implementation of regulation. There is however no common framework under which cooperation takes place. Each organisation has its own rules and manuals governing engagement with the private sector. The following chapters will look more closely in particular at the regulatory cooperation between private actors and international organisations. This will be done from a theoretical point of view (in Chapters 2 and 3) and in two case studies (in Chapters 4 and 5).

¹⁴⁸ See FAO Civil Society, section D; as well as FAO Private Sector, Section V; UNEP Programme Manual, *supra* note 127, at 86 ff.

CHAPTER 2

COOPERATION AS A MEANS TO GAIN AND SECURE REGULATORY AUTHORITY IN A COMPLEX TRANSNATIONAL CONTEXT

1. INTRODUCTION

The previous Chapter laid out some explanatory models on how to understand the global order beyond the state and an international framework dominated by nation states. That having been said, little attention has been paid to the micro (institutional) level. The general lack of attention given to the distribution of authority within different organizations and issue areas has been criticised by legal scholars particularly with a pluralist agenda, yet it seems that it is only recently that the issue has started to be taken up.¹ When trying to understand the big picture, an analysis of how the micro level operates can be a very useful exercise. The goal of this section therefore is to depict how the allocation of authority in the global realm triggers cooperation even between different types of actors. It is then argued in the next chapter that cooperation links different regulatory realms and thus creates networks of constitutionalisation.

The main claim made in this chapter is that in the fragmented, pluralistic context of the global legal order today, transnational regulators possess incomplete authority.² We can therefore only understand one regulator's authority in relation to other organisations active in the same or in overlapping realms.³ Individual regulators then, as indicated above, need to cooperate in order to convey sufficient authority to achieve compliance with their regulatory agendas, and consequently to prevail as regulators.

To support the argument, it is first necessary to build an account of authority in the transnational context. It will be shown that an institutional understanding, which puts social practices at the

¹ See for instance N Roughan, *Authorities – Conflicts, Cooperation, and Transnational Legal Theory* (OUP, 2013) at 60 or I Venzke, 'Between Power and Persuasion: On International Institutions' Authority in Making Law' 4 *Transnational Legal Theory* (2013) 354.

² N Roughan, *supra* note 1, at 136

³ *Ibid.*

centre of a definition, is the best fit for an analysis of transnational authority. In particular, it allows for the inclusion of private authority which is often not possible in many normative understandings. Apart from the issue of ‘private political’ authority, this chapter will also focus on the issue of plurality. To this end it is first necessary to distinguish between different regulatory realms. Those can be structured hierarchically with one organisation being the sole or at least dominant authority; or they can be fragmented, characterised by multiple (and possibly competing) authorities. It will be shown that even dominant monopolists in one area necessarily must interact with authorities from other related or relevant areas. Thus, transnational authority can only be understood in its interaction with other authorities and as such it is relative.⁴

The second part of this chapter will look in a more detailed way at authority interactions and the impact cooperation has on individual regulators authority. Here the thesis will support the main argument outlined above in steps. This part will look at two aspects in particular – what it takes for a regulator to be recognised as a *de facto* authority and what it takes to be recognised as a legitimate authority. Cooperation, it will be argued, can be used to improve both levels of recognition.⁵ The picture thus presented is highly complex and it is impossible to depict authority interactions in all their rich nuances. Yet there are a number of recurring themes in regulatory cooperation which the thesis will focus on.

The first concerns the relationship between power, architecture and *de facto* authority. I will show how regulatory power is particularly located in hierarchically structured environments. Usually, organisations being the only regulator in the realm possess strong *de facto* authority. Cooperating with these types of regulators can balance out power deficits of organisations active in less consolidated realms. Furthermore, through cooperation, organisations can pool capacities and thereby achieve better and, possibly less costly, regulation throughout the entire process (standard setting, monitoring and enforcement). This increase in effectiveness could provide competitive advantages and thus a strong motive for engaging in cooperation in a market-type environment.

⁴ Ibid.

⁵ See RB Hall & TJ Biersteker, *The Emergence of Private Authority* (CUP, 2003) at 4.

The second issue concerns the rise of ‘epistemic authority’ or the increasing need for expert driven regulation on a transnational level. The thesis will show how this triggers interaction, particularly between public regulators and private expert organisations such as the ISO, but also between private organisations and public actors which have specific legal or political expertise in a given regulatory area.

Finally, the thesis will address the issue of legitimacy and cooperation. Of all three this is perhaps the most complex matter dealt with. It will be shown that recognition of a regulator’s legitimacy depends on a variety of factors. For simplification the thesis will distinguish procedural and substantive legitimacy. On both levels there is, however, a certain tendency towards more traditional accounts of legitimacy. Thus, both procedurally and substantially, public organisations seem to be regarded as more legitimate than other types of regulators. Private actors seek to benefit from this through cooperative processes.

However, the above tasks merely outline certain trends and do not establish universal rules. The main purpose of this chapter is to provide an account of authority which can explicate transnational cooperation and which creates awareness of the rich nuances in which this can occur.

2. UNDERSTANDING AUTHORITY IN A FRAGMENTED TRANSNATIONAL CONTEXT

Before engaging in any discussion on how authority limitations can trigger cooperation, it is first useful to outline the understanding of authority adopted in the thesis. After some preliminary remarks (2.1) two major issues will be given particular attention. First, the possibility of ‘private political’ authority (2.2) and secondly, the problem of plural authority particularly in the global sphere (2.3).

2.1 Some Preliminary Remarks on Authority

Three types of discussion are recurrent in the literature on political theory dealing with the issue of authority. Firstly authority is contrasted with power. Secondly, there is an extensive debate on what makes authority legitimate and thirdly the final issue concerns the distinction between authority in a political sense and other forms of authority, particularly epistemic authority. All three debates in themselves have the potential to (and actually do) create a body of literature which fills libraries. This section will therefore not attempt to discuss each debate definitively. Rather it will provide a few preliminary remarks on the general understanding of authority adopted in this chapter. This is intended to provide some guidance to the reader and avoid confusion in the argument developed below.

Authority and power: One of the major themes in the discussion of authority concerns its relationship with power. In particular so-called practical or *de facto* authority seems to significantly overlap with power in many ways. Max Weber attempted to draw a distinction by introducing a voluntary element. Thus when referring to authority (or domination, as he calls it) he states that ‘every genuine form of domination implies a minimum of voluntary compliance, that is, an interest (based on ulterior motives or genuine acceptance) in obedience’.⁶ According to this definition there is at least initially a voluntary element inherent in authority (a ‘pro attitude toward the agent on part of the subject’⁷) which does not solely work through power, narrowly defined ‘as direct coercion by means of force’.⁸ However, this element must not be confused with genuine consent to the concrete command. In fact ‘authority always demands obedience’ and is thus ‘incompatible with persuasion, which presupposes equality and works through a process of argumentation’.⁹ Authority takes place within a hierarchical framework and cannot be based on egalitarian grounds. Cutler therefore states that:

⁶ M Weber, *Economy and Society - An Outline of Interpretive Sociology* (University of California Press, 1978) at 214.

⁷ T Christiano, ‘Authority’ in: *Stanford Encyclopedia of Philosophy* (revised version, 2012), available at <http://plato.stanford.edu/entries/authority/> (last accessed 21 October 2014) at 3.

⁸ Venzke, *supra* note 1, at 358.

⁹ H Arendt, *Between Past and Future* (Penguin Books, 1977) at 93.

[as Lincoln notes] “force is always implicit in authority” It is implicit in the asymmetry in power relations between the “ruler and ruled, officer and private, teacher and student, parent and child” Liberalism obscures this asymmetry by positing a consent-based social unity which tends to equalize relations between members of society.¹⁰

One possible way to understand practical authority would therefore be to see it as a particular form of exercising power. This would, however, necessitate an adapted, broader understanding of power. Accordingly, power must not only be understood as passing ‘through the barrel of the gun’ but also ‘through institutions and broader social relationships’¹¹. For Andrei Marmor practical authority is a ‘normative power to impose obligations on another’. However this type of power, which he also calls systemic power, presupposes ‘power-conferring norms’ (that grant or constitute this power) these norms ‘are essentially institutional’ in that they ‘form part of some social practice or institution’.¹²

Consequently the element introduced here is an overarching framework provided by institutions or social practices, which establishes limits to the arbitrary exercise of power. This framework is based on the recognition granted by others, in particular the targeted addressees (or subject, as they are also commonly referred to).¹³ The kind of power exercised in this way is much more complex than for instance *ad hoc* power or the simple use of force. The norms granting authority are interconnected and define the power-holder, its scope and content.¹⁴ In establishing authority what matters is the existence and at least theoretical ability to observe such structures. Often such a framework has a more consolidated character (a founding treaty or organisational statutes for

¹⁰ C Cutler, *Private Authority and Global Authority - Transnational Merchant Law in the Global Political Economy* (CUP, 2003) at 68. Cutler refers in this quote to B Lincoln, *Authority: Construction and Corrosion* (University of Chicago Press, 1991) at 6.

¹¹ Venzke, *supra* note 1 at 357 and 358.

¹² A Marmor, ‘An Institutional Conception of Authority’, 39 *Philosophy & Public Affairs* (2011) 238, at 240 and 241.

¹³ See D D Avant, M Finnemore, & S K Sell, ‘Who Governs the Globe?’ in: D D Avant, M Finnemore & S K Sell (eds), *Who Governs the Globe?* (CUP, 2010) 1 at 9f stating that: ‘We define authority as the ability to induce deference in others. Authority is thus a social relationship, not a commodity; it does not exist in a vacuum. Authority is created by the recognition, even if only tacit or informal, of others. Recognizing an authority does not mean one always agrees with or likes the authority. It does mean, though, that one defers to the authority. Such deference confers power. Having a set of constituents that have signified their acceptance of an authority allows that authority to exert greater influence than would be the case if she did not have their deference’.

¹⁴ Marmor, *supra* note 12, at 243

instance),¹⁵ but can also take the form of simple general consent by the concerned addressees. This distinction is important as many decisions of transnational regulatory regimes do not only extend to their members but often also to third party addressees. Thus, for instance the ISO 26000 standard is designed to affect workers by improving their working conditions. Workers are, however, not members of ISO or its sub-organisations, even though the employers of these workers may be (as they could be members of national technical standard setters). Thus, although the industry involved falls under the official ‘authority framework’ of ISO, workers do not. Authority over them has to be gained through a different (or enlarged) authority framework, which is not covered by the statutes applicable to the members. It will be shown that cooperation can be a useful path in this regard.

To summarise, the thesis will use a notion of practical authority defined as a normative power received through norms stemming from institutions or social practices. As the thesis will show below, practical authority is of great explanatory force in understanding both - private authority as well as authority in a pluralistic transnational context.

***De facto* authority vs legitimate authority:** Linked to the issue of authority and power just discussed is the question regarding the relationship between authority and legitimacy. Generally two issues are of importance here. The first concerns the general relationship between authority and legitimacy. Is authority intrinsically legitimate or do the two concepts need to be separated? The second commonly addressed issue concerns the question of what it is that makes authority legitimate (or what kind of prerequisites legitimate authority entails). This later point will be addressed in some more detail below, even though the answer to the first question already pre-empts it to some degree.

¹⁵ Compare also M Zürn who in this context would rather speak of a ‘rule’. For him ‘[a]uthority becomes rule if it governs a social relationship as a whole including the interaction between specific authorities ... Only once such meta-authorities are formed, which decide in cases of collision between various political authorities, and once these meta-authorities can use force of whatever sort to implement their positions if necessary, we can speak of rule’(in ‘How Solid is Liquid Authority? Towards a Reflexive Concept of Authority’ (draft paper on file with the author) at 2). This can be observed among many transnational regulators, at least within their functional realm.

The link between legitimacy and authority has been regularly addressed by political theorists¹⁶ and many have argued that legitimacy is a necessary prerequisite of authority. Legitimacy is said to be the decisive criteria in distinguishing authority from the exercise of power.¹⁷ Others, however, have argued for a separation of both concepts. Marmor states in this context that:

To determine whether an authority is legitimate or not, we need a normative account for sure, but not about authorities in general; we need a normative theory about legitimacy of social practices and institutions, what makes them good and just and worthy of our support.¹⁸

Disentangling legitimacy from authority and evaluating both concepts in separate steps does not imply that authority is independent of legitimacy. Legitimacy is simply not an automatic precondition for an institution to have authority, yet legitimacy does influence it and is often of crucial importance. Thus, similar to Michael Zürn *et al.* I will opt for an understanding according to which authority consists of two layers of recognition. In the first layer – ‘an authority is considered *per se* functionally necessary in order to achieve certain common goods’; ‘institutions have authority when the addressees of their policies recognize that these institutions can make competent judgments and binding decisions’.¹⁹ This is the practical or *de facto* authority addressed in the previous section. The second layer then encompasses the recognition that the exercise of authority is legitimate.²⁰ What this recognition is based upon may vary greatly, depending on the social environment or institution it is exercised in.²¹ The approach taken here is therefore not an abstract one which tries to determine what requirements an authority should meet, in order to be legitimate. Rather, as shall be shown below, normative concepts will be of secondary importance and the thesis will first of all focus on what the relevant social environment regards as the legitimate practice of authority.²²

¹⁶ Christiano, ‘Authority’, *supra* note 7, at 11.

¹⁷ See generally for an overview over the different strands in literature: Ibid, at 2; Cutler, *supra* note 10, at 66, and Hall & Biersteker, *supra* note 5, at 4.

¹⁸ Marmor, *supra* note 12, at 238; as well as M Zürn, M Binder & M Ecker-Ehrhardt, ‘International Authority and Its Politicization’, 4 *International Theory* (2012) 69, at 83.

¹⁹ See Zürn, Binder & Ecker-Erhardt, *supra* note 18, at 83.

²⁰ Ibid.

²¹ A Marmor, *supra* note 12, at 238ff.

²² See also *ibid* at 246.

Political vs epistemic authority: Finally, political authority is often distinguished from epistemic authority. The latter refers to an authority ‘in some area of intellectual inquiry [...] that is an expert in that area’.²³ Epistemic authority is thus based ‘on expert knowledge and moral integrity’.²⁴ It does not require to ‘convince people factually and in detail’ but relies on the overall ‘reputation’.²⁵ This is said to stand in contrast to political authority with its power component as outlined above. Epistemic authority is said to extend over ‘an empirical subject’ whereas political authority extends over ‘individuals as subjects’.²⁶ In the following sections the thesis will however make the argument that given the developments depicted in the previous chapter the differences between the two types of authority are increasingly less pronounced. After all, there is a ‘power component’ involved in epistemic authority, namely an imbalance in distribution of knowledge, which puts the epistemic authority in a more dominant position. Moreover, giving technical developments and the inter-linkages of national economies many epistemic authorities are much less apolitical than one might suppose. In fact they have a great impact in shaping the global political economy.²⁷ Even when an expertise based authority only formally gives advice²⁸ this advice might ultimately be so compelling that one cannot ignore it but must follow it in order to ‘stay in the game’.

Further, even though transnational governance activities are often not directly backed by the ability to resort to force, they are part of complex structures where at one point the threat of the stick can be realised. Moreover, as new governance literature shows us state regulation is also far from being able or willing to always govern through straight forward commands backed by strong enforcement tools as advocates of ‘solid authority’ would have us believe.²⁹ In nation states too, compliance with regulation is achieved through a variety of measures, where often

²³ See Christiano, ‘Authority’ *supra* note 7, at 3.

²⁴ Zürn, *supra* note 15, at 7.

²⁵ Ibid.

²⁶ See Roughan, *supra* note 1, at 20.

²⁷ See T Bütte & W Mattli, *The New Global Rulers – The Privatization of Regulation in the World Economy* (Princeton University Press, 2011) at 2 ff; and below Chapter 4 on ISO.

²⁸ Christiano, ‘Authority’, *supra* note 7, at 3.

²⁹ See I Ayers & J Braithwaite, *Responsive Regulation – Transcending the Deregulation Debate* (OUP, 1992); C F Sabel & J Zeitlin, ‘Learning From Difference: The New Architecture of Experimentalist Governance in the EU’, in: C F Sabel & J Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP, 2010) 1; and C F Sabel & J Zeitlin, ‘Experimentalist Governance’ in: D Levi-Faur (ed), *The Oxford Handbook of Governance* (OUP, 2012) 169; or R Baldwin & J Black, ‘Really Responsive Regulation’, *LSE Legal Studies Working Paper No. 15/2007*.

only at the very end one finds ‘enforcement’ in the strict sense. The rise of ‘epistemic authority’ is therefore an important phenomenon particularly in the context of an examination of public private cooperation of transnational regulators. It signals particular and shifting requirements for those governing and steering global processes; requirements which traditional political authorities may not automatically fulfil.³⁰

To summarise this and the foregoing sections, the concept of authority adopted here is an institutional one, one that seeks authority in social practices and institutions rather than using a fixed normative understanding of what it takes to be a legitimate authority in a universal context. Legitimacy will become important in a second step of the analysis, namely in the assessment of why a given community wants to support this authority and why it is considered legitimate. Finally, the thesis adopts a notion of authority that is based on a less clear distinction between political and epistemic authority. As will be depicted in more detail below and in the following chapters, technical innovations and the increase of global trade have blurred the boundaries between these types of authority and to a significant extent political authority is dependent on epistemic authority.

2.2 The Issue of State Centricity and Private Authority

After the initial clarifications on the general understanding of authority adopted here, this section will focus on one of the more specific issues regarding an understanding of authority in a transnational context. As already outlined in the previous chapter the transnational sphere lacks an overarching framework. There is no world government. Most regulators are founded by and relate back either to a treaty (in the case of international organisations), to private contracts or to some kind of even less formal understanding. Furthermore, organisations, public or private, are usually active in a particular issue area, but they do not possess authority over a territorial domain. This development, often described as functional differentiation into different social and legal systems,³¹ also impacts on the ways in which authority is distributed. Against this

³⁰ This issue will however be addressed further below in section 3.2.1.

³¹ Cf N Luhmann, *The Differentiation of Society* (Columbia University Press, 1982); see also A Fischer-Lescano & G Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’,

background the common practice of seeing authority as being synonymous with state-based authority has proven to be problematic. Rodney Bruce Hall and Thomas J Biersteker show how Weber's understanding of the essence of the state as having 'the monopoly of the legitimate use of physical force within a given territory'³² has led many international relation scholars to argue that the international space, lacking these characteristics, is of an anarchic nature. States in this context 'are both the source, and the exclusive location, of legitimate, public authority'.³³ Moreover, the dominant factor shaping the international realm is the power relations between states.³⁴

This state-centric view has however been challenged at various stages and authority is no longer exclusively conceptualised as an extension of state authority. It is also more commonly accepted that other actors, such as international organisations can exercise authority.³⁵ Ingo Venzke, for instance, provides an account of how to understand the authority of international institutions which are engaging in rulemaking. Unlike more traditional understandings which would only link authority back to state consent, he searches for additional constraint which goes beyond simple persuasion and which he then finds in the actual exercise of authority following initial state consent itself. Such constraint he claims is first and foremost a discursive construction: '[O]ne may [...] think of authority as the ability to establish content-laden reference points in discourse that are difficult to avoid because participants are expected, and in turn forced, to relate to them.'³⁶ Thus, after initial delegation international organisations create discourses on certain matters. The content they put forward therein gradually becomes authoritative and thus actors

25 *Michigan Journal of International Law* (2004) 999 ff.; G Teubner, 'Global Bukowina': Legal Pluralism in the World Society', in: G. Teubner (ed), *Global Law without the State* (Dartmouth Publishing, 1997) 3.

³² M Weber, 'Politics as a Vocation', in: H H Gerth and C Wright Mills (eds) *From Max Weber: Essays in Sociology* (Routledge & Kegan Paul, 1948) 77. Quote taken from Hall and Biersteker, *supra* note 5, at 3.

³³ Hall & Biersteker, *supra* note 5, at 3.

³⁴ I am referring here mainly to the realist account whereby international law was regarded as reflecting powerful state's interests to some degree or another. Starting with Morgenthau and later K N Walz, *Theory of International Politics* (Mcgraw-Hill, 1979) and J L Goldsmith & E A Posner, *The Limits of International Law* (OUP, 2005) just to name a few. For an overview the discussion on power and international law, see R H Steinberg & J M Zasloff, 'Power and International Law', 100 *AJIL* (2006) 64.

³⁵ A von Bogdandy, P Dann & M Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Journal of International Law* (2008) 1375; I Venzke, 'International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law', 9 *German Journal of International Law* (2008) 1401. Zürn, Binder & Ecker-Ehrhardt, *supra* note 18, at 69 ff.

³⁶ Venzke, *supra* note 1, quote at 372.

planning to disagree with it face an increasing uphill battle in justifying their position which will ‘incur costs or forgo benefits’.³⁷

As much as this may constitute a plausible narrative for the emergence and preservation of authority of international organizations, Venzke leaves the question of private authority open. In fact, the debate regarding authority in political and legal theory has long been dominated by rather fierce public private divide usually based on a formal distinction. Liberalism, dominant both in national and international political theory causes a dichotomy whereby the private is said to represent the individual, free markets and economic exchange and the public side consists of ‘state authority and legitimate compulsion’.³⁸ Yet, as Cutler correctly points out, the private sphere is not ‘a consensual realm of civic and economic freedoms’ which is ‘distinct from the political and (at least ultimately) coercive realm of the state’.³⁹ In particular in a globalised context, boundaries between public and private are constantly shifting. States pursue political programs which transfer powers to private actors as much as they transfer them to international organisations. Changes in communication methods and market structures have led to an explosion of new forms of private interaction and caused non-state actors to acquire ‘power in the international political economy’.⁴⁰ In fact, ‘global private rule-making is an important complement to, or even substitute for, formal legal collaboration through international treaties among governments’.⁴¹

Here an institutional or social practice-based understanding of authority proves to be useful. This is first and foremost because it does not *per se* discriminate between public and private institutions having *de facto* authority. An understanding that determines (political) authority by abstract moral characteristics is more likely to limit and possibly exclude forms of private exercise of normative power (such as for instance on its lack of venues for democratic participation). The institutional concept applied here is more open to different kinds of authority

³⁷ Ibid at 368.

³⁸ Cutler, *supra* note 10, at 66 ff. See also Chapter 1 at section 3.

³⁹ Ibid, at 68; see furthermore, Hall & Biersteker, *supra* note 5, at 5.

⁴⁰ See above Chapter 1 and see furthermore Hall & Biersteker, *supra* note 5, at 6, making reference to S Strange, ‘Territory, State, Authority, and Economy: A New Realist Ontology of Global Political Economy’, in: R W Cox (ed) *The New Realisms: Perspectives on Multilateralism and World Trade Order* (UN University Press, 1997) 9; and I Hurd, ‘Legitimacy and Authority in International Politics’, 53 *International Organization* (1999) 381.

⁴¹ Büthe & Mattli, *supra* note 27, at 16.

and distinguishes between actual social practices and forms of legitimate authority on a normative level. Thus, it leaves the question of what kind of exercise of authority is preferable open to a second level - the level of evaluation.

2.3 Plurality, Fluidity and Inter-Relations of Transnational Authority

2.3.1 The Architecture of Transnational Authority

The previous section hinted at another important issue regarding authority in a transnational context – namely the issues of plurality and fluidity. Venzke’s account of international organisations’ authority, for instance, tries to accommodate the particularities of authority outside the context of the nation state. This is a context where there are neither clear relationships of authority from the outset, nor security that international organisations are the only actors claiming authority. As stated in the previous chapter, the transnational space is characterised by a general fragmentation into functionally distinct issue areas (alongside the continuing traditional separation into territorial realms in case of the nation state).⁴² Importantly, these issue areas are not consolidated under an overarching framework - there is no universal global hierarchy. Organisations therefore act in one or several distinct regulatory fields, subject to (sometimes constant) change. Authority in this global, non-hierarchical context is not derived in a top-down manner.

Within the different issue areas a distinction can be found between market-based and non-market-based, or centralised and decentralised structures. The former are characterised by internal fragmentation, the latter by internal hierarchy and integration.⁴³ A market or decentralised scenario occurs when a multitude of public or private standard-setters are engaged in the area and have developed instruments fully or partly independent (non-integrated or

⁴² For more information see Chapter 1. See furthermore, Hall & Biersteker, *supra* note 5, at 4. Others have called it ‘domains’ cf N Roughan, *supra* note 1, at 45 ff.

⁴³ Bütke & Mattli (*supra* note 27, at 18 ff) introduce this distinction in order to conceptualize rule-making in global markets. A similar distinction is the one of K W Abbott & D Snidal (‘Strengthening International Regulation through Transnational New Governance’, 42 *Vanderbilt Journal of Transnational Law* (2009) 501) who talk of centralized and decentralized governance. They, however, ascribe centralized governance to ‘old’ state based governance, in contrast to ‘new’ transnational decentralized governance. The description is fairly accurate when, as done by Abbott and Snidal, describing the transnational realm as a whole. Yet, in different issue areas strong centralization can be found.

disjunctive)⁴⁴ of each other. This may be followed by a competitive ‘selection process through which one set of rules achieves market dominance and thus becomes the single global standard follows the rule-making’.⁴⁵ In the non-market-based or centralised scenario ‘a single institution is already internationally recognized as the predominant forum for writing rules in the issue area, any particular standard that it develops becomes the global standard not through market selection but by virtue of having been promulgated by this focal institution.’⁴⁶

How does this picture influence the authority of transnational regulators? In the first case, any actor engaging in transnational rule making does not *prima facie* possess the necessary authority. As Tim Büthe and Walter Mattli state, whether a certain set of rules will prevail depends on market selection, or put differently, depends on the up-take by the targeted addressees. This again depends on the actor’s ability to build and maintain a bigger market share, which necessitates ‘a mix of political and commercial strategies’.⁴⁷ Regulators in this context first and foremost provide regulatory options, which their addressees can opt for or not. Thus regulators need to take measures to increase their market share and to make sound strategic decisions.

The situation is different in the non-market scenario. Here one regulator dominates the particular issue area. Authority is integrated, which means that ‘authorities are arranged or organized by common rules and principles applying to their relationship’, such as different branches of government or different units in an organisation.⁴⁸ The Olympic Movement which will be presented in one of the case studies below constitutes a good example of an integrated authority. Both, the different branches of the International Olympic Committee (IOC), as well as the International Sports Federations and the National Olympic Committees have clearly defined areas of competences. Ultimate ‘authority and leadership’ however lies with the IOC.⁴⁹ Any rules created by it will in most cases automatically be considered as the ‘global [or regional] standard’ for the issue area. This does not mean that regulators in a non-market scenario possess automatic, unlimited and unquestioned authority. Problems can arise for instance when

⁴⁴ Cf Roughan, *supra* note 1, at 47 ff.

⁴⁵ Büthe & Mattli, *supra* note 27, 18 ff.

⁴⁶ Ibid.

⁴⁷ Ibid at 37.

⁴⁸ Roughan, *supra* note 1, at 47

⁴⁹ See below Chapter 5.

regulation brings along distributional inequalities among addressees. Conflict can also emerge if there is the sensation that the regulator is no longer adequately addressing the crucial concerns in the issue area. Furthermore, conflicts may arise within an organisation between different stakeholder groups.⁵⁰ These problems will be dealt with in more detail below in Section 3. Lastly, one outstanding issue that must be mentioned is that due to the complexity outlined above regulators can be active in a hierarchical and a fragmented realm at the same time. As such, their authority may be integrated regarding one aspect and disjointed regarding another.⁵¹

2.3.2 A Relative (or Relational) Account of Transnational Authority

Given the plurality of authority in the transnational context, one cannot conceive of an actor's authority as absolute or independent⁵² as it is often perceived within the state context. Rather one needs a concept that accommodates plurality and overlap as well as the incompleteness of individual actors' authority. Both *de facto* existence as well as legitimacy highly depends on the relationship an individual authority finds itself in with others. What has therefore been suggested is to adopt an understanding of authority which takes into account those relational factors. Nicole Roughan introduces the concept of relative authority. She argues that 'whenever authority is shared or overlapping as a result of these subject's characteristics [meaning addresses shared by two or more authorities], that authority is not independent and its legitimacy cannot be assessed as if it is. Instead authority is relative.'⁵³ Furthermore she notes that 'in circumstances of plurality of *prima facie* authorities, the justification of authority depends upon a justified inter-authority relationship.'⁵⁴ As such, there are two issues at stake in this regard.

First of all the mere existence of an authority (*de facto* authority) can only be established in relative terms. Until which point an actor's authority extends and in how far subjects recognise it as such depends on the other authorities operating in the same or overlapping realms. On a second level, authorities can only be justified in relative terms. Thus, legitimacy of authorities depends on the relationship this authority has again with other authorities active in the same or

⁵⁰ Bütte & Mattli, *supra* note 27, at 35.

⁵¹ Roughan, *supra* note 1, at 47 f.

⁵² Ibid at 138.

⁵³ Ibid at 138.

⁵⁴ Ibid italics in original.

overlapping realms. Legitimacy can be relative in a substantive or procedural sense.⁵⁵ In the first case there is the ability of authorities to achieve certain desired outcomes (‘subjects conformity with reason/values’).⁵⁶ In a procedural sense relativity might stem from the procedure which requires consideration of an overlapping authority. Secondly, effects on third parties may make an authority relative and require managing the relationship with those authorities where overlaps are created. Finally there may be governance reasons, where certain forms of interaction may provide certain benefits (Roughan mentions ‘checks and balances’ for instance).⁵⁷ The distinction between substantive and procedural legitimacy considerations and their relativity will be elaborated in more detail in the second part in this chapter. What is important to take from this section is the notion of relativity which characterises authority transnationally. On a global scale authorities are usually not independent and self-sufficient entities. Rather they are dependent on others in their respective environments. Individual authority is therefore almost never complete and need to be understood in relative terms.

2.4 Summary: The Challenges of Authority in a Transnational Context

To summarize the general notion of authority adopted here, the following paragraphs will reiterate several issues of particular importance. First, as outlined above, in order to distinguish authority from power and persuasion it is necessary to have some kind of framework of conventions or norms within which it is exercised. This framework is established by institutional or social practices. As depicted in the first chapter, the thesis generally assumes a pluralistic context in the global realm with functionally differentiated regulatory systems. The thesis generally agrees with the notion of a functional separation of society in the global context. In contrast to Gunther Teubner and ultimately Niklas Luhman who assume more or less closed (autopoietic) systems⁵⁸ it is argued here that, even though functionally distinct, regulators are

⁵⁵ Both concepts will be outlined in more detail below in section 3.2.2.

⁵⁶ Roughan, *supra* note 1, at 139.

⁵⁷ Ibid at 140 ff.

⁵⁸ See N Luhmann, *Die Gesellschaft der Gesellschaft* (Suhrkamp, 1997) at 133; as well as id., *supra* note 31, particularly 229 ff. Furthermore, Fischer-Lescano & Teubner, *supra* note 31, at 1006, who, based on Luhmann, state: ‘Through their own operative closure, global functional regimes create a sphere for themselves in which they are free to intensify their own rationality without regard to other social systems or, indeed, regard for their natural or human environment.’

interdependent.⁵⁹ This again creates a high level of complexity regarding the exercise of authority in the global space. Authority is not only dependent on the regulator-addressee relationship but also on the interdependence of regulators. The notion of ‘relative authority’, which the thesis took from Roughan captures this problem.⁶⁰ The authority of one actor is relative towards other actors on an overlapping subject matter and vis-à-vis the same set of addressees. Yet, authority is not only relative in space it is also unstable over time. Authority, particularly in non-hierarchical transnational context can more easily be challenged and is thus at a permanent risk of vanishing. It is simply less consolidated as authority within fixed and long established frameworks in some nation state contexts for instance is. Addressees have easier ways of ‘de-submitting’ themselves and therefore authority is less guaranteed.

The approach adopted here furthermore abstains from differentiating between private and public origins of authority. Whether a certain regulator is based on a founding document originating from a ‘public’ or a ‘private’ source does not make a particular difference at this level. In addition it is argued that developments to be observed in the context of private standard setting depict a blurring of epistemic and political authority on the one side and simultaneously the rise of ‘private political’ authority. The ‘liberal mythology’ which understands the private sphere as ‘[operating] neutrally and consensually as a domain of freedom’⁶¹ is thus abandoned here. In the present approach private actors exercise authority that at least has a similar shape and similar effects as more traditional public political authority. This however, does not mean that on a normative level (as well as on a *de facto* level) the exercise of making a distinction between public and private is entirely obsolete. Particularly, regarding cognitive perceptions towards authority and for the normative expectations which addressees have regarding a particular regulator it might be of great relevance to look at both types of actors separately. This will be addressed in more detail below when looking at the legitimacy of regulatory authority in the transnational context.

To summarise the present approach towards authority in the transnational realm the following elements crystallise: authority is functionally divided among different interdependent regulatory

⁵⁹ See particularly also Roughan, *supra* note 1, at 136 ff.

⁶⁰ See *ibid.*, at 136 particularly.

⁶¹ Cutler, *supra* note 10, at 69.

(systems). Each of these systems has a framework in place through which addressees of the regulation have submitted themselves to this authority. Often these frameworks are rather consolidated in their centre (with written documents fixing degree and extension of the authority) and possibly less concentrated at the peripheries. Moreover, there are in many cases multiple regulators active in overlapping issue areas. Both circumstances lead to the fact that authority in the transnational realm is unstable and relative.

3. COOPERATION AS A MEANS TO OVERCOME AUTHORITY DEFICITS

Above the thesis has outlined how (particularly in a transnational context) within the same issue area authority is often held by a plurality of actors. There is furthermore a tendency towards instability through which authority can shift between different authority holders. This relativity then triggers authority interactions, either in the form of conflict or in the form of cooperation and coordination, which will be described in greater detail in the next section. (3.1) This will then be turned upside down. Consequently, instead of looking at how relativity of authority leads to authority interactions, the thesis will focus on the commutative aspects (the exchange components)⁶² - namely transnational regulatory cooperation. (3.2)

3.1 Authority Interactions

The relativity of transnational authority leads to complex venues of inter-relations between different regulators. These can be confrontational or non-confrontational in nature. In an attempt to provide a typology of forms of ‘inter-authority-relationships’ Roughan distinguishes between five different types, namely deference and toleration, cooperation and coordination and finally conflicts.⁶³ Deference and toleration describe relationships where regulation (either located in one issue area or in distinct areas) although overlapping do not create contradictory obligations for the addressees. The authorities are compatible. This is the case if they are ‘identical or non-

⁶² The term ‘commutative’ is chosen here loosely linked to the philosophical concept (commutative justice) to refer to the transactional aspects of regulatory cooperation. At the core is the exchange of ‘regulatory commodities’ governed by the cooperative relationship between two (or several) regulators. See furthermore, Aristotle’s *Nicomachean Ethics* (translated by R C Bartlett & Susan D Collins, University of Chicago Press, 2011) Book V section 4 who speaks of rectificatory justice in contrast to distributive justice; as well as P Koslowski, *Principles of Ethical Economy* (Springer, 2001), Chapter 8, at 183.

⁶³ Roughan, *supra* note 1, at 48 ff.

contradictory’ but they ‘are not intentionally working together’, either because they are coincidentally compatible or because it is only one authority which is aligning itself to another (through deference or toleration).⁶⁴

There are certainly many such ‘low profile’ authority relationships; Roughan herself lists a few examples such as deference in integrated state constitutional systems, or the toleration of specific legal frameworks applied by minorities within another authority’s realm. However, I would argue that, at least for the present case they are of little relevance for the following reasons. First, the focus here is on cooperation and as such only relationships which could trigger cooperation are of importance. Cases where authorities can operate in an uncoordinated way independently of each other thus fall outside the relevant framework. Furthermore, the thesis assumes that *de facto* there are not many cases where two authorities can pursue activities in overlapping areas without either having to engage in some form of coordination or create conflict at a certain point of their relationship. Therefore the focus here is on the two remaining forms of authority relations – conflict and cooperation.

Roughan provides a definition of conflict which focuses on the addressees of authoritative acts and their inability to comply with the contradicting obligations originating from two authorities. She distinguishes between the cases where, in a single issue area, two authorities create conflicting obligations for the same addressees and where interactions between authorities of different but overlapping issue areas cause conflicts between the respective addressees interacting with each other.⁶⁵ In contrast to Roughan, the present study distinguishes between three possible scenarios of conflicting authority relationships. As such, the following pattern emerges:

1. Regulator 1 (R1) and Regulator 2 (R 2) which are both in the same issue area set out diverging obligations on the same Addressee (A1).

⁶⁴ Ibid at 49.

⁶⁵ Ibid at 56.

2. R1 and R2 come from different issue areas (for instance trade and environment) and set out diverging obligations on the same Addressee (A1) such as a company who has to simultaneously fulfil trade and environmental requirements.
3. R1 and R2 come from different issue areas (again trade and environment). R1 puts obligations on A1, whilst R2 puts obligations on A2. Both A1 and A2 can fulfil their obligations individually, yet they face problems in interacting with each other (for example A2's environmentally friendly produced supplies do not comply with A1's production lines which are aligned with certain trade regulations)

Apart from these interactions Roughan abstained from including 'outward manifestations of hostility or even competition' between the regulators in her definition of conflicts.⁶⁶ Here it is argued, however, that open conflict and competition are important for authority relationships as they can have a particularly 'undermining effect' (such as the race to the bottom dynamic). There are also many other shapes and degrees of conflicts that can be imagined. As stated in the previous section transnational authority is characterised by its multiplicity and the very different shapes it can take. This also has impacts on the types of conflicts which can emerge.

Cooperation, as the second and for our purposes most important form of interaction has been defined as any joint activity between two or more parties which is voluntary and intentionally entered into and which has a common goal. In this thesis joint activity is understood broadly including different types of interaction such as common projects, initiated and executed together, as well as individual projects which are aligned in order to avoid conflicts and to create synergies.⁶⁷ A reminder of this broad definition is important as it allows the inclusion of coordination in the framework of cooperation. Roughan defines coordination as 'a link between authorities, which either places them within hierarchical networks or engages them in dialogical processes that incrementally bring them into alignment'.⁶⁸ Consequently, it contains the element

⁶⁶ Ibid.

⁶⁷ For a more detailed definition see Chapter 1 at section 5, Cf also the definition provided by Roughan, *supra* note 1, at 51; who refers further to M E Bratman, 'Shared Cooperative Activity' 101 *The Philosophical Review* (1992) 327 ff.

⁶⁸ Roughan, *supra* note 1, at 53.

of a ‘joint activity’ even though this activity is predominantly of a discursive nature and the goals of both (or several) actors are not necessarily one and the same but ‘compatible’.⁶⁹

Finally, what must be borne in mind when talking about authority relationships in general is their complexity and their fluid character, already mentioned above.⁷⁰ The multiplicity of transnational authority leads to manifold permutations of authority relationships, which are furthermore not static but of a fluid character. As such, authority is not settled in the global context but a regulator may enjoy authority in a particular issue area for some time, although they maybe also quickly lose this authority.⁷¹ This has led some authors to use a ‘network approach’ when analysing global authority.⁷² The paragraphs above have depicted the different forms of interaction in a predominantly binary manner. Authority 1 and 2 interact in a certain way and stand in a particular relationship towards each other. In reality, however, these relationships are many times more complex and easily extend over a variety of actors.⁷³ Relationships are dependent on the particular subject matter and issue area; there can be cooperation regarding one type of regulation and conflict regarding another.

3.2 The Commutative Part of Transnational Regulatory Cooperation

Cooperation is often explicated as a means of conflict prevention.⁷⁴ However, this is only one aspect of a more rich narrative. It is argued here that what actually makes actors cooperate in a global environment is their need to overcome authority deficits and to stabilise and strengthen authority vis-à-vis their subjects. This approach requires looking at the actual authority exchange taking place. What is it that actors actually seek to acquire by cooperation? Following the social science approach outlined above, the present study does not provide criteria which establish a

⁶⁹ Ibid at 51

⁷⁰ See also N Krisch, ‘Liquid Authority in Global Governance: An Anatomy’ (draft paper on file with the author).

⁷¹ Krisch, *supra* note 70.

⁷² See D Avant, ‘Liquid Authorities, Liquid Authority and Networks’ (draft paper on file with the author) who refers to older literature on the relational relationship of power.

⁷³ See also the general description of authority within the global realm as provided in the first section of this Chapter.

⁷⁴ See, eg, M A Young (ed), *Regime Interaction in International Law, Facing Fragmentation* (CUP, 2012); M A Young, *Trading Fish, Saving Fish, The Interaction between Regimes in International Law* (CUP, 2011); R Wolfrum & N Matz, *Conflicts in International Environmental Law* (Springer, 2003).

universally valid account of *de facto* authority and legitimacy. This depends on many specific circumstances of an institution or a social practice. It is, however, possible to depict some tendencies in conditions which have an impact on authority, and which will allow for a more complex understanding of authority interactions. The following sections will address how cooperation can work on different levels. First, the question of how *de facto* authority can be affected by cooperation will be addressed (3.2.1) before secondly the issue of how legitimacy can be managed through cooperation is examined. (3.2.2)

3.2.1 De Facto Authority and Cooperation

As outlined above, *de facto* authority is understood here as authority which is ‘functionally necessary’. This comprises first and foremost the ability to effectively regulate a certain issue. Effectiveness is simply understood as ‘the degree to which something is successful in producing a desired result’.⁷⁵ Yet, *de facto* authority here goes beyond simple effectiveness. What matters is that an authority is recognised as being functionally necessary – as having the ability to effectively regulate. Thus ‘institutions have *de facto* authority when the addressees of their policies recognize that these institutions can make competent judgments and binding decisions’.⁷⁶ *De facto* authority is therefore given ‘when a person is quite capable of eliciting a distinctive kind of obedience, allegiance, or belief, involving [...] deference or respect or trust’.⁷⁷ Thus, an authority has to be recognised as the right kind of institution dealing with a certain matter. Recognition, however also means that there is room for contestation. Whilst at the national level contestation is less common and mainly originates from radical (for instance anarchist) movements, at the transnational level contestation of *de facto* authority is more likely. Zürn *et al* mention for instance nationalist movements against EU institutions as an example.⁷⁸

How then can *de facto* authority be determined and what are its elements? Additionally, how can cooperation between regulators affect it? *De facto* authority from a sociological point of view is

⁷⁵ Oxford Dictionaries, available at: <http://oxforddictionaries.com/> (last accessed 21 October 2014).

⁷⁶ See Zürn, Binder & Ecker-Erhardt, *supra* note 18, at 83.

⁷⁷ R B Friedman, ‘On the Concept of Authority in Political Philosophy’, in: J Raz (ed), *Authority* (Basil Blackwell, 1990) 61.

⁷⁸ Zürn, Binder & Ecker-Erhardt, *supra* note 18, at 84. Similar movements can probably found *vis-à-vis* international economic organizations such as the WTO; or private entities, see for instance Chapter 5 on Sports and the Environment.

determined in a social context and depends on the expectations of the constituencies represented therein. There are, however some factors which are considered of importance for transnational actors' *de facto* authority. These concern mainly regulatory functions necessary in the different steps of the regulatory processes. Kenneth Abbott and Duncan Snidal, for instance, look at the interaction between different regulatory actors (states and IOs, NGOs and firms) and assess the relationship between the competences required in the regulatory process and the existence of those competences with the different actor groups. They build on a five-step regulatory process: agenda setting, negotiation, implementation, monitoring and enforcement. Different steps require different capacities of the regulators. In their analysis they distil the following competencies as crucial throughout the regulatory process: expertise, independence, representativeness, and operational capacity.⁷⁹ These competences must not be understood in the abstract but have several real attributes. Expertise for example is said to be comprised of normative, business, political and auditing expertise. As such expertise can be relevant at each step of the regulatory process. How independence is established also depends on the concrete context in which it is relevant. One reading of it can be neutrality, in particular with regard to those who are regulated, but also from other stakeholder groups with particular interests such as lobbyists. Independence is said to be of particular relevance in the agenda setting, the monitoring and the enforcement stage. Representativeness mainly refers to the representation of different stakeholder groups within a regulatory institution. There are several ways by which this can be ensured. One is to give different groups an effective voice within the organisation. Another is to implement procedures which assure participation and accountability vis-à-vis relevant stakeholders. Representativeness is required at the agenda setting, the negotiation, as well as at the enforcement stages. The final competence is operational capacity. It includes legal and managerial authority which is necessary, for example to be granted access to relevant sites and information. This capacity is of particular importance in the implementation phase and during monitoring and enforcement.⁸⁰ As a disclaimer it must be said that some of the capacities significantly overlap with legitimacy requirements and in practice it may be very difficult to disentangle the two levels of recognition. Representation for instance certainly has high

⁷⁹ See K W Abbott & D Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State', in: W Mattli & N Woods (eds), *The Politics of Global Regulation* (Princeton University Press, 2009) 44, at 64.

⁸⁰ Ibid.

importance at the level of recognising *de facto* authority. For instance, an individual claiming to be in charge of a country would hardly be recognised as authoritative, particularly in the *de facto* sense, unless it had gained support by major groups of that society (such the army, political parties, unions and so on). On the other hand representation also allows for participation and the ability to consent to a certain authority, an element which is regarded as important when establishing legitimacy.⁸¹

Abbott and Snidal argue that all capacities are required within the regulatory process. Only a regulator which possessed all four capacities could truly administer the entire regulatory process. The following sections will focus on two aspects relevant for *de facto* authority. First, (a) expertise and the rise of epistemic authority which has already been addressed above; whilst (b) the second section is linked to the architecture of the transnational space with the issue of operational capacities and power discussed above.

3.2.1.1 Expertise and the Need for Epistemic Authority

Previous sections have depicted the increasing demand for ‘epistemic authority’. To be precise, expert knowledge has always played a role in law making and regulatory activities even in the heyday of the nation state.⁸² However, technical advancement and complex cross boarder economic interaction require specific rules which regulate these processes. In many cases it is only specialists who have sufficient expertise to be able to draft (and implement) rules that properly address the relevant technical details. However, despite its increasing importance epistemic authority is not simply replacing political authority. Rather, political and epistemic authorities are becoming more and more intertwined. This happens in two particular ways.

First of all, as outlined above, the necessity of technical know-how gives those who possess it a significant amount of power. However, expertise does not reflect the one and only truth, and ‘global regulatory processes [here specifically technical standard setting] are not apolitical’;

⁸¹ See below, section 3.2.2

⁸² See for instance N Jansen, *The Making of Legal Authority – Non-Legislative Codifications in Historical and Comparative Perspective* (OUP, 2010), who examines legal authority deriving from sources other than ‘legally recognized bodies such as courts or legislators. He particularly focuses on academic codifications and their application as authoritative sources.

indeed there are disputes by domestic stakeholders over the preferred technology as a decision towards one end or the other implies significant switching costs for the defeated party.⁸³ This means that these standards do not only reflect the state of the art in a particular technical area, they also include political decisions with possibly significant economic consequences.

Secondly, expertise can be obtained in many different areas and is not limited to technical knowledge. Accordingly, Abbott and Snidal mention ‘normative, business, political and auditing expertise’, which are all relevant for the regulatory process.⁸⁴ As such, an actor with crucial technical expertise might be able to develop rules which cover certain technical processes, however it may lack knowledge of how to implement this in a legally sound and politically feasible way (think of GMO regulation for instance).

Both scenarios can make cooperation necessary. Authorities can exchange their specific kinds of expertise and thus present themselves as more sound and effective towards their addressees. Particularly, when the lines between political and epistemic authority are blurred it may be necessary to have actors from both ‘sectors’ involved. And indeed when this happens actors often seek outside expertise. A good example in this regard is the case study on ISO 26000. Here the technical standard setter ISO engaged in regulation that concerned domains such as labour and environmental law. It decided to cooperate with the relevant public and private institutions which already possess longstanding experience and solid expertise in these areas. Finally, it should be emphasised that technical expertise is not necessarily only found in the private sector. As the case study on sports and environment shows, private actors can also be in need of external expertise. Thus, in this example the Olympic Movement possessed very limited expertise in the environmental sector (at least in the beginning). The IOC very much stressed that it needed UNEP’s expertise in order to build up its own environmental protection framework.

In summary, gaining access to expertise can thus necessitate or at least be a reason for authorities to engage into cooperation.

⁸³ See Bütthe & Mattli, *supra* note 27, at 11-12 (quote at 11)

⁸⁴ Abbott & Snidal, *supra* note 79, at 64.

3.2.1.2 Power and Operational Capacities as Commodities of Exchange

The question of whether cooperation is chosen in order to benefit from power asymmetries becomes of interest when one looks into the architecture of the transnational regulatory landscape. Power as shown above is an essential feature of authority. Power used in the context of authoritative actions has been defined above as a ‘normative power to impose obligations on another’.⁸⁵ Depending on the architecture of the realm regulators may have a regulatory monopoly (in the case of a centralised issue area) or they may have to compete (or at least arrange themselves) with other regulators in a fragmented context.⁸⁶ In the first case the monopolist most likely possesses of a high degree of normative power, as those who are regulated have little choice (if any at all) apart from a potential ‘take it or leave it’ option. One possibility which regulatory cooperation could thus open is to link less powerful regulators from weaker and fragmented areas to strong monopolists. The case study on sports and environment illustrates this with UNEP as an organisation active in a highly fragmented issue area (the environment) which regularly partners with different organisations from different regulatory realms. The sports sector is only one example, but it is one which is characteristic for a hierarchical and centrist realm.

Beyond the architecture of the individual regulatory realms, the normative power of a regulator also depends on its operational capacities. A regulator must have the ‘practical abilities [and] resources to perform the necessary tasks’.⁸⁷ As set out above, operational capacities are distributed unequally among different types of regulators and at different stages of the regulatory process different capacities are necessary.⁸⁸ As such, for instance when it comes to the ability to implement certain standards within a certain realm, an outside regulator either needs to have the normative power to enforce implementation, or it must cooperate with an actor who is able to do so. As a result, one can again use the case of sports and environment as an illustration. UNEP, as will be shown in more detail below, lacked the ability to implement and enforce environmental regulation within the sports sector (even individual states lacked the ability - as the case of the

⁸⁵ See also Marmor, *supra* note 12, at 240 and 241.

⁸⁶ See above at section 2.3.1.

⁸⁷ Abbott & Snidal, *supra* note 79, at 66.

⁸⁸ Ibid at 69.

Albertville games illustrates), yet the IOC was able to do so. With the help of UNEP's expertise it drafted environmental standards which became mandatory for the entire Olympic Movement, extending even to local municipalities and states, which apply to host the Olympic Games.

3.2.2 Legitimacy – Tendencies towards Traditional Justifications

3.2.2.1 Some General Remarks on Legitimacy of Authorities in a Transnational Context

Assessing legitimacy in a transnational context is a rather complex task. There is not a general definition or method for evaluating legitimacy throughout various fields. In fact, the way legitimacy is perceived depends, in line with what was said above, very much on the individual regime and its specific social practices. The increase in governance activities at the transnational level has also caused a shift in the legitimacy debate in this direction. Whereas traditional international law was debated under a normative notion of legitimacy, sociological conceptions of legitimacy have gained more attention when assessing other forms of governance. Thus, Julia Black argues that '[w]here regulatory regimes are largely non-legal and where, as in transnational regimes, infusing them with law is problematic, using only a legal concept of legitimacy will lead us to a dead end ...'.⁸⁹

To bring some conceptual clarity it is necessary to first specify the analytical framework adopted here. Generally, 'legitimacy rests on the acceptability and credibility of the organization to those it seeks to govern',⁹⁰ or in other words – the recognition of an authority as legitimate.⁹¹ Mark C Suchman distinguishes between pragmatic, moral and cognitive legitimacy claims which can all be managed by the organisation. Pragmatic legitimacy is based on the interests of an organisation's most immediate audience, moral legitimacy on normative approval, and finally cognitive legitimacy is based on comprehensibility and 'taken-for-grantedness'. In this scenario legitimacy evolves out of 'mere acceptance of the organization as necessary or inevitable based

⁸⁹ J Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes', 2 *Regulation & Governance* (2008) 137, at 145.

⁹⁰ Ibid.

⁹¹ Zürn, Binder & Ecker-Ehrhardt, *supra* note 18, at 83.

on some taken-for-granted cultural account'.⁹² There is a particular distinction between normative, as well as cognitive legitimacy, and pragmatic legitimacy. Julia Black defines it as the difference between 'when an organization *should* be regarded as legitimate, rather than [...] whether it is regarded as legitimate'.⁹³ Normative approaches usually lead to different types of claims. Those are particularly constitutional claims, which 'emphasize conformance with written norms'; justice claims, which refer to the values or goals pursued by the regulator; performance claims deal with the outcomes of regulation; and finally democratic claims deal with the 'extent to which the organization or regime is congruent with a particular model of democratic governance ...'.⁹⁴ As already mentioned above, the thesis makes a general distinction between input or procedural legitimacy (which would for the most part cover constitutional and democratic claims) and output or substantive claims. These would include justice and performance claims. However, the thesis does not use the set of normative claims as an absolute when establishing legitimacy. Many other considerations (particularly pragmatic ones) play a role as well. Moreover, each normative category is in itself characterised by manifold nuances. Thus, what the thesis does in the following sections is to show how different normative claims can be translated into practice and can affect cooperation between different types of transnational regulators.

Important in this regard is, as already mentioned, the fact that organisations have the ability to manage the different kinds of legitimacy claims. Thus, legitimacy can be gained, maintained and repaired.⁹⁵ To do so, three different strategies can be applied. First an organisation can conform to legitimacy claims, it can secondly select the environments that confer legitimacy on it, and finally it can manipulate legitimacy claims that are made upon it.⁹⁶ In practice this means that for instance an organisation defines its goals, produces certain desired outcomes or positions itself in a particular institutional regime in order to gain moral legitimacy. When legitimacy has been contested, due to a scandal for example, an institution can excuse or justify its behaviour. It has furthermore the opportunity to disassociate itself from the actors or the behaviour that led to the

⁹² M C Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches', 20 *The Academy of Management Review* (1995) 571, at 578 ff; quote at 582.

⁹³ Black, *supra* note 89, at 145, italics in original.

⁹⁴ Ibid at 145 f.

⁹⁵ See Suchman, *supra* note 92, in particular at 600, where he provides a table with different approaches in each field of legitimacy.

⁹⁶ See *ibid*, at 587 ff; see also Black, *supra* note 89, at 146 ff.

legitimacy problem.⁹⁷ A final important aspect to be considered is that modern global governance institutions are often faced with ‘multiple legitimacy claims’ from different stakeholders inside or outside their regulatory regime.⁹⁸ In this context the task of managing will be highly complex and requires ensuring compatibility and avoiding conflicts.⁹⁹

Cooperation can be employed as a tool to manage legitimacy. There are various options through which an organisation can increase its legitimacy by ‘linking’ itself to another organisation.¹⁰⁰ This process of ‘interlinking’ can even go so far as organisations creating ‘systems of mutual legitimacy enhancement’ and ‘legitimacy networks’.¹⁰¹ Organisations can use cooperation in all three steps – gaining, maintaining and repairing legitimacy. In particular in the ‘gaining’ phase, where organisations are said to choose their environments or to conform to a particular environment, cooperation can be a step in this elective procedure. Furthermore, when an organisation decides to increase its regulatory scope, cooperation with organisations that already hold a high degree of legitimacy in the specific area could assist in ‘gaining’ the necessary legitimacy.¹⁰² Cooperation can also be used to ‘maintain’ or ‘repair’ legitimacy. For an organisation to maintain its legitimacy, it needs the ability to perceive change and to protect its accomplishments.¹⁰³ A way of doing this is to link with other legitimacy holders or to create networks that help to foster existing legitimacy.¹⁰⁴ Finally, once legitimacy has been lost it can be helpful for an organisation to cooperate with an institution that still maintains a high degree of legitimacy in order to rebuild its own one. These are of course just examples of how cooperation can have an impact on an individual authority’s legitimacy. Especially, regarding the different legitimacy claims numerous ways of cooperation by which legitimacy is positively influenced are imaginable, some of which will be addressed in more detail in the case studies.

⁹⁷ Suchman, *supra* note 92, at 585 ff.

⁹⁸ Black, *supra* note 89, in particular at 152 ff.

⁹⁹ Ibid at 153.

¹⁰⁰ See *ibid* at 147.

¹⁰¹ Ibid, she mentions in this regard the International Social and Economic Accreditation League (ISEAL) that sets standards for standard setters in the social and environmental realm.

¹⁰² See, eg, the Environment and Sports Program of the United Nations Environment Programme (UNEP), or ISO 26000 where ISO, as a technical standard setter, stepped into the terrain of social, labour and environmental standards. More detailed information can be found in Chapters 5 and 4 respectively.

¹⁰³ Suchman, *supra* note 92, at 593 ff.

¹⁰⁴ See, eg, the example of ISEAL, a meta-regulator which provides good practice certification for the private sustainability standard setting bodies. Thereby it wants to improve particularly the credibility and effectiveness of its members standards (see ISEAL Alliance, ‘What We Do’ and ‘Our Mission’, available at: <http://www.isealliance.org/about-us> (last accessed 22 October 2014)).

3.2.2.2 Cooperation as a Means to Overcome Procedural and Substantive Legitimacy Deficits

Cooperation between public and private organisations in particular can provide a venue to ‘outweigh’ the specific legitimacy deficits that different actor groups are facing.¹⁰⁵ It is claimed that given the complexity of legitimacy claims in the transnational realm, actors orient themselves towards more traditional venues of justification. Thus, public organisations are often favoured partners for cooperation as their public nature seems to stand for legitimacy under both procedural and substantive legitimacy considerations. The following sections will look at two recurring aspects in particular. One concerns the issue of voluntariness and consent as features which are said to make an institution legitimate. Here it will be argued that cooperation can open many useful venues to improve participation, yet traditional forms of participation maintain a special place. The second part will then look at more substantive criteria of authority and the role cooperation can play there.

Origin-based and Procedural Legitimacy: Consent, Participation and Tradition:

Voluntariness as expressed in consent or in forms of participation plays an important role in legitimising institutions. Many normative accounts of legitimate authority use consent as the main or at least as a necessary form of justification.¹⁰⁶

In practice consent, is relevant for many entities (particularly in a transnational context) which are (at least in their initial self-understanding) of a voluntary nature and only as such considered legitimate by their addressees.¹⁰⁷ To what extent this consent stretches in individual circumstances and where its limits are is complex and varies from institution to institution and

¹⁰⁵ See A Peters, T Förster & L Koechlin, ‘Towards Non-State Actors as Effective, Legitimate, and Accountable Standard Setters’, in: A Peters *et al* (eds), *Non-State Actors as Standard Setters* (CUP, 2009) 492, at 523.

¹⁰⁶ I do not want to replicate the nuances of the philosophical debate on the legitimacy of public authority here. I am referring here particularly to classical consent theories such as J Locke’s but also consensus positions under which members of a society agree to structures and institutions which fulfil also particular substantive requirements (justice), see for instance J Rawls, *Political Liberalism* (Columbia University Press, 1993) at 3 ff. A different example is D Estlund’s normative consent theory, which requires only hypothetical consent (see *Democratic Authority* (Princeton University Press, 2008), Chapter VII in particular, at 117). For an overview over the different positions using a consent, or partially consent-based approach see Christiano, *supra* note 7; a very nice summary can furthermore be found in Roughan, *supra* note 1, at 31 ff.

¹⁰⁷ See also, Marmor, *supra* note 12, at 251.

from case to case.¹⁰⁸ Often it will not go beyond certain participatory rights enshrined in the procedures of these institutions. Generally it can be assumed that ‘the more participation in a given practice is voluntary [...] the more it is the case that justifying one’s subjection to the rules or conventions of the practice is based on consent’¹⁰⁹

With regard to procedural legitimacy and public private cooperation under analysis here, there are several aspects to be considered. Under traditional international law legitimacy was for a long time regarded as a matter of consent – and more specifically state consent. As such the origin of any new international rule was regarded as being within the democratically legitimised state system (at least as long as the consenting state was democratic itself). Additional ‘international legitimacy’ was deemed unnecessary.¹¹⁰ However, basing the legitimacy of international law purely on state consent or within the state sphere raised several problems. First of all, not every state is democratic; some are even violent, repressive regimes with little legitimacy themselves. Furthermore, even if one deems it sufficient that democratic states have consented, the question of voluntariness cannot be ignored. Many international regimes only offer the option to ‘take it or leave it’, whereby ‘leave it’ comprises severe negative consequences of an economic or political nature. As a result, and particularly for small countries, the voluntariness was from the outset questionable and basing legitimacy of international law only on state consent problematic.¹¹¹

With the increase in transnational governance conducted by IOs and other public actors such as networks, the legitimacy of international organisations and particularly questions of participation and consent surfaced once more.¹¹² As formal international law became ‘sidelined’ by other ‘institutional normative orders’ this has resulted also in the ‘*decaying role...of [state] consent*’ in

¹⁰⁸ See also *ibid.*

¹⁰⁹ *Ibid* at 250.

¹¹⁰ See for an overview over the development R Wolfrum, ‘Legitimacy of International Law from a Legal Perspective – Some Introductory Considerations’, in: R Wolfrum & V Röben (eds), *Legitimacy in International Law* (Springer, 2008) 1, at 6; M Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’, 15 *EJIL* (2004) 907 ff; A Buchanan & R O Keohane, ‘The Legitimacy of Global Governance Institutions’, 20 *Ethics and International Affairs* (2006) 405, at 412; D Bodansky, ‘The Legitimacy of International Governance’, 93 *AJIL* (1999) 596 ff.

¹¹¹ See Buchanan & Keohane, *supra* note 110, at 413 – 414.

¹¹² See on this development particularly N Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’, 108 *AJIL* (2014) 1.

the global realm.¹¹³ Some authors have therefore argued for an enhancement of democratic legitimacy in the global sphere. This is said to be necessary because changed circumstances require remodelling global structures, in particular global institutions, in the hope of giving the task of supplementing or even substitution national structures.¹¹⁴ The problem with this approach is that a global demos which could confer democratic legitimacy simply does not exist. Furthermore, there is no structure which could ensure democratic participation on the global level.¹¹⁵ Therefore, enhanced global democracy does not serve as an answer to pending legitimacy questions. Instead, other procedural and particularly participatory aspects have become increasingly important.¹¹⁶

Another prominent suggestion in this regard is the Global Administrative Law (GAL) project where certain principles, resembling national administrative law prerequisites, were transposed to the international realm. Consequently, Benedict Kingsbury, Nico Krisch & Richard Stewart list (apart from substantive standards) reasoned decisions, procedural participation, transparency, and review in particular as elements of an emerging global administrative law.¹¹⁷ These elements place importance on individual participation at the decision making level.

Other authors have set similar yet broader consent and participation-based criteria for the legitimacy of global governance institutions.¹¹⁸ Allen Buchanan & Robert Keohane for instance list on-going consent of democratic states, as well as accountability and transparency mechanisms.¹¹⁹ According to these principles global governance institutions should be open to an ‘ongoing, informed, principled contestation of their goals and terms of accountability’.¹²⁰

¹¹³ Ibid at 36; italics in original.

¹¹⁴ R Falk & A Strauss, ‘On the Creation of a Global People’s Assembly: Legitimacy and the Power of Popular Sovereignty’, 36 *Stanford Journal of International Law* (2000) 191. See generally Wolfrum, *supra* note 110, at 3 ff.

¹¹⁵ See Buchanan & Keohane, *supra* note 110, at 416 – 417.

¹¹⁶ See, eg T M Franck, ‘The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium’, 100 *AJIL* (2006) 88, at 93; Buchanan & Keohane, *supra* note 110, 416 - 417; B Kingsbury, N Krisch & R B Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) 15 ff. R Wolfrum, *supra* note 110, at 5; Id. ‘Kontrolle Auswärtiger Gewalt’, 56 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (1997) 38.

¹¹⁷ Kingsbury, Krisch & Stewart, *supra* note 116, at 37.

¹¹⁸ Buchanan & Keohane, *supra* note 110, at 417ff.

¹¹⁹ Ibid at 417 ff.

¹²⁰ A Buchanan & R O Keohane, ‘The Legitimacy of Global Governance Institutions’ in: A Buchanan (ed), *Human Rights, Legitimacy, and the Use of Force* (OUP, 2010) 105, at 126.

Furthermore, Matthias Kumm's constitutionalist framework equally emphasises procedural issues which include adequate participation and transparent procedures to enable participation and accountability.¹²¹ The list is not definitive but it illustrates well the relevance of participation and, to a certain degree, consent for legitimising transnational governance activities exercised by public organisations.

Private regulators, perhaps somewhat unexpectedly, face these issues to an even greater extent. Since they cannot easily rely on laws or a wider administrative apparatus to enforce or otherwise ensure compliance with their regulatory regime, many private actors depend to a larger degree on voluntary participation, which often presupposes that those who are regulated perceive the organisation as legitimate.¹²² This voluntariness has often served as a first justification to regard private regulation as legitimate. However, there are also many instances of private regulation where voluntariness can only provide limited reasons for legitimacy.¹²³ First, many regimes may only appear voluntary in formal terms (actors have the option to take it or leave it) but are *de facto* mandatory (such as, for instance, through market pressure). Furthermore, a number of stakeholders such as beneficiaries and other third parties may be strongly affected by regulation but have no option to support or participate in the organisation or regime.¹²⁴ As such, basing the legitimacy of a private organisation on the voluntary engagement of its members alone is insufficient. Similar arguments have therefore been made to those regarding more traditional public transnational actors. As such, private entities should also aim to involve all relevant stakeholders, through better deliberative processes (an open exchange of arguments between actors concerned) higher transparency, and participation.¹²⁵ In order to be inclusive they are to be applied at different stages of the regulatory process or chain.¹²⁶

¹²¹ Kumm, *supra* note 110, at 924 ff.

¹²² Black, *supra* note 89, at 148; S Wheatley, 'Democratic Governance Beyond the State', in: A Peters *et al* (eds), *Non-State Actors as Standard Setters* (CUP, 2009) 215, at 223.

¹²³ F Cafaggi, *A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement*, draft version, available at: http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/discussions/HIIL%20Comparative%20Report_final%20june.pdf (last accessed 23 October 2014) at para 156 ff.

¹²⁴ Ibid.

¹²⁵ See Kingsbury, Krisch & Stewart, *supra* note 116, 14 ff; see furthermore Peters, Förster & Koechlin, *supra* note 105, at 513 ff.

¹²⁶ Cafaggi, *supra* note 123, at para 161 ff.

With all these attempts at creating more inclusive participation procedures on the transnational level, there is one particular practical problem – namely the complexity of governance so common in the transnational realm, with ‘authorities [...] entwined by their procedural justifications’.¹²⁷ Thus it is difficult to establish which actors must be involved and which can be excluded. In a functionally divided yet highly interlinked context, these questions become extraordinarily difficult to answer. One of the case studies (on the ISO 26000 process) depicts this issue well. Particularly when engaging in regulation which extends to broader public policy areas, which as suggested above are often affected even by so-called ‘merely technical standard-setting’, inclusiveness becomes almost impossible. One means of overcoming this obstacle for private actors in particular, but also more generally, could be cooperation. Generally, actors can cooperate with other regulators active in the area affected by their intended regulation. Thus, ISO 26000, which among other issues covered the area of labour regulation, cooperated with the relevant labour organisations (such as the ILO, as well as trade unions amongst others). Similarly, the IOC, when engaging in environmental regulation cooperated with environmental organisations, UNEP being the most prominent one but also many others).

Private regulators specifically seem to aim at opening up participation and thus more easily bring about legitimisation by cooperation with a public organisation. Even though the thesis has stressed that state participation is not an exclusive (and often not even a very useful) criterion for a transnational actor to be considered legitimate, many states do possess a democratic infrastructure which allows public institutions to more easily link back to this kind of legitimacy. For private regulators this infrastructure is less easily accessible. Through cooperation they can link themselves (admittedly indirectly and definitely often far down the legitimisation chain) to this form of legitimisation. As much as the link between consent by democratic states and international organisations’ administrative actions is farfetched (it would probably not withstand scrutiny under many normative consent-based positions) the case studies seem to indicate that public participation is often considered to be of great relevance or even indispensable by private actors at least as soon as public policy issues are involved. Though procedural legitimacy can be achieved in many different forms, given the complexity of the transnational realm and the challenges many actors face in including the variety of affected stakeholders, established models

¹²⁷ Roughan, *supra* note 1, at 140.

(such as traditional state based legitimacy), as many obstacles as they may face, are of great force.

Substantive Legitimacy: Output, Reason and Justice: Origin and process as the only requirements for legitimate authority have been challenged on various accounts.¹²⁸ Authority has been considered legitimate not (only) based on the consent of people(s) or participation but also based on the actual outputs it produces. Raz as one of the most prominent proponent of an ‘output-based’ theory of legitimacy advocates the so-called ‘normal justification thesis’. Accordingly,

the normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him [...] if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.¹²⁹

Accordingly authority is legitimate if it serves to encourage people to act in conformity with reason. Others have set different requirements as to the outcomes of authority as a condition for their legitimacy such as Finnis’ ‘objective good’.¹³⁰ Under the sociological account of legitimacy adopted here it is not possible to simply integrate normative notions as a way of explaining why authorities are considered legitimate. Neither do they explicate why cooperation is engaged to overcome (perceived) legitimacy deficits – however, they are indicative. As a matter of fact consent is often not given in practice and institutions are only voluntary to a limited extent. As we have seen in the previous section, both international organisations as well as private regulators, even though their membership is formally based on a voluntary act (such as signing a treaty, becoming associate of a private organization) *de facto* require participation and the submission under the rules and decisions of this institution. States for instance have to join because the political consequences would be too severe; private actors have no other option than submitting themselves to the rules of private association if they want to exercise their

¹²⁸ For an overview see Christiano, *supra* note 7, at section 4.

¹²⁹ J Raz, ‘Authority and Justification’, in: J Raz (ed), *Authority* (Basil Blackwell, 1990) 115, at 129 (original is in italics).

¹³⁰ Roughan, *supra* note 1, at 36. J M Finnis, *Natural Law and Natural Rights* (2nd ed, OUP, 2011)

professional or economic activity. What defines whether authority is considered legitimate in these circumstances depends on whether there are ‘good reasons’ to have the particular practice or institution in which the authority operates.¹³¹ An assessment of this legitimacy rests on complex factors to be determined in each context individually but there is certainly room for cooperation between different actors if it leads to better outputs.

The case studies will show how private actors in particular place significant importance on the participation of public actors. Above the thesis argued that this can partly be explicated by their particular link back to the state and possible legitimization chains which can be created in this manner. However, substantive legitimacy considerations hint at another reason which cannot be taken aside. Thus, many international organisations such as the ILO for instance have a long-standing reputation in their issue area. They are regarded as producing good and valuable regulation.¹³² It can be very beneficial to link to an authority which is considered to produce regulation which has a particular value. Cooperation then almost functions as a ‘certification’, at least regarding the regulation produced in this partnership, and possibly also extending to the regulator who functioned as a partner.

4. SUMMARY AND OUTLOOK

This Chapter focused on the ‘commutative’ aspects of transnational regulatory cooperation. Cooperation is engaged into in order to build and maintain regulatory authority. First this chapter provided a definition of authority in the transnational context. Accordingly, authority of individual regulators was shown to be relative as a consequence of the pluralist landscape of the global realm characterised by the lack of an overarching hierarchical framework. The relativity of authority requires regulators to engage into different types of relationships with each other – they can be cooperative or uncooperative. Cooperation, however, is not only a consequence of overlaps in authority, in fact it often becomes necessary for regulators to possess sufficient authority in the first place. Authority generally depends on the recognition by those subject designed to be governed. The necessity of recognition, however, also opens channels to

¹³¹ Marmor, *supra* note 12, at 239.

¹³² See Chapter 4.

challenge it. As such, recognition of *de facto* authority can be denied. Here cooperation can help to gain fundamental capacities to signal the ability to effectively regulate – may they be expertise or power or another capacity. Regarding the second level of recognition – whether authority is legitimate – cooperation can be used as a means to overcome procedural or substantive legitimacy deficits. However, a short disclaimer should be made at this final stage. This chapter has only focused on the benefits of regulatory cooperation for different groups of actors. It should be emphasised that cooperation also has its downsides. Abbott and Snidal mention a number of these when depicting the regulatory ‘bargaining game’.¹³³ Thus, as much as cooperation can improve authority it can also negatively affect it. Legitimacy can be damaged if one cooperates with the wrong partner, such as an NGO engaging with a company whose practices it has been monitoring and criticising for example.¹³⁴ Regulatory processes can become highly complex due to the comprehensive involvement of different stakeholders concerned. Ten years of standard setting as in the example of ISO 26000 might not be exactly what one associates with an efficient private regulator. Cooperation can furthermore lead to ‘regulatory cartels’ boosting efficiency (possibly) but taking away voluntariness for the addressees. All these and many more risks exist when engaging into regulatory cooperation.

In the next chapter we shall look at how the commutative level impacts the political and legal structure of the global realm, or more modestly whether cooperation has any additional effect beyond the exchange of regulatory capacities. The following chapter will also address certain safeguards which particularly international organisations put into place in order to prevent the aforementioned negative effects of cooperation.

¹³³ Abbott & Snidal, *supra* note 79, at 70 ff.

¹³⁴ Ibid at 71.

CHAPTER 3

COOPERATION AGREEMENTS, REGULATORY NETWORKS, AND CONSTITUTIONALISATION EFFECTS

1. INTRODUCTION

The previous chapter examined the distribution of authority in the global realm. It was shown how authority is dispersed among different types of actors and how this necessitates cooperation. Thereby regulators exchange capacities necessary to be recognised as being authoritative. As such, cooperation can be seen as a prerequisite for effective and legitimate transnational regulation.

This chapter will leave the commutative level of regulatory commodity exchange and will focus on the more wide-ranging effects of this cooperation. It will be argued that regulatory cooperation can develop into network structures if certain prerequisites are fulfilled. These regulatory networks first and foremost constitute more integrated forms of regulatory cooperation. A link will be drawn to political science literature dealing with so-called Global Public Policy Networks, which very much overlap (if not actually concur) with the regulatory networks analysed here.

Secondly this chapter focuses on the broader picture – the global order. Though it is not the goal to devise a conclusive depiction of a political and legal meta-structure in a globalised context, this chapter strives to show how transnational regulatory cooperation can add to an understanding of a political and legal order beyond the dichotomy between pluralism and universalism. As a result of the fact that (due to their lack of sufficient authority) transnational regulators are required to engage into cooperation, they are also often forced to negotiate the terms of their interactions and thus, to some degree, the terms of the transnational space itself. Cooperation then creates networks or spaces in which different independent regimes achieve some stability and unity with regard to normative values and structural settings.

As will be shown below, for contract lawyers such as Günther Teubner networks have the ability to unite two conflicting objectives: ‘the imperatives of both co-operation and competition’.¹ Furthermore, ‘each operation within the hybrid must simultaneously meet both the normative demands that stem from bilateral relations between individual actors, and those that stem from the network as a whole’.² Here the opposites to be united through a network concept are hierarchy as inherent in constitutionalisation (or universalism) and fragmentation (as inherent in pluralism) or, as others have put it ‘a public law and a private law framework’.³ As such an approach is suggested which also assumes that ‘an adequate theory of law needs a dialectical synthesis of both approaches [‘private and public law’] that lives up to its tension and contradictions’.⁴ A network approach, it will be argued, will provide an account which can unite both a general and genuinely functional separation in the global realm and at the same time emerging patterns and dispersion of elements of constitutionalisation. As such, networks are not something entirely new or distinct from either the nation state or more traditional understandings of a global legal order but rather represent a continuum which unites traditional public qualities as expressed in the nation state model with new forms of private law (in a conceptual sense) emerging at the global level.

This argument will be developed below in more detail. To this end the thesis will first look into different strands of network scholarship in social and legal sciences and look into how global regulatory networks fit within these frameworks. The goal of this section is to provide an understanding of regulatory network that can then serve as a basis for the second part of this chapter (2). In this part it will be shown how a network approach can provide a more nuanced assessment of the global legal order, uniting, as already outlined in the last paragraph, public and private elements in a dialectic approach (3).

¹ G Teubner, ‘Coincidentia Oppositorum: Hybrid Networks Beyond Contract and Organization’, in: M Amstutz & G Teubner (eds), *Networks: Legal Issues of Multilateral Co-Operation* (Hart Publishing, 2009) 3, at 24.

² Ibid at 19.

³ See for instance C Möllers, ‘Transnational Governance without a Public Law’, in: C Joerges, I-J Sand & G Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing, 2004) 329 ff; See also B Kingsbury, ‘The Concept of ‘Law’ in Global Administrative Law’, 20 *EJIL* (2009) 23, at 31 particularly.

⁴ Möllers, *supra* note 3, at 337.

2. THE NETWORK LEVEL OF REGULATORY COOPERATION IN THE GLOBAL CONTEXT

As stated in the introduction this chapter is interested in looking at the network component of global regulatory cooperation. When do ordinary (bilateral) forms of cooperation shift into broader network structures? And further, what does that change with regard to our understanding of the type of cooperation exercised within these structures; and possibly the regulatory outcomes achieved by such means. The following sections will therefore look at two elements which can be found in network literature from different academic backgrounds.

First, we turn our attention to the particular location of networks between ‘market’ (flexibility and autonomy) and ‘hierarchy’ (integration). Here it will be argued that the networks between transnational regulators allow for both – the preservation of a general plural structure with independent regulators organising their functional realm, and at the same time more integrated forms of cooperation for certain issues. The second aspect to be addressed here concerns the integrative function regulatory networks have with regard to the multitude of different types of regulators, whether they are private or public, territorially or regionally bound, or transnationally active. Here it will be shown how integration becomes necessary given the regulatory challenges and the heterarchical dispersion of regulatory competences among actors of very different backgrounds.

2.1 An Introduction to ‘Network Scholarship’

Scholarship on networks entered the social and legal sciences through research on economic organisation.⁵ In such research networks are discussed in relation to two other forms of organisation: market and hierarchy. In very simple terms a market structure is characterised by individual transactions governed by contracts without any further relationships among its participants. The hierarchical model is represented by the firm under whose umbrella all

⁵ See W W Powell, ‘Neither Market Nor Hierarchy: Network Forms of Organization’, 12 *Research in Organizational Behavior* (1990) 295 ff. and O E Williamson, *The Economic Institutions of Capitalism* (Free Press, 1985); Id., ‘Hierarchies, Markets and Power in the Economy: An Economic Perspective’, 4 *Industrial and Corporate Change* (1995) 21 ff.

transactions take place and which is characterised by central organisation.⁶ Regarding the relationship between the two different approaches, some see markets and hierarchies as two ends of a continuum where networks are located in different variants in between.⁷ For others networks constitute an independent category of cooperation alongside markets and hierarchy.⁸ The details of this dispute are beyond the scope of the present work. What matters for our purposes is that networks are a hybrid ‘creature’ which contains elements of both – a fragmented side which characterises markets and the hierarchical one which is characteristic for firms.

Not surprisingly, this debate was echoed to a large extent in private law theory, as networks pose an interesting challenge to the contract – association dichotomy. Consequently, Gunther Teubner asks whether and if so how the law should respond to the ‘network phenomena’.⁹ He denies the possibility of networks forming an independent private law concept as law cannot simply integrate social phenomena but must reconstruct them ‘out of its own path-dependent logic’. However, they can also not simply be integrated into existing understandings as they ‘traverse private law concepts’.¹⁰ In his exercise of sociological jurisprudence (‘a study of society [combined] with legal doctrinal reasoning’¹¹) he then points to the inherent dichotomy of networks and also the inherent feature of networks to combine ‘the imperatives of both co-operation and competition’.¹² The ‘determinative innovation of networks is that they transform external contradictions into a tense, but sustainable, ‘double-orientation’ within the operational system’.¹³ Teubner points out that ‘each operation within the hybrid must simultaneously meet both the normative demands that stem from bilateral relations between individual actors, and those that stem from the network as a whole’.¹⁴ Thus, it acknowledges both the market (competition) as well as the ‘corporate’ aspects of networks. These are the most crucial

⁶ Williamson, ‘Hierarchies’, *supra* note 5, at 41 ff.

⁷ Ibid; P Kenis & V Schneider, ‘Policy Networks and Policy Analysis – Scrutinizing a New Analytical Toolbox’, in: B Marin & R Mayntz (eds), *Policy Networks: Empirical Evidence and Theoretical Considerations* (Westview, 1991) 25, at 26 ff.

⁸ Powell, *supra* note 5, at 295 ff.

⁹ Teubner, *supra* note 1, at 4.

¹⁰ Ibid at 14.

¹¹ H Collins, ‘Introduction to Networks as Connected Contracts’, in: G Teubner (ed), *Networks as Connected Contracts* (OUP, 2011) 1 at 18.

¹² Ibid at 24.

¹³ G Teubner, *supra* note 1, at 18.

¹⁴ Ibid at 19.

characteristics of networks and we will return to this issue once more in due course when discussing the role of networks in the global legal order.

The concept of network is not only used with regards to markets and corporations or in private law scholarship. It is also utilised in international law and relations literature and in this context it also shifts into focus. Rather than being concerned with market transaction and economic organisation, IR scholars focus on networks concerned with global governance. In this scholarship the term ‘network’ is however also applied to depict ‘a third way of interaction between the market hierarchy antipodes’,¹⁵ and emphasises forms of cooperation beyond classical interstate cooperation in international law.

Prominently, Anne Marie Slaughter has advocated trans-governmental networks as the operation modes of a new world order. In her work Slaughter adopts a very broad understanding of the term network as ‘a pattern of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the ‘domestic’ from the ‘international’ sphere.’¹⁶ As such, rather than states interacting with other states on the international level, the ‘component institutions’ of the latter interact and shape global governance.¹⁷ These components are national public regulators (as well as legislators and judges) which stem from the disaggregated state and which cooperate in an informal way in the specific area of their expertise.¹⁸ For instance, financial market regulators and banking supervisors meet in the Basel Committee¹⁹ or IOSCO²⁰, as would environmental regulatory agencies, anti-crime and drug agencies in the European Network of the Heads of Environment Protection Agencies or Interpol.²¹ In her work Slaughter also discusses more general changes in

¹⁵ See for instance S Waddell & S Khagram, ‘Multi-Stakeholder Global Networks: Emerging Systems for the Global Common Good’, in: P Glasbergen, F Biermann & APJ Mol (eds), *Partnerships, Governance and Sustainable Development: Reflection on Theory and Practice* (Edward Elgar Publishing, 2007) 261, at 270 – 272.

¹⁶ A-M Slaughter, *A New World Order* (Princeton University Press, 2004), at 14.

¹⁷ Ibid at 18.

¹⁸ See also D Zaring, ‘International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations’, 33 *Texas International Law Journal* (1998) 281, at 301 ff.

¹⁹ See ‘About the Basel Committee’, available at: <http://www.bis.org/bcbs/about.htm> (last accessed 27 October 2014).

²⁰ See ‘The International Organization of Securities Commission’, information available at: <http://www.iosco.org/about/> (last accessed 27 October 2014).

²¹ Information about the European Network of the Heads of Environment Protection Agencies, available at:

the global legal order, aspects which will also be addressed in more detail below. Thus, she tries to show that the government networks ‘form the foundation of a full-scale disaggregated world order’.²² However, in her work private actors play a secondary role and private authority receives almost no attention. As such her ‘world order’ is still a predominantly state-centric one.

This is very different in a strand of political science scholarship on so-called Global Public Policy Networks.²³ The innovative character of these networks is their multi-stakeholder composition, linking different societal sectors (civil society and business) with public (governmental) actors.²⁴ Apart from their pluralistic membership, a number of additional characteristics have been attributed to them, most notably flexible and open structures. Unlike international organisations which are usually limited to a significant degree by their founding treaty, these networks can adapt quickly to changing environments by either admitting new actors or by adjusting their policy making processes.²⁵ Due to those structures they are said to be able to accumulate knowledge from different sources, to profit in particular from modern technology in the management of their informal and fluid structures,²⁶ and consequently to address arising regulatory issues quickly and effectively.²⁷ Steve Waddell and Sanjeev Khagram who analysed nineteen Global Public Policy Networks furthermore discerned the following features. First of all, these networks are global in the sense that they include representatives from all or at least almost all continents. Secondly, they usually focus on a specific public good issue –

<http://epanet.ew.eea.europa.eu/> (last accessed 27 October 2014); and information regarding Interpol available at <http://www.interpol.int/About-INTERPOL/Overview> (last accessed 27 October 2014). See also Slaughter, *supra* note 16, at 50 ff.

²² Slaughter, *supra* note 16, at 132.

²³ These networks have received several designations, among them Global Action Networks (GANs), see S Waddell, *Global Action Networks: Creating Our Future Together* (Palgrave Macmillan, 2011); Waddell & Khagram, *supra* note 15, 261; Global Issues Networks, see J F Rischard, *High Noon: 20 Global Problems, 20 Years to Solve Them* (Basic Books, 2002), at 171 ff, and finally the term Global Public Policy Networks (GPPN) is used by W H Reinicke & F Deng, *Critical Choices – The United Nations, Networks, and the Future of Global Governance* (International Development Research Centre, 2000).

²⁴ See, Reinicke & Deng, *supra* note 23, at 28; C Streck, ‘Global Public Policy Networks as Coalitions for Change’, in: D C Esty & M H Ivanova, *Global Environmental Governance: Options and Opportunities* (Yale School of Forestry & Environmental Studies, 2002) 1, at 3. It is however difficult to strictly comply with this composition characteristics, Wadell & Khagram, *supra* note 15, at 264 ff. examine a number of networks among which some are actually privately incorporated organisations, which consider themselves as NGOs and which have only little indirect public involvement (such as the Forest Stewardship Council follows a tri-partite structure (social, environmental and industry) in which governments are usually only involved in their role as participants in the forestry industry).

²⁵ Streck, *supra* note 24, at 4 ff.

²⁶ Reinicke & Deng, *supra* note 23, at 29ff.

²⁷ Ibid at 4 ff.

as opposed to being run by individuals, Global Public Policy Networks are mainly run by other organisations, (NGO, IGO or business-based). Another important feature, which will be dealt with in much more detail below, is that they are systemic change agents. This implicates that they can trigger change in the governance systems in the area on which they focus on.²⁸

The time period for which these networks are established differs and depends on the regulatory project pursued. Most are established for long-term cooperative engagement.²⁹ However, some are also set out for a limited time frame, such as the World Commission on Dams, which was given a two-year mandate to establish standards regarding the construction of dams.³⁰ There is significant overlap between these Global Public Policy Networks and the forms of cooperation analysed here. In recent times, Gráinne de Búrca, Robert Keohane and Charles Sabel have written on global experimentalist governance. This is defined as an ‘institutionalized transnational process of participatory multi-level problem solving’.³¹ Though not explicitly using the term, their understanding of experimentalist governance has many attributes of the multi-level networks examined here. It is, as already pointed out, transnational as well as multi-level and pluralistic. Furthermore, processes often receive some degree of institutionalisation and they often involve public actors or are linked to public (state) regulation.³²

2.2 Transnational Regulatory Cooperation Agreements and Network Structures

In light of the overview of different strands of network scholarship in social, legal and political science given above, this section looks again at transnational regulatory cooperation to assess when it shifts from an exchange based (commutative) level into a more integrated network structure. To this end, the chapter will first outline some characteristics of network structures and then subsequently look at how these structures emerge in transnational regulatory cooperation.

²⁸ See Waddell & Khagram, *supra* note 15, at 265 ff. See furthermore, Waddell, *supra* note 23, at 9ff.

²⁹ For an overview over different GPNs see Waddell & Khagram, *supra* note 15, at 264ff; and furthermore, Reinicke & Deng, *supra* note 23, at 36ff., who mention among others the Apparel Industry Partnership or the Consultative Group on International Agricultural Research.

³⁰ For more information on the World Commission on Dams, see <http://www.unep.org/dams/WCD/> (last accessed 27 October 2014).

³¹ See G de Búrca, R O Keohane & C F Sabel, ‘Experimentalist Governance’, 44 *British Journal of Political Science* (2014) 477.

³² Ibid.

First of all, regulatory networks are defined as multi-party arrangements between different regulatory actors within one or across different but related issue areas.

This definition is a very general account which needs to be complemented by further elements characteristic of transnational regulatory networks. This is best achieved by returning to some of the definitions provided in the short literature overview in the last section. Thus, for Slaughter networks are characterised by ‘regular and purposive relations’ between units of disaggregated states.³³ The literature on Global Public Politics Networks also provides a number of substantive, governance specific and formal features of those kinds of networks.

For the moment, however, the substantive features of specific networks will be left aside and attention turned to the more formal and more general aspects of networks, found in economic organisation literature. Walter Powell provides a table where he compares the three types of economic organisations which he distinguishes along the line of certain key features.³⁴ Those are contracts in a market context and employment (or maybe better put organisational form) in an integrated hierarchical structure. Networks are then the third category which is said to have ‘complementary strengths’ to the other two.³⁵ Networks stand between the very flexible end found in a market scenario and the integrated hierarchical structure of the firm. This is true with regard to the means of communications used, the methods of conflict resolution, the degree and flexibility of the relationships between the members of the network and the overall general commitment.³⁶ Hugh Collins has provided an even more detailed description. Accordingly, networks are multi-party arrangements which are of a long term stable character, characterised by intensive cooperation and a high level of trust as well as by the fact that all actors keep their autonomy and remain separate legal entities.³⁷

Regulatory networks are similarly located between the two poles outlined in the economic organisation and private law literature. On the one hand they leave each organisation and unit autonomous. Thus, they do not formally integrate different regulators under one organisational

³³ Slaughter, *supra* note 16, at 14

³⁴ Powell, *supra* note 5, at 300.

³⁵ Ibid.

³⁶ Ibid.

³⁷ See Collins, *supra* note 11, at 11.

umbrella. In fact regulators might still compete on various other levels and regulatory issue areas. The commutative level depicted in the last chapter also falls within this side of the network hybrid. Thus, similar to a market environment, different actors exchange goods (in this case regulatory commodities) which allow them to better perform individually in their respective areas (such as sports regulation). On the other hand regulatory networks also achieve certain integration and the creation of stable relationships between members in relation to the common project. This requires structures and governance mechanisms through which the network is managed.³⁸ In both case studies which are presented in the next chapters examples of such structures can be observed. Shaped through bilateral contracts, the involved organisations build venues through which their common projects can be conducted and which allow for more integration to the degree necessary for the regulatory goals (such as the Sports and Environment Commission, or comment procedures for international organisations in the ISO 26000 process for example).

Apart from these more formal, general features there are also a number of substantive aspects which address the nature of the cooperation and which have already been addressed in the section above. Thus, crucially important in networks, the different participating actors share a common set of goals which they wish to maximise. In the long run they see their individual success depending on common achievement.³⁹ This is true for business networks as well as for regulatory networks. Thus, Waddell and Khagram write that Global Policy Networks help participants to achieve both their own individual goals as well as collective ‘system-organizing goal’.⁴⁰ Translated in terms of regulatory networks the goal is defined by the regulatory agenda for which the network was set up. Thus, in the sports and environment case studies it was the promotion of environmental protection and sustainability considerations within the realm of sports and beyond in related areas. Here individual organisations such as the IOC wanted to achieve their own goals (green games which would not provoke protests from environmental groups) by engaging and indeed structuring a broader framework of environmental protection in sport. Similarly, the international organisations engaged in the ISO 26000 process at least partly

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Waddell & Khagram, *supra* note 15, at 270-272.

wanted to construct a coherent framework for transnational social responsibility regulation, one in which their own instruments would also have an adequate place.

In summary, regulatory networks, as with other types of networks, fulfil a dual role. They allow the different units of the networks to be autonomous and generally pursue their own regulatory interests. At times this can even involve regulatory competition. However, with regard to the defined common purpose pursued in the network, a higher degree of integration and harmonisation takes place. Ultimately the idea is that a common approach will in the long time benefit both the individual units as well as the overall regulatory aim.

3. NETWORKS IN THE GLOBAL LEGAL ORDER AND CONSTITUTIONALISATION EFFECTS

Regulatory networks are by themselves an interesting phenomenon for legal and political scholarship. However, there is a broader dimension. Whenever one discusses the exercise of authority, and in particular its meta-structuring and framing, one says a lot about the general political and legal order as well. Nicole Roughan depicts this well when she states that ‘within all these distinctions [in scholarship on constitutionalism and pluralism in the global realm] lies a sub-text of plurality of authority’.⁴¹ Thus, the issue is whether and how the authority exercised in the global realm should be framed and tamed. To turn to the current debate, a discussion about regulatory cooperation and networks quickly becomes a more general debate on the structure and frame of the global legal order.

At this stage it is prudent to engage in this discussion and provide some (admittedly very preliminary) suggestions on how regulatory cooperation and the network structures just set out can be used to achieve a better understanding of the global legal order. For this purpose it is necessary to first provide a very rough overview of the on-going debate regarding the state of the global legal and political order. Subsequently, as outlined in the introduction to this chapter, a new approach will be proposed which provides a more nuanced dialectic understanding. The network and cooperative structures characterised above provide a venue to unite a generally

⁴¹ N Roughan, *Authorities – Conflicts, Cooperation, and Transnational Legal Theory* (OUP, 2013), at 64.

fragmented and functionally separated understanding of the global legal order with elements of partial hierarchy and stabilisation. This order is one which is characterised by the emergence of constitutionalisation effects within these more consolidated areas.

3.1 Constitutionalism vs Pluralism? Theorising the Global Legal Order

This section will assess the theoretical conceptions developed to better understand the global political and legal order and more importantly the role law plays within it. On a very general level, two different but closely intertwined strands have developed which aim at providing explanatory models. The first one is constitutionalism whilst the second is legal pluralism. Very roughly summarised, the former aims to provide some form of overarching framework (constitution), which applies at the global scale and at least partially regulates global (governance) activities. The latter concept, legal pluralism, denies the existence or possibility for such a framework. Social (and legal) regimes are fragmented or functionally differentiated.

In both approaches one finds numerous sub-categories and nuances and as such it is often very difficult to draw clear borders between the two concepts. In particular at the moderate ends of both constitutionalism and pluralism one can discern a great deal of overlap, so that in many ways both models complement each other. Therefore the following section will provide a very preliminary suggestion for a slightly different understanding from the general dichotomy. This will be done by synthesising the different approaches in light of the present examination of cooperative agreements and a moderate pluralist approach which takes into account the on-going bargaining process that characterises the transnational sphere will be advocated. These bargaining processes can create networks generating room for constitutionalisation effects.

3.1.1 Constitutionalism and Universalism

The state centric, Westphalian model, as outlined above, reached its limits when global interaction and interdependence on different levels and in different fields augmented and the role of the state in return changed and even declined.⁴² This led to many new challenges, among them

⁴² See Chapter 1, section 2.

the question of whether it would be possible to transpose certain concepts or achievements developed in the nation state realm to the global level. Anne Peters summed up the problem in the following way:

[S]tate constitutions can no longer regulate the totality of governance in a comprehensive way. Thereby, the original claim of state constitutions to form a complete basic order is defeated. National constitutions are, so to speak, hollowed out; traditional constitutional principles become dysfunctional or empty. This affects not only the constitutional principle of democracy, but also the rule of law, the principle of social security, and the organization of territory.⁴³

A rather consequential way to solve this difficulty seems to ‘ask for compensatory constitutionalization on the international plane’.⁴⁴ In other words, since the distinction between ‘national’ and ‘international’ is blurring, concepts such as constitutionalism should be applied to both levels as well. However, how such a transposition would concretely look is highly debated.

Constitutions have the function of legally taming and framing the exercise of political power within a particular territorial space.⁴⁵ In their modern understanding constitutions therefore play a double role: they establish political power, and they limit it (*pouvoir constituant* and *pouvoir constitué*). The first refers to the foundational element of a constitution. All power is grounded on this set of laws which emanates from the people and is thus legitimised in the same way.⁴⁶ The second element goes hand in hand with the first: the same rules which establish power ultimately also set its limits. Thus, modern constitutions constrain the exercise of power by constituting a higher law which has primacy over all acts of a government. As such constitutionalism ‘rules out any absolute or arbitrary power of men over men’.⁴⁷

As will be outlined below in greater detail, in the transnational context it seems particularly difficult to reach the foundational ideal. Therefore one finds few structural constitutionalists who

⁴³ A Peters, ‘Conclusions’, in: J Klabbers, A Peters & G Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2011) 342, at 347.

⁴⁴ Ibid.

⁴⁵ See for instance D Grimm, *Die Zukunft der Verfassung* (Suhrkamp, 1994), at 14.

⁴⁶ See D Grimm, ‘The Achievement of Constitutionalism and Its Prospects in a Changed World’ in: P Dobner & M Loughlin (eds), *The Twilight of Constitutionalism?* (OUP, 2010) 3, at 9; N Krisch, *Beyond Constitutionalism - The Pluralist Structure of Postnational Law* (OUP, 2010), at 38 ff.

⁴⁷ See Grimm, *supra* note 46, at 9, quote at 10.

base their version on the idea of a ‘pouvoir constituant’ and seek an overarching architecture which could provide a genuine global order.⁴⁸ Instead, what can be found are advocates for less wide-ranging forms of ‘constitution’ which focus on its limiting functions. Often advocates presuppose universal values which are considered to be enshrined in human rights or *ius cogens* norms and which also limit the exercise of governance at the global level.⁴⁹

The Global Administrative Law project moves in a similar direction.⁵⁰ Here, however the emphasis is not on a universal set of values (*strictu sensu*) but on procedural and normative standards of publicness (with parallels to national administrative laws) regulating the exercise of global governance.⁵¹ This position has also been termed the ‘public law’ approach.⁵² This obviously not understood in doctrinal but in conceptual terms as ‘ways of conceiving law, for understandings that are at least implicit to the academic analysis of the internationalization of the legal orders’.⁵³

3.1.2 The Pluralist Critique

The underlying assumptions, the shape, as well as the ambition of the more universalist constitutionalism have been criticised on manifold occasions, as will be illustrated in due course. One major point of doubt is whether one can consider the catalogue of liberal human rights standards as universal as is assumed, or whether it is not more of a Western (European) notion which does not take account of cultural pluralism.⁵⁴ Therefore others see the constitutionalist

⁴⁸ See for instance B Fassbender, ‘The United Nations Charter as the Constitution of the International Community’ 36 *Columbia Journal of Transnational Law* (1998) 529.

⁴⁹ E de Wet, ‘The International Constitutional Order’ 55 *International and Comparative Law Quarterly* (2006) 51; P-M Dupuy, ‘L’Unité de l’Ordre Juridique International’ 297 *Recueil des Cours* (2002) 9 ff.

⁵⁰ B Kingsbury, N Krisch, R B Stewart, ‘The Emergence of Global Administrative Law’ 68 *Law and Contemporary Problems* (2005) 15 ff.

⁵¹ See also Kingsbury, *supra* note 3, at 31 ff.

⁵² See *ibid*, and regarding the terminology, N Walker, ‘The Post-National Horizon of Constitutionalism and Public Law: Paradigm Extension or Paradigm Exhaustion’, in: C Mac Amhlaigh, C Michelon & N Walker (eds), *After Public Law* (OUP, 2013) 241 ff; and Möllers, *supra* note 3, at 329 ff.

⁵³ Möllers, *supra* note 3, at 330.

⁵⁴ See J Klabbers, ‘Setting the Scene’, in: J Klabbers, A Peters & G Ulfstein (eds), *The Constitutionalization of International Law* (OUP, 2009) 1, at 26; and Peters, *supra* note 39, at 346.

agenda as having imperialistic connotations.⁵⁵ Constitutionalism as designed at the moment gives preferences to Western concepts of government and governance, and implements these globally.⁵⁶

Another prominent argument against the universalist approach is that the concept of constitutionalism is bound up with the idea of the (nation) state and in particular to its achievements regarding democracy. However, outside the framework of the nation state major prerequisites for constitutionalism are lacking, among them most prominently a global *demos*, or a ‘we the people’ spirit.⁵⁷ Of course one could apply a weaker notion of constitutionalism, such as the notion outlined above. However, it can be anticipated that if one were to do so, critics would retort that such an understanding would take most of the original meaning of the concept—it would be ‘too thin to redeem the full promise of the domestic constitutionalist tradition [...]’.⁵⁸ Globalisation presented new challenges which are not adequately addressed by constitutionalism but require new theoretical legal concepts.⁵⁹

There are several ways of addressing this critique. Some have opted for an entirely new paradigm upon which a (post national) constitution will be based. Instead of a statist vision, which ultimately causes the problems just outlined, the authority of a constitution is said to rest ‘on its authorization by formal, jurisdictional, procedural, and substantive principles of cosmopolitan constitutionalism’.⁶⁰

⁵⁵ J Tully, ‘The Imperialism of Modern Constitutional Democracy’, in: M Loughlin & N Walker (eds) *The Paradox of Constitutionalism* (OUP 2007) 315, at 334; See furthermore, J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP, 1995).

⁵⁶ Tully, ‘The Imperialism’, *supra* note 55.

⁵⁷ From different positions, see for instance Grimm, *supra* note 46, at 21; see K-H Ladeur, ‘Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?’, in: K-H Ladeur, *Public Governance in the Age of Globalization* (Ashgate, 2004) 89, at 101; as well as J H H Weiler, ‘Prologue: Global and Pluralist Constitutionalism – Some Doubts’, in: G de Búrca & J H H Weiler (eds), *The Worlds of European Constitutionalism* (CUP, 2011) 8, and particularly at 12.

⁵⁸ Krisch, *supra* note 46, at 67.

⁵⁹ Ibid; and in a very detailed and nuanced way also G Teubner, *Constitutional Fragments, Societal Constitutionalism and Globalization* (OUP, 2012).

⁶⁰ See M Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism In and Beyond the State’, in: J L Dunoff & J P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP, 2009) 258, at 268.

The majority of ‘constitution-critical’ authors however have adopted a pluralistic approach.⁶¹ Krisch for instance claims that the post national polycentric context is characterized by different ‘layers of law and politics’. There is a ‘heterarchical interplay between these layers according to rules ultimately set by each layer for itself’ without any common point of reference – resulting in pluralism.⁶² He then introduces a vision of pluralism which in his view also has normative appeal as it has a number of virtues. For instance, it allows for better adaptation to new circumstances, as it is less formalised and therefore comes with a different dynamic.⁶³ Furthermore, it leaves more room for contestation. Whereas constitutional frameworks are often ‘elite products, expression of power and social hegemony’ pluralism opens more possibilities for contestation for weaker actors.⁶⁴ Finally pluralism also provides for checks and balances as the different fragments provide constant potential for mutual challenges.⁶⁵

Teubner presents an even more radical depiction of the global realm. Globalisation leads to a development, where constitutionalisation can only be found in fragments.⁶⁶ Fragmentation thereby has to be understood as ‘fundamental, multidimensional fragmentation of global society itself’.⁶⁷ ‘Private’ regimes participate in this fragmented law production as equal participants and they produce ‘proper law’.⁶⁸ Consequently, global law will continue to be highly fragmented and at best may be able to create some fragile compatibility, if conflicts are able to ‘establish a specific network logic, which can affect a loose coupling of colliding units’.⁶⁹

In the context of globalisation the ‘comprehensive claim’ of political constitutions cannot be maintained. There is no all-embracing global constitution but only fragments which developed in particular areas, such as the UN.⁷⁰ On the other hand societal units (subsystems) start to ‘develop their own constitutional legal norms – *the self-constitutionalization of global orders without a*

⁶¹ Krisch, *supra* note 46, 69

⁶² Ibid at 69

⁶³ Ibid at 78 ff.

⁶⁴ Ibid at 81.

⁶⁵ Ibid at 85

⁶⁶ Teubner, *supra* note 59.

⁶⁷ See A Fischer-Lescano & G Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ 25 *Michigan Journal of International Law* (2004) 999, 1004.

⁶⁸ See Teubner, *supra* note 59, at 42 ff.

⁶⁹ A Fischer-Lescano & G Teubner, *supra* note 67, at 1004

⁷⁰ Teubner, *supra* note 59, at 52

state.’⁷¹ These sectorial constitutions have a constitutive element which is aimed at securing their autonomy on the global scale.⁷² Autonomy accomplishes the breakdown of ‘the close structural couplings between the function systems and the nation-state politics and law, and to enable function specific communications to become globally interconnected’. Furthermore, ‘[c]onstitutive constitutional norms of this kind serve to release the intrinsic dynamics of business corporations at the global level.’⁷³ This triggers resistance and therefore in subsequently ‘limitative constitutional norms are needed’,⁷⁴ although they are only of limited reach. Similarly, Poul F Kjaer argues that globalisation has led to the breakdown of the ‘constitutional configurations’ of the nation state, which lead to a ‘fracturing of the equilibrium between different social spheres’.⁷⁵ On the global level, this has created ‘new types of constitutional ordering’ and ‘the gradual emergence of a new type of sectorial constitutions.’⁷⁶ Kjaer also stresses that these constitutions predominantly take an ‘economic focus’ such as the World Bank or other types of organisations related with the Washington Consensus. Similar to Teubner he observes that this one sided focus leads to criticism and counter-movements (which again rely on ‘constitutional conceptuality’).⁷⁷

The question then arises as to how the interrelation of the different fragments is shaped. Particular inter-regime conflicts (legal or cultural) pose a complex set of problems in a context characterised by heterarchy and decentrality. Teubner introduces ‘guiding principles’ to deal with different constitutional conflicts. They consist of two approaches: ‘internalizing disputes into the decisions of the conflicting regimes themselves, or externalizing them to inter-regime negotiations’.⁷⁸ In both cases a common law approach is to be adopted, one which is guided by the principle of ‘sustainability’.⁷⁹ Sustainability ‘requires that regimes limit their options in such a way that they prevent destructive tendencies and avoid the environmental damage they cause (limitative function). Yet, preferable sustainability would also be understood in a supportive

⁷¹ Ibid at 53 (italics in original). See also previous work on societal constitutionalism by D Sciulli, *Theory of Societal Constitutionalism – Foundations of a Non-Marxist Critical Theory* (CUP, 1992)

⁷² Teubner, *supra* note 59, at 75.

⁷³ Ibid at 75 and 78.

⁷⁴ Ibid at 78.

⁷⁵ P F Kjaer, *Constitutionalism in the Global Realm – A Sociological Approach* (Routledge, 2014), at 118.

⁷⁶ Ibid at 122.

⁷⁷ Ibid.

⁷⁸ Teubner, *supra* note 59, at 152, quote at 153

⁷⁹ Ibid at 172.

function, where ‘regimes actively promote[...] their respective environments’.⁸⁰ Such a development he cautiously seems to adopt regarding horizontal effects of human rights.⁸¹

Others suggest a form pluralism which is considerate of the different implications of a heterarchical set-up of the global realm but which does not go as far as Teubner with regard to the separation of the different units. In this vein Neil Walker introduces the notion of constitutional pluralism. In his understanding constitutionalism can be observed in different contexts - state, post state and post polity (private).⁸² Between these different units there is no hierarchy; ‘no neutral perspective from which their distinct representational claims can be reconciled’.⁸³ As with Teubner he then attributes the final responsibility for the embodiment of the individual constitutionalism to each unit itself (‘the constitutional profile associated with each site in the final analysis will develop in accordance with the representative claims peculiar to that site, and with the particular traditions, social pressures and normative dynamics [...] which shape these claims’⁸⁴). In contrast to Teubner, however, Walker introduces a ‘relational perspective’ or a ‘metaconstitutionalism’.⁸⁵ This is necessary as

[i]n this plural configuration, unlike the one-dimensional Westphalian configuration, the ‘units’ are no longer isolated, constitutionally self-sufficient monads. They do not purport to be comprehensive and exclusive polities, exhausting the political identities, allegiances and shaving separate internal and external dimensions, since their very identity and *raison d’être* as polities or putative polities rests at least in some measure on their orientation towards other sites.⁸⁶

As a result of not being self-contained, it is necessary that the different units are somehow interrelated in order to achieve meta-authorisation. Lacking an overarching framework and being not sufficiently self-contained, deeper normative justification can only come from the interaction between the different units, a process which is complex, patterned (as opposed to universal) and fluid. Meta-constitutionalisation is therefore constantly shifting both regarding its formal

⁸⁰ Ibid at 173

⁸¹ Ibid, and in ibid Chapter 5 starting at 124 ff.

⁸² See N Walker, ‘The Idea of Constitutional Pluralism’ 65 *Modern Law Review* (2002) 317, at 340.

⁸³ Ibid at 338.

⁸⁴ Ibid at 339.

⁸⁵ Ibid at 356.

⁸⁶ Ibid at 355 and 356 (*italics in original*).

configuration (with regard to which units interact for instance) as well as regarding its normative content.⁸⁷

3.1.3 Remaining Challenges

A pluralist notion is adopted here, as described by Nico Krisch:

Constitutionalism and pluralism are distinguished, in large part, by the different extent to which they formally link the various spheres of law and politics. While pluralism regards them as separate in their foundations (despite tight links in practice), global constitutionalism, properly understood, is a monist conception that integrates those spheres into one.⁸⁸

Thus, the thesis is in agreement with the pluralists in assuming distinguishable foundations between different regimes and institutions. However, the predominant focus of this chapter is on the ‘tight links’ which Krisch refers to. Here pluralist literature often leaves a number of unanswered questions, particularly regarding the interaction of different (functional) regimes (and spheres) characterising current global plurality (a);⁸⁹ as well as the role actors different to more traditional public ones are to play in it (b).

3.1.3.1 Relationships of the Different Units in the Global Legal Order

Some pluralists argue for a significant autonomy of different individual regimes. This is most pronounced in Teubner’s notion of constitutional fragments. In line with his general system’s theoretical approach borrowed from Luhmann, individual units are highly independent and interact mainly in cases of conflicts and even then predominantly through internalisation (‘Networks translate the external contradictions manifested in conflicts of norms into the internal perspective of the individual nodes, which internally reflects the relations between various levels, subsystems, network nodes, and the overall network’⁹⁰).

⁸⁷ Ibid at 356 ff.

⁸⁸ Krisch, *supra* note 46, at 242.

⁸⁹ But see in this regard M Young (ed), *Regime Interaction in International Law – Facing Fragmentation* (CUP, 2012).

⁹⁰ See Teubner, *supra* note 59, at 159.

Other pluralists advocate a more moderate approach and acknowledge the possibility of some kind of more intensified coordination or linkage between the different fragments. For instance Kaarlo Tuori opts for what he calls ‘discursive pluralism’ which is distinct from the more radical models in the way that:

[i]n a descriptive regard, [...] points to existing phenomena of interlegality – overlap, interpenetration and dialogue – that refute all versions of black box theorising and show these to be, at best, one-sided generalizations. In a normative respect, it advocates discursive treatment of conflicts of authority, a search for compatible solutions to those conflicts, mutual learning processes and the inclusion of the perspective of relevant ‘foreign’ legal orders in a coherence-seeking reconstruction of law.⁹¹

Despite this what might be termed ‘cooperative’ form of pluralism he stresses the horizontal starting point of his approach and rejects ‘hierarchical meta-principles, which remain stuck to state-sovereigntist *Stufenaufbau*-models [...]’⁹². Tuori sees himself in the tradition of other pluralists, particularly Paul Schiff Berman who also stresses the importance of an open pluralist approach. He attempts to provide a framework which is designed to show a ‘development of procedural mechanisms, institutions, and discursive practices that attempt to manage the overlapping of legal or quasi-legal communities’.⁹³ Thus both concepts advocate a form of pluralism which acknowledges the inter-legality of different transnational systems. However, what they have in common with more radical positions is their strong (though perhaps not exclusive) focus on ‘overlaps’ and conflicts. Ultimately, they also regard different legal and social systems or regimes as fairly closed and self-sufficient and consider less the possibility that different actors may be dependent on each other beyond simple conflict resolution. Ralph Michaels therefore correctly criticises that ‘leading accounts of global pluralism have so far not provided the tools to fully capture the nature of the interrelationship among [...] different

⁹¹ K Tuori, ‘Transnational Law: On Legal Hybrids and Legal Perspectivism’, in: M Maduro, K Tuori & S Sankari (eds), *Transnational Law – Rethinking European Law and Legal Thinking* (CUP, 2014) 11, at 54.

⁹² Ibid at 54 (italics in original).

⁹³ P Schiff-Berman, ‘Global Legal Pluralism’, 80 *Southern California Law Review* (2007) 1155, at 1196.

orders’.⁹⁴ Even though different models describe the challenges and nature of legal pluralism they ‘fail to provide a full account of the interpenetration, overlap, and linkage among different normative orders [in the business context].’⁹⁵

These issues are more appropriately addressed by Krisch. In his view pluralism is a ‘hybrid between hierarchical and network forms of order’, in the sense that ‘it allows for regimes with an internally hierarchical structure, but denies them ultimate supremacy, and thus navigates between routine hierarchies and exceptional disruptions, to be solved eventually only through consensual forms’.⁹⁶ He expands on this by introducing cooperation as a form of interaction between transnational actors. He states that ‘[w]hether courts (and other institutions) will associate with their counterparts in other spheres of post-national governance, thus probably hinges on the extent to which they can thereby hope to raise their own authority and ward off challenges from others’.⁹⁷ He continues:

This [...] raises the question of how and when cooperation may be bolstered by the ‘authority’ of common institutions. The construction of such authority may not be necessary for institutional structures to emerge –indeed, these structures may often be based on mutual gains or coercion in the first place. But it helps them persist and be effective over time; ...⁹⁸

Consequently, his account of cooperation goes beyond the predominant narrative of conflict and conflict resolution techniques. It takes into consideration other necessary elements of transnational ‘legal’ systems such as finding answers to authority challenges. Those may require interaction beyond simple conflict resolution.

Above the thesis went one step further, arguing that rather than being independent and self-sufficient, transnational institutions and regimes are predominantly incomplete and highly interdependent. Systems are not internally self-sufficient but rely on cooperation in order to fulfil their ‘regulatory’ agendas. This approach is in line with Walker’s meta-constitutionalism which

⁹⁴ R Michaels, ‘The Interlegality of Transnational Private Law’, 71 *Law and Contemporary Problems* (2008) 107, at 110.

⁹⁵ Ibid.

⁹⁶ Krisch, *supra* note 46, at 239

⁹⁷ Krisch, *supra* note 46, at 245

⁹⁸ Ibid.

is built on the assumption that different units must be oriented towards other sites as a meta-authoritative, or even as a constituent, element.⁹⁹

3.1.3.2 The Issue of Private Authority and Public Law in the Global Realm

Another rather problematic issue in the debate is the treatment of private authority. There still appears to be some reluctance to integrate private actors into the political and legal structures of the global realm. This is less a problem in Teubner's societal constitutionalisation. However, particular constitutionalists often consider private actors on the global level at best as 'contractors' which public institutions bestow with clearly defined technical regulatory functions.¹⁰⁰ This is to some degree understandable, given the strong inspiration stemming from nation state for these models. However, once we leave the domestic (or European) sphere it seems questionable whether this can be maintained or whether interactions between public and private actors are not also characterised by heterarchy and the absence of clearly established roles and hierarchies.¹⁰¹

The changes outlined in the first two chapters¹⁰² require us not only to reconsider the structure of (global) governance but more fundamentally also our preconceptions of its components. Private actors, as outlined in more detail in the last chapter, must not only be perceived as purely self-interested entities. They often represent a functional realm, a sphere with its own constituencies over which they exercise authority. These functional spheres interlink with the more traditional political realms in many ways -blurring the distinctions between them.¹⁰³

However, if we accept this then the question arises as to whether there is and should be any room for considerations of publicness (or even a stronger constitutional integration) more generally.¹⁰⁴

In the last chapter it was pointed out that there is certainly room for a significant role to be

⁹⁹ See above at section 3.1.2.

¹⁰⁰ A description of these approaches can for instance be found in T Büthe & W Mattli, *The New Global Rulers – The Privatization of Regulation in the World Economy* (Princeton University Press, 2011), at 11.

¹⁰¹ See K W Abbott & D Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit' 42 *Vanderbilt Journal of Transnational Law* (2009) 501.

¹⁰² See Chapter 1 and 2 and particular the references made to S Sassen, *Territory, Authority, Rights – From Medieval to Global Assemblages* (Princeton University Press, 2006).

¹⁰³ See the next section for a more detailed depiction.

¹⁰⁴ Cf Kingsbury, *supra* note 3, at 31.

played by traditional public actors regarding the exercise and structure of authority in a transnational context. This goes, to some degree, hand in hand with both procedural and substantive values of public law. Nevertheless, whether this is achievable in general and universalist terms remains questionable. This does not however mean that there is not room for public law considerations and forms of partial constitutionalisation.

3.2 Networks and the Global Legal Order

How can a network approach help to overcome the obstacles set out above? As stated previously, networks are located between a non-integrated market type scenario and an integrated hierarchical structure. Thus they contain public and private elements, or better put flexibility and autonomy on the one side as well as integration and harmonisation on the other. As such, taking a network approach one does not assume a global legal order that is genuinely integrated or structured hierarchically. Networks embrace a pluralist account where regulation and law stems from independent entities which are in many cases functionally separated. Higher integration of and harmonisation between these entities is however possible; and as it will be shown in due course in the case studies in the next chapters certain constitutionalisation effects can emerge from this. The next section will first address the private aspects of this network approach referring to the remarks made above about pluralism (3.2.1); and secondly the public aspects where different forms of integration will be set out. Most importantly the final section will outline in greater detail what is meant by the aforementioned constitutionalisation effects (3.2.2).

As an explanatory note it is first of all necessary to clarify that the term network will refer here, unlike in the last section, to a theoretical concept explicating a structure in the global realm. As such, this section does not refer to concrete empirical depictions of networks such as specific regulatory cooperation networks, or other forms referred to in literature when providing examples for less state centrality (network in the narrow sense).¹⁰⁵ The term network is rather used as a description of an ‘institutional form of globalization’¹⁰⁶ (network in a broader global sense) in which however, the different types of empirically observable networks play a role.

¹⁰⁵ See for instance Kingsbury, Krisch, Stewart, *supra* note 50.

¹⁰⁶ See Ladeur, *supra* note 57, at 63 ff.

3.2.1 The Private Law Characteristics: Flexibility and Plural Autonomy

Networks are a flexible way of structuring the global realm – they allow for cooperation when needed and for separation when a common approach is less useful or required. As the global economy specifically and the global realm in general is structured in a flexible, changing and fluid manner it also ‘demands flexible new forms of legal regimes that do not allow for stable legal and administrative hierarchical order but that are part of a heterarchy of overlapping public and private rules, practices, standards’.¹⁰⁷ The main ‘private’ element to be introduced here is plurality. As I have outlined above plurality consists of actors of different internal composition, structure and regulatory activities in or among different functional or territorial realms.¹⁰⁸ The production of law then takes place within the different units or as a ‘result of a spontaneous co-ordination process, normally between formally equal actors’.¹⁰⁹ Therefore, despite the lack of a general constitutionalisation at a global scale formal organizational structuring takes place within the different sites of polycentricism; and this happens to a degree that it has been claimed by some to be a form of constitutionalisation itself.¹¹⁰ Teubner depicts this with his societal constitutionalism, characterized by ‘the self-constitutionalization of global orders without a state.’¹¹¹ Central is that these different societal spheres which are no longer constrained territorially and politically but which extend across borders and functionally distinguished parts of society (political, economic etc). His and others approaches have been criticized for various reasons. One of the more important ones is decoupling of constitutions from the political; and the generally the ‘oscillation between the political and the social,’¹¹² ‘[T]o shift practice out of domains of morality, or ordinary politics, and into sub-specialized communities of interest and expertise that are barely accessible to civil society or even to most of the educated elite’ is considered a normatively little attractive concept ‘under modern democratic conditions’.¹¹³

¹⁰⁷ Ibid at 116.

¹⁰⁸ See above at 3.1.2.

¹⁰⁹ Möllers, *supra* note 3, at 329.

¹¹⁰ Again in different degrees proponents of this view are, among others, Teubner, *supra* note 59; Kjaer, *supra* note 75; Walker, *supra* note 82, 317 ff.

¹¹¹ Teubner, *supra* note 59, at 53 (original in italics).

¹¹² T Vesting, ‘Constitutionalism or Legal Theory: Comments on Gunther Teubner’ in: C Joerges, I-J Sand & G Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing, 2004) 29, at 31 ff.

¹¹³ Kingsbury, *supra* note 3, at 55.

Here a different account of pluralism is therefore suggested, one which is less internally closed. Rather, what matters is the existence of a certain degree of autonomy that characterizes many transnational entities, whether public or private; and that, within this sphere of autonomy these entities structure and limit themselves. This has at least constitutional resemblance, whether it amounts to a constitution properly called so is then indeed a matter ‘of nuance and graduation’.¹¹⁴

3.2.2 The Public Elements in Networks – Integration and Harmonisation

A network approach, as indicated above, also means that there is a more integrated structure accompanying the autonomous orders, which is first and foremost shaped through bilateral interactions. And it is here where constitutionalisation effects do emerge and do matter. As shown, different actors do not stand alone but ‘intersect with other social structures in their social environment’. In fact I made the argument that this interaction is not only possible but necessary given the dispersal of authority in the global realm. Therefore transnational actors also must achieve some form of ‘external compatibility’.¹¹⁵ This Kjaer argues happens through a dual process:

‘[F]irst, the transposition of social components, such as political decisions, economic capital and products, scientific knowledge or religious promises of salvation, into the wider society; and second, the channeling and incorporation of the social components produced elsewhere in society into a given organization. The *praxis* of fulfilling this dual function is what is described with the term ‘constitutionalisation’¹¹⁶

A network account opens room for constitutionalisation effects throughout the realms of the different participants within the network along the aforementioned lines. By means of necessary interaction, entities both spread their own ‘social components’ into a wider realm, and at the same time integrate components arising out of other sources. Walker states that the

¹¹⁴ Walker, *supra* note 82, at 339.

¹¹⁵ See Kjaer, *supra* note 75, at 143. Forms of interaction between the different realms have also been advocated for by Teubner and Walker see previous footnotes.

¹¹⁶ Ibid (italics in the original) referring to M Loughlin, ‘What is Constitutionalisation?’ in: P Dobner & M Loughlin (eds) *The Twilight of Constitutionalism?* (OUP, 2010) 47, at 59.

development of new authoritative units from the interaction of existing units is structurally facilitated, and the map of constitutional authority becomes a complex and ever-shifting mosaic of the new and the old, the emergent and the mature, the relations between these new and old units as constitutionally significant (and transformative) as the units themselves.¹¹⁷

In contrast to this account, I argue here that within the realms of individual transnational networks there is room for more consolidation than Walker seems to detect in the global realm in general. In private law and organisational theory networks are characterised as ‘long term stable relationships’.¹¹⁸ Translated into the sphere of transnational governance and law, transnational networks which develop between the different autonomous units have stabilising abilities and this then opens room for a stabilisation of public values which are more polity bound in a traditional understanding.¹¹⁹

The following paragraphs will demonstrate how networks can transport constitutionalisation effects both in a foundational and limiting understanding of the term. After that illustration this section will look at the way the network approach responds to general criticism regarding the possibilities of constitutionalism in the global realm. Finally, some limitations will be set out by outlining for what kind of functions (advocated for by proponents of a more globally encompassing understanding of constitutionalism) the network approach does not provide.

As stated above, it is first prudent to look at the different expressions of constitutionalisation effects to be found within transnational networks. Those are both foundational and limiting. Networks can create constitutionalisation effects in more foundational terms; though not in the more general understanding as developed in the context of the nation state (power which emanates from the people and is legitimised by them¹²⁰). Foundational effects are more likely to be found within the individual units of networks and even within these units they are typically present in a more partial than universal sense. As a result foundational constitutional effects cause a particular realignment of the internal authority of individual units with the general

¹¹⁷ Walker, *supra* note 82, at 357.

¹¹⁸ Collins, *supra* note 11, at 11.

¹¹⁹ This is contrary to Teubner, *supra* note 59, at 115 ff.

¹²⁰ See above at sections 3.1.1 and 3.1.2.

dominant framework within the network. An example of this is the adaptation of the Olympic Charter whereby the environment was included as a third pillar of Olympicism. The IOC was from that moment on responsible for the regulation of environmental concerns related to sports in the Olympic context. For this reason it pushed this agenda in the realms of its member sport associations and even within local political communities.

Although foundational constitutionalisation effects such as those described above can be observed within global networks, what is more common are effects which are limiting in nature. In particular states and public organisations (but also NGOs) can use the coordination structures and the venues of mutual learning existing in these networks¹²¹ to promote certain public values. Accordingly, networks can pursue an approach whereby its members have to implement participatory rights or specific procedural mechanisms for instance. In particular with regard to participation, networks have the ability to create a ‘public’ for a certain issue area. Thus, when engaging in social responsibility regulation ISO included international organisations such as the ILO, as well as the latter’s relevant members (for instance trade unions). Similarly, when assessing the implementation of environmental protection mechanisms in the context of the Beijing Olympics, UNEP involved several environmental NGOs to provide their evaluation for the report.¹²²

Limitative constitutionalisation effects can also be of a more substantive, public good oriented character and thus aim at the protection of human rights or environmental protection standards. Examples of such developments can for example be found in the manuals set up by international organisations to be followed when engaging in partnerships with the private sector. Thus, as shown in the first chapter the UN, and other IOs have guidelines in place which provide a general framework for the interaction with the business community. These state a number of exclusionary criteria, such as human rights violations, disregard of Security Council sanctions or systematic failure to meet UN Global Compact Principles.¹²³ Any actor engaging with UN

¹²¹ See Collins, *supra* note 11, at 11.

¹²² For details see Chapters 4 and 5 below.

¹²³ See UN, Guidelines on Cooperation between the United Nations and the Business Sector, 20 November 2009, at 3(c):

‘The UN will not engage with Business Sector entities that are complicit in human rights abuses, tolerate forced or compulsory labour or the use of child labour, are involved in the sale or manufacture of anti-personal landmines or

organisations must align their own processes so that they are in compliance with these requirements.

As mentioned above, the application of constitutionalism beyond the nation state has led to significant criticism following different strands of argument. Most forceful is the argument that constitutionalism is strongly interlinked with the nation state and any application outside this context may be considered a form of legalisation but can never ‘live up to the standard of constitutionalisation’.¹²⁴ The network approach however, offers a dialectic, maybe transitory understanding which first and foremost leaves constitutionalisation within the public realm—where it can maintain its traditional links with politics (even though arguably in an adapted form).¹²⁵ But, it also allows for a better consideration and integration of some achievements of publicness at the transnational level, which if not dominated, is at least strongly characterised by ‘private law’ structures.

However, as networks are based on a cooperative structure between fairly equal participants there is no top down approach, but rather a bargaining process whereby the prevailing effects of this process are transported through the venue of individual couplings. This has some implications for aspirations of publicness in a transnational context. First, a network approach does not, as already outlined above, provide for universality. It ultimately accepts fragmentation and the inability to find a generally uniting framework or an international community capable of agreeing on such a framework.¹²⁶

Even with regard to a more evolutionary development, whereby certain norms and values of publicness¹²⁷ are slowly establishing transnationally, there are some doubts. Walker states that

cluster bombs, or that otherwise do not meet the relevant obligations or responsibilities required by the United Nations.

d) The UN will not engage with Business Sector entities violating sanctions established by the UN Security Council

e) The UN should not partner with Business Sector entities that systematically fail to demonstrate commitment to meeting the principles of the UN Global Compact. However, the UN may consider collaboration specifically intended to address this failure of commitment.’ (footnotes omitted)

¹²⁴ See above and Grimm, *supra* note 46, at 21.

¹²⁵ Cf *ibid* at 20.

¹²⁶ As advocated for by the ‘constitutionalists’ see footnotes 48 and 49; as well as Kumm, *supra* note 60.

¹²⁷ Kingsbury, Krisch & Steward, *supra* note 50.

‘just as the configuration of unities is not fixed, neither is the normative content of that which is represented by these unities’.¹²⁸ Further he states that

the represented unity of constitutional orders, and of their metaconstitutional justification, is a purely formal unity [which has no implication] about the substantive normative discourse through which a particular unit achieves its metaconstitutional justification nor about the substantive framework of constitutional norms which this metaconstitutional justification supports.¹²⁹

Thus, there is at least no settlement and also no guarantee of settlement on specific norms and requirements within these networks neither along the lines of a more cosmopolitan nor more general scheme of publicness. A network approach is a dialectic process and it allows for integration of such principles ‘less with a common substance of values and procedures than with mutual control through overlapping networks of relations’.¹³⁰

Whether such values and principles become a dominant or foundational characteristic of a network depends very much on the specific configuration of this network. Nonetheless, not all is lost for proponents of a more integrated constitutionalism or a more widespread application of principles of publicness. As outlined in the previous chapter different transnational actors are dependent on cooperation in order to be able to effectively regulate and they are particularly dependent on certain regulatory competences distributed unevenly between different actor sets. Consequently, public state based actors in particular are able to link back to traditional forms of justification and legitimation. Moreover, states remain dominant players within their territorial sphere as well as transnationally.¹³¹ In network structures this gives them a strong starting position to be the orchestrating actors within networks,¹³² although whether and how they take up these challenges remains to be seen and will provide substance for further research.

¹²⁸ Walker, *supra* note 82, 357.

¹²⁹ Ibid at 357-358.

¹³⁰ Ladeur, *supra* note 57, 113.

¹³¹ See Chapter 1 and Sassen, *supra* note 102.

¹³² Cf Abbott & Snidal, *supra* note 101.

4. CONCLUSION

This Chapter aimed to evaluate the networks developing out of regulatory cooperation and then link this to the more general discussion regarding the political and legal order in the global realm. Regulatory networks are multi-party arrangements between different regulatory actors within one or across different but related issue areas. They are characterised by a certain degree of integration and stabilisation of the cooperation between the involved parties. Despite this, each regulator retains their autonomy and no general integration into an overarching hierarchical framework is taking place.

Regulatory networks are an important phenomenon, characteristic also for a broader development, namely network structures in the global legal order. Consequently, in general, the global legal and political landscape is structured in a pluralist way, without any overarching framework of hierarchy. Units within this framework comprise a certain degree of autonomy which is however limited and which forces them to engage in cooperation, as was shown in Chapter 2. In a network scenario bilateral cooperation merges into more consolidated and stable structures within which constitutionalisation effects emerge. A network approach thus provides a dialectic umbrella under which elements of both public and private accounts of the global legal order are found.

CHAPTER 4

ISO 26000 – REGULATORY COOPERATION IN A FRAGMENTED ISSUE AREA

1. INTRODUCTION

This case study examines the ISO 26000 process which is an example of public private cooperation in a decentralised and fragmented transnational setting. After deciding to create the 26000 standard for social responsibility the International Organization for Standardization (ISO) concluded cooperation agreements with the International Labour Organization (ILO), the Organization of Economic Cooperation and Development (OECD) and the UN Global Compact (GC). These public organisations were granted particular participatory rights in the process which exceeded those of the numerous other stakeholders involved.

This case study was chosen as it provides an illustration of cooperation in a fragmented issue area. The ISO itself lists 40 cross-sectoral and 35 sectoral initiatives in the area of social responsibility regulation.¹ Furthermore, unlike the case study on sport and environment dealt with in the next chapter, cooperation in this particular case does not bridge different regulatory realms but rather harmonises existing regulation within one issue area. Thirdly, cooperation between the relevant organisations is project based in this specific case. The agreements concluded regulate the public organisations' involvement in the 26000 standard setting procedure. Nonetheless the consequences of such cooperation are more long lasting and it is interesting to note the particular structure of one process and examine how it plays out in the general framework of social responsibility regulation.

The following chapter will therefore first try to understand how cooperation was arranged in this particular example, what impact the general structure of the regulatory realm played and what motives led to cooperation. To this end, the following chapter will look at two levels of rationales for cooperation. The first is the commutative level. In line with the more general

¹ See *International Standard ISO 26000:2010 Guidance on Social Responsibility* (BSI Standards Publication, 2010), Annex A, at 85 ff (hereinafter: ISO 26000:2010).

arguments elaborated in Chapter 2, it is argued that all organisations involved cooperated in order to exchange ‘regulatory commodities’. This section will focus on legitimacy, expertise and operational capacities in particular as the main components of exchange. The main aims of doing so are first of all to highlight that in this example one can also see the special importance of traditional legitimacy originating from the state. Secondly, as the 26000 process involved a higher number of public policy considerations as opposed to more traditional, technical standard setting, the ISO was in need of normative and political expertise. This could be accessed through cooperation with public organisations. Finally, the ISO has strong operational capacities when it comes to the distribution and implementation of standards in the business community. This is due to the special power and expertise it has as a focal institution in the area of technical standardisation.² The international organisations sought to benefit from these capacities by ensuring that their own instruments were sufficiently considered in the 26000 standard.

The final part will examine the broader network level of which the cooperative relations analysed are a component. Here, it is claimed that the international organisations aimed to achieve constitutionalisation effects through agglomeration and consolidation of existing regulatory frameworks. Their goal was to spread a consistent message to the business community which would then lead to path dependency effects. However, this approach is controversial. The role of private entities in ‘public policy’ areas is a hotly debated topic both in public law scholarship as well as within the institutions themselves.

The case study mainly relies on organisational documents such as statutes, founding treaties or procedural guidelines. The ISO has furthermore publicised its archive of the 26000 process.³ As a result it was possible to access all documents produced in the 26000 working group and in other relevant bodies. These were complemented by publically available information which was mainly found on the websites of the various organisations through their official publications. In order to better understand the objectives pursued through cooperation several interviews were conducted with representatives of the relevant organisations.

² See T Büthe & W Mattli, *The New Global Rulers – The Privatization of Regulation in the World Economy* (Princeton University Press, 2011) at 29.

³ Available at: <http://isotc.iso.org/livelink/livelink?func=ll&objId=8929339&objAction=browse&sort=name> (last accessed 22 December 2014). In the following the ISO documents regarding the 26000 process can be found in the archive.

The case study will be structured as follows. First, a short introduction to the ISO's standard setting processes and its impacts on the global economy and broader political and social processes will be provided (2). Second, the commutative aspects of cooperation including a detailed description of the 26000 process, its technicalities as well as the regulatory challenges it faced during its duration will be examined (3). The final section will focus on the network established by this process and broader constitutionalisation effects to be observed in this context (4).

2. THE ISO - THE PARTICULARITIES OF INTERNATIONAL PRODUCT STANDARD SETTING

2.1 General Information - Product Standardisation and Global Politics

The ISO is an international non-governmental organisation made up of national standard setting bodies from 160 different countries. It was founded in 1947 and is a non-governmental organisation with headquarters in Geneva, Switzerland.⁴ Its mission is 'to promote the development of standardization and related activities in the world with a view to facilitating international exchange of goods and services and to developing cooperation in the spheres of intellectual, scientific, technological and economic activity'.⁵ The ISO pursues this goal through what it calls expert consensus, meaning that experts in a certain area come together to draft a standard on the basis of consensus.⁶ In earlier years this was mainly limited to the creation of technical standards however in later years so-called management standards have risen and now complement the body of ISO standards.⁷ The ISO today consists of members from 161 countries and has drafted over 19,500 international standards.⁸

⁴ ISO, 'Structure and Governance', available at: http://www.iso.org/iso/home/about/about_governance.htm (last accessed 12.12.2014).

⁵ Article 2 ISO Statutes (17th ed, 2013) available at: <http://www.iso.org/iso/statutes.pdf> (last accessed 22 December 2014) (hereinafter: ISO Statutes).

⁶ See ISO, 'About ISO', available at: <http://www.iso.org/iso/home/about.htm> (last accessed 22 December 2014).

⁷ See more below at section 3. Management standards are designed to 'provide a model to follow when setting up and operating a management system'. See ISO, 'Management System Standards', available at: <http://www.iso.org/iso/home/standards/management-standards.htm> (last accessed 12 December 2014).

⁸ ISO, 'About ISO', *supra* note 6.

Particularly in the last two decades one can observe an important ‘shift from domestic regulation to global private rule making’ in this area.⁹ What has triggered this development? More generally, technical developments and the increase of transnational trade already mentioned in the first chapter demands a certain degree of global harmonisation. As long as firms and markets are ‘local’ there is little need for international standards, however as soon as markets integrate, non-harmonisation becomes a cost factor whereas coordination and harmonisation opens markets, increases trade and brings economic benefits for those thriving in it (particularly transnational corporations).¹⁰

This development, however, has not only affected private firms but also economies at large and thus ultimately also affects the political realm. An often quoted example for this is the referencing of ISO standards in Article 2.4 of the TBT Agreement, according to which using ISO standards as technical product specifications indicates consistency with international trade law.¹¹ This constitutes a manifestation of the importance of technical standards generally and of the ISO (together with other standard setters) in particular which cannot be overlooked.¹² Other international organisations reference ISO standards in their regulation, a method also common in domestic policies.¹³ The ISO has thus evolved into a dominant global regulator. Together with a small number of other organisations, particularly the IEC and the ITU, the ISO has divided the issue area, and became a ‘focal institution’ in technical standardisation.¹⁴

One question which emerges concerns the very nature of ISO standard setting. Is it merely an expertise driven form of technical problem solving, or does it have implications which make it difficult to characterise it as entirely apolitical? ISO standard setting can undoubtedly have broad

⁹ See Bütthe & Mattli, *supra* note 2, at 6.

¹⁰ See *ibid.*

¹¹ Article 2.4 of the Agreement on Technical Barriers to Trade, 1868 UNTS 120.

¹² Cf also Bütthe & Mattli, *supra* note 2, at 29 ff.

¹³ For a number of examples see ISO/IEC, ‘Using and Referencing ISO and IEC Standards for Technical Regulation’ (September 2007), available at: http://www.iec.ch/affiliates/adoptions/pdf/iso_iec_standards_for_technical_regulations_en.pdf (last accessed 22 December 2014) Annex A, B and C, at 13 ff. There numerous examples of referencing both by international organisations as well as by national or regional regulators are listed. See furthermore, Bütthe & Mattli, *supra* note 2, at 6.

¹⁴ Bütthe & Mattli, *supra* note 2, at 29.

economic and social implications. For instance, one of its early standards concerning containers used in the shipping industry is said to have at least accelerated, if not constituted the foundation for, the revolution of global transportation and as a consequence global trade in its current form.¹⁵

Nevertheless there are commentators who see the ISO standard setting process ‘as so rationalised and problem-driven that it has led some [...] to declare the triumph of “technological rationality over power”’.¹⁶ However, this perception is not shared by many and is not even supported by the ISO itself. At least in more recent publications the ISO shows awareness of underlying economic and social factors when it states, referring to its standard setting process, that ‘[its] geographical reach [...] combined with a multi-stakeholder environment [...] ensures the representation of a wealth of technical views including those relating to social and economic interests’.¹⁷ Other authors have even more vividly stressed particular aspects of product standard setting which indicate its political character.

First of all, product standards often have ‘important distributional implications’ in that they determine how to produce a certain product or deliver a certain service. As such, those who had hitherto based their production on a different standard will face severe adaptation costs.¹⁸ This is particularly the case since international standards are often the basis of supplier contracts and government regulations as well as being central to the establishment of legal liability and the determination intellectual property rights in courts or arbitral proceedings.¹⁹ Apart from economic effects Marcel Heires refers to an example where an ISO product standard on animal

¹⁵ A good depiction of this development is found in C N Murphy & JA Yates, *The International Organization for Standardization (ISO) – Global Governance through Voluntary Consensus* (Routledge, 2009), at 50 ff.

¹⁶ See M Heires, ‘The International Organization for Standardization (ISO)’ 13 *New Political Economy* (2008) 357, at 359 quoting T A Loya & J Boli, ‘Standardization in the World Polity: Technical Rationality Over Power, in: J Boli & G Thomas (eds), *Constructing World Culture: International Nongovernmental Organizations Since 1875* (Stanford University Press, 1999) 169, for instance at 194, stating that: ‘[t]he standardization sector constitutes an alternative model – not coercive, not powerful, not even recognized as such except by those directly involved in its operations. Yet, as we have shown, the sector is eerily state-like in its effects, but based on a very different theory of rational, voluntaristic authority from that normally embodied by states’.

¹⁷ See ISO/IEC, ‘Using and Referencing ISO and IEC Standards for Technical Regulations’, *supra* note 13, at 2.

¹⁸ Bütthe & Mattli, *supra* note 2, at 30.

¹⁹ Ibid, at 30. See furthermore, ISO/IEC, ‘Using and Referencing ISO and IEC Standards for Technical Regulations’, *supra* note 13, Annex A, B, and C, at 13 ff.

traps faced so much opposition from animal rights activists that it had to be abandoned.²⁰ Thus, it had political implications going beyond the more inherent distributional economic aspects.

In summary, given the ISO's dominant position as a focal institution and the significant implications standards can have economically as well as in a broader social context it appears to be difficult to understand technical standard-setting as a purely functional activity, technically institutionalised and entirely apolitical. Instead one has to acknowledge that there are political implications in many standard setting processes. The question then becomes how such implications are accounted for in the standard setting and implementation process.

2.2 Based on Consensus? – How ISO's Governing Processes Function

Bearing this issue in mind, we now turn to the internal set-up and processes of ISO. A number of questions are of particular relevance here such as who is involved in the ISO and in which capacity, how is standard setting conducted, and which procedures are in place?

2.2.1 Membership

As outlined above, the ISO is first and foremost a network of national standard setting bodies.²¹ Those bodies participate in the international forum and in turn represent the ISO within their country.²² Their positions are, however, not entirely neutral. Rather they seek to promote preferences of their domestic stakeholders in order to prevent them from facing the economic disadvantages outlined above.²³ As standard setting requires both expertise and resources, there is an imbalance regarding the capacities of different national bodies. Obviously, standard setters from large, economically developed countries can more easily supply a wide range of knowledge and expertise to the standard setting process. In developing countries, on the other hand, a fully developed standard setting body often does not even exist, and, if it does, it is likely to have far

²⁰ Heires, *supra* note 16, at 360 referring to an article of the Neue Zürcher Zeitung (Reto U Schneider 'Was die Welt Zusammenhält', *NZZ Folio*, February 2005).

²¹ Heires, *supra* note 16, at 360

²² ISO, 'ISO Members', available at: http://www.iso.org/iso/home/about/iso_members.htm (last accessed 22 December 2014).

²³ See Büthe & Mattli, *supra* note 2, at 12.

more limited resources to participate in the ISO processes.²⁴ This imbalance is reflected in three different membership categories.

In the first category (P-Members) one finds full members who are standard setters with full capacity to participate in the ISO processes. Full members participate in standard development and set the policy agenda. They are equipped with voting rights and are thus those who have ultimate decision power. Furthermore, full members adopt and sell ISO standards nationally.²⁵ The second category is so-called correspondent members. These members participate in standard setting and policy-making processes but have an observer status (and do not have voting rights). Nonetheless they are able to adopt and to sell ISO standards within their own country.²⁶ Finally, there are the so-called subscriber members. Those members do not have the capacity to participate in the different ISO activities. As subscribers they are ‘keeping up to date with ISO’s work’. In their home countries they neither adopt nor sell ISO standards.²⁷

Besides financial issues another factor has been highlighted as determining influence in the standard setting process. Thus, the ability to collectively represent national interests and to speak with one voice in the ISO committees has been considered a crucial advantage in the regulatory process.²⁸ This however depends very much on how standard setting is structured domestically. In the US for instance standard setting is more pluralistically organised with functional and regional differentiation. This, it has been argued gives an advantage to European standard setters which are usually hierarchically structured with one single domestic focal institution.²⁹

Another group (however heterogeneous) which should be mentioned at this point are third parties which form relationships with the ISO and which also participate in the standard setting processes.³⁰ These relationships are organised through different forms of liaison arrangements.

²⁴ See ISO ‘ISO and Developing Countries’, available at: <http://www.iso.org/iso/home/about/iso-and-developing-countries.htm> (last accessed 22 December 2014). See furthermore Heires, *supra* note 16, at 360 ff.

²⁵ See Article 3.1.1 ISO Statutes; see furthermore ISO, ‘ISO Members’, *supra* note 22.

²⁶ See Article 3.1.2 ISO Statutes; see furthermore ISO, ‘ISO Members’, *supra* note 22.

²⁷ See Article 3.1.2 ISO Statutes; see furthermore ISO, ‘ISO Members’, *supra* note 22.

²⁸ See Bütte & Mattli, *supra* note 2, at 12 ff.

²⁹ See *ibid*; and Heires, *supra* note 16 at 362.

³⁰ This is provided for in Article 16.1 ISO Statutes which stipulates: ‘The Organization may cooperate with other international organizations interested partially or wholly in standardization or related activities. The conditions of cooperation shall be established by the Council.’

There are liaisons at different levels of ISO standard setting. First at the technical or subcommittee level third party organisations can either be actively involved in the committee work (category A liaison), or they may merely wish to be informed (category B liaison).³¹ On the subsidiary working group level one finds a third category, the so-called D-liaison organisations which usually make technical contributions.³² Liaison organisations generally are required to have some international or regional basis and an interest in the respective area. Furthermore, they should be willing to make a contribution to the work of the committee or working group.³³ In addition, D-liaison organisations are required to have a ‘sufficient degree of representativity within its defined area of competence...’³⁴. In the 26000 process D-liaison organisations played a particularly crucial role because of the necessity for a wide representation of interests.

2.2.2 The Standard Setting Process

As stated above the core of the standard setting process takes place within the technical committees (TCs), sub-committees (SCs) and the WGs. The standard development process is split into different stages, the first being the ‘proposal stage’. Here a new work item is put on the agenda of a TC or an SC.³⁵ This can be done by national bodies, the secretariat of the committee, another committee, a liaison organisation, the Technical Management Board or the Chief Executive Officer.³⁶ To be accepted as a new work item it has to reach a simple majority of P-Members votes in the Committee and furthermore a commitment of four or in some cases five P-Members of the Committee to participate actively.³⁷

Upon acceptance the work item will enter the preparatory stage. Here a working group composed of the experts nominated by the P-Members as well as D-Liaisons is set up to prepare a working draft which will then be circulated among the members of the respective committee and the

³¹ See para 1.17.2.1 ISO/IEC Directives, Part 1, Consolidated ISO Supplement – Procedures Specific to ISO (5th ed, 2014) (hereinafter ISO/IEC Directives).

³² See para 1.17.2.2 ISO/IEC Directives.

³³ See para 1.17.2.1 and 1.17.2.2 ISO/IEC Directives.

³⁴ See para 1.17.2.2 ISO/IEC Directives

³⁵ A work item can be a new standard, a new part of a standard, a revision of or amendment to an existing standard and a specification. See para 2.3.1 ISO/IEC Directives.

³⁶ Para 2.3.2 ISO/IEC Directives.

³⁷ P-Members demonstrate their will to active participation by nominating experts which will be involved in the standard creation process. See para 2.3.5 ISO/IEC Directives.

Central Secretariat.³⁸ It is important to note in this regard that in the working groups no distinction is made between the experts. As such, experts of P-Members have the same voice as those appointed by D-Liaison Organisations.³⁹ Nonetheless, the possession of the capacity to be involved in the process depends very much on expertise and resources, which, as pointed out above, is usually less available in developing countries.

Another important aspect of the working group or technical committees concerns their coordination. This task is performed by a secretariat, usually allocated to a national body which is willing and capable to fulfil the necessary tasks.⁴⁰ The secretariat then determines a chair who leads negotiations.⁴¹ Even though secretariat and chair are formally neutral in the standard setting process they do have influence by way of managing the group or committee. Heires incisively depicts the importance of these positions in practice by pointing out that the committee of horology is presided over by the Swiss standard setter, whereas petroleum products and financial services committees are led by the US body.⁴² Consequently, there is a strategic interest in taking a steering position in domestically relevant industries. Yet, again, the ability to take up such a position depends significantly on the capacity of individual national bodies.

After the working group stage the proposal enters the committee stage. Here it is examined by the national bodies who can comment on it.⁴³ The draft is then, together with the comments, circulated again among all members of the TC or SC which have to decide to either discuss the draft and its comments in the next meeting, circulate a revised draft for consideration or let the draft pass to the next stage. The main objective at this stage is to reach consensus among the P-Members in order to move the draft forward to the next stage (the enquiry stage). If consensus is not reached immediately, successive drafts can be created which will be considered again until finally either consensus is reached or a decision to defer or abandon the project is made.⁴⁴ It is

³⁸ Para 2.4 ISO/IEC Directives.

³⁹ Interview with Kevin McKinley (ISO), 25 February 2013.

⁴⁰ Paras 1.9.1 and 1.9.2 ISO/IEC Directives.

⁴¹ Heires, *supra* note 16, at 361.

⁴² Ibid.

⁴³ Para 2.5 ISO/IEC Directives.

⁴⁴ Para 2.5.6 ISO/IEC Directives, consensus thereby implies: ‘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 to reconcile any conflicting arguments’.

important to note, however, that ‘in case of doubt concerning consensus, approval by a two-thirds majority of the P-members of the technical committee or subcommittee voting may be deemed sufficient for the committee draft to be accepted for registration as an enquiry draft’.⁴⁵ As a result, it is not always necessary to ensure complete support for the standard - in fact, as abstentions are not counted, actual support may even be fairly low for the standard to still pass to the next level.

If consensus within the TC or SC was reached the project will go forward to the enquiry stage, where the standard is forwarded by the Central Secretariat (the Secretary General) to all national bodies, which are given a period of three months to vote on the draft. The options are a positive vote, a negative vote or abstention. Member bodies may also provide technical or editorial comments. In case of a negative vote, the member body is required to give reasons for its decision, as otherwise the vote will not be counted as a negative vote in the final ballot. The enquiry draft is approved if two thirds of the P-Members of the respective TC or SC vote in favour and not more than one quarter of the total votes are negative.⁴⁶

If no negative votes were cast the draft can immediately go to publication. Only if it meets the requirements will it be registered as a Final Draft International Standard and reach the approval stage. At this stage it is distributed to all national bodies for a two month voting period. Again it is possible to vote positively, negatively or to abstain. The standard is approved if two thirds of the P-Members voted in favour of it and if no more than one quarter of the total votes were negative. Where the standard does not receive sufficient support a modified version may be resubmitted as a committee, an enquiry or as a final draft. It may be published as a technical specification or the project may be cancelled. In the other case the standard will advance to publication stage, whereby the Secretary General arranges the printing and distribution of the standard.⁴⁷

⁴⁵ Ibid.

⁴⁶ Para 2.6.1-2.6.3 ISO/IEC Directives.

⁴⁷ Para 2.7 and 2.8 ISO/IEC Directives.

3. ISO 26000 – THE CHALLENGES OF SOCIAL RESPONSIBILITY REGULATION AND THE COMMUTATIVE ASPECTS OF COOPERATION

3.1 Introduction

Why did public organisations ultimately cooperate with the ISO? And what were the reasons for the ISO to involve them in the 26000 process and to grant them a particular status which exceeded that of other stakeholders? As outlined in the preceding chapters, in order to answer these questions one has to look at both the individual motives of each organisation as well as their general understanding of the regulatory regime and their particular contribution to it. This section will focus on the first, the commutative benefits involved in the cooperative process. The complexities of the ISO standard setting process and the broad impacts it can have on a variety of different actors has been demonstrated above. It has also been shown how the ‘regular standard setting process’ already incorporates a number of participatory elements for third parties. However, ISO 26000 however is distinct from traditional technical standard setting and comes with a different set of challenges. This type of regulation has clear public policy aspects to it. Nonetheless as social responsibility had become a major factor in corporate governance and many of the ISO’s members had an interest in one model standard which would cover the different obligations originating from a variety of sources, the ISO felt the need to engage in this domain. At the same time public organisations realised that the corporate level was of crucial importance with regard to their mission to protect environmental or human rights and that many of their own instruments had only limited reach in this regard. The situation was thus one where both sides felt that their own regulation was insufficient, yet they individually faced serious challenges to change this condition. In this context cooperation and an exchange of regulatory commodities as described in Chapter 2 was seen as a means to overcome these limitations.

The following sections will further expand the context broadly described in the previous paragraphs. This will be complemented by a detailed overview of the challenges faced by the different organisations and how this has been translated into different forms of regulatory cooperation (3.2). This section will be followed by a detailed analysis of the commutative aspects of the cooperative processes examined here. Of particular relevance are three features:

public legitimacy, expertise of the public organisations involved in the process, and operational capacities and regulatory power of the ISO as a focal institution (3.3).

3.2 Challenges in the Regulatory Process and Cooperation

3.2.1 The Move from Technical to Social Standards and Its Challenges

ISO 26000 is a guidance standard developed to help businesses and organisations to conduct their operations in a ‘socially responsible way’.⁴⁸ The initiative is part of a general movement within the ISO to compliment purely technical standard setting with standards that are designed to facilitate organisations’ operations in a globalised environment. The most prominent standards⁴⁹ in this context are the so-called management systems standards. These standards are designed to help organisations (of any type⁵⁰) implement procedures into their structures in order to meet certain objectives such as, for instance, energy efficiency (ISO 50001 – Energy Management), good environmental performance (ISO 14000 –Environmental Management), quality (ISO 9000 – Quality Management), or food safety (ISO 22000 – Food safety Management).⁵¹ As management standards are intended to lead to continual improvement they are accompanied by regular audits. Finally, most management standards are open for certification by external certifiers (third party certification).⁵²

ISO 26000 falls within this trend. However, even though the ISO lists it under the category of ‘management system standards’ it should be regarded as a standard *sui generis*.⁵³ In contrast to other ISO standards, ISO 26000 is considered to provide guidance and not to constitute a requirement. It is therefore not open for certification.⁵⁴ Furthermore, it has been remarked that in

⁴⁸ See ISO, ‘ISO 26000 – Social Responsibility’, available at: <http://www.iso.org/iso/home/standards/iso26000.htm> (last accessed 22 December 2014).

⁴⁹ See ISO, ‘Standards’, available at: <http://www.iso.org/iso/home/standards.htm> (last accessed 22 December 2014) – section on ‘Popular Standards’ can be found on the bottom of the page.

⁵⁰ ISO phrases this as follows: ‘These standards can be applied to any organisation, large or small, whatever its product or service and regardless of its sector of activity’, see ISO, ‘Management System Standards, *supra* note 7.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ See ISO, ‘ISO 26000 – Social Responsibility’, *supra* note 48.

distinction to other management standards which place greater focus on procedures and less on specific content, ISO 26000 prescribes both and is consequently not only process but also result-based.⁵⁵

The Guidance is intended to ‘regulate’ social responsibility in relation to organisations and consists of seven sections.⁵⁶ Noteworthy in this context are Clauses 4 and 6. The former contains seven overarching principles of social responsibility: accountability; transparency; ethical behaviour; respect for stakeholder interests; respect for the rule of law; respect for international norms of behaviour and respect for human rights.⁵⁷ The latter addresses the core subjects of social responsibility which are: human rights, labour practices, the environment; fair operating practices; consumer issues; community involvement and development.⁵⁸ Each of these subjects is broken down into several sub-issues, such as prevention of pollution in the case of the environment or conditions of work in the case of labour practices.

Furthermore it is important to note that the ISO was not the first to develop SR standards. As mentioned in the introduction, a number of public and private organisations were active, creating norms and rules in one or several areas falling within social responsibility, before the start of ISO 26000.⁵⁹ The ISO therefore understood its mission less as creating something entirely new, but in providing a standard that harmonised and refined other approaches and that was easily implementable.⁶⁰ It thus integrated a variety of public and private stakeholders into the process.⁶¹ In line with its general approach the ISO sees the 26000 standard as representing ‘international

⁵⁵ See J M Diller, ‘Private Standardization in Public International Lawmaking’, 33 *Michigan Journal of International Law* (2012) 481, 485.

⁵⁶ These are: Scope (1); terms and definitions (2); understanding social responsibility (3); principles of social responsibility (4); recognizing social responsibility and engaging stakeholders (5); guidance on social responsibility core subjects (6); guidance on implementing practices of social responsibility (7).

⁵⁷ See ISO 26000:2010 para 4.

⁵⁸ Ibid. para 6.

⁵⁹ E.g. the ILO has been active in creating labour standards since its foundation in 1919. Both the Global Compact with its 10 Principles (see UN Global Compact, ‘The Ten Principles, available at: <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html> (last accessed 22 December 2014)), as well as the OECD with its Guidelines for Multinational Enterprises (see below fn 208) are also active participants in the area for some time.

⁶⁰ ISO, *ISO 26000 Project Overview* (2010), available at: http://www.iso.org/iso/ru/iso_26000_project_overview.pdf (last accessed 22 December 2014) at 3.

⁶¹ See below in section 3.2.1.3.

consensus'. As such it cannot only be applied by private entities but also by the public sector in developed and developing countries.⁶²

3.2.1.1 The Public Policy Domain and the Necessity for Adapted Procedures

A few issues regarding the 26000 standard deserve particular attention. The first concerns the fact that it touches upon the domain of public policy which, traditionally were more or less exclusively regulated by public entities narrowly defined (state or international organisations). There was concern whether private actors such as the ISO should operate in an area where a substantive body of public regulation already exists at all. Janelle Diller for instance criticises the ISO's goal of developing consensus in an area where decisions had already been made by 'publicly convened representative stakeholders'.⁶³ This she states further

present[s] a genuine risk of compromising the public democratic processes based on the rule of law by requiring a new consensus between public actors broadly representing the community and private actors representing various stakeholders concerned⁶⁴

Despite these more general substantive considerations the ISO also faced significant practical challenges from the very outset of the process. As stated above, many commentators have called into doubt the apolitical nature of product standard setting. Such an approach, however, can certainly not be maintained with regards to social responsibility regulation. Since it is a public policy matter it necessarily comes with the challenges of public policy making.⁶⁵ Moreover, as social responsibility is a fragmented domain, the ISO is no longer a quasi 'monopolist' as it is in many areas of product standardisation. It therefore had to accommodate many different public, as well as other private, regulators active in the area. Applying 'consensus ideal' under which the ISO usually operates met significant challenges in this context.

⁶² See ISO, *ISO and Social Responsibility* (2008), available at: <http://www.iso.org/iso/socialresponsibility.pdf> (last accessed 22 December 2014).

⁶³ See Diller, *supra* note 55, at 528.

⁶⁴ Ibid, at 528-529.

⁶⁵ See in this regard *ibid*.

The ISO tried to accommodate these challenges from the early stages of the procedure. The ISO 26000 standard setting process started out in 2001 with an initiative of the ISO Consumer Policy Committee. This was followed by the formation of a multi-stakeholder ISO Advisory Group by the Technical Management Board, which examined the various organisations and programs active in the area of SR regulation.⁶⁶ The Group finally recommended the creation of a guiding standard on social responsibility under certain conditions. Those were in particular the recognition that a social responsibility standard is qualitatively different to previous ISO standards, the respect for existing authoritative public regulation in the field and the political nature of certain issues, proper involvement of the ILO and finally meaningful participation of interested parties.⁶⁷ In 2004 the ISO held a multi-stakeholder conference which endorsed the idea of the ISO becoming active in the area. In the aftermath, the Technical Management Board circulated a New Work Item Proposal⁶⁸ which was in the following adopted by the ISO Members.⁶⁹ A working group on social responsibility (WG SR) was launched with the mandate to develop a social responsibility standard.⁷⁰

3.2.1.2 Actors Involved and Set Up

As stated above the awareness of the special conditions in the area of social responsibility regulation was already an issue from the initial meetings of the Advisory Group. Trying to integrate different constituencies however remained a challenge until the very end of the process. To achieve decent representation six stakeholder groups (industry, government, consumers, labour, NGOs, and a final group including service, support research and others) were formed. Each group was to represent a different cluster of interests within the ISO/WG SR. In total 450 experts participated, joined by 210 observers from ISO Member Countries and 42 liaison organisations.⁷¹ It is important to note is that the creation of ISO 26000 took place within the

⁶⁶ See Recommendations to the Technical Management Board, ISO/TMB AG CSR N32, stating: ‘[T]he Technical Management Board (TMB) approved Resolution 78/2002 establishing the Advisory Group on Social Responsibility’.

⁶⁷ See *ibid.*

⁶⁸ See New Work Item Proposal Guidance on Social Responsibility, ISO/TMB N 26000, 1 October 2004.

⁶⁹ See Table of replies on the New Work Item Proposal Social Responsibility, ISO/TMB N 26000, ISO/TMB/WG SR N 7, 25 February 2005.

⁷⁰ See ISO, *ISO 26000 Project Overview*, *supra* note 60, at 8.

⁷¹ *Ibid.*, at 9.

ISO's general standard setting process (even though in slightly abbreviated form).⁷² This implied that the representatives within the working group (ideally from all six stakeholder groups) were appointed by national member bodies. Other experts were to be nominated from liaison organisations. However only experts nominated by the member bodies had voting rights. Liaison organisations on the other hand were only allowed to submit comments (simultaneously with the voting process) or to formally back the draft.⁷³ Most importantly, only member bodies voted on the final draft.⁷⁴

Another aspect which was intended to increase the number of representatives was the formation of so called 'mirror committees' at the national level. These committees, also grouped into six different categories, were to develop national positions that were then transmitted to the international standard setting process. Naturally those national committees were also created by the national member bodies. Thus, here as in other standard setting processes the sphere of the national members was crucial for the general direction the process took and the final outcome.⁷⁵

For the purpose of better involving representatives of developing countries a support system was set up to which both developed countries as well as multinational companies were asked to donate.⁷⁶ Furthermore, certain management positions, such as the chair of the WGSR as well as participants in other groups of increased importance were designed to follow the 'twinning' principle, which meant the equal inclusion of representatives from developing and developed countries.⁷⁷

⁷² See ISO, 'How Does ISO Develop Standards' available at: http://www.iso.org/iso/home/standards_development.htm (last accessed 22 December 2014).

⁷³ See Diller, *supra* note 55; and H Ward, *The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy*, 2nd, Foundation for Democracy and Sustainable Development (Second Draft, 2010), available at: http://www.fdsd.org/wordpress/wp-content/uploads/ISO26000_and_transnational_democracy_Sept_draft.pdf (last accessed 22 December 2014).

⁷⁴ See ISO, 'ISO Members', *supra* note 22.

⁷⁵ See Diller *supra* note 55, at 492 ff.

⁷⁶ Ibid at 494.

⁷⁷ Ibid at 495.

3.2.1.3 The Drafting Process

As indicated above, the drafting process followed the general ISO standard setting framework with some specifications to meet the specific requirements of the 26000 process.⁷⁸ This standard setting process usually consists of five stages: the preparatory stage, the committee stage, the enquiry stage, the approval stage and finally the publication stage.⁷⁹ The main part of the drafting process usually takes place at the first stage within the Working Group(s) (WG) set up for this purpose. The drafting process in the case of ISO 26000 was immensely complex due to its ambition to be as representative as possible, the necessity of not contradicting public law, combined with the ISO's usual practice of reaching decisions through consensus.⁸⁰ The following paragraphs attempt to provide a concise overview over the different aspects of this complex process. This is necessary as otherwise it will be very difficult to understand the specificities of the involvement of the individual IOs in the process. As such, the structure of the working group must be explained, with its different sub-groups before the different stages of the standard are set out in chronological order.⁸¹

The organisational structure of the WGSR: Responsibility for the overall management of the WG lies with the Chairman. The TMB decided on the chairmanship of the WGSR during its meeting on September 13-14, 2004. Due to the twinning principle the chairs were distributed to Sweden and Brazil who also established the Secretariat of the Working Group.⁸² The Chairs were supported by the so-called Chairmen's Advisory Group (CAG), an institution within the working group, which mainly fulfils advisory functions.⁸³

⁷⁸ See ISO/IEC Directives; the application of the operating procedures was established in Resolution 21 during the first meeting of the Working Group. See Resolutions from the First Meeting of ISO/TMB/WG SR, Salvador, Brazil, 2005-03-07 – 11, ISO/TMB/WG SR N 15, 17 March 2005.

⁷⁹ See above at 2.2.2.

⁸⁰ See Resolution 22 as reprinted in Resolutions from the first meeting of ISO/TMB/WG SR, Salvador, Brazil, 2005-03-07 – 11, *supra* note 78; Diller, *supra* note 55, at 505 ff.

⁸¹ As stated in *supra* note 3, ISO has published the documents of the 26000 process online. From the first steps to the Final Draft International Standard several hundred documents are published, which are in the complemented by numerous minutes of meetings and resolutions etc. In order to be able to understand and structure this information in its chronological and logical order, the very detailed description made by Diller, *supra* note 55 were relied upon.

⁸² See ISO Strategic Advisory Group (SAG) on SR: Update Briefing #9: October 2004, available at: http://www.iisd.org/pdf/2004/standards_csr_briefing_9.pdf (last accessed 22 December 2014).

⁸³ See Proposal for the Organizational Structure of and Terms of Reference for the ISO/TMB/WG Social Responsibility, ISO/TMB/WG SR N 3, 20 January 2005, at 3. The CAG consisted of the two chairs and the two

The structure of the WGSR consisted of the so-called Task Groups (TGs) (of which there were twelve in total). Those were allocated specific tasks in the standard drafting process and therefore comprised experts in their respective fields. Each TG had a Convenor and a Secretary which was nominated by the Group's members. Five TGs were responsible for the translation into commonly spoken languages such as Spanish or French.⁸⁴ TGs 1 and 2 were concerned with Funding and Stakeholder Engagement as well as Communication.⁸⁵ TGs 3-6 were directly entrusted with the standard setting process.⁸⁶

Within TG5, which was responsible for identifying core SR issues, seven SR issues were identified: Organisational governance, environment, human rights, labour practices, fair operating practices, consumer issues and community involvement/society development.⁸⁷ Those issues were then distributed to four *ad hoc* core issues groups or drafting teams.⁸⁸ In order to process the outputs of the different groups and teams in an integrated manner, an Integrated Drafting Task Force was created.⁸⁹ At a later stage the Editing Committee was responsible for the review and the editing of the draft versions of the 26000 standard.⁹⁰

secretaries, the task group convenors, two representatives (ideally following the twinning principle) nominated by each stakeholder group, and possibly additional representatives appointed by the chair to ensure the balance (eg regarding regional distribution or gender) of the Group.

⁸⁴ For more information on the different task forces and their respective mandates visit the ISO Platform on Social Responsibility – Working Area – available at: <http://isotc.iso.org/livelink/livelink?func=ll&objId=3935837&objAction=browse&sort=name> (last accessed 22 December 2014).

⁸⁵ See Proposal for the Organizational Structure of and Terms of Reference for the ISO/TMB/WG Social Responsibility, *supra* note 83, 4.

⁸⁶ Ibid. which states that TGs 3-7 have the tasks of '[d]rafting [the] designated clauses according to Design specification' and '[r]evise and review drafts based on comments received'. TG3 with the operational procedures, TG4 with scope, SR context & SR principles, TG5 with guidance on core SR subjects/issues, and TG6 for guidance for organisations on implementing SR.

⁸⁷ See Resolutions from the 4th meeting of ISO/TMB/WG SR, Sydney, Australia 2007-01-29 — 2007-02-02, ISO/TMB/WG SR N 107, 2 February 2007, Resolution 3.

⁸⁸ See *ibid.* Resolution 4.

⁸⁹ See Resolutions from the 5th Meeting of ISO/TMB/WG SR, Vienna, Austria, 2007-11-05—09, ISO/TMB/WG SR N 132, 11 September 2007, Resolution 2. This institution consisted of the convenors and co-convenors of Standard Setting TGs, two experts from each stakeholder category (as far as possible following the twinning concept), one representative from the Editing Committee, one expert from ILO (in accordance with MoU), one expert from UNGC (in accordance with MoU), one representative of the ISO Central Secretariat, and finally two Secretaries, appointed by the WG SR Chairs.

⁹⁰ See Proposal for the Organizational Structure of and Terms of Reference for the ISO/TMB/WG Social Responsibility, *supra* note 83, at 5.

Finally, additional *ad hoc* groups were established at different stages of the process and at different levels of the WG structure depending of the necessity for further input or expertise.⁹¹

The Different Stages of the ISO 26000 Standard: After the decision to adopt the New Work Item Proposal and the creation of the WGSR, the ISO officially commenced the drafting process of the ISO 26000 standard. This process consisted of two major elements. The first are the different stages of the ISO 26000 draft consisting of drafting phases followed by several comment periods for comments. The second element consisted of a number of meetings where more fundamental decisions concerning the directions of the WGSR were taken.⁹² In total eight meetings took place over a period of five years.

At the beginning of the development process was the so-called design phase which led to a Proposal for Design Specification,⁹³ the first document which provided a full outline of the prospective content of ISO 26000.⁹⁴ Comments received from stakeholders on the proposal were addressed by an *ad hoc* group established for this purpose.⁹⁵ Another *ad hoc* group was then entrusted with writing a revised draft. The New Proposal, adopted in September 2005⁹⁶ contained seven categories (scope, normative references, terms and definitions, SR context in which organisations operate, SR principles relevant to organisations, guidance on core SR subjects/issues, and guidance on implementation) as well as an annex which provided guidance to the drafters.⁹⁷

This preliminary stage was followed by the drafting stage within the respective task groups. From 2006 until 2008, five working drafts were generated (given that the fourth stage was

⁹¹ See Resolutions from the Second Meeting of ISO/TMB/WG SR, Bangkok, Thailand 2005-09-26--30, ISO/TMB/WG SR N 50, 30 September 2005, Resolution 3 & 4, and see Diller, *supra* note 55, at 506.

⁹² See, e.g. Draft Resolutions from the 7th meeting of ISO/TMB/WG SR, Quebec, Canada, 2009-05-18—22, ISO/TMB/WG SR N 170, 23 May 2007.

⁹³ Diller, *supra* note 55, at 505.

⁹⁴ ISO Guidance Standard on Social Responsibility – ISO 26000, Proposal for Design Specification, Proposal for Design Specification, ISO/TMB/WG SR N 31.

⁹⁵ Diller, *supra* note 55, at 506.

⁹⁶ Ibid. See ISO Guidance Standard on Social Responsibility – ISO 26000 – Design Specification, ISO/TMB/WG SR N 49, 30 September 2005.

⁹⁷ Ibid.

divided into two parts,⁹⁸ each of which was followed by a comment period. The structures of the different drafts were very much based on the design proposal but started to change significantly towards the later versions. Thus Draft Version 4.2 consisted of the following areas: scope, terms and definitions, understanding social responsibility, principles of social responsibility, recognising social responsibility and engaging stakeholders, guidance on social responsibility core subjects, guidance on implementing practices of social responsibility⁹⁹ – a development since the design proposal is clearly visible here.

After the different working draft versions, ISO 26000 reached the stage of the committee draft.¹⁰⁰ This is the stage where the draft leaves the working group and enters the committee level, where it will be circulated together with the comments it received among the ISO members represented within the Technical Committee. These members can either vote in favour and thus ensure the draft advances to the next stage; or require the creation of a new version to be put to vote again. At this level as throughout the whole process consensus was required.¹⁰¹ It should be noted however that ‘in case of doubt concerning consensus, approval by a two-thirds majority of the P-members of the technical committee or subcommittee voting may be deemed to be sufficient for the committee draft to be accepted for registration as an enquiry draft’.¹⁰² As a result support by two-thirds of full ISO members represented in the TC was necessary and could also be obtained.¹⁰³

The final stages which ISO 26000, just like any other ISO standard, went through were the enquiry stage (as draft international standard (DIS))¹⁰⁴ and the approval stage (as final draft

⁹⁸ Guidance on Social Responsibility, ISO /TMB/WG SR N 55, 28 March 2006; Guidance on Social Responsibility – Working Draft 2, ISO TMB /WG SR N 80, 6 October 2006; Guidance on Social Responsibility – Working Draft 3, ISO/TMB/WG SR N 113, 23 July 2007; Guidance on Social Responsibility – DRAFT ISO 26000 WD4.1, ISO/TMB/WG SR N 137, 11 March 2008; Guidance on Social Responsibility - DRAFT ISO 26000 WD4.2, ISO/ TMB WG SR N 143, 2 June 2008.

⁹⁹ See Guidance on Social Responsibility - DRAFT ISO 26000 WD4.2, *supra* note 98.

¹⁰⁰ Guidance on Social Responsibility – Committee Draft, ISO/TMB WG SR N 157, 12 December 2008

¹⁰¹ See para. 2.5.6 ISO/IEC Directives.

¹⁰² Ibid.

¹⁰³ See Result ISO/CD 26000, Guidance on Social Responsibility, ISO/TMB/WG SR N 160, 25 March 2009. It is important to note, that the decisions made by the Members were to reflect also the opinions of the representatives of the six stakeholder groups.

¹⁰⁴ See Guidance on Social Responsibility – Draft International Standard ISO/DIS 26000, ISO/TMB/WG SR N 172, September 2009.

international standard (FDIS)).¹⁰⁵ At the enquiry stage the standard was forwarded by the Central Secretariat (the Secretary General) to all national bodies, which were given a period of three months to vote on the draft. Members were able and partly obliged to make technical or editorial comments. At the approval stage, all members were asked to vote again, but only those voting against it were to provide reasons for this. According to Diller, the ISO managed to improve support for the standard significantly between the two stages.¹⁰⁶ Reasons for a negative vote in the first case were manifold and concerned regional and cultural reservations, trade considerations, as well as the perception that the standard could go further than it did.¹⁰⁷ Generally, during the transition from the Technical Committee to the enquiry and approval stage a certain element of politicisation can be observed; as is also the case where several members changed their support in the latter stages.¹⁰⁸ However, as stated above, in the end the standard achieved the necessary two-thirds majority and was adopted.

3.2.2 The Involvement of Public Organisations in the 26000 Process

Three public international organisations were particularly involved in the ISO 26000 standard setting process. Their involvement was framed by Memoranda of Understanding concluded with the ISO. Those organisations were the ILO, the UN Global Compact (which represented the wider UN System (except the ILO of course)), as well as the OECD.

¹⁰⁵ This standard is not made public, as ISO sells its standards and the FDIS is very close to the final product.

¹⁰⁶ See Diller, *supra* note 55, at 509; the approval rate in the DIS was 56 votes in favour and 18 negative votes (see ISO DIS 26000, Result of Voting, ISO/TMB/WG SR N 175, February 2010); for the FDIS it was 66 votes in favour and 5 negative votes (see ISO/FDIS 26000 – Result of Voting, ISO/TMB/WG SR N 196, September 2010). Importantly, when calculating the percentage of the P-Members in favour, abstentions are not included. They are, however, when determining the percentage of the votes against the standards.

¹⁰⁷ Diller, *supra* note 55, at 509 ff.

¹⁰⁸ Interview with Kevin McKinley (ISO), 25 February 2013. Examples of these changes and ‘political’ reservations are outlined by Diller, *supra* note 55, at 509, who also refers to H Ward, ‘The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy’, 12 *Theoretical Inquiries in Law* (2011) 665, at 699 ff.

3.2.2.1 ILO

a) General Information on the ILO

The ILO was created in 1919 as part of the Treaty of Versailles. The underlying assumption was that peace was dependent on social justice as a necessary foundation.¹⁰⁹ In its first year the ILO adopted six international labour conventions. During World War II the ILO Constitution was extended by the Philadelphia Declaration and the ILO was integrated into the United Nations system as a specialised agency. In the second half of the 20th century the ILO was transformed by the increase in membership of developing countries, which today outnumber developed countries. The ILO was also, however, troubled by a Cold War blockade. Nonetheless, over time the ILO has created a system of more than 160 labour standards which are ‘aimed at promoting opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and dignity’.¹¹⁰ More recently it has focussed on the promotion of a fair globalisation as well as on helping to achieve the UN Millennium Development Goals.¹¹¹

As an international organisation the ILO is of course first and foremost comprised of states. At the moment the ILO has 183 member states, making it one of the most encompassing international organisations. However, specifically the ILO follows a tri-partite structure. This means that it includes employer and worker representatives as well as government delegates. Workers are represented through ‘free trade unions’, which are defined as ‘democratic, self-organizing institutions of working people wishing to advance their rights as workers and citizens’. Employers are grouped into employers’ organisations, which are ‘institutions set up to organize and advance the collective interests of employers’.¹¹² The ILO consists of three main bodies: the General Conference, the Governing Body, and the International Labour Office

¹⁰⁹ See Preamble to the ILO Constitution, 1 April 1919, available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO (last accessed 22 December 2014).

¹¹⁰ See ILO, ‘Introduction to International Labour Standards’, available at: <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/lang--en/index.htm> (last accessed 22 December 2014).

¹¹¹ See ILO, ‘Origin and History’, available at: <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (last accessed 22 December 2014).

¹¹² Information and quotes taken from ILO, ‘Tripartite Constituencies’, available at: <http://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.htm> (last accessed 22 December 2014).

(which is controlled by the Governing Body)¹¹³ – which all follow the tri-partite structure as outlined above.

The main task of the ILO is the promotion and realisation of international labour standards.¹¹⁴ Apart from this the ILO is also engaged in the ‘formulation of international policies and programmes to promote basic human rights, improve working and living conditions, and enhance employment opportunities’. It is furthermore engaged in technical cooperation, research and information distribution.¹¹⁵ It is in this context that it also cooperates with organisations such as the ISO.

As the standard setting processes constitute the core domain of the ILO it should be given a closer look at this point: labour standards are either conventions or recommendations. Conventions are legally binding international treaties whereas recommendations (as the name indicates) constitute non-binding guidelines. They often (but not exclusively) supplement conventions, to which they provide details regarding implementation.¹¹⁶

Labour standards are complemented by another instrument, namely declarations: ‘[d]eclarations are resolutions of the International Labour Conference [and the Governing Body] used to make a formal and authoritative statement and reaffirm the importance which the constituents attach to certain principles and values.’¹¹⁷ There are older declarations such as the Philadelphia Declaration mentioned above, however, a number of important declarations are more recent. They in particular try to address the challenges the ILO is facing in a globalised context. The ILO is also affected by the changing role of the state and the increase in trade and private economic power. There has been a debate on whether labour standards could and should be

¹¹³ See Article 2 of the ILO Constitution.

¹¹⁴ See ILO, ‘Mission and Objectives’, available at: <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> (last accessed 22 December 2014).

¹¹⁵ H Sauer, ‘International Labour Organization’, in: *Max Planck Encyclopaedia of Public International Law* (OUP, 2010), available at: <http://opil.oup.com/home/epil> (last accessed 22 December 2014) para 32.

¹¹⁶ ILO, ‘Conventions and Recommendations’ available at: <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (last accessed 22 December 2014). Both instruments can be found on the ILO Website: <http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:0::NO::> (last accessed 22 December 2014).

¹¹⁷ See ILO, ‘ILO Declarations’, available at: <http://www.ilo.org/public/english/bureau/leg/declarations.htm> (last accessed 22 December 2014)

integrated with trade regulation in order to use more effective sanctioning systems such as those in place under the umbrella of the WTO. Even though the EU and other countries have implemented labour conventions or social standards in their trade relationships,¹¹⁸ the general approach was rejected.

Against this background the ILO adopted several declarations itself which deal with the challenges outlined above. One is the Declaration on Fundamental Principles and Rights at Work (1988) where it declares eight ILO conventions as fundamental as they reflect core principles and rights at work. Four conventions are of specific relevance with regard to the functioning and the application of labour standards. Those are the ‘Governance Conventions’ and member states are encouraged to ratify them in order to support the general functioning of the labour standard system.¹¹⁹ Other declarations more directly address the impacts of global transformations such as the 2008 Declaration on Social Justice for a Fair Globalization, or the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977, last revised 2006). There is particular overlap between the content of the declarations just listed (and the conventions they refer to) and the ISO 26000 standard.

b) The ILO’s Participation in the ISO 26000 Process

Given these overlaps, and particularly its traditional status as ‘the’ international organisation dealing with labour law and politics, the ILO was of course suited for involvement in the 26000 process. And indeed its engagement started at a very early stage. The Advisory Group on Social Responsibility, which was established by the Technical Management Board to determine whether and in what framework the ISO should engage in the field of social responsibility, stressed the importance of the ILO and labour standards for the process.¹²⁰ This was in particular reflected in the condition that the ISO should only proceed with the standard setting process if it

¹¹⁸ See Sauer, *supra* note 115, at para 31.

¹¹⁹ ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, Adopted by the International Labour Conference at its Eighty-sixth Session, 18 June 1998 (Annex revised 15 June 2010) at para 2. Those core principles are: ‘Freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation’. And see furthermore, Sauer, *supra* note 115, at para 32.

¹²⁰ See above at section 3.2.1.

‘recognizes through a formal communication the ILO's unique mandate as the organization that defines, on a tripartite basis, international norms with respect to a broad range of social issues’.¹²¹ Upon this recommendation the TMB adopted Resolution 35/2004 where it confirmed that it ‘recognizes the instruments adopted by global inter-governmental organizations (such as the United Nations Universal Declaration of Human Rights, international labour conventions and other instruments adopted by ILO and relevant UN conventions)’¹²² and further states in the New Work Item Proposal that:

it is necessary to consider the activities of other bodies that have developed or are developing SR standards, norms, guidelines and tools. United Nations (Global Compact) and other inter-governmental organizations, eg ILO, OECD, UNHCR and UNEP, would need to be included in the process, in view of the fact that they already have or are developing international standards.¹²³

On 4th March 2005 the ISO concluded a Memorandum of Understanding with the ILO.¹²⁴ The WGSR which had its first meeting only after the conclusion of the MoU promptly adopted Resolution 29 wherein it was stipulated that:

The WG recognized the special status of ILO as reflected in the MoU signed between ILO and ISO on 4 March 2005 ...; specifically, the leadership of the WG as well as of any of its subgroups will consult ILO when starting their work and regularly thereafter (at the different drafting and circulation stages) to identify early on any ILO issues that may come up and thus ensure the effective and timely implementation of article 1.2, 2.1 through 2.4, 6.1 and 6.2 of the MoU.¹²⁵

¹²¹ Recommendations to the ISO Technical Management Board, ISO/TMB AG CSR N32, April 2004, at 1. See furthermore the Working Report on Social Responsibility, Prepared by the ISO Advisory Group on Social Responsibility, 30 April, 2004, available at: http://iso26000.jsa.or.jp/_files/doc/2004/sagreport_eng.pdf (last accessed 22 December 2014) which outlines the overlaps between the ILO Framework and a possible standard on social responsibility in more detail.

¹²² ISO/TMB Resolution 35/2004, which is reprinted in part in: New Work Item Proposal Guidance on Social Responsibility, ISO/TMB N 26000, 1 October, 2004.

¹²³ New Work Item Proposal Guidance on Social Responsibility, *supra* note 122.

¹²⁴ See Memorandum of Understanding between the International Labour Organization and the International Organization for Standardization in the Field of Social Responsibility, ISO/TMB/WG SR N 18, 4 March 2005 (hereinafter: MoU ILO/ISO).

¹²⁵ Resolution 29, reprinted in Resolutions from the First Meeting of ISO/TMB/WG SR, Salvador Brazil 2005-03-07 – 11, *supra* note 78, at 7, quote taken from Diller, *supra* note 55, at 500.

The MoU mentioned in the Resolution has a number of highly remarkable provisions which frame ILO's role in the ISO 26000 process. First, the MoU sets out the relationship between both ILO standards and the ISO 26000 Guidelines. It opts for a certain hierarchy whereby in situations where labour issues are concerned ILO standards will prevail. This is determined by two provisions in particular:

That any guidance or other ISO International Standard to be developed in the area of social responsibility, which implicates ILO issues will be fully consistent with the object and purpose of the provisions of international labour standards incorporated in ILO instruments, and their interpretation by the competent bodies of the ILO and in no way detract from the provision of those standards, ...¹²⁶

and:

That international labour standards adopted by the ILO will take priority in any case of conflict in the context of development, and of any promotion, support, evaluation and approval, or periodic review of any ISO International Standard in the field of SR, as well as in any case of conflict involving ILO issues with any private initiative with which ISO may collaborate in the context of this Standard;¹²⁷

Moreover, in the process of standard creation 'the provisions of ILO instruments [will] serve as the authoritative and definitive source of reference, and minimum base line for any elements which relate to international labour standards'.¹²⁸ Furthermore, it is provided that the ISO's activities should not interfere in labour issues 'that should only be resolved through representative political or legal processes'.¹²⁹

Secondly, the MoU regulates the ILO's participation in the standard setting process. Regarding the working and task group level, before any proposed text is circulated for review within one of these groups, the ILO can decide in consultation with the ISO whether ILO issues are concerned

¹²⁶ Article 2.1 MoU ILO/ISO.

¹²⁷ Article 2.3 MoU ILO/ISO.

¹²⁸ Article 6.1 MoU ILO/ISO.

¹²⁹ Article 2.4 MoU ILO/ISO such processes would be identified through consultation between the parties.

(and if this is the case review the proposed text and possibly comment on it). If comments are provided those have to be circulated with the text for review by the relevant group.¹³⁰ A similar process is foreseen in the later stages of the standard setting process. According to the MoU:

[a]ny committee or enquiry draft or final draft International Standard (CD, DIS, FDIS) will be subject of a pre-circulation process seeking full and formal backing of the ILO relating to any of the elements in such draft standard that implicate ILO issues prior to circulation for vote and/or comment of any such draft Standard...¹³¹

and further:

In the event ILO does not provide the backing ... ILO's comments on such draft Standard will be circulated, together with the draft Standard (CD, DIS, FDIS), to all statutory ISO members, to the D-liaison organizations in the SR Working Group and to the Technical Management Board prior to submission to a vote by any ISO body¹³²

Thirdly, the MoU specifies ILO's involvement in the standard setting process. Article 5 of the MoU establishes the general right of participation for the ILO in the ISO 26000 process by stating that:

... ISO will provide, within the Working Group on SR including all of its subgroups, and all other ISO bodies concerned with any ISO International Standard in the field of SR, for full participation by the ILO and, through the appropriate ISO mechanisms, by its tri-partite constituency, at ILO's request.¹³³

The concrete arrangements of this participation are clarified throughout the MoU. As outlined above, Article 2 sets the out the comment procedure, by which the ILO can intervene in different stages of the standard setting process in labour matters. Furthermore, Article 6.2 foresees that the

¹³⁰ Article 2.1.1 MoU ILO/ISO.

¹³¹ Article 2.1.2 MoU ILO/ISO.

¹³² Article 2.1.3 MoU ILO/ISO.

¹³³ Article 5 MoU ILO/ISO.

ILO will share its expertise regarding its own labour instruments and there will be regular consultations (Article 4) and exchange of information (Article 3) in relation to the MoU.

Finally, the MoU does not only look at the contribution of the ILO to the ISO, but it also provides stipulations that are concerned with the ISO's role in supporting labour standards. Article 2.2.1 therefore states that the 'ISO activities and/or publications... will [f]acilitate greater awareness and wider observance of international labour standards ...'¹³⁴ However, perhaps even more interesting is Article 2.2.2 which states that the same activities or publications should 'complement the role of governments in ensuring compliance with international labour standards'. In this case clearly one of the motivations pursued by the ILO in the process shines through, namely the increase in the effectiveness of the ISO's own instruments with the help of the private actor. We will return to further examine the ILO's motivations for engaging in the process below. But first it is necessary to ask how these provisions were applied in the actual processes of ISO 26000.

Of particular interest in this regard is the commenting practice, specifically whether the ILO had an almost veto-like power regarding labour issues that the MoU suggested. The first comments the ILO submitted shortly after having signed the MoU concerned preliminary work such as a first draft of the Interim Task Group 5 on core context issues.¹³⁵ Of particular relevance here, however, are the comments on draft versions of ISO 26000 and their subsequent implementation. From the second working draft, the ILO regularly submitted comments. At the beginning those were circulated separately from the other stakeholder's feedback. From the Committee Draft Stage onwards they were compiled with the other comments.¹³⁶ Implementation was difficult to follow during the first stages as the specific draft versions changed significantly due to the extensive work within the task groups. Therefore the comments that the ILO provided at that stage are better understood as suggestions for the next drafting period. In particular the ILO was

¹³⁴ Article 2.2.1 has to be read in combination with Article 2.2 MoU ILO/ISO.

¹³⁵ Draft ITG 5 SR Core Context Issues Paper, Version3, ISO/TMB/WG SR N 21, 30 June 2005.

¹³⁶ For the comments provided by ILO to the different draft versions see under 'projects' in the archive of the ISO 26000 process, available at: <http://isotc.iso.org/livelink/livelink?func=ll&objId=3974907&objAction=browse&viewType=1> (last accessed 22 December 2014).

involved in several task groups, such as TG 1,¹³⁷ the Integrated Drafting Task Force;¹³⁸ as well as TG 4¹³⁹ and TG5¹⁴⁰ which were predominantly charged with the drafting process. Towards the later stages, changes became more specific and thus the WGSR Secretariat clearly stated whether it would implement a comment or not.¹⁴¹ Even though this was not always the case, the ILO finally backed the FDIS stating that it does not appear to conflict with international labour standards whilst stressing the need for further post-publication cooperation.¹⁴²

3.2.2.2 *The Global Compact and the Wider UN System*

a) The Global Compact and the Ruggie Process

The Global Compact: The Global Compact (GC) with its ten universally accepted principles in the area of human rights, labour, environment and anti-corruption, targets, as the 26000 standard does, global business activities.¹⁴³ The GC was therefore included in the ISO 26000 process from an early phase. Moreover, apart from representing its own regime the GC was also entrusted with addressing concerns of other UN agencies.¹⁴⁴

The Global Compact was launched by Kofi Annan in an address to the business community at the World Economic Forum in 1999.¹⁴⁵ It is designed as a ‘strategic policy initiative’ for business, and has been endorsed by business leaders who agreed to submit their practices under the Global Compacts so called ‘ten universally accepted principles’. The GC today is the largest voluntary corporate citizenship and sustainability initiative in the world with over 10,000

¹³⁷ ISO/TMB Working Group on Social Responsibility – Task Group I, Funding and Stakeholder Engagement, ISO/TMB/WG SR/TG1 N 02, 12 December 2005.

¹³⁸ Minutes, Constitution of Integrated Drafting Task Force, IDTF, Annex A, ISO/TMB/WG SR, 15 November 2007.

¹³⁹ List of Experts and Observers, ISO/TMB WG SR TG 4, 14 March 2006.

¹⁴⁰ Composition of ISO/TMB/WG SR TG 5 on 23rd May 2006, 23 May 2006.

¹⁴¹ See Comments Received on ISO/CD 26000 (WG SR N 157), ISO/TMB/WG SR N 161, 25 March 2009.

¹⁴² Comments of the International Labour Office for Circulation with ISO/FDIS 26000:2010(E), ISO/TMB/WG SR N 194.

¹⁴³ UN Global Compact, ‘Overview of the UN Global Compact’, available at: <http://www.unglobalcompact.org/AboutTheGC/index.html> (last accessed 22 December 2014).

¹⁴⁴ Article 2.2 of the Memorandum of Understanding between the United Nations Global Compact Office and the International Organization for Standardization (ISO), ISO/TMB/WG SR N 82, 9 November 2006 (hereinafter: MoU GC/ISO).

¹⁴⁵ See R Khan, ‘Global Compact’ in: *Max Planck Encyclopaedia of Public International Law* (OUP, 2011), available at: <http://opil.ouplaw.com/home/epil> (last accessed 22 December 2014).

participants from 135 countries. Its two main complementary objectives are to '[m]ainstream the ten principles in business activities around the world' and to 'catalyze actions in support of broader UN goals, including the Millennium Development Goals'.¹⁴⁶

The GC operates as a network in which different participant and stakeholder groups cooperate. At the core of the initiative one finds the Global Compact Office and seven UN agencies. Other groups are business and labour associations, NGOs, public sector and city representative as well as academic participants.¹⁴⁷

The GC has a distinct governance structure compared to the other international organisations presented here. It constitutes a policy initiative in a network-structure that is embedded within the UN system.¹⁴⁸ Therefore its governance structure is intended to be 'light, non-bureaucratic and designed to foster greater involvement in, and ownership of, the initiative by participants and other stakeholders themselves'.¹⁴⁹ It does not consist of the typical bodies that can be found in other regulatory organisations. However, certain components are in place to guarantee the functioning on the GC network. In total the GC is comprised of seven governance entities, each pursuing a different role in the GC framework.¹⁵⁰

The main requirement under the Global Compact addresses business participants. They have to adhere to and promote human rights, fair labour practices as well as environmental protection, enshrined in the ten principles.¹⁵¹ For that purpose they are to draft an annual Communication on Progress (CoP). This Communication is directed at the stakeholders of the respective company and outlines the progress the company made regarding the GC Ten Principles and the UN Development Goal. The aim of this disclosure is to create transparency that provides

¹⁴⁶ UN Global Compact 'Overview of the UN Global Compact', *supra* note 143.

¹⁴⁷ Ibid, The seven UN Agencies are: The Office of the High Commissioner for Human Rights (OHCHR), the ILO, the United Nations Environment Programme (UNEP), the United Nations Office on Drugs and Crime (UNODC), the United Nations Development Programme (UNDP), the United Nations Industrial Development Organization (UNIDO), the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women).

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ These are the Board, the Global Compact Leader Summit, Local Networks, the Global Compact Office, an Inter-agency team including the UN organisations and finally the Donor Group.

¹⁵¹ See Khan, *supra* note 145.

stakeholders with the information they need to ‘make informed choices about the companies they interact with, whether as consumers, investors, or employees’.¹⁵² Therefore, one requirement for business participants is that the Communication is published on the GC’s website.¹⁵³ Generally there is no required template which participants have to follow when drafting the communication.¹⁵⁴ That said, there are certain minimum requirements regarding the content of the publication. First, each CoP must contain a statement by the CEO which expresses ‘continued support for the Global Compact and renewing the participant's ongoing commitment to the initiative and its principles’.¹⁵⁵ Furthermore, the company has to describe within the Communication which activities it has undertaken to implement the ten principles in each of the issue areas – human rights, labour, environment and anti-corruption. Finally, the outcomes of those activities are to be measured, including, for example, the degree to which the targets previously set were met.¹⁵⁶

The GC has also faced criticism. The most notable criticism is probably the question regarding the actual impact of the ten principles and the reporting scheme. Some NGOs have accused the GC of facilitating green- and blue-washing.¹⁵⁷

The Ruggie Process: The so-called Ruggie Process is not directly linked to the UN Global Compact.¹⁵⁸ It was in fact initiated by the UN Human Rights Council who requested the Secretary-General to appoint a Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises.¹⁵⁹ Professor John Ruggie, who was

¹⁵² See UN Global Compact, ‘How are COPs Used?’ available at:

https://www.unglobalcompact.org/COP/analyzing_progress/index.html (last accessed 22 December 2014).

¹⁵³ The annual CoPs can be found here: <https://www.unglobalcompact.org/participants/search> (last accessed 22 December 2014).

¹⁵⁴ There is, however, a pattern available as well as guidelines for the different levels of reporting. The pattern can be found here: http://www.unglobalcompact.org/COP/communicating_progress/basic_cop_template.html (last accessed 22 December 2014); the Guide and other reporting tools are available under the following link: http://www.unglobalcompact.org/COP/communicating_progress/reporting_tools.html (last accessed 22 December 2014).

¹⁵⁵ See UN Global Compact, ‘Policy on Communicating Progress’, Version of 25 February 2011, available at: http://www.unglobalcompact.org/docs/communication_on_progress/COP_Policy_Feb11.pdf. (last accessed 22 December 2014) [emphasis omitted].

¹⁵⁶ Ibid.

¹⁵⁷ See Khan, *supra* note 145, at para 20 ff.

¹⁵⁸ Ward, *supra* note 108, at 695 ff.

¹⁵⁹ Office of the High Commissioner for Human Rights, Human Rights and Transnational Corporations and Other Business Enterprises, Human Rights Resolution 2005/69, 20 April 2005.

given this task initially three years, proposed the ‘protect, respect and remedy framework’.¹⁶⁰ According to this framework, the state has a duty to protect human rights whereas business has a responsibility to respect them. Finally, victims of violations should have greater access to an effective remedy.¹⁶¹ Subsequently the Human Rights Council extended the mandate of the Special Representative for another three years until 2011.¹⁶² Within this second term Professor Ruggie and his team developed the ‘Guiding Principles on Business and Human Rights’.¹⁶³ Following an online consultation held by the Special Representative and a number of comments submitted by different actors,¹⁶⁴ the Principles were endorsed by the Human Rights Council.¹⁶⁵

Despite this independence there is a connection between the two initiatives.¹⁶⁶ For this reason UNGC and the Special Representative published an explanatory note which outlines their relationship.¹⁶⁷ Therein it is specifically stressed that the:

UN Protect, Respect and Remedy framework provides further operational clarity for the two human rights principles championed by the Global Compact. Principle 1 calls upon companies to

¹⁶⁰ See Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/5, 7 April 2008.

¹⁶¹ See Business and Human Rights Resource Centre, ‘UN "Protect, Respect and Remedy" Framework’, available at: <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework> (last accessed 22 December 2014).

¹⁶² Human Rights Council, ‘Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/RES/8/7, 18 June 2008.

¹⁶³ Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/31, 21 March 2011.

¹⁶⁴ See Special Representative of the United Nations, Secretary-General for Business & Human Rights, Public Consultation on Draft U.N. Guiding Principles for Business and Human Rights Attracts Input from 120 countries - Submissions from Wide Range of Stakeholders to Inform Final Recommendations, 2 February 2011, available at: <http://www.business-humanrights.org/media/documents/ruggie/public-consultation-on-guiding-principles-press-release-2-feb-2011.pdf> (last accessed 22 December 2014); and Business and Human Rights Resource Center, UN "Protect, Respect and Remedy" Framework > Guiding Principles > Submissions to Consultation on Draft Guiding Principles, available at: <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions> (last accessed 22 December 2014).

¹⁶⁵ Human Rights Council, Seventeenth Session, Agenda Item 3, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, A/HRC/RES/17/4, 6 July 2011.

¹⁶⁶ Ibid.

¹⁶⁷ See UNGC and UN Office of the High Commissioner of Human Rights, ‘The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments’, July 2011 (updated June 2014) available at: https://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf (last accessed 22 December 2014).

respect and support the protection of internationally proclaimed human rights; and Principle 2 calls upon them to ensure that they are not complicit in human rights abuses.¹⁶⁸

Based on this the clarification of the effect that the ‘protect, respect and remedy framework’ has on the UNGC, a number of additional (more specific) effects were detected. First, the principle of ‘due diligence’ should be used by companies in order to fulfil their obligations to respect human rights. In particular, the principle is said to help companies to ‘become aware of, prevent and address adverse human rights impacts linked to their activities’.¹⁶⁹ Another important concept that both the GC and the Ruggie Process expanded on is the ‘sphere of influence’. This concept is designed to be particularly useful with regard to the voluntary support of human rights by companies. Here the concept of ‘sphere of influence’ can ‘help map the scope of a company’s opportunities to support human rights and make the greatest positive impact’.¹⁷⁰ Accordingly, companies have most opportunities to support human rights among their own workers, for example. Yet the more they move outwards, to workers in the supply chain or to communities, the smaller the ability to support human rights becomes.¹⁷¹

In sum, the GC cannot be seen as entirely independent from the ‘protect, respect and remedy framework’. There have been inter-linkages from the beginning and both initiatives have benefited from each other.

b) Involvement of the Global Compact and the Special Representative in the ISO 26000 Process

Global Compact’s Involvement: As in the case of the ILO, cooperation was fixed through a MoU, signed at an early stage of the standard setting process.¹⁷² Even though similar at the outset, there were some important differences between both agreements. The GC-ISO MoU stipulates that ISO 26000 ‘needs to be consistent with the United Nations Global Compact and

¹⁶⁸ See *ibid.*

¹⁶⁹ See UNGC, ‘UN Framework and the Global Compact’, available at: http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html (last accessed 22 December 2014).

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² MoU GC/ISO.

its ten universal principles'.¹⁷³ It furthermore foresees participation of the GC in the working group (and subgroups) responsible for ISO 26000.¹⁷⁴ The GC is also granted the right to submit comments to the different draft versions which will be circulated to the respective participants in the process at the same time as the draft version.¹⁷⁵ Finally, the ISO also '[sought] the full and formal backing' of the GC for the FDIS,¹⁷⁶ and in case this was not provided GC's comments were to be circulated to all relevant actors, in particular ISO members.¹⁷⁷ Peculiar, however, is the wording in the case of the GC/ISO MoU which does not have the same strong language. This might be due to the 'principle character' of the GC's instrument, which makes it less easy adequate to be considered an 'authoritative and definitive source of reference'. Furthermore, in the GC/ISO MoU there are no provisions which emphasise a particular role of the ISO in the support of the GC's agenda. Thus the status of the GC was closer to that of a D-Liaison organisation (the regular status under which third party organisations can participate in ISO Working Groups) than that of the ILO.¹⁷⁸ Nonetheless, the GC was as actively involved as the ILO. It regularly commented on draft versions (even though its comments were always compiled with the feedback of other organisations).¹⁷⁹ Furthermore, it participated in different task groups such as TG4,¹⁸⁰ TG 5¹⁸¹ and the Integrated Drafting Task Force.¹⁸²

The Ruggie Process: The Special Representative role in the ISO 26000 process was of particular importance and should therefore be addressed separately here. As stated above, the UNGC became the umbrella organisation for all UN Organisations originally participating in the process, apart from the ILO.¹⁸³ However, at a certain point in the process the SRSG felt the need to intervene in the standard setting process, as a development was detected that could have led to

¹⁷³ Article 2.1 and Article 1.1 MoU GC/ISO.

¹⁷⁴ Article 4.1 MoU GC/ISO.

¹⁷⁵ Article 2.3 MoU GC/ISO.

¹⁷⁶ Article 2.4 MoU GC/ISO.

¹⁷⁷ Article 2.5 MoU GC/ISO.

¹⁷⁸ See para 1.17.3.1 ISO/IEC Directives.

¹⁷⁹ Diller, *supra* note, 55, at 501.

¹⁸⁰ List of Experts and Observers, *supra* note 139.

¹⁸¹ Composition of ISO/TMB/WG SR TG 5 on 23rd May 2006, *supra* note 140.

¹⁸² See Minutes, Constitution of Integrated Drafting Task Force, IDTF, Annex A, ISO/TMB/WG SR, 15 November 2007.

¹⁸³ Ward, *supra* note 108, at 691.

a conflict with his own framework.¹⁸⁴ His main concern was the ISO's definition of the concept of the 'sphere of influence', not only in relation to the part dealing with human rights (which is also the concern of the Ruggie Process) but generally throughout ISO 26000. His criticism thus was that:

The draft Guidance is internally inconsistent on this issue, and beyond the human rights section it is inconsistent with the UN framework. This will send mixed and confusing messages to companies seeking to understand their social responsibilities, and to stakeholders seeking to hold them to account.¹⁸⁵

The SRSG subsequently referred to a report he drafted for the HRC on the matter of the sphere of influence¹⁸⁶ in which he criticises the concept as ambiguous and imprecise.¹⁸⁷ A particular problem arises because it is not clear whether influence should be understood as 'impact', meaning that the companies 'activities or relationships' cause human rights violations, or as 'leverage', which a company can exercise over other actors to prevent human rights abuses.¹⁸⁸ Moreover, Ruggie points out that when applying the second reading companies' influence over a certain actor could much too easily be read as an obligation to exercise it – in other words, 'can implies ought'.¹⁸⁹ However, this would be particularly undesirable where the actor concerned is a government, as this could lead to strategic manipulations. To elaborate, governments could deliberately not fulfil their obligations on the basis of speculation that a big multinational enterprise operating in their territory might feel pressured to take this responsibility over.¹⁹⁰ Based on these considerations Professor Ruggie 'urged' the WGSR to 'review all references to

¹⁸⁴ See Special Representative of the Secretary-General for Business and Human Rights Prof. John G. Ruggie, Note on ISO 26,000 Guidance Draft Document, available at: <http://business-humanrights.org/sites/default/files/media/bhr/files/Ruggie-note-re-ISO-26000-Nov-2009.PDF> (last accessed 22 December 2014).

¹⁸⁵ Ibid. at 2.

¹⁸⁶ HRC, Clarifying the Concepts of "Sphere of Influence" and "Complicity", Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, A/HRC/8/16, 15 May 2008.

¹⁸⁷ Ibid. para 10.

¹⁸⁸ Ibid. para. 12.

¹⁸⁹ Note on ISO 26000, *supra* note 184, at 2.

¹⁹⁰ Clarifying the Concepts of "Sphere of Influence" and "Complicity", *supra* note 186, para.14.

sphere of influence in the document to ensure that they are consistent with the UN framework not only in the human rights section but throughout'.¹⁹¹

The ISO took this criticism very seriously which was mainly a result of the authority Professor Ruggie possessed in his position as a Special Representative.¹⁹² The Integrated Drafting Task Force proposed to better clarify the concept of 'sphere of influence' within the 26000 framework in order to avoid conflict with the UN Framework.¹⁹³ Despite these efforts the final document has been said to still contain a number of provisions which refer to responsibility to make use of leverage.¹⁹⁴ The concrete understanding of such passages depends of course on interpretation and as such can also be understood as being more in line with the UN Framework. Nevertheless, they can also be seen as a 'rebuke to the view that social responsibility can only arise from contribution to negative impacts'.¹⁹⁵

3.2.2.3 OECD

a) The OECD and the Guidelines for Multinational Enterprises

The OECD was founded in 1960 through the Convention on the Organization for Economic Co-operation and Development, as a reconstitution of the Organization for European Economic Cooperation.¹⁹⁶ The goal pursued by the founding parties was to create an organisation that was to promote policies to achieve 'highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy', as well as to contribute to economic expansion and the expansion of world trade.¹⁹⁷ Today the OECD has 34 member states,

¹⁹¹ Note on ISO 26000, *supra* note 184 at 3.

¹⁹² Ward, *supra* note 108, at 696.

¹⁹³ Copenhagen Discussion Document, Copenhagen Key Topics (CKTs), ISO/TMB/WG SR N 186, 4 May 2010, at 11 ff.

¹⁹⁴ For an extensive analysis of ISO 26000 in this respect see S Wood, 'The Meaning of the 'Sphere of Influence' in ISO 26000', in: A Henriques (ed), *Understanding ISO 26000. A Practical Approach to Social Responsibility* (BSI 2011) 127 ff.

¹⁹⁵ *Ibid.*, at 130.

¹⁹⁶ The OECD founded in 1948 was set up for the administration of the aid under the Marshall Plan, see OECD, 'History', available at: <http://www.oecd.org/about/history/> (last accessed 22 December 2014).

¹⁹⁷ See Article 1 Convention on the Organisation for Economic Co-operation and Development, 888 UNTS 180, 14 December 1960.

predominantly developed countries, as well as several emerging economies such as Mexico or Turkey, and performs numerous activities ranging in areas as wide ranging as agriculture, education, anti-bribery, tax and corporate governance amongst others.¹⁹⁸

Central to the governance activities of the OECD are committees and the assistance they receive from the Secretariat. The latter sets the agenda of the committees in accordance with priorities given by the Council and member state input.¹⁹⁹ The agenda is usually based on data collected and analysis of a particular issue or field; often accompanied by a number of proposals that could later result in reports, proposal or documents. All such documents, which have been elaborated in one of the substantive committees, must be submitted to one of the standing committees for prior evaluation before being transmitted to the Council.²⁰⁰ The Council then has the power to adopt them as an OECD Act, which is either a decision or a recommendation.²⁰¹ Decisions in the OECD context are legally binding on OECD Members (unless they abstained at their adoption), but do not constitute treaties under international law. The member states of the OECD are obliged to implement them.²⁰² Recommendations are not binding but members may implement them.²⁰³ However, the OECD stresses that ‘practice accords them great moral force as representing the political will of Member countries and there is an expectation that Member countries will do their utmost to fully implement a Recommendation’.²⁰⁴ Apart from the OECD Acts other legal instruments were developed in recent years, including declarations,²⁰⁵ arrangements and understandings,²⁰⁶ and agreements²⁰⁷.

¹⁹⁸ For more detailed information visit the OECD Website at: www.oecd.org (last accessed 22 December 2014).

¹⁹⁹ See Rule 12 of the Rules of Procedure of the Organization, available at: <http://www.oecd.org/legal/Rules%20of%20Procedure%20OECD%20Oct%202013.pdf> (last accessed 22 December 2014) (hereinafter: OECD Rules of Procedure).

²⁰⁰ See Rule 25 of the OECD Rules of Procedure. The Standing Committees may make comments and suggest amendments or even refer the document back to the substantive committee.

²⁰¹ See Rule 18 of the OECD Rules of Procedure.

²⁰² See Article 5 OECD Convention, *supra* note 197, and OECD, ‘Legal Instruments’ available at: <http://www.oecd.org/legal/legal-instruments.htm> (last accessed 22 December 2014) for more detailed information.

²⁰³ See Rule 18 b of the OECD Rules of Procedure.

²⁰⁴ See OECD ‘Legal Instruments’, *supra* note 202.

²⁰⁵ Declarations are informal non-legally binding texts that constitute policy commitments that member states subscribe to. They are noted by the Council and the OECD body in charge usually monitors their application. Cf *ibid.*

²⁰⁶ Arrangements and Understandings are negotiated and adopted within the OECD framework by certain member states. They are not legally binding but they are noted by the Council and implementation is monitored. Cf *ibid.*

The Guidelines for Multinational Enterprises are the OECD's own social responsibility instrument. In fact the Guidelines are an annex to the 1976 OECD Declaration on International Investment and Multinational Enterprises,²⁰⁸ and have been amended on five occasions since they were adopted.²⁰⁹ The Guidelines constitute 'recommendations addressed by governments to multinational enterprises operating in or from adhering countries'²¹⁰ which are accompanied by an implementation mechanism (the national contact points), offering mediation and conciliation services in case an enterprise is accused of having committed violations. Given their almost four decade long tradition the Guidelines have been influential on other more recent responsibility movements, as well as having been influenced by other instruments and organisations (such as ILO instruments, or the 'Guiding Principles').²¹¹

b) The OECD's Participation in the 26000 Process

The MoU between the OECD and the ISO was only concluded in 2008, shortly before the Committee Draft was launched, thus at a later phase of the standard setting process.²¹² Nonetheless, there had already been some involvement at an earlier stage.²¹³ The MoU signed between the two organisations mirrors to a large extent the GC/ISO MoU. One small divergence is the stipulation, similar to that in the ILO/ISO MoU that the ISO is to 'facilitate greater awareness and wider observance of the OECD Guidelines'.²¹⁴ Article 4.2 furthermore provided an opportunity for the ISO to participate in OECD bodies concerned with the development of the MNE Guidelines. Even though the ISO in the end was not engaged in this process to a significant

²⁰⁷ Agreements are also negotiated and concluded in the framework of the OECD, they are however legally binding on the parties to it. Cf *ibid*.

²⁰⁸ See OECD, 'OECD Guidelines for Multinational Enterprises – Responsible Business Conduct Matters', available at: http://mneguidelines.oecd.org/MNEguidelines_RBCmatters.pdf (last accessed 22 December 2014) at 2.

²⁰⁹ See also OECD, 'About the OECD Guidelines for Multinational Enterprises', available at: <http://mneguidelines.oecd.org/about/> (last accessed 22 December 2014).

²¹⁰ The OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts, Annex I The OECD Guidelines for Multinational Enterprises (Version of May 2011) Preface, para 1.

²¹¹ See OECD, 'Responsible Business Conduct Matters', *supra* note 208, at 4 and 5; Ruggie Report, *supra* note 163.

²¹² Memorandum of Understanding between the OECD and ISO in the Area of Social Responsibility, ISO/TMB/WG SR N 144, 19 June 2008 (hereinafter: MoU OECD/ISO).

²¹³ Eg the OECD had already been part of TG 4 in 2006 *see* ISO/TMB WG SR TG 4: List of Experts and Observers, 14 March 2006.

²¹⁴ Article 2.7 MoU OECD/ISO.

extent,²¹⁵ the ISO process was said to have inspired some of the changes made to the Guidelines, to the degree that even hard-referencing was considered (although it did not materialise in the end).²¹⁶ The OECD commented on the second Working Draft,²¹⁷ and then provided comments on the Working Draft 3 and 4 as well as to the Draft International Standard. There appeared to have been no backing for the FDIS.²¹⁸ Furthermore, the OECD was involved in WG 4 and 5 but not in the Integrated Drafting Task Force.²¹⁹

3.3 An Analysis of the Commutative Aspects of the Cooperation

3.3.1 A Tendency towards Origin-Based, Traditional Legitimacy

The second Chapter looked at different types of legitimacy and the way in which they can be managed by different organisations. In the present example the ISO pursued a strategy based on high levels of participation. It created a framework which would include as many stakeholders as possible, who would at least at first glance meet on equal footing. State representatives deliberate with labour delegates or with NGOs and business experts. The final standard is then the consensus reached in these deliberations.

However, there is a general tension between public state-based policy and multi-stakeholder negotiations such as the 26000 process, which will be dealt with in more detail below.²²⁰ What is necessary to keep in mind here is that the ISO generally placed considerable importance on ensuring that publically created instruments, linked at least to some degree to democratic legitimisation were not interfered with and that public, state based organisations with relevant

²¹⁵ Interview with Marie-France Houde (OECD), 7 February 2013 and see furthermore, OECD, Responsible Business Conduct Matters, *supra* note 208, at 4 and 5

²¹⁶ Interview with Kevin McKinley (ISO), 25 February 2013.

²¹⁷ Comments received on ISO/WD 26000.2, Guidance on Social Responsibility, Document WG SR N 80, ISO/TMB/WG SR N 83, 18 December 2006.

²¹⁸ Available under 'projects' in the archive of the ISO 26000 process, *supra* note 136. Comments on later stage versions can be found at: <http://isotc.iso.org/livelink/livelink?func=ll&objId=8742970&objAction=browse&viewType=1> (last accessed 22 December 2014).

²¹⁹ See List of Experts and Observers, *supra* note 139, and Composition of ISO/TMB/WG SR TG 5 on 23rd May 2006, *supra* note 140.

²²⁰ See Diller, *supra* note 55, at 529; and Watt, *supra* note 108, at 707

regulation in the area were properly represented.²²¹ The previous chapter called this the turn towards traditional legitimacy. Though generally following a non-state based, expert driven regulatory model, the ISO requires and seeks public endorsement and legitimation. This can also be observed in other, particularly competitive, issue areas. For instance in a 2010 document the ISO distinguishes between ‘private standards’ as issued by sectorial bodies and associations (such as GlobalGAP in the area of food safety) and ‘international standards’ (ISO or IEC standards). The distinction is made based on the link to WTO procedures and designation. The ISO states that:

However, not all standards are created equal. WTO disciplines for the use of standards as the basis for regulatory measures demand that “international standards” be developed by designated organizations in the case of the SPS Agreement or according to principles for international standards development – in the case of the TBT Agreement. Formal international standards, such as those from ISO and IEC, follow such principles and are conventionally not considered “private standards”.²²²

Thus, the link to a public entity and publicly prescribed procedures according to the ISO lifts its standards to a different level, presumably one of higher legitimation.

Cooperation with the public organisations has to be understood in this context. It exceeds pure representativeness and thereby creates a link to more traditional forms of legitimacy. As was demonstrated above, the three international organisations had special agreements framing their participation in the process. Even more ‘special’ in this troika was the ILO-ISO MoU whereby the ILO was granted extensive participation rights. Even though in the interviews the representatives of both organisations did not provide explicit reasons for this, the representative of the OECD thought that it was due to the ILO’s special position as an organisation representing interests of states, as well as the other two stakeholder groups – labour and industry. Furthermore, this was also the case as a result of the fact that it was able to bring (partially) proper international law provisions (as opposed to soft law) to the table.²²³ Origin based

²²¹ See above at section 3.2.2.

²²² ISO, International Standards and “Private Standards”, February 2010/1500, available at: http://www.iso.org/iso/private_standards.pdf (last accessed 22 December 2014).

²²³ Interview with Marie-France Houde (OECD), 7 February 2013.

legitimacy considerations seem to be of relevance, particularly the ability to link to traditional state based (democratic) instruments and organisations. Private organisations use cooperation in their legitimacy management in order to link themselves to these traditional actors.

On the other side of the coin, cooperation might not only open up venues to address legitimacy claims, it might also create new venues. Thus, when cooperating with a public organisation, a private regulator may have to adapt its procedures in order to accommodate special public requirements. The ILO attributed significant importance to certain provisions in the MoU to ensure that the ISO standards were consistent with ILO instruments and that in case of conflict the latter would prevail.²²⁴ The ILO also needed to make sure that its participation would not tie itself to the ISO to a degree that its own responsibilities vis-à-vis its members would be violated. Thus, the MoU between both organisations clearly states that:

ILO assistance or participation provided in this Agreement in any ISO process or activity relating to development, promotion, support, evaluation and approval, or review of any International Standard in the field of SR does not imply the specific endorsement by ILO of that ISO International Standard or any other ISO product or activity²²⁵

The ISO 26000 process is generally a good example of the increase of legitimacy claims through a cooperative approach. The numerous different actors involved came to the table with the expectations of their own stakeholders. Those could not be ignored but had to be integrated into the process. The mirror committees, which the ISO asked its member bodies to establish in order to represent the respective national positions had similar effect. In the end the process became highly complex, requiring enormous effort to integrate the very different demands which originate from such diverse groups. Ultimately, evaluations regarding the success of these efforts vary; even actors from the same stakeholder group came to different conclusions regarding the legitimacy of the ISO 26000 standard setting process.²²⁶

²²⁴ See Article 2.1 and 2.3 MoU ILO/ISO.

²²⁵ See MoU ISO/ILO Article 9.1.

²²⁶ The ILO for instance supported the process in the end. Others remained sceptical, for instance Diller, *supra* note 55, at 529, who arrives at a negative result. For an overview over organisations supporting the ISO/DIS 26000, see ISO/TMB/WG SR N 176 NSB Consensus Comments and Comments from D-Liaison Organizations Received on ISO/DIS 26000 Guidance on Social Responsibility, 1 March 2010. Non-consensus comments can be found in the

3.3.2 Expertise

As highlighted above, the ISO is an expertise driven organisation. It understands its standards as reflecting expert consensus. Therefore it is only natural that the ISO also included experts in this standard setting process, and in fact the ISO representative named ‘expertise’ as the main reason for cooperating with international organisations.²²⁷ Given the nature of the 26000 Guidance it was, however, less technical expertise that was in demand but rather different forms of expertise necessary in the public policy domain. Chapter 2 refers to the different regulatory capacities Abbott and Snidal list in their ‘Governance Triangle’. Expertise, being one of them, can come about in different forms. Thus there is not only technical expertise but also normative and political expertise.²²⁸ The ISO sought to benefit predominantly from the expertise of the public organisations in these two latter categories. In particular, the ILO possessed long-standing and unique knowledge in the area of labour law and the tripartite system.²²⁹ Similarly Professor Ruggie’s intervention and the swift uptake by the WGSR of his suggestions can be seen as an example of the appraisal of specific legal expertise by the ISO.

3.3.3 The Power and Operational Capacities of the ISO as a Focal Organisation

The International Organisations involved in the process had problems in ensuring implementation of their policies in certain parts of the business community. This did not only concern individual rules and instruments but in fact there was a perceived compliance deficit in the regime at large.²³⁰ One reason for international organisations to cooperate was to link their regulation to the particular operational capacities of the ISO and its power as a focal organisation.²³¹ Both the ILO and the OECD stressed that ISO 26000 would be more accessible for certain Asian companies, as those are already well acquainted with other ISO management

document titled: Non Consensus Comments Received on ISO/DIS 26000, Guidance on Social Responsibility, ISO/TMB/WG SR N 178, 1 March 2010.

²²⁷ Interview with Kevin McKinley (ISO), 25 February 2013.

²²⁸ K W Abbott & D Snidal, ‘The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State’, in: W Mattli & N Woods (eds), *The Politics of Global Regulation* (Princeton University Press, 2009) 44, at 64

²²⁹ Interview with Kevin McKinley (ISO), 25 February 2013.

²³⁰ Interview with Emily Sims (ILO), 25 February 2013

²³¹ See above at section 2.

standards, such as the 9000 or 14000 series.²³² The ISO therefore possessed particular operational capacities at the implementation phase which were considered to complement public regulation. For the public organisations it was therefore of interest that their own regulatory mechanisms were sufficiently considered in the process and the final document.

Until today the take up of the instrument was rather weak - ISO 26000 was not as successful as expected. One reason for this could be the decision to make it a non-certifiable guidance regime. As such it may have less appeal to the industry than other management standards that follow the more traditional ISO pattern.²³³ One reason for the decision (among others) not to open it for certification was a compromise made with the trade unions who feared their influence would fade if companies could buy the certification that they are a good, labour-friendly entity.²³⁴ The effort of the IOs to help create an instrument which is closer to industry usage and needs might have not paid off as anticipated.

4. NETWORK LEVEL: CONSTITUTIONALISATION EFFECTS THROUGH AGGLOMERATION AND CONSOLIDATION

As stated above, cooperation is not always based on purely commutative motives but often also aims at a broader set of goals. Concretely, regulators may also engage in cooperation if it leads to stronger and better regulation or a more comprehensive global regulatory framework (if it has constitutionalisation effects).²³⁵ The framework in which the ISO 26000 process is embedded has a decentralised character. It has been demonstrated that each actor involved in the cooperative process possessed one or even several instruments targeting social responsibility issues. This led to a high potential of conflict between the different regimes, organisations and instruments. However, the preferred strategy was a cooperative one. There was a strong ‘more is better’ attitude, which was combined with the idea that an industry-based actor specifically such as the ISO could open new venues through which the message of (corporate) social responsibility could

²³² Interview with Emily Sims (ILO), 25 February 2013. Also interview with Marie-France Houde (OECD), 7 February 2013.

²³³ Interview with Emily Sims (ILO), 25 February 2013.

²³⁴ Ibid.

²³⁵ See above Chapter 3.

then be communicated.²³⁶ These motives seem to suggest that there was first and foremost a need to increase the overall regulatory authority of the regime, rather than those of the individual organisation. Competition between regulatory bodies with contradictory contents would have undermined these efforts.²³⁷

The ISO stressed that it engaged in cooperation in order to avoid creating a conflict with publicly-established policies, as it had no authority to rewrite existing public instruments being a private actor.²³⁸ Its goal was to create a guidance regime which is consistent with established mechanisms and which as such has the advantage of integrating different policies into one document.²³⁹ Cooperation with public actors was thus aimed at creating this coherence. After all, the Standard was intended to provide a fairly complete venue for all types of organisations to comply with social responsibility obligations or recommendations.²⁴⁰ The objective to create a standard on which different organisations could rely to fulfil any kind of social responsibility obligation would have not been met had it not involved all of the important actors in the field and were it not in harmony with the other relevant instruments in the issue area. A standard which contradicted established public regulation would have failed the purpose of providing a ‘one includes everything’ solution. In a similar vein one can note the attempt to make the process as representative as possible, thus ensuring both a representative process and meeting the final goal of creating an encompassing instrument.

Whereas the reasons for the ISO to avoid conflicts and to achieve harmonisation were predominantly based in self-interest, such as achieving high take up of the standard; the international organisations pursued broader and arguably more ‘altruistic’ goals. Such

²³⁶ Interview with Emily Sims (ILO), 25 February 2013, and Interview with Marie-France Houde (OECD), 7 February 2013.

²³⁷ See also K Webb, ‘ISO 26000: Bridging the Public/Private Divide in Transnational Business Governance Interactions’, Osgoode Hall Research Report No. 21/2012, who states that: ‘In addition to the mutual legitimacy and authority-enhancing nature of their participation, the fact that such a range of leading international SR instrument developers participated in the development of ISO 26000 suggests a conscious effort among these entities to move in this instance from SR rule instrument competition to a form of co-opetition, with ISO 26000 creating a “common ground” framework instrument, intended to be and considered to be compatible with the SR Rule instruments of the other SR Rule instrument developers’ (at 16). He further argues that from a legal perspective ‘ISO 26000 represents a sophisticated statement of emerging global SR “custom”’ (at 20).

²³⁸ Interview with Kevin McKinley (ISO), 25 February 2013.

²³⁹ Ibid; and Interview with Emily Sims (ILO), 25 February 2013.

²⁴⁰ See above at 3.2.1 and *ISO 26000 Project Overview*, *supra* note 60, at 3.

organisations sought to improve the overall regulation in the field. The ILO for instance characterises the area of social responsibility regulation as having three levels. First, there are normative institutions such as the ILO or the OECD which set the framework. One level below one finds governments, MNEs, and labour organisations. Entities on both levels affect the third stage – business practices – through their policies, legislation, rules and agreements. ISO 26000 in this framework is considered as having a special status. It belongs to the normative sphere (the drafting process was not only industry driven but also involved to a high degree public actors), but, as a long-standing technical standard setter, it has also particular links with the industry. As a result it can open another channel through which the message of social responsible business behaviour can be conveyed. An important goal for the international organisations was to create policy coherence between the different regulators in order to transform business culture. All normative institutions should convey a consistent message through which expectations on business will be clearly stipulated and as a result actions and practices are influenced. Law sets a framework and private policies (on MNE level or below) determine what happens within a company.²⁴¹

Consequently, both are sought: firstly to increase the number and types of actors spreading the message of social responsibility (agglomeration) and secondly to achieve harmonisation regarding the content of the message spread (consolidation). This ultimately had constitutionalisation effects, not in a foundational sense, but in its limitative function. It became harder for businesses and states to evade specific rules – the area of social responsible business practices became more consolidated and thus constitutionalised.

This approach however has been criticised. As mentioned above, there were general doubts as to whether a private entity such as the ISO is the correct partner for this endeavour and whether it should engage into the public policy domain at all or at least whether this should not happen in a much more cautionary way.²⁴² Several arguments can be made against this position. First of all there are, as has been pointed out by the representatives of international organisations, the benefits of having a private actor on board. The ISO has different relationships with the private

²⁴¹ Interview with Emily Sims (ILO), 25 February 2013.

²⁴² See above and Diller, *supra* note 55, at 529. Less critical however Ward, *supra* note 108, from 685 onwards.

sector than international organisations have and this can be an advantage in the implementation of social responsibility standards. Secondly, as argued in the previous chapters, public actors have ways to ‘steer’ cooperative processes. The example of ILO’s engagement depicts this well. Being aware of its special status, it also required special participation rights which ensured the respect of publicly elaborated rules in the area. Though not perfect this shows an issue that has already been mentioned in the beginning of this book: ‘the public’ is not simply replaced by powerful private entities taking over. Rather there are a variety of actors shaping the global realm and traditional public actors can be the heavyweights among them.²⁴³

Another problem is whether harmonisation in a highly fragmented and complex environment is possible or desirable at all. The example of Professor Ruggie’s intervention illustrates some of the problems this may cause. The direct involvement of the SRSG has been criticised as an illegitimate interference in the process, exceeding the scope of the Ruggie process.²⁴⁴ And indeed there is a risk that harmonisation within one instrument leads to conflicts in a different process or organisation, or that harmonisation can impose certain standards in fields where they are less useful and less desired by the relevant stakeholders. More generally, harmonisation comes with the risk of closing venues for contestation and room testing and deliberating different and potentially better solutions.²⁴⁵ This is an inherent risk in any cooperative process, and one that should not be left unconsidered.

5. CONCLUSION

This chapter has depicted the ISO 26000 standard setting process with a particular focus on the involvement of international organisations. It has shown how the ISO’s move to complement its set of technical standards with management standards saw it enter more and more into the public policy domain. Such a move comes with a number of additional challenges. First, there is the general question whether it is legitimate for a private actor to engage in such areas, and secondly, there is the requirement of specific regulatory expertise. In the 26000 process the ISO tried to

²⁴³ See Chapter 1 at section 2.2. and 3, and S Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006), at 228 ff more particularly on the role of the state.

²⁴⁴ Ward, *supra* note 108, at 696.

²⁴⁵ N Krisch, *Beyond Constitutionalism – The Pluralist Structure of Postnational Law* (OUP, 2010) at 78 ff.

respond to these challenges by increasing the overall representation of stakeholders in general and by including public actors already active in the area in particular through regulatory cooperation agreements.

The cooperative process, it has been shown, included two levels. First, there is a commutative level, where both sets of actors exchanged capacities necessary to effectively regulate. The ISO sought to benefit particularly from the traditional legitimacy of public state based actors. The international organisations on the other hand hoped to profit from the ISO's specific standing with certain industry sectors and more generally its implementation capacities.

The commutative level here was strongly connected to the second – the network level, which was characterised by the attempts of both actors to achieve some form of agglomeration and consolidation of the sector. The technique of choice to accomplish this was to harmonise standards and to spread a consistent message to the business community. This, as argued above, had constitutionalisation effects in the sense that it clarified, harmonised and strengthened the limits of acceptable business behaviour.

CHAPTER 5

CASE STUDY ON SPORT AND THE ENVIRONMENT

1. INTRODUCTION

The following case study describes the cooperation between the Olympic Movement and its main governing organ the International Olympic Committee (IOC) on the one hand, and the United Nations Environmental Programme (UNEP) on the other. This example of cooperation is relevant to the present thesis for a number of reasons. First of all, the value of this example lies in the duration of the cooperation in question. The IOC's engagement with UNEP began in the early 1990s and therefore it is possible to trace the different stages and developments in this long-term cooperation. More important however are the following substantive reasons: the study focuses on two organisations originating from different regimes (sports and environment), which are almost opposite in their composition. Whereas the realm of sport is generally hierarchically structured and composed of highly authoritative organisations with clearly defined areas of responsibility, the environmental regime is fragmented, without strong hierarchies. Finally, the cooperation process from its very beginning did not take place solely on the international level but always had a particular relationship with the local and national level. This is especially so for the Olympic Games mega-events which are:

‘... regulated by multi-level, multi-actor governance regimes, in which authority to define the events and its terms and conditions is negotiated between public and private non-state actors, such as FIFA, UEFA and the IOC, and their national emanations. ... these latter international organizations are ‘sovereignty-free actors’ who engage in contractual relationships with other sovereignty-free actors and with ‘sovereignty-bound’ state actors. Their increased political saliency reflects the diffusion of political and economic authority in the multi-centric post-Cold War context ...’¹

¹ G Hayes & J Karamichas, ‘Introduction: Sport Mega-Events, Sustainable Development and Civil Societies’, in G Hayes & J Karamichas, *Olympic Games, Mega-Events and Civil Societies* (Palgrave Macmillan, 2012) 1 at 5 the concept is taken from J N Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (Princeton University Press 1990) at 36.

The study will therefore examine the dynamics of cooperation between two actors from such diverse backgrounds, as well as in the multi-level context including the local and state level. In line with the previous theoretical chapters, this chapter first sets out to understand the commutative elements which characterise cooperation. Here the main claim is that both organisations are dependent on the cooperative process in order to achieve their regulatory goals. Even for powerful hierarchically structured and functionally specified organisations such as the IOC, the complexity of the transnational context presents challenges in terms of authority. The significant reach of their main deliverable, the Olympic Games, and its particular transformative potential makes the IOC an easy target for criticism and rejection of its governance processes, as well as for activism expressing general discontent with broader global developments. The IOC therefore is required to find means to strengthen its legitimacy and pre-empt criticism at an early stage. UNEP on the other hand is set in a fragmented environment characterised by competition between different environmental institutions. It is underfinanced and lacks support from powerful states and other organisations within the UN family. Cooperation with an organisation such as the IOC not only fits the general regulatory approach of UNEP but it can furthermore link the rather weak organisation with a powerful private actor that has strong operational capacities and effective enforcement mechanisms in place.

The second part of this study examines more closely the network components which emerge out of the commutative process. In the cooperation depicted here, network building is developed in particular and is pursued by both organisations independently as well as inter-connectedly. The main premise is that constitutionalisation within these network structures happens in two ways. First, more straightforwardly, through the prerequisites set up by the public organisation in particular before engaging in cooperation. This requires private actors to ensure that their own activities are in line with certain minimum standards (such as the Global Compact's 10 Principles). More important here, however, is the second way in which constitutionalisation occurs. To elaborate, through using the particular structure and operating mode of the Olympic Movement, UNEP was able to (co-)implement sustainability and environmental protection standards into a much wider community, extending to the national and local level in the host countries, as well as to numerous private actors linked to the Olympics.

This analysis mainly relies on documents produced by the organisations involved, general public information and to a lesser degree secondary literature. Furthermore, interviews were conducted with representatives of the organisations in order to ascertain a better overview over the objectives they pursued with the cooperation.

2. THE COMMUTATIVE ASPECTS OF THE IOC UNEP COOPERATION

2.1 The IOC's Need for Legitimate Environmental Regulation

It is first necessary to address the IOC's need to set in place environmental regulation in the sports realm which would be considered legitimate by the respective stakeholder groups. As outlined in Chapter 2, legitimacy is not an attribute determined once and forever. Changing environments can alter the legitimacy expectations and requirements of a transnational regulator. Organisations need to respond to such expectations in order to maintain existing legitimacy, or when this has been called into question, to repair and rebuild it.² A particular problem in this context are so-called multiple legitimacy claims. This refers to the situation where stakeholders from within or from outside a regulatory regime make different (and possibly contradictory) legitimacy claims to which the regulator has to respond.³ The IOC despite, or perhaps because of, its dominant role in the area of sports regulation faces these problems. A major reason for this is the unique role the Olympics, as mega-events play on the global level and their far-reaching impact on local and global economics, politics and culture. The Games are constantly in the spotlight and receive close media attention. This makes them very attractive and susceptible to political activism. The following sections will first describe the Olympic Movement's special character and the particularities of mega-events causing its increased exposure to political activism and critique of its governance style and focus. The final part will show how the IOC attempted to address these issues in the context of environmental regulation through cooperation with UNEP.

² See Chapter 2 at section 3.2.2.1; See also M C Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches', 20 *The Academy of Management Review* (1995) 571.

³ Again Chapter 2 at section 3.2.2.1; and J Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes', 2 *Regulation & Governance* (2008) 137.

2.1.1 General Information on the Olympic Movement's Governance Structure

The Olympic Movement with the IOC as its dominant governing organ is a unique organisation. Founded on June 23, 1894 through the initiative of Pierre de Coubertin,⁴ the Movement encompasses, apart from the IOC, two other main constituencies: the International Sports Federations (IFs) and the National Olympic Committees (NOCs). These again consist of athletes, judges, referees, coaches, other sport officials, technicians and additional 'organizations and institutions' recognized by the IOC.⁵ Legally, the IOC constitutes an international, non-governmental, non-profit organisation which is incorporated as an association in Switzerland (with its seat in Lausanne). Its status as a legal person has been recognised by the Swiss Federal Council on the basis of a special agreement.⁶ This agreement notably limits the applicability of Swiss law with regard to the association in a way that it is usually only granted to international organisations.⁷ The preamble acknowledges the special status by stating that:

‘in its capacity as the supreme authority of the Olympic Movement, the International Olympic Committee has assumed global dimensions,’

and:

‘... that the universal role of the International Olympic Committee in the vital field of international relations, its global reputation and the cooperation agreements that it has concluded with intergovernmental organizations, bring to fore features of an international legal personality’⁸

Considering a private actor to have international legal personality might at first glance appear disturbing, at least for a traditional international lawyer. However, it can be explained (to some degree) by looking closer at the history and the general impact of the IOC. As stated above the

⁴ Preamble to the Olympic Charter, available at: http://www.olympic.org/Documents/olympic_charter_en.pdf (last accessed 19 December 2014).

⁵ Rule 1 of the Olympic Charter.

⁶ Rule 15 of the Olympic Charter. As well as the Agreement between the Swiss Federal Council and International Olympic Committee Regarding the Statute of the International Olympic Committee in Switzerland, 1 November 2000, available at: <http://archive.icann.org/en/psc/annex6.pdf> (last accessed 19 December 2014).

⁷ See for instance Articles 1 to 9 Agreement between the Swiss Federal Council and International Olympic Committee, *supra* note 6.

⁸ Ibid Preamble (underlining added).

Committee was founded in the late 19th century, more than 20 years before the League of Nations.⁹ Today, the Olympic Movement includes athletes from all five continents and consists of 205 NOCs (again for the purposes of comparison, the UN has 193 member states).¹⁰ The Olympic Games, as the single most important deliverable of the Movement, are broadcast to more than 200 national territories, reaching up to 4.8 billion people; the London Olympics broadcast rights alone created a revenue of 3.9 billion US dollars.¹¹ All of this is ‘governed’ by the IOC, which has the ‘supreme authority and leadership’¹² over the wider Movement, and whose other members ‘shall abide by the decisions of the IOC’.¹³

Internally the IOC consists of the Session, the IOC Executive Board and the President.¹⁴ The Session is the general meeting of all members of the IOC. It meets ordinarily once a year but can be convened by the President in an extraordinary meeting. According to the Charter the Session ‘is the IOC’s supreme organ [and i]ts decisions are final’.¹⁵ The duties of the Session are to adopt and amend the Olympic Charter, to elect the members of the IOC, the President and the Executive Board, and last but not least to choose a host city for the Olympic Games.¹⁶ The Session consists of natural persons (up to 115 in total) which are all linked to a country with a NOC (only one member per country).¹⁷ The Executive Board consists of the President, four Vice-Presidents and ten additional members, a structure which reflects the composition of the Session. The Executive Board is generally responsible for the overall management and administration of the IOC, as is reflected in numerous duties such as monitoring the observance of the Charter and being responsible for rules and regulations of the IOC, including the Charter.¹⁸

⁹ C J Tams, ‘League of Nations’ in: *Max Planck Encyclopaedia of Public International Law* (OUP, 2006), available at: <http://opil.ouplaw.com/home/epil> (last accessed 19 December 2014), para 6.

¹⁰ See Hayes & Karamichas, *supra* note 1, at 4.

¹¹ All numbers stem from the 2012 London Summer Olympics, see IOC, Marketing Media Guide, London 2012, at 6 and 11, available at: http://www.olympic.org/Documents/IOC_Marketing/London_2012/IOC_Marketing_Media_Guide_2012.pdf (last accessed 19 December 2014).

¹² Rule 1.1 of the Olympic Charter.

¹³ Rule 1.4 of the Olympic Charter.

¹⁴ Rule 17 of the Olympic Charter.

¹⁵ Rule 18.1 of the Olympic Charter.

¹⁶ Rule 18.2 of the Olympic Charter. Further powers are: approval of the annual report, appointment of auditors, awarding and withdrawing of recognition to NOCs and IFs, expelling IOC members, to resolve and to decide upon matters assigned by law or by the Charter.

¹⁷ Rule 16.1.1.1 of the Olympic Charter, as well as 2.2.5 By-Law to Rule 16.

¹⁸ Note that the Charter can only be changed by a 2/3 majority of the Session, see Rule 18.3 of the Olympic Charter.

Finally there is the President who is a central and powerful figure in the IOC framework. Elected by the Members of the Session, the President serves a first period of eight years, which can be extended for another four years. The President's main function is to represent the IOC and to preside over its activities.¹⁹ An important prerequisite of the President is his entitlement to establish IOC Commissions (except where explicitly provided for otherwise in the Charter or other regulations as for instance in the case of the Ethics Commission)²⁰ In 2012 there were 26 commissions including the Sport and Environment Commission.²¹

The IOC's broader mission underlying its governance activities is enshrined in Rule 2 of the Olympic Charter: It is first and foremost the promotion of 'Olympism throughout the world'.²² However, it is important to be aware that Olympism is a broadly defined concept. From its beginning Olympism was thought of having a much more extensive impact than just the promotion of sport. Thus the Charter stipulates that:

Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy of effort, the educational value of good example, social responsibility and respect for universal fundamental ethical principles.²³

And further:

The goal of Olympism is to place sport at the service of the harmonious development of humankind, with a view to promoting a peaceful society concerned with the preservation of human dignity.²⁴

Thus, sport is considered to be put into service to help promote broader and more fundamental goals, such as peace and human dignity. There is a strong rights-driven discourse that endorses

¹⁹ Rule 20 of the Olympic Charter.

²⁰ Rule 21 of the Olympic Charter.

²¹ See Comité International Olympique, Commissions du CIO, Révisées en 2012, available at: http://www.olympic.org/Documents/Commissions_PDFfiles/All_Commissions/Commissions_2012.pdf (last accessed 19 December 2014).

²² Rule 2 of the Olympic Charter.

²³ Rule 1.1 of the Olympic Charter.

²⁴ Rule 1.2 of the Olympic Charter.

Western liberal values underlying this agenda – which can be seen for instance in statements such as ‘build a better world through sport’.²⁵ The Charter specifies this in concrete missions. Apart from the promotion of ethics and good governance in the field of sport and the general promotion of sport events, it demands that sport be used to fight discrimination, support equality between men and woman, help protect the environment and promote sustainable development in sport, to achieve a positive legacy from the Olympic Games in the host cities, and to support culture and education.²⁶ There is the argument therefore that ‘the Olympics [specifically and the Movement generally] are constructed as promoters of historically specific ‘universal world views’.²⁷

2.1.2 The Olympic Games as Mega-Events

Having this particular agenda in mind we now turn to the one most fundamental deliverable of the Movement – the Olympic Games. The following sections will address two specific aspects; first, very briefly, some thoughts on the effects the Games have beyond the sporting community will be provided, and secondly the procedures through which a host city is elected and the preparation is conducted will be outlined.

2.1.2.1 Impacts of Mega-Events

The exceptional reach in terms of broadcasting of the Games and the significant economic revenue generated for the IOC have already been mentioned. What has not yet been addressed, however, are the social, economic and political dimensions of such ‘mega-events’ beyond the Olympic Movement and the more general sporting community. The term ‘mega event’ is used to describe ‘large-scale cultural (including commercial and sporting) events, which have a dramatic character, mass popular appeal and international significance’.²⁸ This includes the broad reach

²⁵ Hayes & Karamichas, *supra* note 1, at 6. See for an overview over the Movements activities in this regard the website: ‘Olympism in Action – Building a Better World through Sport’, available at: <http://www.olympic.org/olympism-in-action> (last accessed 19 December 2014).

²⁶ Taken from Rule 2 of the Olympic Charter.

²⁷ Hayes & Karamichas, *supra* note 1, at 6 who are referring to M Roche, *Mega-Events and Modernity: Olympics and Expos in the Growth of Global Culture* (Routledge, 2000), at 198.

²⁸ Roche, *supra* note 27, at 1.

these events have globally and the impact they have at the local level.²⁹ It is suggested that there are four main themes usually addressed in this context. These are: the impact of mega-events on the local economy, mega-events and ‘global culture’, political developments particularly at the local level, and finally the interrelation between mega-events and local communities and civil society groups.

The first point, which is not at the core of this chapter, but has an impact on the other three themes, concerns the relationship between the Games and local economies. Research dedicated to this issue often concerns economic impact assessments where the long and short-term benefits for the local economy generally (and for certain industry sectors such as tourism specifically) are contrasted with public investment needed to execute the Games. Results are mixed and they become relevant for local political discourses.³⁰

The second category concerns the cultural impact of a global event such as Olympic Games, both on the host countries but also on the broader global audience. As stated above, the Games have a tremendously broad reach and the Olympic Movement has a strong value driven agenda. The Olympics thereby ‘create a unique cultural space and provide unrivalled opportunities to dissolve spatial and temporal distance, to participate in a notional global community, and to promote, albeit transitorily but recurrently, individual and collective experiences of ‘globality’ or ‘one world’ awareness’.³¹ Consequently, there is room to transport and promote ‘universalistic ideals’ and to (at least try to) change cultural practices along these lines. This is something which is also important in the context of environmental protection and sustainability considerations – an issue to which we shall return in due course.

²⁹ See among the many contributions on the topic *ibid*; as well as Hayes & Karamichas, *supra* note 1; J Horne & W Manzenreiter (eds), *Sports Mega-Events – Social Scientific Analyses of a Global Phenomenon* (Blackwell Publishing, 2006).

³⁰ See for instance, C Gratton, S Shibli & R Coleman, ‘The Economic Impact of Major Sports Events: A Review of Ten Events in the UK’, in: J Horne & W Manzenreiter (eds), *Sports Mega-Events – Social Scientific Analyses of a Global Phenomenon* (Blackwell Publishing, 2006) 41. And in the same volume: D Whitson & J Horne, ‘Underestimated Costs and Overestimated Benefits? Comparing the Outcomes of Sport Mega-Events in Canada and Japan’, at 73 ff.

³¹ M Roche, ‘Mega-Events and Modernity Revisited: Globalization and the Case of the Olympics’, in: J Horne & W Manzenreiter (eds), *Sports Mega-Events – Social Scientific Analyses of a Global Phenomenon* (Blackwell Publishing, 2006) 27, at 31.

The issue of cultural impact (or even some form of universalisation) leads to the third, and for our present purposes most important, point - the impact of the mega-event on local and national politics and the broader relationship between the transnational regime and the local level. There are indeed two forms of influence which are to be considered, the first being 'top down' influences. A very common narrative when talking about mega-events is that international associations under whose umbrella they are conducted have transformatory impact on local policies. In this vein Hayes and Karamichas for instance state that:

'...sports mega-events impinge increasingly on the definition of public policies (urban planning, transport infrastructure, environment, social welfare, health, etc.) and the allocation of the increasingly scarce public resources available to achieve these (or other, competing) collective goals. And that they do so, even in liberal democratic regimes, by circumventing normative, established, collective decision-making structures and processes.'³²

However, this is only one side of the coin. As outlined in the previous chapters, transnational actors such as sports organisations do not possess absolute authority. Therefore, 'mega-events are regulated by multi-level, multi-actor governance regimes, in which authority to define the event and its terms and conditions is negotiated between public and private non-state actors.'³³ This interaction can moreover have an impact on the rules of the transnational organisation which derive from the local level, as will be shown below.³⁴

Closely related to the interrelationship between national, local and transnational rule-making is the last issue which deals with the (civil) society reaction to large-scale sporting events. One can distinguish between reactions concerning the Games themselves and those activities which use mega-events as a platform in order to spread a particular message to a wider audience. The first type deal with reactions to different effects the Games produce, for instance, on the environment, civil (participatory) rights or on the use of economic resources and restriction of access to economic benefits (such as the prohibition of the sale of non-licensed products in and around the

³² Hayes & Karamichas, *supra* note 1, at 5.

³³ Ibid.

³⁴ See also H Cantelon & M Letters, 'The Making of the IOC Environmental Policy as the Third Dimension of the Olympic Movement', 35 *International Review for the Sociology of Sport* (2000) 294 ff, who depict how Norwegian longstanding experience with environmental protection influenced rules at the IOC level.

sports venues).³⁵ An example of the second type are dissident groups in the host country and wider interest groups who challenge certain policies within the host country, such as the ‘free Tibet’ protests in advance of the Beijing Olympics,³⁶ or terrorist groups which use the platform of the event to spread their political message (even if this is not necessarily directly related to the organising country, as was the case in Munich 1972).

What can be observed especially in the last two categories is that mega-events have an almost unique reach and significant transformative potential but they are also dependent on local level support. In particular, they are prone to civil discontent. The next section will look at the bidding process and the way in which the IOC addresses this dualistic relationship.

2.1.2.2 Rules Regulating the Awarding and Execution of the Games

When examining the impact of a mega-event such as the Olympics on local policies and the effect it has had on local laws and regulations, it is necessary to look at how they are awarded to host cities. The bidding process which requires aspiring cities to make very detailed commitments regarding the later execution of the Games is the issue on which the IOC has most say. As will be described momentarily, it alone sets out the requirements to be fulfilled by candidates and expects far-reaching guarantees by all relevant local actors (including public and private entities) before even considering the application.

Regulated in Chapter IV of the Charter the process usually starts with the election of the host city, seven years before the Olympic Games are to take place,³⁷ and ends in their aftermath with the so called post Games dissolution.³⁸

³⁵ See Hayes & Karamichas, *supra* note 1, at 14 ff. See furthermore, E Dansero, *et als*, ‘Olympic Games, Conflicts and Social Movements: The Case of Torino 2006’, in: G Hayes & J Karamichas, *Olympic Games, Mega-Events and Civil Societies* (Palgrave Macmillan, 2012) at 195 ff; and D Whitson, ‘Vancouver 2010: The Saga of Eagleridge Bluffs’, in: G Hayes & J Karamichas, *Olympic Games, Mega-Events and Civil Societies* (Palgrave Macmillan, 2012) 219 ff.

³⁶ See X Renou, ‘Resisting the Torch’, in: G Hayes & J Karamichas, *Olympic Games, Mega-Events and Civil Societies* (Palgrave Macmillan, 2012) 236 ff.

³⁷ See Rule 33 (7) of the Olympic Charter.

³⁸ See ‘From Candidate to Host City’, available at: <http://www.olympic.org/host-city-election> (last accessed 19 December 2014).

The start of the bidding phase is the election of the host city. The application is regulated by Rule 33 of the Charter. Accordingly, any interested city must first be approved by the NOC of the country in which the city is located and only one city per country may apply.³⁹ All candidates must comply with the Olympic Charter, other regulations or requirements set out by the IOC Executive Board, and with all technical norms issued by the IFs.⁴⁰ Furthermore, they ‘shall comply with the candidature acceptance procedure, conducted under the authority of the IOC Executive Board’.⁴¹ As mentioned above, this procedure requires candidate cities to provide extensive information and make large-scale commitments regarding political, economic and legal issues relevant to the Games. Even though this procedure is of top-down nature it is important to note that some of these requirements concern the involvement of the general public, stakeholders and concern the protection of public goods (particularly the environment).⁴² As such, there is consideration of local specificities and awareness of the need to gain public support.

From the applications received the Executive Board chooses the candidate cities.⁴³ These candidates then undergo an evaluation procedure. To this end, an evaluation commission set up by the President assesses the applications (including through site inspections) and drafts a report on its findings, which is circulated to the Executive Board and the Session.⁴⁴ On the basis of this report, the Executive Board creates a final list with candidates which are submitted to the Session to be voted upon. A simple majority is sufficient for a city to be nominated. Upon selection the IOC will enter into the host city contract with the elected candidate and the respective NOC.⁴⁵

From this moment the preparation phase of the Games starts. For this purpose an Organizing Committee is formed which is the responsibility of the NOC of the country where the host city is located. The Organizing Committee consists of the IOC members of the respective country, the President and the secretary general of the NOC as well as of at least one representative of the

³⁹ Bye-Law to Rule 33, 1.1 of the Olympic Charter.

⁴⁰ Bye-Law to Rule 33, 1.5 of the Olympic Charter.

⁴¹ Bye-Law to Rule 33, 1.6 of the Olympic Charter.

⁴² See for instance the IOC, 2018 Candidature Procedure and Questionnaire (2010), document available at: http://www.olympic.org/Documents/Host_city_elections/2018_CPQ-ENGLISH-FULL.pdf (last accessed 19 December 2014).

⁴³ Bye-Law to Rule 33, 1.6 of the Olympic Charter.

⁴⁴ Bye-Law to Rule 33, 2 of the Olympic Charter.

⁴⁵ Bye-Law to Rule 33, 3 of the Olympic Charter.

host city.⁴⁶ Host city, NOC and Organizing Committee are jointly responsible for the Games. If there are any instances of non-compliance with the Charter, regulations, or the host city contract, the IOC has the right to withdraw the award of the Games. In this case there will be no claim of compensation against the IOC even though it is possible for the IOC to claim compensation from the host city.⁴⁷

Furthermore, conflicts are not to be settled in national courts but by the Court of Arbitration for Sport in Lausanne.⁴⁸ However, as outlined above, the IOC tries to avoid conflicts as early as the bidding phase by requiring significant guaranties from local authorities and other important actors involved.⁴⁹ In order to guarantee cooperation among all relevant actors within the organisation of the Olympic Games (Organizing Committee, the IOC, NOCs and IFs) the President of the IOC establishes the so-called Coordination Commission, which has a wide-ranging mandate.⁵⁰ Its tasks are to monitor the progress of the Organizing Committee, to review and examine aspects of the organisation, to provide assistance and to resolve differences between the different organisers, to ensure that NOCs and IFs as well as the IOC are kept informed about the progress and to inspect facilities amongst other things.⁵¹ Finally, it is important to note that for the executing process of the Games the IOC is the authority of last resort.⁵²

In summary, considering the impact mega-events such as the Olympic Games have in different sectors of society it is important to understand the role the IOC plays in this context. As ‘the’ international sport organisation it has an interest in being at the top of the organisation and execution process. This position is secured mainly through the commitments which have to be made prior to host-city election. As a result, through the bidding commitments which ultimately flow into the host city contract and the rather unique legal system underpinning it (through the

⁴⁶ Bye-Law to Rule 35 of the Olympic Charter.

⁴⁷ Rule 36 of the Olympic Charter.

⁴⁸ See for instance, Host City Contract for the XXI Olympic Winter Games in the Year 2010 (Vancouver, 18 June 2003) para 67, available at: http://nogames.files.wordpress.com/2009/07/vancouver_2010_host-city-agreement.pdf (last accessed 19 December 2014).

⁴⁹ See for instance IOC, 2018 Candidature Procedure and Questionnaire, *supra* note 42, which lays out the different types of guarantees in the respective categories relevant in the bidding process.

⁵⁰ Rule 37 of the Olympic Charter.

⁵¹ Bye-Law to Rule 37 of the Olympic Charter.

⁵² Rule 58 of the Olympic Charter.

Court of Arbitration),⁵³ the IOC guarantees its dominant role in the process. This, however also means that it has significant influence on the different transformative processes the Games facilitate at the local level.

2.1.3 Sport and Environment: Legitimacy Concerns of a Dominant Transnational Private Actor

The preceding sections have set out the Movement's powerful governance structures and its tremendous influence even on national and local political systems. Yet, as shown above, this also makes the system vulnerable to political activism, which either criticises the governance processes or which uses the Games as a platform to reach a wider audience. In the 1992 Albertville Games environmental advocacy groups saw an opportunity to draw attention to the broader global political issue of environmental destruction by pointing to developments in a particular, but well publicised context - sport.⁵⁴

Previously, claims such as those made in the early 1990s regarding the impact of the Games on the environment could have been considered a problem of the local organisers.⁵⁵ However, with increased global awareness of environmental destruction 'the local led directly to the global'.⁵⁶ Together with additional problems concerning doping and corruption, intense criticism caused a legitimacy crisis.⁵⁷ The Olympic Movement's widely shared self-understanding as mentioned above is that of an actor contributing to the development of humankind. This particular 'mandate' had, even in the 1990s, been closely linked to lucrative sponsorship contracts which could have been in peril if criticism continued.⁵⁸ The way the IOC decided to address the problem was to implement environmental policies at IOC level and to include environmental protection in its mandate. These original considerations however soon turned into a new self-understanding of the Movement as 'an environmental custodian'.⁵⁹

⁵³ See for more information on the particularities on the particular structure of *lex sportiva*: A Duval, 'Lex Sportiva: A Playground for Transnational Law', 19 *European Law Journal* (2013) 822, at 827 ff.

⁵⁴ Cantelon & Letters, *supra* note 34, at 300.

⁵⁵ Ibid at 302

⁵⁶ Ibid.

⁵⁷ Ibid at 301; Hayes & Karamichas, *supra* note 1, at 8 and 9

⁵⁸ Cf also Hayes & Karamichas, *supra* note 1 at 9.

⁵⁹ Ibid.

The clearest example of the custodian approach was the alteration of the Olympic Charter through the inclusion of an additional paragraph in Rule 2 in 1996, which states that the mission of the IOC is ‘... to encourage and support a responsible concern for environmental issues, to promote sustainable development in sport and to require that the Olympic Games are held accordingly’.⁶⁰ This was accompanied by the recognition of environment as the third pillar of the Olympic Movement, alongside sport and culture.⁶¹ The new paragraph illustrates this tripartite approach: First, its contribution to the promotion of universal values (in this particular case protection of the environment), secondly its implementation of environmental policies throughout the Olympic Movement, and finally the concrete implementation of environmental and sustainability principles in the execution of the Games. The changes were preceded by the Centennial Olympic Congress, held in Paris in 1994, which recognised the ‘importance of environment and sustainable development’, and which led to the creation of the Sports and Environment Commission at the IOC.⁶² The Commission is composed of different stakeholders including members of the Olympic Movement as well as external experts.⁶³ Its mission is to advice the Executive Board on environmental policy developments of the IOC or the Movement in general.⁶⁴ Another important step regarding the integration of environmental and the Olympic Movement was the Agreement between UNEP and the IOC concluded in 1994.⁶⁵ Cooperation with UNEP was engaged into for two reasons in particular.

First, the Movement needed additional expertise in relation to its new approach to the environment. Even though the IOC possessed some in-house environmental expertise many initiatives such as program and policy development needed very specific capabilities which the IOC did not have when starting the program and to some degree still does not have today.

⁶⁰ Rule 2 para. 13 of the Olympic Charter.

⁶¹ See ‘Sports and Environment Commission – Mission’, available at: <http://www.olympic.org/sport-environment-commission?tab=Mission> (last accessed 19 December 2014)

⁶² Ibid.

⁶³ See ‘Sports and Environment Commission – Composition’, available at: <http://www.olympic.org/sport-environment-commission?tab=Composition> (last accessed 19 December 2014).

⁶⁴ See IOC, ‘Factsheet – The Environment and Sustainable Development’, Update – January 2014, at 1, available at: http://www.olympic.org/Documents/Reference_documents_Factsheets/Environment_and_sustainable_development.pdf (last accessed 19 December 2014).

⁶⁵ See Cooperation Agreement between the International Olympic Committee and the United Nations Environment Programme, signed February 1994 (on file with the author).

Through cooperation with environmental organisations this expertise can be accessed when needed.⁶⁶ This relates to the problem of multiple legitimacy claims. The IOC is first and foremost a sporting association. It has strong capacities to lead the international sporting Movement and to (co-)deliver the Olympic Games. It has, however, less capacity in ‘social regulation’; a field which is not at the centre of its mandate. Yet, as the example shows, its legitimacy as regulator can be questioned even on basis of effects caused in these specific fields outside its actual mandate.

Secondly, the public nature of UNEP played an important role. Public international law literature has traditionally based legitimacy of international organisations on state consent. Recently this has been complemented by additional moral or normative considerations.⁶⁷ Kumm for example has distinguished between formal legitimacy, jurisdictional legitimacy, procedural legitimacy and outcome legitimacy in the international realm.⁶⁸ Kingsbury, Krisch & Stewart focus on procedural mechanisms (such as procedural participation, transparency, as well as reasoned decisions, review, proportionality, means-ends rationality, avoidance of unnecessarily restrictive means, and legitimate expectations) in their GAL project.⁶⁹ As shown above the IOC has at least to some degree implemented these mechanisms both transnationally and as requirements for the local level. Nonetheless, one can observe here the tendency to consider international organisations as particularly legitimate, and therefore as valuable or even necessary cooperation partners.

One way of interpreting this is that also in the transnational realm a more traditional perception of legitimacy is still dominant. As such, international organisations are considered particularly legitimate as they can be linked back to state consent or at least to state representation. Moreover, in the current context cooperation was particularly necessary for the execution of the Games. Here UNEP was required to support national and local (governmental) entities in their implementation of the bidding commitments. UNEP has a long history of practice in dealing

⁶⁶ Interview with Ms. Katia Mascagni (IOC), 26 February 2013.

⁶⁷ See Chapter 2 at section 3.2.2 for a more detailed distinction between the different legitimacy claims.

⁶⁸ M Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’, 15 *EJIL* (2004) 907, at 917.

⁶⁹ B Kingsbury, N Krisch & R B Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) 15, at 37.

with these entities as capacity building is one of its main tasks. Therefore, in an interview which was conducted for this case study, the IOC also stressed that it particularly appreciates the advocacy power which UNEP provided for the development of various policies and programs within the Olympic Movement. Being a public organisation was considered a further asset of UNEP, as it allows for collaboration on a number of platforms from advocacy, policy development, program setting, visibility and branding. According to the IOC there is no similar organisation that can contribute as much in each of these areas.⁷⁰

2.2 UNEP – A Weak Institution Attaining Strength through Cooperation

When talking about the benefits UNEP draws from the regulatory relationship one has to look at the Programme's weak position as an environmental anchor organisation and the resulting need to govern through cooperation. As pointed out in Chapter 2, depending on the architecture of the issue area, regulators may be endowed with a regulatory monopoly (in the case of a centralised issue area) or they may have to compete (or at least arrange themselves) with other regulators in a fragmented context.⁷¹ In the first case the monopolist most likely possesses a high degree of coercive power, as those targeted by the regulation have little choice other than a 'take it or leave it' option. One possibility which regulatory cooperation could thus open is to link less powerful regulators from weaker and fragmented areas to strong monopolists. In the following sections it will be shown that UNEP constitutes a rather weak organisation which has to operate in a highly fragmented issue area. Through cooperation and with the help of stronger organisations it is however able to implement its regulatory agenda in other issue areas (such as the sporting community in our case).

2.2.1 General Remarks on the UNEP

UNEP is not an international organisation as such but is the environmental program of the United Nations. UNEP was not created by a treaty between member states but came into

⁷⁰ Interview with Ms. Katia Mascagni (IOC), 26 February 2013.

⁷¹ See Chapter 2 at section 2.3.1.

existence through a UN General Assembly Resolution.⁷² This resolution was adopted in the aftermath of the United Nations Conference on the Human Environment which took place in Stockholm in 1972 where the recommendation was made to set up an institution that would manage and coordinate environmental issues within the UN system.⁷³ Its general mission is ‘to provide leadership and encourage partnership in caring for the environment by inspiring, informing, and enabling nations and peoples to improve their quality of life without compromising that of future generations’.⁷⁴ Not being a ‘proper’ international organisation, UNEP cannot become a party to international treaties and therefore usually relies on Memoranda of Understanding when organising its relationships with other organisations or actors.⁷⁵ Until recently, membership in UNEP resulted from an election within the General Assembly. The Governing Council of UNEP had been composed of 58 member states which each had a four-year mandate. However, within the general transformation process taking place at the organisation at the moment,⁷⁶ at its 27th session held in Nairobi between 18-20 February 2013, the Governing Council adopted a resolution on paragraph 88 of the Rio + outcome document,⁷⁷ which opens UNEP for universal membership and thus replaces the Council with the Environmental Assembly. Therefore UNEP’s governance bodies are now the Assembly, which is supported by the Committee of Permanent Representatives, the Secretariat, and the Environment Fund.⁷⁸ Furthermore the Programme maintains a number of regional offices and hosts several secretariats of environmental conventions, such as the Convention on International Trade in

⁷² See General Assembly Resolution 2997 (XXVII) on Institutional and Financial Arrangements for International Environmental Co-Operation, 15 December 1972.

⁷³ See ‘United Nations Environment Programme, Environment for Development’, available at: http://www.unep.org/PDF/ABOUT_UNEP_ENGLISH.pdf (last accessed 19 December 2014).

⁷⁴ See ‘About UNEP, The Organization’, available at: <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=43> (last accessed 19 December 2014).

⁷⁵ See E Pushkareva, ‘United Nations Environment Programme (UNEP)’, *Max Planck Encyclopaedia of Public International Law*, available at: <http://opil.ouplaw.com/home/EPIL> (last accessed 19 December 2014).

⁷⁶ See General Assembly Resolution 66/288, The Future We Want, 11 September 2012, as well as the Annex to A/RES/66/288; and General Assembly Resolution 67/213 Report of the Governing Council of the United Nations Environment Programme on Its Twelfth Special Session and on the Implementation of Section IV.C, Entitled “Environmental Pillar in the Context of Sustainable Development”, of the Outcome Document of the United Nations Conference on Sustainable Development, para 4.

⁷⁷ See Annex to General Assembly Resolution 66/288, *supra* note 76, where it is stated: ‘In this regard, we invite the Assembly, at its sixty-seventh session, to adopt a resolution strengthening and upgrading the United Nations Environment Programme in the following manner: (a) Establish universal membership in the Governing Council of the United Nations Environment Programme, as well as other measures to strengthen its governance as well as its responsiveness and accountability to Member States;...’.

⁷⁸ General Assembly Resolution 2997 (XXVII) on Institutional and Financial Arrangements for International Environmental Cooperation; and see also Pushkareva, *supra* note 75, at para 5 ff.

Endangered Species, or the Convention on Biological Diversity.⁷⁹ The Secretariat, located in Nairobi is responsible for the administration of UNEP. In order to fulfil its duties the administration is divided into a number of sub-units such as the Division of Technology, Industry & Economics, or the Division on Environmental Policy Implementation.⁸⁰

The final component of UNEPs governance structure is the Environment Fund. The Fund is endowed by voluntary contributions from UN member states. It is governed by the Assembly, which is also required to lay down general procedures to this end.⁸¹ The fund is intended to finance environmental activities within the UN System and other international organisations. Furthermore, it can also be used for financing programs of general interest at regional level.⁸²

2.2.2 UNEP's Difficult Role as an Anchor Organisation

UNEP is said to have three mandates. First, it is an 'integrative agency' which incorporates environmental aspects into all parts of the UN family. Secondly, it is a 'coordinating agency' which brings together different actors and capacities to contribute to an overarching environmental program. Finally UNEP is a 'funding agency' that supports particular actors and projects.⁸³ The main areas of UNEP's activities comprise climate change, disasters and conflicts, ecosystem management, environmental governance, harmful substances, and resource efficiency.⁸⁴ In all these areas UNEP carries out or simply supports numerous programs. Often this happens in partnership with other international organisations (from within the UN System⁸⁵,

⁷⁹ For an overview over the other secretariats under the roof of UNEP see <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=43&ArticleID=234&l=en> (last accessed 19 December 2014).

⁸⁰ See 'UNEP Organigram', available at: <http://www.unep.org/pdf/UnepOrganigram.pdf> (last accessed 19 December 2014). For more details on the activities of the individual Divisions see Pushkareva, *supra* note 75, at para 8 ff.

⁸¹ General Assembly Resolution 2997 (XXVII), *supra* note 78, at III.

⁸² Ibid. This can involve monitoring, assessment and data collection, public education and training, promotion of research, support of national or regional environmental institution, etc. Particular attention shall thereby be put on the developing priorities of developing countries.

⁸³ See Pushkareva, *supra* note 75, para 16 ff.

⁸⁴ Activities in each area are illustrated on UNEPs webpage: www.unep.org (last accessed 19 December 2014).

⁸⁵ There is almost no UN Organisation that is not somehow engaged with UNEP. Common partners are the Food and Agriculture Organization (FAO); the United Nations Development Programme (UNDP); the World Health Organization; UNICEF, just to name a few.

or from outside⁸⁶), governments and regional institutions,⁸⁷ as well as with private actors.⁸⁸ Whether UNEP is successfully fulfilling its mandate or not is disputed.⁸⁹

In political science literature organisations such as UNEP have been described as an anchor organisation. Such organisations are characterised as the ‘primary, though not the only, international organizations in a global issue area’.⁹⁰ Their main functions are monitoring and assessment (in this case of the state of the environment), agenda setting and managing policy processes (in the issue area as a whole), and capacity development to address persisting problems in the issue area.⁹¹ Here the thesis focuses in particular on the latter two elements as they relate more closely to the specific issues in the intersection of sport and environment.

Agenda setting and the management of policy processes is one of the central tasks of UNEP. It covers large sections of its mandate. As stated above, UNEP is responsible for the coordination of environmental treaties as well as general programs and policies in this area. More generally, UNEP is in charge of coordinating environmental activity taking place within the UN System and beyond.⁹² Treaty coordination has for example taken place in the case of the Convention on Biological Diversity, where UNEP has created clusters of closely related conventions in the

⁸⁶ Such as the OECD, the World Bank Group, or the WTO; see ‘The WTO and the United Nations Environment Program’, available at: http://www.wto.org/english/thewto_e/coher_e/wto_unep_e.htm (last accessed 19 December 2014).

⁸⁷ Apart from partnerships to finance special programs UNEP cooperates on many levels with governments and further on regional level, see for instance: ‘Regional Workshops on Facilitating Understanding Between Officials Responsible for Development Planning and Officials Responsible for Chemicals Management – UNEP-Norwegian Fund project on “Integration of Chemical Safety Concerns into Development Agendas wi’, available at: <http://www.unep.org/chemicalsandwaste/UNEPsWork/Mainstreaming/IntegrationofSMCintoDevelopmentPlanningProce/Background/UNDPUNEPPGuidanceDocuments/TheUNDPUNEPPPartnershipInitiativeEconomicAn/UNEPNorwegianFundproject/tabid/79378/Default.aspx> (last accessed 19 December 2014).

⁸⁸ Such activities can for instance be found in the Sport and the Environment Programme, where UNEP cooperates with several private associations in the field of sport. See UNEP, ‘Sport and the Environment’ available at: http://www.unep.org/sport_env/ (last accessed 19 December 2014); or in UNEP’s ‘Finance Initiative’, where it cooperates with the financial sector, information available at: <http://www.unepfi.org/> (last accessed 19 December 2014).

⁸⁹ M Ivanova, ‘UNEP as Anchor Organization for the Global Environment’, in: F Biermann, B Siebenhüner & A Schreyögg (eds), *International Organizations in Global Environmental Governance* (Routledge, 2009) 151.

⁹⁰ Ibid at 152.

⁹¹ Ibid.

⁹² General Assembly Resolution 2997 (XXVII), *supra* note 78, at I 2 b states: ‘[the Council shall] provide general policy guidance for the direction and co-ordination of environmental programmes within the United Nations system’. Pushkareva, *supra* note 75, para 19.

field.⁹³ A further coordination process takes place regarding the secretariats of different environmental treaties. This includes general coordination processes (such as conferences for secretariats or providing a meeting platform) but also the hosting of several environmental convention secretariats. For those secretariats, even though they remain bodies of the respective treaty they are part of, UNEP executes the administrative tasks necessary.⁹⁴

However, UNEP struggles in fulfilling its role, particularly due to the conclusion of numerous environmental treaties. These all come with treaty organs which have ‘autonomous influence’ sometimes stronger than that of UNEP. Similarly, within the UN family and vis-à-vis other international organisations, UNEP was not able to emerge as the central institution for environmental issues.⁹⁵ Rather, environmental regulation remains fragmented and UNEP’s activities dispersed. Many organisations are not willing to give up important features of their governance activities just because they relate to the environment and UNEP lacks the capacity but also the ‘institutional vision’ to take a more prominent role.⁹⁶

In capacity building UNEP faces problems as well. Similar to the previous point, capacity building can be found throughout UNEP’s mandate.⁹⁷ The Programme has extensively contributed to the development of environmental law at the international, national and local level.⁹⁸ This was mainly done through the facilitation of inter-governmental platforms which helped create international environmental agreements, principles and guidelines.⁹⁹ These activities are conducted under the so-called Montevideo Programmes (there are four in total). They define the strategy UNEP is to take regarding the development and the periodic review of international environmental law.¹⁰⁰ Apart from driving the normative agenda UNEP is designed to support governments in particular in the implementation of environmental instruments.

⁹³ Pushkareva, *supra* note 75, para 21.

⁹⁴ Ibid para 22 and 23.

⁹⁵ Ivanova, *supra* note 89, at 158.

⁹⁶ Ibid.

⁹⁷ Pushkareva, *supra* note 75, para 24.

⁹⁸ See DELC, ‘About DELC’, available at <http://www.unep.org/delc/AboutDELC/tabid/54412/Default.aspx> (last accessed 19 December 2014); and Pushkareva, *supra* note 75, para 24.

⁹⁹ See DELC, *supra* note 98.

¹⁰⁰ See DELC, ‘Montevideo Programme’, available at: <http://www.unep.org/delc/MontevideoProgramme/tabid/54416/Default.aspx> (last accessed 19 December 2014). Some of the Environmental Agreements concluded under the auspices of the Montevideo Programmes are listed by Pushkareva, *supra* note 75, para. 25.

However, due to the explosion of environmental treaties and the strong demand for governments to receive assistance UNEP's human and financial capacities are stretched to the limit.¹⁰¹

One of the major weaknesses of UNEP which results in these problems, apart from its limited budget, is its informal structure and its lack of support from certain states.¹⁰² There have been various attempts to change UNEP's role as a 'second class' UN Organization over the years. Crucially, at the Rio+ 20 Conference mentioned above it was decided to strengthen and upgrade it.¹⁰³ For the moment however, the success of these measures is still unclear. UNEP's means of choice is therefore to cooperate with existing organisations, which already at this stage turns it into a 'policy forum where various clusters of agencies and networks convene to negotiate and exchange experience'.¹⁰⁴ This function could increase even further in the future.¹⁰⁵

2.2.3 Sport and Environment - Cooperation as a Way to Overcome Weaknesses in the Governance Structure

The claim made in this thesis is that the main benefit for UNEP in the cooperation process was its ability to access the Olympic Movement's unique implementation capacities. As such it was able to shape the environmental policies within the sporting community and beyond. As will be shown in greater detail below, from the very outset of the IOC's environmental turn, UNEP was included. It not only helped shaping policies at the transnational level but also supported organising committees at the local level and cooperates with host cities and countries.¹⁰⁶ UNEP, due to its particular expertise, had significant influence in drafting policy documents on Sport and Environment. Due to the strong and monopolistic character of the IOC, those policies were swiftly implemented throughout the Movement, thus allowing UNEP to reach a wide audience

¹⁰¹ Ivanova, *supra* note 89, at 160.

¹⁰² Ibid at 161 ff.

¹⁰³ See General Assembly Resolution 66/288, *supra* note 76, and in particular Annex to General Assembly Resolution 66/288, at para 88. See General Assembly Resolution 67/213, *supra* note 76, para 4; and UNEP, Notification by the Executive Director Twenty-seventh session of the Governing Council/Global Ministerial Environment Forum (Nairobi, 18–22 February 2013), 5 December 2012, para. 6.

¹⁰⁴ Ivanova, *supra* note 89, at 168.

¹⁰⁵ Ibid.

¹⁰⁶ See below at section 3.2.

previously not specifically targeted by environmental policies.¹⁰⁷ Particularly in the preparation and execution of the Olympic Games, UNEP had significant impact on projects which it was anticipated would have a long-lasting legacy in the host country. UNEP thereby benefited from the host city arrangement which contractually obliged any host city vis-à-vis the IOC to comply with its bidding commitments. As these commitments always contain an environmental component local authorities are, depending on their own capacities, bound to cooperate with experts (UNEP) which help them fulfil these requirements. Often those commitments foresee projects involving enormous amounts of financial investment. It is also significant that UNEP's participation was not only limited to the Games but usually extended to the city or the region in which the event was taking place. UNEP was furthermore able to link local authorities with other environmental organisations in the area, thus expanding their influence and connecting their expertise to the developments in the respective environmental domain.

The present case study thus exemplifies cooperation where regulators from differently structured issue areas engage into a regulatory project which helps one actor to benefit from the powerful position of the other one.

2.3 Summary

What this section shows is that cooperation is driven by commutative benefits for the parties. When facing a legitimacy crisis, the IOC could benefit not only from UNEP's expertise but also from its reputation and particularly its public character as member of the UN family, backed from participating governments. Additionally, UNEP was familiar with capacity building at local and national level, skills which were useful when helping organising committees to fulfil their environmental commitments of the host city contract. UNEP on the other hand found in the IOC a powerful organisation with an exceptionally wide reach. As will be shown in more detail below, through this cooperation it had the opportunity to implement environmental protection and sustainability standards into a broad network which reached not only the sporting community but also national and local levels.

¹⁰⁷ However, see also the criticism by the representative of UNEP that the IOC could invest more resources into implementing better environmental protection at the local level, below section 3.

3. SPORT AND ENVIRONMENT – A COMPLEX NETWORK INBETWEEN TWO REGULATORY FIELDS

The following part will show how, based on and alongside the original bilateral cooperation, UNEP and the IOC have created interlinked networks of environmental regulation in the sporting context. This complex web extends from the sporting community, includes supplying business sectors, the national and local political level, and environmental protection and sustainability standards. This reveals a form of constitutionalisation as described in Chapter 4. In order to properly grasp the different processes and inter-linkages it is necessary to first of all describe the Sports and Environment Programs of the Olympic Movement (3.1). Secondly, the thesis will address UNEP's participation in the different regulatory levels of the Program (3.2). Subsequently it will then briefly assess UNEP's own sports and environment network (3.3). Ultimately, the final part will return to the main research claim and point out different forms of constitutionalisation throughout the sport and environment network (3.4).

3.1 The Olympic Movement's Sport and the Environment Program

3.1.1 Overview over the Program at the IOC Level

The Olympic Movement's Sports and Environment Program developed from very modest environmental regulation in the late 1980s to a comprehensive set of policies in the late 1990s. These policies cover the large network of the wider Olympic family, encompassing not only sports federations but host cities, their home states, local communities, civil society and business actors. After the structural changes already described above (such as the amendment of the Charter for instance), various policies emerged at the IOC level. One of the most prominent policies is the Agenda 21 for the Olympic Movement, adopted by the Session 1999, which is modelled on the Earth Summit's Agenda 21.¹⁰⁸

¹⁰⁸ See IOC, Focus Sport and Sustainability, April 2011, available at: http://www.olympic.org/Documents/Olympism_in_action/Sport_and_Environment/FOCUS_Sustainability-April_2011.pdf (last accessed 19 December 2014).

The Agenda: '[lays] out the general principles of the Olympic Movement's policies and programmes associated with sport, sports events and environment-related initiatives',¹⁰⁹ and aims 'to encourage the members of the Olympic Movement to integrate sustainability principles into their operations'.¹¹⁰ In concrete terms, the Agenda provides for three major areas of actions for sustainable development. Those are improved socio-economic conditions (such as health protection, changing consumer habits, or human habitat), conservation and resource management (in particular regarding the implications of large-scale sport events), and finally the strengthening of major groups such as women, young people or indigenous populations.¹¹¹ The Agenda is complemented by additional documents. One is the IOC Guide to Sport, Environment and Sustainable Development, which was developed in collaboration with all International Federations, and has the goal of transforming the recommendations of the Agenda into 'concrete actions and programmes'.¹¹² Another is the Manual on Sport and the Environment, a document which is intended to address all levels of the Olympic Movement, in awareness of their different competences in environmental issues. The Manual is aimed at '[providing] basic tools to identify problem areas, establish priorities and find appropriate responses to issues stemming from the relationship between sport and the environment'.¹¹³ Most recently, the report on 'Sustainability through Sport: Implementing the Olympic Movement's Agenda 21' provided a summary of the developments of environmental protection in the area of sport in particular with regard to the Olympic Games, stakeholder initiatives and partnerships with UN agencies. Apart from this it also looks into and addresses future challenges.¹¹⁴

Every second year the IOC conducts the World Conference on Sport and the Environment. This event includes representatives of the Olympic Movement, and other entities, such as

¹⁰⁹ Ibid.

¹¹⁰ See IOC, 'Factsheet', *supra* note 64, at 1.

¹¹¹ See IOC/Sport and Environment Commission, 'Olympic Movement's Agenda 21, Sport for Sustainable Development', available at: http://www.olympic.org/Documents/Reports/EN/en_report_300.pdf (last accessed 19 December 2014).

¹¹² See IOC, 'Factsheet', *supra* note 64.

¹¹³ See IOC, 'Manual on Sport and the Environment', at 7, available at: http://www.olympic.org/Documents/Reports/EN/en_report_963.pdf (last accessed 19 December 2014).

¹¹⁴ See IOC, 'Factsheet', *supra* note 64, at 2. See also IOC, 'Sustainability through Sport, Implementing the Olympic Movement's Agenda 21', in particular at 85 ff, available at: http://www.olympic.org/Documents/Commissions_PDFfiles/SportAndEnvironment/Sustainability_Through_Sport.pdf (last accessed 19 December 2014).

governments, IOs, NOGs, industry and business, research institutes and the media.¹¹⁵ Its goal is to assess the progress made by the Olympic Movement regarding sustainable development, combined with the suggestion of new policies. It furthermore brings different actors together and in doing so allows for sharing experiences, expertise and for initiating or fostering cooperation. It furthermore provides a venue for education in environmental matters in the sports field.¹¹⁶

Apart from these particularly prominent actions, the IOC pursues further activities (seminars or the creation of information material for example) to foster environmental and sustainability considerations within the Olympic Movement. There are also events at the local level conducted by NOCs or IFs. They vary depending on local specificities, preferences and concerns. More visible and more prevalent events are the so-called regional seminars, which are conducted together with Olympic Solidarity, an IOC entity which organises support programs for NOCs.¹¹⁷ These seminars, which are adapted to local conditions, advocate use of sport for sustainable development, and help to identify environmental issues that need to be addressed. They furthermore encourage commitment of NOCs to programs that need to be implemented at national level. Finally, the seminars enable NOCs to share experiences concerning their local environmental programs.¹¹⁸

3.1.2 Greening the Olympics

Being at the centre of the Olympic Movement, the Games are also at the centre of environmental concerns. In fact, as stated above, the driver behind the environmental agenda of the IOC was to ‘green’ the Games in order to appease parts of the public concerned with the negative environmental externalities of the mega-events. Therefore, just after the ‘environmental disaster’ of the 1992 Games¹¹⁹ environmental concerns and sustainability increasingly became of primary concern both in the application and execution phase of the Games.

¹¹⁵ See IOC, ‘Factsheet’, *supra* note 64, at 2.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ See above section 2.1.3.

As outlined above, the applications phase follows two stages, a candidature acceptance and a candidate phase. In the first, applicants are required to answer a questionnaire provided by the IOC. Under the category ‘environmental conditions and impact’ cities have to:

- Provide an assessment of current environmental conditions in the city
- Provide details of ongoing environmental projects and their organisation
- Provide an assessment of the environmental impact of staging the Games in that city/region
- Provide information in regard to any environmental impact studies carried out on proposed venues and if legislation requires such studies.¹²⁰

The information gathered is assessed with that gathered in other categories and a final decision is made on this basis. Cities which have made it to the candidate phase are then required to submit a detailed ‘candidature file’. This file includes a section labelled ‘environment and metrology’. Here the candidate has to provide information on its environmental approach ‘in regard to geographical features; public authorities; environmental management systems; venue construction and development projects’.¹²¹ Thus, at both stages environmental concerns are part of the criteria by which a host city is chosen.

All commitments made in the second application stage are binding and have to be implemented by the organising committee if the city is chosen. For this the Organizing Committee must cooperate with governmental authorities and other stakeholders in order to implement the policies across the city and nationwide. Experts from the IOC and other organisations (such as UNEP) assist the Organizing Committee in development and implementation.¹²² Furthermore, the IOC Coordination Commission monitors the process (together with external actors, such as UNEP, NGOs or the media) in order to ensure ‘maximum fulfilment of commitments and maximum use of the opportunity to improve environmental conditions and practices’.¹²³

¹²⁰ Sport and Environment Commission, ‘Environmental Protection and the Olympic Games’, available at: <http://www.olympic.org/sport-environment-commission?tab=games> (last accessed 19 December 2014).

¹²¹ Ibid. The details of this include: ‘[A]ir quality; protected areas; public authorities’ roles and responsibilities; Environmental Impact Assessments; construction work; work with NGOs; integration of environmental approaches into contracts with suppliers and sponsors; special features and actions; and Games-time rainfall, wind, temperatures and humidity levels’.

¹²² Ibid.

¹²³ Ibid.

Since Lillehammer the green approach of the Olympic Games has steadily increased. Nagano in 1998, as the first city where the IOC had prescribed an environmental protection policy to be implemented by the Organizing Committee,¹²⁴ included a number of environmental friendly activities in its agenda such as the use of low-emission vehicles. Sydney in 2000 already put the ‘green theme’ at the centre of the Games and sought to create a beneficial impact for the environment.¹²⁵ In Athens (2004) and Torino (2006) environmental aspects became more and more important. The Athens’ Organizing Committee was the first to sign a MoU with UNEP, even though UNEP had more of an observer role due to the fact that this happened at a late point in the organizing phase. In general there were a number of environmental failures linked to the Games in Athens.¹²⁶ In contrast, Torino began cooperation with UNEP at an earlier stage, the result of which according to UNEP, ‘was seen as a genuine step forward in the environmental management of sporting events’.¹²⁷ However, the legacy of these two early examples of ‘Green Games’ has been challenged by other observers.¹²⁸

Two years later Beijing followed this trend by trying to make the Games a ‘catalyst in bringing the concept of environmental sustainability into a comprehensive city development plan’.¹²⁹ The bidding commitments covered the areas of air and water quality, transport, energy, ecosystems and protected areas.¹³⁰ In total 17 billion US dollars were allocated to fund 20 different environmental projects over a period of nine years.¹³¹ The measures taken in the individual areas were manifold, ranging from raising public awareness for environmental concerns, to concrete infrastructure construction, the promotion of environment-related industries and detailed

¹²⁴ See Cantelon & Letters, *supra* note 34, 294.

¹²⁵ IOC, ‘Sustainability through Sport’, *supra* note 114, at 39 ff.

¹²⁶ Hayes & Karamichas, *supra* note 1, at 9.

¹²⁷ See UNEP News Center, ‘London 2012 Will Leave a Lasting Legacy for the UK and the Olympic Movement: UNEP Executive Director’ (26 July 2005), available at: <http://www.unep.org/newscentre/default.aspx?DocumentID=2691&ArticleID=9239> (last accessed 19 December 2014)

¹²⁸ See J Karamichas, ‘Olympic Games as an Opportunity for the Ecological Modernization of the Host Nation: The Cases of Sydney 2000 and Athens 2004’, in: G Hayes & J Karamichas, *Olympic Games, Mega-Events and Civil Societies* (Palgrave Macmillan, 2012) 151 ff.

¹²⁹ Ibid at 42.

¹³⁰ UNEP, ‘Independent Environmental Assessment, Beijing 2008 Olympic Games, 2009’, available at: http://www.unep.org/pdf/BEIJING_REPORT_COMPLETE.pdf (last accessed 19 December 2014) at 14f.

¹³¹ Ibid at 16; and UNEP, *Beijing 2008 Olympic Games – An Environmental Review* (2007), at 26.

pollution reduction efforts.¹³² These endeavours were monitored by NGOs and UNEP which provided expertise and conducted audits. Results of these measures were an increase in the green area in Beijing by 43% and the promotion of a waste sorting and recycling system.¹³³

For the execution of the Games in Vancouver in 2010 the Organizing Committee for the first time created a sustainability department. The underlying concept of the environmental plans for the Games was the combination of ecological, social and economic benefits. This was intended to be achieved through six sustainability performance objectives, which were ‘accountability, environmental stewardship and impact reduction, social inclusion and responsibility, aboriginal participation and collaboration, economic benefits, [and] sport for sustainable living’.¹³⁴ These criteria translated *inter alia* into green construction of the game venues, waste management, and CO2 neutrality.¹³⁵

London 2012 put its environmental program under the motto ‘one planet living’¹³⁶ which was designed to raise awareness of the imbalanced exploitation of the earth’s resources, with particularly burdensome behaviour displayed by developed countries.¹³⁷ Therefore, apart from building green facilities and infrastructure, London 2012 attempted to raise environmental awareness in five areas: Climate change, waste, biodiversity, inclusion, and healthy living.¹³⁸ These fields also constituted priority areas in the environmental plan for the Games and thus translated into low carbon measures, a zero waste target, and the creation of new green spaces within the city.¹³⁹

Finally Sochi, the host city of the last Olympic Games, had set up an environmental action plan. Its goal was to achieve zero waste and climate neutral Games. Furthermore, the event was to be

¹³² See UNEP, *Beijing 2008 Olympic Games – An Environmental Review*, *supra* note 131, at 26 ff, which also provides a detailed overview over the different projects into which the money was allocated.

¹³³ IOC, ‘Sustainability through Sport’, *supra* note 114, at 42.

¹³⁴ See Sport and Environment Commission, ‘Environmental Protection and the Olympic Games’, *supra* note 120.

¹³⁵ IOC, ‘Sustainability through Sport’, *supra* note 114, at 44 f.

¹³⁶ A concept developed by the World Wildlife Fund, the Global Conservation Organization, and BioRegional, see *ibid* at 46.

¹³⁷ *Ibid* at 46 ff.

¹³⁸ Sport and Environment Commission, ‘Environmental Protection and the Olympic Games’, *supra* note 120.

¹³⁹ IOC, Sustainability through Sport, *supra* note 114, at 47 f.

conducted in harmony with the surrounding nature, whilst at the same time trying to promote sustainable development in the region. The Games were to create an ‘enlightenment’ effect for the area, which was to be supported by a strong educational and awareness raising component.¹⁴⁰ Despite this approach and its cooperation with UNEP and the IOC, the environmental legacy of the Sochi Olympics seems to be mixed.¹⁴¹

What the previous paragraphs draw out well is the inter-relationship between the host city, country and the transnational (IOC) level discussed above. As we can see, the IOC sets the framework yet it is the host city and the regional or national government whose engagement matters to a large extent for the final outcome. Further, their engagement also refers back to the transnational level. Thus, without Lillehammer’s showcase model of ‘green Games’ the IOC’s environmental policies might look different today. Other cities, such as Beijing, in return used the ‘catalyzing effect’ that the Games could provide to revamp their own environmental approach. Thus, in this particular case Hayes and Karamichas’s assessment seems to fit particularly well:

Sport mega-events increasingly provide a platform for economic growth oriented approaches to environmental protection and amelioration. In this scenario, the IOC ... functions as regulatory authority for the development and dissemination of environmental best practice and sustainable technologies, facilitating the creation and growth of new markets.¹⁴²

As the description of the bidding and implementation process shows the IOC is indeed playing the role of a regulatory authority in this case. Based on the general legal framework the IOC has ultimate authority. This is particularly the case at the moment when it chooses the host city but and also at a later level, exercised through the Coordination Commission backed by the ultimate possibility to withdraw the Games (although this measure of last resort has never been applied). The example of the Sochi Games furthermore indicates that once the Games are awarded, the

¹⁴⁰ See UNEP, ‘Green Olympics in Sochi’, information available at: <http://www.unep.org/roe/GreenOlympicsinSochi/tabid/54610/Default.aspx> (last accessed 19 December 2014).

¹⁴¹ ‘The Not So Sustainable Sochi Winter Olympics’ *Time Magazine*, 30 January 2014, available at: <http://time.com/2828/sochi-winter-olympics-environmental-damage/> (last accessed 19 December 2014).

¹⁴² Hayes & Karamichas, *supra* note 1, at 10-11.

IOC is also locked into the process and its own reputation very much depends on a successful outcome.¹⁴³

3.2 Cooperation between the IOC and UNEP

Cooperation between UNEP and the Olympic community takes place on all levels outlined above. First, there is the MoU between the IOC and UNEP upon which cooperation with the general Movement is based. Secondly, UNEP is often involved in the preparations of the individual Games. This is framed by the detailed and legally binding agreements concluded between UNEP and the respective organising committees. Finally, cooperation can also take place at the local level between UNEP and one or more national committees or federations.

3.2.1 Cooperation at the General Policy Level

Formally, cooperation at IOC level is based on the aforementioned agreement between the IOC and UNEP concluded in 1994. It constitutes a broad political declaration of intent and the main framework document which sets out both organisations' intentions.¹⁴⁴ In concrete terms the MoU confirms that the IOC has put sustainability and environmental protection at the core of its policy and operation. Furthermore, it holds that UNEP has the expertise in the area of the environment and sustainability. Sport then is both a venue to address sustainability concerns but also a domain which needs to better integrate sustainability into its policies.¹⁴⁵

Based on this framework many individual projects and forms of mutual participation take place, often through informal mechanisms such as exchange of letters (or are simply based on customary practices). For example, UNEP has a fixed seat in the Sport and Environment Commission of the IOC. This practice is not enshrined in a particular document but is based on an unwritten rule concerning the composition of this body.¹⁴⁶ Moreover, regular exchange of information and services between the IOC and UNEP takes place through two other departments

¹⁴³ See 'The Not So Sustainable Sochi Winter Olympics' *supra* note 141; as well as Cantelon & Letters, *supra* note 34, at 302.

¹⁴⁴ See Agreement between the IOC and UNEP, *supra* note 65.

¹⁴⁵ Ibid.

¹⁴⁶ See Interview with Ms Katia Mascagni (IOC), 26 February 2013.

of the IOC: The International Cooperation and Development Department and the Department of Games.¹⁴⁷

Regarding the output of this cooperation at the IOC level, two projects must be named in particular. Firstly, it is necessary to mention Agenda 21 and subsequent documents such as the ‘IOC Guide to Sport, Environment and Sustainable Development’ or ‘Sustainability through Sport: Implementing the Olympic Movement’s Agenda 21’.¹⁴⁸ UNEP was one of the key contributors to the Agenda. UNEP representatives were at the forefront of the expert group responsible for the drafting process. As a result, UNEP had a significant impact in setting out the general environmental directions and policies of the Olympic Movement.

The second example is the Conference on Sport and Environment which the Olympic Movement organises in cooperation with UNEP. UNEP thereby has visibility as one of two key organisers and is the only organisation apart from the IOC that has ‘branding’ in the conference. UNEP has also influence in the substantive content of the Conference and participates by sending speakers on different panels. In short, even though the initiative for the Conference originates from the IOC, UNEP is heavily and visibly involved both in the preparation and execution of the Conference.¹⁴⁹

3.2.2 The Olympics – Regulatory Cooperation in the Context of Mega Events

As stated above, a central aspect of the cooperation between UNEP and the Olympic Movement takes place at host city level. The Olympic Games are the key deliverable of the Movement and are also the most visible event which carries significant potential for problematic environmental effects. As a result of this particular focus on the Games and their sustainability and environmental impact,¹⁵⁰ cooperation with outside partners is also highly developed at this level. For this reason one can find detailed agreements between the organising committees and UNEP. In contrast to the rather general MoU between UNEP and the IOC, the agreements between

¹⁴⁷ Ibid.

¹⁴⁸ IOC, ‘Focus Sport and Sustainability’, *supra* note 108.

¹⁴⁹ See Interview with Ms Katia Mascagni (IOC), 26 February 2013.

¹⁵⁰ See above at section 2.1.3.

UNEP and the organising committees stipulate in detail which different contractual services are to be provided. In this way UNEP becomes one of the experts of the committee or an external provider of environmental expertise. Therefore these agreements actually resemble service contracts with UNEP tasked with delivering a number of items within a particular timeframe. In return, the organising committees usually have to fulfil a number of obligations to UNEP.¹⁵¹

The scope of each agreement varies from city to city. Depending on the host city or other partner's expertise and capabilities, UNEP can be more or less involved in the planning and execution of the Games. In the London Olympics, for instance, UNEP's involvement was less necessary as the City of London was equipped with extensive environmental expertise and execution abilities. In contrast, Sochi 2014 and Beijing 2012 were more dependent on outside assistance in their environmental agenda.¹⁵² Consequently, the Sochi Organizing Committee signed a Memorandum of Understanding with UNEP laying out the extensive cooperation for the purpose of achieving green Games.¹⁵³ Generally, the IOC encourages involvement of different environmental organisations which may be IOs such as UNEP or NGOs with international or local reach. However, this is never a requirement as the organising committee has the final decision in this regard.¹⁵⁴ Furthermore, it is important to note that it is UNEP which often involves other specialised NGOs. In order to get a better understanding of the actual contribution UNEP provides to the host cities, it is useful to briefly outline UNEP's involvement in the preparation of the last four Olympic Games in Beijing, Vancouver, London, and Sochi.

3.2.2.1 Beijing

The 2008 Summer Olympics in Beijing were conducted in cooperation with UNEP which was established through a MoU signed between the Organizing Committee and UNEP in 2005.¹⁵⁵ UNEP's role thereby was to help Beijing to implement the environmental goals enshrined in Beijing's bidding commitments. It also helped to improve communication with environmental

¹⁵¹ See for instance the Memorandum of Understanding between the Sochi 2014 Organizing Committee and UNEP, 5 June 2009 (on file with the author).

¹⁵² Interview with Ms Katia Mascagni (IOC), 26 February 2013.

¹⁵³ See MoU between Sochi 2014 and UNEP, *supra* note 151.

¹⁵⁴ Interview with Katia Mascagni (IOC), 26 February 2013.

¹⁵⁵ See UNEP, 'Independent Environmental Assessment – Beijing 2008 Olympic Games, 2009', *supra* note 130, at 13.

NGOs and to raise awareness among the media and the general public.¹⁵⁶ These efforts were accompanied by two reports on the environmental performance of Beijing's Organizing Committee: the intermediate report published in 2007 (which assessed whether Beijing was on track in meeting bidding commitments¹⁵⁷) and the final report that focused on the environmental impact of the Games.¹⁵⁸

The intermediate report first looks at the efforts regarding green Olympic Games in a number of issue areas such as environmental management, the use of the venues in the post-Games era, energy, transport, water, waste, green building, ozone layer protection and green coverage of the Olympic sites amongst others.¹⁵⁹ The second part concerns the greater impact of the Games on Beijing. Here air quality, transport, energy and industry, water and waste management, green coverage and protected areas are addressed.¹⁶⁰ The final part of the report contains the views of several environmental NGOs whose inclusion in the process UNEP had advocated. Those NGOs are the Chinese Society for Environmental Sciences, Conservation International, the Chinese Environmental Protection Association, the World Wide Fund for Nature (WWF), Friends of Nature and Greenpeace. All of these organisations contributed to the execution of the environmental plan in one way or another. The reports in this section were provided by the NGOs themselves. They all included assessments of the different contributions the NGOs made to the process and some contained an evaluation of future activities, suggestions for improvement and a critique of current practices.¹⁶¹

The final report assesses the impact of the Games in different environmental categories such as air quality, transport, energy, green coverage and protected areas, water, waste, the Olympic sites, climate neutrality and communication and education. Furthermore, it also addresses the role of the partners of the Games and again leaves room for the perspective of NGOs (even though in this report the feedback of the NGOs was summarised by UNEP and not simply

¹⁵⁶ See 'UNEP and the Various Olympic Events', available at: http://www.unep.org/sport_env/olympics_Events.aspx (last accessed 19 December 2014).

¹⁵⁷ See UNEP, *Beijing 2008 Olympic Games – An Environmental Review*, *supra* note 131.

¹⁵⁸ See UNEP, 'Independent Environmental Assessment', *supra* note 130.

¹⁵⁹ See UNEP, *Beijing 2008 Olympic Games – An Environmental Review*, *supra* note 131, at 40-83

¹⁶⁰ *Ibid* at 84-144.

¹⁶¹ *Ibid* at 145-158 note that only Greenpeace China, the World Wildlife Fund and Conservation International submitted reports.

reprinted as in the intermediate report).¹⁶² For the main part of the report, UNEP relied predominantly on data provided by the Municipal Government of Beijing as well as on information provided by the Organizing Committee. UNEP therefore had to make a disclaimer stating that it and its ‘team of experts [has] tried to provide objective analysis, comments and recommendations based on this data. It should be noted that in some instances required data was not available’.¹⁶³ Each section contains comments and recommendations regarding the progress achieved during the preparation for the Games and possible improvements that could still be made. These recommendations extend to the general environmental situation in Beijing and China.

3.2.2.2 Vancouver and London

Both, the Vancouver and London Organizing Committees possessed a high degree of environmental expertise. It was therefore stated that UNEP’s input in the preparation and execution of these Games was lower than in others.¹⁶⁴ UNEP however stressed that they were nonetheless highly involved at different levels.¹⁶⁵ In the case of Vancouver, the Organizing Committee signed a MoU with UNEP on October 27th 2007. The MoU foresaw cooperation regarding environmental education and raising public awareness.¹⁶⁶

3.2.2.3 Sochi

As stated before, Sochi 2014 was more dependent on outside environmental expertise than its two predecessors. Consequently UNEP’s participation was also stronger. Since the very beginning of the preparations UNEP was heavily involved. On June 5th 2009 the Organizing Committee concluded a MoU with UNEP. Later, in 2010, a broader MoU between UNEP and

¹⁶² See UNEP, ‘Independent Environmental Assessment’, *supra* note 130.

¹⁶³ *Ibid*, at 13.

¹⁶⁴ Interview with Michelle Lemaitre (IOC), 10 April 2013.

¹⁶⁵ Interview with Wondwosen Asnake Kibret (UNEP), 12 April 2013.

¹⁶⁶ See Press Release: ‘UNEP Partners with Vancouver 2010 on Environmental Initiatives for the 2010 Winter Games’ (29 October 2007), available at: <http://www.unep.org/documents.multilingual/default.asp?DocumentID=519&ArticleID=5691&l=en> (last accessed 19 December 2014).

the Russian Federation was developed.¹⁶⁷ The 2009 MoU with the Organizing Committee foresaw several areas of cooperation. Very generally UNEP was to assist the Organizing Committee in the planning and delivery of the Games by providing advice on issues such as greenhouse gas management, ozone management, solid waste-management and other goals of the bidding commitments.¹⁶⁸ Two projects were particularly pursued in this regard. First, as in the case of Beijing UNEP was to conduct two environmental reviews, one prior to the Games and a second to be conducted after the Games.¹⁶⁹ Secondly, UNEP was to build an expert team which was to provide advice to the organisers upon request.¹⁷⁰

Apart from those central issues UNEP was to assist in a number of additional areas. Among other things, UNEP was to promote good working relations with NGOs and other stakeholders,¹⁷¹ to support awareness-raising activities,¹⁷² co-organise cultural¹⁷³ and educational programs¹⁷⁴ and participate in the development of joint communication projects regarding the environmental aspects of the Games.¹⁷⁵

3.2.3 Room for Improvement – Cooperation with Local Entities

As outlined above the IOC supports cooperation on Games and advocacy and educational work regarding the environment among the members of the Olympic Movement. This crystallises in different programs to raise awareness for the need to integrate sustainability into the sporting agenda of the members, in education efforts by which specific tools are put at the disposal of local committees, and last but not least in the creation of linkages with the network of experts from UNEP and other organisations (through workshops and conferences for example). UNEP is

¹⁶⁷ The MoU is mentioned in UNEP, 'Report of the UNEP 2nd Expert Mission 28-30 January 2010', available at: http://www.unep.org/PDF/PressReleases/SOCHI_2014Jan28to302010_Mission_%20ReportFinal_%2015March.pdf (last accessed 19 December 2014)

¹⁶⁸ MoU between Sochi 2014 and UNEP, *supra* note 151, Article 4.3.

¹⁶⁹ Ibid. Article 4.4. As of now none of these reports seems to be publically available. There are however, smaller reports on a particular issues such as UNEP, 'Report of the UNEP 2nd Expert Mission 28-30 January 2010', *supra* note 167.

¹⁷⁰ MoU between Sochi 2014 and UNEP, *supra* note 151, Article 4.4.

¹⁷¹ Ibid Article 4.5.

¹⁷² Ibid Article 4.5.

¹⁷³ Ibid Article 4.8.

¹⁷⁴ Ibid Article 4.10.

¹⁷⁵ Ibid Article 4.9.

not represented in all countries – so there may not be an office in the specific country of a NOC, yet when there is a specific need for expertise by a NOC then the IOC will help to set up contact by, for instance, having someone from the headquarters come to the committee. UNEP's role would then be to train local personnel in workshops and through other events.¹⁷⁶

3.3 UNEP's Own Sport and the Environment Program: Using Sport to Improve Environmental Protection

UNEP, as has been described above, often uses cooperation and partnerships to foster and improve environmental protection in certain areas. Therefore, it is not surprising that apart from its cooperation with the Olympic Movement, UNEP has also created its own program that is designed to combine the field of sport with that of environment. After cooperation with the Olympic Movement began in 1994, a number of other actors in the field of sport have built ties with UNEP. This collaboration led to a complex program linking the two areas, though the cooperation with the Olympic Movement remains the most crucial.¹⁷⁷ In 2003 the UNEP Governing Council developed a long term strategy for the Sports and Environment Program.¹⁷⁸

UNEP's Sports and Environment Program has two main objectives which resemble those of the Olympic Movement's Sport and Environment initiative. First, it intends to '[p]romote the integration of environmental considerations into sports'.¹⁷⁹ This means that sporting activities should be planned and executed in a way that is sustainable and not environmentally harmful. In addition, sport events should have a positive environmental impact in the respective community where the event is taking place or where it is practiced. This leads to the second objective pursued with the Sport and the Environment Program: it aims to use 'the popularity of sports to promote environmental awareness and respect for the environment among the public'.¹⁸⁰ The idea behind this is that sport has significant appeal to the public and as such has significant

¹⁷⁶ Interview with Ms. Katia Mascagni (IOC), 26 February 2013, and Interview with Wondwosen Asnake Kibret (UNEP), 12 April 2013.

¹⁷⁷ See 'About UNEP, Sport and the Environment', available at: http://www.unep.org/sport_env/about.aspx (last accessed 19 December 2014).

¹⁷⁸ Governing Council of the United Nations Environment Programme, Long-Term Strategy for Sport and Environment of the United Nations Environment Programme, UNEP/GC.22/3/Add.3/Rev.1, 23 January 2003.

¹⁷⁹ Ibid para 2; and 'About UNEP, Sport and the Environment' *supra* note 177.

¹⁸⁰ Governing Council of the United Nations Environment Programme, Long-Term Strategy for Sport and Environment of the United Nations Environment Programme, *supra* note 178.

influence within society. Therefore it ‘can become a powerful agent for change’.¹⁸¹ Apart from sport’s popularity within society as a whole, another argument for making sport an advocate for environmental protection is that sporting organisations often have good relationships with government and the industry representative and may also advocate for and encourage greater environmental protection at this level.¹⁸² In sum, sport has grown in importance over the last decades, hand in hand with its increased prominence. The Sport and the Environment Program intends to benefit from this development by using sport’s popularity to further its goals – environmental protection. The sporting community on the other hand is to benefit from the expertise that UNEP can provide for the execution of sporting events.

As stated at various stages above, the partnership between UNEP and the Olympic Movement is still a crucial one.¹⁸³ However, UNEP also extended cooperation to general and individual sport associations,¹⁸⁴ sporting events and businesses active in the area of sport.

Regarding the first case, one can cite the cooperation between UNEP and the Indian Premier League (Cricket). This partnership is based on a Memorandum of Understanding signed by the two organisations in 2010¹⁸⁵ and encompasses two main areas of cooperation. Firstly, UNEP is to provide expertise in order to improve the environmental impact of sporting events of IPL. This includes subjects like ‘sustainable transport, energy efficiency, waste and water management, green building and green procurement’.¹⁸⁶ Secondly, the public reach that the IPL has should be used to promote environmental programs, protection and sustainability in general.¹⁸⁷

An example of the second area of cooperation is the cooperation of UNEP with FIFA World Cup events. UNEP signed agreements with the organisers of both the 2006 World Cup in Germany as well as the 2010 World Cup in South Africa. 2006 was the first time that a FIFA World Cup included environmental considerations in the preparation and execution of the event. The

¹⁸¹ ‘About UNEP, Sport and the Environment’, *supra* note 177.

¹⁸² *Ibid.*

¹⁸³ See Governing Council of the United Nations Environment Programme, Long-Term Strategy for Sport and Environment of the United Nations Environment Programme, *supra* note 178, para 24 and 25.

¹⁸⁴ *Ibid* para 26 and 27.

¹⁸⁵ See Memorandum of Understanding between Indian Premier League and UNEP, available at: http://www.unep.org/sport_env/images/IPL_MoU.pdf (last accessed 19 December 2014).

¹⁸⁶ *Ibid* Article 3.

¹⁸⁷ *Ibid* Article 3 (1)-(11).

agreement between the organisers and UNEP particularly focused on a low-pollution and eco-friendly competition.¹⁸⁸ After the success of this first cooperation, a partnership between the Global Environment Facility, UNEP and the South African Department of Environmental Affairs was set up for the 2012 World Cup. This initiative had three components: ‘[r]enewable energy interventions in six World Cup host cities, [a]n awareness-raising drive on green tourism [...] funded by GEF, [a]nd a UNEP programme to offset the carbon emissions of eleven World Cup teams’.¹⁸⁹

Finally, UNEP also cooperates with industries active in the sport sector. On its website it lists the example of Puma, a manufacturer of sports attire, with which it launched the ‘The Play for Life Campaign’ which was intended to fund conservation programs in Africa and thereby to support the International Year of Biodiversity in 2010.¹⁹⁰ As has been already discussed in the previous chapters UNEP has set out a framework governing its cooperation with private actors which also applies in the sporting context. Thus, any potential cooperation project has to first undergo a due diligence process which depends on the type of cooperation involved. Consequently, a distinction is made depending on whether UNEP receives funds or makes payments to the partner organisation, and on how high the payments are.¹⁹¹

Substantively, UNEP has a number of exclusionary criteria for partnerships. They depend on whether the partner is a for- or non-profit organisation. Partnerships either fall into category A – exclusionary, or B – cautionary. As such, for for-profit organisations complicity in human rights abuses, toleration of forced labour and child labour, the sale or manufacturing of landmines, active work against UN goals or violations of Security Council sanctions fall within the exclusionary category.¹⁹² In category B one finds a list of Global Compact-sensitive industries (such as weapons or tobacco producers), UNEP-sensitive industries (such as chemical or fossil

¹⁸⁸ ‘Greening of the 2006 World Cup’, available at: http://www.unep.org/sport_env/2006worldcup.aspx (last accessed 19 December 2014).

¹⁸⁹ ‘2010 Green Goal in South Africa’, available at: http://www.unep.org/sport_env/Worldcup2010.aspx (last accessed 19 December 2014).

¹⁹⁰ See ‘Puma® Play for Life’, available at: http://www.unep.org/sport_env/Puma_PlayforLife.aspx (last accessed 19 December 2014).

¹⁹¹ UNEP, Partnership Policy and Procedures, Policy Outline No.1/2011, 21 October 2011.

¹⁹² See *ibid* Annex 2, at 26.

fuel industries) as well as a list of issues which could lead to a conflict of interest.¹⁹³ Furthermore, there is a third category (C) which lists positive criteria such participation in the Global Compact or GRI reporting schemes for example.

For business partners there are nine such positive criteria. Meeting more than six indicates a clear affirmative decision for cooperation whilst less than six may require specific assessment of the commitment.¹⁹⁴ For not-for-profit organisations a similar list exists which is also divided into three categories. In category A one finds particular exclusionary criteria that are based on the organisation's status and capacities (financial, administrative and technical).¹⁹⁵ In the B category one finds the list of UN policy and value related issues which are listed in the previous category of for-profit organisations. Examples are violations of UN Security Council sanctions or other UN-related obligations and responsibilities.¹⁹⁶ Lastly in category C organisations can receive positive points if they possess relevant technical or strategic capacity.¹⁹⁷

In conclusion, UNEP has also has created a network of cooperation between the sport sector and the environmental sector. It has broadened its sport and environment campaign by partnering with other influential organisations (such as IPL or FIFA), even though the partnership with the Olympic Movement still takes a central position. In all cases the major goal is the promotion of environmental protection among the wider public, but also to assist organising committees in their efforts to create more environmental friendly events. UNEP's partnership requirements constitute a framework within which cooperation can take place. However, UNEP has less hierarchical force and is more dependent on voluntary cooperation of interested actors.

3.4 Synthesis – Cooperation, Networks and Constitutionalisation Effects in the Field of Sport and Environment

The development of commutative forms of cooperation into broader networks which have more of a constitutionalising function can be well observed in this case study. It is important to point

¹⁹³ Ibid at 26 and 27.

¹⁹⁴ Ibid at 27 and 28.

¹⁹⁵ Ibid at 30.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid at 30-31.

out two ways in which this development takes place in this regard. First, constitutionalisation via cooperation requirements: As shown above, UNEP has a partnership framework in place which entails due diligence procedures for every instance of cooperation. Under this framework potential partners must be in line with certain normative standards (such as the Global Compact's 10 principles). Consequently, with each cooperation engaged into, UNEP promulgates these norms in other (private) sectors and functional issue areas. This can also be observed in the case of the sporting sector.

However, a second way of network construction is more important in this case. This is namely the integration of environmental protection standards into the sporting community and through mega-events into territorial political spaces and broader civil society. This has happened in two phases, first of all through the network created between UNEP and the sporting community (starting with the UNEP-IOC Cooperation Agreement), which in actual fact consists of several interlinked networks. As such, the IOC has created a loose network whereby it brings together actors (sports-related organisations, public actors, and NGOs) engaged in the area of sport and environment.¹⁹⁸ Equally, UNEP has started an initiative for sport and environment whereby it cooperates with various actors from the sporting sector, such as sporting associations (national and international), particular sport events and industry. This led to a constitutionalisation process which made environmental protection and sustainability an intrinsic part of sports governance. This is of course most visible in the Charta amendment by which a new paragraph was introduced into Rule 2. As demonstrated above, UNEP had significant input in this development and actively shaped particular second tier rules and regulations establishing environmental protection in the realm of sport.¹⁹⁹

Through mega-events environmental protection and sustainability considerations reached both the national and local level. In particular in developing countries, which could not build on a long tradition of environmental policies, such events can be a catalyst for enormous regulatory transformation. UNEP very straightforwardly stressed the catalyst effect as the main reason for engaging in cooperation.²⁰⁰ By providing advisory services, UNEP has the opportunity to work

¹⁹⁸ The main example of this is the Conference on Sport and Environment, see above for more information.

¹⁹⁹ See above section 3.3.1.

²⁰⁰ Interview with Wondwosen Asnake Kibret (UNEP), 12 April 2013.

closely with local and national governments and the industry involved. It can thus implement its regulatory policies into the local realm in a much more wide-ranging and direct way than it would be possible through pure advocacy.

Furthermore, the Games are an opportunity to raise awareness with the general public, due to the wide coverage the Olympics enjoy. They can thus help in changing environmentally harmful habits and create a more sustainable culture within the region or even on a larger scale.²⁰¹ However, whether the Olympics have this catalyst effect also depends largely on the motivations at the local level as the different examples of Beijing and Sochi portray. Moreover, at the moment the ‘extended network’ is still very limited as it usually only develops in the context of the Games. Therefore UNEP stressed that cooperation with local sports federations is of particular importance for them. Those local entities usually have a broad network including government entities and industry (in form of sponsors, construction companies, and equipment providers for instance). Therefore, being able to influence policies and behaviour of local sports entities can have very beneficial impacts on national and local environmental policies and practices.

An additional advantage of this cooperation is that it is not linked to one particular event, such as the Olympics, which takes place only on biennial basis and in one particular city. Many places in the world will never be able to host Olympic Games. They nonetheless have long and successful sport traditions and possess strong and influential NOCs and other sporting federations. Access to those organisations means that the message of sustainability can be spread on a much broader scale.²⁰²

In conclusion the present case study demonstrates how cooperation, which is first engaged into out of necessity, turns into a broader network with constitutionalisation effects. Environmental protection is now an intrinsic element of sports regulation. It is widespread throughout the community and backed by the influential institution in place in this issue area. UNEP was able (and probably necessary) to shape this process.

²⁰¹ Ibid.

²⁰² Ibid.

CONCLUSIONS AND OUTLOOK

This aim of this work was to provide an introduction to regulatory cooperation at the transnational level. The goal was not only to raise awareness of the existence of regulatory cooperation but also to improve our understanding of the related theoretical implications for the global order. Cooperation links different issue areas and takes place between a wide variety of actors in terms of origin, composition and importance. The thesis provided two specific examples – the ISO 26000 process and cooperation in the intersection of sport and environment. However, as the different manuals international organisations have developed to govern cooperation with the private sector and other public institutions illustrate, cooperation is a common phenomenon throughout various regulatory fields.

On a more theoretical level, regulatory cooperation required consideration of the debates on the global order and the allocation of authority beyond the state. A further achievement of the decision to adopt this particular approach to public private cooperation was the fact that it enabled us to traverse institutional and conventional boundaries. This was particularly so with regards to those boundaries within legal scholarship, particularly between public international lawyers and scholars concerned with transnational private law. The thesis attempted to integrate, or perhaps more accurately, to merge literature on private authority and governance with the broader meta-framework discussion on the global legal order found in public law scholarship.¹

Concretely, the thesis first looked at what was termed the commutative level of cooperation and attempted to provide an understanding of why regulators with different origins set out to cooperate within a transnational context. The argument was made that in a fragmented, heterarchically structured, context such as the present global realm, regulators possess incomplete authority. A regulator's authority has to be understood in relational terms, or in other words in terms of the way it is linked to other organisations active in the same or overlapping areas. Those actors then have to cooperate in order to possess sufficient authority to achieve

¹ Cf H-W Micklitz, 'Rethinking the Public/Private Divide', in: M Maduro, K Tuori & S Sankari (eds), *Transnational Law – Rethinking European Law and Legal Thinking* (CUP, 2014) 271, at 283.

compliance with their regulatory agendas, and consequently to operate effectively as a regulators.

Three major themes were dealt with in Chapter 2, which arose repeatedly in the empirical examples of regulatory cooperation in the case studies.

1. The first important issue was the blurring of expertise-driven epistemic authority and political authority. Given technological progress, global alignment of production chains and integrated markets, the need for expertise-driven authority is steadily increasing. This happens both at the national level and in particular also in the transnational realm.² However, it was also shown, based on the framework provided for by Kenneth Abbott and Duncan Snidal,³ that expertise is not synonymous with technical expertise. Rather, political and legal expertise are also of significant importance in transnational regulation. Furthermore, public organisations may also possess rather technical expertise which they can bring to a cooperative process with private actors as the example of cooperation between the UNEP and the IOC showed.
2. At first glance a more obvious motivation for engaging in cooperation was the alignment of less authoritative regulators coming from highly fragmented issue areas with regulators which occupy a dominant position in their respective fields. This could for instance be observed in the sport and environment case study and also in the example of ISO 26000. However in the latter case study ISO actually entered the highly fragmented issue area of social responsibility regulation, where it did not have such a strong competitive advantage as it did in the more traditional technical standard setting field. Nonetheless, in both case studies representatives of the public organisations stressed the benefits of cooperating with regulators which are significantly influential within their respective communities.

² In fact, some of the earlier transnational private regulatory organisations were actually bodies of experts, as the example of the ISO illustrates.

³ K W Abbott & D Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State', in: W Mattli & N Woods (eds), *The Politics of Global Regulation* (Princeton University Press, 2009) 44.

3. The importance of traditional legitimisation of transnational regulation was another central theme in Chapter 2. Although the analysis pointed to numerous ways of legitimising transnational regulation and to the different ways in which cooperation can increase legitimacy, traditional (respectively state-based) venues seem to still be of major importance for regulators seeking to be considered legitimate. Both private actors, the ISO and the IOC, were severely criticised with regard to the impact of their regulatory agenda in the public policy domain (either at the state level (IOC) or the international level (ISO)). Particularly in the 26000 process it became clear that the ISO could not pursue the standard setting process without crucial public actors being on board. And indeed, public participation went beyond mere representation. As shown in the case study, ISO sought to justify its special status as an ‘international standard setter’ by referring to its links with public actors and instruments. What seems to matter for a regulator in terms of being considered legitimate is therefore not only the participatory processes and the quality of the regulation produced, but also endorsement by actors which have traditionally been considered legitimate (to a greater or lesser extent) seems to remain an important factor.

The second part of this thesis dealt with aspects of cooperation that went beyond commutative, exchange-based interactions. One could call it the ‘society’ level. This, however, would probably go too far given the absence of one single global public community or *demos*. Rather, in the present work a pluralist approach was adopted according to which authority in the transnational realm is fragmented with no overarching framework in place to guide interactions and to solve conflicts between the different realms.

Cooperation among different transnational actors can, however, lead to more integrated network structures. Thus, for instance, when faced with severe public criticism regarding the environmental impact of the Olympic Games in the 1990s the IOC began cooperating with the United Nations Environmental Program in order to create environmental rules for the sporting sector. Over time this developed into a far-reaching program (Sport and the Environment) which encompasses a variety of actors, sports federations, local Olympic committees, public environmental organisations, NGOs (such as the World Wildlife Fund), corporations (such as

Puma), as well as states and local communities (and in particular host cities). Environmental rules regarding the field of sport are implemented, or at least supported, by all these actors even though not all actors are connected to each other (in the sense that there is no international environmental sports organisation under whose umbrella regulation takes place). Consequently, we can speak of a transnational regulatory network.

The thesis claimed that networks such as the one in the areas of sport and environment are interesting from a legal perspective for several reasons. From a theoretical point of view networks raise the question of how to conceive the global order. It was shown in this thesis that a network approach can improve our understanding of the political and legal order beyond the pluralism universalism dichotomy. In networks different independent regimes achieve some stabilisation and unification of normative values and structural settings. This was labelled constitutionalisation effects. Such a network approach then offers a dialectic understanding which allows for a better consideration and integration of the achievements of the public sphere at the national level into the transnational realm. This is important since the transnational realm is one which is, if not dominated, at least strongly characterised by ‘private law’ structures. As networks are based on a cooperative framework between fairly equal participants there is no top down approach, but rather a bargaining process whereby the prevailing effects of this process are transported through the venue of individual couplings. This has implications for aspirations of publicness in a transnational context. A network approach does not provide for universality but instead ultimately accepts fragmentation and the inability to find a generally unitary framework.

As mentioned at the beginning, this work has only gone so far as providing a first introduction to the phenomenon of regulatory cooperation. More research will undoubtedly be needed in the future. One dominant issue, particularly in the case study on sport and environment, was multi-level regulatory cooperation. Networks often link global transnational with local regulation. As has been pointed out in the literature on Global Experimentalist Governance and many others, the interaction between local and transnational level is of crucial importance.⁴ There is much

⁴ See for instance, G de Búrca, R O Keohane & C Sabel, ‘Global Experimentalist Governance’, 44 *British Journal of Political Science* (2014) 477.

more to say, especially with regard to the interplay between local level implementation and transnational rule setting which should be further pursued.

On a more general level it is necessary to continuously improve the understanding of global orders and structures even in a fragmented context. In this regard regulatory cooperation will provide a new angle to look at some of the pressing issues. Of particular importance is of course the interplay between expertise-driven private authority and power with more traditional political authority patterns. Regulatory cooperation and ultimately regulatory networks can provide a venue to allow for both access to the expertise necessary and the safeguarding of public values enshrined and cherished in the nation state. As stated above, in this context the network approach is a means to allow for flexibility and can also be understood as a laboratory for experimenting on a new legal order. This flexibility and open-endedness however also comes with few normative guidelines to direct the 'experiments'. We might want to provide more concrete normative suggestions on what kind of interaction is preferable and which direction such experiments should take. As Abbott and Snidal have suggested, '[o]vercoming the orchestration deficit' could be a way forward.⁵ We can also find some concrete suggestions in the practice of international organisations which set out manuals with requirements for transnational regulatory cooperation. These and other approaches provide good starting points for adding another piece of the complex puzzle that is understanding the global order.

⁵ K Abbott and D Snidal, 'Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit', 42 *Vanderbilt Journal of Transnational Law* (2009) 501.

BIBLIOGRAPHY

Table of References

Monographies

- Abegg, A, *Die Evolution des Verwaltungsvertrags zwischen Staatsverwaltung und Privaten – Der Kontrahierende Staat in Deutschland, Frankreich und der Schweiz seit dem 18. Jahrhundert* (Stämpfli Verlag, 2010)
- Arendt, H, *Between Past and Future* (Penguin Books, 1977)
- Aristotle's Nicomachean Ethics* (translated by R C Bartlett & Susan D Collins, University of Chicago Press, 2011) Book V
- Ayers, I & Braithewaite, J, *Responsive Regulation – Transcending the Deregulation Debate* (OUP, 1992)
- Brownlie, I, *Principles of Public International Law* (7th ed., OUP, 2008)
- Büthe T & Mattli, W, *The New Global Rulers – The Privatization of Regulation in the World Economy* (Princeton University Press, 2011)
- Calliess, G-P & Zumbansen, P, *Rough Consensus and Running Code – A Theory of Transnational Private Law* (Hart, 2010)
- Cutler, C, Haufler, V & Porter, T (eds.), *Private Authority and International Affairs* (State University of New York Press, 1999)
- _____, *Private Authority and Global Authority - Transnational Merchant Law in the Global Political Economy* (CUP, 2003)
- de Sousa Santos, B, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Routledge, 1995)
- Estlund, D, *Democratic Authority* (Princeton University Press, 2008)
- Fukuyama, F, *The End of History and the Last Man* (The Free Press, 1992)
- Goldsmith, J L & Posner, E A, *The Limits of International Law* (OUP, 2005)
- Grimm, D, *Die Zukunft der Verfassung* (Suhrkamp, 1994)
- Habermas, J, *The Postnational Constellation* (MIT Press, 2001). Philip C. Jessup, *Transnational Law* (New Haven, 1956)
- Hall, R B & Biersteker, T J, *The Emergence of Private Authority* (CUP, 2003)
- Harvey, D, *The Conditions of Postmodernity: An Inquiry into the Origins of Cultural Change* (Blackwell, 1990)

- Horne, J & Manzenreiter, W (eds), *Sports Mega-Events – Social Scientific Analyses of a Global Phenomenon* (Blackwell Publishing, 2006)
- J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP, 1995)
- Jansen, N, *The Making of Legal Authority – Non-Legislative Codifications in Historical and Comparative Perspective* (OUP, 2010)
- Kjaer, P F, *Constitutionalism in the Global Realm – A Sociological Approach* (Routledge, 2014)
- Koslowski, P, *Principles of Ethical Economy* (Springer, 2001)
- Krisch, N, *Beyond Constitutionalism - The Pluralist Structure of Postnational Law* (OUP, 2010)
- Lauterpacht, E (ed), *Hersch Lauterpacht – International Law – Collected Papers, 2. The Law of Peace, Part I International Law in General* (CUP, 1975)
- Lincoln, B, *Authority: Construction and Corrosion* (University of Chicago Press, 1991)
- Luhmann, N, *Die Gesellschaft der Gesellschaft* (Suhrkamp, 1997)
- _____, *The Differentiation of Society* (Columbia University Press, 1982)
- Mann, M, *The Sources of Social Power* (CUP, 1993)
- Maurer, H, *Allgemeines Verwaltungsrecht* (16th ed., CH Beck, 2006)
- _____, *Staatsrecht I* (3rd ed., CH Beck, 2003)
- Murphy, C N & Yates, J A, *The International Organization for Standardization (ISO) – Global Governance through Voluntary Consensus* (Routledge, 2009)
- Nussbaum, A, *A Concise History of the Law of Nations* (The Macmillan Company, 1954)
- Pauwelyn, J, *Conflicts of Norms in Public International Law* (CUP, 2013)
- Rawls, J, *Political Liberalism* (Columbia University Press, 1993)
- Reinicke, W H, & Deng, F, *Critical Choices – The United Nations, Networks, and the Future of Global Governance* (International Development Research Centre, 2000)
- Rischar, J F, *High Noon: 20 Global Problems, 20 Years to Solve Them* (Basic Books, 2002)
- Roche, M, *Mega-Events and Modernity: Olympics and Expos in the Growth of Global Culture* (Routledge, 2000)
- Rosenau, J N, *Turbulence in World Politics: A Theory of Change and Continuity* (Princeton University Press 1990)
- Roughan, N, *Authorities – Conflicts, Cooperation, and Transnational Legal Theory* (OUP, 2013)
- Sassen, S A *Sociology of Globalization*, (W W Norton & Company, 2007)
- _____, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006)
- Sciulli, D, *Theory of Societal Constitutionalism – Foundations of a Non-Marxist Critical Theory* (CUP, 1992)
- Shaw, M N, *International Law* (6th ed, CUP, 2008)

- Slaughter, A-M, *A New World Order* (Princeton University Press, 2004)
- Teubner, G, *Constitutional Fragments, Societal Constitutionalism and Globalization* (OUP, 2012)
- Twinning, W, *General Jurisprudence, Understanding Law from a Global Perspective* (CUP, 2009)
- _____, *Globalization & Legal Theory* (Butterworths, 2000)
- Waddell, S, *Global Action Networks: Creating Our Future Together* (Palgrave Macmillan, 2011)
- Wade, R, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press, 1990)
- Walz, K N, *Theory of International Politics* (Mcgraw-Hill, 1979)
- Weber, M, *Economy and Society - An Outline of Interpretive Sociology* (University of California Press, 1978)
- Williamson, O E, *The Economic Institutions of Capitalism* (Free Press, 1985)
- Williamson, J, *The Political Economy of Policy Reform* (Institute for International Economics, 1994)
- Wolfrum, R & Matz, N, *Conflicts in International Environmental Law* (Springer, 2003)
- Young, M A, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (CUP, 2011)
- _____, (ed), *Regime Interaction in International Law – Facing Fragmentation* (CUP, 2012)

Articles and Book Chapters

- Abbott, K.W, 'Public Private Partnerships', in: *Max Planck Encyclopedia of Public International Law* (OUP, 2008), available at: <http://opil.ouplaw.com/home/EPIL> (last accessed 19 December 2014)
- Abbott, K W & Snidal, D, 'Hard and Soft Law in International Governance', 54 *International Organization* (2000) 421
- _____, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State', in: W Mattli & N Woods (eds), *The Politics of Global Regulation* (Princeton University Press, 2009) 44
- _____, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit' 42 *Vanderbilt Journal of Transnational Law* (2009) 501
- Avant, D D, Finnemore, M & Sell, S K, 'Who Governs the Globe?' in: DD Avant, M Finnemore & S K Sell (eds), *Who Governs the Globe?* (CUP, 2010) 1

- Avant, D, 'Liquid Authorities, Liquid Authority and Networks' (draft paper on file with the author)
- Azis, D 'Global Public-Private Partnerships in International Law' 2 *Asian Journal of International Law* (2012) 9
- Baldwin, R & Black, J, 'Really Responsive Regulation', *LSE Legal Studies Working Paper No. 15/2007*
- Baldwin, R, Cave, M & Lodge, M, 'Introduction: Regulation – The Field and the Developing Agenda', in: R Baldwin, M Cave & M Lodge (eds) *Oxford Handbook of Regulation* (OUP, 2010) 3
- Benvenisti, E & Downs, G W, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', 60 *Stanford Law Review* (2007) 595
- Berman, P S, 'Global Legal Pluralism', 80 *Southern California Law Review* (2007) 1155
- Berman, H J, 'The Law of International Commercial Transactions (Lex Mercatoria)' 2 *Emroy Journal of International Dispute Resolution* (1987) 235
- Best, J & Gheciu, A, 'Theorizing the Public as Practices: Transformations of the Public in Historical Contexts, in: J Best & A Gheciu, *The Return of the Public in Global Governance* (CUP, 2014) 15
- Black, J, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World', 54 *Current Legal Problems* (2001)
- _____, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes', 2 *Regulation & Governance* (2008) 137
- Bratman, M E 'Shared Cooperative Activity' 101 *The Philosophical Review* (1992) 327
- Buchanan, A & Keohane, R O, 'The Legitimacy of Global Governance Institutions', 20 *Ethics & International Affairs* (2006) 405
- _____, 'The Legitimacy of Global Governance Institutions' in: A Buchanan (ed), *Human Rights, Legitimacy, and the Use of Force* (OUP, 2010) 105
- Cafaggi, F, 'New Foundations of Transnational Private Regulation', 38 *Journal of Law and Society* (2011) 20
- Cantelon, H & Letters, M, 'The Making of the IOC Environmental Policy as the Third Dimension of the Olympic Movement', 35 *International Review for the Sociology of Sport* (2000) 294
- Christiano, T, 'Authority' in: *Stanford Encyclopedia of Philosophy* (revised version, 2012), available at <http://plato.stanford.edu/entries/authority/> (last accessed 21 October 2014)
- Collins, H, 'Introduction to Networks as Connected Contracts', in: G Teubner (ed), *Networks as Connected Contracts* (OUP, 2011) 1
- Cranston, R, Theorizing Transnational Commercial Law, 42 *Texas International Law Journal* (2007) 597

- Dansero, E, *et als*, 'Olympic Games, Conflicts and Social Movements: The Case of Torino 2006', in: G Hayes & J Karamichas, *Olympic Games, Mega-Events and Civil Societies* (Palgrave Macmillan, 2012) 195
- de Búrca, G, Keohane, R O & Sabel, C F, 'Experimentalist Governance', 44 *British Journal of Political Science* (2014) 477
- de Sousa Santos, B 'The Processes of Globalization', *Eurozine* (2002) 2
- de Wet, E, 'The International Constitutional Order' 55 *International and Comparative Law Quarterly* (2006) 51
- Deakin, S, 'The Return of the Guild? Network Relations in Historical Perspective', in: M Amstutz & G Teubner, *Networks: Legal Issues of Multilateral Co-Operation* (Hart Publishing, 2009) 53
- Diller, J M, 'Private Standardization in Public International Lawmaking', 33 *Michigan Journal of International Law* (2012) 481
- Dupuy, P-M, 'L'Unité de l'Ordre Juridique International' 297 *Recueil des Cours* (2002) 9
- Duval, A, 'Lex Sportiva: A Playground for Transnational Law', 19 *European Law Journal* (2013) 822
- Fassbender, B, 'The United Nations Charter as the Constitution of the International Community' 36 *Columbia Journal of Transnational Law* (1998) 529
- Fischer-Lescano, A & Teubner, G, 'Regime –Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan Journal of International Law* (2004) 999
- Fortier, L Y, 'The New, New Lex Mercatoria, or, Back to the Future', 17 *Arbitration International* (2001) 121
- Friedman, R B, 'On the Concept of Authority in Political Philosophy', in: J Raz (ed.), *Authority* (Basil Blackwell, 1990) 61
- Gill, S, 'Globalization, Democratization, and the Politics of Indifference', in: J H Mittelman (ed.), *Globalization and Critical Reflections* (Lynne Rienner Publishers, 1996)
- Gilson, R J, Sabel, C F & Scott, R E, 'Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration', 109 *Columbia Law Review* (2009)
- Goldman, B 'Frontières du Droit et "Lex Mercatoria"' 9 *Archives de Philosophie du Droit* (1964) 177
- Goode, R, Usage and its Reception in Transnational Commercial Law, 46 *International and Comparative Law Quarterly* (1997) 1
- Gratton, C, Shibli, S & Coleman, R, 'The Economic Impact of Major Sports Events: A Review of Ten Events in the UK', in: J Horne & W Manzenreiter (eds), *Sports Mega-Events – Social Scientific Analyses of a Global Phenomenon* (Blackwell Publishing, 2006) 41
- Grimm, D, 'The Achievement of Constitutionalism and Its Prospects in a Changed World' in: P Dobner & M Loughlin (eds), *The Twilight of Constitutionalism?* (OUP, 2010) 3

- Gross, L, 'The Peace of Westphalia, 1648-1948', 42 *American Journal of International Law* (1948), 20ff;
- Grote, R, 'Westphalian System', in: *Max Planck Encyclopaedia of Public International Law* (OUP, 2006), available at: <http://opil.ouplaw.com/home/epil> (last accessed 19 December 2014),
- Hall, R B & Biersteker, T J, 'The Emergence of Private Authority in the International System', in: R B Hall & T J Biersteker (eds), *The Emergence of Private Authority Global Governance* (CUP, 2002) 3
- Hancher, L & Moran, M, 'Organising Regulatory Space', in: L Hancher and M Moran (eds.), *Capitalism, Culture and Economic Regulation* (OUP, 1989) 1
- Hayes, G & Karamichas, J, 'Introduction: Sport Mega-Events, Sustainable Development and Civil Societies', in: G Hayes & J Karamichas, *Olympic Games, Mega-Events and Civil Societies* (Palgrave Macmillan, 2012) 1
- Heires, M, 'The International Organization for Standardization (ISO)' 13 *New Political Economy* (2008) 357
- Hirst, P & Thomson, G, 'Globalization and the Future of the Nation State', 24 *Economy and Society* (1995) 408
- Hurd, I, 'Legitimacy and Authority in International Politics', 53 *International Organization* (1999) 381
- Ivanova, M, 'UNEP as Anchor Organization for the Global Environment', in: F Biermann, B Siebenhüner & A Schreyögg (eds), *International Organizations in Global Environmental Governance* (Routledge, 2009) 151
- J Karamichas, 'Olympic Games as an Opportunity for the Ecological Modernization of the Host Nation: The Cases of Sydney 2000 and Athens 2004', in: G Hayes & J Karamichas, *Olympic Games, Mega-Events and Civil Societies* (Palgrave Macmillan, 2012) 151
- Kelly, P F, 'The Geographies and Politics of Globalization', 23 *Progress in Human Geography* (1999) 379
- Kenis, P & Schneider, V, 'Policy Networks and Policy Analysis – Scrutinizing a New Analytical Toolbox', in: B Marin & R Mayntz (eds), *Policy Networks: Empirical Evidence and Theoretical Considerations* (Westview, 1991) 25
- Khan, R 'Global Compact' in: *Max Planck Encyclopaedia of Public International Law* (OUP, 2011), available at: <http://opil.ouplaw.com/home/epil> (last accessed 22 December 2014)
- Kingsbury, B, Krisch, N & Stewart, R B 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005) 15
- Kingsbury, B, 'The Concept of 'Law' in Global Administrative Law', 20 *EJIL* (2009) 23
- Kjaer, P F 'Post-Hegelian Networks, Comments on the Chapter by Simon Deaking', in: M Amstutz & G Teubner, *Networks: Legal Issues of Multilateral Co-Operation* (Hart Publishing, 2009) 75

- Klabbers, J, 'Setting the Scene', in: J Klabbers, A Peters & G Ulfstein (eds), *The Constitutionalization of International Law* (OUP, 2009) 1
- Krasner, SD, 'Globalization, Power, and Authority', in: E D Mansfield & R Sisson (eds), *The Evolution of Political Knowledge, Democracy, Autonomy, and Conflict in Comparative and International Politics* (Ohio State University, 2004) 60
- Kress, C, 'International Criminal Law', in: *Max Planck Encyclopedia of Public International Law* (OUP, 2009), available at: <http://opil.ouplaw.com/home/EPIL> (last accessed 19 December 2014)
- Krisch, N, 'Liquid Authority in Global Governance: An Anatomy' (draft paper on file with the author).
- Krisch N & Kingsbury, B, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order', 17 *EJIL* (2006) 1
- Kumm, M, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *EJIL* (2004) 907
- _____, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism In and Beyond the State', in: J L Dunoff & J P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP, 2009) 258
- Ladeur, K-H, 'Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?' in: K-H Ladeur (ed) *Public Governance in the Age of Globalization* (Ashgate, 2004) 89
- _____, 'Theory of Governance' in: *Max Planck Encyclopedia of Public International Law* (OUP, 2010) available at: <http://opil.ouplaw.com/home/EPIL> (last accessed 19 December 2014)
- Loughlin, M, 'What is Constitutionalisation?', in: P Dobner & M Loughlin (eds) *The Twilight of Constitutionalism?* (OUP, 2010) 47
- Loya, T A & Boli, J, 'Standardization in the World Polity: Technical Rationality Over Power, in: J Boli & G Thomas (eds), *Constructing World Culture: International Nongovernmental Organizations Since 1875* (Stanford University Press, 1999) 169
- Mann, M 'Has Globalization Ended the Rise and Rise of the Nation-State?' 4 *Review of International Political Economy* (1997) 472
- Marmor, A, 'An Institutional Conception of Authority', 39 *Philosophy & Public Affairs* (2011) 238
- Mattlie, W & Woods, N. 'In Whose Benefit? Explaining Regulatory Change in Global Politics', in: W Mattli & N Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) 1
- Mégret, F, 'Globalization' in: *Max Planck Encyclopaedia of Public International Law* (OUP, 2009) available at: <http://opil.ouplaw.com/home/epil> (last accessed 19 December 2014)
- Michaels, R, 'The True Lex Mercatoria: Law Beyond the State', 14 *Indiana Journal of Global Legal Studies* (2007) 447

- Michaels, R, 'The Interlegality of Transnational Private Law', 71 *Law and Contemporary Problems* (2008) 107
- Micklitz, H-W, 'Rethinking the Public/Private Divide', in: M Maduro, K Tuori & S Sankari (eds), *Transnational Law – Rethinking European Law and Legal Thinking* (CUP, 2014) 271
- Möllers, C, 'Transnational Governance without a Public Law', in: C Joerges, I-J Sand & G Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing, 2004) 329
- Panitch, L, 'Rethinking the Role of the State', in: J H Mittelman (ed.), *Globalization and Critical Reflections* (Lynne Rienner Publishers, 1996)
- Pauwelyn, J, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands', 25 *Michigan Journal of International Law* (2003) 903
- Perez, O, 'Using Private-Public Linkages to Regulate Environmental Conflicts: The Case of International Construction Contracts', 29 *Journal of Law and Society* (2002) 77
- Peters, A, Förster, T & Koechlin, L, 'Towards Non-State Actors as Effective, Legitimate, and Accountable Standard Setters', in: A Peters *et al* (eds), *Non-State Actors as Standard Setters* (CUP, 2009) 492
- Peters, A, 'Conclusions', in: J Klabbers, A Peters & G Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2011) 342
- Powell, W W, 'Neither Market Nor Hierarchy: Network Forms of Organization', 12 *Research in Organizational Behavior*, (1990) 295
- Pushkareva, E, 'United Nations Environment Programme (UNEP)', *Max Planck Encyclopaedia of Public International Law*, available at: <http://opil.ouplaw.com/home/EPIL> (last accessed 19 December 2014)
- Renou, X, 'Resisting the Torch', in: G Hayes & J Karamichas, *Olympic Games, Mega-Events and Civil Societies* (Palgrave Macmillan, 2012) 236
- Roche, M, 'Mega-Events and Modernity Revisited: Globalization and the Case of the Olympics', in: J Horne & W Manzenreiter (eds), *Sports Mega-Events – Social Scientific Analyses of a Global Phenomenon* (Blackwell Publishing, 2006) 27
- Sabel C F & Zeitlin, J, 'Learning From Difference: The New Architecture of Experimentalist Governance in the EU', in: C F Sabel & J Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP, 2010) 1
- _____, 'Experimentalist Governance' in: David Levi-Faur (ed.), *The Oxford Handbook of Governance* (OUP, 2012) 169.
- Sassen, S, 'The Participation of States and Citizens in Global Governance', 10 *Indiana Journal of Global Legal Studies* (2003) 5
- Sauer, H, 'International Labour Organization', in: *Max Planck Encyclopaedia of Public International Law* (OUP, 2010), available at: <http://opil.ouplaw.com/home/epil> (last accessed 22 December 2014)
- Schiff-Berman, P, 'Global Legal Pluralism', 80 *Southern California Law Review* (2007) 1155

- Schill, S W, 'Lex Mercatoria', in: *Max Planck Encyclopedia of Public International Law* (OUP, 2011), available at: <http://opil.oup.com/home/EPIL> (last accessed 19 December 2014)
- Schmitthoff, C M, 'Das Neue Recht des Welthandels' 28 *The Rabel Journal of Comparative and International Private Law* (1964) 47
- Scott, C, Cafaggi, F & Senden, L, 'The Conceptual and Constitutional Challenge of Transnational Private Regulation', 38 *Journal of Law and Society* (2011) 1
- Steinberg, R H & Zasloff, J M, 'Power and International Law', 100 *AJIL* (2006) 64
- Strange, S, 'Territory, State, Authority, and Economy: A New Realist Ontology of Global Political Economy', in: R W Cox (ed.) *The New Realisms: Perspectives on Multilateralism and World Trade Order* (UN University Press, 1997) 9
- Streck, C, 'Global Public Policy Networks as Coalitions for Change', in: D C Esty & M H Ivanova, *Global Environmental Governance: Options and Opportunities* (Yale School of Forestry & Environmental Studies, 2002) 1
- Suchman, M C, 'Managing Legitimacy: Strategic and Institutional Approaches', 20 *The Academy of Management Review* (1995) 571
- Tams, C J, 'League of Nations' in: *Max Planck Encyclopaedia of Public International Law* (OUP, 2006), available at: <http://opil.oup.com/home/epil> (last accessed 19 December 2014)
- Teubner, G, 'Global Bukowina': Legal Pluralism in the World Society', in: G. Teubner (ed.), *Global Law without the State* (Dartmouth Publishing, 1997) 3
- _____, 'Foreword: Legal Regimes of Global Non-State Actors', in: G. Teubner (ed.), *Global Law Without the State* (Dartmouth Publishing, 1997) xiii
- _____, 'Coincidentia Oppositorum: Hybrid Networks Beyond Contract and Organization', in M Amstutz & G Teubner (eds), *Networks: Legal Issues of Multilateral Co-Operation* (Hart Publishing, 2009) 3
- Thürer, D, 'Soft Law', in: *Max Planck Encyclopedia of Public International Law* (OUP, 2009), available at: <http://opil.oup.com/home/EPIL> (last accessed 19 December 2014)
- Tully J, 'The Imperialism of Modern Constitutional Democracy', in: M Loughlin & N Walker (eds) *The Paradox of Constitutionalism* (OUP 2007) 315
- Tuori, K, 'Transnational Law: On Legal Hybrids and Legal Perspectivism', in: M Maduro, K Tuori & S Sankari (eds), *Transnational Law – Rethinking European Law and Legal Thinking* (CUP, 2014) 11
- Venzke, I, 'Between Power and Persuasion: On International Institutions' Authority in Making Law' 4 *Transnational Legal Theory* (2013) 354
- _____, 'International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law', 9 *German Journal of International Law* (2008) 1401
- Vesting, T, 'Constitutionalism or Legal Theory: Comments on Gunther Teubner', in: C Joerges, I-J Sand & G Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing, 2004) 29

- von Bogdandy, A, Dann, P & Goldmann, M, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Journal of International Law* (2008) 1375
- Waddell, S & Khagram, S, 'Multi-Stakeholder Global Networks: Emerging Systems for the Global Common Good', in: P Glasbergen, F Biermann & A P J Mol (eds), *Partnerships, Governance and Sustainable Development: Reflection on Theory and Practice* (Edward Elgar Publishing, 2007), 261
- Wagner, M, 'Non-State Actors', in: *Max Planck Encyclopaedia of Public International Law* (OUP, 2013), available at: <http://opil.ouplaw.com/home/EPIL> (last accessed 19 December 2014)
- Walker, N, 'The Idea of Constitutional Pluralism' 65 *Modern Law Review* (2002) 317
- _____, 'The Post-National Horizon of Constitutionalism and Public Law: Paradigm Extension or Paradigm Exhaustion', in: C Mac Amhlaigh, C Michelon & N Walker (eds), *After Public Law* (OUP, 2013) 241
- Walter, C, 'Subjects of International Law', in: *Max Planck Encyclopedia of Public International Law* (OUP, 2007) available at: <http://opil.ouplaw.com/home/EPIL> (last accessed 19 December 2014)
- Ward, H, 'The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy', 12 *Theoretical Inquiries in Law* (2011) 665
- _____, *The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy, 2nd, Foundation for Democracy and Sustainable Development* (Second Draft, 2010), available at: http://www.fdsd.org/wordpress/wpcontent/uploads/ISO26000_and_transnational_democracy_Sept_draft.pdf (last accessed 22 December 2014)
- Webb, K, 'ISO 26000: Bridging the Public/Private Divide in Transnational Business Governance Interactions', *Osgoode Hall Research Report No. 21/2012*
- Weber, M, 'Politics as a Vocation', in: H H Gerth and C Wright Mills (eds) *From Max Weber: Essays in Sociology* (Routledge & Kegan Paul, 1948) 77
- Weiler, J H H, 'Prologue: Global and Pluralist Constitutionalism – Some Doubts', in: G de Búrca & J H H Weiler (eds), *The Worlds of European Constitutionalism* (CUP, 2011) 8
- Whitson, D & Horne, J, 'Underestimated Costs and Overestimated Benefits? Comparing the Outcomes of Sport Mega-Events in Canada and Japan', in: J Horne & W Manzenreiter (eds), *Sports Mega-Events – Social Scientific Analyses of a Global Phenomenon* (Blackwell Publishing, 2006) 73
- Whitson, D, 'Vancouver 2010: The Saga of Eagleridge Bluffs', in: G Hayes & J Karamichas, *Olympic Games, Mega-Events and Civil Societies* (Palgrave Macmillan, 2012) 219
- Williamson, O E, 'Hierarchies, Markets and Power in the Economy: An Economic Perspective', 4 *Industrial and Corporate Change* (1995) 21

Wolfrum, R, 'International Law of Cooperation', in: *Max Planck Encyclopedia of Public International Law* (OUP, 2010) available at: <http://opil.ouplaw.com/home/epil> (last accessed 19 December 2014)

____ 'Legitimacy of International Law from a Legal Perspective – Some Introductory Considerations', in: R Wolfrum & V Röben (eds), *Legitimacy in International Law* (Springer, 2008) 1

Wood, S, 'The Meaning of the 'Sphere of Influence' in ISO 26000', in: A Henriques (ed.), *Understanding ISO 26000. A Practical Approach to Social Responsibility* (BSI 2011) 127

Wouters, J, Marx A & Hachez, N, 'In Search of a Balanced Relationship: Public and Private Food Safety Standards and International Law', Working Paper No. 29 - June 2009

Young, M, 'Fragmentation or Interaction: The WTO, Fisheries Subsidies, and International Law', 8 *World Trade Review* (2009) 477

Zaring, D, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations', 33 *Texas International Law Journal* (1998) 281

Zumbansen, P, 'Evolving Transnational Law' in: J M Smits, *Elgar Encyclopedia of Comparative Law* (2nd ed, Edward Elgar, 2012) 898

____ 'Defining the Space of Transnational Law: Legal Theory', *Global Governance & Legal Pluralism, Osgoode Hall Law School Research Paper No. 21/2011*

Zürn, M, Binder, M & Ecker-Ehrhardt, M, 'International Authority and Its Politicization', 4 *International Theory* (2012) 69

____ 'How Solid is Liquid Authority? Towards a Reflexive Concept of Authority', *Draft Paper* (on file with the author)

Table of Treaties, Statutes and Organizational Documents

UN General

Charter of the United Nations, 1 UNTS XVI, 24 October 1945

United Nations, Statute of the International Court of Justice, 18 April 1946

Universal Declaration of Human Rights, UNGA Res 217 A (III), adopted 10 December 1948

General Assembly Resolution 2997 (XXVII) on Institutional and Financial Arrangements for International Environmental Co-Operation, 15 December 1972

United Nations Foundation, Understanding Public-Private Partnerships (2003), available at: http://www.globalproblems-globalsolutions-files.org/unf_website/PDF/understand_public_private_partner.pdf (last accessed 19 December 2014)

General Assembly, Report of the Secretary General, Enhanced Cooperation between the United Nations and All Relevant Partners, in Particular the Private Sector, A/58/227, 18 August 2003

Office of the High Commissioner for Human Rights, Human Rights and Transnational Corporations and Other Business Enterprises, Human Rights Resolution 2005/69, 20 April 2005

International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, 58th Session, U.N. Doc. A/CN.4/L.682, 13 April 2006.

Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/5, 7 April 2008

Human Rights Council, Clarifying the Concepts of “Sphere of Influence” and “Complicity”, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, A/HRC/8/16, 15 May 2008

Human Rights Council, ‘Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/RES/8/7, 18 June 2008

UN, Guidelines on Cooperation Between the United Nations and the Business Sector, 20 November 2009

Special Representative of the United Nations, Secretary-General for Business & Human Rights, Public Consultation on Draft U.N. Guiding Principles for Business and Human Rights Attracts Input from 120 countries - Submissions from Wide Range of Stakeholders to Inform Final Recommendations, 2 February 2011, available at: <http://www.business-humanrights.org/media/documents/ruggie/public-consultation-on-guiding-principles-press-release-2-feb-2011.pdf> (last accessed 22 December 2014)

Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/31, 21 March 2011

Human Rights Council, Seventeenth Session, Agenda Item 3, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, A/HRC/RES/17/4, 6 July 2011

General Assembly Resolution 66/288, The Future We Want, 11 September 2012

Special Representative of the Secretary-General for Business and Human Rights Prof. John G. Ruggie, Note on ISO 26,000 Guidance Draft Document, available at: <http://business-humanrights.org/sites/default/files/media/bhr/files/Ruggie-note-re-ISO-26000-Nov-2009.PDF> (last accessed 22 December 2014)

Business and Human Rights Resource Center, UN "Protect, Respect and Remedy" Framework >

Guiding Principles > Submissions to Consultation on Draft Guiding Principles, available at: <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions> (last accessed 22 December 2014)

Business and Human Rights Resource Centre, 'UN "Protect, Respect and Remedy" Framework', available at: <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework> (last accessed 22 December 2014)

General Assembly Resolution 67/213 Report of the Governing Council of the United Nations Environment Programme on Its Twelfth Special Session and on the Implementation of Section IV.C, Entitled "Environmental Pillar in the Context of Sustainable Development", of the Outcome Document of the United Nations Conference on Sustainable Development

ILO

ILO Constitution, 1 April 1919, available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO (last accessed 22 December 2014)

ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, Adopted by the International Labour Conference at its Eighty-sixth Session, 18 June 1998 (Annex revised 15 June 2010)

ILO, Director-General's Announcement, IGDS Number 81, 14 July 2009

ILO Governing Body, 316 Session, Public Private Partnerships: The way forward, GB.316/POL/6, 5 October 2012

IOC

The Olympic Charter, available at: http://www.olympic.org/Documents/olympic_charter_en.pdf (last accessed 19 December 2014)

Cooperation Agreement between the International Olympic Committee and the United Nations Environment Programme, signed February 1994 (on file with the author)

Agreement between the Swiss Federal Council and International Olympic Committee Regarding the Statute of the International Olympic Committee in Switzerland, 1 November 2000, available at: <http://archive.icann.org/en/psc/annex6.pdf> (last accessed 19 December 2014)

Host City Contract for the XXI Olympic Winter Games in the Year 2010 (Vancouver, 18 June 2003) available at: http://nogames.files.wordpress.com/2009/07/vancouver_2010_host-city-agreement.pdf (last accessed 19 December 2014)

IOC, '2018 Candidature Procedure and Questionnaire', 2010, available at: http://www.olympic.org/Documents/Host_city_elections/2018_CPQ-ENGLISH-FULL.pdf (last accessed 19 December 2014)

- IOC, 'Focus Sport and Sustainability', April 2011, available at: http://www.olympic.org/Documents/Olympism_in_action/Sport_and_Environment/FOCUS_Sustainability-April_2011.pdf (last accessed 19 December 2014)
- IOC, Marketing Media Guide, London 2012, available at: http://www.olympic.org/Documents/IOC_Marketing/London_2012/IOC_Marketing_Media_Guide_2012.pdf (last accessed 19 December 2014)
- Comité International Olympique, Commissions du CIO, Révisées en 2012, available at: http://www.olympic.org/Documents/Commissions_PDFfiles/All_Commissions/Commissions_2012.pdf (last accessed 19 December 2014)
- IOC, 'Factsheet – The Environment and Sustainable Development', Update – January 2014, at 1, available at: http://www.olympic.org/Documents/Reference_documents_Factsheets/Environment_and_sustainable_development.pdf (last accessed 19 December 2014)
- IOC, 'Sustainability through Sport, Implementing the Olympic Movement's Agenda 21', available at: http://www.olympic.org/Documents/Commissions_PDFfiles/SportAndEnvironment/Sustainability_Through_Sport.pdf (last accessed 19 December 2014)
- IOC/Sport and Environment Commission, 'Olympic Movement's Agenda 21, Sport for Sustainable Development', available at: http://www.olympic.org/Documents/Reports/EN/en_report_300.pdf (last accessed 19 December 2014)
- IOC, 'Manual on Sport and the Environment', available at: http://www.olympic.org/Documents/Reports/EN/en_report_963.pdf (last accessed 19 December 2014)

ISO

- Working Report on Social Responsibility, Prepared by the ISO Advisory Group on Social Responsibility, 30 April 2004, available at: http://iso26000.jsa.or.jp/_files/doc/2004/sagreport_eng.pdf (last accessed 22 December 2014)
- Recommendations to the ISO Technical Management Board, ISO/TMB AG CSR N32, April 2004
- New Work Item Proposal Guidance on Social Responsibility, ISO/TMB N 26000, 1 October 2004
- ISO Strategic Advisory Group (SAG) on SR: Update Briefing #9: October 2004, available at: http://www.iisd.org/pdf/2004/standards_csr_briefing_9.pdf (last accessed 22 December 2014)
- ISO/TMB Resolution 35/2004, reprinted in part in: New Work Item Proposal Guidance on Social Responsibility, ISO/TMB N 26000, 1 October, 2004
- Proposal for the Organizational Structure of and Terms of Reference for the ISO/TMB/WG Social Responsibility, ISO/TMB/WG SR N 3, 20 January 2005

Table of replies on the New Work Item Proposal Social Responsibility, ISO/TMB N 26000, ISO/TMB/WG SR N 7, 25 February 2005

Memorandum of Understanding between the International Labour Organization and the International Organization for Standardization in the Field of Social Responsibility, ISO/TMB/WG SR N 18, 4 March 2005

Resolution 29, reprinted in: Resolutions from the First Meeting of ISO/TMB/WG SR, Salvador Brazil 2005-03-07 – 11, ISO/TMB/WG SR N 15, 17 March 2005

Resolutions from the Second Meeting of ISO/TMB/WG SR, Bangkok, Thailand 2005-09-26--30, ISO/TMB/WG SR N 50, 30 September 2005

ISO Guidance Standard on Social Responsibility – ISO 26000 – Design Specification, ISO/TMB/WG SR N 49, 30 September 2005

Draft ITG 5 SR Core Context Issues Paper, Version3, ISO/TMB/WG SR N 21, 30 June 2005

ISO/TMB Working Group on Social Responsibility – Task Group I, Funding and Stakeholder Engagement, ISO/TMB/WG SR/TG1 N 02, 12 December 2005

List of Experts and Observers, ISO/TMB WG SR TG 4, 14 March 2006

ISO/TMB WG SR TG 4: List of Experts and Observers, 14 March 2006

Guidance on Social Responsibility, ISO /TMB/WG SR N 55, 28 March 2006

Composition of ISO/TMB/WG SR TG 5 on 23rd May 2006, 23 May 2006

Guidance on Social Responsibility – Working Draft 2, ISO TMB /WG SR N 80, 6 October 2006

Memorandum of Understanding between the United Nations Global Compact Office and the International Organization for Standardization (ISO), ISO/TMB/WG SR N 82, 9 November 2006

Comments received on ISO/WD 26000.2, Guidance on Social Responsibility, Document WG SR N 80, ISO/TMB/WG SR N 83, 18 December 2006

Resolutions from the 4th meeting of ISO/TMB/WG SR, Sydney, Australia 2007-01-29 — 2007-02-02, ISO/TMB/WG SR N 107, 2 February 2007

Draft Resolutions from the 7th meeting of ISO/TMB/WG SR, Quebec, Canada, 2009-05-18—22, ISO/TMB/WG SR N 170, 23 May 2007

Guidance on Social Responsibility – Working Draft 3, ISO/TMB/WG SR N 113, 23 July 2007

Resolutions from the 5th Meeting of ISO/TMB/WG SR, Vienna, Austria, 2007-11-05—09, ISO/TMB/WG SR N 132, 11 September 2007

ISO/IEC, ‘Using and Referencing ISO and IEC Standards for Technical Regulation’ (September 2007), available at: http://www.iec.ch/affiliates/adoptions/pdf/iso_iec_standards_for_technical_regulations_en.pdf (last accessed 22 December 2014)

Minutes, Constitution of Integrated Drafting Task Force, IDTF, Annex A, ISO/TMB/WG SR, 15 November 2007

Guidance on Social Responsibility – DRAFT ISO 26000 WD4.1, ISO/TMB/WG SR N 137, 11 March 2008

Guidance on Social Responsibility – DRAFT ISO 26000 WD4.2, ISO/ TMB WG SR N 143, 2 June 2008

Memorandum of Understanding between the OECD and ISO in the Area of Social Responsibility, ISO/TMB/WG SR N 144, 19 June 2008

Guidance on Social Responsibility – Committee Draft, ISO/TMB WG SR N 157, 12 December 2008

ISO, ISO and Social Responsibility (2008), available at: <http://www.iso.org/iso/socialresponsibility.pdf> (last accessed 22 December 2014)

Comments Received on ISO/CD 26000 (WG SR N 157), ISO/TMB/WG SR N 161, 25 March 2009

Result ISO/CD 26000, Guidance on Social Responsibility, ISO/TMB/WG SR N 160, 25 March 2009

Guidance on Social Responsibility – Draft International Standard ISO/DIS 26000, ISO/TMB/WG SR N 172, September 2009

ISO DIS 26000, Result of Voting, ISO/TMB/WG SR N 175, February 2010

ISO, International Standards and “Private Standards”, February 2010/1500, available at: http://www.iso.org/iso/private_standards.pdf (last accessed 22 December 2014)

Non Consensus Comments Received on ISO/DIS 26000, Guidance on Social Responsibility, ISO/TMB/WG SR N 178, 1 March 2010

NSB Consensus Comments and Comments from D-Liaison Organizations Received on ISO/DIS 26000 Guidance on Social Responsibility, ISO/TMB/WG SR N 176, 1 March 2010

Copenhagen Discussion Document, Copenhagen Key Topics (CKTs), ISO/TMB/WG SR N 186, 4 May 2010

ISO/FDIS 26000 – Result of Voting, ISO/TMB/WG SR N 196, September 2010

Comments of the International Labour Office for Circulation with ISO/FDIS 26000:2010(E), ISO/TMB/WG SR N 194

International Standard ISO 26000:2010 Guidance on Social Responsibility (BSI Standards Publication, 2010)

ISO Statutes (17th ed, 2013) available at: <http://www.iso.org/iso/statutes.pdf> (last accessed 22 December 2014)

ISO/IEC Directives, Part 1, Consolidated ISO Supplement – Procedures Specific to ISO (5th ed, 2014)

Recommendations to the Technical Management Board, ISO/TMB AG CSR N32

ISO Guidance Standard on Social Responsibility – ISO 26000, Proposal for Design Specification, Proposal for Design Specification, ISO/TMB/WG SR N 31

ISO, ISO 26000 Project Overview, available at: http://www.iso.org/iso/ru/iso_26000_project_overview.pdf (last accessed 22 December 2014)

OECD

Convention on the Organisation for Economic Co-operation and Development, 888 UNTS 180, 14 December 1960

OECD, Rules of Procedure of the Organization, available at: <http://www.oecd.org/legal/Rules%20of%20Procedure%20OECD%20Oct%202013.pdf> (last accessed 22 December 2014)

The OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts, Annex I The OECD Guidelines for Multinational Enterprises (Version of May 2011)

OECD, ‘OECD Guidelines for Multinational Enterprises – Responsible Business Conduct Matters’, available at: http://mneguidelines.oecd.org/MNEguidelines_RBCmatters.pdf (last accessed 22 December 2014)

OECD, ‘About the OECD Guidelines for Multinational Enterprises’, available at: <http://mneguidelines.oecd.org/about/> (last accessed 22 December 2014)

UNEP

Governing Council of the United Nations Environment Programme, Long-Term Strategy for Sport and Environment of the United Nations Environment Programme, UNEP/GC.22/3/Add.3/Rev.1, 23 January 2003

UNEP, Beijing 2008 Olympic Games – An Environmental Review (2007)

UNEP, ‘Independent Environmental Assessment, Beijing 2008 Olympic Games, 2009’, available at: http://www.unep.org/pdf/BEIJING_REPORT_COMPLETE.pdf (last accessed 19 December 2014)

Memorandum of Understanding between the Sochi 2014 Organizing Committee and UNEP, 5 June 2009 (on file with the author)

UNEP, ‘Report of the UNEP 2nd Expert Mission 28-30 January 2010’, available at: http://www.unep.org/PDF/PressReleases/SOCHI_2014Jan28to302010_Mission_%20ReportFinal_%2015March.pdf (last accessed 19 December 2014)

UNEP Partnership Policy and Procedures, Policy Outline No.1/2011, 21 October 2011

UNEP 'United Nations Environment Programme, Environment for Development', available at: http://www.unep.org/PDF/ABOUT_UNEP_ENGLISH.pdf (last accessed 19 December 2014)

UNEP, Notification by the Executive Director Twenty-seventh Session of the Governing Council/Global Ministerial Environment Forum (Nairobi, 18–22 February 2013), 5 December 2012

UNEP Programme Manual, May 2013, available at: http://www.unep.org/QAS/Documents/UNEP_Programme_Manual_May_2013.pdf (last accessed 19 December 2014)

Memorandum of Understanding between Indian Premier League and UNEP, available at: http://www.unep.org/sport_env/images/IPL_MoU.pdf (last accessed 19 December 2014)

UNGC

Global Compact, 'The Ten Principles', available at: <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html> (last accessed 22 December 2014)

UNGC and UN Office of the High Commissioner of Human Rights, 'The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments', July 2011 (updated June 2014) available at: https://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf (last accessed 22 December 2014)

UNGC, 'UN Framework and the Global Compact', available at: http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html (last accessed 22 December 2014)

Others

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended); American Convention on Human Rights 1969, 1144 UNTS 123

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58

Agreement on Technical Barriers to Trade, 1868 UNTS 120

Committee on Sanitary and Phytosanitary Measures, Report by the Commonwealth of the Bahamas to the WTO-SPS Committee on Private Standards and the SPS Agreement: The Bahamas Experience, Communication from the Bahamas, G/SPS/GEN/764, 28 February 2007

Committee on Sanitary and Phytosanitary Measures, Private Industry Standards. Communication from Saint Vincent and the Grenadines, G/SPS/GEN/766, 28 February 2007

ICANN, Strategic Plan, July 2011 – June 2014, Draft, available at: <http://www.icann.org/en/news/announcements/announcement-7-21feb11-en.htm> (last accessed 19 December 2014)

Table of Cases

ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, 14

ICTY, *Prosecutor v. Dusko Tadic, Judgement*, Case No. IT-94-1-A, 15 July 1999

Table of Newspaper Articles, General Encyclopedias and References on Websites

‘About the Basel Committee’, available at: <http://www.bis.org/bcbs/about.htm> (last accessed 27 October 2014)

‘The Not So Sustainable Sochi Winter Olympics’ Time Magazine, 30 January 2014, available at: <http://time.com/2828/sochi-winter-olympics-environmental-damage/> (last accessed 19 December 2014)

DELC, ‘About DELC’, available at: <http://www.unep.org/delc/AboutDELC/tabid/54412/Default.aspx> (last accessed 19 December 2014)

DELC, ‘Montevideo Programme’, available at: <http://www.unep.org/delc/MontevideoProgramme/tabid/54416/Default.aspx> (last accessed 19 December 2014)

Encyclopaedia Britannica. Encyclopaedia Britannica Online Academic Edition (2014), available at: <http://www.britannica.com/EBchecked/topic/128386/common-law/280077/Public-law?anchor=ref1023189> (last accessed 19 December 2014)

Huntington, S, ‘The Clash of Civilization’, 72 (3) *Foreign Affairs* (1993) 3-12

ILO, 'Conventions and Recommendations' available at: <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (last accessed 22 December 2014)

ILO, 'ILO Declarations', available at: <http://www.ilo.org/public/english/bureau/leg/declarations.htm> (last accessed 22 December 2014)

ILO, 'Introduction to International Labour Standards', available at: <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/lang--en/index.htm> (last accessed 22 December 2014)

ILO, 'Mission and Objectives', available at: <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> (last accessed 22 December 2014)

ILO, 'Origin and History', available at: <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (last accessed 22 December 2014)

ILO, 'Tripartite Constituencies', available at: <http://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.htm> (last accessed 22 December 2014)

IOSCO, 'The International Organization of Securities Commission', available at: <http://www.iosco.org/about/> (last accessed 27 October 2014)

ISEAL Alliance, 'What We Do' and 'Our Mission', available at: <http://www.isealalliance.org/about-us> (last accessed 22 October 2014)

ISO 'ISO and Developing Countries', available at: <http://www.iso.org/iso/home/about/iso-and-developing-countries.htm> (last accessed 22 December 2014)

ISO, 'About ISO', available at: <http://www.iso.org/iso/home/about.htm> (last accessed 22 December 2014)

ISO, 'How Does ISO Develop Standards' available at: http://www.iso.org/iso/home/standards_development.htm (last accessed 22 December 2014)

ISO, 'ISO 26000 – Social Responsibility', available at: <http://www.iso.org/iso/home/standards/iso26000.htm> (last accessed 22 December 2014)

ISO, 'ISO Members', available at: http://www.iso.org/iso/home/about/iso_members.htm (last accessed 22 December 2014)

ISO, 'Management System Standards', available at: <http://www.iso.org/iso/home/standards/management-standards.htm> (last accessed 12 December 2014)

ISO, 'Standards', available at: <http://www.iso.org/iso/home/standards.htm> (last accessed 22 December 2014)

ISO, 'Structure and Governance', available at: http://www.iso.org/iso/home/about/about_governance.htm (last accessed 12 December 2014)

OECD, 'History', available at: <http://www.oecd.org/about/history/> (last accessed 22 December 2014)

OECD, 'Legal Instruments' available at: <http://www.oecd.org/legal/legal-instruments.htm> (last accessed 22 December 2014)

Olympic Movement 'Olympism in Action – Building a Better World through Sport', available at: <http://www.olympic.org/olympism-in-action> (last accessed 19 December 2014)

Olympic Movement, 'From Candidate to Host City', available at: <http://www.olympic.org/host-city-election> (last accessed 19 December 2014)

Oxford Dictionaries, available at: <http://oxforddictionaries.com/> (last accessed 21 October 2014)

Press Release: 'UNEP Partners with Vancouver 2010 on Environmental Initiatives for the 2010 Winter Games' (29 October 2007), available at: <http://www.unep.org/documents.multilingual/default.asp?DocumentID=519&ArticleID=5691&l=en> (last accessed 19 December 2014)

Schneider, Reto U 'Was die Welt Zusammenhält', NZZ Folio, February 2005

Sport and Environment Commission, 'Environmental Protection and the Olympic Games', available at: <http://www.olympic.org/sport-environment-commission?tab=games> (last accessed 19 December 2014)

Sports and Environment Commission, 'Composition', available at: <http://www.olympic.org/sport-environment-commission?tab=Composition> (last accessed 19 December 2014)

Sports and Environment Commission, 'Mission', available at: <http://www.olympic.org/sport-environment-commission?tab=Mission> (last accessed 19 December 2014)

UN Global Compact, 'How are COPs Used?' available at: https://www.unglobalcompact.org/COP/analyzing_progress/index.html (last accessed 22 December 2014)

UN Global Compact, 'Overview of the UN Global Compact', available at: <http://www.unglobalcompact.org/AboutTheGC/index.html> (last accessed 22 December 2014)

UN Global Compact, 'Policy on Communicating Progress', Version of 25 February 2011, available at: http://www.unglobalcompact.org/docs/communication_on_progress/COP_Policy_Feb11.pdf. (last accessed 22 December 2014)

UNEP News Center, 'London 2012 Will Leave a Lasting Legacy for the UK and the Olympic Movement: UNEP Executive Director' (26 July 2005), available at: <http://www.unep.org/newscentre/default.aspx?DocumentID=2691&ArticleID=9239> (last accessed 19 December 2014)

UNEP, '2010 Green Goal in South Africa', available at: http://www.unep.org/sport_env/Worldcup2010.aspx (last accessed 19 December 2014)

UNEP, 'About UNEP, Sport and the Environment', available at: http://www.unep.org/sport_env/about.aspx (last accessed 19 December 2014)

UNEP, 'About UNEP, The Organization', available at: <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=43> (last accessed 19 December 2014)

UNEP, 'Finance Initiative' available at: <http://www.unepfi.org/> (last accessed 19 December 2014)

UNEP, 'Green Olympics in Sochi', information available at: <http://www.unep.org/roe/GreenOlympicsinSochi/tabid/54610/Default.aspx> (last accessed 19 December 2014)

UNEP, 'Greening of the 2006 World Cup', available at: http://www.unep.org/sport_env/2006worldcup.aspx (last accessed 19 December 2014)

UNEP, 'Puma® Play for Life', available at: http://www.unep.org/sport_env/Puma_PlayforLife.aspx (last accessed 19 December 2014)

UNEP, 'Regional Workshops on Facilitating Understanding Between Officials Responsible for Development Planning and Officials Responsible for Chemicals Management – UNEP-Norwegian Fund project on "Integration of Chemical Safety Concerns into Development Agendas"', available at: <http://www.unep.org/chemicalsandwaste/UNEPsWork/Mainstreaming/IntegrationofSMCintoDevelopmentPlanningProce/Background/UNDPUNEPPGuidanceDocuments/TheUNDPUNEPPPartnershipInitiativeEconomicAn/UNEPNorwegianFundproject/tabid/79378/Default.aspx> (last accessed 19 December 2014)

UNEP, 'Sport and the Environment' available at: http://www.unep.org/sport_env/ (last accessed 19 December 2014)

UNEP, 'UNEP and the Various Olympic Events', available at: http://www.unep.org/sport_env/olympics_Events.aspx (last accessed 19 December 2014).

UNEP, 'UNEP Organigram', available at: <http://www.unep.org/pdf/UnepOrganigram.pdf> (last accessed 19 December 2014)

WTO, 'The WTO and the United Nations Environment Program', available at: http://www.wto.org/english/thewto_e/coher_e/wto_unep_e.htm (last accessed 19 December 2014)

