ANALYZING AND SHAPING INTER-INSTITUTIONAL RELATIONS IN GLOBAL GOVERNANCE

INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE, NYU SCHOOL OF LAW

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INTRODUCTION

Overview of the Project

Presenter: Benedict Kingsbury, Murry and Ida Becker Professor of Law and Director of the Institute for International Law and Justice, NYU School of Law (currently visiting University of Utah School of Law)

This project begins with the observation that the way in which interactions happen in the global administrative space seems important and under-theorized.[1] Might there be some practical pay-offs to studying interactions, rather than institutions in isolation? At the outset, the idea in throwing the net widely is to capture five types of institutional interaction:

1. *Horizontal*: Interactions between institutions that are international actors.
2. *Vertical*: Interactions between international and national institutions, where the latter is a member of the international body.

[1] For an introduction to the concept of "global administrative space," see Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

3. *Diagonal*: Interactions between an international institution and a national one where the national body is not a member. This type of relationship is a more oblique one.
4. Interactions between institutions from different countries. The typical discussion has been about "dialogue" among national courts, but the frame could be much broader, to capture transnational engagement among regulatory agencies, etc.
5. Relationships between different national institutions in the same country.

Following these five dimensions, we can ask several questions about institutional interaction. The following discussion focuses on management, change, effects, and the consequences of interaction for law.

What do we know about how these interactions might be managed?[2] At least five mechanisms seem relevant. First, interactions might be managed through legal interpretation of the relevant rules or constitutive instruments. Second, conflict of laws methodologies have been developed to solve such problems through concepts such as interest analysis and contacts. Third, we might resort to concepts of leadership or specialization. The International Court of Justice, for example, elaborated a principle of specialty for United Nations agencies in one of its *Nuclear Weapons* advisory opinions.[3] Fourth, we see attempts to delimit boundaries between institutions. This is often done with ideas such as "competence" or "mandate." Fifth, we might look to the distinction between formal and informal institutions.

In addition to managing interaction, we want to understand how change works, and how to move from interaction to institutional change. Change may happen through manifestations of power, or through shifts in the balance of power. We should supplement these standard realist accounts of material power with an understanding of market dynamics, such as the logics of competition, collusion, coordination, and cooptation. Theories of the firm might provide an account of how institutional boundaries develop and shift over time, and when we might see devolution and privatization.[4] Knowledge-type theories may supplement these mechanisms by giving accounts of learning, diffusion, or mimesis. Other such views might focus on the role of deep-structural general principles. Finally, we should consider what impedes change, such as switching costs, inertia, and the enmeshment of institutions among other organizations. What contributes to the durability of some institutions?

Another direction focuses on the effects of interaction. What are the effects of interaction on the distribution and flows of power? Interaction will also have normative effects. We might consider these from a generally progressive liberal perspective of justice, which is concerned with welfare, sustainable development, and the rule of law. Interaction also implicates structural concerns, invoking normative theories of the separation of powers and

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[2] REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION (Margaret A. Young, ed., 2012).

[3] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66.

[4] R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937). More recent work has began to think outside the typical distinction between "contracting-in" and "contracting-out," to note other types of inter-firm relationships that may be relevant to the regulatory environment. *See* Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377 (2010).

constitutionalism. And we may study the normative effects of interaction through what may be a broadly pluralist lens, focusing on the way interaction potentially enhances "voice," leading to a kind of legitimation through wider participation.

A sociological perspective might focus on the effects of *expert* governance, and the role of interaction in limiting or enhancing expert rule. Interactions may also be understood in dynamic terms as networks, as increasing the power of some nodes, or as generating new pathways and linkages. Finally, there is an autarkic dimension to interaction, in that it could perpetuate existing distributions of power.

In studying the consequences for interaction on law, we can use a broad understanding of legality. Thus, by "law," we might refer to rules, regulatory decisions, institutional processes, remedies, epistemologies, or law as expressed values. Recent work focuses on the juris-generative aspect of interaction.[5] Interaction may also spur legal innovation. It might catalyze the diffusion of norms, rules, and institutional principles. Or, through review, the quashing of decisions, and mutual challenge, interaction might prompt the revision of existing law. Finally, we might consider the ways in which interaction fosters the incorporation of private law into public institutions, and vice versa.

Structure of the Workshop

The workshop was divided into three main parts, followed by a round of concluding remarks and reflections. After Benedict Kingsbury's presentation of the project's general overview, Nico Krisch and Armin von Bogdandy presented two different frameworks within which inter-institutional relations may be studied. Subsequently, scholars presented a series of case studies, each of which was immediately discussed by an expert in the field, followed by a round of discussion open to all of the workshop's participants. The presentation of case studies was divided into two parts. The first series of case studies was related to the new Global Administrative Law (GAL) network projects on inter-institutional relations, which are being supported by the International Development Research Centre (IDRC). The second group was composed of smaller, more specific case studies being advanced by scholars independently. Finally, the floor was opened to all participants for a round of concluding remarks.

APPROACHES TO INTER-INSTITUTIONAL RELATIONS

Pluralism beyond Constitutionalism

Presenter: Nico Krisch, Professor of International Law, Hertie School of Governance (Berlin, Germany) (visiting at Harvard Law School)

One might benefit from approaching interaction using a pluralist orientation. The central claim of pluralism is that we do not need an overarching frame, and that the presence of

[5] JUTTA BRUNÉE & STEPHEN TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT (2010).

different sub-orders might be preferable. It is useful to focus on *interaction*, as we are currently seeing a multiplication of institutions, increasingly inhabiting a shared space. The intuitive reaction to this phenomenon is that we need "coordination," which is treated as an inherent good. But this raises the question of whether and when there is actually a problem with multiplicity, and, if it is, whether we can imagine or observe helpful forms of coordination or interaction.

We may begin with a useful distinction between institutions as fora through which others act, and institutions as actors in their own right. The view of *institutions as fora* is probably the strongest in the literature on regime complexes.[6] The focus in this work is on regimes competing to get their solutions into the world, a dynamic that can be characterized in terms of forum-shopping and the creation of new institutions. Overall, this literature is generally skeptical of multiplicity, and states continue to play a dominant role.

A more positive role for international institutions may be found in the recent work of Abbott and Snidal.[7] Theirs is a more nuanced view, which admits of the possibility that international organizations, NGOs, and private actors, as well as states, may drive regulation.[8] Polycentric governance theories also hold a more sanguine view. Charles Sabel's work, which emphasizes experimentation and learning, may be helpful.[9] Each of these views sees a more active role for institutions in facilitating the interaction of other players—Abbott and Snidal refer to this practice as "orchestration."

The view of *institutions as actors in their own right* is not as popular, though it is represented in the 2004 book by Barnett and Finnemore.[10] The more one sees institutions as actors in their own right, the more room there is for serious talk of coordination among international institutions. But there is also a great deal of competition for regulatory share, as emphasized by Julia Black.[11] To understand these dynamics, we may need to dig deeper into behavioral theories, and draw on organizational sociology.

A third view, drawn from systems theory, suggests that the problem of interaction is the *fundamentally different rationalities of various subsystems*.[12] But, on this account, bridging different rationalities of different institutions seems impossible.

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6 Karen Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7 PERSPECTIVES ON POL. 13 (2009); Kal Raustiala & David Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277 (2004).

7 Kenneth W. Abbott & Duncan Snidal, *International Regulation without International Government: Improving IO Performance through Orchestration*, 5 REV. INT'L ORG. 315 (2010); Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501 (2009).

8 The authors plot various institutions within a "governance triangle," with states/IOs at one corner, NGOs at another, and firms at the third.

9 *E.g.*, Joshua Cohen & Charles F. Sabel, *A Global Democracy?*, 37 N.Y.U. J. INT'L L. & POL. 763 (2005).

10 MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS (2004).

11 Julia Black, *Legitimacy and the Competition for Regulatory Share*, LSE Law, Society and Economy Working Paper No. 14-2009 (July 2009).

12 *See generally* Andreas Fischer-Liscano & Gunther Teubner, *Regime Collisions: The Vain Search for Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (Michelle Everson trans., 2005);

In summary, in order to understand relationships between different institutions, we need to move in three steps. First, we try to understand what institutions are doing, along the continuum between joint action and competition. Second, we should understand the structure of these institutions: what are their decision-making rules, and do they share sets of actors? Third, we should work from the perspective of ideology: what are the normative and cognitive frames that govern institutions, and do institutions operate on similar ground?

Relations between International Public Authorities

Presenter: Armin von Bogdandy, Director, Max Planck Institute for Comparative Public Law and International Law (Heidelberg, Germany)

The core idea of this work is to look at the phenomena Professor Krisch describes using the core concept of "international public authority." This is a public law approach, which is broader than both constitutionalist and administrative approaches, and goes back further in history.

How can these phenomena be studied? One approach is inductive, but we also need a deductive element, which gives us an idea of the frame in which we set the pieces. Deduction, however, is insufficient; as long as we do not have strong organizing concepts shared broadly, confusion will persist. A third frame is a comparative one, but we must have some idea of what we are comparing. This is where the concept of *composite administration* might be useful.

This idea, elaborated in a 2008 paper with Philipp Dann,[13] comes from continental Europe. It has been agreed upon as a conceptual basis within which research is done. This enables comparison. The concept has also been politically influential in Europe. The purpose is to discern typical elements of stable institutional interaction. It says very little about power, effects, or change. The idea is to have a framework for the organization of knowledge.

The core insight is similar to that explored by Nico Krisch. In composite administration, the autonomy of each institution plays a strong role; there is no overarching constitutional frame for interaction. There is, however, a legal basis for interaction, such as a duty to cooperate. The institutions do not behave according to a common policy, but they are co-dependent in producing results. Together, institutions in composite administration are in the business of exercising public authority.

NIKLAS LUHMANN, SOCIAL SYSTEMS (1984) (John Bednarz Jr. & Dirk Baecker trans., Stanford Univ. Press, 1995).

[13] Armin von Bogdandy & Philipp Dann, *International Composite Administration*, 9 GER. L.J. 2013, 2016 (2008).

THEMES FROM THE NEW IDRC-SUPPORTED GAL NETWORK PROJECTS ON INTER-INSTITUTIONAL RELATIONS

Inter-Institutional Evaluation Through the Use of Indicators

Presenter: René Urueña, Professor and Director of the International Law Program, University of Los Andes (Bogotá, Colombia)

Reflecting their growing importance as a platform for designing and adopting policy, indicators have become the subject of increased scholarly interest.[14] This project advances the research agenda that explores the role of indicators as a technology of governance, both domestic and global. Shared by the GAL Network, the question from this perspective is whether the "burgeoning production and use of indicators in global governance has the potential to alter the forms, the exercise, and perhaps even the distributions of power in certain spheres of global governance."[15] More specifically, the project focuses on the horizontal dimension of indicators as a platform of regime interaction: indeed, indicators are increasingly used not only by international organizations to assess states along various dimensions, but also by institutions to measure and shape performance of other "horizontally" positioned institutions, thus articulating the interaction among domestic institutions and regimes. To that end, the project will focus on the "receiving" end of the indicator, that is, on those whose performance is being measured and compared. It will engage with four instances of such interaction:

1. *Use of indicators by national courts to monitor government actions in development fields (evaluation by judiciary of executive)*: This study will focus on the role of the Colombian Constitutional Court in re-shaping the country's health care regime, deemed by the court to be unconstitutional. The court made extensive use of indicators to evaluate compliance of its orders by national authorities. In many instances, said indicators drew on norms and guidance from international organizations, as well as literature by Western scholars.

2. *Use of indicators by a government agency to evaluate another government agency (self-evaluation of executive)*: This study will focus on performance contracting in Kenya. The Kenya Anti-Corruption Commission (KACC) has developed a fairly comprehensive guide that public institutions implementing performance contracts are required to use to determine levels of corruption. Said guide is motivated by the inclusion of a "corruption eradication" indicator in the performance contracts that public institutions sign with the government. Pursuant to the indicator, institutions must conduct surveys on corruption perception, which are used by the KACC to rank the institutions based on their anti-corruption performance. The good performers are rewarded at an annual public ceremony officiated by the President and/or the Prime Minister.

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[14] See, most recently, the papers collected in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH CLASSIFICATION AND RANKINGS (Kevin Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry eds., 2012).

[15] Kevin E. Davis, Benedict Kingsbury and Sally Engle Merry, *Indicators as a Technology of Global Governance*, 46 LAW & SOCIETY REVIEW 71 (2012).

3. *Use of indicators by civil society to evaluate judges and public officials (evaluation by civil society of judiciary and executive)*: Often, judicial performance is considered an indicator of the quality of a country's democracy. In Brazil, an effort to evaluate performance and efficiency of the judicial system has been undertaken by academics at the Fundação Getulio Vargas, with the creation of the Brazilian Justice Confidence Index (BJCI). This study will look at the impact of the BJCI on the Brazilian public and policymakers in Brazil and neighboring countries. One of the main aims is to examine whether governance by indicators improves (or deteriorates) opportunities for inclusive participation in public policy.

4. *Use of indicators in measuring the gender perspective of policies in the context of the Colombian armed conflict*: Colombia has the second largest population of forcefully displaced persons in the world, following Darfur. Although forced displacement is not always a form of gender-based violence, it has a different and disparate impact on women and girls. In 2004, the Colombian Constitutional Court found a pattern of mass violation of displaced population's rights, which could not be attributed to a particular agency but to the State as a whole. One of the Court's orders focused on indicators. However, such indicators featured an extremely simplified understanding of gender, showing only the disaggregation of men and women who benefited from public policies. Women's NGOs complained that these indicators were inadequate, and demanded that the Court and the government adopt indicators with a real gender perspective that would incorporate the orders of another key Court follow-up decision. Nonetheless, the implementation of policies related to these orders was not reflected in the indicators. Lack of indicators with a comprehensive gender perspective has created divergent positions regarding their ultimate worth.

The central focus of the project is the effect of indicators on policy discourse, knowledge production, power relations, and decision-making, in most cases at the national level. The goal is to engage many scholars working in different parts of the world and on different indicators, in order to develop a broader and more nuanced theoretical perspective on the role of indicators in global governance. This involves comparison across indicators and among countries, and will attempt to create a general theory about how indicators work in action, identifying the risks, challenges, and opportunities they open in the developing world. A general intuition of the project is that indicators have a wide range of implications at the horizontal level: once indicators are created and they leave the global sphere, they become an artifact, and are used for purposes that were not originally intended.

Finally, the project seeks to explore the following possible policy reforms:

a. *Indicators as the target of wider democratic/electoral control*: Generalized use of quantitative methods of governance could shield redistributive decisions from democratic scrutiny, or wider democratic debate.

b. *Empowering transnational experts?*: Framing public decision-making as a matter of data may empower transnational experts, expert-based domestic agencies (such as independent regulatory agencies), and civil society organizations with access to such expertise.

c. *Indicators as platforms for advocacy*: Indicators may be instrumental in determining the very issues that gain prominence in the policy agenda.

d. *Indicators as part of the judicial discourse*: As Courts in developing countries become bolder in adjudicating on issues that have an impact on the redistribution of wealth, indicators are bound to become a central part of activist judicial discourse. Do quantitative techniques have an impact on judicial reasoning?

Discussant: Margaret Satterthwaite, Professor of Clinical Law and Faculty Director, Root-Tilden-Kern Program, NYU School of Law

Professor Satterthwaite's own project uses indicators as a lens to ask how human rights practice can, and should, become "evidence-based"; it studies how indicators can be a meeting point between norms and empiricism. With regard to the overall framing of the project presented by Professor Urueña, she noted that the fourth category, relating to human rights indicators, was odd. This is an area where much work has already been done, and it could be broken down into one of the other three categories, as it can be considered a more general area of inquiry.

As regards the quantitative method, she mentioned that indicators have been the main technology to integrate human rights into other fields, such as development or counter-terrorism. The result is the ossification of the norm by choosing the indicator, as in the Sphere indicators (where a certain volume of water is deemed the human rights standard for daily needs).[16] In turn, we should ask why indicators are the chosen technology, and how that relates to their quantitative nature. In relation to the policy implications, she recognized that the move toward experts is an important element to consider, including the fact that indicators have may have the effect of empowering experts. However, there is also a role for a "translator figure" who can speak about the norm and also use the quantitative methods, which creates a potential role for professional networks, where different kinds of translator figures come together. Finally, Professor Satterthwaite noted that the lack of indicators is also an interesting question, as reflected in the fourth case study. For example, is the failure to capture gender using indicators a problem intrinsic to the technology of indicators or the methods of data-gathering?

Open Discussion

Adrian Di Giovanni noted that the procurement indicators in Kenya relating to the second case study were actually developed for intra-governmental use, to monitor each other's performance. It is very much a domestic process, like a scorecard model for bureaucratic performance. **Mariana Mota Prado** suggested a focus on the "clash of indicators" in certain cases, and recalled a related, ongoing project on police reform in Brazil. **Vikram Raghavan** mentioned the World Bank's recent approval of its Program for Results (P4R), according to which grants are disbursed to states based on outcomes. This furthers the World Bank's bringing of indicators into its mainstream operation; nevertheless, it is not always easy to determine what the appropriate indicators to use are. **J. Benton Heath**

[16] SPHERE PROJECT, SPHERE HANDBOOK: HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN HUMANITARIAN RESPONSE (3d ed., 2011), *available at* http://www.sphereproject.org/handbook/.

suggested that, while indicators may empower experts, we should also expect that experts may make rational political calculations in anticipation of the reactions by powerful interests. Therefore, we should expect that the empowerment of experts may in some cases be empowering these political actors whose interests are affecting expert decision-making. This is suggested by Professor Satterthwaite's example of the Sphere quantitative indicator on clean water, which was set in expectation of how powerful actors would react, not according to some scientific methodology. Finally, **Matthias Goldmann** stated that many different indicators are considered in these projects and that the authors should be careful in taking into account whether particular indicators are being used by public or private authorities.

Transnational and Comparative Responses to Political Corruption

Presenter: Kevin Davis, Beller Family Professor of Business Law, NYU School of Law

Professor Davis presented the proposed next stage of the GAL Network project on Transnational and Comparative Responses to Political Corruption. So far, the project has examined multi-jurisdictional anti-corruption legal proceedings originating in Latin America, with particular case studies in Brazil and Argentina. This first stage has revealed a striking pattern of highly uncoordinated enforcement activity involving administrative, civil, and criminal proceedings by multiple agencies. Some of these are domestic actors (*e.g.* anti-corruption commissions, special prosecutors, regulators, and *ad hoc* arrangements); others are foreign (*e.g.* the U.S. Foreign Corruption Practices Act, the U.S. Department of Justice, and the SEC).

He identified a number of potential problems with such a pattern of activity, involving questions of jurisdiction, resources, information and expertise, and accountability. More generally, uncoordinated transnational enforcement of anti-corruption norms can result in disregard for the interests of the members of developing societies.

According to Davis, the proposed next stage of the project would identify and assess the potential impact of various mechanisms for coordinating the activities of institutions involved in enforcing anti-corruption norms. Possible coordination mechanisms include *ad hoc* case-by-case consultations, unstructured working groups, inter-agency agreements, priority rules of general application (such as grants of exclusive jurisdiction or prohibitions on double jeopardy), and the creation of integrated specialized anti-corruption agencies or tribunals. All of these possibilities are to some extent influenced by international norms and actors outside developing countries. The project will evaluate each mechanism against several criteria, including their potential for jurisdictional conflict, procedural fairness, risk of over- or under-enforcement, magnitude and distribution of enforcement costs, development of institutional capacity, and accountability to various constituencies. The impact of these mechanisms will be assessed, taking into account variations in the interests and capabilities of the relevant institutions and the extent to which they can serve as complements or substitutes for one another. The objectives of this work are to:

- Inform ongoing national debates about the direction of anti-corruption law;
- Help Latin American countries to make informed contributions to debates at both the national and international levels about appropriate ways of implementing international anti-corruption agreements;
- Suggest directions for redesign of the legal architecture that supports international anti-corruption initiatives; and
- Formulate hypotheses about the efficacy of mechanisms for coordinating inter-institutional interaction that apply beyond the anti-corruption context.

This stage of the work would focus on Brazil, Argentina, Colombia, Peru, Bolivia, and Paraguay. These countries are in close geographic proximity, have a similar legal heritage, span a range of levels of economic development, and have enforcement practices for anti-corruption norms that involve varying forms and levels of coordination. In *Phase I*, researchers will identify and evaluate prevailing forms of coordination in each country by examining the following types of questions:

- What actors are involved in enforcing anti-corruption norms that govern local public officials?
- What roles have each of those actors played in recent cases?
- Have there been any jurisdictional conflicts?
- Have any incidents of corruption led to multiple forms of enforcement?
- How have the costs and benefits of any enforcement actions been distributed?
- How is expertise in enforcing anti-corruption norms distributed across various actors?
- What sorts of accountability mechanisms govern the relevant actors? How have they been applied?

Phase II of the research will then identify key coordination mechanisms (*e.g.* prohibitions upon double jeopardy, specialized anti-corruption commissions), analyze them using data provided by the country studies, and suggest directions for further research. Throughout the research, Professor Davis expects to draw comparisons between this 'regime' (if it can be called such) or field, and the field of human rights: both are concerned with the possibility of using foreign or international institutions to combat impunity.

Open Discussion

Armin Von Bogdandy wondered how the researchers planned to organize the material they gathered. One option was to write up discrete case studies, perhaps focusing on a few of the more high-profile cases, and then leave it to others to draw generalizations from them. He also asked whether there was a set of international best practices that could be used to do this. **Nico Krisch** suggested that it might be useful to develop a set of testable hypotheses to organize the inquiry, particularly concerning the similarities and differences between coordination in the fields of anti-corruption and human rights. For example, there might be higher cooperation in the anti-corruption field because of a higher confluence of interests among different actors than in the case of human rights. **Horatia Muir-Watt** supported the overall methodology of the project in seeking to build up a larger empirical picture of global governance by starting with one specific problematic.

Relations between Courts and Regulatory Institutions in Brazil

Presenter: Mariana Mota Prado, Professor, University of Toronto Faculty of Law

Professor Prado presented a proposed project dealing with relations between courts (national and international) and regulatory institutions in Brazil. She envisaged that the project would consist of a series of case studies, covering the regulatory roles of both national and international courts. Professor Prado explained that the central focus of these case studies would be on the potential relationships observed in the relations between courts and regulatory institutions. Here, she drew a parallel between the work envisaged in this project and work already done by Arun K. Thiruvengadam and Piyush Joshi for the Regulatory State of the South Project.[17] In the study by Thiruvengadam and Joshi, it was observed that the Supreme Court of India was attempting to assist the national regulatory agency by empowering it to better perform its regulatory functions.

The starting point of this project would therefore be to map the interactions occurring in each case study, and to ask: to what extent are these dynamics providing greater "voice" to actors on the regulatory scene which did not manage to have a voice at the outset of the regulatory process? In particular, it was envisaged that each case study would map the dialectical process between the court and the regulatory agency.

Professor Prado then described the five proposed case studies of relations between courts and regulatory institutions confined to Brazil. These were:

1. judicial dispute of regulatory decisions: a quantitative analysis;

2. small claims courts and the telecommunications regulator (ANATEL);

3. courts and the private health care regulator (ANS);

4. courts, the Securities and Exchange Commission (CVM) and the Developmental State; and

5. the Brazilian Supreme Court (STF) and regulatory independence.

Then, Professor Prado described the two proposed case studies relating to the regulatory role of international courts. These case studies were: the Inter-American Commission on Human Rights and the statute against domestic violence; and the WTO, the Mercosur, and the *Brazil—Tyres* Case.[18]

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[17] Arun K. Thiruvengadam & Piyush Joshi, *Judiciaries as crucial actors in Southern regulatory systems: A case study of Indian telecom regulation*, 6 REGULATION & GOVERNANCE (2012), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1748-5991.2012.01143.x/abstract.

[18] Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007).

Open Discussion

Nehal Bhuta commented that there was an oscillation in thinking in the proposed project: would the central question be a "why" question a descriptive one? The project coordinators would also need to identify which of the interactions already identified are sufficiently different or similar on certain points, so as to make them useful case studies. Further questions that would be helpful might include the following: What is at stake in this investigation? Is it the relationship between different kinds of public power? Are there any specific historical trajectories that have emerged in the countries under study? Are there path dependencies of both courts and regulators that, in turn, shape interactions? For the case studies concerning Brazil, it was suggested that one possible way forward could be to choose one or two cases, and then provide a careful historical account of the regulatory mechanism itself, followed by a historical account of the functioning of the Brazilian judiciary in this sphere of activity. Some research questions for each case study could then be: Are courts now doing more than they used to in Brazil? What kind of power is at stake? In what ways is power being displaced or channeled through these sites of contestation or interaction? Could what is going on be described as different logics or rationalities of public power? In summary, Professor Bhuta recommended greater discipline in the choice of case studies, as well as a historical focus. **Bronwen Morgan** highlighted that it could be useful to place case studies of "activist courts" side by side with "non-activist courts."[19] Picking up on an earlier comment referring to different rationalities of public power, **René Urueña** noted that the proposed case studies involved "law versus economics" rationalities. These were not only institutional conflicts, but collisions of worldviews in the Teubnerian sense.

Climate Change as a Challenge of Multilevel Governance

Presenter: Bronwen Morgan, Professor of Socio-Legal Studies, University of Bristol Faculty of Social Sciences and Law

The regulatory architecture for climate change is in flux both politically and institutionally, and a clear global agreement on collective action and the assignment of responsibilities seems increasingly out of reach. In its place, a patchwork of climate governance is emerging, that rests on a mix of nudges from above and political mobilization and innovative action from below. This focuses attention on the ways in which inter-institutional communication and coordination occurs within countries, and between countries and an emergent procedurally focused global climate governance architecture.

Professor Morgan presented a project that will study climate governance from two perspectives. First, it will ask to what extent and how international legal regimes (or the process of negotiating them) can induce changes in national and subnational policies and actions, and through what instruments and pathways this influence operates. Among existing climate policy tools, Professor Morgan focused in particular on the concept of Nationally Appropriate Mitigation Actions (NAMAs), which emerged just over five years

[19] She suggested that a helpful methodology may be found in COURTING SOCIAL JUSTICE (Varun Gauri & Daniel M. Brinks, eds., 2008).

ago in the context of United Nations Framework Convention on Climate Change (UNFCCC) negotiations.

Second, the project will give attention to the politics behind national and subnational laws and policies. In the climate context, the proliferation of national and subnational action plans, strategies, missions, and policies is only in part a reaction to global climate politics and their episodic crystallization in negotiating sessions. NAMAs, national action plans, and their siblings are equally the result of fraught national debates over sustainable development. Domestic climate policies will therefore be significantly shaped by their integration into more firmly entrenched institutional agendas addressing energy, water, urban development and the like. Understanding emergent climate regulation will require understanding regulatory negotiation between entrenched and emerging agendas at multiple levels (global and national/ subnational), both horizontally and vertically.

To illustrate the close interplay of these two perspectives, Professor Morgan spent some time discussing the background and negotiation difficulties surrounding NAMAs. Despite a growing effort to define and encourage "national actions," developing and developed countries continue to disagree over what constitutes a NAMA and how they should be carried out in a "measurable, reportable, and verifiable manner." In the case of individual state actions without international funding or assistance, practices of measurement, reporting, and verification (MRV) are carried out domestically and reported to the UNFCCC. In contrast, national actions that receive international support will necessarily require international MRV, and all actions will be registered with an international registry.

Professor Morgan emphasized that many aspects of NAMAs remain undetermined. The lack of any precise definition of an appropriate national action, for example, has led to a wide variety of approaches and expectations from both developed and developing countries. Other contested issues have included the definition of MRV, the status of Reducing Emissions from Deforestation and Forest Degradation projects and the Clean Development Mechanism as appropriate national actions, and the need for an international registry. More generally, the question remains of how to account for national actions that are "autonomous" and take place without international support or reporting. There is concern among developing country governments that if certain autonomous NAMAs are recognized as national actions then it might be possible for developed countries to claim that there is no absolute obligation for developed countries to support all NAMAs. The question of whether NAMAs result in legal commitments, and if so, of what kind, is also central to much of the reticence of developing countries in supporting NAMAs. Finally, all of these debates feed into a broader political question regarding which countries are responsible for contemporary climate change. In this way, NAMAs are one nexus through which new geopolitical tensions between developed and developing countries have become articulated in debates over global climate change.

Discussant: Richard B. Stewart, John Edward Sexton Professor of Law, NYU School of Law

Professor Stewart commented that the project needed a tighter focus, and was not persuaded that NAMAs are the best vehicle for it. He mentioned that U.S. and Western

(and Japanese) emissions have been flat or declining for five years, while there has been a significant spike in the emissions of developing countries. The latter group must be persuaded to make changes, and institutional financing will play only a small part in this; more important will be private foreign direct investment. The question, he said, is how we can move in this direction. There are lots of funds not being delivered because the institutional interface between international funders and developing countries is not optimal. It is important to look at the political-institutional structure within developing countries; NAMAs are one avenue to do that, but it is also unclear whether the international discourse of local actors is just diplomatic rhetoric. It is necessary to see what the real significance of this was for the main actors at the local level. He emphasized that there are various pathways for funding, but questioned whether NAMAs were really the best focus, especially for gaining a view of how international discourse was *really* affecting domestic action.

Open Discussion

Matthias Goldmann suggested a role for the principle of subsidiarity in discussions of local ownership over mitigation. **Tim Büthe** commented that institutional complementarity theory might help, and asked what the institutional consequences of developing national implementation were—in other words, what do these institutions look like at the domestic level?

General Comments on the IDRC-Supported GAL Network Projects

Adrian Di Giovanni, Senior Program Officer, IDRC (Ottawa, Canada)

These projects all capture transnational exports and the problems associated with enforcement of existing norms or generation of new ones. The main issue this general project faces is how all of these components relate to one another, given their great variety. In other words, why is all of it relevant? The main challenge, therefore, is to develop the best unified narrative to present to a policymaker.

IDRC is confronted with the basic problem of promoting law and justice for citizens in developing countries. In the end, the standard discourse of getting the law or the courts right can be enriched by this discussion. Mr. Di Giovanni suggested three tentative themes through which these projects may contribute to the above challenges. The projects:

1. show the challenges of ensuring that developing country concerns are respected in international efforts;
2. deepen knowledge on the need to enhance or promote the role of courts in the regulating process; they contribute to an understanding of courts as regulatory and development actors; and
3. direct focus towards the challenges of ensuring access to justice.

Mr. Di Giovanni expressed confidence that deeper and more detailed conclusions will emerge from these projects. For the moment, however, the fundamental principles of national law, public law, or administrative law at the heart of the GAL project are present and come out in all the projects in one way or another; the GAL framework is more than

reaffirmed, and has the possibility to push the law beyond the traditional thinking in international law and development. Mr. Di Giovanni also remarked that a basic principle present throughout the preceding discussion is that building institutions is as much a political exercise as a technical, procedural one. This might be obvious, but the dimension of interaction will capture this well. Hence, the projects allow us to see the "nitty gritty" work of constraining the use of power. Finally, he recalled the Kenya example, and stated that it is a fascinating context for seeing collision between institutions and frameworks, as there is a new Constitution, the International Criminal Court is getting involved, and the truth commission will soon release its recommendations.

OTHER CASE STUDIES

Peer Reviews between Institutions

Presenter: Georgios Dimitropoulos, Hauser Research Scholar, NYU School of Law

Peer reviews between institutions have been introduced in several global governance fields as monitoring systems of the implementation of global and regional rules. They are conducted on the following levels of global governance:

1. *Domestic to domestic*: this is the most important form of peer review, conducted by officials of domestic institutions organized under the auspices of an international or regional organization, in order to monitor compliance with global or regional regimes. Peer review in this sense is an examination of one national administration's performance in a particular area by other national administrations (the peers). Several global regimes use this type of peer review, most importantly the International Atomic Energy Agency (IAEA), the Financial Action Task Force (FATF), the Financial Stability Board (FSB) and the Organization for Economic Cooperation and Development (OECD). At the regional level, the European Union uses this mechanism broadly in order to monitor progress of its policies, especially in the frame of the Open Method of Coordination (OMC). In other regional organizations, the African Union has introduced the New Partnership for Africa's Development African Peer Review Mechanism (NEPAD APRM).

2. *Global to global*: peer review between international institutions is one alternative to the general absence of accountability mechanisms for global actors. Some regimes have institutionalized forms of monitoring of their activities by judicial or quasi-judicial organs like the World Bank Inspection Panel or various kinds of ombudsmen and administrative tribunals.

The OECD has a particularly relevant role for peer review. It has been trying to set global best practice standards for the conduct of mutual evaluations and to promote peer review in several fields and regimes. It can be predicted that the OECD will play a major role in the field of inter-institutional peer reviews because it has the relevant expertise and because it has overlapping powers in several fields with other major global and regional actors.

Peer review operates as a *horizontal* accountability mechanism. It presents a different way of inter-institutional monitoring in global governance than traditional surveillance schemes: it is not hierarchical monitoring. This is an innovative approach to global governance and GAL, and generally to accountability. It re-introduces the idea of horizontal relations between international actors that is prevalent in classical international law, but without the characteristics of traditional sovereign equality. This project proposes that inter-institutional relations should be shaped in a horizontal way beyond command-and-control, using new tools of governance like the ones proposed by New Governance theories.[20] This is a decentralized approach to global governance that also takes into account local actors in the shaping of inter-institutional relations. Horizontal systems are directed toward mutual assistance of the involved institutions instead of sanctioning. The guiding principles of such an inter-institutional approach are cooperation and trust; compliance is not forced but encouraged through collegial and cooperative interaction, peer pressure, and the creation of trust relationships, which may lead to socialization of participating actors.

Vocabularies of Public Law and Governance as a Medium for Inter-Institutional Relations: The World Bank and National Infrastructure Regulators

Presenter: Megan Donaldson, JSD Student, NYU School of Law

Megan Donaldson's presentation focused on the World Bank's 2006 *Handbook for Evaluating Infrastructure Regulatory Systems* as a window into the Bank's endeavors to reform legal frameworks and institutional design in national regulatory system. Her presentation drew out three main points:

- the way in which inter-institutional relations involve not only formal interconnections, but shared epistemic and professional orientations;

- the role played by particular vocabularies—in this case, a vocabulary that mingles terms and concepts having a public law lineage and normativity with a newer vocabulary of governance—in shaping inter-institutional relations; and

- whether the mutability of this vocabulary raises any questions about the plausibility of seeing concepts and ideas like Global Administrative Law as meaningful normative constraints on the conduct of inter-institutional relations. Put another way: is it right to place so much faith in that vocabulary as a checking mechanism?

Donaldson noted that the Handbook takes a very instrumental view of law, and depends, for its implementation, on creating little "enclaves" within national legal systems. She noted further that in adopting a rhetorical structure consisting of "meta-principles," "principles," and "standards," the Handbook draws on public law and governance-related vocabulary. She posited that the vision of public law being promoted in this way might be contestable, but when presented, is entirely consonant with what people desire to hear. In this manner, the Handbook both generalizes and diffuses particular ways of thinking about things.

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[20] For one comprehensive collection of New Governance studies, see LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006).

In terms of implications for inter-institutional relations, Donaldson put the key question as follows: What do we do when faced with a project like this Handbook, which uses this sort of language to push a particular normative agenda?

Discussant (on Dimitropulos and Donaldson): Matthias Goldmann, Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law

Before commenting individually on the two presentations, Goldmann first pointed out that both projects were interesting in the way they related to each other—in a way, they could be taken as comments on each other.

Commenting on Donaldson's presentation, Goldmann asked whether the Handbook or the evaluations based on it were authoritative. Using the concept of international public authority,[21] he suggested it could be seen as authoritative, which would require intrinsic and extrinsic reasons for following it (based on a Kantian idea of law). An intrinsic reason here could be a deduction from a few largely uncontroversial principles along the lines of 'natural law reasoning'. Extrinsic reasons may be financing or group pressure – relevant actors would need to follow the existing vocabulary (which can also be seen as an element of power).

Goldmann then commented that Donaldson should be careful in directing her criticism correctly. Her two main points are that the Handbook adopts an instrumental view of the law, but also that it is influenced by the Washington Consensus. Goldmann agreed with the two points, but suggested that these observations do not pinpoint the problem: From a public law perspective, it is not in itself a problem to view law as a means to an end; and on the other hand, neoliberal policies may be adopted by states in a democratic manner. The real problem lies in attempts to present neoliberal policies as objective or scientific, de-politicizing the concept of law or the rule of law.

Regarding Dimitropulos' presentation, Goldmann first suggested that the author take a wider perspective. Known by different names, peer review is not a phenomenon that began in the 1990s, but dates back to the 1920s with the ILO and its reporting system, and can be said to have continued somehow with the monitoring bodies of human rights conventions. According to Goldmann, peer review is not as adversarial as Dimitropoulos suggests; it rather tries to "switch off" the politics through quantitative methodology and good governance language, not necessarily being the product of open political debate. Secondly, Goldmann recommended the author to examine the conflicts which peer reviews reveal or conceal. Which countries benefit from peer review, and which don't? How often do international organizations actually criticize each other? In this regard, it would be useful to look at Tim Büthe's methodology, and to do an in-depth case study to see how institutions actually criticize each other.

Finally, in relation to both projects, Goldmann asked what would be the possible role for GAL in these cases of inter-institutional relations, and he identified two dimensions where

[21] *E.g.*, Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GER. L.J. 1375 (2008).

it could be used. First, at the *internal* institutional level, it could be used in order to make discourse more open and fairer. An example of this would be to include dissenting views in reports. Secondly, at the level of *inter-institutional* relations, GAL could be used to ensure either an integrated solution or more open contestation, for which one may choose between the frameworks presented by Armin von Bogdandy (composite administration following legally framed routines) and Nico Krisch (more open contestation).

Regime Shifting in International Intellectual Property Law Making: Fragmentation and Integration

Presenters: Graeme Dinwoodie, Professor of Intellectual Property and Information Technology Law, University of Oxford and Director, Oxford Intellectual Property Research Centre; Rochelle Dreyfuss, Pauline Newman Professor of Law, NYU School of Law

Professor Dreyfuss began by giving an overview of the current state of play in international intellectual property law-making.[22] She explained that the World Trade Organization and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Council have not functioned as originally envisaged, so that international intellectual property law is now being "made" at various other fora, including World Intellectual Property Organization (WIPO), the Anti-Counterfeiting Trade Agreement (ACTA), the Trans-Pacific Partnership, the Convention on Biological Diversity (the Nagoya Protocol on Access and Benefit Sharing) and many more bilateral fora. In addition, there has been some "pushback" in the development of counter-norms in the World Health Organization (WHO), United Nations Conference on Trade and Development (UNCTAD) and the U.N. Educational, Scientific and Cultural Organization (UNESCO). This pluralism in international intellectual property law could well be a positive development. However, intellectual property is about creating incentives to innovate. It is more difficult for actors to invest if they do not know what their rights are ultimately going to be. This leads to "cycling," among other things: the phenomenon of some claims that never go away. In a nutshell, rights-holders are currently operating in a very difficult environment.

Professor Dinwoodie discussed the available tools for integrating the different instruments. He highlighted article 4 of TRIPS as one possibility, which specified, for the first time, a "most-favored-nation" obligation in the context of intellectual property. But the problem with international intellectual property law is that everything tends to move in the direction of more protection, as opposed to international trade law, which tends to move in the direction of reducing barriers. Professor Dinwoodie then outlined three methods of integrating the different instruments:

1. *Integration through interpretation*. Here, there were four variables:

   (*a*) the source of the instrument, and the extent to which that source has particular expertise in the area that is potentially being integrated;

[22] These remarks are drawn from the presenters' recent work, GRAEME B. DINWOODIE & ROCHELLE DREYFUSS, A NEOFEDERALIST VISION OF TRIPS: THE RESILIENCE OF THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME (2012).

(*b*) the timing of the instrument;

(*c*) the governance of the instrument, including issues such as transparency and the extent which the relevant provision reflects a negotiated consensus; and

(*d*) the relationship between the scope of TRIPS and the measure that is meant to be integrated in TRIPS.

2. *Harnessing expertise from other bodies*. The problem, however, is that the TRIPS Council is insufficiently willing to take account of expertise from other international organizations. Thus far, the TRIPS Council has been relatively slow to grant observer status to other international organizations.

3. *Development of an* acquis. This method is more trans-substantive, and involves looking to national and international law.

Open Discussion

In response to questions from participants, Professors Dreyfuss and Dinwoodie clarified the following points. First, their proposed approach would help draw out what the international community thinks a balanced international intellectual property law regime might look like. Just articulating the similarities among national intellectual property regimes would already be very valuable. Second, national courts are not seen to be in competition with the *acquis*, but as adding to it. **Tim Büthe** commented that from a political science perspective, it was probably no accident that trade lawyers occupy a privileged position in international intellectual property negotiations. In terms of the political feasibility of getting to any of the proposed solutions, or partial solutions, what preferences do we expect stakeholders to have? If there are these multiple fora, then it was not clear that it was undesirable to have multiple outlets for such preferences. Professor Dreyfuss noted that creators are on both sides of current IP issues. The IP community is much more diverse than lawyers would anticipate. The key question, then, was how best to utilize the input of multiple institutions.

The Global Governance Implications of Private International Law : Beyond the Schism from Closet to Planet

Presenter: Horatia Muir-Watt, Professor, Sciences Po École de Droit (Paris, France)

Professor Muir-Watt's presentation began by noting that current discussions about global governance are largely unconnected to private international law. Private international lawyers have had very little to say about the causes of crisis and injustice in areas of global governance such as financial markets, environmental protection, pollution, the status of sovereign debt, the sale and purchase (or confiscation) of natural resources and land, the use and misuse of development aid, unequal access to food, the status of migrant populations—all issues with an important 'private law' dimension, but which have been left to public international lawyers.[23] On the other hand, public international law is increasingly

[23] These comments are drawn from Horatia Muir-Watt, *Private International Law Beyond the Schism*, 2 TRANSNAT'L LGL. THEORY 347 (2011).

confronted with a range of conflicts articulated as collisions of jurisdiction and applicable law, in which private or hybrid public-private entities and regimes play a significant role. Given these apparently obvious connections with its traditional subject-matter, the question is whether private international law can learn from, or contribute to, global governance debates.

Professor Muir-Watt suggested two focuses for further inquiry. First, an exercise in disciplinary genealogy: why and how did private international law get closed up and cut off from the global governance debate. Her own thinking is that the answer lies in the separation between the public and the private at the historical moment examined by Martti Koskenniemi, when public international law was constructed as a discipline and profession.[24] Second, what can private international law contribute now, and what are the bridges between private international law and global governance? Answering these questions would require consideration of jurisdictional conflicts between supranational courts and court-like entities, formal and informal sources of law, the public/private divide, and issues of pluralism. Furthermore, private international law needs to focus on power. In the domestication of private international law, issues of power were eliminated, and the discipline has dealt with global governance as a mere technical matter of developing rules for managing conflicts. It is time to rediscover the politics of private international law, while learning from its long experience and know-how in the recognition of alterity and the responsible management of pluralism.

Open Discussion

René Urueña disagreed that private international law has had nothing to contribute to global governance debates. Private international law can also be seen as a "regime" that itself is trying to expand and gain ground. He suggested looking as well at comparative international law, which also brings together public and private international law. **Graeme Dinwoodie** offered a historical data point, referring to the 1883 and 1886 intellectual property conventions when there was a choice between territoriality and public international law. **Armin von Bogdandy** argued that the public/private divide remains important because they are distinct concepts of law. More profoundly, the distinction between whether something is an action of a private or public actor leads us to completely different legal regimes: a public actor requires a legal basis for action, whereas there is a presumption of liberty in the case of private actors. Thus, for example, public actors act always within a human rights setting, whereas for private actors human rights norms only apply in exceptional circumstances. **Adrian Di Giovanni** suggested that the public/private divide had not been eliminated completely, but that there was overlap between the two.

[24] *See generally* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870–1960 (2001).

Institutional Complementarity Theory: A Sketch

Presenter: Tim Büthe, Assistant Professor, Duke University Department of Political Science

Very little theoretical or empirical work directly addresses the issue of the interaction between domestic and international institutions in global governance—which we may approach as a special case of the relation between institutions at two levels of aggregation. Professor Büthe's paper builds on this issue, providing a sketch of Institutional Complementarity Theory.[25] The paper addresses governance systems with two (or more) levels of aggregation (*e.g.* an international organization, "international" being the higher level of aggregation, and "domestic" the lower one). Generally, the project intends to address the inherently political and contentious nature of purely technical rulemaking.

With the above example in mind, assume that some consequential decisions get made at the international level, and that there are identifiable and generally followed decision-making rules for collective decision-making at that level. Such decision-making constitutes global governance if it entails developing standards or rules that prescribe some behavior as more desirable, legitimate, or legal than alternatives. Even when the rules are seemingly technical, they often have major distributional implications, creating winners and losers. And global—rather than merely local or national—rulemaking with substantial distributional consequences extends far beyond the material realm. This makes it imperative to ask who will exert greater or lesser influence over the decisions at the inter- or transnational level?

To answer the above question, various social science traditions emphasize material resources, either at the level of the constitutive units or at the individual level; others emphasize specialized knowledge or expertise, as a means to establish credentials within an epistemic community. Institutional Complementarity Theory recognizes the importance of expertise and resources, but suggests that focusing exclusively on them is insufficient to understand important variations in the ability of different stakeholders to exert influence *when rule-making is highly institutionalized*. The central claim of the Institutional Complementarity Theory of governance is: *When decision-making at the international level follows well-established procedural rules, stakeholders are likely to differ in their ability to influence international rulemaking as a function of the fit between their domestic institutions and the rulemaking institutions at the international level*.

In *The New Global Rulers*, Professor Büthe and Walter Mattli present two examples that illustrate the analytical advantage of Institutional Complementarity Theory: the International Accounting Standards Board (IASB), and the International Organization for Standardization (ISO, along with its sister organization for electrical and electronic technologies, the IEC). Many individual states and some international organizations have delegated rulemaking for global product (ISO/IEC) and financial markets (IASB) to these organizations, whose standards therefore effectively control market access for large parts of the world economy.

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[25] *See* Tim Büthe & Walter Mattli, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY (2011).

Professor Büthe argues deductively that stakeholders who want to influence international standard-setting will need: (1) good and timely information about the agenda at the international level; and (2) effective mechanisms for aggregating preferences at the national level. He envisions two ideal types of domestic institutional structures that differ starkly on both of those dimensions: systems with high organizational hierarchy and a high degree of coordination among economic actors (structured like a pyramid); and systems that are fragmented and characterized by an often intense competition among multiple standard-setters, with contestation over who speaks for the country's interests at the international level.

Institutional Complementarity Theory predicts that stakeholders operating in the hierarchical and coordinated domestic system should have a substantial advantage (and will thus exert more influence) *vis-à-vis* their counterparts from countries with fragmented domestic systems. More organized systems enjoy greater complementarity with the institutional structure at the international level, given that hierarchical structures are geared toward passing information up and down the hierarchy, enabling stakeholders to speak timely and with a single voice at the global level. A wealth of quantitative and qualitative evidence supports this claim.

There are three major reasons to focus on institutional complementarity rather than just the variation in domestic institutions. First, the advantage of hierarchical domestic institutions *vis-à-vis* fragmented domestic institutions is not an inherent characteristic of the institutions studied by the author, but arises from their complementarity with the specific international institutions for setting standards for product and financial markets. Second, economic integration need not entail global rulemaking in a single global focal institution; in some sectors (such as those where technological change is particularly fast-paced), domestic institutional fragmentation may be advantageous insofar as it stimulates innovation and provides a safeguard against early technological lock-in. And, third, structure and decision-making procedures of international rulemaking can vary, even when there is a clear international focal institution, and hierarchical structures may not necessarily be beneficial.

Open Discussion

Rochelle Dreyfuss noted that this is a powerful theory from the perspective of regime-shifting in international intellectual property law. **Graeme Dinwoodie** commented that the mere perception of a hierarchy may be sufficient to produce the effect described in the central claim of Institutional Complementarity Theory. **Benedict Kingsbury** wondered whether the theory could be applied to situations where an international institution attempts to construct a domestic regime in a way that might suit the international institution. **Nico Krisch** commented that the theory assumes that international politics mirrors politics at the domestic level, and asked whether the theory accounted for different configurations, such as the politics of industry/consumer groups.

The India-USA Nuclear Deal

Author: Surabhi Ranganathan, Research Fellow-elect in Law, King's College, Cambridge University (Ms. Ranganathan was not able to attend the workshop, but submitted a short paper which is summarized below)

Ms. Ranganathan drew from her doctoral thesis, which observes that treaty conflicts do not just "happen"; often, they are intentionally created. Sometimes, small groups of states deliberately conclude treaties contrary to their obligations under multilateral agreements, in an effort to coerce change in legal regimes. This practice may have serious implications for the stability and legitimacy of international cooperation. Her thesis examines whether and how international law regulates such treaty conflicts. It concludes that the relevant rules of the law of treaties are inadequate, as they do not indicate how to legally regulate the problem of coercive change; and that the legal scholars who drafted these rules were keen for international law to regulate international politics, but anxious about whether it could effectively do so. The author examines three cases in the fields of equitable sharing of seabed resources, international criminal justice, and nuclear governance, which reveal how, in practice, international institutions (as well as states and individuals) leverage the forms, rituals, practices, and discourse of law in creative ways to moderate the outcomes of strategically created treaty conflicts.

With regard to nuclear governance, Ms. Ranganathan studies a U.S.-India civil nuclear energy trade agreement that altered the expectations that underpin the Non-Proliferation Treaty (NPT). The bilateral treaty was adopted in 2007, and provided for the supply of nuclear materials and equipment by the United States to India's civil nuclear program. This drew intense criticism, because other States, including the U.S., had for years refused to supply India with nuclear material, owing to its refusal to join any non-proliferation agreements. Though some argued that the deal would consolidate the non-proliferation regime, and that it represented an adaptation to a changed context, critics argued that it violated the rules governing nuclear proliferation.

The author's thesis examines both the conflict between the deal and the non-proliferation regime, and the process by which the latter was adapted to the former. It argues that this adaptation may be described as an "accommodation" of the two regimes. This is different from "reconciliation." The Deal still represents an exception to the ordinary rules of the NPT, but it is today firmly embedded in the architecture of this regime. Ms. Ranganathan uses the framework of regime interaction to examine the role played by formal and informal institutions and legal discourse in bringing about this accommodation. She argues that the Deal has been accommodated in two respects. First, its terms have been modified so as to clarify and limit the scope of the exception made for India and to align the exception more securely with the objects and purposes of the nuclear governance regime. This was accomplished by routing the finalization of the deal through a long process of approvals, including the Nuclear Suppliers Group, the International Atomic Energy Agency, and the U.S. Congress, which conditioned its implementation on India's implementation of several formal commitments. Second, the supporters of the deal have promoted a narrative of the nuclear governance regime that bases its normative legitimacy on the fact that it includes, rather than excludes, India.

U.S.-Tuna *and the Hardening of International Soft Law*

Presenter: Sam Litton, Candidate for JD, NYU School of Law

This paper addresses the recent WTO Dispute Settlement Panel decision in *United States-Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products (Tuna)*[26] and the potential impact it has on non-WTO soft law regimes. The dispute concerned Mexico's challenge to US regulations governing "dolphin safe" labels on tuna and tuna products. The paper focuses on Mexico's claims under article 2.4 of the Technical Barriers on Trade Agreement (TBT), where it asserted that U.S. regulations were not based on a "relevant international standard," and were thus in violation of TBT 2.4. The Panel accepted the first part of this argument, finding that the standards created under the Agreement on International Dolphin Conservation Program (AIDCP) did constitute a relevant international standard, and that the U.S. regulations were not based on those created under the AIDCP. However, for other reasons, the Panel stopped short of finding a violation of TBT 2.4.

The decision indicates that Panels could interpret the TBT in very broad terms. It seemed to place few, if any, limits on what counts as a valid standards-creating body whose standards can be hardened through TBT 2.4. There are two main difficulties in the Panel's reasoning. First, it interpreted the requirement that a potential standard-setting body be "open to all WTO members" in a manner that ignored the fact that AIDCP accession excludes a number of states. Second, it decided that the AIDCP constituted a "standardization" body merely because the regulations promulgated under it contain provisions concerning tuna and tuna products, as well as marketing and labeling requirements.

The Panel's expansive reading of TBT 2.4 would have several effects on international law. First, it would alter incentives to participate in the creation of both soft and hard law by widening the definition of standards-creating organizations, thereby increasing the sources of potentially binding international law and giving states an incentive to engage in "ultraparticipation" in organizations. Second, it would alter the enforcement of existing and future treaties in unpredictable ways, since a Panel or the Appellate Body (AB) could harden regulations created by nearly any type of organization, thus increasing unpredictability as to what is actually binding on states. Finally, the ruling could alter the meanings of existing regimes: in the process of determining whether a domestic standard is based on an international standard, a Panel must interpret the international standard, but there is no guarantee that the Panel will interpret the treaty in the same way that the treaty's own dispute settlement organs would or in the way the drafters intended.

A better approach to the defining "international standardization organization" is to view the issue from the perspective of WTO member states—to base TBT 2.4 on whether a standard is one which states might expect to be hardened. The TBT requires parties to participate in the creation of international standards and, through TBT 2.4, requires parties to base their domestic standards on them. It is thus necessary for states to know when these obligations

[26] Panel Report, *United States—Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 15, 2011).

are triggered, *i.e.* which international organizations they must participate in and which international standards they must incorporate into domestic regulations.

Several considerations would be relevant. First, while the Panel acknowledged that a standardization body must be open to the entire WTO membership, a better question seems to be whether a broad range of members would ever actually join the body. Second, the stated purpose of the organization should be relevant. Finally, the Dispute Settlement bodies should determine the purpose of a given pronouncement by an international organization. This has several potentially important implications for international law, both soft law and treaties alike. First, it would significantly alter the incentives to participate in the creation of both hard and soft international law. Second, it would alter the level of enforcement in a given regime in potentially unpredictable ways. Finally, it has the potential to alter the meaning of treaty regimes.

Discussant: Rob Howse, Lloyd C. Nelson Professor of International Law and Director of the Institute for International Law and Justice, NYU School of Law

This case is currently on appeal before the AB, which may well reverse the decision based on a more pedestrian reason: that for a body to effectively qualify as a standard-creating organization it must have "open" membership.[27] One of the systematic considerations raised in Mr. Litton's paper is that the TBT Agreement does not provide a list of the international bodies that count as standardization bodies. This contrasts clearly with the Agreement on Sanitary and Phytosanitary Measures, which does contain such a list. Another important consideration raised relates to the fact that WTO Dispute Settlement has adopted a narrow textualist approach that it has not been able to shake off. In this instance, however, the Panel had no textual basis on which to rely in order to determine whether the relevant institution qualified as a standard-setting body. Mr. Litton makes a good effort by proposing a test that relies on states' expectations. However, such a test is difficult to establish through judicial interpretation, especially taking into account that it is almost impossible to get political consensus about anything in the WTO. Furthermore, the issue of normative authority remains, since the AB does not have a real textual hook in the treaty to establish such a test.

Open Discussion

Tim Büthe expressed doubts that this ruling would encourage "ultraparticipation" in potential standard-setting organizations. He questioned the rationale behind that assumption, and noted that it seemed to be in tension with the rest of the paper's arguments.

[27] In May, the Appellate Body did reverse the Panel for these reasons. Appellate Body Report, *United States—Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products*, ¶ 401, WT/DS381/AB/R (May 16, 2012).

The U.N. Cluster System and Institutional Relations in Humanitarian Emergencies

Presenter: J. Benton Heath, LL.M. Candidate 2012, NYU School of Law

This work argues that the United Nations' framework for the management of complex humanitarian response operations facilitates the exercise of power and produces difficultues for accountability and legitimacy in disaster response. Today's framework for the coordination of humanitarian affairs is managed by the Office for the Coordination of Humanitarian Affairs (OCHA), an office of the UN Secretariat. Policy setting and best practices are developed by an Inter-Agency Standing Committee that includes all the United Nations operational agencies, and external actors. Country-level efforts are overseen by a local Humanitarian Coordinator, who is named by the head of OCHA and remains directly accountable to him or her.

The Cluster Approach organizes humanitarian response into sectors, such as shelter, food, camp management, etc. It works at two levels: country-level and global. At the global level, the clusters are standing bodies, where lead agencies coordinate standard-setting, dissemination of best practices, and capacity-building among responders. Country-level clusters are assembled as needed when disaster strikes, and lead agencies are tasked with ensuring "adequate coordination mechanisms" among agencies within their sector.[28] Crucially, lead agencies serve as the "providers of last resort" in their given sector. The lead agency of an in-country cluster is determined by the United Nations humanitarian coordinator overseeing operations, and it is not necessarily identical to lead agencies at the global level.

By designating certain "lead agencies," the system may grant certain fundraising and reputational advantages to these agencies over other aid organizations. Moreover, the Cluster Approach changes the dynamics of the operational response by homogenizing policy, either through socialization or through more explicit mechanisms.[29] Finally, by selecting a "lead agency," the Cluster Approach exercises a form of *institutional choice* that magnifies the power of a particular agency and brings its unique practices and principles to bear on an affected population.

The question of who monitors the consequences of institutional choice remains largely unanswered. On paper, the Cluster Approach solves any monitoring problems through an elegant, two-tiered structure of supervisory accountability. As multiple evaluations of the Cluster Approach have pointed out, this system often does not, and perhaps will not, work, for a host of operational reasons.

Observers searching for alternate ways to monitor and legitimate the activities of the Cluster Approach have seized on a burgeoning practice of informal "peer review" in some

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[28] ISAC, *Guidance Note on Using the Cluster Approach to Strengthen Humanitarian Response*, 10 (Nov. 24, 2006).

[29] For example, an MSF review of cluster operations noted that, in Uganda, the European Community Humanitarian Office (ECHO) "required 'partners' to fit their proposals into existing cluster strategies before granting funding." Katharine Derderian et al., *UN Humanitarian Reforms: A View from the Field*, HUMANITARIAN EXCHANGE MAG. June 2007, http://www.odihpn.org/humanitarian-exchange-magazine/issue-39/un-humanitarian-reforms-a-view-from-the-field

operations. There is some evidence that cluster leads are being held to account by other participants, who demand greater commitment and leadership. These processes might be catalyzed as more information is shared among the agencies, as well as between clusters and the Humanitarian Coordinator. When this process works, the agencies in cluster meetings become both monitor and monitored, creating dynamics that could foster learning and mutual improvement. There is certainly some temptation to view the system as "experimentalist" in spirit.[30]

But there are many reasons to remain critical. First, this reflexive learning at present takes place only *within* individual clusters, not across sectors or across time. Second, the peer review system is subject to many flaws in the information-sharing process. Third, the argument for greater "peer review" also underestimates the possibilities for cartel-like behavior among humanitarian agencies: to the extent that information in the cluster meetings *is used* to hold lead agencies to account, organizations may collude to play down or conceal damaging information.

Mr. Heath's work has begun to develop some principles that might strengthen accountability, such as quasi-independent monitoring mechanisms, and two-track flows for information that allows for some confidentiality while still keeping OCHA in the loop. However, it must be recognized that non-UN organizations operating within this framework will be wary of any further encroachments on their autonomy. All the while, the U.N. framework for humanitarian coordination will continue to alter the power dynamics of humanitarian response, even if it fails to improve either coordination or accountability.

Discussant: Philip Alston, John Norton Pomeroy Professor of Law, NYU School of Law

This work should investigate alternatives to the cluster system, and place it in historical perspective. In fact, the system has solved several problems identified before 2005. It came about because of a transformation of the humanitarian enterprise, particularly regarding the proliferation of NGOs in disaster response. The discussion must also dig deeper into the concept of accountability, and bring out the complexities for humanitarian actors. As Janice Gross Stein points out, there are reasons for being concerned about excessive accountability as well.[31]

Most importantly, this work should distinguish problems that flow from the Cluster Approach itself from those that predate or may outlast it. Foreign NGOs, for example, always have a difficult time incorporating local actors. There is always some poor management, etc. Are these problems really linked to the cluster system, and in what way?

It is probably right to dismiss the formal accountability structure, but one has to take account of the general state of accountability mechanisms within the UN, which is quite

[30] *E.g.*, Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 78–93 (2011) (describing the accountability-enhancing aspects of experimentalism).

[31] Janice Gross Stein, *Humanitarian Organizations: Accountable—Why, to Whom, for What, and How?*, *in* HUMANITARIANISM IN QUESTION: POWER, POLITICS, ETHICS 124 (Michael Barnett & Thomas G. Weiss eds., 2008).

weak. An experimentalist analysis might be more productive than any formal mechanism for accountability.

Open Discussion

Margaret Satterthwaite noted that often agencies do not want to be cluster leads, as was the case in Haiti. As far as alternative accountability mechanisms are concerned, in Haiti a women's rights organization has named the gender-based discrimination sub-cluster and its lead in a petition before the Inter-American Commission on Human Rights. One might also consider the lawsuit against the United Nations regarding cholera. **René Urueña** noted that institutionalization takes place along a continuum: institutions come into existence as a way of formalizing spontaneous interaction. Calling a set of practices a "cluster" makes it a kind of institution. **Richard B. Stewart** expressed discomfort with broad and diffuse notions of accountability. Unlike the FASB, which has a regularized review process, the clusters seem to be little more than peer pressure or jockeying. **Mariana Mota Prado** noted the connection with anti-corruption scholarship, in that affiliation with a cluster may be used as a means to deflect scrutiny.[32] Another useful analogy might be modification of arrangements under concession contracts, where changing partners is not possible. **Tim Büthe** wondered why some clusters have been more successful than others. **Georgios Dimitropoulos** suggested that a useful approach would be to propose a better peer review mechanism, and compare the before and after.

FINAL DISCUSSION AND CONCLUSIONS

René Urueña began the discussion by stating that all the projects in question seen to be talking about similar things from different perspectives; therefore, one task for the future is making the individual projects start talking to each other. Overall, one important challenge is to fit the projects better together, which will require conversation between the participants. He put forward that the main normative issue in this general project is twofold: first, a preoccupation with GAL-related elements (transparency, accountability, etc.); but secondly, we find a distributive concern, a desire to frame these issues in order to facilitate development, to improve the lives of the weaker, which is clearly less procedural in comparison to the first wave of GAL projects. Finally, he pointed out several issues that were systematically repeated throughout the presentations:

1. *Expertise*: He noted the lack of a conceptual framework to talk about it in the way participants desired to.
2. *Private international law*: This is a very powerful concept, but he did not know how to integrate it into the general project.
3. *Pluralism* (decentralized) vs. *public authority* (unifying).
4. *Institutional complementarity*.

[32] *Cf.* Gustavo Bobonis et al., *The Dynamic Effects of Information on Political Corruption: Theory and Evidence from Puerto Rico*, http://homes.chass.utoronto.ca/~bobonis/research.htm.

Mariana Mota Prado expressed that the immediate venture should be to attempt to bring all of these projects together. She also identified one common issue throughout the presentations, a tension between pluralism and a centralized hierarchical system of sorts. **Nico Krisch** found that coordination was being sought outside of hierarchies, but by very different means, such as peer review or the use of indicators. There was thus an attempt to get people to act together and bridge knowledge/information gaps, or different worldviews. He lastly emphasized the need to specify how far we the overall project can be pursued, given the great differences between the sub-projects. **Megan Donaldson** remarked that the prior stage of mapping institutional relations might need more explicit thinking, given that there may be many diverging perspectives and we may see different things depending on the frame of reference used, even within the legal discipline.

René Urueña commented that it is also important to frame the idea of non-interaction, for which GAL has a useful framework that can be used, namely the concept of "global regulatory space." **Horatia Muir-Watt** stated that she would be interested in pursuing a common reflection on the intersections between public and private international law. **Tim Büthe** identified the need to find a common set of questions: some presenters are interested in mapping interaction, while others in its consequences. He did not deny the fact that both endeavors could be pursued simultaneously, but he nonetheless urged participants to identify explicit ideas. Finally, **Matthias Goldmann** found that during the workshop discussion focused mostly on institutions clashing, conflicting with each other, there having been no discussion about institutions working together to create a new form of authority. The example of sovereign debt studies could be used to understand cases of interaction as a specific form of authority.[33]

[33] This is the subject of ongoing work by Goldmann and Armin von Bogdandy, available in draft form at http://www.iilj.org/courses/documents/BogdandyGoldmannwithcover.pdf.