
Special Report on Transnational Governance and Democratic Legitimacy

The Hague Institute for Global Justice

Netherlands Institute of International Relations Clingendael



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for Global Justice



Clingendael

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The Hague Institute for Global Justice is an independent, nonpartisan organization established to conduct interdisciplinary policy-relevant research, develop practitioner tools, and convene experts, practitioners and policymakers to facilitate knowledge sharing. Through this work the Institute aims to contribute to, and further strengthen, the global framework for preventing and resolving conflict and promoting international peace.

The Hague Institute for Global Justice, or simply The Hague Institute, was established in 2011 by the city of The Hague, key Hague-based organizations and with support from the Dutch government. Located in the city that has been a symbol of peace and justice for over a century, The Hague Institute is positioned uniquely to address issues at the intersection of peace, security and justice.

About Netherlands Institute of International Relations Clingendael

The Netherlands Institute of International Relations ‘Clingendael’ is a leading Dutch think tank and diplomatic academy on international affairs. The institute provides public and private sector organisations with in-depth analysis of global developments in the fields of international security, conflict management, European integration and global issues & diplomacy.

Clingendael Institute was established in 1983 and has been acknowledged by governments, international organizations, NGOs, the private sector and media as hub for policy-oriented and applicable expertise on international affairs. Clingendael’s knowledge group on Global Issues, Governance and Diplomacy offers policy-relevant insights and ideas on global public goods, transnational governance, trends in diplomacy and non-traditional foreign policy issues. Its research agenda assumes that ongoing global power shifts will have a significant impact on the value patterns that govern the role of state and non-state actors in world politics. Research topics include water and food scarcity, the geopolitics of resources, global health, international development, economic governance and trends in foreign policy practice, specifically with regard to economic, consular, public and city diplomacy.

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Introduction

In 2012 The Hague Institute for Global Justice and the Netherlands Institute for International Relations Clingendael decided to conduct a feasibility study to map out the challenges and problems related to the democratic legitimacy of existing processes of transnational governance. On Wednesday April 16, 2014, The Hague Institute hosted an expert meeting to explore challenges related to the democratic legitimacy of existing processes of transnational governance. The basis for the conference was a set of five draft papers prepared by researchers from Clingendael (see profiles below). A group of 25 experts on transnational governance provided comments and feedback on these papers. The revised versions of these papers are compiled in the present report.

The conceptual framework that underpinned the case studies on climate change, global health, the global financial system and Weapons of Mass Destruction (WMDs) and their proliferation, was developed by Dr. Peter van Ham. The framework sets out the main challenges to the democratic legitimacy of current transnational governance initiatives. It does so through five prisms – representation, accountability, transparency, effectiveness and deliberation.

The first and second papers in this report address climate change and global health, respectively. These papers were both written by Dr. Louise van Schaik and, with regard to the paper on global health, by Mr. Remco van der Pas. Within the area of climate change, ‘climate fatigue’, or declining public interest in the phenomenon of climate change, is indicated as a major concern to be overcome. Regarding the prisms of democratic legitimacy, representativeness and effectiveness appear to be the most contested when it comes to climate change, not least due to the proliferation of initiatives and the resulting lack of global overview.

Global health governance does not yet seem to be as high a priority as climate change, despite potentially devastating consequences related to pandemic diseases. In this policy area, financing mechanisms which bypass states and the different Janus-faced nature of the World Health Organization as both an operational actor and incubator of norms are flagged as salient features. Norm setting and transparency were hence identified as most pressing challenges in the coming years with regard to the transnational governance of both climate change and global health.

The fourth thematic paper, written by Prof. Jan Rood, focuses on transnational cooperation in the sectors of finance and economics, with an emphasis on G20 and related forms of governance. This major forum of international economic cooperation has placed itself alongside the longer existing Bretton Woods institutions. It argues that the G20 can very well be an effective forum, as evidenced in recent financial crisis management, yet it has received credible criticism regarding democratic legitimacy, not least due to the self-appointment of its members as “systemically significant”.

The fifth thematic paper hones in on the non-proliferation of WMDs, authored also by Dr. Peter van Ham. The paper provides an overview of current WMD regulations around the world, and addresses a number of problems stemming from the lack of

democratic legitimacy in related transnational governance processes. One of the key issues is the secrecy surrounding WMD regulation, which remains in large part a matter for the political elite. The paper also details the transnational governance innovations made by non-state actors in this field.

Transnational Governance and Democratic Legitimacy

A Conceptual Overview

By Peter van Ham

1. Introduction

In an ever-more interdependent world, the need for more, regional and global, collective action has increased drastically. The range of public goods has expanded, and now includes sustainable development and growth, halting of the proliferation of weapons of mass-destruction (WMD), as well as financial stability and combatting of global poverty. New forms of cooperation have developed, which include governments, International Organisations (IOs), non-governmental organisations (NGOs), the corporate sector, and – even – (powerful) individuals as actors. Most of these collaborations fall under the generous heading of “transnational governance”, a catch-all concept encompassing multiple forms of institutional innovation, and often informal ways to address transborder problems and challenges. Since transnational governance involves more than states and formal treaties, it raises the question of the democratic quality of the procedures of decision-making, and hence the legitimacy of the policy outcomes.

This paper maps out and examines the main academic approaches to the issue of democratic legitimacy of transnational governance. Much of the academic debate centres around the European Union’s democratic legitimacy, and the opportunities and possibilities to overcome the EU’s generally recognized “democratic deficit.” The majority of reservations regarding the EU’s postnational democracy equally apply to the even bigger challenge of global or transnational governance. In conjunction with the debate on the need, or chimera, for a cosmopolitan democracy, we can look back on two decades of inspired academic debate on why and how transnational governance can be imbued with both a democratic spirit and democratic procedures, assuring the legitimacy, and thereby effectiveness of (regional and global) collective action.

A further purpose of this paper is to offer conceptual guidelines for the case-studies that complete this Study. It argues that democratic legitimacy can be analysed through five prisms: (1) representation; (2) accountability; (3) transparency; (4) effectiveness; and (5) deliberation.

Representative democracy is the model based on the experiences of states, and it remains the standard. Governments claim democratic legitimacy because they are elected by their people. Although this may appear to be a straightforward model, it becomes more complex once we examine the assertion that even supranational institutions are legitimized, as decisions are made by diplomats representing their elected governments. The question then arises: when does the chain of representative legitimacy break down? Moreover, should we see representation (one man, or even

one country: one vote) as the alpha and omega of democracy, particularly given the absence of a coherent “people” (or demos) on the regional and global level?

Accountability assumes that decision-makers can be asked to take responsibility for the initiatives, actions, and policies they have agreed to. When things go well, legitimacy is bestowed on decision-makers, while if and when things go wrong, it should be clear who should bear the brunt of criticism, and who should be called upon to make amends. The lack of accountability is quickly becoming a recurrent problem in transnational governance, giving rise to the dystopia of the G-zero, the notion that on a global level, no-one is really in charge, and no-one can be held accountable for initiatives and policies that emerge from IO’s, networks, groups, and informal bodies and structures.

The factor of transparency presupposes that those who shape and make decisions are prepared to explain their motives (interests), as well as the broader aims, to justify their actions. All the stakeholders engaged in transnational governance are supposed to openly acknowledge their participation, explicate their goals, and provide openness about the strategies and resources they use. Transparency is required to assure a certain measure of public scrutiny, and is a prerequisite to accountability. Offering openness also paves the way for the “level playing-field”, which is necessary to ensure that democracy is not just achievable for actors with deep pockets.

The prism of effectiveness is based on the idea of output legitimacy. Considering transnational governance is generally new, and often technical in nature, it tends to be judged on the basis of performance and usefulness, rather than on its procedural democratic credentials, or on normative aspects such as justice and fairness. Though understandable, examining its efficacy is a rather precarious way to appraise the democratic legitimacy of transnational governance.

Lastly, deliberation is a new, and somewhat vague, aspect of democratic legitimacy. Based on the work of Jürgen Habermas, deliberation presumes a process of reasoning, a practice based on give-and-take, and of critical scrutiny of arguments, strategies, and objectives. It is based on the ideal that governance processes are not only transparent, but also open and accessible to most, if not all, who have a stake in dealing with problems collectively.

This paper examines the problem of democratic legitimacy of transnational governance by looking carefully at, and through, these five prisms. It concludes that they all have their merits; and that postnational democracy can only be achieved by taking their concerns seriously, and taking concrete measures to address them.

2. Innovations of Transnational Governance

When does a paradigm shift? What does it take to change the parameters we use to analyse economic, social, and political processes? Or are the discussions about conceptual and theoretical issues merely a matter of fads and fashions, hiding the “fact” that our world will forever be based on the Realpolitik of states, national interests and international anarchy? The academic debate on the relevance and future

of transnational governance covers a wide range of perspectives, from Daniel Drezner, who suggests that Great Powers still determine most (if not all) of the major rules and regulations that govern international affairs, to former United Nations Deputy Secretary General Mark Malloch-Brown, whose book *The Unfinished Global Revolution* (2011) claims that national governments are no longer equipped to address complex global problems.¹

Arguably, it was opened by the seminal work edited by James M. Rosenau and Ernst-Otto Czempiel, *Governance Without Government: Order and Change in World Politics* (1992). In this book, the main questions were introduced that continue to guide research on transnational governance: What is the role of states and International Organizations in a new, globalizing world order? And what does democracy and citizenship mean in a postnational context? Apart from this academic debate – which is, or at least should be, based on rigorous, disinterested study –, we can recognize a political debate on the desirability of transnational governance. Even if global problems could be effectively tackled by transnational governance, is giving up state-based democracy and sovereignty not too high a price to pay? Should the state encourage and participate in transnational governance, or only accept it as a necessary evil? The answer to these questions largely depend on one's understanding of what makes a "good society", and, hence, one's political beliefs or even one's ideology.

Against the background of these on-going academic and political discussions, there is one constant: a remarkable institutional innovation in global politics. Both academics and policymakers acknowledge that states – especially small and medium-sized states – are seriously challenged by a wide variety of problems that fall outside of their territorial jurisdiction. From health and disease to financial regulation, and from climate change to cybercrime, global problems can no longer be effectively handled by states. Even classical international cooperation, be it through intergovernmental organizations and/or treaties, seems to have reached its limits, and perhaps even its nadir. Gabriel Goodliffe and Stéphan Sberro recently argued that the G20 summits have "degenerated into ritualised exercises in sterile debate, empty grandstanding and vacuous promise-making, bringing the organisation's effectiveness and even relevance increasingly into question."²

A similar damning conclusion is now drawn on the usefulness of intergovernmental negotiations to tackle climate change. After two, more-or-less ineffective global summits (Copenhagen in 2009, and Durban in 2011), the December 2012 Doha Climate Change Summit (Qatar) again failed to reach consensus on extending the Kyoto Treaty. In Doha, more than 17.000 participants – including NGOs, experts, business leaders, and celebrities – debated the urgency of addressing climate change.

¹ Daniel W. Drezner, *All Politics is Global: Explaining International Regulatory Regimes* (Princeton, N.J.: Princeton University Press, 2008); and Mark Malloch-Brown, *The Unfinished Global Revolution: The Pursuit of a New International Politics* (London: Penguin, 2011).

² Gabriel Goodliffe and Stéphan Sberro, "The G20 After Los Cabos: Illusions of Global Economic Governance", *The International Spectator*, vol. 47, no. 4 (December 2012), p. 2.

However, behind the scenes, the real players, being the Heads of State and Government, did not reach a consensus, apart from promising to meet again in France, in 2015. This public display of the limits of intergovernmental negotiations is only the latest in a long, and slightly depressing series, starting with the launch of the World Trade Organization's (WTO) Doha round in 2001; a round of multilateral talks that has come to nought, and has almost completely run out of steam.

Given the obvious and increasing inadequacies of existing intergovernmental frameworks, political space has opened up for institutional innovation, particularly for private actors like NGOs and companies to engage in their own norm-setting, rule-making, implementation, monitoring, and enforcement activities and competences. Academic literature on these new modes of regulations and private authority is flourishing.³ And rightfully so, since the institutions that matter most to solving global challenges and problems are no longer the "usual suspects", but the transnational governance institutions that are the focus of this Study. Despite the fact that governance innovation is far from new (the older transnational governance set-ups date from the Middle Ages),⁴ it remains hard to shed the intellectual shackles of state-based thinking. This may not apply to the well-informed academic and policymaking elite, but it certainly affects most media reporting and the collective imagination of the interested layman. What we see on TV and read in newspapers are "summits", in an EU or UN configuration, of toothless political leaders grappling with challenges that are clearly too hard to handle.

But these summits are merely the visible top of the global policy-iceberg. What is underreported, and thereby invisible to the inquisitive public eye, are the transgovernmental policy networks that develop new capacities to attend to shared problems, build frameworks for collective action based on market incentives, in addition to moral suasion. This is not to say that these new policy networks are always effectively managing globalization's challenges. As this analysis on the legitimacy of transnational governance will bear out, most initiatives are beset with the all too familiar problems of competing interests, the asymmetry of power and information, and the level of transaction costs. Still, understanding the nature, scope, and impact of transnational governance innovations is a prerequisite to help policymakers in their efforts to cope with the new trials related to globalization. And, as this Study suggests, this should occur, preferably, by complying with a basic standard of democratic legitimacy.

Before examining the five prisms of democratic legitimacy, a brief academic review of the key concepts and assumptions of this Study is called for. For the definition of "governance", it follows the description of Thomas Hale and David Held: "[T]he process and institutions, formal and informal, whereby rules are created, compliance

³ Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford and New York: Oxford University Press, 2012); and Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002).

⁴ Avner Greif, *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade* (Cambridge: Cambridge University Press, 2006).

is elicited, and goods are provided in pursuit of collective goals.”⁵ Hale and Held define “transnational” as follows: “[A]ctivities, institutions, actors or processes that cross at least one border, especially when actors other than national governments are involved.”⁶ Perhaps the most tricky and open question concerns the definition of “innovation”, mainly because historians will rightly contest that transborder governance is new, given that these kind of arrangements have come and gone at different times and places. For example, the Hanseatic League was a “late-medieval network of economically largely independent long-distance trade merchants which was based on trust, reputation and reciprocal relations (...) By institutionalizing the rules of conduct, they facilitated cooperation, promoting and ensuring a peaceful culture of negotiation and exchange based on the honesty and reliability of the members.”⁷ Given the historical example of the Hanseatic League network, we should perhaps be more hesitant in using the labels “new” and “innovative.” In a way, transnational governance harks back to the pre-modern era, a period not yet dominated by states. As Stephen J. Kobrin suggests in his seminal article *Back to the Future: Neomedievalism and the Postmodern Digital World Economy*: “The neomedieval should be seen as an inter-temporal analog of comparative political analysis. It allows us to overcome the inertia imposed by our immersion in the present and think about other possible modes of political and economic organization.”⁸

Indeed, overcoming intellectual inertia and opening up thinking space on new economic and political configurations are the objectives for this Study. However hard it may be to imagine a viable democracy “beyond the state”, we should acknowledge two things. First, history offers us many examples of political legitimacy in widely divergent times and places. Second – and perhaps most important –, we may have no choice but to envision, and work hard toward designing and creating, “new”, “innovative” and preferably democratic transnational governance arrangements. Given the déconfiture of traditional intergovernmentalism, academics, policymakers and the wider public may have few alternatives to embracing the wide variety of transgovernmental networks, arbitration bodies, multi-stakeholder initiatives, voluntary regulation systems, and finance mechanisms. Perhaps the only real alternative to transnational governance is what Roger Scruton labels “local sovereignty”, based on small communities taking local responsibility.⁹ Be it

⁵ Thomas Hale and David Held (eds), *Handbook of Transnational Governance: Institutions and Innovations* (Cambridge: Polity Press, 2011), p. 12. Other definitions can be found in James Rosenau’s ground-breaking work *Governance Without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992), co-edited with Ernst-Otto Czempiel.

⁶ Hale and Held (2011), p. 15.

⁷ Margrit Schulte Beerbühl, “Networks of the Hanseatic League”, *EGO – European History Online* (13 January 2012). Internet: <http://www.ieg-ego.eu/>

⁸ Stephen J. Kobrin, “Back to the Future: Neomedievalism and the Postmodern Digital World Economy”, *Journal of International Affairs*, vol. 51, no. 2 (Spring 1998), p. 365. See also Jan Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (Oxford: Oxford University Press, 2006).

⁹ Roger Scruton, *Green Philosophy: How To Think Seriously About the Planet* (London: Atlantic Books, 2012).

impractical, as small groups will have difficulties in dealing with multinational corporations or tackling climate change, Scruton's alternate vision of democratic localism fits well in the neo-medieval metaphor, and should warn us that transnationalism may also have its drawbacks and opponents.

So, how can transnational governance be imbued with a democratic spirit and democratic procedures, assuring the legitimacy of collective action?

3. Representation – The Limits of Electoral Rectitude

Representative democracy is the model based on the experiences of states; it remains the standard. Governments claim democratic legitimacy because they are elected by their people. It informs eminent distinctions between “state” and “non-state”, and between “public” and “private”.¹⁰ Our familiarity with the state and representative democracy hides the fact that this historically specific manifestation of authority is only one of many. As Hans Krause Hansen argues: “[T]he making and contestation of authority are basically relational, socially constituted, and challenge conventional social distinctions”.¹¹ The state is unique in the sense that it is accountable through public institutions, and that its authority relies on the active participation of citizens in one public sphere. Non-state actors, on the other hand, may rely on a variety of smaller groups and “micro-spheres”. Through elections, citizens select their “representatives”, usually involving clear procedures regarding accountability and transparency (see sections 4 and 5).

Although this may look like a straightforward model, it becomes more difficult once we examine the claim that even supranational institutions are legitimized, since decisions are made by diplomats and politicians representing their elected governments. The question then arises: when does the chain of representative democratic legitimacy break down? This is a particularly pertinent question since legitimacy is by its very nature a subjective concept (based on what the Germans call *Rechtsgefühl*). Even the state has often taken centuries to penetrate “its” territory with public authority, forming the identity of “its” people within the now well-known (and slightly shop-worn) Westphalian mould. Formally, representative democracy may legitimize decisions, all the way up from the local, national, regional to the global level. Yet, if this link of representation (or delegation) is not subjectively felt and experienced, “democratic legitimacy” turns into a mere label, or even a charade or deception. Especially postmodern scholars like Jean Baudrillard emphasise the alleged “crisis of representation”, arguing that the very practice of representation presupposes clear interests and a solid identity, which can be taken for granted.

¹⁰ Sonia Alonso, John Keane and Wolfgang Merkel (eds), *The Future of Representative Democracy* (Cambridge: Cambridge University Press, 2011).

¹¹ Hans Krause Hansen, “Investigating the Disaggregation, Innovation, and Mediation of Authority in Global Politics”, in Hans Krause Hansen and Dorte Salskov-Iversen (eds), *Critical Perspectives on Private Authority in Global Politics* (Houndsmills: Palgrave Macmillan, 2008), p. 5.

Baudrillard and other critical theorists claim that the latter assumptions are wrong, which would make representative democracy organized fraud.¹²

Representative democracy's troubles have deepened by the on-going economic and financial crisis. This crisis has shown that national authorities do not possess the instruments to prevent and deal with major shocks in the economic and financial system, and are under pressure of international bodies such as the IMF and the European Central Bank (ECB) to endorse austerity measures that may benefit the interests of businesses, rather than those of the general public. Therefore, in a recent conference of the presidents of European national parliaments, it was discussed whether the "legitimacy of representative democracy, including Parliaments, is being put into question, as those institutions are perceived as being reduced to rubber-stamping policies devised by technical bodies with no democratic legitimacy or accountability."¹³

The crisis of representative democracy can also be explained by examining the changing political culture in most Western societies. Whereas the process of representation used to be firmly anchored along a left-right continuum, most deeply entrenched social, cultural, and ideological chiasms and antagonisms have reduced, or even disappeared. As a result, citizens are increasingly guided by short-term personal advantages, adding to the growing number of swing voters. Franklin Rudolf Ankersmit observes that "most of the dramatis personae of representative democracy – the political party (...), the legislative power, the executive power – are all on their way out."¹⁴ Ankersmit therefore foresees a new form of "plebiscitary democracy", in which the role of citizens is limited to passively approving or rejecting the performance of bureaucrats and experts in elections.

These practical problems and theoretical obstacles explain the complications national authorities and International Organizations face in designing credible and workable models of representative democracy. The debate within the EU on how to arrange qualified majority decision-making (in the Council of the European Union) has been longstanding and painstaking. From 2014 onward, there will be needed a "double majority" of 55% of the member states representing 65% of the population of the EU to adopt an act. In the IMF, decision-making is even more byzantine, since it uses a complicated quota system principally based on the financial weight (and contribution) of its member states. The UN Security Council system of five permanent members (with veto power) and ten (non-veto) rotating members, is particularly glaring and unsatisfactory. In these three cases – the EU, IMF and UN Security Council –, the debate centres less around the need for reform in decision-making than on the manner

¹² Jean Baudrillard, *Simulacra and Simulation* (Ann Arbor: The University of Michigan Press, 1994); and Jenny Edkins and Nick Vaughan-Williams (eds), *Critical Theorists and International Relations* (London/New York: Routledge, 2009).

¹³ "Is Representative Democracy in Crisis? Challenges for National Parliaments", *European Conference of Presidents of Parliament Background Paper* (5 July 2012), p. 2.

¹⁴ Franklin Rudolf Ankersmit, *Political Representation* (Stanford: Stanford University Press, 2002), p. 128.

in which this is to be achieved. For all three, it is clear that representation (and delegation) alone fails to generate democratic legitimacy.

Although the idea of representative democracy is still alive and well (witness the debate on beefing up the European Parliament,¹⁵ or on the re-arrangement of quotas and voting procedures in the IMF), the practice of this model faces harsh criticism. The theory that an elected official can be relied upon to be the stand-in for a varied and complex community of constituents on an equally varied and complex set of issues, has become hard to sustain.¹⁶ Since ideology guides neither the electorate nor politicians, the need for more feedback-loops than one vote every four to five years is evident. So we search for alternatives. Does the crisis of representative democracy suggest that non-state actors – from NGOs to lobby groups, and from civic groups to multinational corporations – should play a bigger role in policymaking, on all levels? Or should we acknowledge that today’s policy environment calls for different forms of democratic legitimacy than delegation?

4. Accountability – Who to Blame?

One of the newer political nightmares revolves around the want of accountability of the economic and political elites for the events and developments in both their direct vicinity, and the world at large.¹⁷ Especially when things go badly, our political leaders claim to be blameless, as if they are merely innocent bystanders and “policy-takers”. “Don’t blame us, blame the international financial markets!” has become the standard excuse of western policymakers, exonerating them from responsibility and hence from criticism. The problem is that this justification is no longer tenable. By not taking responsibility, national authorities implicitly acknowledge that they are becoming increasingly powerless, and that they lack the instruments and strategies to regain at least a modicum of control over the lives and destinies of those who have elected them into office.

The principle of accountability is a key element of democratic legitimacy, since it surmises that government officials — whether elected or appointed by those who have been elected — are (and can be held) responsible for their decisions and actions. Without accountability, elections and representative democracy have no meaning, and government would become unreliable, autocratic, or worse. This principle also involves putting in place sanctions just in case things indeed go wrong. As Christopher Rude and Sara Burke argue: “Accountability without sanctions for institutional failure is not meaningful if the objective (...) is to create more socially

¹⁵ See Juan Mayoral, “Democratic Improvements in the European Union Under the Lisbon Treaty”, *EUDO/EUI* (Fiesole, February 2011).

¹⁶ Jeremy Gilbert, “Postmodernity and the Crisis of Democracy”, *Opendemocracy.net* (May 28, 2009).

¹⁷ Ian Bremmer and Nouriel Roubini, “A G-Zero World”, *Foreign Affairs*, vol. 90, no. 2 (March/April 2011).

responsible and democratic institutions.”¹⁸ In less enlightened times, this used to be called “Let’s kick the bastards out!”

Given the active and important role of International Organizations and non-state actors in transnational governance, accountability has become a requirement for all bona fide players, and not just for states. One could even argue that, since non-state actors lack plebiscitary legitimacy, they have to go the extra mile to publicly justify their cause, policies and procedures. Even terrorist organizations like Hamas now worry about their accountability, referring to the Islamic notion of al-shoura (consultation), derived from the Qur’an and the Sunna.¹⁹ And NGOs, who face a serious “accountability deficit”, are concerned about the issue as well.²⁰ Advocacy groups like Greenpeace and Human Rights Watch claim the moral high ground, although a clear mandate from a significant slice of (global) society is non-existent. As L. David Brown suggested (in 2008): “Civil social actors are among the many agencies for whom there are relatively few standards of transnational legitimacy and accountability (...) The transnational context has few established authorities that can create widely accepted laws and regulations, few mechanisms for articulating commonly held values and norms”.²¹

This, however, is rapidly changing. NGOs not only have to account for the money they spend as contracted agents or donors, they also have to comply with a long (and growing) list of national laws and regulations, besides self-imposed ethical principles and guidelines. The INGO Accountability Charter is an example of the latter, and an initiative of international NGOs to demonstrate their commitment to accountability and transparency. As INGO acknowledges, the Charter is developed “as a response to increasing pressure from the media, businesses and governments”, and aims to create “*balanced relationships with its diverse stakeholders, empowering these to hold it to account over its decisions, activities and impacts, with a view to continuously improve the organization’s delivery against its mission.*”²² The Council of Europe’s “Code of Good Practice for Civil Participation in the Decision-Making Process” (2009), is just another example of the development of new standards that makes NGO accountability possible.²³

¹⁸ Christopher Rude and Sara Burke, “Towards a Socially Responsible and Democratic Global Economic System: Transparency, Accountability and Governance”, *Friedrich Ebert Stiftung Briefing Paper*, no. 15 (New York, November 2009), p. 3.

¹⁹ Ghazi Ahmad Hamad, “The Challenge For Hamas: Establishing Transparency and Accountability”, *DCAF Working Paper* (Geneva, 2006), p. 3.

²⁰ “International NGOs must address their accountability deficit”, *Povertymatters Blog, The Guardian* (February 9, 2012).

²¹ L. David Brown, *Creating Credibility: Legitimacy and Accountability for Transnational Civil Society* (West Hartford: Kumarian Press, 2008), p. 20.

²² INGO Accountability Charter (Internet: ingoaccountabilitycharter.org/). Charter members include Amnesty International, Greenpeace, Oxfam, Cordaid, and Transparency International.

²³ Internet: http://www.coe.int/t/ngo/code_good_prac_EN.asp?

These codes of conduct emerge because NGOs themselves acknowledge that their accountability is an asset, adding to their credibility and social power.²⁴ Given the absence of an official electoral mandate, non-state actors have to assure that at least their accountability is in order. But, as a 2006 UN Report on NGO accountability argues, “The question of organizational accountability is seen as a bureaucratic hurdle at best, and at worst as a threat to achieving an NGO’s aims. Some fear that any toughening of accountability may lead to an overbearing influence from funders and governments, which could then lead to co-optation and a deflection of original purpose, or lead to the stymieing of innovation and reducing the diversity of NGOs.”²⁵ What is more, NGOs also fear that too much accountability may result in a so-called “compensation culture”, in which any failure to achieve the stated objectives will lead to litigation. This explains why many NGOs and non-state actors may only pay lip-service to accountability, and why most of the arrangements remain based on good intentions, self-regulations, or, at worst, window-dressing.

But transnational governance obviously is not limited to value-based advocacy groups, but also involves lobbies, corporations, and the media. Most western governments, as well as the EU and UN, have their own codes of conduct, registration systems, or even a Lobbying Accountability and Transparency Act (like the United States, 2006). But ultimately, accountability is about answerability and responsibility. Not taking responsibility for one’s actions directly undermines democratic legitimacy. Recent experiences with collapsing banks and financial institutions have taught that some non-state actors (i.e. corporations) are “too big to fail”, since their continued existence makes them “systemic”.²⁶ By freeing these financial institutions from the ultimate accountability of the market – since they cannot (be allowed to) go bankrupt –, their legitimacy is seriously undermined, making them vulnerable to fierce criticism.

5. Transparency – Creating Glass Houses

Transparency is essential to accountability, and vice versa. Accountability requires transparency, because the general public has need of the disclosure of information to make policymakers assume responsibility for their decisions and activities. Transparency requires that the decisions and actions of those in government are open to public scrutiny, and that the public has a right to access such information. Both concepts are central to the very idea of democratic (transnational) governance. The objective is to create a translucent, honest, and fair process of deliberation, policy and decision-making, as well as implementation. In short: transnational governance should be a house of glass, clear and accessible. Characteristically, reality looks markedly different.

²⁴ Peter van Ham, *Social Power in International Politics* (London/New York: Routledge, 2010).

²⁵ Jim Bendell, *Debating NGO Accountability* (New York/Geneva: United Nations NGLS Development Dossier, 2006), p. xi.

²⁶ George G. Kaufman and Kenneth E. Scott, “What Is Systemic Risk, and Do Bank Regulators Retard or Contribute to It?”, *The Independent Review*, vol. 7, no. 3 (Winter 2003).

International Organizations (especially those with an economic and financial focus, such as the IMF, World Bank, and the OECD) have been instrumental in turning transparency into an established global norm. Under the guise of neo-liberal marketization, transparency has been considered crucial to creating a level playing field for state and non-state actors. Using labels like the “publicity principle” and the “right to information”, the transparency imperative has become a crucial part of the modern management attitude based on surveillance and control. The basic view is that citizens – like consumers – should have sufficient and reliable information in order to make good decisions. Transparency is a prerequisite for a functioning market, as well as for a functioning democracy. As we will discuss later (Section 7), transparency is also required for a public opinion to be formed within a public sphere. Ever since the Enlightenment (from Kant and Rousseau to Mills), access to information has been considered an important civil right.

The US Federal Freedom of Information Act (1966) is only one of many codifications of that important right, making transparency the global standard. Particularly during the Cold War, the US has actively used its influence in International Organizations (especially the IMF and the UN) to promote transparency as a means to democratize the non-western world, encouraging a new social contract between state and society in autocratic regimes still clinging to secrecy and nepotism.²⁷ These were the times of Confidence and Security-Building Measures (CSBMs) between the US and the Soviet bloc, creating transparency on nuclear missile sites, troop movements, on top of military research and development, particularly in the field of chemical and biological weapons. Where trust is low (e.g. between Iran and the West), transparency offers opportunities to remove fears and create confidence.

As accountability, transparency does not come spontaneously, but takes hard work. The NGO Transparency International has been at the frontline of working towards “a world in which government, business, civil society and the daily lives of people are free of corruption.” By exposing corrupt regimes and bringing the culprits to justice (along with seizing their illicitly gained riches), Transparency International is one of the watchdogs keeping governments, businesses, and NGOs on their toes (and hopefully honest)²⁸. This drive towards transparency has benefitted from the practice and mantra of “management” that now dominates all institutions and bureaucracies. This has resulted in what is labelled an “audit society”, based on the dual principles of accountability and transparency.²⁹ Consequently, set-ups like the International Accounting Standards Board (IASB) and the International Financial Reporting Standards (IFRS), as well as the standards devised by the Basel Committee on Banking Supervision, are crucial parts of the global “rules of the road”.

²⁷ Magnus Thor Torfason and Paul Ingram, “The Rise of Global Democracy: A Network Account”, *American Sociology Review*, vol. 75, no. 3 (June 2010).

²⁸ Sam Moon and Tim Williamson, “Greater aid transparency: Crucial for aid effectiveness”, *ODI Project Briefing*, no. 35 (January 2010).

²⁹ Michael Power, *The Audit Society: Rituals of Verification* (Oxford: Oxford University Press, 1997).

However, what aspects of state and non-state actor behaviour merit transparency? During the Cold War, early reporting on troop movements was considered essential, whereas few care about this matter today. Clarity on decent bookkeeping rules has always been deemed important, whether this was the 16th century East India Company's accounting system, or today's IASB standards and interpretations. The areas of transparency therefore may change over time, reflecting the values and interest of a society. If transparency is not high on the agenda, it often indicates that society as a whole is not really interested in the issue at hand. Many corporate lobbies and NGOs invest heavily in making society care, and have successfully added social, environmental, and gender problems to the list of issues that require openness and public scrutiny. For example, most international corporations now feel obliged to elaborate on their "environmental and social footprint", especially in low-wage countries in Africa, Asia, and Latin-America.³⁰ This has given rise to new transnational governance arrangements like the Global Reporting Initiative (GRI) and the Carbon Disclosure Project. Most big international accounting firms now offer these kinds of "balanced sustainability reports" to their clients, indicating that monitoring "sustainability transparency" has become routine, like financial reporting.

Given transparency's contribution to democratic legitimacy, one could presume that more will surely be better. More transparency offers more openness, scrutiny and accountability. However, the downside of unrestrained openness became clear during the WikiLeaks imbroglio of 2010, when thousands of secret documents were placed online, ranging from the US Department of Defense Counterintelligence Analysis Reports, diplomatic cables on nuclear disarmament and climate change negotiations, to information on the BP oil scandal (of April 2010). The question was raised whether full transparency and the continued pressure of accountability undermines diplomatic and transnational cooperation. During every policy process, stakeholders make compromises and often murky deals to reach their objectives. A certain measure of confidentiality and even concealment is surely conducive to reaching agreement. One could even argue that one of the reasons why intergovernmental negotiations break down so often (as we have seen with the WTO Doha round, and the numerous Climate Change Summits), is the reluctance of governments to lose face. And one of the reasons why transnational governance is flourishing may well be because it ensures a certain level of discretion, if only for the reason that both the media and the general public often remain unaware of what is going on.

6. Effectiveness – When Doing Right is Not Enough

Colloquial speech suggests that "nothing succeeds like success", especially if we deal with "fair weather" arrangements. The trivial truth in these statements is that if things go well, especially during times of growing prosperity, the level of public scrutiny and accountability drops, and the verdict is relaxed. High levels of effectiveness (real or imagined), assure that sleeping (watch)dogs lie quietly, and that other markers of democratic legitimacy – representation; accountability; transparency – become

³⁰ Sidney Tarrow, *The New Transnational Activism* (Cambridge: Cambridge University Press, 2005).

somewhat less pertinent. This psychological process especially applies in times of great uncertainty and crisis. If immediate action is called for (to deal, for example, with a major financial crisis or an existential security threat), the call for effectiveness eclipses other democratic practices and requirements. We may accept an unrepresentative UN Security Council, as long as it performs its job well. The same applies to most transnational governance institutions, whose claims to representing global interest and opinion are shaky (to say the least), and whose accountability and transparency often leaves much to be desired (the G7 and G20 come to mind). It even applies to the EU, whose grandiose Euro-project was only seriously questioned when the consequences of a Europe-wide monetary union proved a mixed blessing, particularly for southern member states.³¹ This not only undermines the trust in the EU as an institution, but also – and arguable more importantly – in the effectiveness of liberal democratic systems to cope with globalization as well.³²

Effectiveness is, therefore, a much-cherished route towards democratic legitimacy, an avenue most often taken if other options are unavailable or problematic.³³ However, how do we identify effectiveness? Can we measure it, or do we simply “recognize it when we see it?” As we know, success has many fathers; and if things go right, states, International Organizations, NGOs, and corporations are keen to claim recognition of their essential role. The still obscure Internet Corporation for Assigned Names and Numbers (ICANN) may serve as an example. ICANN is a non-profit private organization responsible for essential parts of Internet supervision. ICANN’s representative legitimacy is non-existent, and efforts to make it more “democratic” were soon discarded. Its main credentials are its continued effectiveness in dealing with domain ownership issues in a technical and fair way. Turning ICANN into a UN-based institution, in order to boost its “democratic credentials”, is widely seen as a step backwards, risking incompetence for the delusion of democracy. Some states would love to bring ICANN under their “democratic” control (such as Russia, India, and China). For now, ICANN’s claim to effectiveness seems to be sufficient to weather these challenges to its independence.³⁴ Recent proposals to turn ICANN into a sui generis institution (i.e., not a classical IO, and not officially linked to the UN), and possibly moving from California to Geneva, should therefore be monitored carefully, and judged on the merits of its impact on ICANN’s effectiveness and legitimacy.³⁵

³¹ Paul Krugman, “Crash of the Bumblebee”, *The New York Times* (July 29, 2012).

³² Duha Altıntaş and Naci Mocan, “Joblessness and Perceptions About the Effectiveness of Democracy”, *IZA Discussion Paper*, no. 4930 (Bonn, May 2010).

³³ See also the debate on “goal attainment” as a mode of effectiveness, Oran Young, *International Governance: Protecting the Environment in a Stateless Society* (Ithaca: Cornell University Press, 1994); and on “throughput legitimacy” (as a procedural aspect of legitimacy, Vivien A. Schmidt, “Democracy and Legitimacy in the European Union Revisited: Input, Output and ‘Throughput’”, *Political Studies* vol. 61, no. 1 (March 2013).

³⁴ Jonathan J.S. Koppell, “Pathologies of Accountability: ICANN and the Challenge of ‘Multiple Accountabilities Disorder’”, *Public Administration Review*, vol. 61, no. 1 (January/February 2005); and Kendra Srivastava, “U.S. and U.N. Battle for Internet Control”, *Mobiledia* (June 20, 2012).

³⁵ Kevin Murphy, “Chehade Rules Out Move to Geneva”, *Domainincite.com* (April 5, 2014).

How different the picture looks when things go wrong. No credit ratings agency has proclaimed a *mea culpa*, acknowledging that it has failed – either by incompetence or mendacity – to warn for the unacceptable risks banks have taken over the past few years.³⁶ Although these ratings agencies have, arguably for the first time, come under scrutiny of an indignant public opinion, this sector of transnational governance has shown neither the will, nor the capacity for self-cleansing. European and American financial regulators differ markedly on the best course of action, and the Basel Committee’s framework for banking supervision (“Basel III”) has, again, proven very lenient. Probably due to the non-existence of a credible (and better) alternative way to regulate the powerful and unruly financial sector, the current system of transnational financial governance remains untouched, despite its proven catastrophic track-record.

All this makes effectiveness an ambiguous, even somewhat awkward, element of democratic legitimacy. Has the time come to acknowledge that the world is too messy, too inter-connected and too dynamic to leave decisions in the hands of representative, accountable and transparent, but also sluggish and technocratic, decision-makers? Should we make a calculated trade-off between accountability and transparency on the one hand, and effectiveness on the other, as the recent WikiLeaks-debate may have suggested? Is effectiveness perhaps the principal reason why innovation in transnational governance has sprung up? This should make us cautious of nipping these new approaches to dealing with new challenges in the bud for the sake of procedural democratic principles. These dilemmas are awkward since they invoke memories of non-democratic theorists (like Michels, Pareto and Mosca)³⁷ who would happily sacrifice a bit of democracy for the sake of action and result. The allure of effectiveness certainly feeds on discontent with established diplomatic practices, and should therefore be approached with some caution.

7. Deliberation – Let’s Argue!

Deliberative democracy is based on the value of public debate that is inclusive of a wide variety of different perspectives, including those of groups that tend to be excluded. Based on the work of political theorists like Jon Elster, Jürgen Habermas and Seyla Benhabib,³⁸ democratic legitimacy has been interpreted as a process devoid of power inequalities, based on public reasoning and non-manipulative dialogue. Transparency is a prerequisite for deliberation, since all participants are supposed to weigh arguments based on accurate and relevant information available to all. Diversity is equally important, since legitimacy is derived from the conscientious and equal consideration of all arguments and positions. Although deliberative democracy

³⁶ United States Senate, Permanent Subcommittee on Investigations, *Wall Street and the Financial Crisis: Anatomy of a Financial Collapse* (Washington DC, April 13, 2011).

³⁷ Robert A. Nye, *The Anti-Democratic Sources of Elite Theory: Pareto, Mosca, Michels* (London/Beverly Hills: Sage, 1977).

³⁸ Jon Elster (ed), *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998); Jürgen Habermas, *The Theory of Communicative Action* (Boston: Beacon Press, 1984); and Seyla Benhabib, “Towards a deliberative model of democratic legitimacy”, in Benhabib (ed), *Democracy and Difference* (Princeton, N.J.: Princeton University Press, 1996).

has its critics,³⁹ it is clear that the appeal of a radical, participatory democracy is growing. The concept of “people power” underwrites concepts such as public diplomacy, place branding, and crowd sourcing. James Surowiecki’s notion of the “wisdom of crowds” suggests that decisions taken by a large group, even if the individuals within the group are not always that intelligent, tend to be better than decisions made by small numbers of so-called “experts.”⁴⁰ And, even in case the decisions are not “better”, Habermas would argue that the practice of free moral discourses amongst equal citizens will contribute to their emancipation, which may be seen as a value and goal in itself.

Deliberative democracy has its roots in the Greek agora, or assembly, which was the centre of artistic, spiritual and political life of the city. Here, citizens could speak up, and make up their minds. Through delegation, the ideal of the agora is reflected in representative democracies, most notably by public debates in parliament.⁴¹ The rise of the Internet in particular has opened new opportunities to broaden the public sphere, and to facilitate access to the agora. Modern media – from blogs to Facebook to Twitter – allow an unprecedented connectivity between people worldwide, eliminating borders for everyone who has access to the web on a laptop or smartphone. The consequences of these developments are not merely technological, but also social and political. Just as the Greek polis was constituted through action and speech (in the agora), modern media may equally create a new transnational (or cosmopolitan) community of active citizens.⁴² The Internet already offers previously ignored and powerless non-state actors a cheap and easy way to get their voices heard, and to organize themselves to prepare for collective action. Surely, the rise of NGOs and a wide variety of advocacy groups can be explained this way. Deliberation generates democratic legitimacy by claiming that, regardless of outcome and accountability, all relevant voices have been heard. This process in itself is expected not only to produce the wisdom of crowds, but create the basis for a new cosmopolitan citizenship.

The concepts of deliberative democracy raises some fundamental questions on the feasibility, desirability and its possible dangers? Since a truly global agora is practically impossible (just imagine “town hall meetings” with a few million participants), much will depend on the practical, procedural rules of deliberative democracy. Here the UN Global Compact (UNGC) offers insight into the challenges to offer a fair deal for all. The UNGC (set up in 2000) is the UN’s largest forum for discussion aimed at implementing the UN’s Millennium Goals, involving governments, companies, labour organizations, and a motley crew of civil society representatives. During numerous meetings and Summits, this UN-based agora

³⁹ Charles Blattberg, *Patriotic Elaborations: Essays in Practical Philosophy* (Montreal: McGill-Queen’s University Press, 2010).

⁴⁰ James Surowiecki, *The Wisdom of Crowds* (New York: Doubleday, 2004).

⁴¹ Christian Reus-Smit, “The Constitutional Structure of International Society and the Nature of Fundamental Institutions”, *International Organization* vol. 51, no. 4 (Autumn 1997).

⁴² Andrew Linklater, *Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Cambridge: Polity Press, 1998).

opened its doors to any participant who was “serious about its commitment to work towards implementation of the Global Compact principles throughout its operations and sphere of influence, and to communicate on its progress.”⁴³ This very openness has raised the criticism that the UNGC is not just a non-accountable talking-shop, but even offers opportunities for companies to “bluewash” their policies, and a way to avoid binding rules and regulations.⁴⁴ The lack of transparency in the rules of the debate, the absence of any accountability and sanctions, plus the window-dressing involved in participating in such a “noble” arrangement, has undermined the credibility and effectiveness of the UNGC.

Experiences with the UNGC can be considered part of a learning process, the first few steps en route towards cosmopolitan citizenship. These experiences have taught that modern technological means do not suffice to get access to the global public sphere, and to be heard and taken seriously.⁴⁵ Established political and economic elites will not hand over the keys to power without a fight. This explains the continued struggle of the World Social Forum, setting itself against the “elitist” World Economic Forum,⁴⁶ as well as the rise of the Occupy-movements across the world. Creating cosmopolitan citizens is a long-standing process, with ups and downs, requiring both opportunities (modern media) and political determination by an engaged elite (social movements). Functioning agoras remain fairly small in size, and rarely acquire a post-national basis (the EU and its European Parliament come to mind as a moderate success). Innovations in transnational governance make noteworthy case-studies, offering insight into the development of cosmopolitan citizenship, and reclaiming legitimacy by rekindling the oldest argument in the history of democracy: participation.

As Kurt A. Raaflaub argued, Athenian democracy in the middle of the fifth century was a remarkable system: “exhilarating, capable of mobilizing extraordinary citizen involvement, and achievement, enormously productive and at the same time potentially greatly destructive.”⁴⁷ At that time, few imagined the triumph democracy would achieve throughout world history. Currently, reconfigurations of democratic legitimacy are essential to ensure the development of transnational governance. Although not (yet) “exhilarating”, this process certainly is “potentially destructive”, particularly for established, state-based models of democracy.

⁴³ Internet: <http://www.unglobalcompact.org/aboutthegc/faq.html>.

⁴⁴ Global Policy Forum Europe (ed.) *Whose Partnership for Whose Development? Corporate Accountability in the UN System Beyond the Global Compact* (August 2007).

⁴⁵ Evgeny Morozov, *The Net Delusion: The Dark Side of Internet Freedom* (New York: PublicAffairs, 2011).

⁴⁶ Internet: <http://www.fsm2013.org/> and <http://www.weforum.org/>

⁴⁷ Kurt A. Raaflaub, “Introduction”, in Kurt A. Raaflaub, Josiah Ober and Robert Wallace (eds), *Origins of Democracy in Ancient Greece* (Berkeley and Los Angeles: University of California Press, 2007), p. 3.

8. Conclusions

The five prisms of legitimacy suggest that it is not analytically helpful to develop a list of criteria to measure or judge transnational governance's democratic credentials. Going through a simple check-list would not do justice to the intricate dynamic between the aspects of democratic legitimacy, as discussed above. A better system of representation may open opportunities for deliberative democracy, but undermine effectiveness; more accountability and transparency may result in deadlock and a reluctance to compromise. The importance of trade-offs between the five elements of legitimacy should be acknowledged. An increase or improvement of one or two legitimacy-markers will not always result in more democracy, on the contrary.

These nuances should make it easier to avoid simplistic recommendations on how transnational governance's legitimacy could be improved. It also sensitizes us to the truism that legitimacy is contextual, and that legitimacy depends both on the case at hand, and the actors involved. Democracy means something different when managing nuclear weapons than regulating banks. Not only are procedures markedly different, so are the expectations of (for example) transparency and accountability. Legitimacy is also grounded in national traditions. Needless to say, *Rechtsgeföhle* vary between nations and continents, between political and religious creeds, and between classes.

Taken together, the conclusion can be drawn that the democratic legitimacy of transnational governance is highly circumstantial and complex. One of the main drivers of transnational governance is to be found in the flexibility and agility of new cooperative arrangements to solve shared problems. Since established multilateral processes are either too slow or ineffectual, transnational governance fills a gap and services a perceived need for at least basic "rules of the road." One could certainly argue that effectiveness – getting things done, creating results – is the main driver of governance. This implies that imposing the other markers of legitimacy on these informal, often transitional, processes (representation, accountability, etc.) may be unfair and unwise. However, the effectiveness of transnational governance structures may equally benefit from a boost in legitimacy due to greater accountability, transparency, and access of (all) stakeholders. It is all a matter of balance and nuance.

Two provisional conclusions present themselves. First, we should accept that transnational governance may not (and perhaps never will) have perfect democratic legitimacy, yet that it should pass a certain minimum requirement. An institution may be "good enough", may possess sufficient credentials, based on the five markers identified in this Study. What is more, striving for perfection (i.e., more accountability, transparency, openness, etc.), may well be counterproductive, forcing an ideal type on an inherently murky and sub-optimal social reality. Second, we should acknowledge the organic nature of transnational governance. The institutional architecture that is emerging is less Bauhaus than Gaudi. Institutions and arrangements come and go, flourish and dwindle depending on their relevance and effectiveness. It is political Darwinism in action. This implies that transnational governance's spontaneity is an asset, as is its rootedness in people power. Not always, but certainly often enough, it caters to ordinary needs and tastes, needs and tastes that are all-too-often forgotten and watered down by political elites negotiating on "our

behalf.” In this sense, transnational governance is a valuable antidote to what Roger Scruton calls the “dangers of internationalism.”⁴⁸ Internationalists are “only too happy to transplant people from place to place, to abolish local attachments, to shift boundaries and customs in accordance with the inexorable demands of economic progress”, whereas the cosmopolitan “is a nationalist – a believer in his own nation. But also a believer in all the other nations that have captured a corner of the earth”.⁴⁹ For transnational governance to experience a democratic turn, the further development of cosmopolitanism will be essential.

⁴⁸ Roger Scruton, “The Dangers of Internationalism”, *The Intercollegiate Review*, vol. 40, no. 2 (Fall/Winter 2005).

⁴⁹ Scruton (2005), p. 35.

Transnational Governance and Democratic Legitimacy

The Case of Climate Change

by Louise van Schaik

1. Introduction

International governance of climate change has been referred to as a wicked problem. The topic combines the challenge of collective action on common pool resources, distributional conflict among states over responsibilities and financial contributions, and a large degree of uncertainty on climate science.¹ The legitimacy of key institutions governing different aspects of climate change policy has been contested. The credibility of the Intergovernmental Panel on Climate Change (IPCC), the main scientific body to take stock of climate science, was called into question after the climate-gate scandal of 2009. The international climate change regime centering around the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol (KP) was said to be ineffective and a talking shop or circus at best. Other efforts are piecemeal, ad-hoc and not leading to substantial measures. However, in business circles green innovation is still popular, and considered a means to obtain a competitive edge by some companies.

This paper will look at the legitimacy of a variety of transnational governance bodies and arrangements addressing different aspects of climate change policy, namely science gathering, mitigating greenhouse gas emissions, and climate finance. It will examine formal UN-related bodies, the IPCC, UNFCCC, the World Bank, and the recently established Green Climate Fund, as well as other arrangements of transnational governance related to climate change. Climate-related governance increasingly emerges in non-traditional transnational governance arrangements, such as the so-called “minilateral” bodies, of which the G20 is the prime example, and initiatives driven by non-state actors, such as the GLOBE network of parliamentarians,² the C40 Cities Climate Leadership Group,³ and the World Business Council for Sustainable Development.⁴ This report will analyze the legitimacy of a variety of transnational governance arrangements.

This paper builds upon the concept of transnational governance, a catch-all concept that includes multiple forms of institutional innovation and often informal ways to

¹ Johannes Urpelainen, “A Model of Dynamic Climate Governance: Dream Big, Win Small,” *International Environmental Agreement: Politics, Law and Economics*, vol. 13, no. 2 (April 2012), pp. 107-125.

² Cf. Internet: <http://www.globeinternational.org/>

³ Internet: <http://www.c40.org/>

⁴ Internet: <http://www.wbcsd.org/home.aspx>

address transborder problems and challenges.⁵ The concept illustrates the increased awareness that thoughts and action on global issues reaches beyond the traditional UN-based multilateral system of one nation, one vote. The concept can be considered a recognition that international problems, such as climate change, can often no longer be tackled effectively by states (alone) and require solutions where relevant stakeholders, including the private sector and NGOs, are not only involved in deliberations, but also take up commitments and responsibilities. The question is how this is related to the democratic legitimacy of international efforts.

This paper analyses the democratic legitimacy of transnational governance arrangements for climate change using 5 different prisms: (1) representation; (2) accountability; (3) transparency; (4) effectiveness; and (5) deliberation.⁶ It will start with a brief discussion on the legitimacy of the main provider of scientific data on climate change, the IPCC. With regard to arrangements for mitigating greenhouse gas emissions, it will look at the UNFCCC, the Kyoto Protocol (KP), and the Major Emitters Forum (MEF). Subsequently, it will move on to discuss the contribution of the private sector and NGOs to the formal institutions as well as their own initiatives to directly engage with climate mitigation. As regards adaptation, it will focus at the governance of funding arrangements: the World Bank's Global Environment Facility (GEF) and Climate Investment Funds, and the Kyoto Protocol's Adaptation Fund, and Green Climate Fund.

2. The Legitimacy of the Key Provider of Climate Science, the IPCC

The (perceived) legitimacy of policy-making is often to a large extent influenced by scientific insights into the problem the policy aims to address. For some policy issues, the problem is relatively simple and obvious, whereas for others it can be more complex. In the latter cases, it often is debated whether there is a problem, what were to be its cause, what scope it has, and if and how it can be addressed by policy measures.

Climate change, undoubtedly, is one of these cases where science is complex (i.e. with high probability and uncertainty ranges) and contested. At the same time, interests of several groups in society, and even of future generations, are (possibly) adversely affected by the findings presented. For instance, depending on the scientific findings and the attention devoted to them, a political debate on costly mitigation and adaptation policies may ensue. Basic issues in such debates are whether climate change occurs, how dangerous this is, and to what extent it is caused by the use of fossil fuels. The problem is that their use is intimately linked to the way our economies operate, since fossil fuels are still the cheapest source of energy and necessary for almost all economic activity and growth. This makes a reduction or shift to alternative energy sources politically sensitive. As a result, politicians will be

⁵ Peter van Ham, "Transnational Governance and Democratic Legitimacy: A Conceptual Overview", *The Hague Institute for Global Justice and the Netherlands Institute of International Relations "Clingendael"* (2013).

⁶ Ibid.

hesitant to argue for strong climate policies, and if they do so, they will use the availability and perceived credibility of scientific evidence to legitimize their choice. In order to obtain credible and authoritative insights into the science on climate change, governments established the Intergovernmental Panel on Climate Change (IPCC) in 1988. The IPCC is a body of scientists nominated by governments which issues influential reports that provide an update of knowledge on the scientific, technical, and socio-economic aspects of climate change. It falls under the auspices of the World Meteorological Organization (WMO) and the United Nations Environment Program (UNEP). IPCC reports are published about every 5 years, and already the first report published in 1990 was groundbreaking, seeing that it confirmed research indicating that climate change was occurring and most likely caused by human induced greenhouse gas emissions. In 2007, the IPCC received a share of the Nobel Peace Prize for its work just after the publication of its 4th Assessment Report. The full version of the 5th edition came out in the spring of 2014. Crucial findings were already released in the autumn of 2013.⁷ It was concluded, among others, that temperatures had warmed by 0.85 degrees since 1880, and that it was “extremely likely” – wording that indicates a certainty level above 95% –, that humans had been the “dominant cause”.

IPCC reports are drafted by scientists under the supervision of the IPCC Bureau that consists of a Chair, co- and vice-Chairs. They are nominated and elected by the countries who are members of the IPCC, currently 195. Key persons are also the lead authors who (initially) guide the work on specific chapters of IPCC reports, and are selected by the Bureau upon nomination by governments. Appointments of central posts, such as the Chair, are not limited to specific time periods. Representatives of the member countries participate in the review process and the plenary Sessions, where main decisions about the IPCC work program are taken, and reports are accepted, adopted, and approved. Governments also fund the IPCC and its small secretariat of about ten staff persons. Most of the work is done by scientists funded by their own universities, governments, national research councils, and others. In principle, IPCC reports are thus based on an extensive review of reliable research findings gathered and assessed by eminent scientists, but ultimately their work falls under the supervision and responsibility of governments.

Having a scientific mandate, while it is organized within a political institutional mandate, affects the legitimacy of the IPCC. According to Skodvin and Alfsen, acceptance of the findings signifies the likelihood of an IPCC report presenting a comprehensive, objective, and balanced view on the subject matter.⁸ Moreover, with the inclusion of policy-makers in the process, IPCC reports are subjected to intense scrutiny by both scientists and policy-makers representing different perspectives, positions, and interests. Thus, IPCC conclusions could be assumed to be more robust, and the scope for subsequent delegitimization of the knowledge base would be

⁷ IPCC, Working Group I Contribution to the IPCC Fifth Assessment Report Climate Change 2013: The Physical Science Basis, *Summary for Policymakers* (September 2013), p. 27.

⁸ Tora Skodvin and Knut H. Alfsen, “The Intergovernmental Panel on Climate Change (IPCC): Outline of an assessment”, *CICERO Policy Note* (2010).

reduced. They are based on a long process of deliberation. Besides, the intergovernmental nature of the IPCC helps to educate policy-makers, which makes them more willing to discuss policy measures, and helps to raise the issue on the political agenda.⁹ The IPCC thereby potentially contributes to the effectiveness of climate policy-making.

However, the intergovernmental nature also means that IPCC assessment summaries are widely regarded as being politically negotiated, which has, at times, undermined their credibility. Specific states, such as the oil producing Saudi Arabia, have been accused of seeking to prevent and delay the adoption of IPCC reports, and representatives of other states of being influenced by advocacy groups with specific objectives. On a more regular basis, the findings of the IPCC (and climate science in general) have continuously been criticized by so-called “climate sceptics”, who either deny the existence of (man-made) global warming altogether, or consider the problem highly exaggerated. Yet others have argued that the IPCC is rather too conservative and cautious in its conclusions, and that new research findings are not being incorporated in time.¹⁰

In 2009, shortly before the Copenhagen Climate Summit, criticism intensified after emails of some of the leading authors of the 2007 IPCC report had been leaked. These authors were based at the University of East Anglia, and their e-mails confirmed selective interpretation of research data, even though this did not fundamentally undermine decisive findings. A real error that was detected was the exaggeration of the melting of the glaciers on the Himalaya Mountains, but other small mistakes were unveiled too.¹¹ The affair became known as the climate-gate scandal. The publication of the 5th assessment report saw one eminent scientist publicly severing his affiliation with the IPCC.¹² According to him, the report consisted of too many doom and gloom scenarios, underestimating the chances of technological progress. He mentioned the bias of many climate scientists and civil servants resulting from their identification with their work on climate change, and the incentive for developing countries to emphasize severe consequences of climate change in order to demand increased funding for loss and damage.

There are several structural points of criticism concerning the IPCC.¹³ First of all, the IPCC bases its assessments mainly on peer reviewed and published scientific literature, but sometimes also on other research findings, which are less reliable. Secondly, due to the involvement of government officials, who demand simplicity

⁹ Shardul Agrawala, “Context and Early Origins of the Intergovernmental Panel on Climate Change”, *Climatic Change*, vol. 39, no. 4 (August 1998), pp. 605–620.

¹⁰ Tapio Kanninen and Georgios Kostakos, Global Governance of Climate Change: A Comprehensive Assessment Through a Functional Approach, *Mother Pelican*, vol 8, no. 8 (2012).

¹¹ PBL (Netherlands Environmental Assessment Agency), “Assessing an IPCC Assessment: An Analysis of Statements on Projected Regional Impacts in the 2007 Report” (July 2010).

¹² Richard Tol, “Waarom ik uit het klimaatpanel van de VN stap (Why I break with the IPCC)”, *NRC* (April 5, 2014).

¹³ InterAcademy Council, “Climate Change Assessments, Review of the Processes & Procedures of the IPCC” (October 2010); and Skovin and Alfsen (2010).

and clarity to guide policy-making, scientific uncertainty ranges and probabilities are not always adequately presented in the most well-read part of the report, the summary for policy makers.¹⁴ Thirdly, reviews by climate skeptics are insufficiently addressed in the review process, resulting in scientific controversies being downplayed or omitted. Fourthly, scientific research on climate change is permeated by advocacy groups from both the environmental and business side, and its funding would be linked to research findings confirming political beliefs. The question raised specifically is whether climate scientists, in order to attract funding for their research, are more inclined to seek the publication of research findings confirming climate change being a policy problem worth spending public research funds on. On this matter, little evidence appears to be available, making it difficult to accuse the scientific community of climate scientists of being biased, but also to reject this claim. All of this affects the legitimacy of the IPCC's work. Even though the IPCC process is inclusive, open, and transparent, the degree of scientific understanding required to read even the *Summary for Policy Makers* hinders access by the general public to the core of the work of the IPCC, and thereby its transparency and accountability. The models and data used are simply too complicated for non-climate scientists. The IPCC's authority is also contested by a general declining trend of the level of trust in scientific authorities by ordinary citizens, something which has also affected the opinion of political decision-makers on climate science.¹⁵ The validity of opinions and conclusions of experts are no longer taken for granted, and despite a rapid increase in the availability of scientific information, those who contest it also have easier access to publicly available sources and media. The climate-gate scandal contributed to a decrease of confidence in climate science among the general public as expressed in opinion polls.¹⁶

However, following the climate-gate scandal, the InterAcademy Council review confirmed the likelihood of IPCC working method leading to reliable results, thereby refuting much of the criticism regarding the credibility of its research findings.¹⁷ Furthermore, despite the controversies, the IPCC's findings are still widely endorsed by governments, and used to underpin their climate change policies, notably by the EU. IPCC findings are used as reference points within the official UN climate negotiations (e.g. in the Bali Action Plan and Copenhagen Accord), and the G8 has recognized and referred extensively to the IPCC's work.¹⁸ Hence, they are not only legitimized by the intergovernmental nature of the IPCC itself, but also by other international governance bodies. That being said, so far, this has not resulted in agreement on policy actions commensurate with the IPCC's advice on avoiding dangerous climate change. In that respect, the effectiveness of the IPCC's work is very limited.

¹⁴ "Another week, another report. Options for limiting climate change are narrowing", *The Economist* (April 19, 2014).

¹⁵ Anthony Giddens, *The Politics of Climate Change* (Cambridge and Malden: Polity Press, 2011).

¹⁶ InterAcademy Council (2010).

¹⁷ InterAcademy Council (2010).

¹⁸ Internet: <http://www.g8.utoronto.ca/summit/2009laquila/2009-declaration.pdf>.

As an overall assessment, the legitimacy of the IPCC's work - to a large extent - hinges on its credibility as being the dominant provider of authoritative and non-partial assessments on the state of climate science. On the one hand, it is effective in publishing assessments and raising awareness for its work among policymakers and the general public. Its work processes are fairly transparent, even though a good understanding of the content IPCC's work requires a considerable degree of scientific knowledge. In terms of accountability, the close scrutiny of government representatives stands out. On the other hand, questions continue to be posed with respect to the representativeness of what is included in the IPCC reports. Are the findings presented based on true deliberation between advocates of different perspectives, or is the extensive review process partly window-dressing in order to legitimize the publication of the research findings of its lead-authors? Is evidence provided by climate skeptics systematically ignored, or is the IPCC rather too conservative in presenting the climate science? Does the general public believe in the ability of the IPCC to strike the right balance? Why do policymakers not duly take into account its findings by translating them into policy action, thereby genuinely endorsing them? These questions illustrate the limitations to the IPCC's credibility, and by extension its legitimacy base. In turn, this strongly influences the legitimacy of policy action on climate change, which is influenced by whether the general public and politicians consider climate change an important policy problem, and what policy measures they will support to address it. Credibility of science underpinning a (possibly) controversial policy can even be recognized as an additional prism for assessing legitimacy.

3. Governance for Mitigation of Greenhouse Gas Emissions

If the findings of the IPCC are taken as a reference point, reducing greenhouse gas emissions is a necessity when striving to avoid dangerous climate change. For climate change to occur, it is irrelevant where on earth these greenhouse gases are emitted. Therefore, mitigating climate change can be considered a typical global public goods issue for which collective action is at the same time the prescribed medicine, as well as extremely difficult to achieve, given the (short-term) incentive for individual countries not to undertake action.¹⁹ When countries take a "free ride", they are unlikely to suffer significantly more, while climate policies come at a considerable cost to others. An extra complicating factor is that many of the likely consequences of climate change will only affect future generations.

A number of governance arrangements have been established to encourage and facilitate collective action in this area, the most important of which are the annually held Conferences/ Meetings of the Parties (COPs/MOPs) of the United Nations Convention on Climate Change (UNFCCC) and the Kyoto Protocol (KP), in short: the UN climate change regime. The UNFCCC sets out general principles and objectives for climate action, and the KP sets specific reduction targets, but only for a subset of countries. Even though the UNFCCC and KP also address adaptation and provide political guidance to several funding instruments, here they are treated mainly as

¹⁹ Elinor Ostrom, *Governing the Commons: The Evolution of Institutions For Collective Action* (Cambridge: Cambridge University Press, 1990).

platforms for discussing climate mitigation. In addition to these UN bodies, reducing emissions has also been discussed in other transnational bodies, such as the G8 and G20, and in many informal dialogues and new coalitions (e.g. Cartagena Dialogue²⁰, pre-COP meetings, the Climate and Clean Air Coalition).²¹ One platform that was initiated by the US, who withdrew from the KP, is the Major Emitters Forum. As it can be considered an example of an alternative arrangement of transnational governance with only a few participants, its legitimacy will be analyzed here. The contribution of non-state actors to mitigation will be discussed in the next section of this paper.

3.1 UNFCCC: Treaty, Platform or Excuse For Passivity?

The UNFCCC was established in 1992 at the Earth Summit in Rio de Janeiro. Its ultimate objective is to prevent dangerous climate change. It requires countries to collect and report their greenhouse gas emissions data (art 4(1)(a)). Countries agreed to stabilize emissions at 1990 levels by 2000, but no sanctions were attached to this objective. In 1992, a distinction was made between developing countries on the one hand, and developed countries (i.e. members of the OECD) and countries with economies in transition (i.e. the former Soviet Union countries) on the other hand. Developing countries were exempted from reduction commitments, and countries with economies in transition were requested to stabilize their emissions to 1990 levels. Parties agreed this to be fair, that is, in line with the principle of “common but differentiated responsibilities” that was written into the UNFCCC treaty to guide the future level of emission reduction obligations (art 3(1)).

The UNFCCC soon turned into a big negotiation “circus”, with over 180 Parties, 1200 NGOs, and 800 UN bodies participating in annual Conferences of the Parties (COPs) and other meetings, almost all of them taking part with multi-person delegations.²² The COPs are sometimes referred to as UN Climate Summits, and important ones were those taking place in Kyoto (1997), Marrakech (2001), Copenhagen (2009), and Durban (2011). To make decisions, all the 180 Parties have to agree by consensus. Observers wonder, taking account of the large number of participants, in combination with consensus as the decision-making rule, whether any meaningful UNFCCC decisions can ever be achieved.²³ However, despite this constraint on effective decision-making, the Parties managed to agree on the Kyoto Protocol in 1997, a treaty

²⁰ The Cartagena Dialogue evolved out of an initiative of a small group of countries with a shared (national) interest in securing progressive action with relation to climate change, such as countries in the Alliance of Small Island States (AOSIS), the least-developed country (LDC) group, the European Union, and Australia, Chile, and Norway.

²¹ The Climate and Clean Air Coalition is a group of countries initiated by the US and Sweden to address short-lived pollutants. Although it does not focus on the greenhouse gases covered by the UNFCCC, addressing these short lived climate pollutants is likely to be a rather cost-effective way to mitigate climate change.

²² Miguel M. Cabré, “Issue-Linkages to Climate Change Measured Through NGO Participation in the UNFCCC”, *Global Environmental Politics*, vol. 11, no. 3 (August 2011), p. 10.

²³ Jeffrey S. McGee, “Exclusive Minilateralism: An Emerging Discourse Within International Climate Change Governance”, *PORTAL Journal of Multidisciplinary International Studies*, vol. 8, no. 3 (September 2011).

with legally binding emission reduction targets for developed countries. Even though this in itself appears remarkable, the effectiveness of this treaty has also been refuted, in light of principal participants, including the US, having withdrawn from it, and its overall contribution to limiting greenhouse gas emissions is small. After the failure to negotiate an alternative to the Kyoto Protocol, which would be acceptable for a broader number of Parties in Copenhagen, negotiations within the UNFCCC have continued. The next big summit with a negotiating deadline for a new agreement is the 2015 COP in Paris (see also the next section of this paper).

In view of this deadline, the debate on the consensus rule has reignited. In 2011, Mexico and Papua New Guinea brought a proposal for substantial decisions to be made by a three quarter majority vote in the absence of consensus.²⁴ The proposal was not agreed upon, but in 2013 Russia started to question whether talks should continue without this issue being resolved.²⁵ This illustrates how the debate on the matter alone already frustrates the effectiveness of decision-making in the UNFCCC.

From a legitimacy perspective, the fact that each participating country can block decision-making within the UNFCCC increases its representativeness. The equality of states with large and small populations respectively, as well as those with or without a specific interest, can, however, be debated. Consider for instance that the position of a low lying island, whose existence is directly threatened, is likely to be rather different than the position of an oil-exporting country, whose income depends heavily on fossil fuel exports. The representativeness is defined as equality of states, but not of individual people living within these states, or of those being worst affected having a larger say over their fate.

The tricky issue is that acceptance of a mitigation commitment by all states, or at least by all states with major economies, is pivotal in ensuring compliance. At the same time, national acceptance of mitigation policies is more likely when other states take up similar commitments. This not only increases the degree of (perceived) fairness, but also enables the level playing field of companies operating in countries where a carbon constraint is imposed on their economic productivity. In other words, countries with an emission reduction policy are eager for other countries to do the same, because they fear industries will relocate to countries without such a policy or a less stringent one. This desire of national governments to include others decreases the attractiveness of an agreement with just a subset of states, since that leaves the competitiveness concern open (see also below). They consider it of utmost importance to have economic competitors included. On account of these being the developed countries and the emerging economies, the real political issue is whether

²⁴ Legal Response Initiative (LRI), *Issues on Consensus in the UNFCCC Process* (December 2011).

²⁵ “Progress For Climate Negotiations: In the UNFCCC and Beyond”, *Climate & Development Knowledge Network*. Internet: <http://cdkn.org/2013/06/feature-progress-for-climate-negotiations-in-the-unfccc-and-beyond/>.

they can agree on emission reduction commitments. However, the problem is that their preferences and interests currently still appear to be too far apart.²⁶

In this respect, it is also a political choice under what conditions, and to what extent, poorer countries should be exempted from reduction efforts. The principle of *common, but differentiated responsibilities* implies a prime responsibility for the rich, who had a larger historic contribution, in view of the greenhouse gas CO₂ for instance staying in the atmosphere for about 100 years. How this is interpreted, and whether specific countries continue to qualify as a developing country despite rapid economic growth levels, is a political choice. When subscribing to the findings of the IPCC and to the objective of the UNFCCC that dangerous climate change is to be prevented, action by all major emitters, including the developing countries with high economic growth figures, is inevitable. However, in the words of Polish Environment Minister Korolec, many countries fear that undertaking such action might be a brake on their exit from poverty.²⁷

In recent years, particularly the emerging countries Brazil, South Africa, India, and China (BASIC) have played a vital role. They present themselves as leaders of the developing world, and advocate the right for “development first”. They were responsible for the outlines of the Copenhagen Accord that they negotiated in a back room together with the US at the 11th hour of the 2009 Summit, and contained only few hard commitments. It could rightfully be denied that this can be called legitimate, if only because the core components of the deal were negotiated by just 5 states instead of 180.²⁸ The representativeness of the countries as true defenders of the interests of developing countries can be contested, as well as the representativeness of a deal negotiated by them and the US only. They do not appear to pay much attention to the voices of a broad range of civil society groups aiming to influence the debate on climate change, and thereby placing direct national interest above deliberation and accountability. The fact that it became very transparent what transpired was due to the leaking of about everything that had happened to the press and to newsletters. On a regular basis, climate change negotiations taking place in the context of UNFCCC meetings are also covered rather extensively by the Earth Negotiations Bulletin in any case.²⁹ Additional insights were provided by cables published at the wikileaks website, a reconstruction in *Der Spiegel*, and documents of the US National Security Agency, which apparently had spied on others to inform its negotiating team on the (secret fallback) positions of others.³⁰ As a result, transparency of what happened

²⁶ Louise G. van Schaik and Simon Schunz, “Explaining EU Activism and Impact in Global Climate Politics: Is the Union a Norm- or Interest-driven Actor?”, *Journal of Common Market Studies*, vol. 50, no. 1 (October 2012).

²⁷ *Bulletin Quotidien Europe*, no. 1092 (September 2013).

²⁸ Simon Schunz and Hans Bruyninckx, “The Democratic Legitimacy of the Contemporary Global Climate Governance Architecture”, *Working Paper*, no. 75 (Leuven Centre for Global Governance Studies, 2011).

²⁹ *Earth Negotiations Bulletin*. Internet: <http://www.iisd.ca/voltoc.html>.

³⁰ “US spied on UN Climate Summit, NSA leaks show”, *Euractiv.com* (February 3, 2014).

during the negotiations occurred more by chance than on purpose, and some appeared to have access to more information than others.

Above all else, the legitimacy of the UNFCCC is hampered by the lack of agreement on future emission reductions. Therefore, it is generally considered a rather ineffective form of transnational governance. Despite the investment of immense diplomatic resources, only a weak agreement was reached at for instance the crucial Copenhagen Summit of 2009. Even though key negotiations take place primarily outside the official negotiating sessions and with only smaller sets of countries, processes are fairly transparent, due to accurate and extensive press coverage and other written sources (including ENB, and later on wikileaks and NSA documents). However, the decision-making in smaller groups and in backrooms lessens the accountability of what has been agreed to (or rather what has not been agreed to), and is accompanied by a lack of true deliberation despite a large number of delegates from states and civil society being present at UNFCCC meetings.³¹ The consensus rule secures representativeness of states at the formal and final level of decision-making, but impedes any progress on emission reduction commitments in a significant way. It hinders adoption of COP decisions directly; indirectly, it reduces the chance of agreement between a subset of countries, forming a majority, with each of them finding it difficult to sell a deal at home that excludes chief competitors.

3.2 Kyoto Protocol: Targets and Timetables For the Happy Few?

The Kyoto Protocol presents a first attempt to agree to climate mitigation action based on emission reduction commitments per country. It was agreed upon in 1997, with a detailed rule book added at the COP in Marrakech in 2001. The Kyoto Protocol sets reduction targets for developed countries and countries with economies in transition. They can meet these targets *inter alia* by using so-called flexible mechanisms, through which they can earn reduction credits by implementing projects in developing countries or by buying surplus reductions from countries overshooting their own target. Developing countries are also party to the KP, but they only have reporting obligations, and only have to adhere to these when developed countries assist them in gathering relevant data and drafting their reports.

The problem with the KP is that the US withdrew from it in 2001, undermining the overall reduction effort set for the period until 2012, and the instrument as such. It severely damaged the legitimacy of a multilateral approach on climate change mitigation, inasmuch as it diminished the representativeness of the deal, which had to continue without the biggest emitter. The US considered the KP potentially harmful to its economy, and found it unacceptable that emerging economies – notably India and China – were exempted from reduction obligations.³² It was due to the EU's insistence and diplomatic campaigning that the KP still survived and entered into force following ratification by *inter alia* Russia.³³ However, some countries, including

³¹ See on this topic also Kanninen and Kostakos (2012).

³² United States Senate Resolution 98. *Congressional Record*, Report No. 105-5412 (June 1997).

³³ Martijn L. P. Groenleer and Louise G. van Schaik, "United We Stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol", *Journal of Common Market Studies*, vol. 45 no. 5 (November 2007).

Canada and Australia, eventually failed to live up to their initial commitment. In 2013, the latter did not subscribe to a Second Commitment Period, in which effectively only the EU, Switzerland and Norway participate, substantially limiting the effectiveness of the KP in terms of contributing to a reduction of global emissions, for only about 15% of global emissions are now covered by it.

Currently, negotiations concentrate on the design of a successor to the KP to be agreed upon in 2015 (in Paris, with commitments that would start from 2020 onwards). After the failure of the Copenhagen Summit in 2009, where a similar attempt was undertaken, expectations are modest, given that preferences and interests of principal players still appear to be worlds apart. A large coalition of countries, including Latin American, African and EU countries, gathered in the so-called Cartagena Dialogue group, is nevertheless pressing for an ambitious future deal. They managed to get the negotiation process in motion at the COP in Durban in 2011.³⁴ The case for taking action is supported by the new IPCC report of 2014 as well, and pushed for by a large number of civil society groups, as well as UN Secretary-General Ban Ki-Moon, who is organizing a pre-Summit with heads of states and governments for September 2014 in New York.

In light of its design and subscribers, the legitimacy of the Kyoto Protocol is contested. The “targets and timetables” approach on which it is based is “loved” by the EU and a few others and “hated” by others. The US and China are opposed to targets set at the international level, and to subsequently be held accountable for them. They prefer climate policies to be entrenched in national policy-making, and not to be imposed from above. China refers to its sovereignty when opposing mechanisms to measure, report, and verify emission reductions by independent international (i.e. UN) experts. India simply argues it wants to develop first before putting any constraint on fossil fuel-based energy use. Mitigating climate change is not its first priority. A related issue is the claim of developing countries that developed countries should pay for the damages of climate change, something which will be discussed below. All in all, the KP model is not widely considered legitimate, but it is difficult to envisage an alternative to a multilateral agreement with emission reduction commitments for all countries, given the global public goods character of climate change mitigation and the incentive to take a free ride when possible.

3.3 Major Economies Forum: Coalition of the Unwilling?

In early 2007, President George W. Bush announced a new US initiative on climate change that was initially called the “Major Emitters and Energy Consumers” process (MEP). The MEP consisted of a series of US-sponsored meetings of 15 top greenhouse economies and polluters.³⁵ They aimed to develop a long-term global goal to moderate greenhouse gasses with each country working to achieve this emissions

³⁴ Louise G. van Schaik, “The EU and the Progressive Alliance Negotiating in Durban: Saving the Climate?”, *Overseas Development Institute Working Paper* (October 2012).

³⁵ For these meetings, representatives from Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, South Korea, South Africa, United Kingdom, the European Union, the European Commission, and the United Nations were invited.

goal by establishing ambitious mid-term national targets and programs, based on national circumstances.³⁶ The US was to facilitate international development banks to provide low-cost financing options for clean energy technology transfer. The country claimed to honor its commitment to the UNFCCC process, to which the MEP meetings were to be complementary.

In March 2009, the US Major Economies Process was renamed by the Obama Administration as the Major Economies Forum on Energy and Climate (MEF). The seventeen countries of this new Obama-backed forum met on five occasions in the lead up to the Copenhagen COP 15 meeting with a view of reaching agreement on fundamental climate related issues. MEF meetings failed to agree on a figure for a medium term collective emission reduction target, and were hardly any different from the process led by the Bush-government.³⁷

The MEP/MEF initiative clearly has been used by the US to demonstrate to its own citizens and the international community its continued adherence to the international climate agenda, despite its withdrawal from the KP. The US was accused of not caring about this international problem, and its non-participation in the KP meant it had fewer opportunities to set the agenda, unlike the usual role of the US on global issues. Therefore, the MEF could be considered window-dressing used to legitimize the foreign policy responsibilities of the US on international climate change. Other countries accepted and participated in the MEF, but their expectations on it leading to substantive outcomes was probably low. Still, the MEF comes closest to a minilateral version of international climate talks, and from that perspective potentially could be more effective than the UN process.

When viewed as a vehicle to avert internationally agreed national targets to reduce greenhouse gas emissions, as was perhaps the hidden agenda of the US and others, the MEF could be considered an effective form of transnational governance given its lack of agreement on this topic. However, for the EU and others striving for international agreement on emission reduction commitments, the MEF thus far has been far from effective, and its investments in this process proving to represent a false hope of bringing the US back to the UNFCCC negotiating table. The legitimacy of the MEF as a form of transnational governance is thereby seriously undermined seeing that it is not representative in terms of state participation, a closed shop for deliberation with civil society, and does not provide a very high degree of transparency and accountability to citizens. All in all, it could therefore not be considered a very productive endeavor in the search for a legitimate solution for the climate change issue.

³⁶ Jeffrey S. McGee, "Exclusive Minilateralism: An Emerging Discourse Within International Climate Change Governance", *PORTAL Journal of Multidisciplinary International Studies*, vol. 8, no. 3 (September 2011).

³⁷ Ibid.

4. Initiatives of Green NGOs and Business: Window-Dressing or the Only Real Alternative?

The private sector and environmental advocacy groups are significant players in the debate on climate change policy. The main reason is that reducing greenhouse gas emissions involves a radical transition in the way we produce and consume energy, and this forms the foundation of economic activity. Climate change policy is therefore inherently linked to economics, business, and jobs. From an environmental perspective, it is furthermore considered one of the largest threats to sustainable human living on this planet.

Civil society groups actively contribute to the official UNFCCC meetings. Over the past fifteen years, more than half of the delegates participating in the process, over fifty thousand, came from one of the 1200 represented NGOs.³⁸ They organize a large number of side events during (the breaks of) the official sessions, and when organized as Environmental, Business, and Research NGOs (ENGOS, BINGOs and RINGOs), they are allowed to make statements in the plenary. However, as the real negotiations usually take place in the corridors and preparatory meetings without the involvement of non-state actors, it is difficult to judge their real contribution to the deliberations between government negotiators. The MEF and other dialogues between states, such as the Cartagena Dialogue, also deny access to non-state actors.

Over the years, environmental NGOs, often with financial support of Environment Ministries, have actively lobbied for climate change to be prioritized on the political agenda. Particularly in Europe, the general public considered climate change a critical threat, and it could therefore be used by politicians to gain support.³⁹ For Ministers responsible for environmental policies, climate change became the topic with which they could market themselves. As a result, budgets were made available to acquire new insights, promote green innovation, study geological and climatic processes, and so on. In turn, government policies and efforts, to a large extent, were influenced by the environmental NGOs they supported, and in Europe these were increasingly financed to focus on climate change. Through naming and shaming (e.g., the fossil of the day award handed out at COPs) and public information campaigns, they still draw considerable attention to the need to undertake action on climate change.

Because environmental NGOs are often heavily subsidized by states, and are based predominantly in developed countries, their representativeness has been contested. Many NGOs fall short of democratic legitimacy because their staff members are not elected, their working methods not always very transparent, and their accountability as regards justifying their activities can be limited. Empirically, there is no robust and generalizable evidence for whether the public view negotiations and their outcomes are more legitimate and thus acceptable when civil society is involved to a greater

³⁸ Miguel M. Cabré, "Issue-linkages to Climate Change Measured Through NGO Participation in the UNFCCC", *Global Environmental Politics*, vol. 11, no. 3 (August 2011).

³⁹ van Schaik and Schunz (2012).

extent.⁴⁰ Developing countries are confused about NGOs openly contradicting policies of the governments that fund them, and campaigning against multinationals operating from the same countries. They consider this unreliable.

Businesses form a special category of non-governmental actors. They do not (pretend to) represent the “public voice”, but they are the major sources of economic growth, employment, but also greenhouse gas emissions. From the early days in which scientists started to indicate a possible link between human-induced greenhouse gas emissions and changing weather, the private sector was accused of discrediting this science, and lobbying against climate policy efforts that could damage their activities in general. For instance, the oil company Exxon was accused of funding climate sceptics by sponsoring the Global Climate Coalition.⁴¹ However, it would be a fallacy to present all industry and business as climate sceptics and laggards. Several companies, including energy utilities companies, have lobbied in favor of climate policies, such as the EU’s emissions trading scheme. They realized the political reality of climate change, and considered possible gains *vis-à-vis* their competitors when policies of their liking would be implemented as opposed to policies not to their liking, such as a carbon tax. They also increasingly realized that being sustainable could optimize internal business processes and create new markets. For instance, the EU emissions trading scheme has created new business opportunities for some companies. Being green could also inspire own employees to work with greater dedication.

What is more, as a result of the new climate change agenda, new businesses emerged, including a considerable renewable energy industry, as well as a “carbon service industry” to measure and verify emissions in order to fulfill new policy obligations and advice on how to become more efficient and sustainable. Large multinationals initiated platforms like the World Business Council on Sustainable Development (WBCSD), the Climate Group to develop the Verified Carbon Standard (VCS), and the International Emissions Trading Association (IETA). Under these umbrella associations, they jointly further (research) insights and dialogue on climate change and other environmental issues. Another example of initiatives of multinationals for environmental benefit is the Global Sustainable Electricity Partnership (GSEP), consisting of large electricity companies, promoting sustainable energy projects and capacity building.⁴² Initiatives came to be to self-regulate business processes with a view to make them more sustainable, sometimes in close cooperation with NGOs. Consider for instance the Gold Standard initiative, which assessed the contribution of emission reduction projects in developing countries to sustainable development.⁴³ But

⁴⁰ Thomas Bernauer and Carola Betzold, “Civil Society in Global Environmental Governance”, *The Journal of Environment Development*, vol. 21, no. 62 (February 2012).

⁴¹ Ian H. Rowlands, “Beauty and the Beast? BP’s and Exxon’s Positions on Global Climate Change”, *Environment and Planning C: Government and Policy*, vol. 18, no. 3 (2000), p. 339.

⁴² Kenneth W. Abbott, “Engaging the Public and the Private in Global Sustainability Governance”, *International Affairs*, vol. 88, no. 3 (May 2012).

⁴³ Christof Arens, Urda Eichhorst, Frederic Rudolph and Hanna Wang-Helmreich, “Further Development of the Project-Based Mechanisms in a Post-2012 Regime”, *Wuppertal Institute*, no. 2249 (September 2009).

also many other examples of business-civil society initiatives exist, such as the Greenhouse Gas Protocol, a leading carbon accounting standard developed by the WBCSD.⁴⁴

Abbott identifies three governance tasks in what he refers to as *private sustainability governance*.⁴⁵ The first is to set regulatory standards, the second to sponsor operational programs, and the third is to share information. According to him, the extensive growth of new governance initiatives in the area of sustainable development is caused by a void of international regulation imposed by governments. The problem is that self-regulatory business standards are typically less demanding than those emanating from civil society bodies or public authorities; preference is given to so-called “light-touch regulation”.⁴⁶ They tend to succeed only if they offer sufficient benefits to the firms committing to them: helping them to distinguish themselves from competitors, gain access to markets, cut transaction costs, or pre-empt regulation.

A way to increase the effectiveness, and by extension the legitimacy of private initiatives, is to obtain the backing from environmental (and development) NGOs. This increases the accountability of efforts undertaken, and makes them more representative. For NGOs, it is important to cooperate with businesses, since this increases the likelihood of environmental results. A prominent example of a joint initiative is the Green Economy Coalition that aims to accelerate the transition to a new green economy.⁴⁷ Within the context of such initiatives, NGOs usually demand transparency in respect of finances and results of initiatives. Consequently, a new wave of “governance by disclosure” initiatives has come about.⁴⁸

Despite efforts undertaken and a rapid increase of private-public partnerships, the “shadow” of regulation by governments continues to be vital for the success of voluntary schemes.⁴⁹ In light of the current economic crisis in traditional environmental frontrunners, such as the EU countries, Japan, and the State of California, pressure is currently low. On top of this, environmental NGOs are weakened by subsidy cuts and a decrease in financial support by their membership. A general overview of what is achieved in terms of emission reductions, emanating from all the various initiatives, does not exist. Moreover, they appear to be primarily based on the private sector and NGOs based in the West, reducing their representativeness and coverage of business activities in emerging economies and developing countries, except for perhaps the activities undertaken by multinationals based in the West.⁵⁰

⁴⁴ Abbott (2012).

⁴⁵ Abbott (2012).

⁴⁶ Aarti Gupta, “Transparency in Global Environmental Governance: A Coming of Age?”, *Global Environmental Politics*, vol. 10, no. 3 (August 2010).

⁴⁷ Green Economy Coalition. Internet: <http://www.greeneconomycoalition.org>.

⁴⁸ Gupta (2010).

⁴⁹ Abbott (2012).

⁵⁰ Barabara Buchner, Angela Falconer, Morgan Hervé-Mignucci and Chiara Trabacchi, “The Landscape of Climate Finance 2012”, *Climate Policy Initiative Report* (December 2012).

The overall effectiveness of the efforts and initiatives of civil society groups is therefore debatable.

All in all, the active involvement of environmental NGOs and business has contributed to the awareness to climate change. It legitimated the attention devoted to the issue at the multilateral level, and has led to alternatives for the lack of progress made within the UN. Nevertheless, initiatives tend to be ad hoc and piecemeal. Their success depends on whether the private sector believes governments may regulate in the absence of voluntary action, as well as green innovation leading to future profits. Another point of concern is the unequal distribution of efforts to green economic activity with most of the initiatives being developed and implemented by multinationals headquartered in the OECD countries and companies based in developing countries and emerging economies lagging behind.

A future challenge will also be the possible contribution of non-state actors to financing adaptation to climate change. Governments aim for private money to be the lion's share of the future finances available for climate measures, and for public money mainly to be used to leverage private funding. The question is whether, and how, this private funding will become available, particularly in light of current financing mechanisms not being very receptive to involvement of the private sector, as we will examine in the next section of this paper.

5. Where the Money Flows or is Talked About: Governance of the Funds

With the increased recognition that greenhouse gas emissions are highly likely to cause climate change, attention for how to cope with, or adapt to these changes appeared on the political agenda. A particularly salient question was who was to blame for the consequences and damages, especially with regard to those occurring in countries with low emissions and little resources. While richer countries, such as the Netherlands, would possess the resources to increase water defense systems and undertake other adaptation policies to adjust to structurally changing weather conditions, this could not be expected from developing countries, and these therefore proved most vulnerable to the consequences of climate change. As a result, the debate on climate adaptation at the international level soon developed into a North-South divide. Typically, climate negotiations were used by developing countries and NGOs to point not only to the need to curtail emissions, but also for taking up the responsibility to pay for the consequences and damages occurring in developing countries.

At the Copenhagen UN Climate Summit of 2009, developed countries set a goal of jointly mobilizing USD 100 billion a year by 2020, from both public and private sources, to address the needs of developing countries. They also pledged USD 30 billion fast-start financing for the period 2010-2012 of which a considerable part has been made available.⁵¹ Questions prevailed concerning whether this funding would be

⁵¹ Wytze van der Gaast and Katie Begg, *Challenges and Solutions For Climate Change* (London and New York: Springer, 2012), p. 117.

additional to the Overseas Development Assistance (ODA) already on the balance sheet of developed countries. Developing countries argue that in order to truly take the climate adaptation challenge seriously, new funds would need to become available. However, in practice, it often proves difficult to disentangle the two, and mainstreaming is often desired to be most effective. For instance, adaptation projects are unlikely to be implemented properly when governance systems of a country are malfunctioning or corrupt. Moreover, pressure on ODA made it very difficult politically to keep up the levels provided for regular assistance, let alone to find new money for climate adaptation, and therefore some relabeling did occur.⁵² Other salient questions were if, and how, private funding would be secured, and – perhaps most importantly – in what way the (possible) funding would be allocated and distributed.

On this issue of the governance of climate adaptation finance, the North-South divide has intensified over the years. Developed countries favor a substantial role for existing institutions, notably the World Bank, considering they are the largest funders of this organization. This is also reflected in them having a larger weight in the decision-making processes of the Bank. Developing countries distrust the existing institutions, and prefer new institutions in which they have at least an equal say.⁵³ One would expect the countries who pay to dominate in such disputes, but in the political reality of the climate negotiations, the funding provided is also used, at least by the EU, as a means to obtain support and concessions for mitigation.⁵⁴ As a result, finance for adaptation has become a bargaining chip for developing countries. Moreover, developed countries have acknowledged the importance of ownership as part of a broader aid effectiveness agenda.⁵⁵ For these reasons, whether the governance of funds is perceived legitimate is a tricky issue, not only from a perspective of obtaining donor money, but also from a perspective of recipients considering the funding useful and sufficient to support the push for mitigation by the EU and others.

The legitimacy of the (governance of) three types of funds will be analyzed: those falling under the auspices of the World Bank, and the experiences with the Adaptation Fund and the recently established Green Climate Fund respectively. Furthermore, it should be noted that climate finance is also channelled through national development agencies, both those based in donor and recipient countries.⁵⁶

⁵² For instance, in the case of the EU where development aid was double-counted as climate aid, cf. internet: <http://www.euractiv.com/specialreport-un-development-go/eu-admits-double-counting-climat-news-530583>.

⁵³ Athena Ballesteros, Smita Nakhoda, Jacob Werksman and Kaija Hurlburt, *Power, “Responsibility, and Accountability: Re-Thinking the Legitimacy of Institutions for Climate Finance”*, *World Resources Institute* (2010).

⁵⁴ Sivan Kartha, Preety Bhandari, Louise Van Schaik, Deborah Cornland and Bo Kjellén, “Adaptation as a Strategic Issue in the Climate Negotiations”, *European Climate Platform Report*, no. 3 (November 2006).

⁵⁵ The provisional agenda is published at internet: <http://unfccc.int/2860.php>.

⁵⁶ For example, the Swedish International Development Cooperation Agency (SIDCA), International Development Association (IDA), Department For International Development (DFID), and the Indonesia Climate Change Trust Fund.

5.1 The Good "Old" World Bank Funds: The GEF and CIFs

The Global Environment Facility (GEF) has been in operation since 1994, and from then on has been the interim financial mechanism of the UNFCCC. The governance and management of two KP funds, the Least Developed Countries Fund (LDCF) and the Special Climate Change Fund (SCCF), is also carried out by the GEF. The GEF was designed as an interim body, considering that, from the early days on, countries could not agree on it being the prime institution for financing climate projects. More specifically, developing countries distrust the GEF as an institution of the West, despite a roughly equal distribution of seats between developing and developed countries in the GEF Council, and decision-making based on a double-weighted majority of 60% of all participants, and 60% of contributors (even though never used).

The GEF finances the incremental costs of projects, i.e. the part of the project that generates "global environmental benefits", leaving the remainder for mainstream domestic and international sources. In practice, it often proves difficult to determine the incremental costs. The GEF is criticized for not being accountable to the UNFCCC COPs, as it makes financing decisions rather autonomously, and this is also the case for its implementing agencies that disburse the funds for the projects. Hence, there is no guarantee that funding priorities are in line with preferences of (developing) countries who are member of the UNFCCC, and negotiate in this body over the need to finance adaptation projects in return for concessions on mitigation. A specific point of concern is the system the GEF uses for the allocation of resources to specific countries in which the preferences of donor countries would dominate, and which would be cumbersome for recipient countries. During the negotiations of the fourth GEF replenishment the US made its contribution conditional upon a Resource Allocation Framework being agreed to.⁵⁷ This framework is little appreciated by developing countries. Therefore, despite recipient countries being relatively well represented at the formal level, they do not feel represented in key decisions on priorities of the GEF, and the way its funds are disbursed and accounted for.

The World Bank, sometimes jointly with other multinational development banks and/or donors, also manages a number of climate investments funds (CIFs). Not all of them focus on adaptation. The governance of the CIFs replicates the design of the GEF and the Multilateral Fund for the Montreal Protocol (on ozone substances). They are governed by small Trust Fund Committees with an equal number of representatives from contributors and recipients. In some of the committees, representatives of civil society have a seat or observer status. Decisions are taken by consensus, and meetings of the committees usually take place behind closed doors. This reduces the transparency and accountability of the CIFs towards civil society. The CIFs are also operating autonomously from the UNFCCC COPs, reducing their accountability even further.

⁵⁷ Ballesteros *et al.* (2010)

In general, the World Bank and GEF are trusted by their contributors since they traditionally control their decision-making bodies and work with advanced systems to measure and manage the impacts of investments. The degree of accountability towards donor countries and their views on the World Bank's effectiveness therefore is considered quite high. Developing country recipients, however, have been frustrated by the detailed procedures for resource allocation, and the focus on generic rather than country specific concerns. Moreover, they are sometimes confronted with loans and project requirements that consultants from contributor countries have designed, which the latter are best equipped for to implement. However, recipients would prefer direct funding for local businesses and aid providers instead of hiring consultants from donor countries.

In terms of effectiveness, a crucial question is whether the lack of trust of developing countries, and the alleged administrative burden accompanying implementation, hinders the contribution of the funds to the adaptation challenge. In general, an independent overview of the effectiveness of the funds is absent, but this is also caused by the general challenge to measure aid effectiveness. The World Bank has proposed to monitor overarching impacts on mitigation of greenhouse gasses at the country level, such as the average carbon intensity of the sector or country, the share of low-emission technologies, or the average efficiency of coal-and gas-fired plants. These indicators proved quite controversial with developing countries, because they extended beyond the lifetimes of financing provided by World Bank-related funds, and it would be difficult to make a causal link between funded projects and macro-trends. For adaptation, the situation would probably be even more difficult with indicators being less tangible. As a result of the deeply embedded distrust of the "good old" World Bank and GEF by developing countries, its overall legitimacy was undermined and new funds were established.

5.2 New and Innovative: The Adaptation Fund and Green Climate Fund

Because of dissatisfaction with the GEF and World Bank funds, states decided to establish a new governing body for the Adaptation Fund of the Kyoto Protocol. This fund still received administrative support from the GEF.

The Adaptation Fund can be considered a so-called innovative financing mechanism. It is financed primarily by a two percent levy on credits earned by implementing offset projects under the Clean Development Mechanism (CDM). In view of this mechanism being linked to the KP, its significance has lowered with the "decay" of the KP. The ability to use the CDM for meeting emission reduction requirements under the EU emissions trading scheme initially secured a flow of (envisaged) CDM projects, but the collapse of the EU carbon price scaled down the interest of European companies to invest abroad in emission reduction projects. As a result, the AF never received as much resources as originally envisaged. Up until 2013, the income from the levy on CDM projects was 188 million dollar with 150 million dollar added by voluntary contributions from developed countries.⁵⁸ Nevertheless, to date, it is the

⁵⁸ Nella C. Trujillo and Smita NakhodaI, "The Effectiveness of Climate Finance: A Review of the Adaptation Fund", *ODI Working Paper* (March 2013).

only fund that does not rely solely on contributions of states. In fact, a large share of its income can be considered private sector money, in consideration of mainly companies investing in CDM projects.⁵⁹ Another specificity about the AF is that it falls outside the sphere of influence of the US seeing that it has not ratified the KP.

The AF is managed by the GEF, but governed by the specifically established Adaptation Fund Board. In this Board, 16 representatives of contributor and recipient countries are equally represented. It is accountable to the COP, even though issues surrounding its “international legal personality” were never fully solved, leaving questions of accountability on possible intended and unintended impacts of the AF unanswered.⁶⁰ Since the AF has no traditional contributors, the dynamic of this fund is rather different from other climate funds. On the one hand, it eases the need for transparency on financial flows and decision-making and accountability towards the funders. On the other hand, recipient countries feel more ownership and responsibility to ensure the effectiveness of funded projects. The project approval process is much simpler, and made transparent by publishing program proposals on the website of the AF before they are discussed by the Board. This also allows for scrutiny by civil society groups, and business who essentially are excluded from the governance of the AF.

At the Copenhagen Summit, parties agreed to depart even one step further from the World Bank and the GEF. They decided to establish a new fund, the Green Climate Fund (GCF). Subsequently, they spent a considerable amount of diplomatic arm-wrestling on its governance structure, and even on where the fund would be located. Eventually, it was decided that its seat would be in South Korea, formerly a developing country, but nowadays a medium-sized economic frontrunner. According to Ballesteros *et al.*, for a new fund to be legitimate, it should be based on a balanced representation of all countries within a transparent system of governance, be accountable to the COP, have sufficient funding from the wealthier countries, be guided by independent scientific and technical advice, award funding on the basis of projects proposed by developing countries, and aim at cost-effective projects that do not duplicate efforts of others.⁶¹

The set-up of the GCF is broadly in line with these requirements. The principles of transparency, effectiveness, and accountability are even explicitly stated in the working definition of the GCF.⁶² The GCF Board consists of 24 members, equally balancing developing and developed economies. Four representatives of non-state actors are invited to board meetings as active observers: two civil society representatives, one each from developing and developed countries; and two private sector representatives, one each from developing and developed countries.⁶³ The non-

⁵⁹ Marco Grasso, “The Role of Justice in the North-South Conflict in Climate Change: The Case of Negotiations on the Adaptation Fund”, *International Environmental Agreements*, vol. 11 (2011).

⁶⁰ Ballesteros *et al.* (2010).

⁶¹ Ballesteros *et al.* (2010).

⁶² Transparency International, “Ensuring An Efficient, Effective and Equitable Green Climate Fund”, *Working Paper For the 17th Conference of the Parties* (January 2011).

⁶³ Transparency International (2010).

state actors do not have voting rights, nor are they allowed to intervene during discussions on funding decisions, which makes one wonder how “active” the observer status will be. On the website of the GCF, the representatives of non-state actors are not listed as Board Members.

One of the aims of the GCF is to raise innovative finance with private sector funding being part of its revenues. However, with their representatives not likely to obtain a great say in funding decisions, this may turn out to be difficult to achieve. Moreover, it is not yet clear whether meetings of the GCF will be recorded and/or broadcasted online, which would increase the transparency.

Some promising plans for monitoring the GCF and for ensuring its accountability towards the COP exist. These include the establishment of an independent integrity unit, investigating allegations of fraud and corruption, and a mechanism receiving complaints related to the operation of the Fund.⁶⁴ The Board will report annually to the COP on various operational measures, including an overview of what funding allocation decisions were made.⁶⁵

The GCF was supposed to start functioning in the beginning of 2014. Ahead of this date, the start-up capital of a promised 30 billion dollars was supposed to be donated, but in February 2013, only around 7 billion of this money actually had been delivered.⁶⁶ This raises major concerns relating to the estimated 100 billion the GCF is supposed to channel each year once up and running.

5.3 Is Overcoming the North-South Divide Making the Governance of Climate Finance More Legitimate?

Of the currently operational funds, the governance of the AF is most representative, transparent and accountable, but given the limited amount of money that eventually became available in this fund, its effectiveness can be disputed. The GEF and CIFs are probably more effective, but not trusted by recipient countries. The question is now whether the newly established GCF will be able to be, at the same time, representative, transparent, and accountable, and effective in raising large sums of money for projects contributing to mitigation and adaptation. In this respect, a significant question is not only whether public funds will be made available, but if private funds will become available as well. From this perspective, it is not very promising that representatives of the private sector are not well represented in the governance structures of the GCF, which essentially is a funding body dominated by states’ representatives. Additionally, climate finance is channeled by national development agencies, and some funding is made available by development NGOs. Private sector funding thus far appears limited to the few CDM projects that were implemented.

⁶⁴ Governing instrument for the Green Climate Fund, XI para 68 and 69.

⁶⁵ See, for example, the UNFCCC 2012 Annual Report. Internet: <http://unfccc.int/resource/docs/2012/cop18/eng/05.pdf>.

⁶⁶ Internet: <http://www.ipsnews.net/2013/03/civil-society-wants-bigger-role-in-green-climate-fund-planning>.

6. Conclusion

Transnational governance in the field of climate change consists of a wide variety of organizations and initiatives, covering different aspects and involving a large number of different actors. In this web, states gathering in annual UNFCCC COP meetings is sometimes portrayed as a relic of the past. However, the effectiveness of voluntary regulatory initiatives and financing still appear closely linked to decisions made in these meetings.

In this paper, we have only looked at the most important governance arrangements and focused on their legitimacy. The IPCC was examined both as providing legitimacy to negotiations on emission reductions and finance for adaptation, and having its own legitimacy problems, relating to its credibility in providing a balanced assessment of scientific evidence on climate change. Its representativeness is contested, even though it could be argued that its extensive review process, in which representatives of state governments are responsible for final approval of texts, is quite transparent and accountable.

The UNFCCC system, at first sight, appeared quite representative as well, inasmuch as all states can block decision-making on the basis of their national preferences. However, in reality, important decisions taken in the UNFCCC often are cooked up in advance in sessions between subsets of countries, and the consensus rule is broadly perceived as a factor undermining any decisions being taken. Negotiations taking place in backrooms diminish the transparency of the UN process, but this was restored by extensive leaking of what happened in these backrooms. Nevertheless, on the spot, the large number of non-state actors present at COPs do not have direct access to the real negotiations. The agreement on a continuation of the KP can hardly be considered representative, for it contains only commitments for the EU and a few others representing in total a share of less than 15% of global greenhouse gas emissions. The traditional climate change regime consisting of the UNFCCC and Kyoto Protocol can therefore hardly be considered legitimate.

The MEF, as an alternative form, and representing the new wave of minilateralism, proved to be neither very representative, nor very effective, transparent, accountable, and open for true deliberation. It appears to mainly provide a platform through which the US can argue to stay internationally engaged on the issue of climate change, despite its withdrawal from the KP.

A wide variety of initiatives by civil society and the private sector have emerged in the field of climate change, but a comprehensive overview of their impact is lacking. They are mainly voluntary, and therefore contingent on continuing interest and support of multinationals. In terms of representativeness, most of the initiatives are rooted in Western societies, and through involvement of NGOs, they were legitimized and made more transparent.

In connection with the governance of climate finance, the predominance of state-actors is striking, not only from a representativeness and deliberation perspective, but also in light of the objective of increased private sector funding. The traditional funds,

the GEF and the World Bank's CIFs, are considered donor-driven by recipient countries, and administratively cumbersome. They may be transparent and accountable to developed countries, but they are distrusted by developing countries. The AF, funded in part by a two percent levy on carbon offset projects implemented (predominantly) by companies in developing countries (the so-called CDM), is preferred, but its revenues have been low due to the collapse of the EU's carbon price to which it is linked. The effectiveness of this fund is therefore low. Expectations concerning the newly established GCF are higher in this regard, as governments have pledged to make considerable resources available for climate finance channelled through this fund. Thus far, only a portion of this finance has been received, and in view of the economic crisis in many donor countries and the debate on aid effectiveness, this may not change in the short term. But, only time will tell considering the GCF will only be operational from this year onwards.

Looking ahead, the 2015 COP in Paris may turn our perceptions of legitimacy of transnational governance arrangements in the field of climate change upside down. In particular, the notion of effectiveness in terms of legitimizing climate governance institutions is determined by this meeting generating a tangible impact, but also in this respect effectiveness depends on the eye of the beholder. Those who consider climate change one of the world's biggest challenges will evaluate the results differently than those who consider the issue to be exaggerated.

Transnational Governance and Democratic Legitimacy

The Case of Global Health

by Louise van Schaik and Remco van de Pas

1. Introduction

The democratic legitimacy of transnational arrangements for global health is contested. The traditional United Nations' body for health, the World Health Organization (WHO), is subject to severe criticism regarding its focus, effectiveness, and independence from country specific, and private sector interests. It is confronted by budget cuts and a fundamental reorganization. Other major actors, such as the Global Alliance for Vaccines and Immunization (GAVI), Global Fund and the Bill and Melinda Gates Foundation (hereafter The Gates), make significant contributions to international health projects,¹ but they can be criticized for not being representative and accountable. The global health landscape in general has become an intransparent patchwork of organizations and interests, where objectives of public health, development, economy, security, and foreign policy dominate to various degrees, and sometimes clash. This paper discusses the principal arrangements for transnational governance in the area of global health, and analyses their democratic legitimacy using five different prisms: (1) representation; (2) accountability; (3) transparency; (4) effectiveness; and (5) deliberation.

Transnational governance is a catch-all concept that includes multiple forms of institutional innovation, and often informal ways to address transnational problems and challenges.² The concept illustrates the increased recognition that thinking and action on global issues extends beyond the traditional UN-based multilateral system of one nation, one vote. It is a recognition of states no longer being able to tackle international problems effectively (on their own). They require solutions in which relevant stakeholders, such as the private sector and non-governmental organizations (NGOs), are not only involved in deliberations, but also take up commitments and responsibilities. They are involved in both policy implementation and policy shaping. The question is how this relates to the democratic legitimacy of international efforts.

In the field of global health, the WHO is under siege on account of its spending having decreased, and its credibility is disputed by suggestions about the pharmaceutical industry having infiltrated the organization. Public-private partnerships, such as the Global Fund and GAVI, undermine its authority, and the

¹ See for an overview: Nirmala Ravishankar, Paul Gubbins, Rebecca J. Cooley, Katherine Leach-Kennon, Catherine M. Michaud, Dean T. Jamison, and Christopher J.L. Murray, "Financing of Global Health: Tracking Development Assistance For Health From 1990 to 2007", *The Lancet*, vol. 373, no. 9681 (June 2009). See also Declan Butler, "Revamp For WHO", *Nature*, vol. 473 (May 2011).

² Peter van Ham, "Transnational Governance and Democratic Legitimacy – A Conceptual Overview", The Hague Institute for Global Justice and the Netherlands Institute of International Relations "Clingendael", 2014.

World Bank, the G20, and the Organization for Economic Co-operation and Development (OECD), increasingly encroach upon its remit. Donors increasingly prefer to channel their funds through the new transnational governance structures, since they can more easily control them.³ They are also preferred by those advocating a more “neo-liberal” approach, based on lending facilities and innovative financing,⁴ as opposed to a more “interventionist” approach, focused on international norm-setting, public health regulation, and scaling up development assistance for health.⁵ Another difference is their focus on combating specific diseases, or groups of diseases, rather than improving the quantity and quality of health systems generally. The rise of multiple new actors in the global health system poses questions about the roles various organizations should play, the rules by which they should play, and who should set those rules.⁶

At the same time, the treaty-making function of WHO has been reinvigorated with the revision of the International Health Regulations (IHR) for infectious diseases, the Framework Convention on Tobacco Control (FCTC), and the Pandemic Influenza Preparedness (PIP) framework. These multilateral processes and debates, on for instance the relationship between intellectual property rights and research into diseases disproportionately affecting the poor,⁷ have proved cumbersome, and evoked a debate on how to incorporate legitimate interests of non-state actors in these processes. It is likely that, in the near future, pressure will mount for new international standards to address factors contributing to non-communicable diseases linked to inter alia the “obesity pandemic”. This could mean the launching of a new era of measures to promote increased regulation and taxation of unhealthy consumption (levels) of processed food and alcohol. Newer issues, such as the interlinkages between animal, human, and ecological health, demand increased international standard-setting as well, something which transnational governance arrangements that are not able to offer “hard law” solutions cannot offer. The question is whether the WHO still is considered the strong, reliable, and credible organization that has the constitutional mandate to negotiate such solutions for global health problems.

³ Devi Sridhar, “Who Sets the Global Health Research Agenda? The Challenge of Multi-Bi Financing”, *PLoS Medicine*, vol. 9, no. 9 (2010).

⁴ Mark Dybul, Peter Piot, and Julio Frenk, “Reshaping Global Health”, *Policy Review*, vol. 173, (July 2012), p. 3.

⁵ Lawrence O. Gostin, Eric A. Friedman, Gorik Ooms, Thomas Gebauer, Narendra Gupta, Devi Sridhar, Wang Chenguang, John-Arne Røttingen and David Sanders, “The Joint Action and Learning Initiative: Towards a Global Agreement on National and Global Responsibilities For Health”, *PLoS Medicine*, vol. 8, no. 5 (May 2010).

⁶ Nicole A. Szelzák, Barry R. Bloom, Dean T. Jamisonm, Gerald T. Keusch, Catherine M. Michael, Suerie Moon and William C. Clark, “The Global Health System: Actors, Norms, and Expectations in Transition”, *PLoS Medicine*, vol. 7, no. 1 (January 2010).

⁷ John-Arne Røttingen and Claudia Chamas, “A New Deal For Global Health R&D? The Recommendations of the Consultative Expert Working Group on Research and Development”, *PLoS Medicine*, vol. 9, no. 5 (May 2012).

This paper seeks to identify which governance mechanisms can deal most effectively with global health challenges, and their level of legitimacy. It will specifically look at the ongoing debate on the WHO reform, and what this tells us about the legitimacy of this traditional UN body in contrast to new forms of transnational governance. With regard to transnational governance arrangements in the field of global health, a selection of key players is made: the World Health Organization,⁸ Global Fund, the GAVI Alliance, and the Gates Foundation. While the first is part of the UN family, the latter three are not, but they are nevertheless considerable funders of international health programs. They are public-private partnerships (Global Fund & GAVI), or completely private (The Gates). This allows us to make a comparison of their legitimacy, and to look at their interlinkages and contextual determinants in relation to this concept. We have chosen to examine these four institutions, as they have been at the center of the changing global health landscape over the last decade, with the understanding that this selection does not provide a full picture of the complex global health landscape. In terms of expenditure, the World Health Organization spent (or envisaged to spend) 2,000 million US dollars in 2012, whereas the Global Fund spent 3,475, the GAVI Alliance 934, and The Gates 1,485 million. Other big international funders were the World Bank, UNICEF, Doctors Without Borders, Oxfam International, and the Wellcome Trust.⁹

2. WHO: Organization Under Siege

For a number of years, the WHO has been subject to severe debate on reforming the organization and the way it currently functions, which is closely linked to financial constraints imposed by a freeze of the assessed contributions of WHO member states since the mid-1980s. An important aspect in the most recent debates on the WHO is that its legitimacy would be undermined by: 1) inadequate finances and a lack of transparency and accountability towards the member states; 2) unjustified private sector interest influence; 3) ineffectiveness due to its intergovernmental character and regional structure; 4) a lack of clear organizational priorities; 5) inadequate civil society involvement; and 6) other international actors becoming increasingly active in the field of global health.¹⁰ The organization would no longer be able to act as the directing and coordinating authority on international health work for global health, as described in article 2 of its constitution.¹¹

2.1 Inadequate Finances and a Lack of Transparency and Accountability

⁸ Including its partnerships, sub-entities and treaties negotiated within its remit, such as the Stop Tuberculosis Partnership (Stop TB), UNITAID, Global Outbreak & Response Network (GOARN), FCTC and IHR.

⁹ Julio Frenk and Suerie Moon, "Governance Challenges in Global Health", *The New England Journal of Medicine*, vol. 368, no. 10 (March 2013).

¹⁰ Charles Clift, "The Role of the World Health Organization in the International System", *Chatham House Centre on Global Health Security* (February 2013); GAO, "World Health Organization: Reform Agenda Developed, But U.S. Actions to Monitor Progress Could be Enhanced", *United States Government Accountability Office Report* (July 2012).

¹¹ Constitution of the World Health Organization, July 22, 1948.

Several sources indicate the financial troubles the WHO finds itself confronted with. In its WHO-strategy, Sweden argues that the WHO's legitimacy is undermined by accountability issues regarding the allocation of resources.¹² Budget control was found to be weak, and operations only partly governed by decisions of the WHO's official governing bodies – the World Health Assembly (WHA) and Executive Board (EB). Financers of voluntary contributions would form a parallel governance mechanism. This is in stark contrast with the 1970s, when the UN had a more prominent stance on poverty eradication and social justice, which for the WHO culminated in the landmark Alma Ata declaration on Primary Health care. The WHO was then largely financed by contributions provided by its members, assessed according to their population numbers and GDP, the so-called assessed contributions.

The trend towards more multilateral public policies regulating the role of the different and diverging interests on the health agenda was undermined in two ways. In response to the perceived politicization of the UN organizations, in 1984, the Geneva Group (comprising the eleven major donors of the UN agencies, including the US and several European states) set out to restrict the growth of international agency budgets, such as that of the WHO, to zero in real terms. A major factor in this was US opposition to the WHO's essential drugs policy, and the code for the marketing of breast milk substitutes in 1982.¹³

Secondly, the World Bank (WB), with its macroeconomic and neo-liberal culture, and the establishment of a Population, Health, and Nutrition department in 1979, completely changed the landscape of global health in the 1980s. In one decade, the WB, whose governance structures are mainly dominated by wealthy OECD countries, was lending a multiple of the WHO's annual budget to the health sector in lower income countries. The WB's intrusion into the health domain has been the most sophisticated and structural response to the WHO's position, particularly with respect to its endeavor to promote "Health for All".¹⁴

This has led to a current situation in which the WHO relies on the voluntary contributions of Member States, and the sponsors of the WHO largely determine the organization's priorities through funding tied to specific projects or programs. Voluntary contributions now make up most of the organization's budget, and most of these funds are earmarked. Nearly half of it is said to come from non-state donors. Upon closer inspection, only a very limited amount is paid directly by the industry (-supported foundations), while most of it is coming from private philanthropic

¹² Swedish Ministry of Health and Social Affairs, *Sweden's Strategy For WHO 2011-2015* (February 2011).

¹³ David Legge, "Future of WHO Hangs in the Balance", *British Medical Journal*, vol. 345 (October 2012).

¹⁴ Remco van de Pas and Louise van Schaik, "Democratizing the World Health Organization", *Public Health*, vol. 128, No. 2 (February 2014), pp. 195-201.

foundations – such as The Gates, Rockefeller, and Bloomberg –, and other international organizations, such as UNICEF and UNDP.¹⁵

Member States of the WHO approve multi-annual and bi-annual budgets, but these budgets are not the final guidance on the allocation of funds. One reason is that a large part of the money still needs to be raised during the budget time, another one is the WHO not being accustomed to provide transparency on how it has eventually spent its budget.¹⁶ A proper evaluation of programs hardly ever takes place, resulting in a lack of insight on whether resources are spent effectively and efficiently. For member states, which use taxpayers' money to fund the organization, this is hardly satisfactory, and therefore they demand a greater degree of transparency and accountability in an ongoing effort to reform the WHO.¹⁷

Some measures were decided upon to improve the accountability and evaluation functions of the WHO, such as a strengthening of the Program, Budget and Administration Committee (PBAC). Another important reform has been the establishment (in 2013) of new financing mechanisms, a so called finance dialogue, in which the World Health Assembly approves the entire bi-annual budget (the combination of assessed and voluntary contributions). Afterwards, in a WHO facilitated pledging conference, countries come together with non-state donors to agree in a transparent way on funding the complete program.¹⁸

These measures may improve the situation, yet fail to solve the inherent legitimacy problem of the WHO that consists of it being governed and considered as a traditional intergovernmental body, whereas it spends much of its time serving non-state actors and a small selection of states which pay for its activities. Its state-based membership may complain about this, but as long as they are unable to step up their own financial contributions and are unwilling to see a halving of the organization's activities by disallowing it to accept external funding, they cannot do much about it. Moreover, even if they strengthen their grip on the WHO, still many international health activities, i.e. those of other organizations, are left unattained, considering the WHO is currently not directing and steering them.

2.2 Unjustified Private Sector Influence

The WHO relies on its intergovernmental nature to justify its credibility as a public health interest defender for a number of its tasks, including norm-setting, surveillance, and providing independent technical advice. It is the most universal, and thus

¹⁵ World Health Organization, *Voluntary Contributions By Fund and By Contributor For the Year Ended 31 December 2012, Annex 66th World Health Assembly*. A66/29 Add. 1 (April 2013).

¹⁶ Charles Clift, "What's the World Health Organization For?, Final Report from the Centre on Global Health Security Working Group on Health Governance", *Chatham House Report* (2014).

¹⁷ Department for International Development, "Assessment of the WHO Multilateral Aid Review Ensuring Maximum Value For Money For UK Aid Through Multilateral Organizations", *Multilateral Aid Review Assessment Summaries* (March 2011), p. 206; "Institutional report World Health Organization (WHO)", *Multilateral Organisation Performance Assessment Network (MOPAN)* (2013).

¹⁸ World Health Organization, *Financing of the WHO*, 66th World Health Assembly, A66/48, (May 2013).

representative, organization for health, if equality of states is taken as a way to measure representativeness, and its legitimacy is to a large extent based on its worldwide membership of states. However, its intergovernmental character contrasts with calls for an increased involvement of private sector actors to strengthen its effectiveness. A debate on public-private cooperation dates back to the time when Gro Harlem Brundtland was the Director General of the WHO. In 1997, the newly elected UN Secretary-General Kofi Annan advocated strengthening ties with the business community as a particular focus of his UN reform proposal. He launched the Global Compact initiative as the flagship of this trend at the 1999 World Economic Forum in Davos. Although the WHO never formally joined the Global Compact, it developed closer ties with the private sector via the creation of a number of partnerships, such as the Roll Back Malaria initiative and collaboration with pharmaceuticals under the Special Program for Research and Training in Tropical Diseases (TDR). Dr. Brundtland justified the restructuring of the global health arena at the 2002 World Health Assembly with the claim that there was no way to solve “complex health problems” except through these new partnerships. She asserted that “whether we like it or not, we are dependent on our partners ... to achieve health for all.”¹⁹

Ever since, concerns about the allegedly unjustified involvement of private sector actors in the WHO’s activities have been expressed. For instance, according to a critical report of the Council of Europe’s Parliamentary Assembly, the WHO’s impartiality during the H1N1 (“Mexican flu”) pandemic of 2009-2010 can be put into question.²⁰ The report considers that the WHO has overrated the seriousness of the pandemic, and relates this to pharmaceutical industry interests, which may have influenced its decision-making. The WHO was found to be non-transparent pertaining to possible conflict of interests of participants of important committees advising the WHO on the severity of the pandemic (and its definition), and the use of medicines and vaccines to combat it. For similar reasons, Indonesia, in 2007, refused to share samples of the H5N1 virus with the WHO before obtaining the guarantee that once they were shared with pharmaceutical producers, these would also make the resulting medicine available at a reasonable cost.²¹

Recently, a new debate has emerged in respect of the WHO being susceptible to interests of producers of alcoholic drinks, and unhealthy processed foods and beverages. After the establishment of the Framework Convention on Tobacco Control (FCTC), contacts with tobacco producers are strictly forbidden for WHO staff, but they are still on speaking terms with the alcohol industry and producers of unhealthy processed food and beverages. In February 2013, a group of worried scientists and experts issued a *Statement of Concern* on the increasing involvement of the alcohol

¹⁹ Judith Richter, “WHO Reform and Public Interest Safeguards: An Historical Perspective”, *Social Medicine*, vol. 6, no. 3 (March 2012).

²⁰ Council of Europe, *The Handling of the H1N1 Pandemic: More Transparency Needed*, Report of the Parliamentary Assembly of the Council of Europe (June 2010).

²¹ Adam Kamradt-Scott and Kelly Lee, “Global Health Security Interrupted: The World Health Organization, Indonesia and H5N1”, *Political Studies* (forthcoming).

industry in public health activities.²² The statement was addressed to the WHO as a reaction to a declaration of industry on the *WHO's Global Strategy to Reduce the Harmful Use of Alcohol*. According to the group, industry efforts compromise the work of the WHO. They call for stronger conflict of interest policies to avoid partnerships with producers of beer, wine, and spirits, their “social aspects” organizations, and other groups funded by the commercial alcohol industry.

An influential article in *the Lancet* moreover illustrated how companies, such as PepsiCo, Kraft, and SAB Miller seek to avoid regulation by funding research – directly or through associated organizations (i.e. the “social aspects” organizations) –, advanced media strategies, and lobbying governments and the WHO.²³ According to these researchers, their strategies are similar to the ones used by the tobacco industry before they were banned. The sugar industry, for instance, would have threatened the WHO to lobby for the US to completely withdraw its funding, because of the *WHO strategy on diet, physical activity, and health* highlighting a strong link between sugar and obesity. They argue that it would now be time to put an end to the illusion of industry self-regulation, and consider stronger measures.

The legitimacy of the WHO as a public health organization has thus been oppugned owing to the allegations regarding industry interests influencing the policies of the organization. Even according to a report by the US Government Accountability Office,²⁴ the WHO's policies on conflict of interest and information disclosure are insufficient to deal with the growing complexities of global health. This is despite the US and others, such as Japan, Canada, Switzerland, Norway, and EU countries, being relatively open to higher degrees of cooperation between the WHO and private sector.²⁵ To address the concerns over unjustified private sector influence, the WHO presented a document on the relationship with private commercial entities to the Executive Board in May 2013 as part of the ongoing reform of the organization.²⁶ The ensuing debate evolved over whether or not to distinguish between the different non-state actors collaborating with the WHO, which would imply different policies for nonprofit NGOs and commercial organizations. Most Western countries prefer not to distinguish, whereas the majority of countries from other regions do so prefer. The

²² Global Alcohol Policy Alliance, *Statement of Concern: The International Public Health Community Responds to the Global Alcohol Producers' Attempt to Implement the WHO Global Strategy on the Harmful Use of Alcohol* (October 2012).

²³ Rob Moodie, David Stuckler, Carlos Monteiro, Nick Sheron, Bruce Neal, Thaksaphon Thamarangsi, Paul Lincoln and Sally Casswell, “Profits and Pandemics: Prevention of Harmful Effects of Tobacco, Alcohol, and Ultra-Processed Food and Drink Industries”, *The Lancet* (February 2013). Internet: <http://people.ds.cam.ac.uk/ds450/details/LancetProfits.pdf>.

²⁴ GAO (2012); *Ibid*.

²⁵ Louise G. van Schaik and Samantha Battams, “The EU's Role in Creating a More Effective WHO”, in Edith Drieskens and Louise G. van Schaik (eds.), *The EU and Effective Multilateralism: Internal and External Reform Practices* (London and New York: Routledge, (forthcoming).

²⁶ World Health Organization, *WHO Governance Reform*, 133rd Executive Board Meeting (May 2013).

debate will be continued at a next board meeting, while in the meantime the secretariat will consult with member states, NGOs, and the private sector.²⁷

2.3 WHO's Effectiveness Undermined By Its Intergovernmental Character and Regional Structure

The WHO is the only inclusive organization for global health with universal membership.²⁸ Its effectiveness is inherently hampered by the fact that all 194 Members have blocking power. For the vast majority of activities, and for accomplishing joint objectives set in treaties and resolutions agreed upon at the World Health Assembly, the organization, just like other international organizations, has to rely on their proper and adequate implementation. Only in case of a reasoned suspicion of a country not acting adequately in response to a (possible) outbreak of a dangerous and infectious disease, some weak mechanism has been agreed upon to send in international observers to monitor and report on the situation (in the context of the International Health Regulations). Both the International Health Regulations and the FCTC, the two legally binding WHO agreements, do not include dispute settlement mechanisms. Instead, they promote and urge active cooperation between states and the WHO, without possibilities for external enforcement of public health measures.²⁹

Furthermore, WHO predecessors have been the Regional Sanitary Offices, and this regional structure has been maintained when the WHO was founded in 1946. The six regional offices of the WHO (PAHO, EURO, EMRO, AFRO, SEARO and WPRO) have their own governance structures (regional committees). Coordination and coherence between the WHO headquarters and the regional offices have been a matter of concern, with fundraising and allocation not always connected to global strategic objectives. According to DeCoster, a case can be made for strong regional and country offices, if only to be able to provide context-specific support. Needs in the AFRO region are obviously very different from needs in the EURO or SEARO region, and priorities of work will differ.³⁰ Nevertheless, the WHO's weaknesses are most obvious in the AFRO regional office, and in the country support it provides (or fails to provide) in some sub-Saharan African countries. This lackluster performance is a main reason why the WHO lost support in the African region. The regional structure therefore can be considered a crucial impediment to the WHO's effectiveness. This view is confirmed in several other sources on the functioning of the WHO.³¹

²⁷ International Breast Feeding Action Network, *WHO Secretariat Fails to Act On WHA Decision On Relations With Non-State Actors*, A digest of discussions at the 133rd Executive Board on WHO's engagement with non-state actors (NSA). Internet: http://info.babymilkaction.org/sites/info.babymilkaction.org/files/Digest%20May%20EB%202013_FA ILSTOACTFINAL.pdf.

²⁸ Frenk and Moon (2013).

²⁹ *The International Health Regulations*, May 25, 2005, Part VIII, General provision, Art. 42- 46.

³⁰ Kristof DeCoster, "Is WHO Ready For a Rising Africa?", *International Health Policies* (January 2013).

³¹ See for an overview: Clift (2013).

2.4 Debate on WHO Priorities

Developing countries complain that the WHO is driven excessively by the interest of Western donors. These donor countries, on the contrary, criticize the WHO for having engaged into development aid activities to the detriment of its norm-setting role, which is considered of most direct relevance to them since it concerns norms and standards for health hazards in their countries. They prefer other UN agencies, the World Bank, bilateral development agencies, and NGOs, to focus on development aid for health, and point to most of the resources of the WHO going to the regional and country offices located in developing countries. At the same time, many of them also use the WHO to implement part of their own development funding for health. Partially as a result of the development efforts, notably concerning the health-related Millennium Development Goals (MDGs), the WHO's mechanisms for stopping bioterrorism and dangerous infectious diseases from becoming pandemics, i.e., the Global Outbreak Alert and Response Network (GOARN) and provisions of the International Health Regulations (IHRs), are said to not receive the investments needed. The problem is most severe in developing countries lacking strong institutions and capacities to detect new outbreaks.³²

On top of this, the WHO is facing extensive budget cuts, and has to adapt to austerity. "The WHO of tomorrow will not be the same hegemonic health powerhouse of the past. It will likely be more decentralized, placing a greater share of the responsibility for health on individual nations. Countries will be compelled to carry the onus for provision of health, including epidemic control, on their own shoulders, increasingly based on domestic revenues."³³

2.5 The Tricky Issue of Civil Society Involvement to Boost Legitimacy

Civil society in turn complains about the intergovernmental and closed character of WHO. This would be a constraint for their involvement, while they carry out a considerable part of the global health work on the ground, and as a result possess considerable expertise and know-how on issues discussed at the WHO. In comparison to other multilateral organizations, NGOs are allowed hardly any speaking time during official meetings of WHO. Member states counter-argue that most civil society groups are funded by the big foundations, specifically the Gates Foundation, and already have a great say through the WHO activities they fund. They consider themselves the legitimate representatives of their citizens. China, for instance, does not see the added value of civil society involvement, also given its own limited experience with them contributing to public policy-making. A proposal for further involvement of civil society was blocked in 2004 at the 57th WHA by a number of member states, including China.³⁴

³² House of Lords, *Diseases Know No Frontiers: How Effective Are Intergovernmental Organisations in Controlling Their Spread?*, Select Committee on Intergovernmental Organisations (2008).

³³ Maxine Builder and Laurie Garret, "Adapting to Austerity: WHO Remodels For 2014", *Devex Editor* (May 2012).

³⁴ World Health Organization, *Policy For Relations With Nongovernmental Organizations*, 57th World Health Assembly, A57/32 (May 2004).

In democratic states, it could be wondered whether international health concerns receive sufficient attention in public debates and election campaigns. National health ministers and parliaments appear most concerned with national, as opposed to international, health, let alone the activities of the WHO. International health matters only feature prominently when a pandemic occurs, and during other times the link of representative democracy is weak. The degree of accountability towards ordinary citizens is indirect at best. In order to include civil society still, countries like Brazil and Thailand have created national health assemblies where a broader range of actors are invited for policy shaping on both domestic and international health issues. Switzerland and the EU have also created fora in which international health policies, including the WHO's, are discussed with civil society.³⁵

2.6 Restoring WHO as Directing and Coordinating Authority

Despite all its shortcomings, the WHO is still perceived a relatively legitimate body by many observers, on account of being allegedly more neutral than any national health or development agency, company, or NGO. Even though its effectiveness may be jeopardized by inefficient (financial) processes and a lack of resources for all the global health challenges confronting humanity, it is probably still the most authoritative and expert-based organization to advocate and promote public health matters. In this respect, it being widely criticized for not being able to coordinate and steer other efforts in the area of global health, is worrisome.³⁶ None of the organizations active in the field want to be coordinated, and double work and competition abound. A systems' integrator or network coordinator is absent, and would be useful *inter alia* to identify gaps and new threats, and watch over heavy administrative burdens for recipient countries. It could be a counterweight to a self-sustaining aid community that disconnects from the real health needs, and concentrates only on specific diseases and methods of treatment.

Some mechanisms for coordination were established, such as the International Health Partnership (IHP+), which focuses on operationalizing aid effectiveness in the health sector and is made up of the WHO, World Bank, donor countries, NGOs, and The Gates. Another one is the Health 8 (H8), which is an informal group of eight health-related organizations comprising the WHO, UNICEF, UNFPA, UNAIDS, GFATM, GAVI, the World Bank, and The Gates. It was created in mid-2007 to stimulate a global sense of urgency for reaching the health-related Millennium Development Goals. These efforts are noteworthy, but do not overcome the coordination challenge completely, nor did they reestablish the centrality of the WHO as coordinating and directing organization for international health. The position of the WHO as the prime legitimate international organization for international health matters has eroded over the last two decades. According to Mahbubani, the diminution of the WHO's role

³⁵ World Health Organization (2013).

³⁶ Suerie Moon, Nicole A. Szlezák, Catherine M. Michaud, Dean T. Jamison, Gerald T. Keusch, William C. Clark and Barry R. Bloom, "The Global Health System: Lessons For a Stronger Institutional Framework", *PLoS Medicine*, vol. 7, no. 1 (January 2010).

undermines long-term Western interests.³⁷ The West should have spent the past few decades strengthening the WHO, notably by providing it with more resources. Instead, it starved the WHO thereof. At a time when more complex health matters, such as an epidemic, spread around our global village in a day or two, the weakening of the WHO by western countries can be considered a strategic error.

The WHO is thus subject to severe pressures that undermine both its authority and legitimacy. In addition to financial constraints, it is confronted with fundamental questions regarding its accountability, the way it involves the private sector and civil society, and its position within the overall global health landscape. In the remainder of this paper, we will examine in what way other players operate, and how they can be judged from a legitimacy perspective.

3. Global Fund and GAVI: Big Public Money Belts For Global Health

In 2012, the Global Fund to Fight AIDS, Tuberculosis, and Malaria was the main multilateral funder in global health, channeling approximately three billion US dollar annually – 2/3 of all international financing for tuberculosis and malaria, and 1/5 of all international financing for AIDS. The aim of the Fund is to attract and disburse additional resources to prevent and treat these diseases. The GAVI alliance aims to save children’s lives, and protect people’s health by increasing access to immunization in poor countries. Both the Global Fund and the GAVI alliance receive considerable levels of support from the Gates, and GAVI has even been initiated by this foundation.³⁸ They are largely funded by a limited number of Western donors. The lion’s share of GAVI’s budget, for instance, comes from just three donors: the UK, the Gates, and Norway.³⁹

Global public private partnerships in health (GPPH) emerged in the mid-1990s, at a time when the UN and its member states became more interested in partnerships. The socio-political shifts in several Western countries, known as “the third way”, led the UN to see the benefits of industry as “re-legitimizing the UN”. Harnessing the private sector for human development, was, and is seen, as a way to enable UN agencies to fulfill their mandates by means of funding and advice from the private sector.⁴⁰

The legitimacy of GPPHs remains highly contentious. According to Buse and Harmer, the “inclusion of private actors, both for-profit and not-for-profit, enhances

³⁷ Kishore Mahbubani, *The Great Convergence: Asia, the West, and the Logic of One World* (New York: Public Affairs, 2013), pp. 89-116.

³⁸ See for an excellent account of the establishment of the GAVI from an international relations perspective, Ingstrad K. Sandberg, Steinar Andresen and Gunnar Bjune, “A New Approach to Global Health Institutions? A Case Study of the New Vaccine Introduction and the Formation of the GAVI Alliance”, *Social Science & Medicine*, vol. 71, no. 7 (2010).

³⁹ Ann D. Usher, “GAVI Funding Meeting Exceeds Expectations”, *The Lancet*, vol. 377, no. 1984 (June 2011).

⁴⁰ Kent Buse and Gill Walt, “Global Public-Private Partnerships Part 1: A New Development in Health?”, *Bulletin of the World Health Organization*, vol. 78, no. 4 (January 2011).

the problems of democratic legitimacy in international institutions rather than help to alleviate them, considering private actors contribute to the ‘de-governmentalization’ and the ‘commercialization’ of world politics”.⁴¹

According to Devi Sridhar, there are several ways in which these organizations differ from a traditional intergovernmental organization, which in general make them more attractive to donors.⁴² Firstly, the Global Fund and GAVI are governed by boards consisting of the WHO and other international organizations, civil society representatives, the private sector, and the Gates Foundation. Secondly, unlike the broad mandate of the WHO (“the attainment by all people of the highest possible level of health”), they have narrowly defined mandates that are problem-focused. Thirdly, they are entirely funded by voluntary contributions, allowing for maximum influence of donors on what they pay for. Fourthly, they do not have offices and personnel in recipient countries, which makes them rather flexible and able to operate in relative isolation from (failing) national policies. Finally, they derive their legitimacy from their effectiveness in improving specifically defined health outputs and outcomes in contrast to traditional multilateral agencies, which rely on claims of being representative and the result of state-based deliberations.

The Global Fund and GAVI thus rely on a different type of legitimacy based on effectiveness. They are quite transparent in providing detailed information about their activities to (potential) donors, even though this does not mean that they have been free from corruption and fraud. Given their donor-driven set-up, they can be expected not to be responsive to the development objectives of recipient countries, and thereby to miss opportunities to support and stimulate nationally-funded health initiatives. However, concerning GAVI, an independent assessment conducted by a network of donor countries found that its support of country ownership and its alignment and harmonization of arrangements and procedures with partners were highly valued by survey respondents.⁴³ They considered that GAVI support was aligned with national priorities, and that procedures, such as funding application and reporting requirement, took into account local conditions and capacities.

The Global Fund is considered to be sensitive to national health systems’ priorities and constraints, and to take serious national ownership of the activities it funds as well.⁴⁴ Apparently, both The Global Fund and GAVI consider that being responsive to national health preferences and approaches increases their legitimacy and effectiveness. A large scale assessment of interactions between GPPH and country health systems indicates mixed results. The Global fund and GAVI are praised for leveraging financing, ambition, and speed in attaining the health related MDGs, but at

⁴¹ Kent Buse and Andrew Harmer, “Power to the Partners? The Politics of Public-Private Health Partnerships”, *Development*, vol. 47, no. 2 (January 2004).

⁴² Devi Sridhar, “Who Sets the Global Health Research Agenda? The Challenge of Multi-Bi Financing”, *PLoS Medicine*, vol. 9, no. 9 (2012).

⁴³ Multilateral Organisation Performance Assessment Network (MOPAN), *Organisational Effectiveness Assessment: GAVI 2012* (2012).

⁴⁴ Moon *et al.* (2010).

the same time are encouraged to extend their mandate to health systems strengthening and align to a larger degree their planning to national health policies. Despite the investments by the Global Fund and GAVI, domestic revenues for health have not really increased in many low and middle income countries, and global health financing is levelling off in the wake of the economic crises.⁴⁵

Another point of criticism is their focus on achieving short-term gains, instead of structurally improving the long-term viability of health systems. For instance, a fundamental problem in Sub-Saharan Africa is a shortage of doctors, nurses, and community health workers. This problem is not addressed by setting-up externally funded disease treatment programs and bringing in vaccines. Perhaps even more fundamentally, the Global Fund and GAVI alliance operate as parasites on the knowledge infrastructure and capacity of the WHO. Whilst pretending to be independent, they rely heavily on WHO expertise about, for instance, tuberculosis, and use WHO (and World Bank) country offices for many of their activities. GAVI and the Global fund have so far paid too little attention to a country's macro-economic framework and its health care system. Health systems strengthening, such as training and retention of the health workforce in rural areas, has been included in new funding rounds of GAVI and the Global Fund. These provide a basis for improved direct health care provision, but do not take into consideration the country's legal and policy framework. The reason why the health workforce has not increased considerably in most low and middle income countries is that the wages of (governmental) health staff are often correlated to macro-economic and fiscal factors.⁴⁶ This aspect remains unaffected by the investments by GAVI and the Global Fund.

The contribution of the industry's know-how is said to have been essential to the success of the Global Fund and GAVI alliance.⁴⁷ Nevertheless, some specific concerns have been raised that illustrate the drawbacks of their public-private construction. The organizations focus on increasing the use of drugs and vaccines, whereas they have less attention for prevention and (antimicrobial) resistance to certain drugs.⁴⁸ This appears in line with the sales objectives of pharmaceutical industry, but not necessarily with the overall public health interest. The Global Fund has also been accused of supporting a rather expensive and inefficient new treatment

⁴⁵ World Health Organization Maximizing Positive Synergies Collaborative Group, "An Assessment of Interactions Between Global Health Initiatives and Country Health Systems", *The Lancet*, vol. 373, no. 2137 (June 2009).

⁴⁶ Markus Rossier, Seble Frehywot, Amie Heap and Alan Greenberg, "Policy Analysis of the Impact of Global Health Initiatives on Health Systems: Policies and Lessons Learned From Donor Programmes", *Interactions Between Global Health Initiatives and Health Systems: Evidence From Countries* (June 2009). Internet: http://www.who.int/healthsystems/publications/MPS_academic_case_studies_Book_01.pdf.

⁴⁷ Michael McCarthy, "What's Going on at the World Health Organization?", vol. 360, no. 9340 (October 2002).

⁴⁸ Select Committee on Intergovernmental Organisations, *Diseases Know No Frontiers: How Effective are Intergovernmental Organisations in Controlling Their Spread?* (July 2008).

system for malaria.⁴⁹ It was furthermore accused of conflicts of interests in relation to alcohol producers. In South-Africa, it funds the so-called Tavern Intervention Program (TIP) that aims to minimize alcohol related harm, and the spreading of aids. The program is implemented by liquor producer SABMiller, and is criticized for providing unwarranted justification for their image as socially-responsible producers, while the company actually is said to be at the root of the problem by ensuring that its sales and profits are maintained.⁵⁰

Moreover, in 2011, the Global Fund had been suffering from internal management squabbles and allegations of theft in a few recipient countries.⁵¹ The problems led to an overhaul of how the organization allocates money, and the appointment of a new director. As a result, and on account of the overall economic crisis, it is estimated that financial resources from its biggest contributors – which include the European Commission, EU member states, the United States, and Japan – will decline slightly from 2012 to 2013. Contributions from private foundations and companies are also diminishing. Bill Gates finds this unfortunate, as he still considers the Global Fund “one of the kindest things people have ever done for each other”, and therefore a “terrific investment”.⁵² Civil society organizations appear less happy about the recent changes made at the Global Fund. They complain about the organization being less engaged with organizations in the field, among others due to the removal of a dedicated civil society team at the secretariat of the organization in Geneva.⁵³

GAVI is partially funded through so-called innovative finance mechanisms. It has helped to develop the International Finance Facility for Immunization (IFFIm) and Advance Market Commitments (AMCs). With the former, donor countries make legally-binding aid commitments for 10-20 years, against which IFFIm borrows on capital markets. AMCs are mechanisms to attract private sector investment for new vaccine products for poor countries by guaranteeing purchase volumes at agreed prices over a period of time. After the financial crisis started in 2008, these mechanisms have become less effective and appetite to explore new options for innovative finance has lowered.⁵⁴ Until recently, European governments could

⁴⁹ Oxfam (ed.), “Salt, Sugar, and Malaria Pills”, *Oxfam Briefing Paper* (October 2012).

⁵⁰ Richard Matzopoulos, Charles D.H. Parry, Joanne Corrigan, Jonny Myers, Sue Goldstein and Leslie London, “Global Fund Collusion With Liquor Giant is a Clear Conflict of Interest”, *Bulletin of the World Health Organization*, vol. 90, no. 1 (January 2012).

⁵¹ “‘Difficult times’ in global fight against AIDS, TB and malaria”, *Euractiv.com* (April 2013). Internet: <http://www.euractiv.com/development-policy/global-fund-seeks-billions-eu-do-news-518954>; and Richard G. A. Feachem, “The Global Fund: Getting the Reforms Right”, *The Lancet*, vol. 378, no. 9805 (November 2011).

⁵² Bill Gates, “Why the Global Fund Is a Terrific Investment”, *Huffington Post* (April 8, 2013). Internet: http://www.huffingtonpost.com/bill-gates/the-global-fund_b_3034610.html.

⁵³ Alvaro Bermejo, “Global Fund at Risk of Alienating Civil Society, Responses”, *The Lancet*, vol. 380, no. 9854 (November 2012).

⁵⁴ For an overview of innovative mechanisms in use and possible additional options, see Taskforce on Innovative International Financing for Health Systems (ed.), *More Money For Health and More Health For the Money: Final Report* (June 2009).

account for the guarantees “off budget” – or off the balance sheet – until the bill came due. That flexibility was eliminated with new accounting requirements for the European Union following the financial crisis.⁵⁵ Additionally, the mechanisms, especially the AMC, are criticized for “subsidizing” pharmaceutical industry by paying too high a price for vaccines.⁵⁶

Currently, the Global Fund and GAVI provide assistance to developing countries in the form of activities and funding. According to Mark Dybul, Peter Piot, and Julio Frenk, the Global Fund perhaps could be even more effective if it would hand out loans for national initiatives to strengthen global health efforts in a country.⁵⁷ They call for a new Bretton Woods-style agreement to guide a new international health strategy and rationalize its structure. Funding and providing technical advice should become two separate activities to avoid conflict of interests, and the WHO’s role would be to provide global standards, surveillance, and accountability, rather than to deliver technical support and program implementation. Roger England takes a rather different perspective. He is critical about the loans currently provided to health systems by the World Bank, and doubts the ability of all three organizations to contribute to health systems strengthening.⁵⁸ In 2009, the World Bank, the Global Fund, and GAVI proposed a health systems funding platform that should have enabled external health funding to be integrated coherently into national health systems. However, both GAVI and the Global Fund had to abandon further steps in this direction as declining funds forced them to return to their original, narrower mandates: the provision of disease specific treatment and vaccines.⁵⁹

While the accountability of the WHO to ordinary citizens was considered weak, this is even more so the case for the Global Fund and GAVI Alliance. Despite their effectiveness in promoting global health, few citizens of donor countries contributing to their funding know of their existence. Citizens of recipient countries have little say either. Even though they have received some board member seats to contribute on the basis of their experience, in practice they are simply expected to be grateful for the treatment and vaccines provided. Hence, the legitimacy of the funds rests above all on their (short-to-medium term) effectiveness, and them not being contested by the general public of donor and recipient countries.

⁵⁵ Dybul *et al.* (2012).

⁵⁶ Ann D. Usher, “GAVI Funding Meeting Exceeds Expectations”, *The Lancet*, vol. 377, no. 2165 (June 2011).

⁵⁷ Dybul *et al.* (2012).

⁵⁸ Roger England, “The GAVI, Global Fund, and World Bank Joint Funding Platform”, *The Lancet*, vol. 374, no. 9701 (November 2009).

⁵⁹ Peter S. Hill, Peter Vermeiren, Katabora Miti, Gorik Ooms and Wim van Damme, “The Health Systems Funding Platform: Is This Where We Thought We Were Going?”, *Globalization and Health*, vol. 7, no. 16 (October 2010).

4. The Gates: Big Money, High Effectiveness, But Little Accountability

In 2007, the spending of The Gates on global health was almost equal to the annual budget of WHO.⁶⁰ The mission of The Gates Global Health Program is to encourage the development of life-saving medical advances, and to help ensure they reach the people who are disproportionately affected. It focuses on two main areas: 1) access to existing vaccines, drugs, and other tools to fight diseases common in developing countries; and 2) research to develop health solutions that are effective, affordable, and practical. The Gates continues a century old tradition of philanthropic institutions, such as the Rockefeller Foundation, being involved in international health policy and shaping its agenda.⁶¹

Several concerns have been raised as regards the role, effect, and lack of accountability of The Gates. Research illustrates that all significant contributors to global health have an association with The Gates through some sort of funding arrangement.⁶² Coupled with the large amount of money involved, these relations give the Foundation a great degree of influence over the structure and policy agenda of global health. Through its funding of NGOs and think tanks, the Foundation has also established some leverage over the voice of civil society.

An example of an advocacy NGO alliance fully funded by the Gates is Action for Global Health (AFGH). It is a network of development and health organizations that aims to ensure the progress of the Health MDGs through additional funding of health, strengthening health systems, and ensuring fair access to healthcare.⁶³ The group propagates a continuation, and even increase, of current levels of official development assistance (ODA) for global health. It is also influential in the debate on the health-related objectives to be set after 2015 when the MDGs come to an end, and are likely to be replaced by new sustainable development objectives (i.e. the so-called MDG post-2015 debate). In this essentially “intergovernmental” debate, The Gates is believed to have its own positions, such as opposing the idea of an objective for universal health coverage. It calls for stepping up investments in the current health related MDGs.⁶⁴ The establishment of universal health coverage is strongly promoted by the WHO, for whom the topic is a new strategic priority defined as “access to key promotive, preventive, curative and rehabilitative health interventions for all at an affordable cost”.⁶⁵ A new MDG would set targets for better access to health services and financial protection to prevent ill-health from leading to poverty. This idea is

⁶⁰ David McCoy, Gayatri Kembhavi, Jinesh Patel and Akish Luintel, “The Bill and Melinda Gates Foundation’s Grant-Making Programme For Global Health”, *The Lancet*, vol. 373, no. 9675 (May 2009).

⁶¹ Ane-Emanuelle Birn and Elizabeth Fee, “The Rockefeller Foundation and the International Health Agenda”, *The Lancet*, vol. 381, no. 9878 (May 2013).

⁶² *Ibid.*

⁶³ See Action for Global Health website, internet: www.actionforglobalhealth.eu/index.php?id=197.

⁶⁴ The High Level Dialogue on Health in the Post-2015 Development, *Meeting Report* (March 2013).

⁶⁵ World Health Organization, *Universal health coverage*, Report by the EB Secretariat (January 2013).

supported by a group of prominent public health experts,⁶⁶ but considered too “interventionist” and broad by others. They argue that the goal should be healthy people and populations, not systems.⁶⁷ This latter view apparently is shared by The Gates.

The question is whether The Gates uses its funding to NGOs to propagate such specific objectives, which may counter the preferences of states deciding upon the post-2015 goals. So far, AFGH has been a strong voice for universal health coverage, with a reference to the international Human Right to Health and health equity, to be included in the post 2015 development framework.⁶⁸ AFGH focuses its advocacy on development policies for health, and has so far not addressed policy coherence and broader determinants of health, such as international free trade agreements and macro-economic policies. It has been argued that without attention to these contextual determinants, the attainment of universal health coverage will not be possible.⁶⁹

A more general legitimacy concern is that civil society groups often accuse states of being influenced by specific (economic) interests, whereas they should operate for the common good or the most vulnerable. They claim the moral high ground, but questions can be posed as regards their own representativeness and accountability. Those who fund NGOs increasingly ask for more transparency and accountability. However, particularly in case of large charitable donors, the incentives to share information on what NGOs do with their money are lacking.

Formal lines of accountability to ordinary citizens and governments of donor and recipient countries are non-existent in the case of The Gates Foundation, despite the organization receiving a considerable tax exemption and some public subsidies. Some comments are made regarding funding being disproportionately allocated towards US-based organizations, new technologies and vaccines development (rather than towards overcoming the barriers to the use of existing technologies), and health care delivery regarding specific diseases, including malaria and HIV/AIDS (rather than strengthening health systems).⁷⁰

Moreover, questions are asked about potential conflict of interests. For instance, The Gates has a considerable holding in Coca-Cola, and also participates in grants that encourage communities in developing countries to become business affiliates of Coca-Cola. Observations by researchers Stuckler, Basu, and McKee indicate that some of the same people who participate on the boards of major multinational pharmaceutical and food corporations are also linked to the managerial boards of the Gates. The researchers advise the Gates three practical strategies for mitigating

⁶⁶ Gostin *et al.* (2011).

⁶⁷ Dybul *et al.* (2012).

⁶⁸ Action For Global Health (April 2013)

⁶⁹ Eduardo Missoni, “Understanding the Impact of Global Trade Liberalization on Health Systems Pursuing Universal Health Coverage”, *Value Health*, vol. 16, no. 1 (February 2013).

⁷⁰ McCoy *et al.* (2009).

conflicts of interests: *divestment*, as there should be separation between investment management and the foundation's board; *full transparency* of a potential conflict of interest, such as the corporate affiliations of board members of the Gates; and lastly the *alignment of aid* with community needs.⁷¹

Nevertheless, in general, the activities of The Gates are not widely contested and criticized. They are rather well respected, and its legitimacy therefore rests above all on its effectiveness in addressing global health problems.

5. Conclusions: Legitimacy To The Detriment of Health?

The overall picture that emerges when discussing the legitimacy of transnational arrangements of global health is that there are many issues of concern. While the WHO is criticized for lacking effectiveness, transparency, accountability, and for losing ground within the overall landscape of global health activities, the Global Fund, GAVI, and The Gates are not considered representative for the global community. Moreover, they have restrained from investing in public health systems' expertise and in-country capacity. Nevertheless, they are considered effective, and their activities are not widely contested. Perhaps this should not come as a surprise. After all, who would oppose generous providers of (funding for) global health?

Within the debate on global health, what is considered legitimate appears closely intertwined with how one views the roles and responsibilities of transnational arrangements for global governance. What can be left to the market and private philanthropists, and to what extent is private sector involvement a hurdle or a necessary asset for delivering global health solutions? How can health security considerations be strengthened?

On the one hand, interventionists call for a strong WHO, an increase of ODA for reaching the health-related MDGs, a reinforced infrastructure for addressing health threats (pandemics, bioterrorism, anti-microbiological resistance, etc.), and vastly expanded regulation and public health measures to combat unhealthy living (e.g. policies to lower the intake of alcohol, salt, sugar, and fat) and environmental degradation (drinking water, air pollution). They advocate a focus on health systems strengthening, prevention of diseases, and health equity as a basis for a stable and healthy society. In this view, legitimacy rests primarily on representative democracy steering choices and action, accompanied by clear mechanisms for accountability being in place to check and balance.

On the other hand, neo-liberals promote a focus on combating specific diseases, involvement of the private sector to effectively provide health solutions and stimulate innovation, personal responsibility guiding healthy lifestyle choices, and adequate risk management (instead of trying to avoid all possible risks). Here, legitimacy of global health activities rests above all on effectiveness, and the idea that the market will help

⁷¹ David Stuckler, Sanjay Basu and Martin McKee, "Global Health Philanthropy and Institutional Relationships: How Should Conflicts of Interest Be Addressed?", *PLoS Med*, vol. 8, no. 4 (April 2011).

in finding the most cost-efficient solutions for global health problems facing today's world.

An extra layer of complexity in this debate on the legitimacy of transnational arrangements for global health is the (gradual) emergence of a different set of views and values that could be summarized as “post-Western”. In the current era, how the legitimacy of global health arrangements, and the WHO specifically, is seen, is likely to depend to an increasingly high degree on the viewpoints and involvement of the major emerging economies (the BRICS). They would be able to form “a countervailing force” to Western-dominated prescriptions for global health, but seem to view its legitimacy in rather different ways.

It can be observed that the BRICS' global health agenda is shaped at specific ministerial health meetings, preceding WHA meetings. India and Brazil make robust interventions at the WHA, while China is investing in (international) epidemic disease surveillance and is currently represented in the WHO's Executive Board. Together with most Western countries, the BRICS see the need for stronger global governance for health in relation to the containment of (emerging) infectious diseases.

Yet, it is “still early days” for the BRICS in global health, and so far they have focused on bilateral and trilateral cooperation in global health matters, with a small role for the WHO and diplomacy more focused on the G20 (except from Brazil). Concerning legitimacy, the largest problem is that they follow rather different diplomatic and development cooperation approaches, and political paradigms to deal with issues such as human rights, health equity, universal health coverage, and the Non-Communicable Diseases burden that is becoming a major concern in high, middle, and low income countries.⁷² The lack of involvement of the BRICS in the GAVI and Global Fund is also noteworthy, and worth further investigation.

Nevertheless, for two reasons, the BRICS' influence in global health is likely to increase over the coming years. Firstly because these countries will make more use of the ‘soft power’ in international fora, such as the WHA, including the strengthening of their diplomatic representation. Secondly, the scale of UN assessed contributions was recently revised with important increases of the BRIC's share, giving these countries a larger financial interest to steer the organizations' spending priorities.⁷³ The potential transformative discourse employed by the BRICS bloc hence gives weight to the claim that a paradigm shift in global health *is* underway.⁷⁴

⁷² Andrew Harmer, Yina Xiao, Eduardo Missoni and Fabrizio Tediosi, “BRICS Without Straw”? A Systemic Literature Review of Newly Emerging Economies' Influence”, *Globalization and Health*, vol. 9, no. 15 (April 2013); and Katherine E. Bliss *et al.*, “The Changing Landscape of Global Health Diplomacy”, *Centre for Strategic & International Studies* (April 2013).

⁷³ Lara Gautier, Andrew Harmer, Fabrizio Tediosi and Eduardo Missoni, “Reforming the World Health Organization: what influence do the BRICS wield?”, *Contemporary Politics*, Vol. 20, No. 2 (2014).

⁷⁴ Andrew Harmer and Kent Buse, “The BRICS – a paradigm shift in global health?”, *Contemporary Politics*. Vol. 20, No. 2 (2014).

In short, the debate on what constitutes legitimacy of global health institutions has just commenced, and challenges are still abound with regard to how legitimacy is to be defined and judged, both from different Western-dominated ideological perspectives and “post-Western” (i.e. BRICS) outlooks. In this respect, the contribution of public-private partnership and philanthropists are basic issues, and certainly deserve more attention. The same is the case for the dinosaur in the landscape of global health: do we accept an ever-growing weakening of the WHO, or do we acknowledge the need for a large-scale rescue and true overhaul of the organization? Can unjustified private sector interests (most notably the food and pharmaceutical industries) still be contained?

In our view, the legitimacy of the global health system as a whole is probably most adequately served if some steps are taken to strengthen the WHO, and with a careful review of the conflicts of interest issues in all institutions analyzed in this paper. The current weakness of the WHO is a serious point of concern, particularly relating to its ability to identify new health threats, prevent and stabilize new outbreaks of highly infectious diseases, and set standards for health-damaging consumption goods and/or patterns. Health and economic objectives are not automatically commensurate. From a legitimacy, or global justice, perspective, therefore, a stronger force and coordinating authority for global health seems justifiable.

Transnational Governance and Democratic Legitimacy

The Case of the G20 and Financial-Economic Cooperation

by Jan Rood¹

1. Introduction

In response to the global financial and economic crisis which started in 2008 after the collapse of the Lehman Brothers bank, the G20 Summit, i.e. the meeting of the G-20 members at the level of heads of state and government of the G20 countries, was established by having its first meeting in November 2008 in Washington. The 2008 crisis illustrated that the global financial-economic system was in need of more effective and inclusive mechanisms and arrangements for crisis management and governance at the highest political level of the G20 member countries. By meeting at this level, not only the seriousness of the crisis and the need to respond to it were underlined, but also the political clout of the G20 process, which until then only met at the level of finance ministers and central bank governors, was substantially strengthened.²

During its Pittsburgh summit (September 2009), the G20 proclaimed “to be the premier forum for (...) international economic cooperation”, taking the main responsibility for governing the global financial-economic system as a successor to the G7/8.³ As a result, the G20 is at the center of the global financial-economic governance structure as we know it today, the arrangements that in the absence of world governments are meant “to produce norms, codes of conduct, and regulatory, surveillance, and compliance instruments”⁴ needed to enhance transnational cooperation and to provide global public goods.

¹ The author wants to thank the participants in the seminar on “Transnational governance and global justice” that took place on April 16, 2014, in The Hague. He wants to specifically thank John Kirton, Age Bakker, and Frederik Haver-Droeze for their comments.

² The origins of the G20 as a group of countries with specific responsibilities regarding the world financial and economic system date from the late nineties of the last century, when in response to the Asian financial crisis, the initiative was taken by the G7 ministers of finance and the central bank governors to establish a forum in which, at the level of finance ministers and central bank governors, the “systemically important” countries would be represented in order to discuss world financial and economic issues (see also par. 2). The birth of the G20 marked the end of the functioning of the G10 (in fact eleven countries, being the G7 countries plus Belgium, The Netherlands, Sweden, and Switzerland), which had played an important role principally during the final stage of the Bretton Woods system.

³ Members of the G20 are 19 countries: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, the Republic of Korea, Mexico, the Russian Federation, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States, plus the European Union.

⁴ Andrew F. Cooper and Ramesh Thakur, *The Group of Twenty (G20)* (London/New York: Routledge, 2013).

The emergence of the G20 at the level of heads of state and government is seen as a means to accommodate the ongoing shift in the global financial and economic balance of power, which is mainly due to the rise of the BRICS-countries, but reflects a wider shift in the global relations of power. The emerging economies demand a greater say on today's global financial and economic architecture, as it reflects, to a large extent, the geopolitical and economic configuration from after the Second World War in terms of its underlying values and principles and its structure of power and positions. Reforming this system in order to make it better mirror the relations of power of today and tomorrow, is a cumbersome and difficult process. At the same time, the financial and economic crisis had once again demonstrated, on the one hand, the need for a safer and better regulated global financial and economic system. But, on the other hand, the crisis signaled that such a sustainable governance structure can only be created with the support of the upcoming economic powers, and their willingness to accept responsibility for the management of the global financial and economic system. Given the problems with reforming the existing institutions, the G20 as an informal body can potentially play an important role, both as an informal forum that enables upcoming countries to do their part in the global economy, and as a mechanism for global economic and financial cooperation and coordination.

But the rise of the G20 as the most important body for international economic cooperation also raises a number of important questions. Firstly, the issue of legitimacy and accountability. The G20 is a self-appointed body, without clear rules regarding its composition. Decision-making is based on consensus, and informal means of conduct. On the one hand, in this regard it could be argued that the economic weight of the group and its composition in terms of regional spread and population size give the G20 by definition a high level of legitimacy. But on the other hand, some important economic powers are not represented, Europe is overrepresented, and Africa is clearly underrepresented. In addition, there are no regular mechanisms to account for the positions that are adopted collectively by the G20.

Secondly, to what degree will the G20 be able to function as an effective mechanism of global financial and economic cooperation at all? This issue is clearly related to the question whether the old powers are willing to share power, and to what extent the upcoming powers are willing to take responsibility and share the burden of managing "the commons" in exchange.

Thirdly, there is the question of what the impact of the G20 will be on the existing international financial institutions. Will these institutions (the IMF, World Bank, and Financial Stability Board in particular) cooperate in a harmonious way with the G20, that is, will the G20 function as a stimulus for the International Financial Institutions (IFIs), or will the presence of the G20 lead to inter-institutional rivalry and a further erosion of the effectiveness of the IFIs? This issue is obviously related to the rather fundamental question whether the rise of the G20 is an indication of the world to come. A world in which more informal models of cooperation ("multilateralism light"), ranging from regional groupings to G2+ formations, will emerge; a world in which principally the big powers will dominate efforts of international cooperation

and consultation; or, even a world where power is so dispersed, that no-one is able to provide leadership – a G-zero world.⁵

These questions will be addressed in this paper, with a specific focus on the issue to what extent the G20 can be seen as a democratically legitimate and accountable forum for global governance in the financial-economic domain. What are the main strengths of the G20 in this respect, and what are the main deficiencies? And what can be done to improve the legitimacy and accountability of the G20, accepting that, as a forum for economic cooperation, it is here to stay? This issue will be discussed from three different perspectives:

Firstly, there is the issue to what extent the G20 acts as a representative body. This is relevant in view of the fact that only a very limited number of the world's states are part of the G20, and that the G20 as an informal grouping has no clear and well-defined criteria concerning membership, which entails that many countries potentially affected by G20 decisions, are excluded (referred to as non-G20 countries).

Secondly, one can wonder whether the G20 is effective in delivering results, in terms of crisis management, but especially in reforming the international financial-economic constitution in such a way that it will result in a more sustainable and stable global financial-economic system.

Thirdly, to what extent does the G20 act in a transparent manner, which is a precondition for accountability towards the outside world? To the extent that the deliberations within the framework of the G20 are seen as open, and that there are opportunities for non-G20 members, international organizations and non-governmental stakeholders to be involved in, directly or indirectly, G20 activities, the legitimacy and accountability of the group will be stronger.

These three dimensions approach the issue of legitimacy from different angles. Firstly, the perspective of input legitimacy, which refers to representation. Secondly, the issue of output legitimacy, which is contingent on the capability of the G20 to deliver, to say its effectiveness. And finally, the dimension of throughput legitimacy, which concerns the accountability, transparency and openness of the G20 as a governance process.⁶ Before discussing these perspectives in relation to the G20 and its role in the financial-economic architecture, first, a brief summary will be given of the inception and evolution of the G20, and the reasons for its appearance.

⁵ Ian Bremmer and Nouriel Roubini, "A G-Zero World: the new economic club will produce conflict, not cooperation", *Foreign Affairs*, vol. 90, no. 2 (March/April 2011), p. 2-7; Ian Bremmer, *Every nation for itself: winners and losers in a G-zero world* (New York: Portfolio, 2012); Charles A. Kupchan, *No one's world: the west, the rising rest, and the coming global turn* (Oxford: Oxford University Press, 2012); Gideon Rachman, *Zero-sum future: American power in an age of anxiety* (New York: Simon & Schuster, 2011).

⁶ See Frits W. Scharpf, *Governing in Europe* (Oxford: Oxford University Press, 1999); Vivien E. Schmidt, "Democracy and legitimacy in the European Union revisited: input, output and "throughput"", *Political Studies*, vol. 61, no. 1 (2013), p. 2-22.

2. The Rise of the G20⁷

The initiative to establish the G20 was taken by the G7 ministers of finance and central bank governors in response to the Asian financial crisis of the late 1990s. On 25 September 1999, they proposed “to broaden the dialogue on key economic and financial issues among systematically significant economies and promote co-operation to achieve stable and sustainable world economic growth that benefits all”.⁸ Subsequently, representatives of a number of “systemically important” countries were invited to a meeting in Berlin in December 1999. This meeting marked the birth of the G20 as a new forum for dialogue and cooperation on global financial and economic issues.

The G20 continued to function at this rather technical/operational level for almost nine years, without having a clear mission. Yet, the global financial crisis that erupted following the collapse of the Lehman Brothers Bank and the risk of a meltdown of the global financial system created an emergency situation, which, in the opinion of the then US administration, required a meeting of the G20 at the highest political level, that of heads of state and government. On 14-15 November 2008, following this US initiative, the leaders of the G20 met in Washington during the G20 “Summit on financial markets and the world economy” to decide on the measures needed to combat the financial crisis in a coordinated manner, and to avoid a worldwide economic depression.⁹

Originally meant as a one-off event, in consideration of the seriousness of the crisis, the decision was taken to reconvene to discuss the progress made regarding implementation of what was agreed, and to assess the need for further measures during follow-up meetings, first in London (April 2009), and next in Pittsburgh (September 2009). This, in hindsight, proved to be the start of a process of cooperation and coordination through yearly summits of the G20 members, during which the focus shifted from crisis management in the first stage (2008 to 2010) to establishing the structural conditions under which strong, sustainable, and more balanced world economic growth could be achieved. A longer term aim, which requires efforts and measures to correct the global (macro-)economic imbalances – primarily between surplus and deficit countries –, and to reform the international financial and economic configuration, both from an institutional and a regulatory perspective. Although established in direct response to the 2008 financial crisis, the emergence of the G20 as the main platform for global economic and financial coordination and consultation should be seen as a result of four more fundamental, interlinked developments in the global economic (and political) system. These more

⁷ See for an extensive analysis of the G20, John. J. Kirton, *G20 Governance for a globalized world* (Farngate U.K.: Ashgate Publishing, 2013).

⁸ G-7, Statement of G-7 Ministers and Central Bank Governors (Washington D.C., September 25, 1999).

⁹ The idea of elevating the G20 to the level of heads of state and of government was already suggested some years before the meeting in Washington DC. Prominently, the then Canadian Prime Minister Paul Martin was a strong advocate of upgrading the G20 to this level.

structural factors should be taken into account in order to explain both the rise of the G20 and its functioning.

The first refers to the global shift of power and the entering of new players onto the global stage. Consequently, it had become steadily more apparent that the “old” group of industrial countries working together in the G7 and OECD was no longer in a position to manage the global economy. Their overall weight in the world economic system was declining rapidly due to the emerging of new market economies. These new powers had to be included – as so-called “responsible stakeholders” – in order to achieve effective global action.

A second factor refers to the unprecedented level of financial and economic globalization and integration because of the neo-liberal revolutions of the 1980s and 1990s, and developments in technology and communication. In consequence – and this was highlighted during the 2008 crisis –, the world economic system is characterized by strong financial and economic interdependencies, and by linkages and spill-over effects that may escalate, out of the control of policy-makers, predominantly in times of crises. The implication of this is that in a world economic system as integrated as today, in order to sustain stability, collective action between the main participants is a necessity.

A third set of circumstances concerns the state of the traditional multilateral system, which is a “system in crisis”. Having its origins in the Western dominated post-Second-World War world, it no longer reflects the rapidly changing world of today and tomorrow. These changes refer to three specific developments. Firstly, the already mentioned shift of power, with rising powers demanding more influence on issues on the international agenda, and a reform of the multilateral framework in order to make it more representative. Secondly, the emergence of a “network global society”, implying that together with states, non-state actors play an active role in the international scene, trying to have an impact on decision-making, mainly by lobbying and setting the global agenda. Thirdly, the international community is challenged by an ever more complicated agenda, with issues as wide-ranging – and at the same time interrelated – as scarcity and climate change, and corruption, fraud, criminality and terrorism, in addition to the more traditional topics of trade and WMD non-proliferation. The existing multilateral framework, however, is not (sufficiently) adapted to the complex global agenda of today, and subsequently this system is facing a serious “governance deficit”. Nonetheless, reforming this system has proved to be extremely difficult and time-consuming. An additional explaining circumstance is the fact that the UN – ECOSOC – has never been able to play an important role in the global financial and economic domain, and the unwillingness of the main global economies to give the IMF a key role in dealing with the Asian and 2008 crises on account of it being perceived as too much dominated by “Western’ states/US and too “liberal”.

This leads to a fourth factor, which is partly a response to the crisis of multilateralism: the upsurge of more informal modes of global governance outside the domain of the traditional formal multilateral organizations. This phenomenon is also known as the

“informalisation” of governance, as “club” or “network governance”, and specifically for the G20 as the “G phenomenon”.¹⁰ In this study, this more general trend of which the G20 is part, is summarized under the heading of “transnational governance”. This term includes multiple forms of institutional innovation and often informal ways of cooperation to address transborder problems and challenges. In the case of the G20, the creation of this informal arrangement is seen as a way to accommodate the referred to shift of global power, to raise the level of political commitment, and to engage rising powers without going through the cumbersome process of reform of the multilateral institutions. Moreover, it is claimed that such a more informal setting enables the discussion of issues on a more general and coherent level, that is, without being entrapped in the bureaucratic idiosyncrasies of the formal multilateral institutions.

Thus, although the direct reason for establishing the G20 is found in the Asian financial crisis of 1999 and the global financial crisis of 2008, its growth needs to be explained from a more general set of circumstances, basically the shifting relations of power in the world against the background of a multilateral system in crisis and an international agenda that is characterized by an overload of “new” interrelated issues. In this respect, the G20 underlines the challenge that the global economy is facing: the need to accommodate rising power within the framework of a highly interdependent world financial and economic system and against the background of fragile global governance arrangements.

3. The Institutionalization of the G20

Started as a “crisis committee” to respond to the 2008 global financial crisis, the G20 has evolved into the world’s “permanent steering committee” with an ever expanding agenda of global issues. This evolution is the result of a number of decisions that were taken by the leaders of the G20 during their summits, which have culminated in a “process of institutionalization” of the G20. Meanwhile because it is an informal arrangement, the G20 is suffering from a number of institutional deficiencies, which affect its legitimacy and effectiveness.

As “an example of network-style governance”, the G20 foremost lacks the elements that characterize a formal multilateral organization.¹¹ It is not grounded in a treaty or other international agreement, in which the competences of the organization are defined and delaminated. Being an informal, self-appointed club, there are no clear rules or criteria regarding membership, apart from the rather vague notion, applied in the aftermath of the Asian financial crisis, of “systemically important” countries. The

¹⁰ See Anthony Payne, “How many Gs are there in ‘global governance’ after the crisis?; The perspectives of the ‘marginal majority’ of the world’s states”, *International Affairs*, vol. 86, no. 3 (2010), p.729-740; Bernard Rinke and Ulrich Schneekener, “Informalisation of world politics?; Global governance by clubs”, in Tobias Diebel et al. (eds), *Global Trends 2013: Peace – Development – Environment* (Bonn: SEF/INEF, 2012).

¹¹ Jan Wouters and Dylan Geraets, “G20 and informal international lawmaking”, *Working Paper no. 86* (Leuven: Centre for Global Governance Studies, 2012), p. 9.

G20 does not have a permanent secretariat.¹² Secretarial support is provided by the country occupying the chair of the G20, and which, in that capacity, is responsible for organizing the annual summit. Additional support regarding analysis and knowledge, administration, and compliance is offered by the IMF, which, on the grounds of the close relationship between the activities of the G20 and IMF, and the dependence of the G20 on the IMF for the implementation of its decisions, seems to be logical. Ultimately, in the absence of a treaty base, no formal rules of decision-making are applied. Therefore, decisions are based on consensus, and are not legally binding. As far as there is commitment of the G20 members, this is relies on non-binding “soft law”, signifying that compliance with what has been agreed on is rather weak.¹³

Table 1: Scheme of groupings

Group	Nations	Group	Nations	Group	Nations	Group	Nations	Group	Nations
Group 1	Australia	Group 2	India	Group 3	Argentina	Group 4	France	Group 5	China
	Canada		Russia		Brazil		Germany		Indonesia
	Saudi Arabia		South Africa		Mexico		Italy		Japan
	United States		Turkey		-		United Kingdom		South Korea

But the extent of institutionalization stands out in particular in view of the fact that the annual G20 summit has become the “tip of the iceberg”, meaning that the yearly summit is part of, and prepared by a much broader range of official meetings at ministerial levels and at the level of civil servants. This development started with the continuous involvement of the ministers of finance and the central bank governors in the activities of the G20, and in the preparation of the summits in particular, in cooperation with the G20-sherpas, i.e. the officials who are involved in the summit’s preparation as a permanent representative of the head of state or government of a G20 country. Besides the ministers of finance, depending on the agenda of a G20 meeting, other ministers are also involved, and have meetings before, or within the framework of the summit. Accordingly, under the G20 French presidency of 2011, meetings of the G20 agricultural ministers, and of the ministers responsible for labor and employment were convened. This example was followed during the Mexican and Russian G20 presidencies. Finally, a large number of G20 working groups have been

¹² The establishment of a permanent G20 secretariat was proposed by France during its G20 presidency. Although there was support from some members, agreement on the creation of such a secretariat could not be reached.

¹³ See Peter van Ham, *Upgrading the global financial system: the why and how* (The Hague: Clingendael Institute, September 2012), Clingendael Policy Brief no. 12. Still, some institutionalization of the G20 with regard to proceedings has taken place. Obviously, the first step towards this was to have an annual G20 meeting at the level of heads of state and government, a decision that was taken during the Pittsburgh summit of September 24-25, 2009. A next step was the introduction and formalization of the Troika system, in which the past, present, and future chair of the G20 cooperate in order to guarantee continuity on the agenda, and to supervise the implementation of decisions. The Troika-system has been formalized further by defining a scheme of five groupings from which the chair is selected each year in accordance with a fixed schedule.

established, dealing with topics as diverse as development, economic growth, the international financial architecture, and energy and commodities.

This “proliferation” of activities and forums reflects the expansion of today’s G20’s agenda from its start as a crisis management group, focusing specifically on the global financial system. An example of this development is the agenda as defined by Mexico during its presidency, which covered the following topics:

1. Economic stabilization and structural reform;
2. Strengthening the global financial system;
3. Improving the international financial architecture;
4. Enhancing food security and addressing commodity price volatility;
5. Promoting sustainable development, green growth and the fight against climate change.

This agenda is indicative of the overall evolution of the G20, moving from economic issues into even the domain of politics. One example is the last G20 summit in St. Petersburg, which was dominated by a conflict, between the US on the one hand and China and Russia on the other hand, about how to respond to the escalating civil war in Syria, despite efforts of the Russian chair to focus the summit’s agenda on financial-economic issues again.

In addition, aside from the meetings and activities within the “formal” framework of the G20, a broad range of activities and initiatives affiliated to the G20 has emerged, encompassing a very diverse community of interest groups, ranging from the business communities (B20) and labor organizations (L20) to Think Tanks (T20), youth organizations (Y20) and civil society (C20). The business community has from the very start of the G20 been involved in its deliberations by organizing a meeting where business leaders meet to discuss the G20 agenda and to put forward recommendations and expert opinions before a G20 summit. The trade union’s met for the first time in the G20 framework during the Cannes summit of 2011, where unemployment was high on the agenda. The L20 meeting also takes place on the eve of a G20 summit. It is concluded with a joint statement addressed to the G20 leaders. The first T20 meeting occurred in 2012 as part of the outreach activities of the Mexican G20 presidency. Its aim was to bring together representatives of leading think tanks and to provide academic input on global issues to the G20 process by coming up with recommendations and policy reports.

The Y20 has a somewhat longer history. It had its first meeting in 2010 on the occasion of the Toronto summit. The aim of the Y20 also is to have some impact on the G20 discussions by putting forward a joint statement and recommendations, which are presented to the country holding the G20 chair. Regarded from the perspective of transparency and accountability, the most important public platform engaged with the G20, is probably the C20. It brings together NGO’s, academics, and

other actors, with the specific aim to contribute to the transparency of the G20 deliberations, and to evaluate and monitor the outcomes and commitments of the G20. Furthermore, these activities underline the efforts of the G20, mostly the presidency which defines an “outreach strategy”, to engage non-governmental interest groups in the G20 process to stimulate exchange of views and discussion.

Notwithstanding these efforts to reach out to and interact with a great variety of interest groups and actors, the legitimacy of the G20 has been contested from the very start. In particular countries that are not part of this forum, and non-state actors, specifically civil society organizations, have questioned the role of the G20 as an exclusive and self-appointed club of countries taking the lead in managing the global economy. Their concerns have increased further due to the developments described above, namely the institutionalization of the G20 and the expansion of its agenda. Concerns refer to the insufficient representativeness of the G20, its (under-)performance, and its lack of transparency and accountability – due to the informality of its procedures and its closedness.

4. Is the G20 Representative?

The legitimacy of any institution pivots *inter alia* around whether it is perceived as representative, both in its composition and in terms of the interests that are discussed. As an institution with a limited number of members, the question in the case of the G20 is specifically to what degree it is appreciated as representing their interests by the non-members, a pressing issue in view of the ambition of the G20 to become a “permanent steering committee” for the global financial and economic system.¹⁴

As has been mentioned, serious concerns have been voiced about the representativeness of the G20, by non-G20 members¹⁵ and academics. The G20 has been accused of being “a ‘concert’ of big countries that can dictate the new rules to all others”, and “a global economic government in the making”, without the legitimacy and accountability required.¹⁶ At the heart of this criticism lies the issue of inclusion and exclusion. Who is part of the G20 process, and on the basis of which criteria? To the critics, the G20 acts as a privileged self-appointed group of countries taking decisions that potentially could have an impact on non-members, the 173+ countries that are not part of the G20, but which directly or indirectly may be affected by

¹⁴ Paola Subacchi and Stephen Pickford, *Legitimacy vs. effectiveness for the G20: a dynamic approach to global economic governance* (London: Chatham House, October 2011).

¹⁵ This criticism was *inter alia* voiced by the Norwegian minister of foreign affairs Jonas Gahr Støre in an interview with the German journal *Der Spiegel*, in which he stated: “The G-20 is a self-appointed group. Its composition is determined by the major countries and powers. It may be more representative than the G-7 or the G-8, in which only the richest countries are

represented, but it is still arbitrary. We no longer live in the 19th century, a time when the major powers met and redrew the map of the world. No one needs a new Congress of Vienna.” (*Der Spiegel*, June 22, 2010).

¹⁶ Andrew F. Cooper and Eric Helleiner, “The G20: A ‘Global economic government’ in the making?”, in Christoph Pohlmann, Stefan Reichert and Hubert René Schillinger (eds), *The G20: a “global economic government” in the making?* (Berlin: Friedrich Ebert Stiftung, 2010), p. 8; Jakob Vestergaard, *The G20 and beyond: towards effective global economic governance* (Copenhagen: DIIS, 2011).

decisions taken by the G20 members. Moreover, the composition of the G20, it is stated, deviates from one of the most basic principles underpinning the multilateral architecture, i.e. the principle of universality: all international institutions being open to all states and function on the basis of equality.

The primary response of the G20 to the commentary that on account of its composition, the group lacks the required representativeness, is that it is important to bring together the leaders of the countries that represent the main world economies in an informal setting to discuss issues that cannot be solved within the framework of the formal multilateral organizations. It is, furthermore, pointed out that the G20 countries represent two-thirds of the world population altogether (including the countries with the largest population size India and China), and that these countries account for between 80 and 90 percent of the world's gross product, trade, investment, and growth. Moreover, compared to the past, when the G7/8 was the main global forum to discuss financial and economic issues, the G20 is allegedly much more representative of the present and future relations of power in the world economic system, and in that sense an improvement, due to its broader membership, and largely because of the presence of countries from the South, and from outside the OECD area. In the words of the G20 members, “[t]he G-20’s economic weight and broad membership gives it a high degree of legitimacy and influence over the management of the global economy and financial system.”¹⁷

From different corners, this claim has been contested. The first item of criticism refers to the way in which the G20 has been composed. The G20 lacks clear, transparent and objective criteria for membership. The membership of today originates in the composition of the G20 as it started in 1999 at the level of ministers of finance and central bank governors. The main criterion applied then was whether a country was “systemically important”, indicating that it could have an impact on global financial and economic stability, and should for that reason be involved in global decision-making.¹⁸ But this criterion raises serious questions about how to apply it, and what would be the effect if used to compose the G20 in 2013. As to the definition of “systematically importance”, the question is what determines whether a country should be seen as having potentially a systemic impact on the global economy: the size of the economy, the size of the banking sector, the official debt, a combination of factors, etc.? The Euro-crisis has shown in this respect that countries judged on the basis of indicators like the size of their GDP etc., considered to be too small to have any impact at all, could, under specific circumstances have a dramatic effect on regional and even global financial and economic stability due to spill over-effects. Greece, Portugal, and Ireland testify to this.

¹⁷ G20, *What is the G20?* Internet: http://www.g20.org/about_what_is_g20.aspx.

¹⁸ Apart from this criterion, two other criteria are defined in the literature: 1. “a balanced geographical representation”, entailing that all continents should more or less be equally represented in the G20, but in the current G20, Europe is overrepresented while Africa is underrepresented (see also Table 2); and 2., “the status of democracy”, with leads to questions regarding the membership of China, Russia and Saudi Arabia. See on the membership criteria, Kirton, *supra* note 7.

This first item is related to a second one, which is the non-existence of agreed and transparent procedures to modify or adjust the composition of the G20 in response to the changing international relations of power, an observation that is particularly relevant in view of the ongoing global shift of power. Given the absence of such procedures, the G20 creates the impression that it is a permanent fixture in its present composition, whatever changes may occur in the relations of power. This fact will only further undermine its legitimacy.

A third observation concerning the present composition of the G20 is that it does not consist of the world's 20 largest countries measured by GDP and/or population size. Depending on the indicator applied (GDP nominal, GDP PPP, a combination thereof, or population size), it is evident that the composition of the G20 will differ quite substantially, which strengthens the criticism that the present composition is arbitrary and not representative.¹⁹

The main reproach remains, however, that 173+ countries are excluded from the G20. This could be corrected by balancing the composition of the G20, both in terms of the level of economic development of its members and their regional origins. As has been observed by Vestergaard, "low income countries" are not part of the G20, which in its present form consists of nine middle-income countries and ten high-income countries (see table 2). Obviously, this is the logical effect of applying "systemic importance" as the main criterion for selection, but becomes progressively problematic now that also issues concerning development and poverty, climate change, commodities, etc., are on the G20's agenda, which are vital issues for low income countries in particular. A similar imbalance exists when the regional background of members is taken into account. Africa is only represented by one country (South Africa), while the other "regions" (Americas & Australasia/Asia/Europe) are each represented by six countries (see table 2). It underlines that, in the G20 of today, low-income countries, but also small more advanced economies, are not represented, and that Africa is underrepresented. Overall, the underrepresentation of small and poor countries, led to the initiative under the leadership of Singapore, to organize an informal "Global Governance Group" (3G) of 28 non-G20 countries – including several small micro-states, "third world" countries, and (European) middle powers (e.g. Belgium) – cooperating in order to channel their views into the G20 process more effectively. Singapore's chairing of the Global Governance Group was cited as a reason for inviting Singapore for the Seoul summit in 2010, an invitation that has been extended for every G20 summit since then.²⁰

¹⁹ See in particular: Vestergaard, *supra* note 16, p. 22-24.

²⁰ Iftekhhar A. Choowdhury, "The Global Governance Group ("3G") and Singaporean leadership: can small be significant?", ISAS Working Paper no. 108 (Singapore, 2010).

Table 2: G20 Countries – by region and income classification²¹

	Low-income countries	Middle-income countries	High-income countries	Total
Africa	0	South Africa	0	1
Americas & Australasia	0	Argentina, Brazil, Mexico	Australia, Canada, USA	6
Asia	0	China, India, Indonesia	Japan, Korea, Saudi Arabia	6
Europe	0	Russia, Turkey	France, Germany, Italy, UK	6
<i>Total</i>	0	9	10	19

A special case in this regard is the position of the European Union, which as a regional organization is an official member, next to the nineteen countries of the G20. The EU's membership increases the already quite large number of participants representing Europe, notably the member states of the EU. It raises the question why, in addition to Germany, France, the UK and Italy (and Spain on a permanent wild card), the EU also needs to be included, while other regional organizations do not have an official seat at the G20 table. This appraisal should be taken seriously in view of the widely shared observation that the EU on the level of its member states, is already overrepresented, not only in the G20,²² but in the system of multilateral organizations in general.

And finally, there is the impact of the rise of the G20 on the position and role of international organizations, primarily the IFI's (the IMF, World Bank, and Financial Stability Board), but also, as a result of the expanding scope of the G20's agenda, on other international organizations, including the UN. This issue is directly related to the question of the legitimacy of the G20. For non-G20 members, multilateral organizations of which they are a member, and which are based on the principle of universality, obviously should be the main framework for decision-making on global financial and economic topics. This applies especially if decisions have an impact on their own economies and societies. The non-G20 member's concern is twofold. Firstly, that the rise of the G20 will undermine the effective functioning of the multilateral institutions of which they are part. Secondly, that the G20, as a group,

²¹ From Vestergaard, *supra* note 16, p.21.

²² This overrepresentation is even worse, as the EU is represented by the presidents of the European Commission and the European Council respectively. One reason for the EU's presence is that on a number of issues (e.g. trade), the EU level and not the member states does have a primary responsibility for policies.

will start to act as some sort of a caucus, “pre-cooking”, framing, and dictating decision-making within these institutions, without taking into account the interests of the non-G20 members, and imposing their views on this latter group, which in the end would undermine the legitimacy of these organizations themselves.

5. Expanding the Group of Participants

The response of the G20 to its critics has been to expand the number of invitees for G20 meetings, a practice that was established from the very start in 2008 when the Netherlands and Spain were invited on a wild card, and the IFI’s plus the UN were present. Not only individual states, but explicitly states chairing regional organizations, and multilateral organizations have been invited since then, to participate in the G20 summits and to represent in this way the views of the non-G20 members and the multilateral institutions. Yet, without any formal criteria, the decision who to invite as guest, be it an individual country, a country representing a regional grouping, or an international organization, remains at the discretion of the host country. On the other hand, as appears from table 3 (see next page), some pattern has emerged during the course of the G20 meetings, especially with regard to the engagement of international organizations. The need to involve specifically the IFI’s in the G20 summitry can be explained by the need to counter the criticism of non-G20 members concerning the lack of representativeness of the G20. But more importantly, the G20 is, in most cases, reliant on the support of, and cooperation with institutions as the IMF, World Bank, etc., for the implementation of its decisions.

Despite its efforts to augment the participation in G20 meetings, important questions about the legitimacy of the G20 still remain. Even with countries representing various regional organizations invited, the fact is that a large majority of the world’s states is not present during the deliberations. Moreover, the countries that are invited on a wild card do not participate in the preparation of the G20 meetings on an equal footing; and perhaps even more importantly, it could be questioned to what extent they are seen as the representative by their organization’s members. And, whether the impact of the G20 on the multilateral system will be positive or negative very much hinges on the ability of the G20 to reach consensus on the measures needed on a domestic level to have a more balanced and stable world financial and economic system, and on decisions concerning a reform of the global multilateral architecture. But it also depends on the G20’s ability to develop a sustainable working relationship with these organizations, founded on a clear and mutually accepted division of labor.

Hence, the legitimacy of the G20 will continue to be questioned, expressly by non-G20 members. Subsequently, in the short and medium term, the issue is whether the G20’s legitimacy deficit can be improved by expanding its membership. Will an increase in the number of G20 members make the G20 more transparent, more accountable to the outside world (non-G20 members, NGOs, and the wider public), and will this also improve the G20’s accountability record? Or, given the fact that the G20 will endure, will an expansion of its membership undermine its effectiveness as a body for consultation and cooperation? These questions will be discussed further in the concluding paragraph.

Table 3: The G20's "guest country" policy²³

G20 members: Argentina, Australia, Brazil, Canada, China, European Union, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, United Kingdom, United States		
<i>Summits</i>	<i>Countries which would otherwise not have attended</i>	<i>International organisations</i>
Washington, DC / USA 15-16 November 2008	Netherlands, Spain	FSB, UN, IMF, WBG
London / UK 2 April 2009	Netherlands, Spain, Ethiopia (NEPAD), Czech Republic (EU Council Presidency), Thailand (ASEAN)	FSB, UN, IMF, WBG
Pittsburgh, PA / USA 24-25 September 2009	Netherlands, Spain, Ethiopia (NEPAD), Sweden (EU Council Presidency), Thailand (ASEAN)	FSB, UN, IMF, WBG, WTO, OECD
Toronto / Canada 26-27 June 2010	Netherlands, Nigeria, Spain, Ethiopia (NEPAD), Chile (ILO / UN), Malawi (AU), Thailand (ASEAN), Vietnam (ASEAN)	FSB, UN, IMF, WBG, WTO, OECD
Seoul / South Korea 11-12 November 2010	Singapore, Spain, Ethiopia (NEPAD), Chile (ILO / UN), Malawi (AU), Thailand (ASEAN), Vietnam (ASEAN)	FSB, UN, IMF, WBG, WTO, OECD
Cannes / France 3-4 November 2011	Spain, Equatorial Guinea (AU), Ethiopia (NEPAD), Chile (ILO / UN), Singapore (3G), United Arab Emirates (CCASG)	FSB, UN, IMF, WBG, WTO, OECD, ECB, BCBS
Los Cabos / Mexico 18-19 June 2012	Spain, Benin (AU), Ethiopia (NEPAD), Cambodia (ASEAN), Chile (LACS), Colombia	FSB, UN, IMF, WBG, WTO, OECD, ILO, FAO
St. Petersburg / Russia 5-6 September 2013	Spain, Ethiopia (NEPAD), Kazakhstan (EurAsEC and CIS), Brunei (ASEAN), Singapore (3G)	FSB, UN, IMF, WBG, WTO, OECD, ILO

6. Does the G20 Produce Results for the Global Community?

The alleged lack of representativeness of the G20 could, according to theories that emphasize the importance of output-legitimacy, be off-set by the extent that the G20 is able to act as an effective body of decision-making concerning global financial and economic affairs, and – more importantly – is seen by non-participants as an institution that is able to deliver on issues that are in their personal interest. On this

²³ Rinke and Schneckener, *supra* note 10, p. 30.

account, there appears to be quite some skepticism regarding the effectiveness of the G20 as the primary forum for global economic cooperation. For instance, Goodliffe and Sberro, following the Los Cabos meeting in Mexico (2012), come to the conclusion that the G20 summits “have degenerated into ritualised exercises in sterile debate, empty grandstanding and vacuous promise-making, bringing the organisation’s effectiveness and relevance increasingly into question.”²⁴ This opinion is shared by others, and even made the Lowy Institute for International Policy call upon the incoming Australian G20 presidency to re-launch the G20.²⁵

This censure of the G20 refers precisely to the observation that, after a positive beginning during which the Group was able to respond successfully to the financial and economic crisis, the G20 process seems to have run out of steam. Substantially, the G20 has proven to be unable to reach consensus on measures needed to put the world economy on a structurally more balanced path of economic growth and development, and therefore is not able to fulfil the expectations that it has raised.

It confirms a more widespread assessment that in the brief history of the G20 until now, i.e. the G20 meeting at the level of heads of states and government, two stages can be distinguished.²⁶ During the first stage – covering the Washington, London, and Pittsburgh meetings in the period 2008-2009 –, the focus was fully on the financial-economic crisis, and the threat of it escalating into a worldwide depression similar to the one in the 1930s. Preventing a repetition of “the great depression” by avoiding the “beggar thy neighbor policies” of that period, proved to be the main challenge to the G20 leaders. Retrospectively, and although it remains always difficult to establish to what extent the G20 has been responsible, it can be concluded that the G20 was successful as a crisis manager. This can partly be explained by the immediate urgency of the situation that the world financial and economic system found itself in. The imminent danger of a collapse of the banking system and a financial meltdown forced the G20 leaders to come together to discuss the world’s economic situation, an event that in itself had a positive impact on the financial system, in particular through the commitment expressed that the G20 countries, if necessary, were willing to take “unprecedented steps” to restore world economic growth, and to avoid a new crisis.

These statements were underpinned by agreeing on a number of measures intended to calm down the gathering storm on the financial markets, and to reestablish confidence in the global economy. The main focus of these measures was on the stabilization of the global financial system, chiefly by reforming and regulating the financial markets and institutions in such a way that a new crisis could be prevented. The main consequence was the upgrading of the Financial Stability Facility (founded in 1999) to the Financial Stability Board during the G20 summit of London (April 2008), an

²⁴ Gabriel Goodliffe and Stéphan Sberro, “The G20 after Los Cabos: illusions of global economic governance”, in *The International Spectator*, vol.47, no. 2 (2012), p.2.

²⁵ Terra Lawson-Remer, “Does the G20 matter?”, *Reuters: The Great Debate* (February 24, 2012); Van Ham, *supra* note 13; Mike Callaghan, *Relaunching the G20* (Sidney: Lowy Institute for International Policy, January 30, 2013).

²⁶ Cf. Cooper and Thakur, *supra* note 4.

institution of which all G20 countries are a member, and which was to act as a coordinator and monitor of the global financial system (in close cooperation with the IMF in particular), especially where it concerns the systematically important financial institutions. A second decision regarding a more strict regulation of the financial markets was the agreement about the Basel III package, aiming to introduce tougher capital standards and requirements for financial institutions (banks, etc.), in order to increase global financial transparency, and to reduce the risks in a globalized financial system.

Additionally, it was important to stimulate economic growth and maintain an open world economic system by countering the temptation of protectionism. In order to support countries in their efforts to stimulate economic growth and to stabilize their banking systems, in addition to national (fiscal) measures, the G20 decided to increase the resources available through the IMF and development banks (London summit, April 2009).

By these decisions and initiatives, the G20 showed itself capable of concerted action in a time of crisis. By doing so, the G20 imbued the global economy with the trust that was needed in a period of severe instability and uncertainty. Yet, the real test for the G20 as the premier forum for economic cooperation was obviously whether the Group would be able to deliver once the urgency and momentum of the crisis had passed, and more structural, long-term issues concerning the global economic system had to be discussed.

At first glance, the G20 made a start in tackling this more structural dimension during its Pittsburgh summit by agreeing to launch “a framework for strong, sustainable, and balanced growth”. Its first priority was to develop and define credible “exit strategies” regarding the on-going support and stimulus programs, which could be implemented once sustainable economic recovery was secured. But, more importantly, in this framework, individual G20 members committed themselves to domestically make those structural (macro)economic adjustments that were perceived as needed to make the transition to a more balanced pattern of global economic growth, an issue that is clearly related to the structural imbalances in the global economy, above all between deficit and surplus countries. In order to assure compliance, the IMF was asked to monitor this process by setting up a “Mutual Assessment Process” (MAP), the aim of which is to determine, in an early stage, as to whether, and to what extent, national policy measures are supporting a more balanced world economy.

The framework referred to is part of a broader program of initiatives that the G20 has adopted in order to provide the world economy with a structurally stronger and more stable foundation. Beyond stable and sustainable economic growth, this concerns first and foremost the strengthening of the global financial system – as a follow-up of the emergency measures taken during the crisis –, and the reform of the global financial and economic governance system, in particular the IFI’s.

What has become apparent is that progress on these three fundamental goals is more difficult, and slow indeed. One example is the inability of the G20 to break the deadlock in the WTO-Doha round of negotiations on a further liberalization of world

trade. In Bali, December 2013, the WTO members could broker a deal on a package of measures to reduce specifically administrative obstacles to free trade. Although a step in the right direction, this agreement is incomplete and by no means a breakthrough. More importantly, it has not prevented a rise of protectionism in the main global economies. Additionally, the agreements concluded by the G20 members concerning the reform of the IMF and World Bank by changing the quota system and the composition of governing board, have failed to deliver due to opposition in the American Congress. As a result, the IMF in particular still predominantly reflects the post-war domination by the West, considering that the US would still be in a position to block important decisions, even if reform was implemented. Also as regards the realization of the ambition for a more balanced world economy, a key-policy area of the G20, progress has been rather limited. Perhaps one could even conclude that the process of coordination has gone into reverse in view of the internal frictions within the Eurozone about who needs to adjust, the unilateral US and Japanese monetary policies (the US third round of quantitative easing and the following unilateral decision to “restrict” the US monetary policy of quantitative easing), and the lingering conflict and irritation between especially the US and China about the exchange rate of the Yuan,. On this very crucial issue, events show that domestic interests prevail, and the G20 countries have not been able to live up to their promises.

This can be explained by a number of factors. First of all, after the G20’s successful handling of the crisis, some complacency may have set in. In the absence of the imminent urgency of 2008-2009, the pressure to cooperate and take the required measures has disappeared. More importantly, the measures that have to be implemented in order to create a structurally more balanced world economy require drastic, and potentially far-reaching actions on a domestic level, actions which moreover may need the approval of national parliaments. These measures, in other words, may “bite at home”, which makes it tempting for governments to fail to comply with their commitments, to “cherry-pick”, and to promote more short term domestic interests, without taking into account the adverse effects on the global economy or on other countries.

This inability to deliver is also partly the result of the rather weak and soft compliance mechanisms that characterize the G20 itself, being informal in its setting and operations. Consequently, the G20 depends on the efforts of national governments and the IFIs for the implementation of its decisions. However, this reflects the (increasing) divergence between the G20 members in terms of visions concerning the preferred global financial and economic system, the interests that need to be promoted, and their priorities. This divergence is the ramification of the diversity of the G20 itself, diversity in economic development (middle-income versus high-income countries); position, Western “old” powers versus rising economies; economic systems (welfare states, market economies, and state-led economies); and the problems these countries face and the priorities that follow. This diversity and the lack of real progress may also explain the proliferation of the G20’s agenda over the past few years. Not able to deliver on what should be its core mission, the G20 – definitively G20 presidencies – have turned to other, even non-economic issues in an effort to mask its failure, which has resulted in ever longer final declarations and an

expanding number of meetings at lower levels, without substantially improving the success rate of the G20.

Behind these differences and problems lurks a more fundamental disagreement, which is the different views on the basic values and principles that constitute the global (economic and political) order, which reflect different interests of the Western economies (including Japan) and the emerging powers. Whereas the first expect emerging powers to integrate into the post Second World War “liberal international order” and behave as a “responsible stakeholder”, emerging powers are not willing to do as long as the West is not willing to give up its privileged position. More importantly, emerging powers do not share the liberal values and principles (democracy, human rights, rule of law, market economy, enlightened sovereignty, etc.) of the West, and perceive these values and principles as an expression of Western domination.²⁷

Taking into account the rather weak track record of the G20 in terms of effectiveness, the tentative conclusion should be that the legitimacy of the G20, as far as it is derived from its output, is fragile and under pressure. In this regard, moreover, it is fair to assume that the G20’s effectiveness will come under greater pressure if the tensions between the great powers – the US, China and Russia – will increase due to what is called ‘a return of geopolitics’, i.e. a world that is dominated by security issues and lacks the leadership that is required for effective global governance.²⁸

7. The G20 as A Transparent Body of Global Decision-Making?

Whether the G20 can be seen as acting in a transparent manner is partially conditional on the question to what extent it can be held accountable and is able to deliver on the decisions that are taken (see also the preceding paragraph), and partially on the degree in which it is open to non-G20 members and to the outside world more generally.

A first observation regarding the transparency of decision-making is that, due to its informal character, principally the lack of clear procedures regarding decision-making and the non-bindingness of what has been agreed among the G20 members, the G20 by definition is in short supply of transparency and accountability.

Regarding accountability, the introduction of the MAP has been an important step forwards, which in principle should stimulate compliance by the G20 members. The MAP has moreover been enhanced since 2011 by identifying more specific indicators and guidelines for the policies that G20 countries should follow in order to contribute to a more balanced world economy. Yet, the effectiveness of this system very much rests on the willingness of G20 countries to provide and share information on the state

²⁷ See *inter alia*, John Ikenberry, “The future of the liberal world order; internationalism after America”, in *Foreign Affairs*, vol. 90, no. 3 (2011), p.58-68; Patrick Stewart, “Irresponsible stakeholders?; the difficulty of integrating rising powers”, in *Foreign Affairs*, vol. 89, no. 6 (2010), p. 44-53.

²⁸ See, Robert D. Kaplan, *The revenge of geography; what the map tells us about coming conflicts and the battle against fate* (New York: Random House, 2012); Walter Russel Mead, “The return of geopolitics: the revenge of revisionist powers”, in *Foreign Affairs*, vol. 93, no. 3 (2014), p. 69-79.

of their economy, and their macro-economic and structural policies. Moreover, what has become clear during both the global financial and economic crisis and the Euro-crisis, is that the stability of the global economic and financial system not only decided by traditional factors such as the balance of payments, the trade balance and the debt position of countries, but is also determined in an highly interdependent system by factors like the state of the housing market, the level of private debt, the flexibility of the labor market, etc. This means that in order to monitor the progress that is made regarding global financial and economic stability, more and more information needs to be factored in to assess the state of the global economy and to take the necessary measures. In addition, as has been mentioned before, the G20 focuses on what has been defined as “systemically important countries”, a criterion that has been tightened further by categorizing seven economies as key-economies: the professed Systemically Important Countries (SIC’s). Yet, the lesson from past events is that a global crisis may start in a country that is not considered as systemically important, and which even may not be a G20 member.

This underlines the complexity of the global financial and economic system and the level of interdependence, and above all that, in order to govern this system, more strict surveillance mechanisms are needed. Then, the question is whether the G20 procedures, which are non-binding and the quality of transparency and accountability of which are judged by peer review, suffice to guarantee the compliance required. The system, as it functions today, depends on the willingness of the G20 members to accept the findings of the IMF in particular, but in the final analysis it relies to a great degree on their willingness to hold each other accountable. In this regard, there may be doubts as to whether G20 members are really willing to do so, in other words, whether they are likely to succumb to the temptation of “peer protectionism”.²⁹

What this demonstrates is that for an effective surveillance process, a process that guarantees transparency and accountability, two conditions are crucial. The first requirement is the availability of clear and well defined objectives and guidelines regarding the policies and goals agreed on. These objectives should leave as little room as possible for interpretation. The final declarations of the G20 summits have become more ambitious, the already referred to expansion of the agenda –, but at the same time tend to be less specific and more vague as to the goals to be achieved. The second condition concerns the presence of an independent and credible audit mechanism from outside the group, a necessity that emphasizes the importance of a strong link between the G20 and the financial institutions, notably the IMF, OECD, FSB, and Basel Committee.

Finally, also the wider public can play a role in ensuring G20’s transparency by monitoring its performance. It is important to note that under the acronyms of C20, B20, L20, Y20 and T20, civil society, the business community, labor unions, youth organizations, and think tanks have become involved in the G20’s activities, in this way forcing the G20 to be more transparent. Essential in this respect is that, with regard to the involvement of these groups in the G20 process, some

²⁹ Subacchi and Pickford, *supra* note 14.

institutionalization has taken place, *inter alia*, by means of the outreach strategy that the G20 presidency defines at the start of its term. As this involvement started rather recently, it is too early to assess what impact the activities of these interest groups have had on the G20 in terms of transparency and accountability.

8. The Way Forward: Dilemmas

In response to the commentary that the G20 lacks democratic legitimacy and accountability, and is not representative, different, more far-reaching proposals have been suggested regarding replacing the G20 by a more representative institution and/or by reforming the existing International Financial Institutions. The creation of a Global Economic Council as part of a reformed Bretton Woods System has been proposed, which would function as a steering committee for the global economy and for the IFI's in general. This council should be built on a reformed voting power system and country constituency arrangements, as known from the Bretton Woods institutions, in order to make it more representative. This suggestion resembles proposals from the past to establish an Economic (and Social) Security Council as a replacement of the ECOSOC in conjunction to the UN-Security Council within the framework of the United Nations. Finally, proposals have been made to integrate the G20 format, rooted in the IMF-model of constituency arrangements, into the existing IFI's in order to make them more legitimate and effective.³⁰

This is not the place to discuss these proposals. Moreover, in view of the reform they require, implementing these proposals will be a lengthy and difficult process. It may therefore be expected that, for the time being, the G20 will remain the main forum for global financial-economic coordination and consultation. As a forum for cooperation, the value of the G20 is that it brings together the leaders of the world's main economies to discuss issues of common interest. This in itself is of utmost importance in view of the level of global financial and economic interdependence, and the ongoing shift in the global relations of power. Under the present circumstances, the G20 as a "hub of networked consultative governance" may be the only way by which to avoid a "G-zero world without leadership".

Nevertheless, serious questions regarding the legitimacy of the G20 remain. These refer particularly to the composition of the G20, and its claim to act as the primary forum for global economic cooperation. In the longer term, it seems to be unacceptable from a legitimacy perspective that a self-appointed exclusive group of the alleged "relevant countries" claims the right to take decisions on behalf of a large majority of countries which are not a member. Yet, expanding the G20's membership in order to make it more inclusive, as has been urged by some, does not seem to be the right way under the present circumstances. A first problem is which countries to select as new members. Besides, expanding the number of members could undermine (further) the already vulnerable effectiveness of the G20. It may especially affect what

³⁰ See Michel Camdessus et al., *Reform of the international monetary system: a cooperative approach for the twenty first century* (Palais-Royal Initiative, February 2011); Vestergaard, *supra* note 16; Jakob Vestergaard and Robert Wade, "The new global economic council: the governance reform at the G20, the IMF and the World Bank", *DIIS Working Paper no. 25* (Copenhagen, 2011).

has proven to be the real strength of the G20, namely its flexibility, adaptability and informality, which enable it to respond fast and adequately in times of crisis.

In the short term, therefore, the emphasis should be on streamlining the activities of the G20 as it is composed today. There is a need to focus on what, from the very start, was the core of the G20's mission: global financial and economic issues. In this regard, it is important to guarantee more continuity and coherence in the G20's agenda, which may require the creation of a secretariat, which should work in close cooperation with the IFI's, in particular the IMF, which supports the Troika of presidencies. A second challenge is to improve transparency and accountability by defining a limited number of clearer and more objective goals and guidelines, and engaging with the IFIs. Thirdly, the system of inviting countries and IO's to G20 summits should become more open and transparent, including the possibility of non-G20 members joining the activities of G20 working groups.

However, the final litmus test of the G20 is to be found in the fundamental question whether its creation and activities will lead to a weakening or strengthening of the global system of financial and economic governance. Although there have been some positive results, the jury still seems to be out on this.³¹

³¹ An important question in this regard is whether the tensions between the "West" and Russia as a result of the Russian aggression against Ukraine, and the expelling of Russia from the G8 (which in practice is a G7 again), will have a negative impact on the G20.

Transnational Governance and Democratic Legitimacy

The Case of WMD Proliferation

by Peter van Ham

1. Introduction

There is hardly a policy area that merits the label “high politics” more than that of Weapons of Mass Destruction (WMD). Nuclear, chemical, and biological weapons are unique in raising the specter of mass-scale destruction and annihilation, be they in the hands of rogue states or terrorists. A few decades ago, the fall of the Soviet empire gave rise to nightmare scenarios where the “burgeoning flow, or even a catastrophic flood, of nuclear-weapons material, or perhaps even the weapons themselves, has become a distinct danger given the conditions in which nuclear assets are held in Russia.”¹ Today’s security agenda is more varied, encompassing keeping Iran from developing nuclear military capabilities, assuring that Syria’s chemical weapons are not diverted in a protracted and hazy civil war between the Assad government and a mixed bag of “rebels”, and upgrading the existing treaty-based WMD non-proliferation framework to meet 21st century standards. But no matter how diverse, these policy issues all qualify as “high politics”, which implies that they are *hors catégorie*, and deserve our special attention.²

The WMD agenda is first and foremost a *security* agenda. As a result, three elements apply: first, the state is considered the key actor to take responsibility and action; second, the main source of danger is generally considered to be external; and third, the privileged policy response comprehends coercive (even military) action.³ Given the strategic impact of WMD, the process of securitization is spontaneous and natural, following the line of a long and established tradition.⁴ The nuclear arms race gave the Cold War its special edge, and the looming Armageddon has been used to establish the “national security state”, with its wide array of intelligence institutions and the concomitant surveillance of society.⁵ The nuclear threat has long been used to silence political dissent at home, legitimate control and the use of violence (both at home and abroad), as well as nurturing a general contempt for normal democratic procedures.

¹ Graham T. Allison, Owen R. Coté, Jr., Richard A. Falkenrath and Steven E. Miller, *Avoiding Nuclear Anarchy: Containing the Threat of Loose Russian Nuclear Weapons and Fissile Material* (Cambridge, Mass.: The MIT Press, 1996), p. 2.

² Michael Quinlan, *Thinking About Nuclear Weapons: Principle, Problems, Prospects* (Oxford: Oxford University Press, 2009).

³ Jack Donnelly, *Realism and International Relations* (Cambridge: Cambridge University Press, 2000).

⁴ Harald Müller, “Security Cooperation”, in Walter Carlsnaes (ed), *Handbook of International Relations* (London: Sage, 2002). See also Harald Müller and Carmen Wunderlich (eds), *Norm Dynamics in Multilateral Arms Control: Interests, Conflict, and Justice* (Athens and London: The University of Georgia Press, 2013).

⁵ Daniel Yergin, *Shattered Peace: The Origins of the Cold War and the National Security State* (Boston: Houghton Mifflin, 1977).

By their very nature, Weapons of Mass Destruction make the state the prime – if not the sole – actor, claiming a monopoly on policy-ownership.

This paper takes a broader view, and examines how even the apparently exclusive WMD agenda has been forced open to public debate and scrutiny. It is still dominated by states, yet even here traditional top-down, authoritative “government” is gradually giving way to more open and diverse transnational governance. The main drive behind this process toward normalizing the overly securitized WMD agenda is a rather common one: in many cases, states require societal involvement and cooperation for their WMD policies and strategies to acquire broad acceptance and be effective. This applies to export control regimes like the Wassenaar Arrangement, which deals with conventional arms and dual-use goods and technologies; the more formalized Missile Technology Control Regimes (MTCR); innovations in transnational governance, such as UN Security Council Resolution 1540, which obliges all states to develop and enforce legal and regulatory measures to halt WMD proliferation; and platforms like the Nuclear Security Summit, which brings together all relevant stakeholders in order to take measures to protect nuclear facilities and material from falling in the hands of terrorist groups. All four of these cases, together with many others, are examined in this paper.

This paper studies all layers of the WMD framework, starting with nuclear weapons and fissile materials, chemical weapons and chemical agent precursors, biological and toxin weapons and their precursors, and on to the broader field of missile and dual-use technologies. A brief overview, in four sections, is given of the state of play in these WMD areas, with a clear focus on the main innovations in transnational governance, and their impact on the question of democratic legitimacy. In most WMD areas, established International Organizations (IOs) and treaties intermingle with separate, and occasionally even enigmatic and highly exclusive, regimes. We also see the active involvement of societal actors, ranging from NGOs and firms to research institutes and hospitals. This paper examines the impact of these innovations of transnational governance on democratic legitimacy by looking through the five prisms as they were defined in the introductory chapter.

Although it is clear from the onset that even the uniquely securitized policy area of WMD has steadily accustomed itself to the reality of transnational governance, the question of democratic legitimacy has hardly been raised. For obvious reasons (most prominently the greatest moral silencer of all: state security!), WMD remains a different ballgame than the other case studies of this Study (such as the climate change, global health, and economic and financial policy). In a WMD policy setting, democracy and legitimacy tend to be considered secondary to security, and even to safety (see below for a debate on the differences). How should we value, measure, and analyze the democratic legitimacy of initiatives that aim to halt WMD smuggling, for example? What does transparency and deliberation imply in such a highly securitized environment? Have innovations in transnational governance helped to *desecuritize* WMD policy, imbuing the WMD agenda with traditional political concerns, including matters of democratic legitimacy? The process of desecuritization merits special attention, since transnational governance tends to counter the three security practices indicated above (state centrism; inside/outside thinking; and

coercion). Transnational governance innovations in the WMD domain may normalize, and hence help to democratize, a policy area that hitherto has been unapproachable and oblique.

The paper concludes that, despite marked changes in the institutional set-up of tackling WMD proliferation, encompassing key innovations in transnational governance, democratic legitimacy remains contested, and auxiliary to security. The need for more stakeholders and new allies in the continued struggle to halt WMD proliferation has contributed significantly to the transparency of decision-shaping and policy-making. However, strict limits to democracy and legitimacy remain, based on longstanding and deeply rooted concerns about secrecy, security, and – ultimately – effectiveness.

2. Democracy in the Nuclear Realm: Old Enemies, New Allies

Restricting the spread of nuclear weapons has been a long-standing mission of several IOs, including the International Atomic Energy Agency (IAEA) and the Comprehensive Test-Ban Treaty Organization (CTBTO). The nuclear non-proliferation norm was established and codified in the Nuclear Non-Proliferation Treaty (NPT) of 1975. It is monitored by (amongst others) the IAEA, and enforced by the United Nations Security Council.⁶ On account of five states (the United States, Russia, France, the United Kingdom, and China) being allowed to possess nuclear weapons, while all other state parties to the NPT have promised to refrain from acquiring them, the “nuclear club” remains highly restrictive, as well as based on inherently discriminatory (one might even say: arbitrary) rules justified mainly by Realpolitik and opportunism.⁷ Insomuch as the world’s five established nuclear powers are also permanent members of the UN Security Council, the impression is given that nuclear capabilities confer status, and even grandeur. Despite significant nuclear disarmament after the end of the Cold War, the nuclear arsenals of the US and Russia remain sizable, drawing continued criticism of anti-nuclear NGOs, as well as most non-nuclear weapons states.⁸

The IAEA meticulously monitors nuclear proliferation, offering both expertise (specialists and on-site inspectors) and authority (the IAEA is UN-based). Every five years, the nuclear norm is scrutinized and reinforced by a NPT Review Conference, bringing together not only all state parties, but also a wide array of stakeholders (ranging from the Campaign for Nuclear Disarmament to Greenpeace and Mayors for Peace).⁹ One could argue that the IAEA offers a certain level of transparency and a

⁶ Christine Wing and Fiona Simpson, *Detect, Dismantle, and Disarm: IAEA Verification, 1992-2005* (Washington DC: United States Institute of Peace Press, 2013).

⁷ Daniel H. Joyner and Marco Roscini (eds), *Non-Proliferation Law as a Special Regime: A Contribution To Fragmentation Theory in International Law* (Cambridge: Cambridge University Press, 2012).

⁸ The list of anti-nuclear NGOs is long and diverse. The UK Campaign for Nuclear Disarmament (CND) is amongst the best-known and most influential. Internet: <http://www.cnduk.org/>.

⁹ List of participants of the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (New York, April 25 – May 2005). Internet: <http://www.un.org/en/conf/npt/2005/npt-conf2005-misc1.pdf>.

level playing field (for NPT signatories). As Stuart Reid suggests, “The real value of the IAEA, then, is less as an advocacy group than as a ratings agency, providing third-party assessments of countries’ nuclear programs. It is also useful as a clearinghouse for information about these programs, a place where governments can share intelligence and compare notes. This is a decidedly minimalist vision — a sort of nuclear Moody’s.”¹⁰ At the same time, the NPT Review Conference confers a sense of openness and deliberation (or at least scrutiny and continued criticism) in what remains a highly exclusive and secretive policy area.

From 2001 on, these multilateral nuclear non-proliferation frameworks have faced serious criticism (most notably from the US Bush administration), mainly due to their want of “teeth”. IAEA nuclear safeguards were considered too weak, and were supplemented by a US-led Proliferation Security Initiative (PSI).¹¹ PSI is a separate arrangement, now endorsed by over 100 countries, aimed at exchanging information on illegal shipments of all WMD (counting, obviously, nuclear materials and weapons). The goal is to interdict suspicious and illegal transfers, using a wide network of national legal authorities.¹² Starting off as a so-called “counterproliferation initiative”, focused on results, PSI was initially seen as undermining multilateral non-proliferation frameworks (including the IAEA and the NPT). Evidently, the large number of participants from all over the globe – Thailand signed up as the 102nd participant in November 2012 – has gradually altered this perspective. With so many signatories, and the credibility of the IAEA still intact, PSI’s legitimacy has increased. Its track-record of successful interdictions as well as the Ship Boarding Agreements with countries that offer Flags of Conveniences (e.g. the Bahamas, Cyprus, and the Marshall Islands), further complete the PSI’s claim to legitimacy based on effectiveness as well as (legal) transparency.

A further innovation in the WMD area is UN Security Council Resolution 1540, adopted in April 2004. UNSCR 1540 establishes obligations (under Chapter VII of the United Nations Charter) for all member states to develop and enforce legal and regulatory measures against the proliferation of nuclear, chemical, and biological weapons, and their means of delivery.¹³ This is a unique, global, and mandatory non-proliferation effort, forcing all states to enforce rules and regulations to keep WMD material from reaching criminal and terrorist (non-state) actors. A small UN-based 1540 Committee oversees the implementation of the Resolution, and uses the expertise and funding of established WMD non-proliferation IOs, inclusive of the IAEA, as well as regional organizations like the European Union (see also the

¹⁰ Stuart A. Reid, “The Man From Vienna”, *New Republic* (May 9, 2011).

¹¹ Emma Belcher, “The Proliferation Security Initiative: Lessons for Using Nonbinding Agreements”, *Council on Foreign Relations Working Paper* (July 2012).

¹² Proliferation Security Initiative (PSI) website, U.S. State Department. Internet: <http://www.state.gov/t/isn/c10390.htm>.

¹³ Olivia Bosch and Peter van Ham (eds), *Global Non-Proliferation and Counter-Terrorism: The Impact of UNSCR 1540* (Washington DC: Brookings Institution Press, 2007).

following sections).¹⁴ UNSCR 1540's main focus is to fill the many gaps that existing treaties, regimes, and national legal systems have left to keep WMD materials and weapons out of the hands of terrorists and traffickers. It also strives towards real enforcement, both through international regulations and a dense network of national laws.

Like the PSI, UNSCR 1540 has made use of the post-9/11 sense of urgency to effectively deal with terrorists by introducing innovations of transnational governance. In order to be effective, UNSCR 1540 not merely calls upon the "usual suspects" (i.e., states, the military establishment, and the civilian nuclear industry), but particularly upon scientists, technicians, and auxiliary staff, engineers in academic and industrial research, the broader life science community, as well as customs control and law enforcement officials. UNSCR 1540 has been important in raising awareness in these stakeholders of the potential consequences their work may have for WMD proliferation. Most academics and researchers take precautionary measure to assure safety (so that they themselves will not be harmed), but relatively little to assure security (diversion and theft of materials and knowledge). UNSCR 1540 is obviously based within the UN framework, giving it a traditional, multilateral feel. Still, its outreach to the wide community of scientists, officials, and other practitioners, is genuinely novel, and even revolutionary. Although the democratic legitimacy has been contested – could and should the UN Security Council make global legislation in this way? –, these initial (legal) qualms have quickly dissipated. The UN Security Council remains the solid pinnacle of international law, and the global reach of UNSCR 1540, its non-discriminatory approach (all member states and all stakeholders have to comply to the same obligations), as well as the full transparency of the process, adds to its broad acceptance – and, hence, its effectiveness.

The end of the Cold War has opened up the nuclear field, animating numerous initiatives to create rules, regulations, agreements, and guidelines with the purpose of limiting proliferation. The Global Initiative to Combat Nuclear Terrorism (initiated by the US and Russia in 2006), and the G8 Partnership Against the Spread of Weapons and Materials of Mass-Destruction (agreed at the 2002 Kananaskis G8 Summit), come to mind. The Nuclear Security Summits of 2010 (in Washington DC), 2012 (in Seoul), and 2014 (in The Hague) are of particular relevance to our analysis. These Summits are amongst the largest gatherings of heads of state and government, representatives from industries, the academic and scientific community, as well as NGOs and media, focusing on nuclear terrorism as "one of the most challenging threats to international security." Although the results of these Nuclear Security Summits are limited to non-binding communiqués (which, amongst others, call on states "to work cooperatively as an international community to advance nuclear security", and to "recognize the continuing role of nuclear industry in nuclear security"), the Summits are the closest one can possibly get to a truly functioning

¹⁴ Monika Heupel, "Implementing UN Security Council Resolution 1540: A Division of Labor Strategy", *Carnegie Papers*, no. 87 (June 2007).

framework for deliberative democracy.¹⁵ High-level political debates are complemented with industry and academic symposia, and most of these debates are open and accessible.

Certainly, the nuclear non-proliferation sphere remains dominated by states (especially nuclear powers), based upon discriminatory policies and regulations rather than transparency and deliberation. The Nuclear Suppliers Group (NSG, set up in 1974), for example, is an export control regime (with 47 participants, including the EU's European Commission) intended for monitoring the export (and re-export) of nuclear material.¹⁶ The even more obscure Zangger Committee was set up in 1972 to harmonize, or be a "faithful interpreter" of, the nuclear export control policies of all NPT member states.¹⁷ The merits of this kind of non-proliferation regime will be examined in more detail in later sections of this paper. What is evident, however, is that the logic of globalization – which assures that materials and knowledge ultimately will become available at lower costs and less risk – is also at work in the nuclear dimension. This necessitates more dedication and effort to maintain the (nuclear) non-proliferation norm, involving large sectors of society all over the world, and either encouraging or enforcing their cooperation to keep nuclear materials and weapons out of the wrong hands.

3. Chemical Weapons and Precursors: Long Struggle, Little Doubt

It is a truism to label chemical weapons the poor man's atom bomb, but platitudes often tend to be correct. Whereas nuclear weapons require not only sufficient high-grade fissile material, but also the technology to deliver and detonate them (radiological devices – commonly named "dirty bombs" – are the exception), rudimentary chemical weapons can be fabricated in one's backyard using basic and readily available chemicals. Like the nuclear realm, the chemical weapons area is equally blessed with a solid IO: the Organization for the Prohibition of Chemical Weapons (OPCW), which is headquartered in The Hague since 1997. The OPCW has an impressive 188 member states, and (like the NPT's Review Conferences) regularly organizes a "Special Session of the Conference of the States Parties to Review the Operation of the Chemical Weapons Convention." In these Special Sessions (the third of which took place in April 2013, in The Hague), not only diplomats participate, but also representatives from relevant IOs, as well as NGOs and other "Non-State Parties", such as academics and researchers, and firms. Just as the IAEA, the OPCW has a close working relationship with the UN, which implies that the OPCW keeps the UN informed on all relevant matters.¹⁸ Considering only a few UN member states remain outside the OPCW framework (most conspicuously Egypt, Syria, and North-Korea), representative legitimacy is strongly anchored. The openness of the Special

¹⁵ Internet: <http://www.thenuclearsecuritysummit.org/>.

¹⁶ Internet: <http://www.nuclearsuppliersgroup.org/>.

¹⁷ Internet: <http://www.zanggercommittee.org/>.

¹⁸ Ian R. Kenyon and Daniel Feakes (eds), *The Creation of the Organisation For the Prohibition of Chemical Weapons: A Case Study in the Birth of an Intergovernmental Organisation* (The Hague: T.M.C. Asser Press, 2007).

Sessions (as well as regular workshops, conferences and outreach programs), assures a high level of transparency within the Organization, also furthering its claim to deliberative (democratic) legitimacy. Receiving the Nobel Peace Prize in 2013, for its efforts to disarm Syria, has obviously boosted the OPCW's credibility and democratic legitimacy.

Apart from strengthening the chemical non-proliferation norm, the OPCW assists in chemical weapons demilitarization efforts, most notably in Russia, the US, Libya, India, and Iraq. Most (more than 75%) of the declared chemical weapons agents have now been destroyed, sending the global message that chemical WMD lack all legitimacy. Like the IAEA, the OPCW conducts regular on-site inspections, strengthening the level of mutual trust based on verification and credibility of information. The OPCW website boasts that from "April 1997 to 23/01/2013, the OPCW has conducted 5,035 inspections on the territory of 86 States Parties, among which 2,369 inspections of industrial sites. 5,382 industrial sites have been inspected out of a total of 5,382 declared. Worldwide, 4,913 industrial facilities are liable to inspection."¹⁹ The OPCW works closely together with universities, laboratories, and industry all over the world to raise awareness, using the legal obligations of the Chemical Weapons Convention and UNSCR 1540 to gain access to relevant institutions and facilities, and to work with governments to assist them in implementing the national requirements of the CWC. This requires active participation of national authorities, involving military, technical, and legal expertise. Like the IAEA, the OPCW offers this important public good, creating a level playing field based on a certain degree of trust, generated by continuous and meticulous verification, procedural openness, and reliable reporting.

However, as one may expect, the story does not end here. A reputable IO like the OPCW is important, but only as strong and trustworthy as its weakest link (in this case: unreliable OPCW member states), and only as effective as multilateralism allows it to be. Just as PSI adds teeth to the IAEA, and the Zangger Committee adds clarity to the nuclear export rulebook, the OPCW has been supplemented by numerous export control regimes. The Australia Group (set up in 1985) brings together forty countries, as well as the EU's European Commission. The list of participants mainly contains Western countries, together with Japan, Argentina, and South-Korea. Its official aim is to "use licensing measures to ensure that exports of certain chemicals, biological agents, and dual-use chemical and biological manufacturing facilities and equipment, do not contribute to the spread of CBW. The Group achieves this by harmonizing participating countries' national export licensing measures. The Group's activities are especially important given that the international chemical and biotechnology industries are a target for proliferators as a source of materials for CBW programs."²⁰ Delegations of participating states meet every year in Paris to co-ordinate their mutual export control policies, discuss revisions of export control lists, and exchange intelligence. Needless to say, these meetings take place outside the public eye. The importance of regimes like the Australia Group, is that

¹⁹ OPCW website. Internet: <http://www.opcw.org/news-publications/publications/facts-and-figures/>.

²⁰ Internet: <http://www.australiagroup.net/>.

they are based on a high level of mutual trust. Participating states not only exchange sensitive (commercial, technical, and security) information, but are also committed to disapprove any particular export to a specific country that another member had previously denied.²¹

Although the Australia Group is an informal, intergovernmental gathering – with a modest Secretariat in Australia –, its relevance and effectiveness is contingent upon the close involvement of technical experts, most notably with relevant industry sectors. Some categories of chemical (and biological) precursors are evidently dangerous, and are either banned or under strict control. But technology advances quickly, requiring swift updates of both export control lists and control of the means of distribution. For example, the Australia Group decided, in its June 2012 meeting, to enhance its controls on brokering services and to review the proliferation risks of new and emerging technologies, particularly in the area of nanotechnology. Compared with the OPCW, the Australia Group is more versatile, taking more decisive action based on scientific and technological developments, open source expertise, and information from intelligence agencies.

Several closely related proliferation dynamics can be identified here.²² First, many developing countries now manufacture their own fertilizers and pesticides, and (Western) multinational companies have built high-tech chemical plants all over the world to save labor costs and exploit loopholes in environmental regulations. Second, more countries have become self-sufficient in the production of crucial precursor chemicals, and could more easily develop chemical weapons, or sell them. Third, emerging technologies change the nature of the chemical weapons threat. New technologies, and the growing convergence between chemical and biological production methods, make it increasingly hard to update export control list, and to recalibrate OPCW verification measures. The bottom-line is that, in order to keep up with the pace and intricacy of change, states feel obliged to act equally swiftly and decisively.²³ This implies that non-proliferation and export control regimes have to be the best of both worlds: politically cohesive, based on shared norms and interests (which presupposes a measure of exclusivity), as well as accommodating the timely input of external expertise and intelligence (which requires sufficient institutional openness). We will return to this puzzle in the concluding section of the paper.

4. Biological Weapons and Precursors: The Danger From the Margins

The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,

²¹ “The Australia Group at a Glance”, *Arms Control Today*. Internet: <http://www.armscontrol.org/factsheets/australiagroup>.

²² Jonathan B. Tucker, “The Future of Chemical Weapons”, *The New Atlantis*, No. 26 (Fall 2009 – Winter 2010), pp. 14-7.

²³ Jean Pascal Zanders, “Workshop on the Future of the Chemical Weapons Convention: Transition Towards the Post-Destruction Phase”, *EU ISS Report* (Brussels, September 10, 2012). Internet: http://www.iss.europa.eu/uploads/media/CWC_report.pdf.

commonly known as the Biological Weapons Convention (BWC), entered into force in 1975. Only 17 states have *not* joined the BWC (most notably Israel). Members agree to “take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition, or retention of the agents, toxins, weapons, equipment and means of delivery” (Article IV). Due to the absence of a solid IO to monitor and verify member states’ policies, the biological weapons domain remains severely under-institutionalized. Member states meet annually (and more often in intermediate technical sessions), and irregularly gather in Review Conferences (the Seventh of which took place in Geneva, December 2011). However, without a Secretariat and without a shared sense of urgency, there is little pressure to upgrade and harmonize policies. The United Nations’ Institute for Disarmament Research (UNIDIR), based in Geneva, acts as a focal point and driver of research in the biological weapons purview. UNIDIR’s research projects and conference series keep this issue on the political and academic agenda.²⁴ The UN Office for Disarmament Affairs houses a three-person BWC Implementation Support Unit. Still, there are many avenues left for NGOs and transnational governance to fill the normative and institutional gaps (see below).

An important shift in the discourse on biological weapons took place after 9/11. While before only the armed forces were considered at risk from biological warfare, the threat is now perceived to involve wide-scale bioterrorism affecting the population as a whole.²⁵ As a result, biodefense is now entangled with large parts of the public health sector, ranging from an IO like the World Health Organization (WHO), health-oriented NGOs, and multinational corporations to new transnational arrangements like the Global Outbreak Alert and Response Network (GOARN).²⁶ GOARN (coordinated by the WHO since 2000) “focuses technical and operational resources from scientific institutions in Member States, medical and surveillance initiatives, regional technical networks, networks of laboratories, United Nations organizations, the Red Cross and international humanitarian nongovernmental organizations. Participation is open to technical institutions, networks and organizations that have the capacity to contribute to international outbreak alert and response.”²⁷ As we have seen in other WMD areas, governments call upon and include industry, research facilities and academia to draw in expertise and capabilities to control the production and trade (or smuggling) of pharmaceutical ingredients and biological agents.

This attempt to securitize public health has been opposed by the WHO ever since the inception of GOARN. The WHO has tried to keep itself apart from the debate about biological weapons and its control mechanisms, and has refused any suggestion that it could take on the BWC’s role of verifying “the use of BW or other aspects of states’

²⁴ See, for example, Piers Millet’s edited volume *Improving Implementation of the Biological Weapons Convention. The 2007-2010 Intersessional Process* (New York and Geneva, UNIDIR, 2011).

²⁵ Wil S. Hylton, “How Ready Are We For Bioterrorism?”, *The New York Times* (October 26, 2011).

²⁶ Internet: <http://www.who.int/csr/sars/goarn/en/>.

²⁷ Internet: <http://www.who.int/csr/outbreaknetwork/en/>.

compliance with their obligations undertaken under the BWC.”²⁸ It is a politically neutral IO, offering assistance to its member states when they are faced with the outbreaks of diseases. Proposals to use GOARN as a clearinghouse for information have been rejected, as this could compromise the WHO’s public health mission. Although this concern about securitization may seem reasonable, this leaves the dire reality that the biological weapons domain misses a functioning framework facilitating the exchange of information. At most Review Conferences, only a minority of the state parties submit their so-called “Confidence-Building Measures” (CBM) forms, which list information on national research facilities and laboratories, biological defense research, possible outbreaks of infectious diseases, and vaccine production facilities (amongst others). Consequently, considering transparency and reciprocity are fundamental in building trust within a regime, the BWC maintains its deplorably low profile.²⁹ Discussions at the 2011 Review Conference on working towards an obligatory verification mechanism, which would require states to submit periodic reports on infrastructures available, occurrences, and actions taken concerning outbreaks of diseases and epidemics, have all come to naught.

Given the limit of multilateralism and classical state-to-state diplomacy in making progress in the biological weapons area, it is little surprising to see innovations in transnational governance. The BWC has benefited greatly from, and actually depends upon, the active participation of IOs like the Food and Agriculture Organization (FAO), the International Committee of the Red Cross, and the World Organization for Animal Health, as well as the WHO of course. Societal actors from the industry, and professional, scientific, media, and ethical organizations have all been essential in developing a framework for a more common understanding in this area. For the biological non-proliferation effort, UNSCR 1540 has been particularly important, seeing that it not only obliges all UN member states to take decisive action to regulate and criminalize the use of biological weapons in their national legal order, but also offers the *ersatz* institutional framework that the BWC is so sorely lacking. For example, under the auspices of the UN Office for Disarmament Affairs, the first Civil Society Forum on UNSCR 1540 took place at Geneva in January 2013, involving more than 50 participants from NGOs, think tanks and the industrial sector.³⁰ In this Forum, the creation of an effective partnership between states and civil society, especially concerning national implementation of BWC obligations, was a central issue.

Here, the role of the Verification Research Training and Information Centre (VERTIC) deserves special mention. VERTIC is an independent, non-profit organization established in 1986, based in London. Most relevant to our analysis is

²⁸ Alexander Kelle, “Securitization of International Public Health: Implications for Global Health Governance and the Biological Weapons Prohibition Regime”, *Global Governance*, vol. 13, no. 2 (April/June 2007), p. 231.

²⁹ Nicole Burtchett, “Forcing a Square into a Round Hole: The Control Model as a Difficult Fit for the Biological Weapons Regime”, paper presented at the 2009 ISA annual meeting (New York, February 2009).

³⁰ Internet: <http://www.un.org/disarmament/update/20130108/>.

VERTIC's new role of offering assistance to all member states "with legislative drafting for BWC obligations, remotely or in capitals, at no cost. VERTIC assesses the comprehensiveness of existing national measures, identifies gaps, and proposes approaches to fully implement the BWC, including amendments to existing legislation, a single issue law or omnibus legislation to cover several CBRN treaties and related legal instruments."³¹ VERTIC has also taken the lead in encouraging greater coordination and cooperation among the various, international and national, WMD non-proliferation agencies, and calls upon states to combine their national WMD implementation processes. It has published a "Guide to National Implementation of UN Security Council Resolution 1540", which offers (in one document) the model laws, implementation kits and handbooks that already have been developed by VERTIC itself, the OPCW, and the IAEA.³² It is obviously noteworthy that VERTIC – a registered UK charity – spearheads policy innovation, in particular as this occurs in an area that remains highly securitized.

5. Missile and Dual-Use Technology: Catch-All – Or Nothing

The spectrum of WMD non-proliferation regimes is completed with the export control arrangements that focus on missile technology, which overlaps with technology related to meteorology and the peaceful use of outer space, and dual-use technology, which has both military and civilian usage. The Missile Technology Control Regime (MTCR) is an informal and voluntary arrangement of like-minded (Western) states set up in 1987, nowadays counting 34 members. MTCR states enforce integral common lists of controlled items (the MTCR Equipment, Software and Technology Annex), and adhere to common export policy guidelines (the MTCR Guidelines). The MTCR is now chaired by Germany, but has no a formal secretariat.³³ The MTCR Guidelines specifically state that they are "not designed to impede national space programs or international cooperation in such programs as long as such programs could not contribute to delivery systems for weapons of mass destruction." The MTCR works alongside the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Technologies (WA), set up in 1995, which now involves 41 participating states, and follows procedures akin to the MTCR.³⁴ The WA sees itself as the successor of the Cold War CoCom (a deliberately non-descript abbreviation of "Coordinating Committee"), a rather obscure export control arrangement specifically designed to keep dual-use technology out of Communist hands.³⁵

Like the Nuclear Suppliers Group, the Australia Group, and the Zangger Committee, both the MTCR and the W A are discriminatory regimes, excluding states whose political, strategic, and/or economic interests are at odds (or even openly clash) with

³¹ Internet: <http://www.vertic.org/>.

³² Internet: <http://www.vertic.org/pages/posts/vertic-publishes-guide-to-national-implementation-of-un-security-council-resolution-1540-351.php>.

³³ Internet: <http://www.mtcr.info/>.

³⁴ Internet: <http://www.wassenaar.org/>.

³⁵ Gary K. Bertsch and Steven Elliott-Gower (eds), *Export Controls in Transition: Perspectives, Problems, and Prospects* (Durham and London: Duke University Press, 1992).

the regime's member states. These export control regimes justify their existence pragmatically, at times referring to the norms and obligations of treaties and UNSC resolutions (1540, as well as 1718, 1874 and 1929); at other times vindicating themselves by claiming success in keeping essential precursors and/or technologies from reaching rogue states and/or terrorists. The rationale that binds these regimes together is a combination of shared – political and economic – interests, as well as trust. This mutual trust in each other's legal, and customs, systems is implied by the fact that the controlled substances and technologies are freely tradable amongst the regime members themselves.

The other selling-point of these regimes is relevance and flexibility. Given the rapid pace of technological change and procurement practices of potential proliferators, these export control regimes have to adjust their control methods and lists frequently, and without much ado. This can only be possible within a group of like-minded states, based on timely information and reliable expertise. The MTCR makes these changes at its annual plenary meeting, based on the input of three experts groups: the Licensing and Enforcement Experts Meeting (LEEM); the Information Exchange Meeting (IEM); and the Technical Experts Meeting (TEM).

The dilemma MTCR members face is that they are, to a large extent, dependent on the expertise from defense firms that often have a stake themselves in preventing certain new technologies and weapons systems from being put on the control list. A relevant example is the successful lobbying of Northrop Grumman to keep Unmanned Aerial Vehicles (UAVs), better known as “drones”, of the Category One list, for which there is a “strong presumption of denial”, and have it placed into Category Two instead, where states have greater discretion to export.³⁶ This problem – striking a balance between incorporating external expertise and external political and/or commercial interests – is a long-standing one (it already befell CoCom in the 1980s), and is probably the price to pay for openness and transparency, even in more-or-less closed and secretive export controls regimes.³⁷

Still, despite the fact that the process of export control remains unclear, the export control lists are obviously public, because otherwise firms would not know which rules to stick to.³⁸ The MTCR also holds “outreach meetings with Non-Partner states” in order to increase transparency and promote the MTCR's objectives. MTCR member states further commit themselves to encourage and assist these “Non-Partners” in applying MTCR guidelines and control lists. Regular Export Control Seminars have been organized (the fifth in Berlin in June 2012), in order to increase

³⁶ House of Commons, Committees on Arms Export Controls, *Arms Export Controls 2013* (HMSO, London: 2013). See also Bill Sweetman, “Missile Treaty A Drag On US UAVs”, *Aviation Week* (August 22, 2011).

³⁷ Gary K. Bertsch (eds), *Controlling East-West Trade and Technology Transfer: Power, Politics, and Policies* (Durham and London: Duke University Press, 1988).

³⁸ See, for example, the MTCR “Equipment, Software and Technology Annex” (from November 18, 2011), which is fully accessible online. Internet: http://www.mtc.info/english/MTCR-TEM-Technical_Annex_2011-11-18.pdf.

the awareness of the Regime's activities. The WA has a similar commitment to openness and transparency, As demonstrated by the "Best Practices For Implementing Intangible Transfer of Technology Controls", published after the WA's 2006 plenary meeting, and available online.³⁹ Although the updates and reforms of the export control lists remain shrouded in secrecy, the lists themselves and the enforcement methods are public and transparent. Without openness and clarity on *what* cannot be exported (or only under certain conditions), these regimes just would not work. Despite the unmistakable discriminatory character of export control regimes, and their less-than-perfect legal basis, there is no ambiguity in their rationale, and a surprising transparency regarding their working methods.

6. Conclusions: The Securitization – Legitimacy Trade-Off

The wide-ranging assortment of WMD-related IOs, treaties, arrangements, regimes and coalitions has proven resilient in light of the rapidly changing strategic and technological environment, starting with the break-up of the Soviet empire and the end of the Cold War until the emerging of the specter of international terrorism. Flatter and more transparent borders make it harder to keep technology and dangerous materials from falling into the "wrong" hands, especially since globalization entails that "sensitive" knowledge and capabilities hitherto guarded by Western states are now readily available across the world. These changes are here to stay, and will continue to erode the pillars of the existing WMD non-proliferation system.

This paper has offered an overview of the main innovations in the management of WMD non-proliferation. Given the limited scope of this paper, only the principal advances could be examined. But the list of novelties in this area could easily be expanded with, for example: the UN-based (and legally binding) Convention on Nuclear Terrorism, which defines nuclear terrorism, and requires international co-operation to prevent and punish such acts; the Global Initiative to Combat Nuclear Terrorism (GICNT), launched in 2006, which seeks to co-ordinate international efforts to detect, investigate and respond to nuclear proliferation by non-state actors; the Fissile Material Cut-Off Treaty (FMCT), which is discussed, but not yet under negotiation, and would aim to prohibit the further production of fissile material for nuclear weapons or other explosive devices; and the Global Partnership against the Spread of Weapons and Materials of Mass Destruction, set up by the G8 in 2002 to prevent terrorists from acquiring WMD. The multitude of new developments – from UN-based and legally binding ones to unstable arrangements with a motley crew of stakeholders – is indicative of both the need for reform, and the willingness and capabilities of varied actors to arrange for it.

For our Study, the main question concerns the state of affairs of democratic legitimacy in the area of WMD non-proliferation, particularly regarding the innovations in (transnational) governance. Is there a crisis in representative

³⁹ Internet: <http://cns.miiis.edu/inventory/pdfs/wassbestpractices2006b.pdf>. An integral list of all WA public documents is available online. Internet: <http://www.wassenaar.org/publicdocuments/2012/Basic%20Documents%202012.pdf>.

democracy which encourages the emergence of new arrangements to effectively hinder WMD proliferation? What are the merits of accountability and transparency in a policy area that is traditionally highly securitized? Is there a minimum level of accountability and transparency that applies even to these securitized governance innovations? Should we even consider a trade-off between highly valued propositions like effectiveness, timeliness and focus on the one hand, and democratic legitimacy on the other?

The varied landscape of WMD non-proliferation arrangements can be divided between (1) formal treaties; (2) restricted setups of expediency; (3) export control regimes; and (4) societal initiatives, usually with the long-term aim of (nuclear) disarmament. As we have seen, each type of arrangement and each approach can claim different forms of democratic legitimacy, using the democratic legitimacy prisms as they see fit.

The first category involves treaties such as the NPT, the CWC and the BWC, which establish and enforce the norm that WMD proliferation is destabilizing and generally detrimental to global security. Without these treaties, this norm would be insubstantial and open to general criticism. The above-mentioned treaties are almost universally acknowledged, and have from the very outset made a claim to representative democratic legitimacy. A mere four states are “non-signatories” of the NPT: India, Israel, Pakistan, and South Sudan. Only eight states are not party to the CWC: Angola, Burma, Egypt, Israel, North Korea, Somalia, South Sudan and Syria. The BWC lacks 17 signatories, Israel and several African states are numbered among them. All three treaties make a claim to universality, striving towards the full disarmament of nuclear, chemical, and biological weapons. The fact that the NPT recognizes five nuclear weapons states remains a discrepancy, only argued away by claims based on Realpolitik and pragmatism. Still, the (nigh) universality of membership for these three treaties strengthens their claim to (representative) democratic legitimacy, and has laid the foundation for the WMD non-proliferation norm as we know it today.

In the nuclear and chemical weapons realm, this claim to legitimacy is reinforced by strong and effective institutions: the IAEA and the OPCW. Both IOs have established themselves as the “guardians” of the commitments in their respective proliferation field. These IOs are widely considered as politically neutral, offering a platform for strategic negotiations at the highest possible diplomatic level. At the same time, they have started to open up to societal actors – mainly NGOs, representatives from industry, and media –, taking into account their opinions and concerns. The NPT Review Conferences, which assess the NPT’s workings and agenda, for instance, are reasonably open and accessible to a variety of non-state actors from across the world. The OPCW falls short of such a claim to deliberative democratic legitimacy, as it convenes annually at the highest level, while, in the meantime, the Technical Council performs the crucial activities of inspection and verification. The BWC has no IO, and only irregularly meets in Review Conferences. As mentioned above, ever since 2007, it has an Implementation Support Unit (ISU) for the Convention within the Geneva Branch of the United Nations Office for Disarmament Affairs. Most importantly, the

ISU provides (modest) administrative and national Implementation support and assistance, as well as support and assistance for Confidence-Building Measures and for obtaining universality. Of all WMD areas, the nuclear field is – not surprisingly – best endowed with strong and credible institutions, technical expertise, robust inspection and verification procedures and capabilities, as well as a broad and open societal network generating public support and deliberative democratic legitimacy. On all these counts, the CWC and BWC show short-comings and lacunas.

So what about accountability and transparency? The legal frameworks of established IOs like the IAEA and the OPCW may offer clarity of purpose, procedure and policy. We know what these IOs aspire to do, how they are funded and organized, and who shapes their policies. For IOs, accountability and transparency do not seem to be the fundamental avenues of criticism they are subjected to.⁴⁰ Since these IOs also actively do societal outreach – involving NGOs, industry, academia, and research facilities –, their claim to deliberative democracy is warranted. The Review Conferences organized multi-annually resemble (relatively) open *agoras*, offering a voice to all who want to be heard. Although this may have value in its own right, societal openness is particularly prized as a prerequisite for assuring timely information and high-level expertise, as well as broad societal support, all targeting the ultimate prize of effectiveness. It is on this latter issue that IOs are, in varying degrees, exposed to criticism. PSI, for example, prides itself on being the necessary operative arm of the norms and aims laid down in the NPT, and only partly safeguarded by the IAEA. UNSC Resolution 1540 equally aims to fix a legal loophole in all existing WMD-related treaties by obligating criminalization. As we have seen, existing WMD-related IOs have proven strong enough to weather this criticism, and have (as in the cases of PSI and UNSC Resolution 1540) even been able to benefit from the support of governance innovations.

The second category of WMD non-proliferation arrangements are demand-driven, based on the well-known premise of “coalitions of the able and willing”.⁴¹ The PSI, GOARN and VERTIC are poster children for innovation in WMD non-proliferation policy. The PSI in particular, exemplifies how a flexible arrangement, combining “legally binding bilateral agreements with an overarching multilateral pledge”, can become widely accepted as both legitimate and successful.⁴² It lacks a decision-making mechanism, has no governing body, and no real authority that must approve an interdiction, yet, the call of US President Obama of April 2009 to turn the PSI into a “durable international institution” has been given heed to, with the notable adjustment that the PSI will be shaped into a “durable international effort” (rather than an institution).⁴³ Emma Belcher’s detailed study on the lessons of PSI is worth

⁴⁰ Pavel Podvig, “Global Nuclear Security: Building Greater Accountability and Cooperation”, *UNIDIR* (Geneva, 2011).

⁴¹ Niels Blokker, “Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force By ‘Coalitions of the Able and Willing’”, *European Journal of International Law*, vol. 11, no. 3 (September 2000).

⁴² Belcher (2011), p. 11.

⁴³ Internet: <http://www.state.gov/t/isn/c10390.htm>.

recalling here. She suggests that PSI's informal nature has been a useful complement "to existing treaties and other formal mechanisms of international cooperation"; that, although nonbinding, it cannot be easily modified; that participation confers "seriousness of purpose", providing all participating actors "a good reputation for compliance"; and that it has strengthened the WMD non-proliferation norm, despite not being clearly grounded in international law. Consequently, such informal arrangements are "probably best used in situations where the behavior they circumscribe is not too controversial or groundbreaking". Lastly, Belcher concludes that these ad hoc coalitions will also appear outside the "Western world", particularly in the BRIC countries (Brazil, Russia, India and China).⁴⁴

Relating to this paper, the PSI-experience suggests that transnational governance innovation will be more successful if its main policy aim is congruent with international norms (in this case the NPT, CWC and BWC), if participation is (relatively) open to all actors who are "willing and able", and if success is forthcoming. In more general terms, democratic legitimacy is conferred by normative congruence, openness, as well as effectiveness. Given the often divergent views and interests of major world powers, it will be increasingly difficult to achieve both openness and effectiveness. A trend towards a certain regionalization in security management is therefore manifest and explicable. For this reason, Ash Jain calls for a new "Democracies 10" (or D10) group, whose shared worldview and tremendous sources of leverage in the international system could play the role of strategic hegemon. Jain's concerns about democratic legitimacy are modest: "The D10 has a logical basis for participation – highly capable states who share a similar perspective on advancing the norms of a liberal world order – and concerns over its legitimacy are likely to fade as soon as it proves capable of effectively advancing its mission."⁴⁵ Although the trade-off between openness (i.e., inclusiveness and wide participation) and effectiveness may be the norm and generally accepted within a securitized policy environment, it remains uncertain whether the emergent polycentric world order can be imagined without more openness. Jain's argument that the D10 (still) musters sufficient leverage to guarantee effectiveness can be questioned.

This point is emphasized by the third category of governance innovations: export control regimes. The WMD and dual-use (technology) export control regimes, which have been briefly introduced above, often taking Jain's D10 at their core, are based on the premise that exclusivity generates effectiveness. Most (if not all) export control regimes are normatively congruent with global WMD non-proliferation treaties. Together with effectiveness, this is their basis for democratic legitimacy. Export control regimes require timely expert information from stakeholders to assure relevancy as well as societal support for their policies. Export control lists also have to be widely publicized in order to be implemented by all involved. This modicum of inclusiveness is set-off against the inevitable discriminatory features of these arrangements. In the end, their democratic legitimacy is based on the normative

⁴⁴ Belcher (2011), p. 15.

⁴⁵ Ash Jain, "Like-Minded and Capable Democracies. A New Framework for Advancing a Liberal World Order", *Council on Foreign Relations Working Paper* (July 2012), p. 15.

congruence of their objectives with established global standards, as well as their claim to effectiveness.

The last category of innovation – the broad, catch-all collection of “societal initiatives” – comprehends VERTIC’s practical work on national implementation efforts of UNSC Resolution 1540 obligations, the initiatives and coalitions of the WHO-coordinated Global Outbreak Alert and Response Network, and the International Campaign to Abolish Nuclear Weapons (ICAN).⁴⁶ The range and scale of these activities is extraordinary, showing that despite the securitization of WMD-policies, there is unwavering societal interest. The democratic legitimacy of most of these efforts, despite many disarmament groups having been denounced as a Soviet-funded fifth column during the Cold War,⁴⁷ is beyond reproach. In a way, the inclusiveness of these organizations, and their commitment to strengthening global WMD-norms, is what a vibrant, liberal democracy is all about: active citizenship on a global scale. This development towards cosmopolitanism (rather than internationalism) is laudable, and a requirement for both the maintenance of already existing WMD non-proliferation norms and unrelenting governance innovation. Although effectiveness remains the ultimate goal of all these societal initiatives, their democratic legitimacy is mainly rooted in normative congruence, openness (both accountability and transparency), and deliberation.

⁴⁶ Internet: <http://www.icanw.org/>.

⁴⁷ Bruno Waterfield and James Kirkup, “Baroness Ashton Questioned over CND and Soviet Money”, *The Daily Telegraph* (November 25, 2009).



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