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# Supranational Institutions and Governance in an Era of Uncertain Norms

Editors

Russell Alan Williams and Reeta Tremblay

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Editorial

# Norms, Institutions and Governance in an Era of Uncertainty: Connecting the Disparate Scholarship

Russell Alan Williams [1,*] and Reeta Chowdhari Tremblay [2]

[1] Department of Political Science, Memorial University, St. John's, NL A1B 3X9, Canada; E-Mail: russellw@mun.ca
[2] Department of Political Science, University of Victoria, Victoria, BC V8W 2Y2, Canada; E-Mail: reeta@uvic.ca

* Corresponding author

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**Abstract**
This thematic issue sprung from a desire to encourage more dialogue across subfields in the study of politics and governance on how we understand the emerging practices of global governance. Shifts in global power, the emergence of new organizations and regimes and the ever-increasing complexity of interstate cooperation have all contributed to increased interest in "governance" and the role supranational organizations play in managing globalization, regionalization and regional integration. They have also contributed to increased theoretical diversity in how "governance" should be studied. While international politics scholars, drawing on constructivist literature, have placed considerable emphasis on the development and diffusion of norms; others have drawn on the insights of comparative politics, public policy and political economy to study similar issues. While the legacy of older disciplinary boundaries continues to isolate new theoretical developments, it is clearly the case that there is a high degree of complementarity in the study of governance, particularly in the emphasis on "norms" or "ideas" and their level of institutionalization.

**Keywords**
comparative politics; governance; institutions; international organizations; international relations; norms

**Issue**
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"It was the best of times, it was the worst of times"
Charles Dickens, *A Tale of Two Cities*, 1859

## 1. Introduction

For scholars pursuing the study of global governance, this is indeed, both the "best" and "worst" of times. We are awash in exciting and challenging topics for study; the crisis in EU governance, "Brexit", the global climate change policy negotiations, the shortcomings of the global trade regime, endemic financial crises, Human rights and "R2P" and the integration of emerging powers into the existing institutional ensemble. However, as we try to understand the increasing complexity of our multilevel political systems, we are also confronted with ever-increasing theoretical and methodological pluralism. As Holzscheiter, Bahr and Pantzerhielm (2016) put it in this thematic issue, "In global governance scholarship, it is an almost ritualistic acknowledgement that contemporary international relations are characterized by an escalating institutional fragmentation, competing/intersecting spheres of authority and the resulting pluralism of norms, rules and implementation structures." In our efforts to make sense of the vast challenges of governance, we do so from a variety of perspectives; perspectives that we argue here are inherently complimentary, if somewhat academically disconnected. This thematic issue attempts to connect a variety of approaches to global governance as part of plea for cross-disciplinary dialogue on how

governance operates in contemporary world order.

When we initially issued the call for papers, we expected to get a mixture of two kinds of articles. Some, coming from an international relations (IR) perspective, would inevitably deploy constructivist approaches to the development of norms and institutionalization (Barnett & Finnemore, 2004; Checkel, 1998). A second group, we hoped, would spring form more traditional comparative politics concerns about federalism, representation and more norms-based or discursive approaches to the study of comparative public policy. While the response we received was deep, what we have ended up with is far more complex than we originally hoped for, highlighting our basic concern; a wide variety of scholarship is talking about "global governance" or "supranational politics", but it in a disconnected way.

## 2. Understanding Global Governance

The challenges are two fold to the study of global governance. On the one hand, we continue to struggle with the legacy of the "levels of analysis" problem so central to the last forty years of scholarship on politics and international relations. While much of the study of global governance has emerged from International Relations scholarship, reflecting its longstanding commitment to the challenges of cooperation and interstate relations in an environment lacking formal mechanisms of government, increasingly the problems of governance, be they challenges of implementation at the domestic level, the creation of more effective and responsive institutions, and basic questions about the accountability of the global and regional organizations, draw analysis closer to issues traditionally encountered in comparative politics.

Relatedly there is also the challenge of "scope". While some study global institutions, others focus and specialize narrowly on regional institutions. Others go further, exploring the problem at the domestic level, asking questions about how global norms etc. are institutionalized within national settings. Interestingly, the domestic level focus often draws on international relations theory to explain failures in implementation, rather than tools more clearly developed for the domestic political setting.

We have a conceptual and theoretical diversity. While this can be fruitful, generating the new ideas necessary to grapple with the world "as it is", the point here is that much of the work tends to only speak to isolated groups of scholars with shared theoretical and methodological commitments. As is illustrated in this issue, work from alternative approaches can offer challenging new insights to our own modes of study.

## 3. The Contributions

Despite considerably different theoretical commitments the contributors to this volume do offer an overarching theme in how we should study (and practice, for the matter) global governance. On the one hand, all of the articles highlight the role of "norms" (variously labelled) as being crucial to "effective" governance. On the other hand, they all also highlight the role that institutional design plays in facilitating the development of shared norms.

### *3.1. The Contribution from International Politics*

As alluded to above, Holzscheiter et al. (2016) offer a big picture assessment of how we should think about global governance from an IR "constructivist" perspective. In their careful examination of international organizations involved in global health, they argue that despite considerable scope for fragmentation given haphazard institutional arrangements there has actually been considerable convergence across organizations due to the existence of an overarching "metagovernance" provided by a shared normative commitment to "order" and "harmonization" among these groups. They offer both a typology for thinking about these metagovernance norms (Jessop, 2014, Wiener & Puetter, 2009) and important insights on how we might approach the challenge of fragmentation. For example several of the articles coming out of comparative politics literatures, highlight the absence of these kind of shared metagovernance norms in explaining organizational and institutional failures.

Likewise, expanding on her own considerable contribution to the constructivist literature, Antje Wiener's (2016) article offer a unique and challenging case study on the management of the North Atlantic fishery. Working in a context where state's positions were initially deeply rooted in national interests, and contestation was all too familiar to traditional students of foreign policy, Weiner illustrates that over time what emerged was a more cooperative and shared set of norms about what constituted good fisheries management. While the article illustrates the considerable power of Weiner's particular approach to the study of norms, it also illustrates concerns central to the comparative public policy literature (below); "getting to agreement" requires careful attention to the institutional process used to engage stakeholders. As Weiner illustrates, resolving conflict over fisheries in this case could have been accelerated by promoting more direct stakeholder involvement in management.

Finally, Carla Barqueiro, Kate Seaman and Katherine Towey's (2016) examination of regional security organizations' adaptation of Responsibility to Protect (R2P) norms is a compelling (and topical) illustration of the power of the constructivist approach to international institutions. Drawing on Finnermore and Sikkink's (1998) concepts about norm life cycle "localization" they offer an in depth analysis of how the EU, the

League of Arab States and the African Union have deployed different ideas about R2P in relation to the Libyan and Syrian civil wars. Pessimistically, they argue these differences only render R2P even less effective from the perspective of ensuring, “timely and decisive responses to protect civilians”. While they suggest that the key cause has been a level of politicization within the organizations, their account highlights the role of both norms and institutional arrangements in support of those norms in the on-going politics of R2P.

### *3.2. The Contribution from Comparative Politics*

Meng Hsuan Chou, Michael Howlett and Kei Koga (2016) offer an alternative approach to assessing the success of international institutions; one that comes squarely out of the comparative public policy literature on policy failure and the role of institutional design and organizational capacities in facilitating “learning” in response to policy problems (Streck & Thelan, 2005). Through a careful examination of ASEAN’s struggles with security cooperation and the EU’s challenges in relation to migration, they argue that there are really two kinds of policy failures encountered in international organizations, substantive failure relating to the shortcomings of existing policies and more basic failures relating to conflicts over policy image within organizations. While the article is a novel and challenging new way to think about governance, the emphasis on “drift” in policy image echoes many of the concerns raised in the constructivist IR literature about norms. This complimentary focus on norms is also echoed in the key takeaway from their article: that successful governance requires (first and foremost) successful institutional design and capacities if organizations are going to be able to address policy failures.

Drawing on the rich political economy literature, which has been grappling with its own concerns about global governance for a long time, Robert Finbow (2016) offers his insights. While examining recent developments in investor to state dispute resolution systems, Finbow argues (Cerny ,1997; McBride, 2006) that the growth in these governance mechanisms expands the powers and interests of economic elites at the expense of national governments. While the political economy literature has always been sensitive that not all global governance is necessarily “good governance” the real lesson provided by Finbow, is that we have reached a point where we require new thinking about the basic intellectual underpinnings of the “democratic state”, a challenge not often made clearly in the IR literature.

Finbow’s concerns are echoed by David P. Rapkin, Jonathan R. Strand and Michael W. Trevathan (2016). Another “comparative politics” based analysis of global governance, drawing on the traditions of normative political theory and its considerable insight on the meaning and substance of representation, Rapkin et al. (2016) argue that global governance has a more basic challenge than simply tinkering with different forms of engagement to facilitate learning. Instead, they argue that scholars working in this area need to think more deeply about representation itself. Through a case study on the governance structures of the International Monetary Fund (IMF) they illustrate how limited and contradictory ideas about representation are in these type of venues. To put it in words borrowed from the constructivist literature, these organizations lack “metagovernance” norms about things as basic as representation. Rapkin et al. (2016) argue that without greater clarity on these issues international organizations are unlikely to be effective.

### *3.3. The Contribution from the Study of “Domestic” Politics*

Valerie J. D’Erman’s (2016) article on the Canada-European Union trade negotiations of CETA draws on insights from the comparative federalism literature in effort to understand the normative status of EU trade institutions. D’Erman challenges us to think about EU-level governance on this one topic in comparison to governance within a federal state (Canada). Her key point, running counter to much of the current malaise about EU institutions is that in practical terms, EU trade policy is more “integrated” at the supranational level than it is in Canada, and more to the point, that it enjoys a unique level of normative legitimacy. While D’Erman’s article suggests important lessons for the “success” of the EU project, it also suggests the need to move the study of the EU to something more closely approximating how multilevel governance is studies in other federations. Indeed, Amy Verdun (2016) offers a similar but wider reaching analysis of this comparison in her article. Verdun puts the case more bluntly, asking whether we should be studying the EU as we study federations? Looking across the range of EU activities and comparing directly to Canada, Verdun argues that while some aspects of the EU meet the criteria of a “federation” particularly when compared to the highly decentralized Canadian example, it lacks an overarching (metagovernance norm?) commitment to being a federation—it is a federation without an ideology of “federalism”.

## 4. Conclusions

While the articles included in this thematic issue are disparate, both in terms of the scope of what they cover and their theoretical commitments, they nonetheless illustrate how complimentary much of the work on contemporary global politics is; no matter where it emerges from. The focus on norms and institutional arraignments runs throughout these papers. There is also huge potential for cross fertilization in these works.

While the existing IR constructivist literature has made large strides on focusing our attention on norms, work in comparative politics has more developed ideas about institutional design—greater dialogue between these approaches would advance the global governance project.

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**Conflict of Interests**

The authors declare no conflict of interests.

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**About the Authors**

**Russell Alan Williams** is an associate professor of political science at Memorial University. His research focuses on the intersection between international political economy and public policy in the areas of financial services regulation, the management of trade disputes, and climate change policy. He has numerous publications, including articles in the *Journal of Public Policy*, *Review of Policy Research*, the *International Journal of Public Sector Management*, *Canadian Foreign Policy*, *Global Social Policy* and the *American Review of Canadian Studies*.

**Reeta Chowdhari Tremblay** is Professor of Comparative Politics and Global South in the department of Political Science at the University of Victoria. Her major areas of research are identity-based politics and secessionist movements (Kashmir) in South Asia, the politics of subaltern resistance and accommodation in post-colonial societies, democracy and governance, and comparative federalism. She has authored or co-authored six books and several articles and reviews. Her recent publications include: *Kashmir's Contentious Politics: The More Things Change, the More They Stay the Same* (2015); "Beyond Parochialism and Domestic Preoccupation: The Current State of Comparative Politics in Canada" (2013) and "Labor Migration, Citizenship, and Social Welfare in China and India" (2013).

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Article

# Emerging Governance Architectures in Global Health: Do Metagovernance Norms Explain Inter-Organisational Convergence?

Anna Holzscheiter [1,2,3,*], Thurid Bahr [1,2,3] and Laura Pantzerhielm [2,3]

[1] Department of Political and Social Sciences, Freie Universität Berlin, 14195 Berlin, Germany;
E-Mails: anna.holzscheiter@fu-berlin.de (A.H.), thuridbahr@zedat.fu-berlin.de (T.B.)
[2] Junior Research Group Governance for Global Health, Freie Universität Berlin, 14195 Berlin, Germany;
E-Mail: laura.pantzerhielm@wzb.eu
[3] WZB Berlin Social Science Center, 10785 Berlin, Germany

* Corresponding author

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**Abstract**
This paper proposes a theoretical account of institutional transformation and the emergence of order in global inter-organisational relations, which is centred on the concept of "metagovernance". It does so by theorising on the advent of governance architectures in global health governance—relationships between international organisations (IOs) in this field that are stable over time. Global health governance is routinely portrayed as an exceptionally fragmented field of international cooperation with a perceived lack of synergy and choreography between international and transnational organisations. However, our paper starts from the observation that there are also movements of convergence between IOs. We seek to explain these by looking at the effects of international norms that define good global governance as *orderly and harmonised* global governance. We conceptualize such norms as "metagovernance norms" that are enacted in reflexive practices which govern and order the relationships between IOs. Empirically, this paper traces changing interactions and institutional arrangements between IOs (World Health Organization; World Bank; Gavi, the Vaccine Alliance; and the Global Fund to Fight AIDS, Tuberculosis and Malaria) in global health governance since the late 1940s and shows how patterns therein reflect and (re)produce broader discursive perceptions of what "health" is about and how the governance thereof ought to be organised.

**Keywords**
discourses; global health; international organisations; metagovernance; norms

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## 1. Introduction

In global governance scholarship, it is an almost ritualistic acknowledgement that contemporary international relations are characterised by an escalating institutional fragmentation, competing/intersecting spheres of authority and the resulting pluralism of norm, rules and implementation structures. As a result, debates on how to govern the relationships between a plurality of actors with overlapping mandates and missions have proliferated which testify to the search for good governance norms promising to reorder fragmented, pluralist governance fields (Biermann, Pattberg, van Asselt, & Zelli, 2009; Drezner, 2007; Holzscheiter, 2010; Rosenau, 2004). An allegedly pathological complexity is also routinely diagnosed in global health governance. Global governance structures that were created for the provision of public

goods in the health area—particularly the eradication of infectious diseases, such as HIV—are emblematic of a core characteristic of global governance in the 21st century: the simultaneous drive of state and non-state actors towards more international order and more coherent institutional architectures on the one hand and on-going contestation and erosion of these institutional constellations on the other. While some call it a dilemma (Karns & Mingst, 2004), others see a dialectic between these two processes (Cerny, 2010; Hülsemeyer, 2003; Rosenau, 2000, p. 177). Traditional intergovernmental organisations and new forms of governance with or without the state, according to the literature, find themselves caught between their desire for autonomy on the one hand and recognition of increasing inter-organisational interdependence on the other.[1]

Global health governance often figures as a prime example of the much researched general trend towards proliferation and pluralisation of institutional actors in global governance fields since the late 1990s (Inoue & Drori, 2006, pp. 205-206). Scholarly engagement with these empirical transformations—in global health policy studies and International Relations (IR) alike—has shown a tremendous propensity towards emphasizing fragmentation, complexity and competition. The end of the Cold War did indeed stimulate a period of excessive experimentation and expansion in international organisation with the creation of a broad array of smaller, issue-specific organisations such as the Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund). Yet, the past decade has seen the emergence of new initiatives, mechanisms and institutions that construct new kinds of inter-organisational cooperation. Metaphorically speaking, these initiatives are meant to provide the "glue" that holds the pieces of the global health mosaic together. Taking this empirical observation as a starting point (section 2), our paper puts forward an alternative account of global health governance that highlights the many instances of convergence between international organisations (IOs) and rule-systems and associates them with shifting discourses on what constitutes good global governance. We propose an alternative conceptual framework for the study of institutional constellations in organisational fields of contemporary global governance (section 3). This framework has two main aspects: First, we develop an empirical-descriptive conceptual toolbox which integrates the study of fragmentation *and* convergence in inter-organisational relations so as to escape the one-sided focus on fragmentation. Pointing to the manifold instances of inter-organisational convergence in global health, we propose an explanatory framework which highlights the role of meta-governance norms and reflexive governance practices to account for transformations in inter-organisational relations and the emergence of governance architectures. That is, we argue for an analysis of historically grown discursive perceptions about how governance ought to be pursued, as well as of how such meta-governance norms are enacted in governance practices to explain convergence between actors, the emergence and (re)organisation of order in organisational fields and the ensuing stabilisation of institutional constellations (section 4). Accordingly, the fourth section of this paper traces changing interactions and institutional arrangements between IOs in global health governance since the late 1940s and shows how patterns therein reflect and (re)produce broader discursive perceptions of what "health" is about and how the governance thereof ought to be organised. More specifically, we illustrate how such norms and perceptions have been a frequent object of contestation and discontinuity and how over time they have included sharply divergent visions, such as the rights-based understandings advanced in the context of the "Health for All"-campaign which was closely connected to the Non-Aligned Movement on the one hand, and later approaches that instead located global health governance in close proximity to quantitative indicators and economic development, innovation and marketisation. Finally, we take a closer look at how - in this historically grown web of meanings and institutions - the numerous contemporary initiatives towards coordination and harmonisation among global health actors came to emerge and how they are underpinned by the formulation of norms that equate good global health governance with orderly and harmonised interactions.

## 2. Global Health Governance: Ever Greater Complexity?

Over the last 20 years, the health sector has evolved into one of the most popular areas of development cooperation[2]—with a five-fold increase in official development assistance from US$ 5.6 billion in 1990 (Ravishankar et al., 2009) to US$ 31.3 billion in 2013 (Murray & Dieleman, 2014). The observation that health is currently one of the most densely populated

[1] Likewise, there seems to be a discernible divide between IR scholars who welcome institutional fragmentation in the name of legal pluralism and policy-responses more adequate to contemporary problems, and scholars who argue in favour of (re)strengthening more centralised governance architectures in the name of global constitutionalism. Both of these "camps" see either a pluralist or a centralised global order as more effective and legitimate (Shaffer, 2005, p. 684 ff.).

[2] In comparison with other aid sectors such as agriculture and rural development, this shift in international priorities becomes particularly apparent: see 'Trends in aid to agriculture and rural development between 1971 and 2009', in OECD (2011a) and 'Trends in aid to health between 1971 and 2009', in OECD (2011b).

areas of global governance with about a hundred major organisations can be interpreted as either cause or consequence of this development (Godal, 2005; International Development Association, 2007; Organisation for Economic Co-operation and Development, 2011d; Schieber, Gottret, Fleisher, & Leive, 2007). Global health governance is therefore routinely described as a "messy" structure (Sidibé, Tanaka, & Buse, 2010, p. 2) composed of different types of actors with diverging motivations and rationalities. As a consequence, it is no longer self-evident which organisation constitutes the backbone of global health governance. As many claim, the World Health Organization's (WHO) central position is undermined by organisations that compete for legitimacy and influence on global health priorities and national health strategies, such as the World Bank, the Global Fund, the Bill and Melinda Gates Foundation (the Gates Foundation) or global programmes like the U.S. President's Emergency Plan for AIDS Relief (PEPFAR) (Huckel, 2005; Smith, 1995; Taylor, 2002), particularly in developing countries. The complexity of this institutional landscape is especially visible in the global response to HIV/AIDS where numerous governmental and non-governmental, bilateral and multilateral agencies are part of institutional structures created to respond to the challenges presented by the HI-Virus. In a typical high HIV-prevalence country such as Namibia or Zambia between seven and twelve bilateral agencies or AIDS programmes, such as PEPFAR, and six to eight multilateral organisations, such as WHO, United Nations Children's Fund (UNICEF), United Nations Population Fund (UNFPA), United Nations Development Programme (UNPD), the World Bank and the Global Fund, are contributing to the national AIDS response (Government of Namibia, 2010; Ministry of Health and Social Services of the Republic of Namibia, 2010; National AIDS Council Zambia, 2014). These external agencies—particularly those belonging to the "H8"[3]—provide around 50 to 90 per cent of the total budget for the national AIDS strategy.

Like few other areas of governance, global health governance reflects a "world that is characterized by increasingly dense, extended and rapidly changing patterns of reciprocal interdependence and by increasingly frequent, but ephemeral interactions across all types of pre-established boundaries, intra- and inter-organisational, intra- and intersectional and intra- and international" (Scharpf, 1994, p. 36). In the beginning, the multiplication and fragmentation of sources of authority in global health governance was lauded as an indication of enhanced funding flows, as well as greater flexibility in policy-making and implementation. By now, however, the initial enthusiasm for such centrifugal tendencies in development cooperation seems to have decreased in the face of an on-going "implementation crisis" (The Joint United Nations Programme on HIV and AIDS, 2006, p. 53). Both traditional bilateral and multilateral agencies and more recently established programmes and partnerships increasingly lament the multiplication of players, programmes and sources of funding and perceive of them as producing suboptimal outcomes. In this governance area, collective action problems and their implications for effective development cooperation have been widely discussed and recognised for a long time.

As a consequence of the continuing debate on the negative ramifications of institutional fragmentation—particularly the administrative strain they put on already weak domestic governance structures in developing countries—global public health also ranks among those policy fields in which experimentation with rule-systems and instruments of governance has been strongest. International actors are progressively undertaking efforts to streamline their activities and to work towards agreement on a global division of labour and on coherent policies for programming, programme implementation, technical assistance, monitoring and evaluation. Beyond health, this applies to various other densely populated areas of global governance, such as security, humanitarian aid or environmental protection (for health see Holzscheiter, Walt, & Brugha, 2012). The Organisation for Economic Co-operation and Development (OECD), through its Development Assistance Committee (OECD-DAC) has been a trend-setter in this domain and the major driving force behind the most influential approaches to principles of good governance in development cooperation (cf. Paris Declaration (2005), Accra Agenda for Action (2008) and the Busan Partnership for Effective Development Cooperation (2011c)).

It is a remarkable finding from existing research on global health governance that the "appropriateness" of re-establishing institutional order by strengthening norms that outline individual responsibilities and competencies of actors with overlapping mandates seems largely uncontested (Holzscheiter, 2015b). This points to a growing desire for centralisation and ordering in this fragmented field of governance by means of streamlining of policies; funding mechanisms; monitoring systems; and through agreements on divisions of labour or the sharing of essential knowledge. As a consequence, an impressive number of global frameworks has been developed in the past decade that seek to create new or strengthen existing arrangements for inter-organisational cooperation—for health and for development assistance overall. In 2010, Balabanova et. al. identified 75 global health partnerships and initiatives whose main purpose was to ensure coordination

[3] The H8, or Health 8 are those IOs that are typically presented as particularly influential in global health: WHO; The Joint United Nations Programme on HIV and AIDS (UNAIDS); UNICEF; UNFPA; the World Bank; Gavi, the Vaccine Alliance (Gavi); the Global Fund and the European Commission.

between international actors, as well as between international and domestic actors working on the same issues (Balabanova, McKee, Mills, Walt, & Haines, 2010). This contrasts with previous tendencies to create an ever greater number of partnerships that addressed new, increasingly specialised substantive issues. Among the new institutional frameworks are five "signed agreements" that continue to be the most important normative frameworks for inter-organisational cooperation in global health governance: the Paris Principles, the International Health Partnership Global Compact, the Three Ones principles (developed specifically for HIV, but then also applied to malaria), the Global Task Team on Improving AIDS Coordination, and the Global Implementation Support Team. As the paper seeks to show in the empirical discussion, these institutions and their underlying normative frameworks can be accounted for as part of a movement of convergence between IOs that is driven by changing norms on good global governance. Yet before elaborating on these empirical observations, the next section outlines our proposed conceptual framework for studying institutional constellations and the influence of reflexive perceptions about "good governance" on the emergence of order amongst IOs.

### 3. Explaining Inter-Organisational Convergence in Global Health: The Role of Metagovernance Norms

Empirical instances of convergence between organisations have come to constitute a blind spot in the current research landscape on inter-organisational relations. Against this backdrop, this paper proposes an alternative conceptual framework for the study of institutional constellations in organisational fields of contemporary global governance. Our framework has two main aspects: first, we develop an empirical-descriptive conceptual toolbox which integrates the study of fragmentation *and* convergence in inter-organisational relations so as to escape the one-sided focus on fragmentation and ever increasing complexity, which has thus far characterised much scholarly engagement with the topic. Here, we propose to focus on the stabilisation of inter-organisational practices and transformations therein over time. Conceptually, we distinguish between i) fragmentation and convergence as processes which can be observed in interactions between organisations over time, and ii) the concepts of "governance architectures" and "governance hamlets" which we understand to denote more stable institutional constellations that result from the consolidation of such practices. Second, we propose an explanatory framework which highlights the role of metagovernance norms and reflexive governance practices to account for transformations in inter-organisational relations and the emergence of governance architectures. That is, we argue for an analysis of historically grown discursive perceptions about how governance ought to be pursued and their enactments in governance practices to explain convergence between actors, the emergence and (re)organisation of order in organisational fields and the ensuing stabilisation of institutional constellations.

To this end, we combine and develop further existing scholarship on reflexive governance practices, so-called "metagovernance" and recent critical norm theories in IR which conceptualize norms as "enacted meaning-in-use" rather than as fixed containers of meaning (notably, Wiener, 2007, 2014; Wiener & Puetter, 2009). In a highly innovative paper, David P. Fidler has analysed the metaphor of "architecture" as it has been used in global health, finding that it is being filled with very disparate meanings by different actors and in different contexts (Fidler, 2007). It is such observations that we take as a starting-point in order to argue for the need to study the meaning-struggles revolving around specific notions of inter-organisational order in global health. Such a perspective, we contend, enables one to grasp convergence empirically, but more importantly provides a critical constructivist account of its emergence. Our approach proposes to consider how institutional transformations in global governance are influenced by struggles over interpretation between actors, as well as of how such transformations are tied into and articulated within broader discourses and knowledge domains which define the proper "governance of governance" (Kooiman & Jentoft, 2009) in a given historical-political context. In other words, the proposed framework combines the study of "power in discourse", by looking at divergent enactments of norms and discursive struggles, with the study of the "power of discourse" in the sense of historically contingent interpretative scripts (Holzscheiter, 2011b, 2014) to explain the emergence of order and institutional transformations in contemporary fields of global governance. To flesh out our concepts and situate them in the literature, we first introduce our empirical-descriptive conceptual toolbox, then turn to a discussion of our conceptualisation of metagovernance norms and practices and, finally, discuss examples from global health governance which—whilst surely not amounting to a full, systematic application of our framework—serve the purpose of illustrating its possible applications and empirical plausibility.

To avoid setting a predefined focus on dynamics where organisational units, mandates, norms or other entities are seen to "drift apart" or "become more complex", we suggest defining fragmentation and convergence as complementary conceptual antipodes for the study of changing institutional constellations. Importantly, we understand both terms to denote *processes* that take place in inter-organisational relations over time rather than to describe structural traits of a governance field at any given isolated point in time.

We define convergence as an increase in the number and depth of cooperative relationships between two or more formally independent organisational units. Correspondingly, we understand fragmentation to designate a decrease in such relationships. On a theoretical level, we support Biermann et. al.'s argument (2009) that all global policy-making can be seen as fragmented and complex albeit to varying degrees. Yet, we challenge the fruitfulness of this insight for empirical analyses of institutional arrangements and inter-organisational relations. Instead we propose to conceptually distinguish between movements of increasing convergence and movements of greater fragmentation between organisational units so that both directions of institutional transformation can be accounted for when studying concrete policy domains. In other words, we seek to go beyond the fixation on mounting "complexity" and omnipresent fragmentation by proposing a research strategy that allows for studying both the emergence of order and its disintegration by tracing patterns of interactions between IOs in the same policy field over time.

To describe more stable, ordered patterns of interaction which crystallize through repetition and institutionalisation in inter-organisational practices over time, we make use of the concept of "governance architecture". While the broader literature on fragmentation and regime complexity widely draws on the metaphor of "architecture" (Biermann et al., 2009; Dias Guerra, Widerberg, Isailovic, & Pattberg, 2015; Isailovic, Widerberg, & Pattberg, 2013), we find that it is mostly employed indiscriminately to denote any kind of identifiable institutional structure.[4] In our theoretical framework, governance architecture refers to the existence of a plurality of synchronised and stable relations between multiple IOs relevant to a policy area or problem. Moreover, we propose the concept "governance hamlets" to describe the opposite condition, namely a *lack* of such synchronised and stable relations. Finally, whilst we perceive of these concepts as corresponding with empirically observable phenomena, on a conceptual level, we suggest situating them between the ideal-typical concepts "integrated institution" and "atomized governance units" (see Figure 1 below). The latter respectively denote the existence of one single organisational framework within which international governance practices in a given policy area are carried out and the complete absence of such relations. We emphasize that both integrated institutions and atomised governance units are ideal-type extremes that do not exist in global governance: neither is there an international health organisation with an undisputed exclusive mandate that single-handedly carries out all health governance activities on the global level, nor does global health governance consist of free-floating, discrete health IOs that are not tied, at least minimally, to other institutional structures. Figure 1 summarises the described conceptual toolbox.

Beyond conceptualising movements of convergence, fragmentation and ensuing transformations in institutional constellations so that they can be grasped empirically, the question arises how one ought to explain and account for such movements of convergence and fragmentation. As touched upon above, to this end we propose an explanatory framework that draws on theories of metagovernance and critical IR norms theory. That is, we suggest to consider how inter-organisational relations in global health governance and other global governance domains are embedded in more encompassing historically grown discourses on the proper "governance of governance" (Jessop, 2014, p. 106) and to pay attention to how actors enact such regularities of speech and thought in reflexive governance practices, thereby (re)producing, (re)ordering and potentially transforming institutional constellations.

In the most generic sense of the term, metagovernance refers to the notion that governance activities which aim at influencing or steering societal processes are themselves governed by second-order governance practices. That is, beyond the "day-to-day" (Kooiman & Jentoft, 2009, p. 822) governance of society, metagovernance refers to the "governance of governance

[4] For an exception see Fidler (2007).

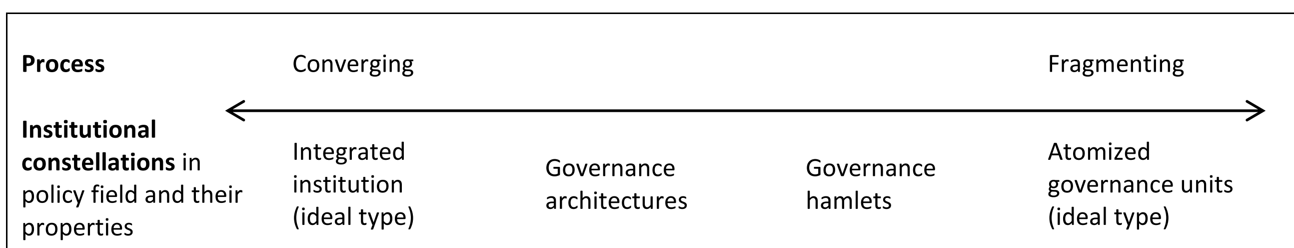


**Figure 1**. Graphical depiction of conceptual framework.

itself (Jessop, 2014, p. 106; Torfing, Peters, Pierre, & Sørensen, 2012). Whilst competing notions of metagovernance exist that will not be elaborated here in any greater detail, for the sake of clarity it is important to stress that we use metagovernance as an open analytical concept which serves to denote a *reflexive quality* of governance practices and discourses forming around them. Extant scholarly understandings of the term have ranged from such analytical conceptualisations to more empirical-descriptive ones. To exemplify the latter category, in Cologne School theorizing (Mayntz, 1999; Mayntz & Scharpf, 1995; Scharpf, 2007), integration theory (Kickert & Koppenjan, 1997; Rhodes, 1996, 1997), Luhmann-inspired scholarship (Braun, 1993; Luhmann, 1984), but also in more recent theoretical accounts of democratic governance (Torfing et al., 2012; Torfing & Sørensen, 2007), metagovernance tends to be understood as a novel, postmodern kind of governance which aims at steering and/or operates through horizontal networks and independent societal subsystems. Consequently, it is often typologically juxtaposed to other governance modes such as hierarchical coordination (state) and market exchange. In conceptualising metagovernance as a second-order, reflexive form of governance we instead side with the open analytical pole on this theoretical spectrum. From such a viewpoint, metagovernance might be concerned with state/hierarchy, market, networks or indeed with other governance practices, but is ultimately defined by its reflexive quality: by aiming to redesign governance in a self-referential manner. To exemplify this kind of conceptualization, it is worthwhile to consider Bob Jessop's theoretical approach.

Following Jessop, first-order governance denotes non-reflexive activities aimed at directing societal spheres through different "forms of coordination", namely imperative organisation, heterarchy, exchange and solidarity (Jessop, 2014, p. 112). Metagovernance, in turn, refers to governance practices which (re)define the operation of first-order governance modes ("first-order metagovernance") or their relative importance in governing any given societal realm ("second-order metagovernance", Jessop, 2014, pp. 112-116). In other words, in Jessop's terminology, first-level metagovernance refers to the reflexive redesign of markets, authority structures, self-organisation and bases for solidarity—"loyalty, trust, and commitment" (Jessop, 2014, pp. 114-115), whilst second-order metagovernance denotes "the asymmetrical privileging of different modes of coordination" (Jessop, 2014, p. 116). As a further example, Jan Kooiman and Svein Jentoft advance an understanding of metagovernance that is similarly premised on a distinction between levels of reflexivity in defining it as an "order where values, norms and principles are advanced according to which governance practices can be formed and evaluated" (Kooiman & Jentoft, 2009, p. 823). Finally, Andrew Dunsire's proposal to use the term "collibration" to describe the "manipulation of balancing social tensions, the controlled shifting of a social equilibrium, the fine tuning of an oscillation of near-equal forces" (Dunsire, 1993, p. 11) constitutes a related concept as it is concerned with activities that "set the frame" within which everyday practices of governance take their course.

For the study of inter-organisational relations in realms of global governance, adopting a perspective which is informed by a thus defined understanding of metagovernance therefore sharpens our gaze for common activities and practices between organisations which define and reshape the framework within which governance takes place—such as the creation of new venues for coordination amongst institutions or the reordering of relationships between existing mechanisms and arenas. To exemplify, in the realm of global health governance, we argue that this theoretical lens renders visible the reflexive, ordering quality of a range of initiatives and practices amongst institutions which have emerged since the late 1990s. The International Health Partnership (IHP+; and related initiatives) that was established in 2007, for example, has become a widely accepted harmonisation mechanism for multilateral and bilateral development cooperation for health. It provides for Compacts between donors and recipients at the domestic level, which constitute negotiated agreements between governments and development partners with the aim to reduce donor fragmentation, harmonise donor action and improve alignment with the national health system. The number of these Compacts has grown continuously over the years (Holzscheiter, 2011a; Shorten, Taylor, Spicer, Mounier-Jack, & McCoy, 2012) which points to the increasing institutionalisation of the partnership as a mechanism to order the relationships between multiple organisations (Buse, 2004; Buse & Walt, 2002). In Jessop's terminology, the establishment of such harmonisation mechanisms can be analytically described as practices which combine elements of metaheterarchy between IOs, e.g. the reordering of relations in a network-like structure, and elements of metaorganisation, as the more specific agreements between donors, recipient and development partners inevitably address and hence might "tilt" the balance of relative authority between the said actors in the respective area of concern. Another example for such harmonising initiatives was the "H4+" Partnership which—until 2016—constituted an inter-organisational structure holding together six United Nations (UN) organisations (UNAIDS, UNFPA, UNICEF, United Nations Entity for Gender Equality and the Empowerment of Women [UN Women], WHO and the World Bank). This group of H4+ acted as the lead technical partner for the implementation of the UN Global Strategy for Women's and Children's Health and as a central implementation mechanism for Millennium Development Goals 4 (Child Health) and 5 (Maternal

Health). As these kinds of reflexive, ordering practices increase in numbers, stabilise and consolidate over time, they unfold a transformative effect on the institutional constellation in the field as a whole. In other words, the emergence and proliferation of metagovernance can be seen to change the functioning and nature of global health governance in the aggregate, as despite the continuing plurality of actors, their interactions amongst each other increasingly follow more stable, sedimented paths. This kind of emergent order in inter-organisational relations is what we propose to describe as an emerging “governance architecture”.

Now, if the transformation of institutional constellations and emergence of order in global governance policy realms might be accounted for by considering how reflexive governance practices stabilise over time, a crucial question has still been left unaddressed. To stick to the empirical realm of global health governance, why did IOs in the historical institutional setting just discussed perceive of a need to ”harmonise” and ”coordinate” their activities, rather than to pursue any alternative course of action, using other words and engaging in other activities? How, more specifically, did the overarching rhetorical commitment to the principle of harmonisation translate into tangible practices and how would some of them come to gradually acquire a higher level of stability and institutionalisation? As touched upon earlier, in order to uncover the specificity and explain the diachronic stabilisation of emergent orders in inter-organisational fields, we propose to draw on recent theoretical proposals in critical IR norms research. Norms research continues to be a popular field of scholarly inquiry in the field of IR and it has made significant advances with regard to explaining how norms emerge, unfold and transform. Early norms research predominantly pursued the quest to identify norms in international politics, to explain why they emerge and under what conditions they diffuse (actors; opportunity structures; hegemonic actors; issue characteristics) (Colonomos, 2001; Finnemore & Sikkink, 1998; Keck & Sikkink, 1998; Nadelmann, 1990; Price, 1998; Risse, 2002). Newer research on norms has shifted emphasis to observing and explaining what happens to international norms in the long run, how they transform, translate into different contexts and also how their meaning and effects are contingent on (re)production in practice (Grillot, 2011; Krook & True, 2012; Wiener, 2009; Zwingel, 2012). The idea that norms structure social life while at the same time being contested and loaded with controversies is a central tenet of contemporary critical norms research. Our ambition to trace the institutional evolution in global health ties in with this second wave of norms research inasmuch as we embrace the assumption that norms simultaneously have a structuring and contingent quality. To study the existence and effects of metagovernance norms in global health through discourses on good global health governance is thus, in our view, a necessary endeavour with regard to identifying both periods of normative stability *and* periods of movement and transformation.

In contrast to the rationalist institutionalist mainstream which has so far dominated the engagement with inter-organisational relations in the field of IR research (Jönsson, 1986; Koops & Varwick, 2009) we thus propose a constructivist account of how metagovernance practices emerge and unfold. That is, we suggest that the reflexive reordering and redesigning of governance itself—which the concept of metagovernance enables us to highlight—is embedded, enacted and reproduced in broader historically grown discourses about the appropriate “governance of governance”. Drawing on Antje Wiener’s account of norms as “enacted meaning-in-use” (Wiener, 2009) we conceptualize metagovernance norms as contingent perceptions about how governance ought to be pursued that are enacted and negotiated in social practices (cf. also Wiener, 2007; Wiener & Puetter, 2009). If we understand the term discourse as a more encompassing concept which refers to an overarching regularity or formation of perceptions/knowledge and practices that delineate the borders of what is reasonably thinkable in a given socio-political context (cf. Foucault, 1972), metagovernance norms can be described as a category of discursive objects which emerge as parts of such discourses to establish moral, ethical imperatives (what is believed to be “good”) and are closely interwoven with causal beliefs (what is believed to be “necessary” and “possible”) about how governance ought to be pursued and organised. Conceptualising metagovernance norms as a category of discursive objects, rather than as fixed normative entities or stable “standards of appropriate behavior for actors within a given identity” (Katzenstein, 1996, p. 5) has important consequences for their analysis. First, if discourse is historically contingent and reproduced in social practices, the meaning of norms is principally open to divergent and indeed conflicting interpretations amongst actors in the same field. Or, to reformulate this point by borrowing a phrase from Wiener, as “the rule always lies in the practice…norms—and their meanings [are] contested by default” (Wiener, 2007, p. 5). Second, such a perspective underlines the necessity to consider how the power of norms is underpinned by and made possible through the discursive context in which they emerge; to inquire into their relationship with other discursive objects, causal beliefs and knowledge domains. Both of these points, finally, should encourage us to engage with the delicate relationship between norms and power by addressing how, on the one hand, power is exerted by actors *in* discourse through struggles about the meaning of norms, as well as how, on the other hand, the power *of* discourse restricts the realm of reasonably speakable statements—the political and factu-

al imaginary—within which actors struggle, rearticulate and enact norms about how to govern. Let us once again turn to the example of global health governance to illustrate what these theoretical considerations might imply for empirical research.

## 4. Shifting Discourses and Norms of Good Global Health Governance

We are certainly not the first to explore the contestation revolving around the notion of "global health governance" in terms of what it means, which actors it includes and where its boundaries are (Cooper, Kirton, & Schrecker, 2007; Fidler, 2007; Hein, Bartsch, & Kohlmorgen, 2007; Lee & Kamradt-Scott, 2014). However, we seek to advance this debate by proposing to study inter-organisational practices and the meanings enacted therein across time. Such a focus, we suggest, delivers important insights into the normative underpinnings of global health and promises to shed light on how meaning-struggles transform and give rise to distinct patterns of interaction between organisations. To study discourses on "good global health governance" as they evolve among health organisations themselves, thus, is necessary in order to uncover the procedural norms that have structured and ordered inter-organisational interactions at specific points in time. In other words, we believe that our perspective represents an innovative take on the subject by making visible how inter-organisational interactions in global health governance are being structured by metagovernance norms while, at the same time, enabling us to consider how such norms are continuously (re)negotiated. To illustrate this point, the strong negative connotation that is routinely attached to the terms "fragmentation" and "complexity" can be identified as a textual representation of a powerful, overarching belief that unites the world of science and the world of practice in global health. Social Science and Public Health research on global health have been largely dominated by rationalist–functionalist institutionalist theory in which the existence of overlapping or even competing rule-systems and organisational mandates is mostly perceived as a dysfunctional feature of regime complexes and associated with high transaction costs. These transaction costs are often related to the duplication of management structures targeting the same issue or problem; the duplication of operational activities in the field; incongruent indicators for monitoring policy issues; or the co-existence of different and often contradictory rule-systems that states (and other actors) should comply with domestically. The formula "coordination/harmonisation = more effectiveness" has emerged as almost a truism or at least a strong causal belief about what constitutes "good governance" in communities of scholars and practitioners alike. Harmonisation of this orchestra of global health—which is not only perceived to be many-piece but also dissonant—emerges as a normatively desirable solution that promises to cure problems of ineffectiveness and inefficiency. The following section provides examples from different discourses on global health and demonstrates that this turn towards "harmonisation" constitutes a significant change in metagovernance norms, reflected not only in the rhetorical commitment of all major international health agencies to harmonisation as a metagovernance principle—but more importantly in the many interactions that health IOs have undertaken to translate these principles into practice.

### *4.1. Early Periods of Global Health Governance: 1940s–1970s and 1970s–2000s*

International cooperation in health matters dates back to the mid-19th century when the first International Sanitary Conference was convened in response to a series of worrying cholera outbreaks in Europe. WHO, that was established in 1948, owes its historical legacy to two predecessors: the International Sanitary Bureau established in 1902 in Washington (later named the Pan-American Sanitary Bureau) and the Office International d'Hygiène Publique (OIHP) established in Paris in 1907 (Fidler, 1997, 1999, 2001; Goodman, 1977). However, the international institutional structures propping up the issue of health were built after 1945, originating in the WHO with a much broader and truly "international" mandate than earlier organisations as well as more specialised IOs with health-related tasks such as the International Labour Organization (ILO), UNICEF or the World Bank. For this reason, our account of inter-organisational cooperation in global health governance starts in the late 1940s. Most of the health-related IOs that were established after the Second World War centred on the promotion of health as an instrument for economic development and overall progress. Health became "a tool for enabling the full utilization of human capital" (Inoue & Drori, 2006, p. 209). In the early period of international organisation in the field of health (1940–1970), thus, classical state-centred international politics and a global health policy field revolving around WHO conjured up an image of health governance as based on a relatively straightforward division of labour between the latter organisation and national governments or their ministries of health. This organisation of governance points towards metaorganisation as a prevalent type of second-order governance in which WHO constituted the undisputed focal-point for all other actors in the "health universe".

The 1970s and 1980s constituted the beginning of "unsettled periods" (Swidler, 1986, p. 273) in global health, as during these decades discourses on health were changing and new powerful agencies entered the arena. On the one hand, thinking on international/global health policymaking was influenced by trends

associated with the "Health for All"-movement and the movement for a "New Economic Order" within the United Nations. Some aspects of this intellectual current included the framing of health as a right and the insistence that health policy should be holistic and focus on health systems (Lidén, 2013, pp. 14-15). This early infusion of the field of health policy with discourses on human rights, equity and social justice, initiated a growing politicisation of WHO under its Secretary-General Halfdan Mahler (1973–1988) which, in turn, led to an increasing estrangement of WHO from some of its Member States. At the same time, the 1970s also saw the rise of further, competing perceptions which associated "good governance" in the realm of global health with policies underpinned by a view of health as a factor in achieving economic development and poverty reduction. According to some commentators, the World Bank was instrumental in transmitting this "health and development"-discourse which had been formulated and constructed in academia (Ruger, 2005) into the field of global health policy in the 1970s. As one author notes, the Bank "has persuasively argued that alleviating global poverty and achieving broad-based development requires healthy people. Ill health puts a drain on a state's resources, and unhealthy people cannot contribute to a country's economic development" (Youde, 2012, p. 46). The World Bank introduced quantification of (expected) policy outcomes as a measure to determine where policy "interventions" would be most efficient. Following some authors, this stood in contrast to the emphasis of WHO on strengthening health systems. The Bank's 1993 World Development Report entitled "Investing in Health" made sweeping, yet influential recommendations in this regard: It pushed the notion of efficiency in health policy and national health systems in pursuit of the larger aim of poverty reduction, e.g., by calling for private sector involvement, and introduced quantifiable measures to assess the burden of diseases (especially Disability-Adjusted Life Years—DALYs) (Ruger, 2005, p. 66). The conception of health entailed therein was widely perceived as contradicting that of WHO (Davies 2010: 45-6 as cited in Youde, 2012, p. 51). Deciding on health "interventions" on the basis of quantitative indicators of efficiency became the new standard in the field of global health. This could in part be attributed to the influence of the World Bank that is grounded in its lending power, but can also be seen as a reflection of broader discursive shifts towards linking "good governance" to economic efficiency and the neoliberal *Zeitgeist* of the 1990s that presented privatisation and quantification as more efficient alternatives to the way global health had previously been governed.

A closer look at the Global Burden of Disease and Disease Control Priorities Project allows us to trace some of the mentioned changes in health governance. The Global Burden of Disease-approach refers to the attempt to quantify the burden of specific diseases in order to inform policy-making. Results of this project were first included in the abovementioned 1993 World Development Report. The project was initially housed at WHO, which formalized its work through a Disease Burden Unit in 1998 and has published its updated results over the years (Institute for Health Metrics and Evaluation, 2015). The updated report of 2010, however, received funding from the Bill & Melinda Gates Foundation and was put together by the World Bank, WHO and the Fogarty International Center of the U.S. National Institutes of Health (Jamison et al., 2010 front matter). Today, coordination of updates to the report has moved to the Institute for Health Metrics and Evaluation, which was co-founded by the Gates Foundation. The Global Burden of Disease Project could be interpreted as an institutional embodiment of the rise of effectiveness and numerical indicators and "health interventions" to combat specific diseases, in contrast to approaches to health governance that favour health systems strengthening. It also points to the increasing participation of non-state actors in the governance of global health, with the gradual move of the project away from "traditional" health IOs.

This trend equally affected other IOs. As new global health organisations were founded after 1990 (e.g., UNAIDS, Global Fund), their mandates came to reflect a perceived necessity to open up IOs to increased collaboration with other health actors, particularly with non-governmental organisations (Holzscheiter, 2015b, p. 8). To illustrate further, consider the Multi-Country HIV/AIDS Program (MAP) that was founded by the World Bank in 2000 as "a central, prominent lending program" (Youde, 2012, p. 56) to combat HIV/AIDS. It seems remarkable how much this programme sought to avoid working with state actors as it explicitly required receiving states to disburse significant portions of the funds to non-state actors, including "civil society organizations, national nongovernmental organizations, and community groups" (Youde, 2012, p. 56). We thus broadly see that over time cooperation in health governance changed from inter-agency partnerships usually sustained by WHO, the World Bank and others to so-called "innovative" partnerships that accorded a more significant role to non-state actors. The discourses on "innovation" and "partnership" were accompanied by an increasing number of private actors as funders and partners in health governance, the highlighting of quantitative evidence as the basis for policy decisions ("health interventions") and the evaluation of their effectiveness, as well as the desire to use "market-based" mechanisms to fund research and the development of vaccines. In sum, the discussed transformations in global health governance from the 1970s to early 2000s therefore point to how meta-governance norms, about the desirability of privatisation of governance and pluralisation of actors, together

with causal beliefs produced in scholarly discourse which underpin such perceptions (e.g. evidence that market based-mechanisms produce more "efficient" results) might translate into second-order metagovernance practices that change the relative importance of imperative coordination, heterarchy and exchange—in this case to the advantage of the latter two forms of coordination.

### *4.2. Global Health Governance after the Turn of the Millennium: 2000s–Present*

In contrast to the "health and development"-discourse and the associated metagovernance norms about "privatisation", "pluralisation" and "policy innovation", discourses forming around terms such as "coordination", "harmonisation" and "partnership" took centre stage in the 2000s. The call for harmonisation has become ubiquitous across all current major global health issues (Holzscheiter, 2015b, p. 3). Not least through the harmonisation principle contained in the 2005 Paris Declaration on Aid Effectiveness has this norm made its way from development cooperation to health governance (Organisation for Economic Co-operation and Development, 2005). For example, the Three Ones Principles were adopted around the same time with the explicit aim to harmonise action by multilateral and bilateral donors addressing HIV/ AIDS through One National AIDS Strategy, One National Monitoring & Evaluation System and One National AIDS Authority (The Joint United Nations Programme on HIV and AIDS, 2004). The Paris Declaration and the Three Ones Principles have unfolded their converging effect on the field of global health governance. The Global Fund, the World Bank and the UN family more generally have been most active in this regard (Holzscheiter, 2015b, p. 14). Particularly the Paris Principles are reflected in the organisational philosophies and strategies of all important health IOs (Holzscheiter, 2015b, p. 14). Beyond statements on paper, health IOs have built forums through which they seek to harmonise their activities, including IHP+ and the H4+ partnership. They bring and brought together staff of different IOs in temporary expert and working groups that are jointly hosted by these IOs (Holzscheiter, 2015b, pp. 14-15). To illustrate, consider IHP+, which is hosted by WHO and the World Bank to "enhance aid effectiveness…through effective collaboration and coordination of various partnerships and initiatives" (World Health Organization/World Health Assembly, 2010, p. 2). The changes that the Paris Declaration has induced in health IOs' policies and practices testifies to the effect of the harmonisation norm that has unfolded in the health policy field as a whole. Harmonisation and coordination have become synonymous with "better" health governance, i.e., health governance that is viewed as more legitimate and effective (President's Emergency Plan for AIDS Relief, 2007; The Global Fund to Fight AIDS, Tuberculosis and Malaria, 2010; cf. The Joint United Nations Programme on HIV and AIDS, 2006). In contemporary discourses on "good governance" in global health, harmonisation and coordination constitute broadly accepted—indeed even largely unchallenged—principles (Holzscheiter, 2015a). They can hence be described as powerful metagovernance norms which are underpinned by discursive perceptions and regularities positing their necessity and desirability, such as the frequently occurring opposition to "fragmentation" in scholarly discourse and the discussed negative connotation of this term.

However, the more *precise* meaning of the term "harmonisation" and in particular the practical consequences for the organisation of governance that it is seen to entail, are far from undisputed. In other words, whilst the desirability of harmonisation as such is currently uncontested, its exact meaning is more unstable and hence the object of struggle between competing interpretations and enactments. On the one hand, some attempts at fixating the meaning of harmonisation understand it as requiring a coherence of action by diverse health IOs, as was illustrated in the foregoing examples of IHP+ and H4+. On the other hand, other actors envision harmonisation as entailing a division of labour between health IOs in which roles are divided on the basis of specialised functions and comparative advantages (The Joint United Nations Programme on HIV and AIDS Lancet Commission, 2013). To exemplify, the latter version of the harmonisation norm was embodied in a 2014 partnership agreement between the Global Fund and WHO which spells out their division of labour in the field. The agreement envisages that WHO should support countries seeking funds from the Global Fund with technical assistance (World Health Organization, 2014). In a similar vein, the Global Fund has also spelled out its relationship with UNAIDS and UNICEF, amongst other UN organisations (The Global Fund to Fight AIDS, Tuberculosis and Malaria, 2009). The former agreement shows that WHO has managed to reassert its authority in this particular relationship by translating a specific interpretation of the harmonisation norm into inter-organisational, reflexive practices and hence illustrates that IOs actively seek to seize metagovernance norms to stake out their spheres of authority (cf. Holzscheiter, 2015b, pp. 16-17).

The field of global health governance provides further examples of convergence through a division of labour: around 2000, with the adoption of the Millennium Declaration and the Millennium Development Goals and with immense frustration regarding the AIDS epidemic and other infectious diseases, a whole series of vertical health partnerships were established. Among the most prominent of these partnerships were the Roll Back Malaria Initiative (1998), the Stop TB Partnership (2000) and Gavi (2000). These

partnerships were explicitly designed as institutions aiming at metaheterarchy and metaexchange, i.e. reflexive, voluntary and horizontal forms of cooperation which sought to reorder networks of health actors and related markets (for access to medicines, research & development, health personnel, etc.). Many of these partnerships—such as Stop TB or Roll Back Malaria—are so-called "hosted" partnerships, which means that their secretariats are located at WHO, UNICEF or other UN organisations and are thus not free-standing legal entities. Others, such as Gavi, were set up as organisations operating in the geographical vicinity of, but independently from, UN organisations. Following a decision of the WHO Executive Board in 2013 and a protracted debate on the legal status of these hosted partnerships, serval memoranda of understanding were set up that either aim at re-establishing WHO's authority over the partnerships or seek to clarify the division of labour between the organisation and the partnerships by delineating their respective "spheres of authority".[5] In that instance, we thus witness a movement of convergence in the field of global health that is driven by the reflexive reorganisation of authority structures: after the period of "policy innovation", "pluralization" and "privatisation" in the 1990s and early 2000s that saw the founding of new health IOs and novel kinds of initiatives, such as the Roll Back Malaria Initiative, Gavi and the Global Fund, more recent global health governance is characterised by an opposite movement in patterns of interaction between organisations towards a partial return to the leading role of WHO and thus towards privileging imperative coordination as well as noticeable efforts by IOs to clarify and divide roles. Even those organisations and partnerships that emerged in the wake of the innovation and partnership discourses have felt compelled to clarify how they relate to their older peers that were once dismissed as relics of ineffective, hierarchical bureaucracy and have sometimes—as was shown above in the case of the Global Fund—deferred to their pedigree in the name of harmonisation and effectiveness. To conclude, it appears that a rationalist–functionalist perspective on global health governance that focuses exclusively on the increase in actors and rules lends itself to the hasty conclusion that this policy field is inevitably messy, while a closer analysis can reveal stabilising relationships and historically changing, discursively embedded instances of metagovernance that reflexively rearrange the parameters within which health IOs interact and operate.

## 5. Conclusions

Embarking from a critique of the one-sided focus on the bewilderingly "complex" aspects of fragmentation and complexity in contemporary global governance scholarship, the bulk of the present paper has presented an alternative framework for the analysis of inter-organisational relations in global governance fields. More specifically, we have argued for an historical perspective that conceives of convergence and fragmentation as opposite, mirroring patterns of interaction between organisations. As they evolve over the course of time, they give rise to governance constellations of varying density; in our proposed terminology these could range from "governance architectures" to "governance hamlets" (see above pp. 6-7). In order to account for such transformations, we sketched out an explanatory framework that draws on theories of metagovernance and critical IR norms theory in suggesting that inter-organisational practices are driven by, or rather can be seen to constitute enactments of, discursive perceptions about the proper "governance of governance". In contrast to the rationalist–functionalist institutionalisms that have so far dominated much of the social science engagement with global (health) governance, we propose a constructivist approach that distinguishes between different levels of reflexivity to explain emergent orders in global governance. The empirical examples and indications given in this paper are a first step towards a more systematic analysis of both discourses and practices of metagovernance in global health governance. However, the above empirical analysis clearly indicates that inter-organisational patterns of interaction are embedded in and informed by broader discourses on how one can and ought to govern. As we show above, dominant perceptions about what constitutes "good governance of governance" in the health realm are distinctly historically contingent: For the past few decades they have ranged from rights-based understandings connected to visions of a more equitable "New Economic Order", to discourses that locate global health governance within frames of quantitative economic output and development, innovation and marketisation. Moreover, in many of these instances, causal beliefs and implicit normative connotations transcend the borders between the practice of global health governance and scholarly engagement therewith. For instance, an overarching negative connotation of the terms "fragmentation" and "complexity" has crystallized in both realms through the last decade, often assuming the function of causal background knowledge that makes it possible for "harmonization" to figure as a logical, common sense solution to ineffectiveness and inefficiency. Yet, as the above diachronic tracing of inter-organisational interactions, institutional developments and their discursive embeddedness also points to, the more precise meaning of dominant metagovernance norms and hence their translation into practice, far from being a technical matter, constitutes a continuous object of contestation. As we illustrate above, in the

[5] See for example Memorandum of Understanding between the Roll Back Malaria Partnership and WHO (2006).

case of harmonization, struggles have erupted between enactments that interpret the norm as suggesting a stronger centralization of governance processes or in other words a move towards hierarchy, and others that posit the meaning of the norm as a greater functional division of labour between IO actors along lines of comparative advantage. To conclude, studying institutional constellations as a product of historical processes of discursive struggle and stabilisation sharpens our gaze for their contingent, non-technical and hence political origins. Moreover, this gives reason to reconsider the undisputed focus on enhancing effectiveness of pre-existing governance arrangements that has determined the course of much research on global governance.

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**About the Authors**

**Anna Holzscheiter** is Junior Professor of Political Science and International Relations at Freie Universität Berlin and the head of the Freie Universität Berlin & WZB Berlin Social Science Center Junior Research Group *Governance for Global Health*. She received her PhD from Freie Universität Berlin and has held fellowship positions at the London School of Hygiene & Tropical Medicine and the Center for European Studies at Harvard University.

**Thurid Bahr** is a PhD candidate in Political Science at Freie Universität Berlin and a research fellow with the Freie Universität Berlin & WZB Berlin Social Science Center Junior Research Group *Governance for Global Health*. She holds an M.A. in International Relations from Freie Universität Berlin, Humboldt-Universität zu Berlin and Potsdam University.

**Laura Pantzerhielm** is a PhD candidate in Political Science at Freie Universität Berlin and a research fellow with the Freie Universität Berlin & WZB Berlin Social Science Center Junior Research Group *Governance for Global Health*. She holds an M.A. in Political Science from Freie Universität Berlin and a Master's degree in International Affairs and Human Rights from Institut d'Études Politiques de Paris (Sciences Po Paris).

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Article

# Contested Norms in Inter-National Encounters: The 'Turbot War' as a Prelude to Fairer Fisheries Governance

Antje Wiener

Department of Political Science, Faculty of Economics and Social Sciences, University of Hamburg, 20146 Hamburg, Germany; E-Mail: antje.wiener@wiso.uni-hamburg.de

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**Abstract**
This article is about contested norms in inter-national encounters in global fisheries governance. It illustrates how norms work by reconstructing the trajectory of the 1995 'Turbot War' as a series of inter-national encounters among diverse sets of Canadian and European stakeholders. By unpacking the contestations and identifying the norms at stake, it is suggested that what began as action at cross-purposes (i.e. each party referring to a different fundamental norm), ultimately holds the potential for fairer fisheries governance. This finding is shown by linking source and settlement of the dispute and identifying the shared concern for the balance between the right to fish and the responsibility for sustainable fisheries. The article develops a framework to elaborate on procedural details including especially the right for stakeholder access to regular contestation. It is organised in four sections: section 1 summarises the argument, section 2 presents the framework of critical norms research, section 3 reconstructs contestations of fisheries norms over the duration of the dispute, and section 4 elaborates on the dispute as a prelude to fairer fisheries governance. The latter is based on a novel conceptual focus on stakeholder access to contestation at the meso-layer of fisheries governance where organising principles are negotiated close to policy and political processes, respectively. The conclusion suggests for future research to pay more attention to the link between the 'is' and the 'ought' of norms in critical norms research in International Relations theories (IR).

**Keywords**
background experience; contestation; cultural validation; fisheries governance; legitimacy; norms; stakeholders; sustainability; turbot war; UNCLOS

**Issue**
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## 1. Introduction

This article is about norms in international relations. It understands 'inter-national relations' as the interactions between agents of distinct 'national' root context (as opposed to transnational relations where that distinction is blurred). As both socially constructed and structuring elements that are intrinsically interrelated with these agents, norms entail a dual quality. As part of the layered normative structure of meaning-in-use norms are re-/enacted through social interaction. As such they form the key link between agent and structure in any society. The following discusses the 1995 'Turbot War'[1] as a series of inter-national encounters among stakeholders in global fisheries governance. By unpacking the contestations and identifying the norms

[1] Publications on the 'Turbot War' abound, many of them reflecting emotional concerns of the authors, or a summary of these, as reflected among others by the *Wikipedia* entry (see: https://en.wikipedia.org/wiki/Turbot_War). A most notable academic account of the conflict has been presented by Allen L. Springer (1997). Section 3 of this article presents more detailed information of the event.

that were at stake, the article suggests that what began as action at cross-purposes, holds the potential for fairer fisheries governance based on the ultimately shared concern for the balance between the right to fish (UNCLOS Art. 116)[2] and sustainable fisheries. The path to get there involves careful reconstruction of the contestatory practices displayed by all involved parties. The article presents a framework that allows researchers to elaborate on procedural details (i.e. contested norms in inter-national encounters) and normative issues (i.e. the right for stakeholder access to regular contestation). To that end the contestations of three types of norms in the sector of fisheries governance are addressed by agents including two sets of state-plus stakeholders in Canada and in Europe. As will be further detailed with reference to the research framework and the case study respectively, the contested norms include sustainability, responsibility to protect fish-stock from extinction as well as the rule of law, as norms that are categorised as *type 1*; and the 200NM limit of the Exclusive Economic Zone (hereafter: EEZ), mesh-size and total allowable catch (hereafter: TAC) as *type 3.* Notably, however, the negotiation of the specific weighing and reasoning for the details of TAC includes agreement on individual quotas, percentages and regulatory measures, and therefore requires regular contestation in various discursive spaces at the meso-layer. This qualification as interactive and procedural suggests moving the TAC into the category of *type 2* norms. The case evaluation will return to this important point in due course. Other *type 2* norms that would facilitate a via media such as the precautionary approach[3] or regular access to contestation were less vital to the dispute itself, however they acquired a central role in the settlement (compare Tables 1 and 2 below).

The article applies the ideal typical distinction of norms types according to their degree of specification, generalisation and moral reach. It suggests that better understandings of the work of *type 2* norms pave the way towards replacing cross-purpose contestations at the micro- and macro-layers of global governance by common purpose interaction at the meso-layer.[4] To that end the article undertakes two steps: first it presents the key elements of critical norms research which are illustrated by the case of the 1995 'Turbot War', and second it evaluates the case study with regard to the normative goal of filling the legitimacy gap of fisheries governance by enhancing conditions for stakeholder access to contestation. Three distinct scenarios are at play: the domestic Canadian scenario, the regional European scenario and the inter-national scenario. The scenarios are linked by the common reference to the general narrative of the 'Turbot War'. The dispute is presented through the reconstruction of—mostly—inter-national encounters norms of fisheries governance are contested. By distinguishing three scenarios of contestation, which are interrelated through moments of interaction in the dispute, the article puts an emphasis on the socio-cultural contingency of distinct perspectives.

Each perspective informs distinct contestatory practices, as it draws on and contributes to the social construction of the narrative, and each is constitutive for the normativity that ultimately enhances or reduces the legitimacy of the norms of fisheries governance. By disaggregating these contributions it becomes possible to account for diverse background experiences. As potential sources of conflict these have also been referred to as 'latent' contestation.[5] Subsequently, the respective storytellers' narratives about wars differ: notably, the endpoint is often less disputed than the source of conflict. The 'Turbot War' was no exception from this pattern. Like all narratives it had a beginning, a high point and an end.[6] With regard to the timeframe, it is notable, however, that while the dispute reached its high point and settlement in 1995, a legal case brought before the International Court of Justice (ICJ) on behalf of one conflicting party, only came to an end in 1998 with the ICJ declaring that it had "no jurisdiction to adjudicate upon in the dispute".[7] The source of the dispute was not straightforward. For example, according to the Canadian narrative the source of the conflict was situated much further back in the past than by the Europeans' account[8]. And as far as the legitimating reference for the war-like activities was concerned, notably, the Canadian narrative centred on the more vaguely defined sustainability norm (*type 1*), whereas the European narrative centred on the set of

[2] United Nations Conventions on the Law of the Sea (hereafter: UNCLOS), Article 116 on the "Right to fish on the high seas stipulates: All States have the right for their nationals to engage in fishing on the high seas subject to: (a) their treaty obligations; (b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67; and (c) the provisions of this section."

[3] Notably and importantly the "precautionary approach" was introduced at the UN conference on straddling stocks following the dispute in 1995. For details, see Northwest Atlantic Fishery Organization (2016b).

[4] For details of this novel research focus on the meso-layer in global governance in distinct sectors including security, climate and fishery see Wiener (2014, p. 76).

[5] I am grateful to Peter Niesen for suggesting this term.

[6] On the concept of narratives compare generally Della Sala (2015), and especially with regard to the concept in international relations Miskimmon, O'Loughlin and Roselle (2014).

[7] See International Court of Justice (1998); see also: "Judgment of 4 December 1998" in United Nations (UN, 2003).

[8] The following sections elaborate in more detail about the term 'European' which especially in media was often used in multiple ways, thereby blurring knowledge about the actually involved agents.

clearly defined *type 3* norms at first, and was pitched by reference to the rule of law (*type 1*) at the high point of the political dispute. The interplay of the distinct perceptions of background, substance and timing of the conflict is captured by a 'cycle of contestation' all involved stakeholders were situated throughout (see Figure 1). The effect of this interplay is then projected onto the issue of normative ownership. The former displays the conceptual framework for the 'is', the latter the framework for the 'ought' (compare sections 3 and 4 for the case study and the evaluation, respectively).

As an illustrative case, the unpacking of the 'Turbot War' narrative suggests that the reconstruction of distinct norm contestations and their critical evaluation advance insights about the interplay between formal validity and perceived validity of norms, and how this relation affects stakeholder behaviour. By reconstructing norm contestations in context and taking into account the link between the 'is' and the 'ought', the argument suggests moving beyond the task of accounting for normative meanings (i.e. what is) and adding the normative question of how to enhance stakeholder participation. The remainder of the article summarises the core elements of the conceptual framework in section 2. It then summarises the events of the 'Turbot War' with a special focus on inter-national encounters and contested norms of fisheries governance in section 3. The concluding section 4 turns to the normative reflection of the link between the 'is' and 'ought' of norms with a view towards further research on norms in global governance.

## 2. Conceptual Framework: Critical Norms Research

This article's normative proposition to reconstruct disputes in global governance as a prelude for fairer governance builds on the three seminal conceptual contributions of IR constructivism: first, the impact of the socio-cultural environment on state behaviour;[9] second, the role of interactive practices of arguing and internalisation with regard to agents' norm implementation and entrepreneurship;[10] and third, the advanced methodology to account for practices and meaning.[11] While not always in agreement these three major contributions enabled norms researchers to work with a set of concepts and methods to grasp the interplay between material and social facts (Ruggie, 1998), and therefore to better account for the conditions of international interaction as socially constructed. This rich empirical background has led some researchers to engage in the utilitarian study of "norm robustness" despite contestation[12]. By contrast, this article is less interested in the perseverance of a norm than in the effect of normative contingence.[13] The former would pre-empt the assumption about whether a norm is a 'good' or a 'bad' norm, while the latter works with the assumption that norm-ownership enhances normative legitimacy.[14] While the universality vs. particularity argument has been discussed widely for example in the field of citizenship studies,[15] the interplay between both has yet to become an issue of central interest in the field of norms research.

Notably and despite a wealth of methodologically sound research about cultural meaning constructions critical norms researchers[16] still tend to leave addressing the general normative issues of their findings to political theorists.[17] To counter that trend and further develop the innovative potential of critical norms research this article suggests linking normative quality with normative purpose of norms. To that end it centres on the questions why a norm should be followed and, whose norms should count. Taking into account the well-documented knowledge about cultural diversity and normative meanings that in different cultural contexts, the present article sheds light on the normative follow-up. It suggests linking knowledge about the constitution of norms (what is visible) with the normative question of how to enhance legitimacy in global governance (what is possible). The following summarises the key conceptual elements of critical norms research to that end. They include *first* the major typological distinctions about the typology of norms for interdisciplinary research on international relations, three distinct dimensions along which norms are practiced such as legal validity, social recognition and cultural validation, as well as their interrelation based on allocation on the cycle of contestation. *Second*, they

[9] Compare Checkel (1998); Katzenstein (1996); Koh (1997); Kratochwil and Ruggie (1986).

[10] Compare Liese (2009); Müller (2004); Risse (2000).

[11] Compare Engelkamp, Glaab and Renner (2013); Hofius (2015); Hofius, Wilkens, Hansen-Magnusson and Gholiagha (2014); Hofmann (2015); Holzscheiter (2013); Müller and Wunderlich (2013); Wolff and Zimmermann (2015); Zimmermann and Deitelhoff (2015).

[12] See Zimmermann and Deitelhoff (2015).

[13] See especially Bjola and Kornprobst (2010); Kornprobst (2012), as well as Hofmann and Wisotzki (2014, p. 3).

[14] See generally for a critical approach that seeks to enhance the empowerment of 'citizens' in 'struggle' Tully (2002) and Tully (2008, p. 5); and especially for the concept of norm-ownership in global governance the work of Park and Vetterlein (2010).

[15] See for example Soysal (1994); Somers (1995); Hanagan and Tilly (1999).

[16] Compare especially the current 'ZIB Debate' in the German IR journal *Zeitschrift für Internationale Beziehungen* in 2013–2015.

[17] Notwithstanding pro-active engagement with political theory that is well reflected by the growing field of International Political Theorists, norms research in particular has yet to pick up on this research.

involve the concept of background experience that allows zooming in on the reconstruction of constitutive cultural practices for latent and open contestations of norms. The following details these elements in their turn.

### 2.1. Typological Distinctions

The typology of norms distinguishes three types of norms: fundamental norms, organising principles, and standards/regulations. Like all ideal types, these norm types have been derived inductively with regard to two questions[18]: *first*, what is the moral reach of the norm (high—medium—low), and *second*, what is the expected degree of contestation of a norm (high—medium—low)? Answering the first question quickly finds human rights, the rule of law, democracy, sovereignty and other leading principles falling into the *type 1* group of norms which have been identified as "fundamental norms" (Wiener, 2008, p. 66). All share a high degree of moral substance with wider implications for theory and practice, and they also share a significant lack of specification. The latter implies that their validity remains to be specified by adjacent norms and specific procedures which stand to be implemented by additional flanking action. By contrast norms with low moral implications are those that are most clearly defined such as, for example, emission standards entailing specific percentages, fishing quotas, or electoral details. All these fall into the group of *type 3* norms of standards/regulations. In comparison, *type 3* norms are more encompassing than *type 1* norms with regard to their respective 'validity' detail. While knowledge of fishing quota or mesh-size regulations entails all the information required by the designated norm-follower in order to implement the norm, the knowledge about sustainable fisheries does not. That is, while the fundamental norm of sustainability may be adhered to as a taken-for-granted norm that enjoys wide social recognition, its implementation requires a variety of flanking actions. These flanking measures' success depends on the socio-cultural contexts in which they are implemented. They add contingency to the way fundamental norms work in inter-national relations (compare Table 1).

This leads to answering the second question about the degree of contestation expected with regard of the distinct groups of norms. It is related to the answer to the first question insofar as the lower the degree of validity detail, the higher the required flanking measures in order to achieve implementation, and, accordingly, the higher the chance of contestation with regard to each of these measures. That is, contestation is higher with regard to fundamental norms than with regard to standards or regulations. While the latter may be more easily rejected, i.e. by jaywalking, over-fishing or skipping a ballot, objection to fundamental norms usually involves a chain of contestatory practices that refer to distinct flanking measures including organising principles (*type 2* norms) and standards/regulations (*type 3* norms). All can be brought to the fore by distinguishing normative dimensions and practices of norm validation that are attached to them. According to the typology, organising principles (*type 2* norms) such as for example common but differentiated responsibility (CBDR) in climate governance[19] evolve through policy or political practices. They are placed on the meso-layer of global governance where they fill the space that links the universal quality of fundamental norms, on the one hand, with the particular quality of standards and regulations, on the other. In this linking role, they are most important for filling the legitimacy gap.

### 2.2. Practice Dimensions of Norms and The Cycle of Contestation

The concept of 'validating dimensions of norms' reflects the interactive quality that is bound by the (re-) enacted "normative structure of meaning-in-use".[20]

[18] Compare Goodin and Tilly (2006); Tilly (2006).

[19] See especially the account offered by Brunnée and Toope (2010, p. 130ff).

[20] See Jennifer Milliken's seminal article on discourse analysis in IR (Milliken, 1999); compare also Weldes and Saco (1996).

**Table 1.** Norm-types in global fisheries governance.

| Norm | Type / Layer | Fisheries | Moral Reach | Contestation |
|---|---|---|---|---|
| Fundamental | *Type 1* / Macro | Sustainable Fisheries<br>Right to Fish (UNCLOS Art. 116) | Wide | High |
| Organising Principle | *Type 2* / Meso | *Precautionary principle**<br>*Access to contestation***<br>*TAC* | Medium | Medium |
| Standardised procedures/Regulations | *Type 3* / Micro | TAC, EEZ, Quotas<br>Mesh-size | Narrow | Low |

Notes: *Established by NAFO in 1995 following the Turbot War; **Proposed organising principle (see e.g. Wiener, 2014, pp. 58-62). Source: Wiener (2008, 2014).

It is of key importance for the separate reconstruction of distinctive social practices vis-à-vis norms. Three such practices have been identified by norms research in the social sciences: formal validation, social recognition and cultural validation. *Formal validation* entails validity claims with regard to formal documents, treaties, conventions or agreements. In the context of international relations, formal validation is expected in negotiations involving committee members of international organisations, negotiating groups, ad-hoc committees or similar bodies involving high-level representatives of states and/or governments. *Social recognition* entails validity claims that are constituted through interaction within a social environment. The higher the level of integration among the group, the more likely becomes uncontested social recognition of norms. Different from formal validation where validity claims are explicitly negotiated, social recognition reflects mediated access to validity claims qua prior social interaction within a group. *Cultural validation* is an expression of individual expectation that is informed by individually held background experience. Given the diversity of individual expectations in inter-national relations, this dimension is an important indicator for norm conflict. Yet, it remains largely overlooked by current norms research. Each dimension has evaluative potential with regard to each of the three norm types. Notably—and this is the central emphasis of the critical approach to norms research that is derived from James Tully's public philosophy[21]—access to these three dimensions is not equally shared among all stakeholders. This point is elaborated with reference to the figure of the 'cycle of contestation' (see Figure 1).

As the cycle demonstrates, the position of the claims-maker vis-à-vis the norm decides about stakeholder access. This position is distinguished with reference to the *stage* of norm implementation (i.e. constituting, referring and implementing) and the situation within a given *social order* (i.e. government representatives, social group, individual). For example, at the treaty making stage where government representatives of different national provenience come together, an individual will be able to evoke negotiating power her access to formal validation and cultural validation of sustainable fisheries, and pending on the negotiating group's frequency of gatherings, relate to and shape social recognition as well. By contrast, at the implementing stage at the micro-layer of global governance, individual fishing folk will be able to accept or oppose sustainable fisheries based on social recognition and follow or oppose the fishing quota. There is no room left for evoking powers of negotiating. The cycle of contestation demonstrates the potential positions in fields of global governance. By shedding light on the position of stakeholders, critical norms research moves on from questions about motivation (question: why comply with norms?) to a perspective on stakeholders (question: who has access to negotiation?). Braising a question about access it becomes possible to reach beyond "competent practices" to engage with the "principle of contestedness".[22] It implies broadening the perspective to include a focus on the empowerment of stakeholders to actually partake validation.

### 2.3. Background Experience

As the cycle of contestation demonstrates, access to contestation is differentiated by contingency. The broader access to the three validating dimensions of a

[21] See Tully (2002) and for the project of adopting Tully's Public Philosophy in a New Key to IR see especially the work of Havercroft (2012) and Wiener (2008, 2014, 2016a).

[22] For this sociological concept see Sending and Neumann (2011) as well as Adler and Pouliot (2011); for the latter principles of contestedness see Wiener (2014, pp. 58, 79ff).

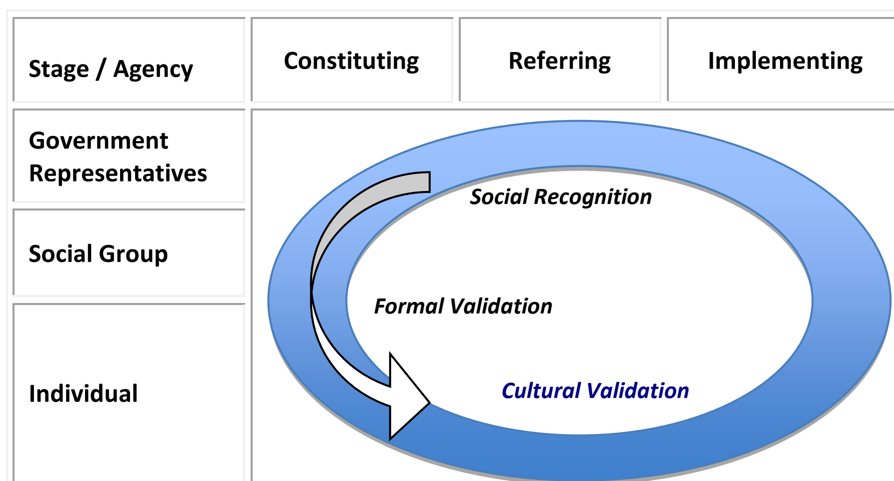


**Figure 1**. The cycle of contestation. Source: Wiener (2014, p. 36, Figure 2.1).

norm become for stakeholders, the higher the potential for norm-ownership. In this scenario "background experience" (Wenger, 1998) plays an important role. It is constructed over time and, notably, it is carried individually. Taking account of individually held background experience by studying "cultural practice" and then relaying it back to the 'regulatory practice' of the law (Tully, 1995) reveals the diversity of perceptions and makes them empirically accessible. The following elaborates this claim based on the distinction between two sources of appropriateness and their respective 'storage' in the social environment. One source is constituted by the practice of social recognition. It is located outside the "individual human being" in international relations (Gholiagha, 2016) in the context of social groups or communities. In turn, the other source is constituted through cultural validation and therefore carried by the individual human being.

To make cultural validation visible it is necessary to engage in conversations with others. These conversations may emerge as spontaneous objections to norms. Alternatively they may be orchestrated. The more regular access to contestation becomes, the higher the chances of obtaining a sense of appropriateness among involved stakeholders. It follows that while social recognition works through the habitually enacted perception of appropriateness, cultural validation requires the active cognitive engagement with diversity. That is, while norms do travel along with human beings once borders are crossed, normative baggage cannot be expected to match. Taking the change that occurs by moving community boundaries into account is of predominant importance for studies on global governance, especially, in research that touches on the global commons (Ostrom, 1990). It matters in particular for cases where inter-national relations are involved because these always involve the crossing of cultural boundaries. Here it is important to note that the concept of 'boundaries' includes not only the literal step over the border of sovereign political entities, but also the crossing of invisible cultural boundaries when engaging with others without sharing their cultural roots.[23] That is, social recognition emerges through iterated group interaction within a social group or community—i.e. Katzenstein's reference to a "community with a given identity" (Katzenstein, 1996, p. 5).

In this social environment perceptions of appropriateness abound, therefore sustaining the implementation of a legally validated norm based on the socially embedded perception of appropriateness. The literature refers to this interplay between legal and social dimensions of norm implementation as the 'logic of appropriateness' (see Finnemore & Sikkink, 1998; March & Olsen, 1989, 1998; Risse, 2000). The more appropriate a legal norm in the eye of the beholder, the higher the likelihood for its uncontested implementation. This would account for the norms of sustainability and sovereignty which are both categorised as *type 1* norms (Wiener, 2008, p. 64). Notably, however, the shared perception of a norms appropriateness—i.e. a norm's taken-for-grantedness—of these vaguely defined *type 1* norms decreases when zooming in from the macro-structures of order towards the social practices at the micro-layer (Hofius, 2015). In situations where the perception of appropriateness does not overlap among the involved stakeholders, social recognition is not an available resource. While it may be generated through iterated interaction of stakeholders, for example, through regular benevolent encounters, it is important to realise for any research on norms that in the absence of social recognition, opposed interests will be enhanced rather than smoothened by distinct background experiences. As cultural validation kicks in, clashes or norms and cross-purpose talk is expected. This is the likely scenario in most international negotiations. Accordingly, perceptions of norms are more likely to clash than to overlap once borders are crossed. This poses the logical follow-up question of what needs to be accomplished in order to generate shared acceptance of norms?

Rather than reducing conflict about the norms of fisheries governance to the legal arena of courts and the practice of arbitrations, the following sheds light on heretofore un-explored links between the legal core of fisheries regulations and the socio-cultural environment of their implementation. It is held that this change of focus allows for a shift from norm-setting agency at the constituting stage towards the involved stakeholders at the implementing stage. Given the diverse state-plus actorship involved in the contestation including the events that had been constitutive for the larger context of crisis that set the frame for this conflict, it is suggested to reconstruct the normative meanings-in-use that were—if largely implicitly—held by the involved agents. If this argument holds true, then further policy steps identifying measures to sustain the norm of sustainable fisheries, may not have to necessarily include more and better legal measures, but may centre around enhanced stakeholder participation at the referring stage instead (compare Figure 1). The following section 3 applies the conceptual framework to make visible cultural validation in the 'Turbot War' and the process leading up to it (the 'is'), on the one hand, and to make possible stakeholder access to contestation (the 'ought') of norm practice, i.e. the discussions of the normative consequences of the event.

[23] There is much more to be said on the issue of 'cultural diversity' here (compare McIlwain, 1947; Tully, 1995). Detailing this literature would however lead beyond the limits of this article (for more details on the 'thin' approach to 'culture' that underlies the concept of cultural validation, compare Wiener, 2014, p. 47ff).

## 3. Case Study

### *3.1. The Dispute in Context*

The 'Turbot War' took place off the Canadian North Atlantic coast from 9 March to 16 April 1995, involving as main contestants Canada and Spain (Galicia). In addition, Portugal, the UK, Ireland, Iceland and the EU have been party to the dispute at various stages. The reconstruction of the dispute's narrative includes incidents leading up to the dispute, incidents at the height and the end of the dispute. Events leading up to the 'Turbot War' involved, in the 1990s, "the collapse of the Grand Bank cod fisheries", which brought a serious reduction of Greenland Halibut stock, which is also called Greenland turbot.[24] To counter the imminent fish-stock extinction the Canadian Government decided to implement a zero quota for Atlantic cod fisheries of Nova Scotia. Accordingly, it was prohibited to fish for cod[25] within the 200 NM EEZ[26] off the Canadian Atlantic coast. This resulted in significant job losses in the Canadian Atlantic fisheries, leaving 40,000 unemployed (Springer, 1997, p. 48). The decision caused wide protests by Canadians. First, societal protest revealed the contention of the quota as a threat to the livelihood of the Canadian fishing. Second, high-level political protest against the fishing the grounds right beyond the EEZ where the fish was breeding involved contestations on behalf of the Ministry of Fishery and Oceans within the context of international organisations.[27] Effectively, these contestations erupted into a full-blown conflict including the use of guns vis-à-vis the Spaniards.

The incident that ultimately triggered what was later dubbed the 'Turbot War' was the moment when "Canadian authorities boarded and seized the Spanish trawler *Estai* about 220 miles [sic] east of Newfoundland for violating Canadian fisheries regulations." As observers noted, "[i]n an unprecedented show of force, Canadian ships fired across her bow, before boarding and towing the trawler to Newfoundland" (Bigney & Wilner, 2008, p. 6). That is, the involved Canadians made use of machine guns and water cannons (see Schäfer, 1995, p. 437). The *Estai* was then seized, their fishing gear was cut off and the vessel was then taken to the UN headquarters in New York. The incident was considered a "flagrant violation of the laws of the high seas" by the European Union (EU) considering the seizure of a ship flying the flag of an EU member state (Nickerson, 1995, p. 14, cited in Springer, 1997, p. 26).[28] "…and Spanish ships were soon dispatched to protect other Spanish fishermen [sic]" (Springer, 1997, p. 26). Given its location 20NM beyond the 200NM EEZ the Galician trawler was in international waters and hence formally not in breach with international law. Clearly defined regulatory norms (*type 3*) setting standards for fisheries governance were available based on common global and regional regulatory frameworks, most importantly the umbrella treaties of the United Nations Convention of the Law of the Sea (UNCLOS) which identifies the norms for fishing on the high seas as well as the activities of the various Regional Fisheries Management Organisations (RFMO) such as the North Atlantic Fisheries Organisation (NAFO).[29] According to the purely legal perspective that involved reference to the formal validity of the rule of law (*type 1*) as well as TAC and EEZ (*type 3*), the Canadian reaction appears as a breach of international law. The question that was immediately raised, however, was whether it was also disproportional under the circumstances of the Canadian trajectory of taking acts with a view to responsible fish-stock preservation (*type 1*).

The following recalls documented contestations of central fisheries norms that were at stake, and which were made by way of inter-national interventions. The reconstruction leads beyond the war narrative and demonstrates how the two conflicting parties began at cross-purposes with their inter-national encounters (compare Table 2).

The Canadians emphasised the importance of preventing fish-stock from extinction by making reference to the *sustainability principle* and the principle of a *responsibility to protect fish-stock* in the absence of action by the global community in this regard. In their contestations Canadian stakeholders justified their actions with reference to "grave and imminent threat" and to "an essential interest" in fighting fish-stock extinction on behalf of the Canadians (Beesley & Rowe, 1995, cited in Springer, 1997, p. 44). To them "the issue was conservation, not how the resources is divided" (Springer, 1997, p. 54). And as Brian Tobin Federal Minister of Fishery and Oceans at the time detailed, "[O]ur objective was not to get a bigger slice of the pie. Our objective was to ensure that there would be pie, there would be [a] resource for the future" (Farnsworth, 1995c, p. A2, cited in Springer, 1997, p. 54). The emphasis on the sustainability norm was even supported

[24] For details, see https://en.wikipedia.org/wiki/Greenland_halibut

[25] "By the 1990s, the Newfoundland cod fishery had collapsed, forcing the government to declare a moratorium on all fishing." (Vogt, 2010).

[26] Compare United Nations Law of the Sea (UNCLOS) Articles 56-61, https://www.un.org/depts/los/convention_agreements/texts/unclos/part5.htm

[27] Here, Canadian reports stress the importance of Canadian contributions to the UN Straddling Stocks Conference—compare Springer's detailed report of interventions in the early to mid-1990s (Springer, 1997, pp. 55ff).

[28] See Nickerson (1995).

[29] Compare, UNCLOS Art. 116; and for the interrelations among the regulatory bodies, see generally Northwest Atlantic Fisheries Organization (2015).

**Table 2.** Inter-national encounters at cross purposes?

| Norm Types | Contested Norms | Relevance Canada | Relevance Europe |
|---|---|---|---|
| Type 1 | Sustainability | High | Low |
| | Responsibility to protect fish-stock | High | Low |
| | Rule of Law | Low | High |
| Type 2 | *Precautionary Principle** | Even | Even |
| | *TAC*** | Even | Even |
| Type 3 | EEC | Low | High |
| | Mesh-size | High | Low |

Notes: *Outcome of dispute settlement in 1995; **Readjusted by dispute settlement in 1995. Source: Author's reconstruction of case material as cited in text.

with reference to the Canadian "responsibility of protecting these fish stocks for the rest of mankind". While Canadians did not wish to claim this responsibility, they adhered to it nonetheless when Clyde Wells pointed out that "absent an effective international agency, Canada…has the *responsibility*…[to act] until such time as the international community is prepared to take responsibility" (MacNeil, 1995, cited in Springer, 1997, p. 54, emphasis added by the author). In other words, *as long as* the global community's regulations were not fit to protect fish-stock from extinction, that obligation fell to the Canadians.[30] As Tobin summarized later, the point was to demonstrate "a first step in instilling in [Canadian] waters and around the world an effective enforcement regime." (Kaye Fulton & Demont , 2003).

By contrast the Europeans stressed the need to re-establish security and in the words of European Union Fisheries Commissioner Emma Bonino "the *rule of law* on the high seas" (Springer, 1997, p. 39, emphasis added by the author).[31] That is, European stakeholders stressed the formal validity of the law as specified by the *type 3* norms, especially the EEZ limit as well as TAC (Springer, 1997, pp. 27, 39). Thereby justifying their action with regard to international law, with Bonino pointing out that "European vessels, operating in full respect of *International Law* and *NAFO regulations*, may not be prevented from fishing" (Springer, 1997, p. 39). In addition, Bonino accused the Canadians of "illegal seizure" of the *Estai* (Bryden, 1995, cited in Springer, 1997, p. 52). Importantly, the European discourse did not stress sustainability, but perseverance of the rule of law on the high seas. As Table 2 shows the international encounters revealed contestations at cross purposes in all but one respect: with regard to *type 1* norms, Canadians valued sustainability, whereas the Europeans stressed the rule of law, with regard to *type 3* norms, Canadians stressed the importance of mesh-size more than the limits of the EEZ, whereas the European stakeholders' contestations revealed reverse preferences. While the total TAC was highly contested especially given the complex trajectory of prior agreements on both sides leading up to the percentage, both parties acknowledged its relevance. And, in the end, it was this norm that carried the weight of the settlement of the conflict on 15 April 1995, where both parties made compromises with regard to the TAC, and the role of NAFO as the regional regulatory body was endorsed.[32]

### *3.2. What Happened Here?*

There have been numerous accounts of the dispute including different descriptions of the involved parties, for example, the *Estai* has been interchangeably identified as Spanish, Galician, European and so on. Academic observers noted that, "[R]easons *given* for such an aggressive action were the past overfishing of turbot and other species by foreign countries, the illegal use of mesh-size of EU nets and the lack of overview of policing overfishing" (Missios & Plourde, 1996, p. 145). Other researchers assigned the comparatively aggressive Canadian behaviour the quality of a morally motivated intervention on behalf of sustainable fisheries (Matthews, 1996). While much of the literature commenting on the dispute at the time discussed the necessity of "enforcement" and the issue of lacking measures under international law.[33] As Springer's excellent documentation and discussion of this debate

[30] For similar rationales, compare the Maastricht judgement of the German Constitutional Court 1993 (BVerfGE 89, 155 of 12 October 1993, *Az*: 2 BvR 2134, 2159/93); as well as the European Court of Justice (ECJ) judgment in the Kadi case 2008 (ECJ, Joined Cases C-402/05P and C-415/05P, Yassin Abdullah Kadi and Al Barakaat International Foundation *v* Council of the European Union and Commission of the European Communities [2008] ECR I-6351).

[31] Next to EU Fisheries Commissioner Bonino, the Spanish Minister of Agriculture, Fisheries and Food Atienza was engaged in the European set of stakeholders (Springer, 1997, p. 51).

[32] For the details see Springer (1997, pp. 36-37) citing Buerkle (1995) and Farnsworth (1995c, p. A2).

[33] Compare Allen L. Springer (1997) for an excellent overview of this literature. Notably, according to the Naval Service Act from 1919 when "most of Canada's maritime activity was conducted by the Canadian Department of Marine and Fisheries, the fourth mandate of the Canadian Navy involves the protection of fisheries" (Bigney & Wilner, 2008, p. 3).

shows, that perspective emphasised legal enforcement procedures. And, for example, a utilitarian analysis of the dispute could argue that two interests stood opposed, concluding that the conflict was solved based on the amounts of money exchanged, and the trawler being returned and TAC quotas agreed for future fisheries.

Given the ongoing interest in the dispute beyond its settlement based on material resources, this article acknowledges the diversity condition of inter-national encounters as an important source for latent contestation. To avoid similar disputes in the future and/or learn from the experience of this dispute, it is therefore worthwhile identifying the sources as places where background experiences are 'stored'. It suggests that by elaborating on the link between the 'is' and 'ought' of normative practice, it is possible to peer beyond this material settlement. While not disputing the formal points raised by that literature, this article's argument suggests that by reconstructing and comparing distinct discourses of norm contestation the dispute's source and outcome may be considered with a different purpose in mind, namely, what are the possibilities of stakeholdership claims with a view to future developments of fisheries governance. What, if both parties' contestations were justified given their respective background experience? Does the dispute reveal access points that allow for improving stakeholder access to contestation? This finding would facilitate a better grasp of the discursive space where organising principles negotiated and therefore contribute to a fairer organisation of global fisheries governance.

The scenario of the dispute was perceived quite differently from the respective Canadian and Spanish perspectives. The Canadians who sought to protect the fish-stock felt their attack of the Spanish trawler, while formally illegal (i.e. fundamental norm of sovereignty, principle of non-intervention), was legitimate both with regard to the sustainability principle (i.e. the fundamental norm of sustainable fisheries) in protection of the global commons, and with regard to their perceived right to protect their livelihood. As a result, distinct background experience and expectations lead to a clash of norms.[34] The situation demonstrates the potential for cross-purposes of formal validation on the one hand, and cultural validation, on the other, quite well. The result consists in two perceptions of legitimate behaviour based on distinct validity claims: while the Canadian moratorium intended to preserve one type of fish stock (cod), the fact that other fish (turbot), which was caught by using means that were in breach with their specific mesh-size regulations, demonstrates the at times significant contradiction between perceived validity and perceived appropriateness differs among stakeholders in inter-national encounters. This difference in perception matters because it informs the way the existing normative structure is re-enacted by the parties of the dispute. The at times quite contradictory interpretation of that structure and the resulting deviation in compliance with norms is the likely cause for conflict in all situations that are not regulated by a single legal order, but by a range of overlapping legal regimes that work beyond the state and within distinct social environments at that. Given that this situation is the rule rather than the exception in global governance, it is important to understand how the diversity of experience and expectation of the involved stakeholders plays out.

The point here is to demonstrate how different segments in the cycle of contestation come into play. While the regulations set by the Canadian authorities were reasonable with reference to the fundamental norm (*type 1* norm) of sustainable fisheries, aiming to sustain the recovery of fish-stock and thereby the livelihood of the fishing folks in the long run, the zero quota was a regulation (*type 3* norm), which had a dramatic and immediate effect first of all on the Canadians. It was the Canadian efforts and subsequent grudge vis-à-vis the European stakeholders that encountered an enforcement problem. In turn, Galician's considered their conduct with regard to the fishing of turbot as legal because their access to turbot was consistent with international law and supported by EU policy. After all, they were fishing outside the EEZ and therefore in international waters where no legally enforceable mesh-size regulations for turbot were in place at the time (see MacDonald, 2002). In addition, Galicia's position vis-à-vis the Spanish state has often been considered as special insofar the Galician commitment to comply with agreements between Spain and the EU has traditionally been limited. Spain's membership in NAFO only lasted three years from 1983–86, when Spain "together with Portugal, acceded to the EEC in 1987 and ceased membership in NAFO (subsequently being represented by the EEC)"[35]. The objective of NAFO, as stated in the Convention[36], is "to contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fishery resources of the Convention Area. The Convention applies to all fishery resources in the Convention Area except salmon, tunas

[34] According to Matthews the Canadian action was justified with reference ''to moral rather than legal terms'' (Matthews, 1996, p. 505).

[35] See Convention on Future Multilateral Cooperation in Northwest Atlantic Fisheries Organization (NAFO, 2016a).

[36] The Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, signed on 24 October 1978 in Ottawa, came into force on 1 January 1979 following the deposit with the Government of Canada the instruments of ratification, acceptance and approval by seven signatories: Canada, Cuba, the European Economic Community (EEC), German Democratic Republic (GDR), Iceland, Norway, and the Union of Soviet Socialist Republics (USSR) (NAFO, 2016a).

and marlins, cetaceans managed by the International Whaling Commission, and sedentary species (e.g. shellfish)." (NAFO, 2016a). This was, however, contested by the Canadians who insisted on a stronger regulative power of NAFO regulations that established a larger mesh-size than the *Estai* used. As Tobin claimed in the Canadian House of Commons: "The net had a 115 mm mesh, which is smaller than the 130 mm required by NAFO. In addition, the net in question had an 80 mm liner in the net" (Commons Debates, 15 March 1995, p. 10511, cited in Matthews, 1996, p. 514). According to Tobin's view, the *Estai*'s fishing practice was in breach with the regulations set by NAFO.

### 3.3. Formal vs. Perceived Validity

The incident achieved significant public and media attention due to the range of Canadian stakeholders participating in the activities (i.e. including fishing folk, the navy, coastguards and government representatives at various layers of social order). All were claiming legitimate stakeholdership in the narrative of the 'Turbot War'. Given this background, the point of the quasi-martial engagement was not a question of right or wrong that could be addressed with exclusive reference to the formal validity of a norm (i.e. the wording in the legal document). Instead, the conflict evolved around the perceived validity of a norm (i.e. the perception of appropriateness). While the Canadians referred to the latter, the Europeans referred to the former (see Table 2). In addition, Canadian background experience entailed the stored experience with the drastic zero-quota decision regarding Canadian cod fisheries. Accordingly, a shared if invisible link between *cod* and *turbot* fisheries existed that was cast forward from the experience with Canadian fisheries policies in the 1990s (i.e. the zero quota policy on Atlantic cod fishing which left a large part of the Atlantic fisheries population out of work, and which triggered contestations about fisheries norms among domestic stakeholders in Canada) towards the international conflict that triggered the 1995 Turbot War (i.e. the conflict about turbot over-fishing which created contestations among international stakeholders including Canadians and Europeans).

The reconstruction of the dispute over what the European stakeholders presented as straightforward legal situation according to international law, revealed that for Canadian stakeholders past experience with one type of fish and the threat of extinction (i.e. cod) had created an environment in which fisheries stakeholders felt that overfishing was not appropriate. According to this perceived threat, the action not only appeared just. It was also justified based on proportionality with reference to the fundamental responsibility to protect fish-stock from extinction.[37] This meant endorsing the fundamental norm of sustainability at a high degree of appropriateness. That is, the diverse domestic range of Canadian stakeholders shared the social recognition that their values were betrayed by the legal contestations of the Europeans, notwithstanding that the latter were catching another type of fish at the time (i.e. turbot), and that this activity was not in breach of the law. Approached from this long-term reconstructive perspective that connects events from the past with present day contestations, the dispute was presented as triggered by a *perceived* breach on with the *type 1* norm of sustainability on behalf of the Europeans. To enforce the point, the Canadians made additional if highly contested reference to the European breach with the Canadian recommended mesh-size standard (*type 3*). The latter was widely publicised with the help of media effective advocacy.

### 3.4. What Is There to Learn from This Incident?

While the case of the various 'wars' in the sector of global fisheries governance may seem *folkloric* to non-fishing folks, these encounters shed light on the interplay of different cultural roots of the validity claims that came to the fore by the contestations. In fact, distinct cultural experiences are likely to suggest a different expectations and hence diverging interpretations of norms that are formally valid. As a site of international encounter the 'Turbot War' offers substantive insight into the way norms play out in global governance. It begins from the simple question: if you were to assume—for a moment—that you were aboard a fishing vessel pursuing fish-stock on the high seas (i.e. under the jurisdiction of international law) and noticed that another vessel was engaged an activity that you perceived as 'not legitimate' (i.e. unfair, inappropriate, or otherwise improper), what would your reaction be to settle the contested issue? Would you contact a third party such as for example the most trusting political or legal representative in whichever country closest by VHF (Very High Frequency) or other means of communication? Or would you, given the location of your vessel and the urgency of the situation, choose to engage directly with the other vessel? The Canadians' decision resonates with a shift from contestation (i.e. objection to norms, and in this case, fisheries norms set on behalf of the Canadian state-plus fisheries stakeholdership) to conflict (i.e. confronting the Spanish trawler with acts of violence that were in breach of the law). As this article's main argument holds, such shifts from contestation to conflict may be prevented based on regular access to contestation for all involved stakeholders, while the narrative of the dispute has

[37] Compare Beesley and Rove (1995, cited in Springer, 1997, p. 49).

been 'of war', this article's unpacking of the narrative into inter-national encounters suggests that the concept of 'dispute' involving a series of contestations is more helpful.

It is important to note that while the sector of fisheries governance forms part of UNCOLS and as the most advanced framework of international legal norms and as such reflects a high degree of formal validity, fisheries norms involve a high degree of latent contestation. This is due to the dual dynamics of movement in the fisheries sector: on the one hand, fishing vessels regularly cross territorial boundaries, on the other hand and relatedly, many types of fish-stock naturally move beyond such formally defined limits. It results that "[D]espite the changes in ocean law made by the 1982 United Nations Convention on the Law of the Sea and the evolving customary state practice that undergirds it, there remains substantial concern about the fate of fish stocks that straddle zones of national control or cross between national zones and the high seas" (Springer, 1997, p. 32). It follows that further agreements about "measures for the conservation" of fish are required (see UNCLOS, 1982, 1283, cited in Springer, 1997, p. 32).

As a rule, "treaty language" is kept relatively vague in order for treaties, conventions, agreements and other formal documents to be signed.[38] In turn, the rules and standardized procedures to implement treaties are much more specific. Accordingly, *type 1* norms are kept relatively vague in international agreements so that despite their formal validity they leave some margin to interpretation. This makes it possible for a diverse group of signatories to agree following a series of negotiations and consultations.[39] The same accounts for Regional Fisheries Management Organisations that also remain "a matter of contention" (Springer, 1997, p. 38), therefore leaving margin for stakeholder engagement with a view to specifying the norms they consider essential. As studies of global environmental governance have shown, these legalised procedures seldom offer sufficiently sound reference to convince all involved stakeholders. Especially, cases where the global commons are involved, such as in the sector of environmental, climate, oceans or fisheries governance, a gap between *type 1* and *type 3* norms, and which can be located at the meso-layer of social order in global governance, remains. Therefore, the meso-layer delineates the space where discursive interaction among stakeholders is most likely to take place. It is defined as the space for critical intervention in global governance, and stands to be carved out by exploring the 'ought' question of what is possible.[40] As this article's reconstructive analysis of the 'Turbot War' reveals, this meso-layer facilitates the space where norms such as the precautionary principle or even novel agreements about ways of distributing total allowable catch (TAC) emerge. These norms are defined as *type 2* norms, which are generated through politics and policy-making, play an important role in the process of generating legitimacy. Following the disaggregation of the narrative and the reconstruction of the contingent contestations of the involved stakeholders the 'war' narrative is more fittingly replaced by a core contestation of fisheries governance. For similar contestations in other sectors consider, for example the principle of common but differentiated responsibility (CBDR) in global climate governance.

In practice, this definition of fundamental norms creates an onus for continuous interpretative assessment on a case-by-case basis; and it is also a cause for many political contestations.[41] In the process additional rules and regulations are developed. As standardised procedures these *type 3* norms are much more specific and as a rule to not leave much margin for speculation, interpretation or contestation. The question is, who has the legitimate right to access in this process? As the following section argues, from a normative perspective that envisages the highest potential of legitimacy, norm ownership is key to this process. Following the reconstruction of the central contestatory practices and reference to norms on behalf of the involved stakeholders, the final evaluative section turns central attention to the second theoretical step, namely, establishing the theoretical link between the 'is' and the 'ought' of global governance. To that end the question of how access to negotiating *type 2* norms could help filling the legitimacy gap in global governance is addressed.

## 4. Evaluation

Taking into account the three distinct practices of normative evaluation two sources of the dispute's escalation matter in addition to formal validation. The *first source* is the *social environment* that matters for the implementation of a norm; the *second source* is the *background experience* of individual day-to-day practice. As noted above, while both are constituted through interaction in context, as compliance and regime analyses have demonstrated in detail, conceptu-

[38] See the seminal article by the Chayeses for details (Chayes & Chayes, 1993).

[39] Compare, for example, the general agreement of international agreements such as the United Nations Fishstock Agreement (UNFSA) of 1995 which despite enjoying widespread "acceptance of UNFSK…is not universal" (Asmundsson, 2014, pp. 2-4).

[40] For more detailed elaboration of the concept of critical intervention with reference to the politics of recognition see Tully (2008, 2014).

[41] See Chayes and Chayes (1995), Koh (1997), as well as Asmundsson (2014, p. 2)

ally the space where they are stored differs: one is group based, the other individually carried. The distinct storage space matters especially when inter-national encounters are at stake.

Following the reconstruction of contestations based on the arenas in which all involved stakeholders operated, the three dimensions of normative practice come to the fore, i.e. legal validity, social recognition and cultural validation (compare Figure 1). First, domestic Canadian stakeholders (including fishing folk, ministry, press, lawyers, politicians, navy, coastguard and so on) engaged in contestation of the 0% quota for cod (in the early 1990s), and generally, the Grand Bank fisheries problems, e.g. the tail-and-nose issue, and the role of regional organisations and international law. They demonstrate an emphasis on the perceived validity of fisheries norms. Second, regional European stakeholders have focused on the regulatory norms of EEZ limitation, TAC, and quotas. Their reference to the formal validity of these *type 3* norms clashed with the Canadian emphasis on the perceived validity of the sustainability norm. It follows that European justifications were based on formal validity, prioritizing the language set within signed agreements under international law. At the same time, however, this justification was informed by the individual background experience of the Galician fishing folk losing out on European quotas as a result of Spanish EU accession in 1986. The third contestation comprises inter-national encounters of stakeholders including stakeholders in the domestic Canadian context, and their interaction with the Galician fishing folks, the Spanish and EU representatives as well as other international stakeholders such as especially the British (who intervened in support of the Canadians) or the Portuguese who supported the Spanish.

The conflict emerged from the contradicting relevance that was attached to the respective contested norms in order to justify stakeholder behaviour. A *structural norms analysis* would hold that these justifications reflect a conversation at cross-purposes. The central norm guiding the behaviour of the Canadian set of stakeholders was the sustainability norm; in turn, the guiding norms for the European set of stakeholders (except the British) were the EEZ and the TAC. By contrast an *inter-relational perspective on norms* would expect contestation to harbour (re-)constitutive effects. That is, through the practice of norm contestation along the three dimensions of norms, the meanings of norms change. This is key for the aim of filling the legitimacy gap at the meso-layer of global governance. And, as noticed with regard to the core contestations of the dispute, norms such as organising principles had no visible impact on triggering the dispute. They were, however, central to its settlement. The question that follows from the insights generated by the reconstruction of the contestations, is whether more regular encounters between involved stakeholders could make a difference in future conflicts. The following elaborates on this question with a focus on the *type 2* norm of access to contestation.

### *4.1. Access to Contestation*

The success of enhancing stakeholder access to contestation depends on whether and how access to regular contestation is established—in principle—for all stakeholders. Does a right to access exist, and is it feasible? To probe this, contestation stands to be mapped as a social practice, and shaped as an activity that is—in principle—norm generative. The two-tiered research design that is typical and conditional for successful bifocal research operationalisation is spelled out by Figure 1, which represents the empirical dimension, and by Table 3, which represents the normative dimension.[42] As the cycle of contestation indicates by the arrows, contestation can be carried in different ways: as social practice, it is contingent. Its effect therefore depends on *who* is involved and *where* contestation takes place. Any agent who is able to access and capable to mobilize all positions on the cycle has a comparative advantage to others who do not. The cycle allows for a number of evaluative steps in order to identify the expected degree of contestation. It enables researchers to understand and explain the contestatory behaviour with reference to normative indicators. Based on this evaluation it is possible to identify first, the involved agents and the stage of norm implementation they encounter themselves with regard to a specific given norm, and secondly, the likelihood of norm acceptance. Both allow for the third step of developing potential solutions in cases where contestatory practices are likely to spark considerable political conflict.

The cyclical model presented by Figure 1 entails three ideal typical situations that indicate whether the potential for contestation is expected to be high or low. These situations include the formal validity, social recognition and cultural validation of a norm. The cycle of contestation assigns three distinct stages of norm implementation (such as constituting, referring and implementing) to three types of agents (such as masters, owners and users). The normative move builds on the second hypothesis, which reads as follows. The positions on the cycle are not fixed. The cycle metaphor allows for an imaginary 'spinning the wheel' to change the 'sites' where the normative structure of meaning-in-use is (re-)enacted. By changing the site, the agency, it is possible to envisage changes with regard to the

[42] Note that, while in current research that draws on these findings, the author addresses the overlay of both, the limited framework of this article do not allow further detailed elaborations of this normative document. Therefore, it should suffice to summarise the central points of this argument here instead (see: Wiener, 2016a, 2016b).

stage of norm implementation (x-axis), on the one hand, and the segment on the cycle of contestation (y-axis), on the other. According to the (re-)enacting the normative structure of meaning-in-use through formal validation is most likely to take place within a context that is qualified by formal institutions such as, for example, committees of international organisations, treaty negotiations and so on that involve encounters between government representatives and/or diplomats. The result of formal validation is most likely to be a treaty or any type of formal agreement. At this stage, negotiations will most likely focus on fundamental norms including a relatively broad, albeit little specified, moral and ethical reach.

By contrast, (re-)enacting through social recognition is expected to occur in the context of well-established social groups. In this context informal institutions such as habits and routinized practices qualify the interrelation between individuals. These may include all sorts of entities that have been constituted as stable groups through social interaction. The result of social recognition is most likely to be expressed through habitual norm-following behaviour. The degree of contestation is low because group members have been socialised into accepting the normalcy of the norm. Cultural validation, in turn, sheds light on (re-)enacting as an interaction among individuals that are likely to encounter each other as strangers with different individual background experience. In inter-national relations—understood as encounters among agents with distinct national roots—this distinct normative baggage is therefore brought to bear across political borders or socio-cultural boundaries. At this cycle position the institutional context is the most flexible among the three possible ideal types. Why and how does this matter with regard to the answering the research question with regard to the legitimating impact of contestation?

### *4.2. Stakeholders Are No Normative 'Dupes'*

If norm implementation is understood as the interactive process of (re-)enacting normative meaning in use, it follows that norm implementation is not carried out by normative "dupes".[43] Instead, it is activated by agency that is capable of norm generation through the respective practices employed at the three stages. The first type of involved actors in this process is defined as the masters: For the masters of a treaty demonstrate the legitimacy of the treaty's content with their signature. The second type of actor is defined by the concept of owners. They are the stakeholders who refer to mid-range organising principles in their day-to-day negotiation of the ground rules of specific norms relevant to a global governance sector. The third type consists of the norm users who are expected to implement the norm on the ground as the designated norm followers. The research question that follows is: under which conditions do the involved actors obtain agency that enables them to develop ownership?

As Table 3 indicates, the potential for norm ownership is highest at the meso-layer in Quadrant B. By turning to the information provided by the empirical research underlying Figure 1, it emerges that norm-ownership at the meso-layer is unlikely to evolve without specific strategic innovations such as enhancing conditions for access to contestation. Given these three ideal typical situations, it is obvious that an overlap of mastership, ownership and followership of a norm will generate the highest compliance rates. Yet, in global governance settings, the occurrence of such overlap cannot be taken as a given. As frequent debates of and breach with the norms of international

[43] Compare Michael Barnett's reference to the absence of culture in international relations (Barnett, 1999).

**Table 3.** The normative model.

| **Y = Layers of Social Order**<br>**X = Implementation** | **Constituting/ Masters** | **Referring/ Owners** | **Implementing/ Followers** | **Moral Reach** |
|---|---|---|---|---|
| **Macro** *(norm type 1)* | *Quadrant A:* Expected Contestation: **Low** | | | Broad |
| **Meso** *(norm type 2)* | | *Quadrant B:* Expected Contestation: **Medium** | | Medium |
| **Micro** *(norm type 3)* | | | *Quadrant C:* Expected Contestation: **High** | Narrow |

Source: Adaptation from Wiener, Hansen-Magnusson and Vetterlein (2014).

law have demonstrated, contested compliance is more likely than the reverse situation. Analysts and policy makers therefore need to design models that facilitate the best possible overlap between experience and expectation regarding the normativity of a norm among the highest number of stakeholders in order to generate the best possible outcome. The metaphor of the cycle of contestation demonstrates the difficulty in obtaining an optimal match between the positions on the cycle of contestation and the location in the global governance setting that allows for the development of norm ownership, on the other.

This is documented by the normative approach, which demonstrates that the optimal site for stakeholders to negotiate normativity (i.e. the ground rules of sectoral governance) is located at the meso-layer of social order (Table 3). Notably, the metaphor of cyclical contestation indicates the agent's placement on one of three stages of norm implementation (x-axis) on the one hand, and, as enabled or constrained by the contingency of the cycle position, on the other. Both are socially constituted and reflected at three layers of social order. At each of these layers normativity different actors have access to contesting normativity (see y-axis). The cyclical involvement in contestation works as an indicator of the legitimacy gap in global governance. By disaggregating the sources of stakeholder empowerment into three practices of norm evaluation, it becomes possible to identify whether one, two or all three dimensions of norm evaluation are accessible for stakeholders. Thus, it is both possible to name the normative deficit and to develop means to counter it. In this regard, access to stakeholder contestation plays a central role for further research on inter-national encounters and contested norms.

## 5. Conclusion

While the conflictive inter-national encounter between state-plus actors culminated in 1995, the reconstruction of the events includes the duration of the Canadian Atlantic fisheries' "crisis" which had been going on for more than half a decade prior to that.[44] The article unpacked the narrative of 'war' and sought to demonstrate how background experience of diverse sets of stakeholders from distinct root communities came into play with regard to the development of the dispute. To that end, it carried out a reconstruction of the dispute thereby offering a fresh perspective on the much-discussed problem of the global commons as a space where diverse stakeholders use limited resources, and interests prevail. Given that this space is regulated and structured by a normative grid that undergirds all practices, it was argued that reconstructing the practices applied by the Canadian and the European stakeholders, would allow for novel insights about contested normative meanings (the 'is' dimension) and, following from that, suggestions for paths towards filling the legitimacy gap (the 'ought' dimension). The article's critical approach involved addressing the link between the 'is' and the 'ought' of norms. This was done by addressing the two-fold challenge of making diverse meanings visible, and by thinking about how to make diverse stakeholder input possible.

To that end, the article suggested linking the cycle of contestation as an explanatory model of contestatory practices with the normative model of the legitimacy gap. It argued that new insights about conflict and legitimacy stand to be gleaned from empirical reconstructions of instances in which norms are contested within a specific sector of global governance such as for example fisheries governance. As a site of international encounter in fisheries governance the dispute allowed for an illustration of the link between the 'is' and 'ought' of norms research. The Spaniard's legal yet, in the eyes of the Canadians illegitimate fishing practices of deep-sea fishing which—albeit not in breach with international law—stood in direct contrast with Canadian fishing practices. The Canadians claimed their contestation of the Spanish practice was legitimate both with reference to the fundamental norm of sustainable fisheries (*type 1*) which they expected the Spaniards to follow, and with reference to their experience with the zero quota regulation (*type 3*) that threatened their livelihood and which was enhanced by the Spaniards' fishing right beyond the EEZ. In this case a settlement at the meso-layer followed extensive contestations at various layers as noted in section 3. The distinct normative dimensions on the cycle of contestation shed light on the space at the meso-layer of social order where former cross-purpose action might, in the future, be channelled into common-purpose negotiations. By respecting the right of access to contestation for involved stakeholders the complex process of TAC negotiations including state-plus agency guided by the precautionary principle could lead the way towards fairer fisheries governance.[45]

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[44] Compare e.g. Bigney and Wilner's article (2008).

[45] The success of such common negotiations has for example been demonstrated by collaboration of regional or sub-state fisheries councils regarding halibut quotas in the Baltic Sea as well as with cod fisheries in Norway and Russia.

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**About the Author**

**Antje Wiener** is Chair of Political Science, especially Global Governance. Prior to coming to Hamburg in 2009 Wiener has taught in Canada, the US and the UK; she held Chairs of Political Science & International Relations at Queen's University Belfast and University of Bath. Her research focuses on International Relations Theories especially norms research. She has served as Managing Director of the Centre for Globalisation and Governance in Hamburg and is founding editor of *Global Constitutionalism* (Cambridge since 2012).

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Article

# Regional Organizations and Responsibility to Protect: Normative Reframing or Normative Change?

Carla Barqueiro *, Kate Seaman and Katherine Teresa Towey

School of Public and International Affairs, University of Baltimore, Baltimore, MD 21201, USA;
E-Mails: cbarqueiro@ubalt.edu (C.B.), kseaman@ubalt.edu (K.S), katherine.towey@ubalt.edu (K.T.T.)

* Corresponding author

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**Abstract**

The adoption of the principle of the Responsibility to Protect (RtoP) by all United Nations General Assembly (UNGA) member states in 2005, and its reaffirmation in dozens of United Nations Security Council (UNSC) resolutions, indicate that there is a growing consensus around the world that egregious human rights violations necessitate a cooperative and decisive international response. But just as the political debates raged surrounding the precise articulation of RtoP between 2001 and 2005, so too goes the contemporary debate surrounding the implementation of RtoP. Regional divergences in RtoP implementation, in particular, have been noted by many scholars, as regional organizations implement those elements of RtoP that best suit their policy goals. This paper will apply recent scholarship on norm-lifecycles, specifically on "norm localization" to the operationalization of RtoP by regional organizations. We seek to explore regional divergences on RtoP implementation between the European Union (EU), League of Arab States (LAS), and the African Union (AU) on Libya and Syria. From this assessment, three main arguments will be put forward: (1) regional organizations remain politicized, reframing RtoP in divergent ways that dilute the strength of the norm, (2) politicization of the RtoP discourse constrains regional norm localization processes, (3) politicization and reframing of RtoP inhibit regional normative change and limit the potential for timely and decisive responses to protect civilians.

**Keywords**

African Union; European Union; League of Arab States; norms; regional organizations; Responsibility to Protect

**Issue**

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## 1. Introduction

With the adoption of the Responsibility to Protect (RtoP) in the World Summit Outcome Document (WSOD) by the United Nations General Assembly (UN-GA) member states in 2005, and its reaffirmation in multiple UN Security Council (UNSC) resolutions since 2006, scholarly and political debates have shifted from a focus on the "what" questions concerning the conceptual parameters of the evolving norm, to the "how?" and "under whose authority?" questions surrounding its implementation. Indeed, it is clear that the 2005 WSOD articulation of RtoP centralized authority for sanctioning collective military intervention exclusively within the UNSC. Given the stalemate of the P-5 member states on Syria following the controversial intervention in Libya by NATO forces in 2011, and even though the connection between these two cases and the action and inaction taken in turn has been much debated (Bellamy, 2014; Morris, 2013), what is clear is the extent to which RtoP has become politicized within the Security Council. This politicization and subsequent inaction has increased pressure on the United Nations (UN) to empower regional organizations to take a

greater role in implementing RtoP, particularly given the unlikely immediate possibility of UNSC reform.

Regional organizations, however, are not a panacea to the challenges of implementing RtoP. As has been noted by many scholars, regional organizations often face challenges associated with lacking resources and capabilities to ensure enforcement of security mandates, have adopted divergent and inconsistent mandates related to RtoP, and suffer from similar deficiencies associated with multilateral decision-making, including consensus-based (frequently lowest common denominator) agreements which overemphasize rhetorical commitments over the practical responses to the protection of civilians (Taft & Ladnier, 2006). Still, the role of regional organizations, particularly in peacekeeping operations, and directing the conceptualization of the RtoP principle itself, has been argued to convey greater international legitimacy to global initiatives on the protection of civilians from mass atrocities (Bellamy, 2011; Haugevik, 2009).

This paper seeks to explore the role of specific regional organizations, namely the European Union (EU), the League of Arab States (LAS), and the African Union (AU), in responding to mass atrocity crimes in Libya and Syria. These organizations have broad mandates that include, but are not limited to, security, unlike the more restricted security-focused mandate of the North Atlantic Treaty Organization (NATO). As such, their security mandates are more likely to be informed by their other policy areas, including in the area of human rights protection, development, and human security. Specifically, this paper seeks to explore whether regional rhetorical commitment and initiatives on RtoP have strengthened the international community's implementation of RtoP, whereby operationalizing the concept has meaningfully enhanced regional capacity to protect civilians from mass atrocity crimes.

## 2. Background on the Responsibility to Protect

The RtoP doctrine originated out of the recognized need to reconsider the United Nations Charter of 1945 and shift international norms from a focus on the rights of the nation-state to prioritizing the rights of the individual. From this, a nuanced debate began regarding how the international community could shift from "state-based collective security" to "human security", particularly how to align moral authority on issues of interventionism with legal and political legitimacy (Chandler, 2004, p. 60). This debate then spawned discourse on understanding the relationship between intervention and state sovereignty and creating a new norm addressing the parameters for action in the face of mass atrocities, while not diluting the sovereignty of the host state.

Chandler (2004) asserts that the quest for international unity regarding the processes and norms related to humanitarian intervention was championed by UN Secretary General, Kofi Annan, at the 1999 and 2000 UN General Assemblies. In response to Annan's discussion, Jean Chrétien, then Canadian Prime Minister, called for the establishment of the International Commission on Interventionism and State Sovereignty (ICISS) tasked with developing a comprehensive framework for legitimizing humanitarian intervention (Chandler, 2004). The completion of the project resulted in the first use of the term "responsibility to protect" in a report titled, *The Responsibility to Protect,* which called for 3R—the responsibility to prevent, the responsibility to react, and the responsibility to rebuild (Chandler, 2010). Published later in 2005, Annan's report, *In Larger Freedom*, revised the three pillars of the ICISS report, to include the responsibility of the state to protect its citizens, international assistance to support capacity-building of the state, and timely and decisive response by the international community (Chandler, 2010). A product of the UN World Summit in September 2005, the WSOD included several paragraphs on RtoP in line with the modifications authored by Annan, and all participating UNGA member states adopted them by consensus.

The core tenant of RtoP doctrine is that each participating state bears the responsibility to protect its citizens from mass atrocities, and, in the case that such efforts are inadequate, the greater international community has the responsibility to assist the state with this mandate, and in select cases, intervene as a last resort (United Nations, 2005). As Paris (2014) highlights, the doctrine prioritizes peaceful means of protection, but also permits the use of coercive force by the international community in extreme cases. The variation in potential RtoP cases that could trigger intervention has left it vulnerable to politicization. One main argument regarding the weakness of RtoP, championed by Paris (2014) is the "mixed motives problem." The distinction between altruistic military intervention and war is politically pertinent because the responses will be different for an operation that aims to protect civilians versus an operation that is a "self-interested war" (Bachman, 2015; Paris, 2014, p. 572). However, in practice, military action almost always has a self-interested component (Evans, 2004). Nonetheless, RtoP still faces structural challenges associated with self-interested rather than humanitarian intentions on the one hand, and the more significant problem of lacking self-interest or political will to protect civilians in countries without geopolitical importance to global powers on the other. Deadlock at the UNSC in key cases, including on Darfur and Syria, has highlighted these challenges, and led to calls for regional organizations to take a greater role on RtoP.

## 3. Regional Organizations as Collective Security Actors

The role of regional organizations within global gov-

ernance, and specifically in supporting international peace and security, has a long history. The United Nations Charter refers to the role of regional organizations under Chapter VIII in Article 52 stating:

> "Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations." (United Nations, 1945, art. 52)

The Charter also asserts that "The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies", while the UNSC can "utilize such regional arrangements or agencies for enforcement action under its authority" (United Nations. 1945, art. 52 & 53). While the founding members to the UN positioned the UNSC as the ultimate arbiter of international peace and security, they also viewed the role of regional organizations and other inter-governmental bodies as supporting global governance efforts to ensure pacific settlement of disputes and security enforcement measures (Haugevik, 2009; Seaman, 2015). As such, regional organizations were positioned to support global governance decision-making and implementation measures at the highest levels.

With the ongoing contemporary challenges the UNSC has faced in terms of legitimacy in security matters, as well as in garnering political consensus for peace and security enforcement mandates, regional organizations have been increasingly relied upon in peace support operations. We have observed the African Union (AU) operation in Sudan since 2003 (in partnership with the UN); the Economic Community of West African States (ECOWAS) operations in Liberia and in Sierra Leone in 1990s; and the North Atlantic Treaty Organization (NATO) operations in Bosnia and Kosovo in the 1990s, and in Libya in 2011 as examples of this growing regional role in implementing global security mandates. Indeed, as Bures (2006) argues, the 2004 *High Level Panel on Threats, Challenges and Change* built on the 2000 *Brahimi Report* on peacekeeping reform, arguing that Chapter VIII arrangements need to be more heavily relied upon to further enhance the UNSC's capacity to prevent and respond to security threats.

Regional organizations have also been elevated as viable security actors that could fill the governance and implementation gaps as they arise. The report of the International Commission on Intervention and State Sovereignty (2001), *Responsibility to Protect*, in 2001 first outlined the role of regional organizations in providing early warning on emerging human rights crises arguing that "Greater involvement by regional actors with intimate local knowledge is also crucial" since "Regional actors are usually better placed to understand local dynamics" (ICISS, 2001, p. 22). In extreme cases, and as a last resort, the ICISS report also advocated for the evocation of Chapter VIII of the UN Charter, where regional organizations can support the enforcement capacity of the UNSC (ICISS, 2001, pp. 64). Most controversially, the ICISS report argued that if the UNSC could not act in a timely manner to protect civilians from mass atrocities, the UNGA under the "Unifying for Peace" clause, or regional and/or sub-regional organizations, should take up the charge (ICISS, 2001, p. xiii).

Not all regional organizations are alike, however. As Haugevik (2009) has argued, regional organizations differ significantly in terms of the extent to which they possess a formal responsibility to protect civilians, adequate capacities, and sufficient political will to undertake "soft" and/or "hard" RtoP operations. Additionally, regional organizations face some of the same challenges that global organizations do. There can be significant obstacles to gaining strong collective mandates due to consensus-based decision-making, they frequently rely on resources and capacities that are a reflection of a single member state's commitment to regional cooperation, and increasingly they can be co-opted by a strong state member's interests and political posturing. The challenges they face surrounding consensus, capacities, and co-option have a significant impact on the normative institutionalization of RtoP and its practical implementation.

## 4. Normative Institutionalization to Operational Implementation

The process through which new ideas, or repackaged ones, become standards of practice and behavior in international affairs has had more and more attention associated with it since the 1990s. Finnemore and Sikkink's (1998) flagship work on processes through which ideas become embedded norms—norm life-cycles—began to map out the process through which norms are created or dismissed through discourse and practice. Contemporary scholarship has largely focused on either norm acceptance and institutionalization (Finnemore & Sikkink, 1998; Risse, Ropp, & Sikkink, 1999) or norm contestation and rejection (Wiener, 2008). A third branch of burgeoning literature sets aside the acceptance/rejection dichotomy on normative change and focuses upon "norm localization", where globally accepted norms take on a hybrid character combining the key characteristics of the global norm with local modifications that make them more contextually salient (Acharya, 2009). What is then key is the framing of the norm by either external or internal promoters to demonstrate the ways in which it fits into already existing local normative structures (Payne, 2001). This re-

framing appears to be taking place in South East Asia (Caballero-Anthony, 2012; Honna, 2012; Teitt, 2011) but has been less successful in other regions where RtoP has been more vociferously contested, including the introduction of the Brazilian concept on "responsibility while protecting" (United Nations, 2011a). Here it is not the internalization of the norm that is occurring but rather a reframing of the norm by external activists in an attempt to make it more palatable to regional and state actors. What also needs to be further examined is the extent to which regional organizations themselves are politicizing the norm rather than localizing the international understanding.

International norms, such as RtoP, are intended to provide a framework of standards by which a state or group of states' behavior will be judged. The implication is that these norms provide a belief system that transcends a specific political or cultural context (Sikkink, 1998) and that they provide standards of appropriateness and clear legitimation discourses to guide the decision making of actors (Dingwerth, 2008). These standards of appropriateness, such as the protection of civilians for example, then become the primary measures of success for the organization.

As Sunstein (1997) argues, these social norms are then enforced through social sanctions. Resistance to these norms and the "moral cosmopolitanism" is then framed as illegitimate (Acharya, 2004). This was the argument made in relation to Kosovo, that the intervention was legitimate because of its humanitarian basis and that to question this was to question the moral authority of, not only the interveners, but the wider concept of humanitarian action.

The question of whether RtoP has evolved from an idea or principle to a norm in international affairs has garnered much attention in recent scholarship (Bellamy, 2009; Welsh, 2013). Contemporary research, however, seems to demonstrate a relative consensus that RtoP is a burgeoning norm, whose status could be solidified if it becomes a standard of behavior for states and interstate organizations on civilian protection. As such, scholarship has increasingly shifted the focus from questions surrounding the institutionalization of RtoP, to inquiries focused more heavily on its operationalization.

Since the adoption by the UNGA member states of WSOD in 2005, which included three paragraphs on RtoP, and UNSC resolution 1973 on Libya sanctioning the use of force to protect civilians, greater consensus on RtoP as a standard of state behavior on civilian protection has been reached, even while new areas of contestation and redefinition emerge. Recent scholarship has demonstrated that regional normative operationalization of RtoP is following a process of "norm localization" where RtoP is becoming regionalized, adopting localized adaptations through its operationalization in specific contexts (De Franco & Peen Rodt, 2015; Dembinski & Schott, 2014; Seaman, 2015). As De Franco and Peen Rodt (2015) argue, the institutional implementation that occurs once an organization has formally accepted a norm "can become a field of contestation and explain why norms are sometimes understood differently across or indeed within international organizations" (p. 46). The process of developing formal policy and legal mechanisms, or "implementing" the norm, creates standards of behavior that facilitate assessments of compliance (see Betts & Orchard, 2014; De Franco & Peen Rodt, 2015). Moving beyond tracing the political discourse or policy development of RtoP, recent scholarship has attempted to begin addressing its "operational implementation" or reactive practices defined by De Franco and Peen Rodt as "the norm's mainstreaming into existing policies and resource allocation" (2015, p. 46). This can begin to shed light on the ongoing contestation and rewriting of the norm, as well as they ways in which this contestation develops into responsive mandates and resources for specific crises, including towards Libya and Syria.

## 5. European Union

The European Union has long been argued to be a progressive institution with significant normative influence around the world. It has developed advanced capacity in the area of conflict prevention and conflict management, peacekeeping, and post-conflict reconstruction where it has sought to position itself as a leader on normative and humanitarian issues (Dembinski & Schott, 2014; Manners, 2006). As such, its influence has local and global implications.

The EU's evolving foreign policy orientation has become increasingly human security-focused (Liotta & Owen, 2006a). Building on the 2003 *European Security Strategy* (ESS), the 2004 Barcelona report, *A Human Security Doctrine for Europe*, argued that the EU should place human security at the core of its foreign policy. The Study Group that authored the report argued that, "Human security refers to freedom for individuals from basic insecurities caused by gross human rights violations placing the protection of individuals" (Kaldor et al., 2004, Executive Summary). The report claimed that the EU's human security doctrine ought to place priority upon "human rights, clear political authority, multilateralism, a bottom-up approach, regional focus, the use of legal instruments, and the appropriate use of force" (Kaldor et al., 2004, Executive Summary). The Study group also recommended that a "Human Security Response Force" composed of 15,000 men and women drawn from both civilian and military institutions be created, as well as "A new legal framework to govern both the decision to intervene and operations on the ground" (Kaldor et al., 2004, Executive Summary). The Barcelona Report greatly influenced the ways in which human security ideas were more com-

prehensively incorporated into the 2008 *European Security Strategy* (ESS) and within the European Commission, including on such issues human rights protection, responses to human trafficking, and nuclear non-proliferation (See De Franco & Peen Rodt, 2015; Martin & Owen, 2010).

While taking a decidedly robust position on the need for the EU to lead the way on the provision of security for people inside and outside its geographical purview, the Barcelona Report's articulation of human security relates narrowly to situations where individuals are under threat of, or actively being targeted by, violent repression (Liotta & Owen, 2006a). Additionally, the connection between these broad-based human-focused security activities and RtoP is decidedly absent from the EU's foreign and security policy mandates, including those that have adapted to a core human security doctrine. The EU has articulated its support for the UN's 2005 WSOD RtoP articulation, reifying the central role of the state to protect its citizens, however, it has remained extremely reluctant to operationalize the norm itself, largely owing to internal political divergences on how or whether to proceed on the implementation of RtoP (De Franco & Peen Rodt, 2015). Dembinski and Schott (2014) argue that while the EU has accepted the UN's approach on RtoP, it has shied away from the military intervention aspects outlined in pillar III, choosing instead to focus on its reputation as a humanitarian organization working towards preventive and rebuilding capacities. Despite the more interventionist positions of Britain and France in their roles as UNSC permanent-5 members, the EU's smaller member-states, such as Finland and Sweden, have held decidedly more neutral and non-interventionist postures on RtoP. Dembinski and Schott (2014) argue that the EU has "pruned international norms" to fit its existing niche activities:

> "we find that the EU acknowledged the R2P after this concept has been approved by the World Summit and interpreted it in a way that corresponded with the existing European security culture and its focus on peace-building and preventive measures." (p. 370)

### *5.1. The EU on Libya*

Since the onset of the peaceful political protests in Benghazi in February 2011 to oust authoritarian leader Muammar Gadaffi in Libya, and the ensuing repression of protesters by government forces, the international community was thrust into a complex RtoP crisis that tested its resolve to meet the commitments it made at the UNGA in 2005. There has been much debate about the EU's role in Libya, with some scholars arguing that there was divergence between rhetoric and action (Gottwald, 2012), while others asserting that the EU adapted RtoP to its existing human security mandates focused largely on development and crisis management (De Franco & Peen Rodt, 2015; Dembinski & Schott, 2014). The process of operationalization of RtoP in the Libyan case seems to highlight some dominant trends worthy of discussion.

Firstly, the EU has widely supported actions of the UNSC on Libya, including UNSC resolution 1973, while preferring to take a more active role in the preventive and humanitarian realms it currently operates within. Specifically, UN resolution 1973:

> "Authorises member states that have notified the secretary-general, acting nationally or through regional organizations or arrangements, and acting in co-operation with the secretary-general, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians." (United Nations, 2011d)

The European Council released statements supporting the UNSC resolution 1973, even though it voted not to pursue military intervention. Cleavages amongst its member states, notably Britain and France on the intervention side; and Germany and Sweden, as well as other smaller countries on the "soft power" non-interventionist side, revealed divergent perspectives on how best to handle the crisis. The EU initially sought preventive measures to compel Gadaffi's regime to relinquish its repressive campaign against the Libyan people. It pursued diplomatic channels, and released statements condemning the repression of peaceful demonstrations, and acknowledged its responsibility to protect the Libyan people. European Council President, Herman Van Rompuy stated "From the beginning of the crisis, the European Union was at the forefront: the first to impose tough sanctions; the first to impose a travel ban on leading figures in the regime; the first to freeze Libyan assets; the first to recognise the Interim Transitional National Council as a valid interlocutor" (See Van Rompuy, in Rettman, 2011). Van Rompuy even went so far as to argue that the EU facilitated the military airstrikes undertaken by the UK, France, and Belgium under NATO and UN auspices (Rettman, 2011).

Secondly, as critics argue, the EU did not adequately apply the Common Security and Defense Policy (CSDP) included in the Lisbon Treaty to the Libyan conflict, and instead, played a diluted role (Faleg, 2013). Due to a lack of consensus among EU member states on its role in "hard power" military interventions for RtoP cases, there remains significant debate about whether the reputation of the EU as a humanitarian, soft-power, and development-oriented institution meshes with its potential role as a military interventionist regional organization. Indeed, the history of European colonization and conflict has highlighted the reluctance of some EU members to contravene the

non-interference principle until preventive and diplomatic means have been more thoroughly exhausted. The dilemma, however, remains salient when faced with populations enduring serious human rights violations where, as in the case of Libya, the perpetrators are the government leaders themselves. The EU will have to find a thoughtful way to adapt its preventive and crisis management lean, with its commitment to upholding and protecting human rights in RtoP cases. Otherwise, its state-centric orientation to RtoP will be analytically incoherent with its human security-oriented policy approach.

### *5.2. The EU on Syria*

What began as peaceful protests in March 2011 in Syria on the tail-end of the Arab Spring movement for democratic revolution across the Middle East and North Africa (MENA), quickly turned into one of the most significant humanitarian crises since WWII. With 470,000 dead, and over 12 million people both internally displaced and fleeing across borders, the Syrian civil war between the Assad government and opposition forces, and Daesh (Islamic State in Iraq and Syria or ISIS) terrorism and territorial expansion has provided a recipe for disaster. The international community has largely been ineffective in its attempts to respond to the crisis, or mitigate the violence against civilians. Moreover, the international community, and the EU in particular, have demonstrated an incoherent posture regarding the influx of refugees fleeing the country and seeking asylum in Europe.

It is widely known that UNSC deadlock between the US, UK, and France on one side, and China and Russia on the other has forestalled any major attempt at military action in Syria to end the conflict and address the humanitarian crises. The reluctance on the part of China and Russia to support any proposed military measures in Syria is a reflection of their concerns with the "mission creep" that occurred in Libya after the NATO led airstrikes sanctioned by UNSC resolution 1973. While the UNSC resolution affirmed the use of force to protect civilians, it did not afford the authority to the UNSC to pursue regime change. The toppling of the Gadaffi regime was argued to have surpassed the mandate of resolution 1973. China and Russia tacit acceptance of the civilian protection mandate in Libya was soured, and has led to a concerted effort to block any UNSC resolutions on Syria that make reference to the use of force, or the removal of Assad from power.

The EU's response to the conflict in Syria included $3.5 million in humanitarian assistance funding, and the imposition of economic sanctions (Pierini, 2014). These efforts had little effect on stemming the violence, or compelling any shift in approach by the Assad regime. Germany, the UK, and France remained active members of the "Friends of Syria" group within the UN, however, Germany was staunchly opposed to military action, and the UK limited its support for robust military action to supporting US-led operations. With the only operational support for US operations coming from France, the Syrian conflict was perceived as a proxy war between the US and Russia (Pierini, 2014).

The Daesh (Islamic State in Iraq and Syria or ISIS) expansion into Syria, and their onslaught against civilians has increased the human rights violations in Syria, and intensified the humanitarian crisis. The flow of internally displaced people (IDPs), and refugees moving through Turkey and seeking asylum in Europe is argued to constitute the greatest humanitarian crisis since WWII. The EU's failure to develop unified policy to address refugee flows has prompted Amelia Hadfield and Andrej Zwitter (2015, p. 129) to argue that, "Political responses to the crises within the Union have accordingly been largely crafted on national, rather than Union perspectives." The UK has framed the issue as a potential burden on its welfare system, while France and Germany have asserted that refugees contribute greatly to the welfare and economic systems that they enter into (Hadfield & Zwitter, 2015). Hungary, notably one of the staunchest opposers of accepting refugees from Syria, has framed Syrian refugees as aggressors, bringing threats of Muslim terror into Europe (Hadfield & Zwitter, 2015).

Despite the European Commission President, Claude Juncker's, attempt to reframe the EU's position in light of its own historical legacy—many Europeans descend themselves from refugees—in accordance with the 1911 Refugee Convention which grants the right of those fleeing persecution to seek asylum elsewhere, there has been little unification across EU member states on addressing the refugee crisis. The result has been a contrary practice to the international human rights and humanitarian norms that the EU espouses. Indeed, while the EU's division on RtoP—particularly the military enforcement measures—is unsurprising, its inability to unify around broad-based human security norms, such as protecting and ensuring safe passage for refugees fleeing conflict is testament to its inability to collectively operationalize "soft" norms. As Hadfield and Zwitter (2015, p. 131) assert that despite efforts to create a European Neighborhood Policy (ENP), which would unify the region and its foreign responsibilities, and broaden adoption of international legal norms, "a combination of cultural specificity preventing a common interpretation of those norms, and national and fundamental upsurges inhibiting their implementation has marked the region." Divergences within the EU on operationalizing RtoP and softer norms related to human security, such as facilitating refugee flows, demonstrate the disconnect between rhetoric and action and serve as a roadblock to effective humanitarian intervention.

In both cases, the EU has modified the norm of

RtoP to fit with its existing prevention-focused humanitarian mandate. While the process of norm localization requires the inclusion of the new norm within existing mandates, there is a lingering question surrounding the extent to which the RtoP norm has sparked any marked change in the operations of the EU when faced with human rights abuses against civilians. What's new about the EU's practice in RtoP cases? In Libya, the EU sought not to apply its CSDP to assist the US-led NATO military operation to protect civilians, opting instead to focus on its crisis management and development capabilities. In Syria, the EU remained divided in whether to push for more robust action, particularly amongst those members who also hold positions in the UNSC. Even more striking, the EU has not adequately addressed a "soft" crisis resulting largely from conflicts in Syria, Afghanistan and Iraq which lies within human security mandates that are well-established, even if they are outside the RtoP normative frame. EU member states have evoked highly politicized arguments to constrain the EU on issues of military action, limiting the organization's ability to pursue more comprehensive and robust regional responses.

## 6. The League of Arab States (LAS)

The League of Arab States (LAS), more commonly referred to as the Arab League, is not a regional organization noted for interventionism. Founded in 1945 the LAS is based on a loosely binding pact designed to improve coordination on matters of common interest. The founding members also rejected violence as a means of resolving disputes, and in 1950 signed the Treaty of Joint Defence, determining an act of aggression against one member state as an act of aggression against all.

In 2004, the Council of the LAS adopted the Arab Human Rights Charter, which came into effect in 2008, and was part of a larger series of reforms of the LAS including the introduction of a peace and security council and the establishment of an interim Arab parliament. These reforms, whilst important, have not resolved underlying issues with the structure of the LAS, particularly in relation to the non- binding nature of many of the votes. Under the LAS charter only a unanimous vote binds all member states, a majority vote only binds those states that voted in favor of the resolution (Aljaghoub, Aljazy, & Bydoon, 2013, p. 292). This voting structure has limited the ability of the LAS to respond to challenges where the preferences of member states are not aligned.

Following the 'Arab Spring' however crises in the region have spurred the LAS into more direct action leading to what some commenters are calling a paradigm shift within the region (Nuruzzaman, 2015). This shift was most clearly demonstrated by the Arab League's support for the UN Security Council Resolution 1973 on intervention in Libya. The support for this resolution, which was the first time the Security Council has authorized the use of force for humanitarian protection against the wishes of a functioning state, could be seen as an indication of the growing acceptance of the norm of RtoP in the region, particularly when coupled with the fact that every member of the LAS voted in favor of the WSOD in 2005 and actively participated in the discussions surrounding the meaning, definition and scope of the normative description outlined in paragraphs 138 and 139. Questions as to the extent of this acceptance are however raised with the selectivity in the application of the norm in relation to regional crises, most notably the response to Syria where reference to RtoP by the LAS was conspicuously absent.

The question then becomes whether support for an intervention based on explicit reference to RtoP demonstrates a wholesale acceptance of the norm itself (Bin Talal & Schwarz, 2013). Perhaps we are instead seeing a form of norm localization within the LAS where in response to the situations in both Libya and Syria the LAS is adding new insights to the debate around the global development of RtoP. For example, the Saudi Foreign Minister has suggested that responsibility involves arming the Syrian opposition (Khaleej Times Online, 2012) whilst other Arab states have interpreted the concept of RtoP as their responsibility to provide humanitarian aid and shelter to Syrian refugees (Bin Talal & Schwarz, 2013), these suggestions fall outside of the WSOD description and open up more questions about the role of regional actors in adapting and localizing international norms and the acceptance of RtoP as outlined in the WSOD paragraphs.

### *6.1. The LAS on Libya*

The LAS was quick to respond to the repressive actions of the Libyan state, following the peaceful protests prompted in part by the self-immolation of Mohammed Bouazizi in Tunisia on 17 December 2010, the trigger event for much of the "Arab Spring". The membership of Libya was suspended on the 22nd of February 2011 and on the 12th of March the LAS called for the implementation of a no-fly zone over Libya, in direct response to the threats issued by Gaddafi against the city of Benghazi (Leiby & Mansour, 2011). The support of the LAS for a no fly zone was seen by many as a requirement for the adoption of resolution 1973 and as Dembinski and Reinhold (2011, p. 7) argue "tipped the balance in favor of those who had argued for the imposition of coercive measures."

The request of the LAS coupled with the participation of two of its member states in the coalition involved in the no fly zone, Qatar and the United Arab Emirates, prompted by what Bellamy refers to as the "al-jazeera effect" (Bellamy, 2011), provided the legitimacy and support which was necessary to avoid a veto by either Russia or China in the Security Council. In fact

"The role of the Arab League in both calling for and supporting the intervention provided a veneer of regional legitimacy to a situation that was hotly contested by other regional actors, including the AU" (Seaman, 2015, p. 68). What is less clear are the reasons why the LAS utilized the frame of RtoP in reference to the Libyan situation which directly encouraged international intervention, rather than framing it as an emerging civil war which would have tempered the international response.

Throughout the crisis the LAS made direct reference to the RtoP obligations of the Security Council including in its statement on March 12th 2011 as well as focusing directly on the need to protect the civilian populations within Libya (League of Arab States, 2011). It is also interesting to note that in the text of resolution 1973 the UN Security Council made explicit reference to the need for any state taking action to consult with not only the UN Security Council but also the Secretary General of the Arab League (United Nations, 2011d). The resolution also made direct reference to the condemnation of Libya by the LAS and the call for a no fly zone, bolstering the legitimacy of the actions being authorized at an international level with regional support.

For some the intervention in Libya represents an ideal test case for the use of RtoP, with resolution 1973 affirming all three pillars of the norm, the importance of a state's responsibility to protect its populations highlighted by the failure of the Libyan state to protect its own citizens pillar one, the attempts by the international community to encourage the Libyan state to fulfill its obligations pillar two, and the action taken by the international community when the Libyan state failed to do so, pillar three (William & Bellamy, 2012). The success of RtoP was however soon questioned with the limited international response to the developing crisis in Syria.

### *6.2. The LAS on Syria*

In response to the actions of the Syrian government against its population, the LAS took a much more cautious approach. This reticence in calling for action or intervention can in part be attributed to the outcomes of the NATO intervention in Libya and the perception that the operation overstepped its boundaries. The limited response can also be attributed to the limitations of the voting patterns explored earlier, and is a clear demonstration that when there are internal divisions within the LAS or when the preferences of all member states do not converge around a single issue, then actions are limited. In its initial response, the LAS made no explicit reference to the RtoP, in direct contradiction to its earlier response to the crisis in Libya.

As the crisis developed, the LAS suspended Syria's membership in November 2011 and then moved to sponsor a peace plan in December of the same year. This plan included establishing a monitoring mission within Syria, in order to observe the compliance of the Syrian government. However, as the violence continued to escalate the mission was withdrawn in January 2012 and in February the LAS stopped cooperating with the Syrian government after Assad rejected the proposed joint Arab League United Nations peacekeeping operation. Once this plan was rejected, the LAS and UN appointed Kofi Annan as their joint special envoy. He introduced a six-point peace plan, which rested on the implementation of a ceasefire beginning in April 2012. When this failed to materialize and after a further five months of limited progress, Annan announced his resignation as envoy, citing the 'destructive competition' between Russia and the other permanent members of the Security Council (*The Guardian*, 2012). The failure of the Annan peace plan highlights not only the importance of unity of purpose at the regional level but also at the international level if success is to be achieved.

The divisions within the LAS have worsened over time with Saudi Arabia, Qatar and other Gulf states openly backing the rebels, while others such as Algeria and Iraq maintain support for Assad. In the case of Syria, "The Arab League's role has become a drag because of the divisions," said one well-placed source. "It's not an asset but a hindrance" (*The Guardian*, 2014). The continued tensions within the organization, and the UN Security Council also led to the resignation of another joint Special Envoy, Lakdhar Brahimi in 2014, who had threatened to resign almost from the beginning of his mission in 2012. Despite the recognition by some members of the LAS, such as Saudi Arabia, that they have a moral responsibility to intervene and to protect civilians, it is clear that the continued lack of unity between member states has been a stumbling block in forging a comprehensive solution to the Syrian Crisis (Gulf News, 2011). When coupled with the limited agreement at the international level and the perpetual vetoes by Russia and China in the Security Council the inconsistency and selectivity in the application and implementation of RtoP is made abundantly clear.

## **7. The African Union (AU)**

As the continent that has hosted the most cases of humanitarian interventionism, Africa has a complex and unique relationship with interventionism, which is evident in the history of the African Union (AU). In 2002, the Organisation of African Unity (OAU) disbanded and the AU was established, largely out of a necessity to better respond to the human rights violations occurring throughout the continent (Sarkin, 2010). UN Secretary General Kofi Annan recognised this need for reform in his Millennium Report to the UN General Assembly, in which he cited the 1994 Rwandan Genocide as one of the key cases demonstrating a need for the international community to rethink its stance on hu-

manitarian intervention (United Nations, 2000). Annan's speech eventually led to the formulation of RtoP at the 2005 UN World Summit (Sarkin & Paterson, 2010), and as such, RtoP is viewed as having African roots (Luck, 2008; Seaman, 2015).

The AU has affirmed its rhetorical support for RtoP in the last decade and has adopted a more interventionist stance. Due to the AU's Constitutive Act and the establishment of the Peace and Security Council (PSC), which handles issues related to RtoP, Africa's peace and security architecture "is arguably the closest institutional embodiment of RtoP's three pillar structure" (Williams, 2009, p. 400). While the AU's Constitutive Act does not use the language of RtoP, its principles resemble those of RtoP, specifically Article 4(h), which grants AU members the right to intervene under certain circumstances:

> "(h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity." (African Union, 2001)

However, critics of the AU's commitment to RtoP argue that there is divergence between the AU's rhetoric and action around the doctrine. Murithi (2012), Sarkin (2010) and Williams (2009), argue that the AU has not resolutely accepted RtoP and the WSOD because member states are concerned with threats to national sovereignty. During the 2005 World Summit, Zimbabwe's President, Robert Mugabe, expressed concern that a few powerful states would dictate the agenda of RtoP (Williams, 2009). Similarly, Murithi (2012, p. 662) writes that a key debate in the AU's dialogue on RtoP is whether or not the AU should "become the primary agent of humanitarian intervention" in Africa or whether that role should continue to be filled by foreign actors.

Another divergence between acceptance of RtoP in theory versus practice stems from a lack of consensus among member states. Many AU members lack political will and do not agree on how and when RtoP should be implemented (Williams, 2009). This division was evident in the case of Libya when AU members spilt the vote on Resolution 1973 (United Nations, 2011b).

### *7.1. The AU on Libya*

From the outset, the AU was reluctant to intervene in the protests in Benghazi against Libyan leader Muammar Gadaffi in 2011, and the AU's failure to develop a coherent, unified response to the crisis resulted in diminished regional and global legitimacy of the organisation. Lack of coherence was most evident in in the AU's response to UN Resolution 1973, granted approval of a no-fly zone when "three African non-permanent members of the UNSC (Gabon, Nigeria, and South Africa) voted in favour" of the Resolution (Seaman, 2015, p. 68). Regarding RtoP, three main positions were forged by AU member states: one group, led by Uganda, South Africa, and Kenya, accepted Resolution 1973, but claimed that NATO's actions exceeded the bounds of the resolution; another group, championed by Rwanda, fully supported military intervention; and the third group, headed by Zimbabwe and Algeria opposed intervention because they viewed it as a ploy by western countries to remove Gadaffi from power an institute regime change (Kasaija, 2013). In response to the AU's ambivalence, the UN made the unilateral decision that Libya was an Arab state, not an African one, and that the "AU had no authority over North Africa" (Kasaija, 2013, p. 127).

Rather than supporting military intervention on the grounds of the doctrine of RtoP and the AU's Constitutive Act, the AU forged a diplomatic solution involving negotiations and settlements. On March 10, 2011 the AU's Peace and Security Council met and proposed the creation of an ad-hoc committee of Heads of State to negotiate with Gadaffi and the political leaders of the rebel group, known as the National Transitional Council (NTC), in hopes that a group of high level leaders would possess enough clout to rally the support of the international community (Dewaal, 2012). The AU's peace settlement called for a ceasefire, delivery of humanitarian aid, protection of foreign nationals, a dialogue between rebels and the government, and an end to NATO's airstrikes (BBC, 2011). The peace settlement was received in two markedly different ways: Gadaffi accepted the proposal, but the National Transitional Council (NTC) in Libya rejected it on the grounds that the deal had zero provision regarding the ousting of Gadaffi (Adams, 2012; BBC, 2011).

The case of Libya highlights an overarching criticism of the AU: that the AU does not act as a collective body, as indicated by the tendency of member countries to "adopt positions that best serve their interests" (Murithi, 2012, p. 667). The NTC criticized the AU for doing just that:

> "The NTC saw the AU, whose secretariat received substantial funding from Libya, as protecting Qaddafi's interests. They were especially sceptical given that two members of the delegation, President Jacob Zuma of South Africa and President Yoweri Museveni of Uganda, had already publicly criticized the NATO-led intervention." (Adams, 2012, p. 9)

The AU's diplomatic approach alone does not warrant its de-legitimization, but the AU's failure to develop a cohesive plan does and, perhaps, if the AU would have been able to convince the LAS or NATO to respond peacefully rather than with force, escalation of the Libyan conflict could have been avoided. However,

due, in part, to misunderstandings around RtoP, the case of Libya highlights regional divergence on RtoP. The EU, LAS, and the AU each responded differently to the Libyan crisis, as a result of divergence in the views of member states regarding the implementation of RtoP, and differing regional interests. In the case of Libya, such divergence resulted in unintended consequences, which should facilitate a re-thinking about how RtoP should be implemented and the role of regional organisations in that implementation.

### *7.2. The AU on Syria*

As the uprisings of the Arab Spring began to plateau at the end of 2011, a new series of protests began in Syria, which quickly escalated into the one of the worst contemporary humanitarian crises. The AU's proposed response to the Syrian crises was markedly similar to its response in Syria: negotiated peaceful resolution. In conjunction with Russia and China, the AU, especially Uganda and Ethiopia, expressed concern that foreign intervention could exacerbate the conflict, as it did in Libya, and thus advocated for no foreign military intervention (Interfax, 2012). While the language of RtoP was not prominent in the AU's remarks on Syria, the African Forum's Statement on the situation in Syria (2013) did refer to RtoP in its call for the AU to act peacefully and adhere to international law.

The AU's largely non-interventionist stance on Syria may stem from the fact that Africa has hosted more cases of humanitarian intervention than any other continent, and its leaders have experienced, first-hand, the counteractive effects that unilateral interventionism can have on people and countries who are already subject to severe suffering. Additionally, Tom Wheeler of the South African Institute of International Affairs said that the AU had no compelling reason to get involved in the events of Syria, especially considering the more localized unrest that was occurring in Egypt in 2013 and, more recently, in Burundi (Powell, 2013).

The case of Syria also demonstrates the lack of credibility that the AU possesses in the global arena. In an address to the 70th Session of the UN General Assembly in September 2015, President Mugabe of Zimbabwe said that the situation in Syria could have been prevented if non-interference had occurred and if the UN acted as a multilateral institution by including and respecting regional organisations such as the AU (NewsdzeZimbabwe, 2015).

Even though the AU accepts the tenants of RtoP in theory, it has failed on multiple occasions to operationalize the doctrine, and this failure presents obstacles to efficient and appropriate intervention, especially in cases such as Syria, where the massive flows of refugees and IDPs throughout the region have resulted in the worst humanitarian crisis since WWII. Whether regional organisations, and their member countries, choose to frame the migration crisis as a threat to national security, or as a humanitarian crisis that calls for comprehensive and cohesive reaction, can have a profound impact on the region's stability.

António Guterres, United Nations Commissioner for Refugees, addressed the consequences that the dire situation in Syria has on neighbouring countries, especially Lebanon, Jordan, Turkey, Iraq and Egypt (2014). While African countries, other than Egypt, are not hosting Syrian refugees, the economic and security threats of the massive displacement still reverberate throughout the African continent. In his remarks, Guterres asserts that crises of this scale do not have a solely humanitarian solution, but rather, the solution must be of a political nature, forged by the world's political leaders.

## 8. Conclusion

Regional organizations do play important roles in global governance on RtoP. We have seen that they can provide support to various preventative and responsive measures when faced with severe humanitarian crises. They have largely supported the UNGA's articulation of RtoP, playing the role of "regional contractor" when engaged in active roles under UN auspices.

RtoP within the regional context has been articulated in a number of ways, and while we see greater reference to the protection of civilians in the rhetorical sense, we often see a reframing of the RtoP norm that dilutes and constrains processes of norm localization, and inhibits normative change. The operationalization of this burgeoning norm does not appear to convey any greater regional responsibility to protect civilians than well-established regional norms.

Even more striking, however, is the lack of consensus and capacity to adequately address human security threats more broadly, such as the refugee crisis, which do not require consideration of military force. This sheds light on the lack consensus on more firmly established norms and mandates that *are* in line with traditional regional mandates within and outside their geographic areas of interest.

Regional organizations will only be capable of taking up the operationalization and implementation side of RtoP, and human security more broadly, if they can garner greater consensus on their policies vis a vis humanitarian crises, and develop national policies that are aligned with regional rhetoric.

Additionally, norm localization processes must maintain the core tenants of RtoP, and lead to measurable normative change, where the protection of civilians is an actionable outcome by regional organizations. Politicization and reframing of the norm of RtoP away from its core human-centered focus on protection will largely inhibit progress on implementation, and erode the international community's potential to actually save lives in RtoP cases.

## Conflict of Interests

The authors declare no conflict of interests.

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**About the Authors**

**Carla Barqueiro** is an assistant professor in the College of Public Affairs at the University of Baltimore. She teaches on the graduate program in Global Affairs and Human Security, and the undergraduate International Studies program. Her areas of research largely focus on human security issues, including the prevention of genocide and mass atrocities, the responsibility to protect, human rights, and citizen security.

**Kate Seaman** is an adjunct professor at the School of Public and International Affairs at the University of Baltimore. Her research is focused on emerging norms of global governance and their impact on United Nations peacekeeping operations.

**Katherine Teresa Towey** is currently pursuing her M.A. in Global Affairs and Human Security at the University of Baltimore where she recently completed a yearlong research fellowship. Her research has focused on human security issues and immigration policy in the United States and abroad. Previously, she worked in the non-profit sector where she designed and implemented academic programming for middle and high school refugee, asylee, and immigrant youth in Baltimore City.

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Article

# Image and Substance Failures in Regional Organisations: Causes, Consequences, Learning and Change?

Meng Hsuan Chou [1,]*, Michael Howlett [2,3] and Kei Koga [4]

[1] Public Policy and Global Affairs Programme, Nanyang Technological University, 637332 Singapore;
E-Mail: hsuan@cantab.net
[2] Department of Political Science, Simon Fraser University, Burnaby, BC V5A 1S6, Canada; E-Mail: howlett@sfu.ca
[3] Lee Kuan Yew School of Public Policy, National University of Singapore, 259771 Singapore
[4] Public Policy and Global Affairs Programme, Nanyang Technological University, 637332 Singapore;
E-Mail: kkei@ntu.edu.sg

* Corresponding author

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**Abstract**
States often pool their sovereignty, capacity and resources to provide regionally specific public goods, such as security or trade rules, and regional organisations play important roles in international relations as institutions that attempt to secure peace and contribute to achieving other similar global policy goals. We observe failures occurring in these arrangements and activities in two areas: substance and image. To analytically account for this, we distinguish four modes of substance and image change and link these to specific types of failure and (lack of) learning. To empirically ground and test our assumptions, we examine instances of image failure in ASEAN (political/security policy) and substantive policy failure in EU labour migration policy. In so doing, this article contributes to several different fields of study and concepts that have hitherto rarely engaged with one another: analyses of policy failure from public policy, and regional integration concerns from area studies and international relations. We conclude with suggestions for ways forward to further analyse and understand failures at the international and supranational levels.

**Keywords**
image failure; institutional change; learning; policy failure; regional organisations; substantive failure

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## 1. Introduction: Failures in International Cooperation—From the Spectacular to the Everyday

Failures of organisations for beyond-the-state cooperation, including their demise, are prominent in world history. When the League of Nations failed to prevent the outbreak of World War II, for instance, it was considered to be malfunctioning and collapsed shortly after the war, dissolving itself in 1947. Similarly, external political shocks, such as the Sino-US *rapprochement* in 1972 and the conclusion of the Cold War in 1989, led some regional organisations, such as the Asia-Pacific Council and the Warsaw Pact Organisation to become dysfunctional or irrelevant, resulting in their rapid collapse. But not all international arrangements fail or fail so spectacularly and not all failures result in wholesale replacement of existing organisational arrangements. How these lesser failures occur, how they can be conceptualised, and what their occurrence foreshadows for regional arrangements are the subjects of this article.

Better understanding of the nature of failures at this level, the reasons for their variation, their conse-

quences and what can be done about them, is critical for contemporary policy studies and international relations. Below we explore how policy failure can be defined, identified and, in turn, affect the existing set-up of regional organisations. Our framework for analysis combines several literatures which rarely speak to each other, but should: the literature on public policy (Bennett & Howlett, 1991; Dunlop & Radaelli, 2013; Howlett, 2012; Radaelli & Dunlop, 2013), organisation studies (Dodgson, 1993; Etheredge & Long, 1981; Etheredge & Short, 1983; Shrivastava, 1983), and comparative politics (Mahoney & Thelen, 2010; Streeck & Thelen, 2005).

We see policy failure as generally related to the 'institutional design and capacity issues such as organizational and human-resource capability and competences' (Howlett, 2012, p. 546) and develop a model of failure types taking these factors into account. To empirically ground our assumptions and test this framework we examine two instances of policy failure in regional organisations: Association of South East Asian Nations (ASEAN) (political/security policy) and the European Union (EU) (labour migration). We then discuss the significance of our findings with respect to these different types of failures and policy learning.

## 2. Studying Policy Failures in International Organisations: Definitions and Approaches

The above observations raise several questions about failures, their consequences and learning in international and regional organisations which scholars of public policy and international relations have only begun to address. For instance, do all failures lead to sizeable policy change or to less dramatic reforms and tinkering with existing arrangements? Or do they sometimes lead to no action at all? And, related to these: why do some policy failures lead to organisational collapse, while others do not? To what extent do policy failures shape the design of international organisations? Is there a cycle of failure and learning involved in the everyday functioning of such organisations? And, if so, how do we first detect and then determine which 'failure-learning' mechanism is weak and which is robust?

### *2.1. Defining Policy Failure*

Since an international organisation is essentially an embodiment of its member states' efforts to achieve an objective and to resolve broadly-defined policy problems or to project the image of collective will, its failure to do any or all of these actions would likely lead the organisation to restructure its efforts in order to increase effectiveness and avoid further organisational ineffectiveness without restructuring (Hulme & Hulme, 2012; Jachtenfuchs, 1996).[1] Yet this perspective on organisational responses to failure is limiting and does not take into account the more subtle ways in which a policy or organisation can evolve. In addressing the questions about learning and failure at the international level set out above, it is important to first better conceptualise the possible empirical manifestations of policy failures in international organisations as well as their links to modes of institutional change, evaluation, and learning (Borrás & Højlund, 2015; Stone, 1999, 2001; Thomas, 1999; Van der Knaap, 1995; Zarkin, 2008). A better theory and model would take into account the modes of organisational change which can occur and link these to specific mechanisms of reform or re-structuring such as policy learning or lesson-drawing (Argyris & Schön, 1978; Busenberg, 2001; Huber, 1991; Rose, 1993, 2005).

In this article we operationalise policy failure based on the relativistic concept of 'contra-policy success'. Simply put, as McConnell (2010) and others have argued, if a policy has not (yet) achieved its objective, it is regarded as a 'failure'.[2] To be more precise and to add a clearer temporal aspect to this definition, we define policy failure as *the failure to achieve previously established policy objective(s) within a specified time frame, often of at least a decade*. This definition allows us to evaluate success or failure of policy implementation

[1] For consistency, we use the term 'organisation' throughout this article to refer to bureaucratic political entities. We focus on beyond-the-nation-state organisations and use 'international' to refer to multilateral inter-state cooperation and 'regional' to a form of international cooperation involving states sharing some geographical similarities. The regional organisations we examine are often considered institutions because they embody particular sets of rules and norms that characterise that inter-state cooperation. Following established literature in international relations and comparative politics, we see that institutions may endure while organisations collapse. We use the terms 'institutional' and 'institution' when engaging with these sets of literature on change and learning.

[2] While academic definition remains contentious, Howlett (2012) identifies two mainstream definitions. One is relativistic. Since it is difficult to objectively identify 'success' and 'failure', this definition takes the position that the subjective assessment of a policy is inevitable, and, thus, depending on individual perspectives, a policy can be considered to have failed or succeeded. The other approach defines failure as anything opposite of policy success. The two definitions have their own merits, but also limitations. The former implicitly focuses on the consequence of policy implementation, while acknowledging that it is subjectively interpreted. As a result, policy failure may be defined in an arbitrary manner. The other definition is relatively objective because it focuses on the process of policy implementation; yet, such a dichotomy between success and failure will miss some nuanced interpretations of the implementation process, not to mention the possible causal relationship between policy outputs and policy outcomes. We therefore synthesise both definitions in our own.

*vis-à-vis* the original policy objective(s) as a reference point, while setting a time frame around this assessment (Howlett, 2012; McConnell, 2010). The time frame may vary by issue area in most cases, but the 10-year rule established by Sabatier (1987) for the evaluation of policy change may be taken as a default if no alternative specific time frame was articulated in the policy.

While most work on policy failures has focussed on the domestic level (McConnell, 2010), and has highlighted the different political, problem and process aspects of failures, in international relations we posit two main types of policy activity which constitute distinct realms of failure. The first type concerns policy substance related specifically to the degree of attainment of the aims of a policy. For example, if an organisation attempts to create a free trade area (FTA) among its member states, the degree of FTA implementation would be the topic for evaluation. We may identify *policy failures of substance* in international organisations when such an objective has not been met within a specified time frame set or agreed by its member states or within the 10-year rule as mentioned above.

The second type of policy objective is subtler and concerns organisational processes and image. This is related to the need for international organisations to reach some modicum level of agreement or a unified stance or position among member states on a course of action to pursue rather than upon the actual implementation of substantive policy content. Image, perhaps more than substance, is important for many international organisations (Knopf, 1998), especially those seeking to project an image of democracy, stability, security or the rule of law. Indeed, we often find that international organisations place a very high value on issuing joint communiqués or declarations because these statements legitimise their existence as well as individual member states' actions outside of their organisational framework (Nilsson et al., 2009; Oberthür, 2009). This emphasis on image distinguishes international organisations from many other types of organisations, including domestic states, although, too, in other spheres this same concern may sometimes be seen. It follows that we may identify *policy failures of image* when an international organisation does not project the image it would like.

But when and where do these failures in international organisations occur? Following Howlett (2012), we argue that 'failure' can be visible at any stage of the policy cycle, for example, when: an unattainable policy agenda is established in agenda-setting (hence leading to policy failure, or failure to reach a decision); designing a policy without investigating or understanding the causes of the problems in policy formulation (so that solutions do not match problems); failing to decide on a policy or distorting its intents during decision-making (political manipulation of policy levers for other, such as electoral, ends); failing to implement a policy effectively in policy implementation (deliberate or unintentional neglect or incompetence); and failing to learn due to weak policy monitoring and feedback processes in policy evaluation (mismatch between the evaluative capacity and the task an organisation faces).

It remains an outstanding empirical question at which point in their activities specific failures of substance and failures of image in international organisations occur (Chou, 2012) and why this happens. These questions are addressed in the case studies set out below. However, a major area of attention in works on policy failure (Boin & Otten, 1996; Bovens & t'Hart, 1995, 1996; Bovens, t'Hart, & Peters, 2001; Deverell, 2009; Deverell & Hansén, 2009; Moynihan, 2008, 2009) concerns the role of policy learning, or its lack, in offsetting or fulminating crises which often accompany or lead to failures of both substance and image.

Our central argument is that the features of international organisations matter in both cases: they contribute to determining the likely tendency of a particular type of policy change (substance or image) to occur and for a specific type of learning process to emerge which may be capable of correcting the problem at the present time and avoiding it reoccurring in the future.

### *2.2. Policy Change and Policy Learning: Four Types of Learning Processes*

Works on policy learning in general have focussed on the governmental or non-governmental aspects of lesson-drawing, including the behaviour of specific kinds of organisations such as think tanks and research institutes involved in knowledge generation and dissemination (Ladi, 2005; Rose, 1993; Stone, 1999). These studies have often distinguished between learning about policy tools or means (Bennett & Howlett, 1991) and learning about policy goals (Hall, 1993; Leys & Vanclay, 2011), and have highlighted variations in the speed of change (rapid vs. slow) (Hall, 1993) which are useful distinctions that will be developed further in the context of international organisations below. Few studies, unfortunately, have focussed on how the processes of policy change and learning, or non-learning, or learning the wrong lessons can affect these processes.

This is especially true for studies of international multilateral cooperation (cf. Gallarotti, 1991). International organisations in fact have rarely been examined from a learning perspective, especially after an observable failure, and thus constitute a new venue for research into the subject and its consequences. In this context, works by Streeck and Thelen (2005) in comparative political studies provide a useful typology of policy change processes which can be linked to several key dimensions of the subject to help better situate the processes of image and substantive failures in international organisations described above.

In their work, Streeck and Thelen (2005, pp. 19-30) describe four distinct *modes of institutional change*, which are relevant to the case of all organisations, including international ones and helpful in better understanding the role of learning in organisational change.[3] These are:

1) *Displacement* ('the removal of existing tools and goals and the introduction of new ones'), often caused by *exhaustion* (gradual 'institutional breakdown');
2) *Layering* ('the introduction of new rules on top of or alongside existing ones within a similar goal framework');
3) *Drift* ('the changed impact of existing rules due to shifts in the environment'); and
4) *Conversion* ('the redeployment of existing institutions and instruments towards new goals').

Based on several studies which have examined how these change processes unfold in institutional and organisational contexts, we hypothesise that substantive and image failures in international organisations involve different kinds of change processes and outcomes. More specifically, we argue substantive failures typically involve layering and conversion processes affecting the policy tools employed, while image failures tend to occur through drift and displacement processes affecting policy goals (Baker, 2013; Béland, 2007; Shpaizman, 2014).

Further, looking at the kinds of activities in which international organisations are involved, we argue that the degree of difficulty in implementing trans-national cooperation depends very much on the issue area, and this is especially true when material interests, such as trade, finance, and natural resources, are involved. We thus expect substantive policy implementation which affects such interests directly, to be cautious, slow, and long-term. Image change, on the other hand, is less likely to involve such actors and hence can be much more abrupt. This is especially the case given the zero-sum and veto-laden consensus styles of decision-making practised by most international organisations. We juxtapose the different processes and speeds of change set out above to arrive at the typology of international organisational change set out in Table 1.

This begs the questions of how these kinds of failures are related to (non)learning. We expect to find different learning processes underway in different organisations depending on the kinds of change processes occurring.

Specifically, we expect substantive learning in layering processes to focus on marginal changes to instruments and in conversion processes to be linked to the ideational or ideological aspects of tool use. This is because an organisation when facing a slow and low level substantive failure tends to continuously aim to achieve the original goal by deploying a new instrument or refining an old one. With a more rapid and higher level of substantive failure, the organisation faces a situation in which policy progress is deemed to be essential and crucial for achieving objective and learning, in this instance, is likely to be associated with deliberation and debate not only about instrument calibrations but also about the ultimate ability of different types of policy instruments to achieve policy goals.

On the other hand, in image change situations we expect to see drift processes linked to a focus on the contextual aspects of policy goals and displacement processes to involve analysis of both goals and means in all their dimensions. Specifically, learning in drift processes depends on actors becoming aware of the changing organisational context and environment and their divergence with agreed policy goals. It is likely to be a slow process because of the initial divide (i.e. disagreements between actors) that has led to image failure in the first instance. With the recoverable degree of image failure, learning in a drift process would see an organisation attempting to adjust its original policy goals to a new environment despite its changed impact. The organisation's foremost concern is to maintain its image or to project unity in public rather than to substantially achieve the goal. With an unrecoverable degree of image failure, learning will encompass both the original organisational or policy goals set out and the means to achieve them.

This chain of failure, change processes and learning subjects and types is set out in Table 2.

[3] Exhaustion and displacement are two closely linked processes that are difficult to empirically distinguish in cases of international cooperation and hence are treated here as one type (as do Mahoney & Thelen, 2010).

**Table 1.** Taxonomy of international policy change.

| Type of Failure | Key Change Element | Typical Change Process | Speed of Change |
|---|---|---|---|
| Substantive | Instruments | Layering | Slowest |
| | | Conversion | More Rapid |
| Image | Goals | Drift | Slower |
| | | Displacement | Most Rapid |

**Table 2.** Learning and types of policy failure.

| Type of failure | Key change elements & speed characteristics | Associated learning process | Learning subjects & type |
|---|---|---|---|
| Substantive | Instruments, Slow | Layering & Learning | Instruments, Marginal |
| | Instruments, Rapid | Conversion & Learning | Instruments, Ideational |
| Image | Goals, Slow | Drift & Learning | Goals, Contextual |
| | Goals, Rapid | Displacement & Learning | Goals and Means, Analytical |

## 3. Testing the Framework: Two Case Studies of Policy Failures in Regional Organisations

Applying this framework to two case studies of policy change beyond the national level allows us to test these hypotheses in the context of regional organisations and policy development. In this section, we compare policy failures in two such organisations to see if the expected relationships between failure types and learning processes hold. The cases of ASEAN and the EU are used to consider one case each of substance and image failure. We selected ASEAN and the EU as our cases because both have successfully survived the Cold War and the post-Cold War era, yet they are often criticised for their inability to further regional cooperation in Asia and Europe beyond the maintenance of the general *status quo* or, indeed, as is the case of post-Brexit EU, even the *status quo*. At the same time, ASEAN and the EU are also two cases exhibiting different organisational traits. For instance, the EU is one of the most sophisticated supranational bureaucracies in the world, with entities such as the European Commission, Parliament, and a Court of Justice designed to exercise independent executive, legislative, and judiciary powers across multiple policy sectors. By contrast, ASEAN is far less institutionalised and has no entities as comparatively bureaucratised and powerful as the EU's. Their shared external perception and distinct organisational characteristics provide a comparative entry point from which to examine the relationship between organisational features, failure, and learning in general.

### *3.1. Dealing with ASEAN Image Failure: Failing to Be United and Learning to Drift*

At its inception in 1967, ASEAN never envisioned itself engaging with security affairs, but in the post-Cold War period, it made two significant changes: inclusion of a security agenda and establishment of security-oriented entities with external powers' participation, such as the ASEAN Regional Forum (ARF) and East Asia Summit (EAS). ASEAN then began to confront security issues in the region.

Admittedly, partly due to ASEAN's non-binding nature, and partly due to member states' differing security interests within and beyond the region (cf. Koga, 2010a, 2010b), ASEAN's capability to manage these issues with any substance is significantly limited and it is often called a 'talk shop'. Nevertheless, through its numerous dialogues, ASEAN produces joint statements and declaration, and consciously tries to project an image of its 'unified' stance to the international community. ASEAN is thus an image-based organisation in the security field, and one of its broader objectives is to maintain the image of a 'unified' stance towards regional political and security issues.

ASEAN thus encountered a serious image failure when its members did not adopt a joint communiqué on the South China Sea issue in 13 July 2012. This failure negatively impacted its image of organisational coherence as ASEAN had consistently issued joint communiqués every year since 1967 following its annual foreign ministerial meetings (AMM). This was done regularly, *no matter how unsubstantial the content of the communiqué became*. It was hence a symbol of ASEAN solidarity and the organisation carefully reproduced such an image each year since its inception. Therefore, the failure to issue one in 2012 was seen as a significant indicator of discord and dysfunction within the organisation.

The main cause of this failure stemmed from internal disagreement between the Philippines and Cambodia in ironing out the wording about territorial disputes in the South China Sea to be included in the joint communiqué. ASEAN's basic political stance over the territorial disputes in the South China Sea can be summarised as 'maintaining neutrality and regional stability'. ASEAN would not support any claims regarding these territorial disputes. Yet ASEAN was concerned about a potential disruption of the safety of sea lines of communication (SLOCs) caused by claimant states' skirmishes and conflicts in the area, and thus it was willing to facilitate dialogues for their peaceful resolution. With this posture, ASEAN created the 'Declaration on the Conduct of Parties in the South China Sea' (DoC) in 2002 as a guideline of actions over the area. In addition, ASEAN and China discussed the creation of a Code of Conduct (CoC) to legally constrain claimant states' behaviour.

In this context, the tension between the Philippines and China over one particular disputed territory, the Scarborough Shoal in the South China Sea, heightened from 8 April 2012, when the Philippines' naval ships attempted to arrest eight Chinese fishery boats staying 'too' close to the Shoal. In response, China immediately

dispatched two patrol ships from the Bureau of Fisheries Administration and blocked the Philippines' naval ships to prevent them from arresting Chinese fishery boats, resulting in a two-month maritime stand-off.

Reacting to this, the Philippines proposed to include a condemnation statement against China into the 2012 AMM joint communiqué. However, this triggered an internal division within ASEAN. Cambodia's Prime Minister Hun Sen emphasised the importance of reducing tensions with China and a code of conduct in the South China Sea ("Hun calls for ASEAN South China Sea code," 2012), insisting that a naming and shaming strategy would only exacerbate the situation ("ASEAN agrees not to mention territorial row," 2012; "Vietnam, Philippines 'bullying' ASEAN over sea conflict," 2012). Laos, Myanmar, and Thailand supposedly supported Cambodia's position (Manthorpe, 2012) and the Cambodian Ambassador to Singapore, Sin Serey, reiterated this position in August by way of accusing the Philippines for its failure to reduce tension in the region ("S. China Sea code of conduct in the works," 2012). The Philippines then criticised Cambodia as being too close to China and promoting Chinese interests ("Naval dispute sinks ASEAN summit talks," 2012; "Xinhua interviews Chinese deputy foreign minister," 2012). It insisted the recent development in the South China Sea would affect the stability in Southeast Asia and the members' interests were at stake. According to the Philippines' Foreign Undersecretary, Erlinda Basilio, Singapore, Indonesia, Malaysia, Thailand, and Vietnam supported this view (Basilio, 2012). ASEAN was decisively split on the matter, resulting in non-issuance of a joint communiqué.

The failure to issue a joint communiqué at AMM raised the question of ASEAN's credibility. Although ASEAN was generally expected to produce an abstract statement to project its image of unity, it became increasingly clear that when there was a strong conflict of interest among the member states, ASEAN could easily become dysfunctional. Several ASEAN members expressed this concern and argued that, if ASEAN failed to develop a collective position, it would lose influence over regional great powers. These included Singapore's Foreign Minister K. Shanmugan and Malaysia's Foreign Minister Anifah Aman (Ghosh, 2012; "South China Sea dispute could affect ASEAN's image," 2012; "Unity before China urged," 2012).

Several ASEAN member states and secretary general also perceived this risk and attempted to restore its organisational image ("Maritime disputes trouble Asian bloc," 2012; "S. China Sea code of conduct in the works," 2012). This effort led ASEAN members to gradually avoid in-depth, contentious discussions regarding the South China Sea issue within AMM, while keeping other unrelated agendas on the table. Instead, they attempted to use different ASEAN venues for discussing the issue. In July 2012, while failing to issue a joint communiqué, ASEAN foreign ministers agreed to mandate ASEAN senior officials to meet with representatives from China for further discussions on the CoC ("ASEAN adopts common stand," 2012). Also, in November 2012, when the ASEAN summit and related forums were held, the Philippines invited the United States to discuss the matter ("ASEAN seeks to calm sea disputes," 2012). International and regional powers, such as the United States and Australia, showed their willingness to discuss the South China Sea issue because it was important for the security of SLOCs and regional stability ("Obama tackles Wen on sea feud," 2012a; "PM pushes China on maritime claims," 2012b). Given this, the ASEAN members moved its designated venue for this issue from the AMM to other forums that included great power members.

In sum, facing this policy failure at the AMM, ASEAN did not reform the AMM as an organisational entity. An image-based organisation's policy failure could have an enormous impact and produce rapid changes, leading to change through displacement. But this did not happen. The ASEAN case instead illustrates that no organisational change followed the policy failure and rather highlighted a particular aspect of learning and drift. That is, while the objective of ASEAN's dispute settlement practice remained the same, shifts in its environment made it difficult to sustain existing practices. However, this became possible when ASEAN deferred the matter to a satellite venue (the EAS) and the organisation was able to conduct a 'run-around'—buying time for acceptable solutions to present themselves, or pretending to do so. This allowed the AMM to return to its *status quo ante*, which in turn contributed to the continuation of projecting an image of ASEAN unity, ameliorating the earlier failure.[4]

### *3.2. Dealing with EU Substance Failure: Failing to Attract the 'Best-and-Brightest'?*

The ASEAN case shows how particular kinds of learning are related to image-based policy issues and failures. The second case presented here, on EU cooperation on labour migration, illustrates the learning dynamics occurring in a substantive issue area.[5]

[4] At the same time, we note this organisational 'run-around' is possible because ASEAN established several affiliated entities in the past. If none existed, ASEAN may have created a new entity to discuss the issue informally or formally, or exhibit displacement or drift. In this sense, this case illustrates that institutional change and learning are likely to depend on not only the type of organisation, but also the organisational structure, which determines the strategies that organisational actors could employ to cope with policy failure.

[5] The current and on-going crisis concerning asylum-seeking and undocumented migrants arriving on the shores of Europe is another excellent case for applying our proposed approach. Given the space limitation, we are unable to include both the asylum-seeking and labour migration as cases in this sub-

Migration cooperation has been contentious since the very beginning of the EU (see Chou, 2009, for an overview) and has become much more so in the very recent past. Indeed, the original EU members never intended to engage in this area of cooperation and only did so to achieve a core integration objective: the free movement of persons *within* the European labour force. When the EU removed internal border controls against its citizens, however, it also saw 'unwanted' secondary movement of asylum applicants and unauthorised migration. Hence, the first measures and policies adopted in the migration field revolved around how to strengthen the common *external* borders through, for example, creating a common visa regime, signing readmission agreements with non-EU countries (the 'Neighbourhood' and beyond), and the mutual recognition of asylum status. It was not until the adoption of the 1999 Tampere conclusions, and its subsequent re-endorsement at The Hague and Stockholm, that a more 'comprehensive' outlook entered into European policy parlance and cooperation spread to other forms of migration such as family reunification and international labour migration (Council, 1999).[6]

The Commission presented the first Tampere labour migration policy proposal in 2001 with a deadline of 1 May 2004 for its completion. This measure—the Council directive on the conditions of entry and residence of third-country nationals for the purpose of paid and self-employed economic activities (Commission, 2001)—had it been adopted, would introduce a set of directly binding common conditions under which a joint residence and work permit would be issued to a foreign worker. The policy idea was that, if the applicants satisfied the requirements for obtaining work permits, there was no need to repeat the bureaucratic process for obtaining the residence permit.

This proposal is an excellent example of an outright substantive and procedural failure within an international organisation. The EU member states' migration ministers, sitting in the configuration of the Council of Ministers, considered the Commission's proposal intensely throughout 2002, but little progress was made. The lack of policy progress was due to national opposition; member states refused to discuss the proposal on the grounds that there was no EU legal basis for the use of this policy instrument (Council, 2003). When the Council refused to negotiate, the Commission withdrew the proposal in March 2006.

What kind of policy failure was this? To begin, it is clear this failure is one of substance since a substantive policy (i.e. an EU directive) failed to be adopted or implemented. We need, however, to examine how the Commission prepared for its 'comeback' in the labour migration domain in order to be more precise about how and why the original 2001 proposal had failed. Even before it withdrew its proposal in 2006, the Commission officials responsible for the dossier realised that they needed to adopt another approach for labour migration issues (Chou, 2009). These Commission officials prepared for the new approach firstly by carrying out informal discussions with the member states. In these talks the Commission identified what could be the EU's added-value in labour migration regulation (Chou, 2009) and then in January 2005 issued a Green Paper on 'managing economic migration', which asked whether there was a need to set out common EU instruments for admitting foreign workers (Commission, 2005). Based on the responses from the public and stakeholder groups, the Commission concluded that the majority of the respondents supported a labour migration policy at the regional level.

The Commission's preparations tell us that the initial substantive policy failure was the result of failure at three different policy stages: *agenda-setting* (the Commission pushed an unattainable policy agenda by proposing the directive for a joint residence and work permit); *policy formulation* (the Commission failed to take into consideration what the member states actually wanted in terms of cooperation in the labour migration field); and *decision-making* (the member states blocked the Commission proposal by arguing that there was no treaty basis for this initiative).

By identifying where it had failed, the Commission was able to learn and re-launch the momentum in EU labour migration policy cooperation. For instance, the responses from the Green Paper gave the Commission popular legitimacy in setting out a new policy agenda for labour migration. By informally soliciting the member states' inputs to the labour migration policy agenda, which was crucial for policy formulation, the Commission was able to parse out in what the member states were primarily interested: an EU measure that would address a specific subset of migrants—the highly skilled. By contrast, the failed 2001 directive addressed all categories of migrant workers and sought to set out their rights once they were admitted to the EU.

The Commission's learning and careful preparation following its original failure thus led to the successful adoption of the first of several EU labour migration measures.[7] The failed 2001 proposal delimited how la-

section. However, we would like to point out that the EU's failure in fostering a holistic labour migration policy to apply to all skill levels is not entirely unrelated to the current crisis revolving around asylum-seeking.

[6] The organisational features of EU labour migration policy cooperation have evolved dramatically over the years: from intergovernmental consensus-seeking decision-making to the 'ordinary' procedure under the Lisbon Treaty (see Cerna & Chou, 2014, for how this led to different outcomes in the labour migration field). The member states, however, still have the final say about admission numbers for economic migrants.

[7] In October 2007, the Commission presented the newest EU initiative in labour migration: the EU Blue Card (formally known

bour migration policy cooperation would be understood at the supranational-level: EU policies in this area would firstly address the highly skilled before others would be considered. This is thus an example of *learning through conversion* in which EU policy discussions on labour migration would be strategically redeployed to relate in the first instance to the recruitment of foreign talent, with existing and subsequent policy instruments (such as the Scientific Visa and the EU Blue Card) configured to achieve this end before other labour migration measures were considered and adopted.

**4. Analysis, Conclusions and Ways Forward**

In this article, we set out an analytical framework that allows us to better understand the nature of policy failures in international organisations and the mechanisms, such as learning, by which they occur and may be overcome. Our goal was to identify and connect specific failure types with the likely *modes of institutional change* that could ultimately lead to organisational and policy transformation, and to better understand their linkages with *modes of learning*. Our framework distinguished between two kinds of policy failures associated with the workings, outputs and outcomes of international organisations: failure in substance and failure in image. We hypothesised that these different types of failure would exhibit different characteristics in terms of speed and the types of learning which would allow them to be overcome.

We argued that different *modes of institutional change* (layering, drift, conversion, and displacement) identified in earlier studies of long-term institutional development and change can be connected to substance-based and image-based organisations and to policy learning. Organisational features such as relative veto likelihood and the overall material capabilities of an organisation in policy implementation (i.e. its ability to realise or adopt a specific policy position) shape what kind of policy failure, image or substance, is likely to occur and specific learning types can be linked to specific change processes common in each case. We expected substantive learning in layering processes to focus on marginal changes to instruments and in conversion processes to be linked to the ideational or ideological aspects of tool use. In learning situations for image-based organisations, we expected to see drift processes linked to a focus on the contextual aspects of policy goals and displacement processes to the analysis of both goals and means in all their dimensions.

We applied this framework to two instances of policy failure in two regional organisations—ASEAN and the EU—one a case of image failure and the other of substance, and found the following. As the EU case shows, policy failure in substance may be quite subtle and nuanced in dealing with policy tool calibrations and uses and may take years to become visible, both empirically and in terms of the judgments of relevant policy actors (McConnell, 2010). On the other hand, as anticipated, the ASEAN case illustrates, policy implementation where image is of central aim is generally less nuanced and appears more quickly. This is because, unlike policy substance, organisational image is a straightforward political act, and once the members of an organisation agree to establish a cooperative scheme by producing joint declarations or statements, it more or less automatically produces a positive image of their political unity (May, 1992, 1999). Ipso facto, image failure also occurs quickly following a failed decision.[8]

We found by moving the controversial issue out of the AMM and into satellite venues where discussions are less prominent, ASEAN members were able to avoid drastic changes and damages to its reputation. The *drift process* followed in this case and the specific method followed—organisational 'run-around'—is a form of incremental transformation and manifestations

as the directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment) (Council, 2009). While this proposal 'fit' what the member states favoured, there was still considerable disagreement among them from the outset. For instance, Cerna and Chou (2014) tell us that there were, in the main, five sets of objections. Similar to the failed 2001 proposal, several member states rejected the proposal on the grounds of 'sovereignty' and referenced The Hague programme's proclamation that 'the determination of volumes of admission of labour migrants is a competence of the Member States' (Council, 2004). The second objection came from the new member states (Czech Republic and Slovakia) and revolved around the transition period placed on the free movement of their nationals: these member states could not support recruiting foreign talent when their citizens were barred from accessing the other member states' labour markets. The third set of objections concerned the definition of highly skilled migrants (there were none) and salary threshold the applicant must evidence (how much higher should it be in comparison to those of EU workers?). The fourth was about lowering the admissions barriers to young professionals. And the fifth was about the rights to which Blue Card holders would be entitled. When the policy proposal was finally adopted in 2009, it embodied nearly the lowest-common-denominator: most of the rights for the admitted highly skilled migrants were removed or moved up to the preamble (which meant that the articles were guiding and not binding); admissions requirements were made more restrictive (e.g. the salary threshold the highly skilled migrant needed to earn would be higher than the average EU workers).

[8] This is unlike the domestic situation where there is usually a state monopoly on decision-making power, and the state does not have to consider other states' interests in most circumstances, so that image concerns are largely secondary to considerations of substantive failure (Howlett, 2012; Scharpf, 1988).

of learning in international organisations facing this kind of failure and should be a subject of more detailed inquiry and investigation in future works.

Our EU case study, on the other hand, is an example of how a policy failure in substance can be overcome through learning and lesson-drawing. We found the failure to adopt an EU directive on a joint residence and work permit for foreign workers during the Tampere period to have been reconfigured to allow the utilisation of existing tools related primarily to the recruitment and regulation of highly skilled migrants. What the EU case revealed is that there is an operational policy cycle of substantive failure and political learning (on the part of the European Commission) that is involved in the daily functions of regional organisations like the EU. When the Commission officials realised that their 2001 proposal was unlikely to be adopted, they embarked on a learning exercise of soliciting and fine-tuning through continuous dialogue with national migration ministers that helped shape the outcome of its second labour migration policy proposal. This is an example of *institutional change* exhibiting *conversion* change patterns, again as our framework anticipated.

Thus both cases have shown our analytical framework to be a useful starting point to examining policy failures in international organisations and how they can be overcome through learning. It also illustrates how several aspects of the framework should be further refined. This includes issues such as the utility of organisational 'run-around' to avoid failure, the issue of organisational capacity related to substantive goal achievement and re-definition as well as the conditions of the success or failure of policy learning as both our cases are examples of successful learning. However, better defining the object of attention—policy failures in international organisations—in both substantive and image terms, and linking these two types of failure to different learning styles and processes is a significant step forward in better understanding, and avoiding, policy failures beyond the national level, a subject heretofore rarely examined in the policy failure literature and not well understood in the literature on international relations.

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**Conflict of Interests**

The authors declare no conflict of interests.

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**About the Authors**

**Meng-Hsuan Chou** is Nanyang Assistant Professor in the Public Policy and Global Affairs Programme at Nanyang Technological University (NTU), Singapore.

**Michael Howlett** is Burnaby Mountain Chair in the Department of Political Science at Simon Fraser University, Canada, and Yong Pung How Chair Professor in the Lee Kuan Yew School of Public Policy at the National University of Singapore.

**Kei Koga** is Assistant Professor in the Public Policy and Global Affairs Programme at Nanyang Technological University (NTU), Singapore.

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Article

# Restructuring the State through Economic and Trade Agreements: The Case of Investment Disputes Resolution

Robert G. Finbow

Department of Political Science, Dalhousie University, Halifax, NS B3H 4R2, Canada; E-Mail: robert.finbow@dal.ca

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**Abstract**
This essay will examine the emergence of transnational governance via supranational economic agreements which promote global imposition of liberalizing policies in the interests of transnational investors. The stalled multilateral World Trade Organization (WTO) process has given way to a plethora of regional and bilateral economic agreements covering a range of new issues—investment, intellectual property, services, and regulations—which trench ever more deeply on domestic decision-making. Informed by Phillip Cerny's conception of "competition states", Colin Crouch's (2000) lament about "post-democracy", Carroll and Sapinski's analysis of "global corporate elites", and David Held's depiction of "global governance complexes", the essay will examine the role of transnational corporate and institutional elites in advancing economic agreements which narrow the scope for democratic governance. These authors depict the combination of constraint and empowerment of states induced by these transnational agreements which force most liberal democracies to cut or tweak programs and regulations in economic and social fields to protect investor rights, while boosting restraints on citizens in areas like intellectual property—what Cerny (1997) calls the "paradox" of the competition state. Given the number and complexity of these transnational governance arrangements, this essay will focus on the transnational constraints of investor state arbitration and disputes settlement systems. This will be illustrated by examining the growth of investor disputes settlement claims in bilateral treaties and major European and North American economic agreements and the rise of arbitration cases which impose costs on states for violations of investor rights. The essay considers the implications of these new forms of transnational governance for democratic governments' responsive to popular demands. It concludes by suggesting the need for revisions to theories of the democratic state, which may be morphing into pluralistic plutocracy.

**Keywords**
disputes resolution; global governance; investment treaties; state theory

**Issue**
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## 1. Introduction

> "[B]ilateral and regional trade agreements are now a primary means through which greater investor protections, commodification of social services, guaranteed rights of investor access to investment opportunities, privatization of public service goods, and generally the diminution of sovereign control are being realized." (Gathii, 2011, p. 421)

The goal of deepening the global economic governance system, centered on the World Trade Organization (WTO), foundered with the resistance of emerging states in the global south, as evidenced in the deadlocked Doha round negotiations, and the stalling of the Multilateral Agreement on Investment (MAI). This does not mean that transnational economic integration and governing mechanisms have reached an impasse. A series of bilateral and regional economic arrangements, driven primarily by European and American leadership,

have emerged instead, permitting deepening of integration and liberalization across a wide range of areas like services, regulation, investment and intellectual property rights. Tienhaara notes the dominance of legal scholars on matters relating to investment treaties and disputes resolution. While this is understandable given the legal complexities of these arrangements and the jurisprudence they reflect, she urges disciplines like political science to begin analysis of the implications for state sovereignty (Tienhaara, 2011). This analysis attempts to situate these developments in the literature on global governance and state theory to bring a political science perspective to bear.

This research will analyze the impact of bilateral, regional and transnational investment treaties on state power and assess the implications for the future character of democracy and transnational governance. Canada the United States and the European Union, among other countries, are entering an increasing array of such arrangements, including North American Free Trade Agreement (NAFTA), Canada–EU Economic and Trade Agreement (CETA), Trans-Atlantic Trade and Investment Partnership (TTIP) and Trans-Pacific Partnership (TPP). There are also many bilateral trade and investment agreements with developing states in Africa, Asia and Latin American including emerging powers like India and China. This essay will focus on the constraints embodied in these bilateral, regional and multilateral investment treaties which are creating a global governance complex which shifts enforcement of investment disputes to transnational institutions.

The analysis focuses on investor rights provisions, which may constrain what governments can do on threat of monetary or trade penalty, tilting public policy away from regulatory and spending initiatives which may be popular with voters but which impinge on investor freedoms and profits. Investor rights are increasingly enforced even against sub-national jurisdictions like provinces, states or cantons in other states as international law evolves to implement the growing web of bilateral and multi-lateral investor rights measures and make arbitrations enforceable through court actions in investor friendly countries. This essay will assess whether constraints on state power produced by investment disputes provisions limit democratic responsiveness to national majorities at the behest of investors and corporations. The focus will be on treaty-generated rules favorable to investors, enforced in arbitration and dispute settlement forums.

These bilateral and regional deals constitute an expression of transnational elite power which can be termed "pluralist plutocracy". While diversified by nationality and economic sector, elite and institutional collaborations are bound together by the overarching drive for protection and promotion of wealth. Taken together these numerous deals both constrain and empower the competition state in directions desired by transnational wealth. The forces driving the measures can be considered plutocratic in promoting the interests of wealth; but also pluralistic as they represent diverse transnational coalitions with diversifying ethno-national bases, including emerging states and sectoral concerns, with energy, natural resources, pharmaceuticals, finance being prominent examples. This is led by the interests which have promoted financialization of the global economy. Cerny, Menz and Soederberg (2005, pp. 19-20) note that this is a loose coalition of transnational institutions, corporations, private lobbies, think tanks and "epistemic communities" whose actions have reduced the variations possible among "competition state" models in the contemporary global economy (Cerny et al., 2005). These powerful allies have a vested interest to promote liberalization including enhanced capital flows, investor rights, intellectual property protections and deregulation with teeth through disputes settlement arrangements. The result could be a weakening of democratic accountability, with states bound to transnational agreements which constrain their actions, while requiring greater restrictions on citizens in the paradox that is pluralist plutocracy.

**2. Globalization and the State**

There is a substantial debate over the implications of globalization for state sovereignty and democratic governance. Authors divide on the amount of sovereignty left to states and the degree of constraints faced by the "competition state". Held observes the impact of globalization on democratic states, notably the "unbundling of sovereignty" and the "end of exclusive state control of territory and population"; he notes the emergence of a "global governing complex", a multiplicity of agents involved in governance in globalized system, featuring a "plurality of actors, a variety of political processes, and diverse levels of coordination and operation" (Held, 2004, p. 5). Some of these are institutionalized in transnational agreements "embodying various levels of legalization, types of instruments utilized and responsiveness to stakeholders"; others are evolving via transnational connections between "public agencies like central banks", which develop "links with similar agencies in other countries and thus forming transgovernmental networks for the management of various global issues" (Held, 2010, p. 34).

Outside these formal institutional frameworks are informal cross national interactions. Most notable are those among "diverse business actors—i.e. firms, their associations and organizations such as international chambers of commerce—establishing their own transnational regulatory mechanisms to manage issues of concern". But these are countered to a degree by "non-governmental organizations (NGOs) and transnational advocacy networks—i.e. leading actors in global civil society—playing a role in global governance at various

stages of the global public policy-making process" (Held, 2010, p. 34). A balance of power is not evident, however, given the greater structural resources of the interconnected corporate world which is increasingly able to evade national regulations and to act singly and in combination to shape the power of the state and determine its limits. The acceleration of economic interconnectedness driven by interests of wealth and profit remain paramount. Institutional connections and shared interests link investors and corporate entities across borders as never before.

Analysts document the growing diversification of corporate managerial sectors, still centered around American leadership but with growing interlocking connections with European states and core emerging states in the South. Their policy advocacy organizations take two key forms, "global policy groups and transnational business councils" which provide "the transnational capitalist class and its organic intellectuals strategic resources in the struggle to protect what was won in the last three decades: investor rights, trade freedoms, low corporate taxation and other key elements of neoliberal globalization" (Carroll & Sapinski, 2010, p. 532). There is also considerable evidence of transnational interaction among elites from core universities and in key financial and business sectors across nations (Hall, 2011). These networks have played a major role in expanding beyond the free trade ambitions of the GATT and WTO towards broader conceptions of investor freedom and deregulation to open capital across international borders (Carroll & Sapinski. 2010, p. 511).

As new tools for interaction and especially technologies for transfers of wealth and interests allows such actors, a transnational pluralistic plutocracy, to avoid state regulations or alter them to suit their preferences, these actors are in a strong position to press states to adopt permanent limitations on sovereignty or reorientation in state policies on investment, intellectual property, regulation etc. to promote their unfettered interests in global liberalization and capital mobility. These are the organizations driving integration and liberalization in a multi-faceted fashion across trade, intellectual property, regulation and investment. In the investment field, these groups reveal themselves at consultations in the US, Canada and the EU on investor-state provisions which attracted numerous corporate, business association and think tank commentaries, balanced by civil society and union input. They are also evident in core instructions like Organization for Economic Cooperation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD) and World Bank which extensively study investment arbitration and publish research underlying the system's evolution. Less visibly these can be seen in the legal arbitration sector whose members may act as prominent promoters of the system (Olivet & Eberhardt, 2012).

## 3. Emergence of Investor–State Dispute Settlement (ISDS)

One of the signature accomplishments of this transnational network has been the creation of a transnational regime for investment, which since the late 1960s has been reinforced by investor-state disputes resolution institutions. After World War II, the negotiation of the General Agreement on Tariffs and Trade (GATT) was meant to be accompanied by a parallel investment agreement, but this was blocked in the US Congress as too ambitious and restrictive (Åslund, 2013). The emergence of the bilateral investment treaty (BIT) regime was initially slow, with the first concluded between Germany in Pakistan in 1959. Some 70 more were inked in the 1960s and 93 in the 1970s. Investment exporters like the US and European states negotiated investment arrangements with developing countries, to counter Cold War threats of expropriation and nationalization by Soviet-linked regimes. These agreements extended national and most favoured nation treatment to investors, giving them freer access to investment opportunities. They also limited expropriations to those essential for public well-being, required fair and prompt compensation, and protected investors against exchange controls and limits on repatriation of profits. These agreements also innovated in including a "dispute resolution provision consenting to the jurisdiction of the International Court of Justice over disputes involving the interpretation or application of the agreement", although investors had first to work through domestic legal remedies before availing themselves of this process (Vandevelde, 2005, p. 165).

Vandevelde notes that investment treaties were unbalanced measures, usually between developed and developing states; the latter, capital importing states assumed most of the obligations to ensure protection for investors. These included bans on capital controls, local hiring or purchasing preferences and other performance requirements. They also provided for compensation for direct seizures or indirect expropriation if regulations diminished or removed the value of investments. These investor state agreements (ISAs) replaced a previous ad hoc system whereby investors had to get their home governments to seek remedies from a foreign country where they had holdings, through diplomatic or occasionally military means. In this "colonial" approach (Vandevelde, 2005), countries like the US might resort to gunboat diplomacy (as happened frequently in Latin American and Caribbean states) when host countries refused to compensate investors for expropriation or losses induced by government action, or afford them legal protections and due process.

The inclusion of binding arbitration implemented after 1965 by the World Bank's International Center for the Settlement of Investment Disputes (ICSID) estab-

lished the framework for private party initiated arbitrations which remains in place today. The system of investor state provisions enabled investors to make claims against signatory states regularizing the system and rendering it independent of diplomatic relations between countries. This created a set of rights for investors who could work through arbitration under international law to secure compensation, without requiring diplomatic or military interventions by their host countries (Vandevelde, 2005, p. 175).

The most ambitious plan for global governance in this sector was the proposed Multilateral Agreement on Investment (MAI) which was a proposed international investment agreement as a companion to the GATT–WTO system. Efforts to add investment protections to the WTO system, like previous efforts through GATT, foundered on differences between developed states keen to secure investor protections and developing countries seeking to promote domestic policy goals, so negotiations were transferred to the OECD of developed states. Its proponents portrayed it as an effort by states to limit sovereignty in the interest of enhanced economic well-being, arguing that liberalized investment would create long-run positive sum growth in the global economic space. It would protect investors from arbitrary and unreasonable actions by governments and enhance the rule of law where required. Critics responded that the MAI would empower "foreign investors to challenge the law-making authority of nation states and subnational governments" by creating "an international forum with the power to award monetary damages against the offending government". The deal was portrayed as a virtual "coup d'etat" which would impose "corporate rule" via an "economic constitution" which would transfer power to investors at the expense of governments (Stumberg, 1998, p. 493). Critics noted the potential constraints of the penalties, "shifting power in the legislative process through the economic leverage of investor remedies" (Stumberg, 1998, p. 495). Supporters countered that arbitration procedures were increasingly common across economic and other policy fields and ruled by courts to be constitutionally acceptable. The MAI negotiations were permanently paused in late 1998, reflecting divisions among proponents as well as a successful civil society campaign to block this "anti-democratic" initiative.

In the wake of the MAI setback, similar measures have been included in bilateral economic agreements between states, to allow the investors of a capital exporter to protect their investments in a situation of legal and political uncertainty. Contemporary investment treaties typically include a few core elements including standards such as "fair and equitable treatment" alongside "National treatment or Most-Favoured Nation" (Peterson, 2004, p. 3). They include guarantees against expropriation or nationalizations without compensation, freedom for capital movement, and increasingly a form of dispute-settlement process (either state-to-state or investor-to-state). Most of these agreements have been bilateral, but such provisions have also been included in multilateral economic agreements, including the major regional trade agreements involving European and North American States.

Vandevelde refers to the 1980–2000 period as a "global era" for ISDS after the end of the Cold War, when the "end of history" presumption of liberal capitalist uniformity meant developing and transitional socialist states accepted investment liberalization on American and European terms (UNCTAD, 2000). The pace of negotiation and adoption of ISDS provisions increased over time, peaking around the turn of the millennium, (Figure 1) though reducing in frequency more recently.

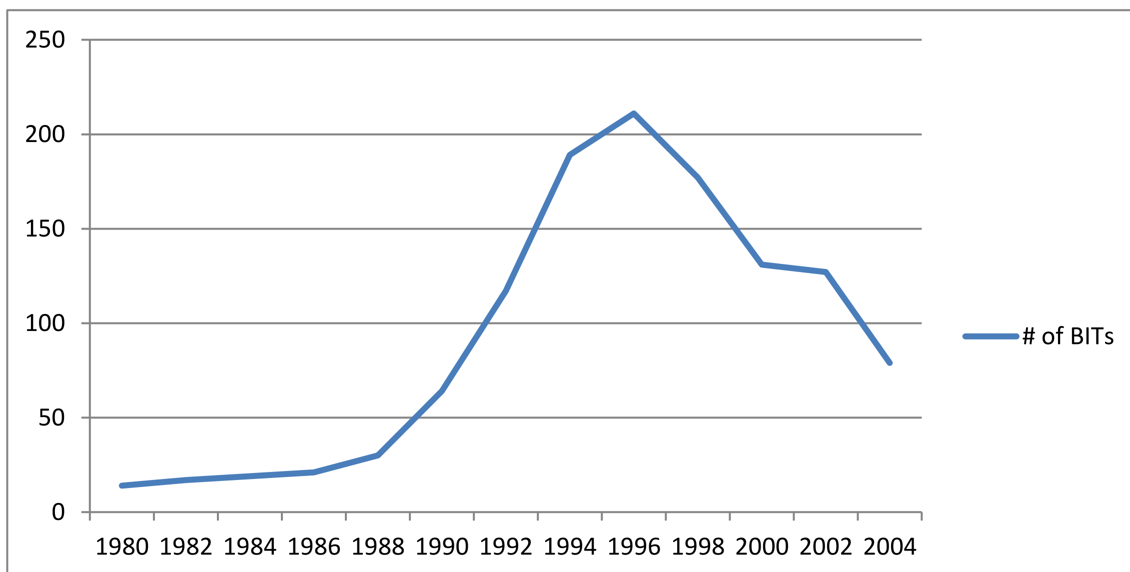


**Figure 1.** Number of new BITs per year. Source: UNCTAD (2006)

Gordon and Pohl (2015, p. 36) note that as the pace of bilateral investment treaties slacked off, replacement agreements became more prominent. But the overall number of BITs (also accompanied by other forms of investment agreements including multinational regional deals like NAFTA and TPP) brought the total number to 2500 by 2005 (Figure 2). While the pace has slowed somewhat, there are currently around 3300 agreements (UNCTAD, 2015).

Investor state disputes resolution (ISDS) mechanisms create processes whereby states can be directly challenged by actual or potential investors over loss of real or anticipated profits. In most of these systems, ad hoc tribunals drawn from a set of legal professionals determine if a state has breached investment obligations; they can decide on damages, and impose costs and penalties with limited possibility for review and limited transparency or release of justification for decisions. The pacts can be used to impose settlements, which domestic courts may have to enforce; but in the absence of compliance by a respondent state, international law may be used under the New York or Washington Conventions on arbitration settlements to enforce judgements in an investor-friendly jurisdiction.

Kaushal argues that "Foreign direct investment ('FDI') and bilateral investment treaties ('BITs') have become key building blocks of the international legal and economic architecture….This network of BITs has engendered a regime of investment treaty arbitration complete with dedicated international institutions" with, "common procedural rules, substantive obligations, a rotating group of arbitrators, a specialized cadre of lawyers, and a growing body of decisions" (Kaushal, 2009, pp. 491-492). Bilateral and regional investment agreements made up for the lack of enforceable investor rights in the WTO, permitting direct claims against states. Investment treaties "increasingly offer foreign investors an opportunity directly to challenge breaches of WTO law and to seek relief in the form of cessation of the WTO-inconsistent measure and, when the measure can be shown to have proximately caused them injury, damages" (Verhoosel, 2003).

## 4. Investor Disputes Settlement Systems as a Contested Global Governance Complex

Initially only a trickle of investment disputes went to arbitration processes, mostly targeted at developing states with uncertain legal protection for investors. Disputes resolution cases have increased dramatically over the last 30 years. Investor state disputes mechanisms have grown ever prevalent and are becoming a more routine means for transnational enforcement of liberalized investment rules. Many of these are conducted under the World Bank's International Centre for Settlement of Investment Disputes (ICSID) system which uses ad hoc arbitrators chosen by the parties rather than permanent professional adjudicators. Other investment treaties rely on bilateral or regional arrangements specific to the BIT in question.

The United Nations Commission on International Trade Law (UNCITRAL) sets general rules for disputes settlement which may be addressed through the ICSID institutions or the Permanent Court of Arbitration (PCA) in The Hague. Other investment treaties may permit parties to make claims via commercial arbitration centers like the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), London Court of International Arbitration, or the International Chamber of Commerce's Court of International Arbitration in Paris. But as shown in Table 1, a substantial majority of the known cases take place under the World Bank ICSID umbrella.

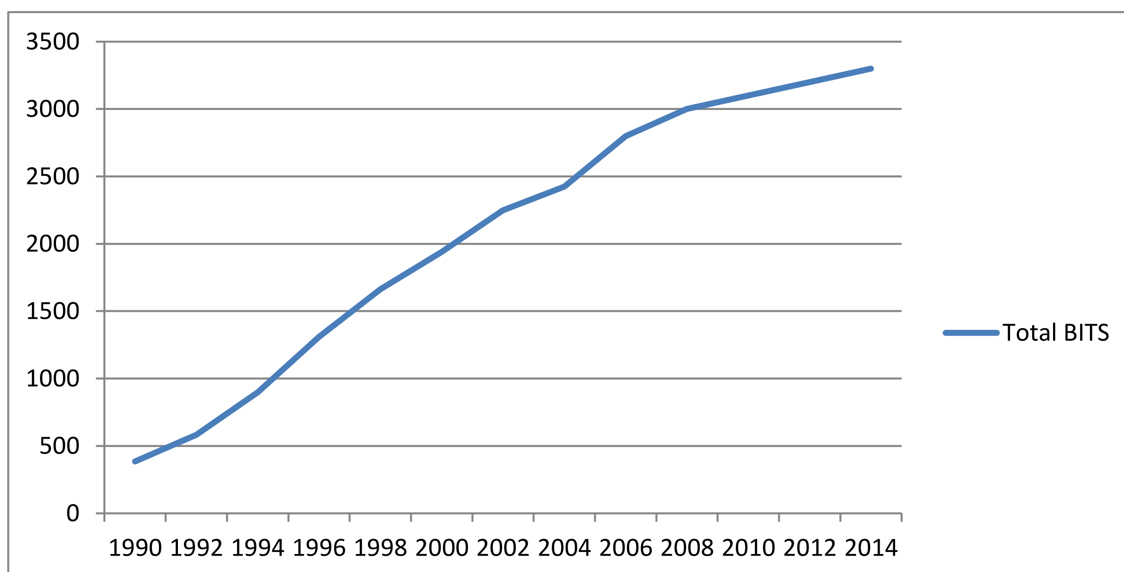


**Figure 2.** Total number of BITs in force. Source: UNCTAD (2006, 2015).

**Table 1.** Major administering investment arbitration institutions. Source: http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution

| Acronym | Institution | # of Cases |
|---|---|---|
| CRCICA | Cairo Regional Center for International Commercial Arbitration | 2 |
| ICC | International Chamber of Commerce | 4 |
| ICSID | International Centre for Settlement of Investment Disputes | 451 |
| LCIA | London Court of International Arbitration | 5 |
| MCCI | Moscow Chamber of Commerce and Industry | 3 |
| PCA | Permanent Court of Arbitration | 83 |
| SCC | Stockholm Chamber of Commerce | 35 |

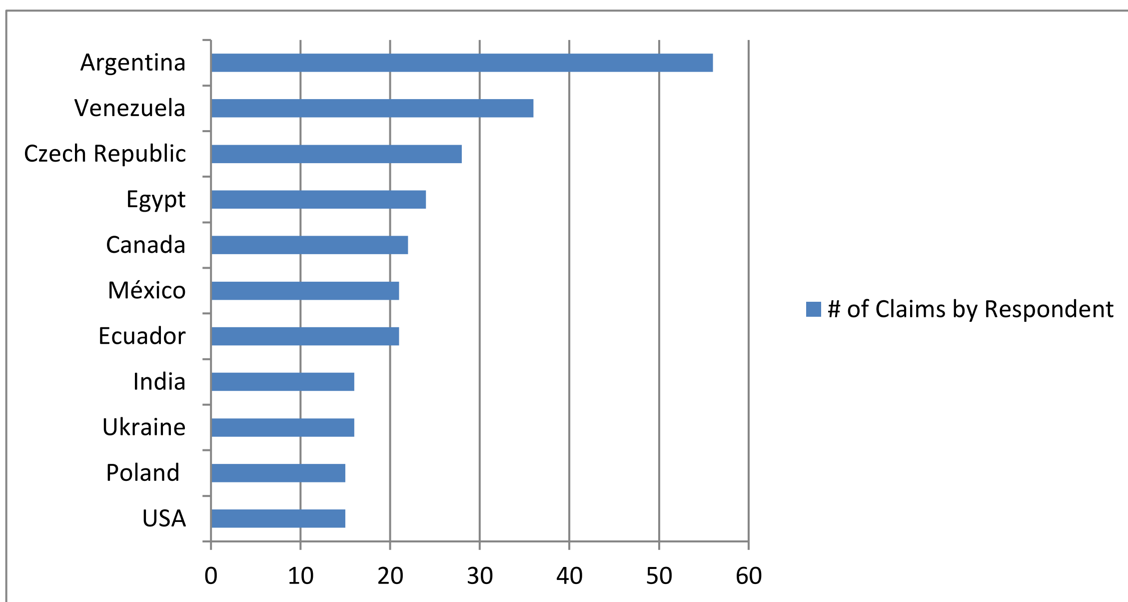


**Figure 3.** Number of claims by respondent state. Source: UNCTAD (2015).

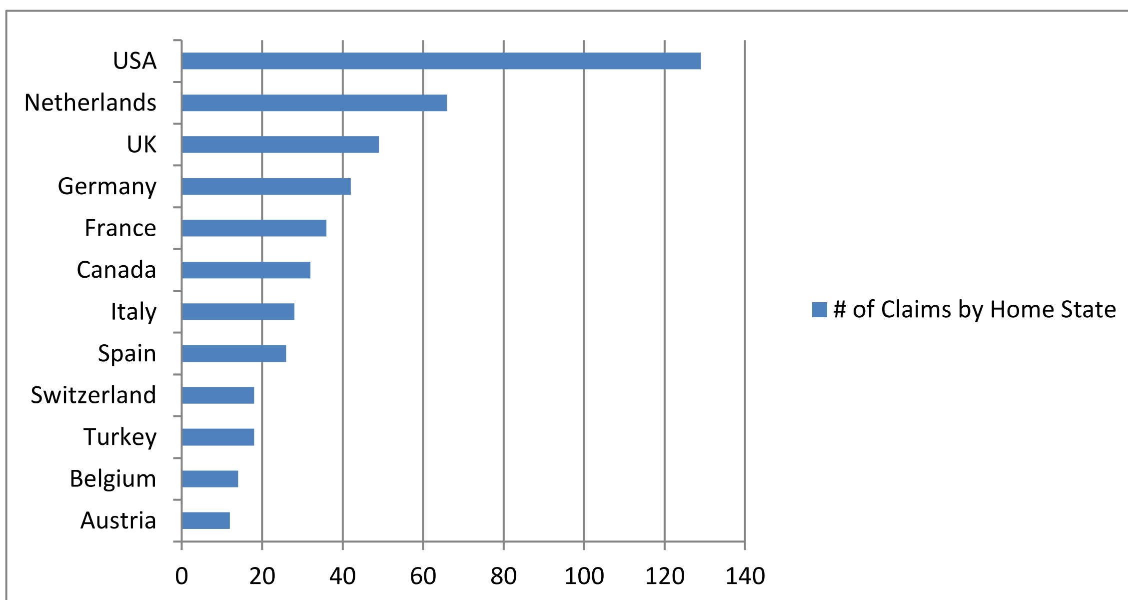


**Figure 4.** Number of claims by home state. Source: UNCTAD (2015).

Initiation of cases and issuance of decisions have escalated substantially. As Figure 3 shows, these mostly target developing and post-Soviet states. Increasingly these cases have targeted developed states, especially Canada, with more questions raised about the necessity given enforceable investment protections and dependable rule of law in most post-industrial states.

But as shown in Figure 4 the states making most use of these provisions remain developed Western European and North American states targeting developing

states. And authorities in the developed world acknowledge that the system works mostly on their behalf, with few worries about challenges from the developing world. The USTR notes for instance, "Because of the safeguards in US agreements and because of the high standards of our legal system, foreign investors rarely pursue arbitration against the United States and have never been successful when they have done so" (USTR, 2015).

The evolution of jurisprudence on enforcement of international arbitration awards under the New York and Washington conventions could prevent states from ducking their obligations and avoiding claims for compensation. They can also expose sub-national units like states or provinces to court sanction and even expropriation of property internationally if they did not enforce ISDS or declined to pay penalties appropriately. Evolving jurisprudence in the US and other jurisdictions may permit claimants aggrieved at national or sub-national policies to sue in foreign courts and have assets of those states or provinces seized as compensation (Van Harten & Loughlin, 2006).

Supporters of such provisions suggest they protect investors and clarify investment rules and ensure that investors can obtain redress for laws or regulations which erode profit potential. UNCTAD outlines the core goals succinctly: "IIAs may offer an avenue for the resolution of investor–State disputes that allow significant disagreements to be overcome and the investment relationship to survive. Equally, where the disagreement is fundamental and the underlying relationship is at an end, the system offered by an IIA might help to ensure that an adequate remedy is offered to the aggrieved party and that the investment relationship can be unwound with a degree of security and equity, so that the legitimate expectations of both parties can, to some extent, be preserved" (UNCTAD, 2003, p. 8). Many business sectors and associations (Carroll and Sapinskis' transnational networks of multi-national firms and lobbying associations) have come out soundly in favour of such measures. Clarity in rules is seen to promote efficient investment flows. Consistency is required through the inclusion of these measures in agreements, even where states have developed systems of law whereby domestic protections and legal recourse exist for investors who are unduly deprived of profit or assets.

Given the variation between established and new member states, some of which are still fleshing out the rule of law, European Union members have been key exponents of such disputes resolution measures. After the Lisbon treaty transferred competence, investment treaties are now dealt with by the European Commission (Bungenberg, 2010; Chaise, 2012). This has created complications with leading states like Germany and France and Commission actors over whether to include such measures in agreements with Canada and the US. Those two North American nations included ISDS measures in Chapter 11 of NAFTA.

Critics portray the ISDS mechanism as a threat to democracy and public policy, with a chilling effect on social and environmental programs and regulations. It is also considered as unnecessary between developed states like the EU and the US, in view of the strength of investment protections in their national legal systems. These views are articulated by most trade unions, a large number of NGOs, consumer organisations and others who responded in the EU consultations on ISDS in TTIP and the US consultations on the updated model BIT. Many of these groups express specific concerns about governments being sued by corporations for high amounts of money which in their view create a "chilling effect" on the right to regulate. Documents from trade unions and social NGOS express a generic mistrust of the independence and impartiality of arbitrators and a concern that ISDS may allow investors to circumvent domestic courts, laws or regulations. A number of trade unions and NGOs consider that the changes in the US model BIT and more recent EU deals to discourage frivolous cases and increase transparency and accountability are insufficient to address their concerns.

Cases are not inevitably decided in favour of investor, with states prevailing in many instances, though investor wins and settlements occur in a majority of cases (Figure 5). Costly settlements as well as successful claims can, critics fear, become constraints on state decision-making. While not all decisions favour claimants, there has been an escalation in both the number and size of clams and more cases have included sometimes substantial penalties. The true extent of the impact is hard to gauge. The EU trade directorate notes that a "complete overview is difficult because information on the amounts claimed and awarded is not always disclosed, even in cases that are public" (EU Commission, 2015, p. 8) a lack of transparency which is problematic for analysts.

The awards fall short of initial claims overall (Table 2). Depending on the state involved the amounts still can be quite crippling on top of the costs of managing the complex system and hiring necessary expertise, which can run into multiple millions of dollars; one Eastern European participant at a recent conference said such cases consumed nearly half of his small country's justice ministry budget.

However, high profile cases (Table 3) have provided fuel for opponents. These critics complain of the imposition of restrictions on state decision-making which runs against the democratic accountability of government. They also note that the closed non-transparent system, with arbitrations by for-profit firms which leads to frivolous lawsuits to secure payouts for investors and their specialized legal teams. Environmental regulations are often a key concern, with Canadian provinces like Quebec and New Brunswick facing challenges to their limits on fracking and Nova Scotia facing a suit under NAFTA

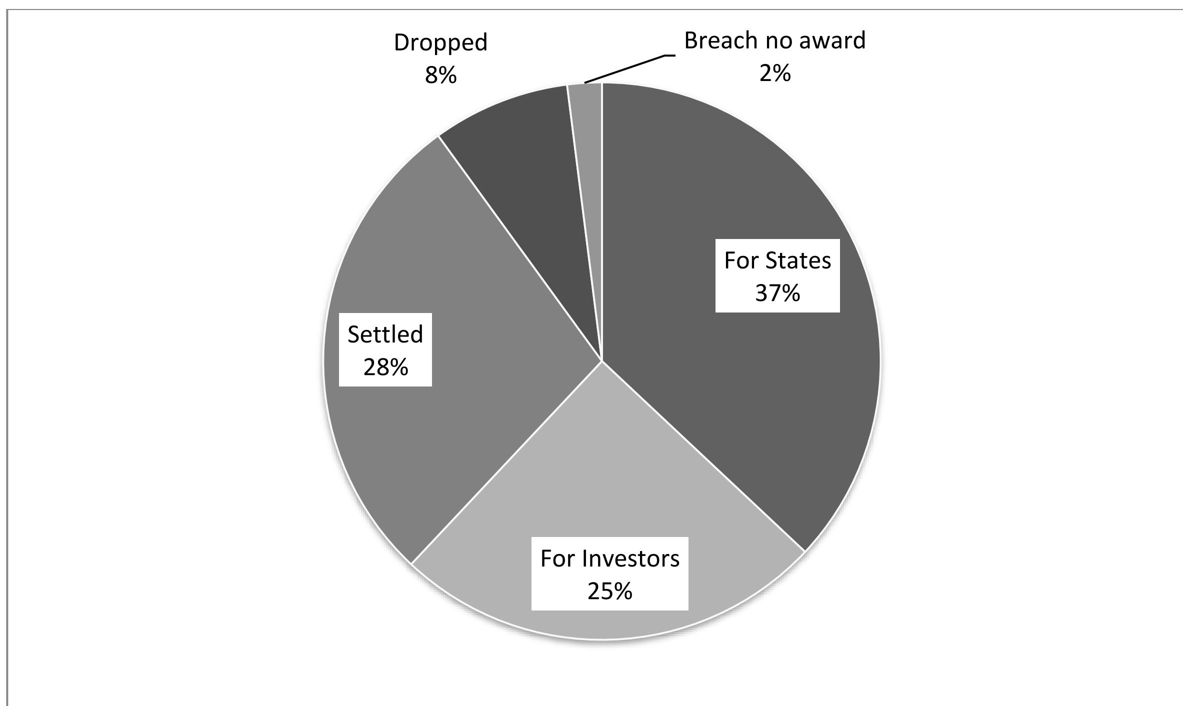


**Figure 5.** Arbitration results to end 2014. Source: http://investmentpolicyhub.unctad.org/ISDS

**Table 2.** Total claims, awards and settlements in $1 million. Source: http://investmentpolicyhub.unctad.org/ISDS/FilterByAmounts

| Amounts $1m | # of times Sought by Claimants | # of Tribunal Awards | # of times reached in Settlements |
|---|---|---|---|
| < $1 m | 5 | 10 | 0 |
| $1-9.9m | 37 | 33 | 2 |
| $10-99.9m | 148 | 42 | 15 |
| $100-499.9m | 156 | 19 | 9 |
| $500-999.9m | 50 | 3 | 5 |
| > $ 1000 m | 80 | 5 | 2 |

**Table 3.** Contentious ISDS cases. Source: Adapted from Van Harten, Porterfield and Gallagher (2015)

| Legislative Fields | Example Cases |
|---|---|
| Health Care | Eli Lilly vs Canada (drug prices)<br>Phillip Morris vs Uruguay (tobacco) |
| Environment | Chevron vs Ecuador (Amazon protection)<br>Vattenfall vs Germany (nuclear energy ban)<br>Renco vs Peru (mining permits and wastes)<br>Lone Pine Resources vs Canada (fracking ban)<br>Windstream Energy vs Canada (green energy) |
| Labour Rights | Veolia vs Egypt (minimum wage)<br>Laval vs Sweden (contract labour standards)<br>Piero Foresti vs South Africa (affirmative action) |
| Financial Institutions | Abalclat vs Argentine Republic (debt relief)<br>Saluka vs Czech Republic (too big to fail) |
| Utilities | Vivendi vs. Argentina (water/wastewater pricing)<br>LG&E International. v. Argentina (energy pricing) |

for rejecting permission for a quarry. European states have also begun to face such challenges, with Sweden fighting the Laval case respecting provision of contract workers at below national labour standards and Germany challenged in the Vattenfall case for its post-Fukushima move away from nuclear power. For Europe, being on the receiving end of such actions as could happen more frequently with TTIP is novel, since EU member states were

the principle architects of and users of ISDS over the years in a plethora of bilateral investment deals.

There is some evidence that "the high costs of ISDS or the threat of such costs can have a dissuasive effect on states and that investors can use the spectre of high-cost ISDS litigation to bring a recalcitrant state to the negotiating table for purposes of achieving a settlement of the dispute" though similar disincentives can also force investors to abandon or settle a claim (OECD, 2012, p. 9). According to UNCTAD, with "its expansive, and sometimes contradictory, interpretations, the arbitral process has created a new learning environment….Issues of transparency, predictability and policy space have come to the forefront of the debate as has the objective of ensuring coherence between IIAs and other areas of public policy, including policies addressing global challenges, such as the protection of the environment (climate change) and public health and safety" (UNCTAD, 2014, p. 4).

## 5. Implications of ISDS Systems for Global Governance

Investment treaties—coupled with equally powerful agreements on trade in goods and services, intellectual property, regulatory convergence etc.—have transformed the nature of international governance and its impact on the state in a globalized era. "To an unusual extent trading states have delegated to impartial third parties the authority to review and issue binding rulings on alleged treaty violations, at times based on complaints filed by nonstate or supranational actors" (Smith, 2000, p. 137). Investment disputes provide an important instance of this state delegation. McBride remarked on how Chapter 11 in NAFTA illustrated this process whereby "states have sanctioned a significant transfer of authority from public to private control. Essentially, a portion of national sovereignty is surrendered, not just to international entities, but to private ones" (McBride, 2006, p. 755).

Defenders of the system correctly note that under democratic constitutional principles, states have rights to enter into binding agreements to protect the rights of private partners, so nothing about the measures is a departure from constitutional principles (despite critical references to the MAI or ISDS system as a "coup d'etat"). Nevertheless, it does reflect a fundamental choice to empower some rights holders, including foreign investors, above others, and thereby to either constrain policy or impose costs on states which decide not to respect investor rights or to pursue policies (regulations, nationalizations, local preferences) which challenge, limit or remove those rights. Additionally, while the systems cannot force countries to adjust laws, they can make jurisdictions wary, change policies by anticipation or adjustment if costs are considered too high (developing countries or have not provinces or states for instance may have to think twice about absorbing such costs). And the privatized arbitration system, run by international lawyers who also work for claimant corporations or investors in other roles, has also been questioned.

As Figure 6 indicates, there has been a steady uptake in the number of claims by investors and the resolution of these claims. To some extent this can be accounted for by the increase in FDI and the increase in the number of BITs. This represents however, an increased willingness to defer to international institutions and legal norms at the expense of local particularism and democratic input. As such, it is a powerful new form of transnational governance regime which increasingly affects many nations. As the Stockholm Chamber of Commerce suggests "The increasing number of ISDS cases may be described as an increase of trust and reliance on international law in general, and to international arbitration specifically, both by investors and States" (SCC 2015).

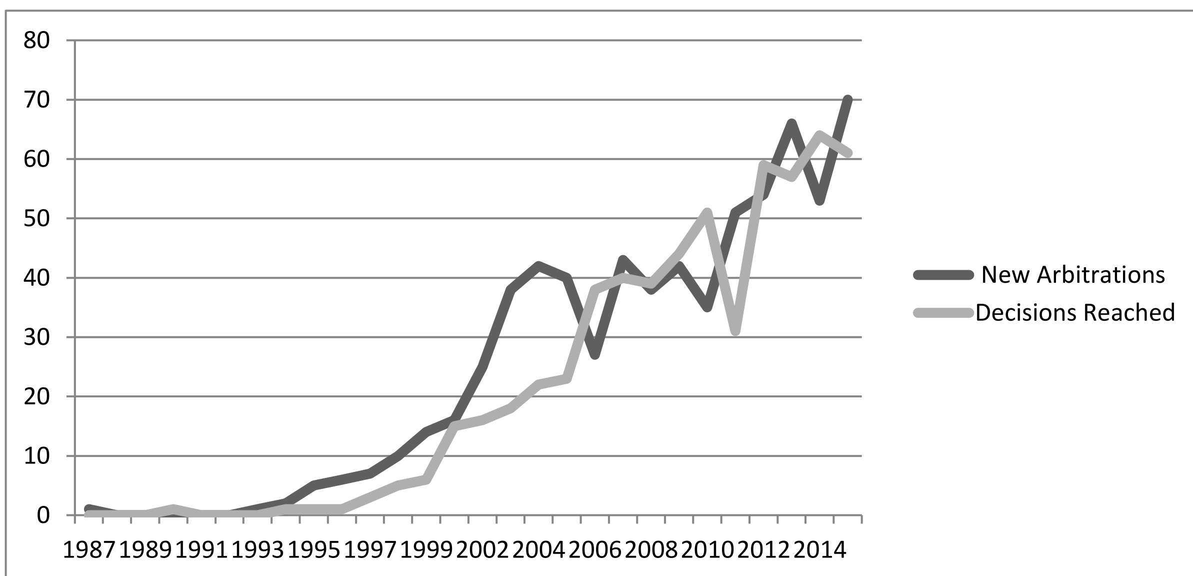


**Figure 6.** Increased ISDS activity. Source: http://investmentpolicyhub.unctad.org/ISDS/FilterByYear

There has been recognition for several years among legal scholars of the profound changes implied by this transnational system, which Foster (2015) terms the emergence of "internationalized public law". In particular, the notion of sovereignty as traditionally associated with state authority is being altered. Instead of sovereign–sovereign relations, these deals substitute individual–sovereign relations in ways which empower private parties, especially investors. "The BIT…creates a public international law instrument that endows the individual foreign investor with direct international standing" (Kaushal, 2009, pp. 498-499). And the awards, made by private sector arbiters (often law firms that do work in other circumstances for the plaintiff corporations) are transnationally enforceable under UN conventions on enforcement of arbitral awards. While in the early years, the provisions were used infrequently, the number of known disputes cases has accelerated from 19 in 1997, to 300 by 2007, and some 514 by the end of 2012. Hence what was once a rarity has become much more common. And the spread of claims across a wide range of policy areas (Table 4) has significant implications for government regulatory and policy autonomy and accountability to the electorate.

Bilateral and regional ISDS provisions have broken down the boundaries between international and national and arguably enhanced the rights of private actors at the expense of public governance. For critics, the transnational plutocracy of investors have obtained rights superior to domestic investors and citizens. There is increased pluralism among capital exporting states, though the dominance of the US, Europe, Japan and emergent states remains significant; developing states remain mostly takers of such arrangements despite evidence that the flow of investment is not substantially augmented by such deals—many states are bargaining away sovereignty for very limited returns.

Supporters deny that ISDS provisions can be used to challenge government policies, declaring that "critics exaggerate the notion that investors 'sue to overturn regulations'; BITs explicitly limit awards to monetary damages" (Miller & Hicks, 2015, p. v). Yet the scale of some awards relative to the size of smaller governments' budgets makes them punitive to the point that regulations could be altered or perhaps not introduced in the first place. Some companies have been accused of buying firms in jurisdictions in order to use the provisions of investment treaties, and high legal fees encourage expensive drawn out deliberations (The Economist, 2014). Investors certainly understand the potential for dissuasion beyond the actual punitive level of awards as the threat of arbitration can pressure states to fulfil treaty obligations on FDI as states try to avoid even the prospect of a claim to preserve their reputation as a safe haven for investors (Olivet & Eberhardt, 2012).

## 6. Emerging Resistance and Potential Reform

As Held suggests the global governance complex in this field contains non-governmental actors other than corporate or plutocratic ones such as unions, social and human rights groups which have exerted pressure on states to alter or opt out of the investor arbitration system. Fabry and Garbasso (2015) note that the increase in ISDS measures and claims have generated fears for their impact on sovereignty which has led some states to withdraw from existing agreements or forgo proposed new pacts. The political and economic costs appear in some cases to outweigh the perceived benefits of participation in ISDS provisions. Several states which historically have supported ISDS measures in their dealings with weaker states have emerged as critics. Significant emerging states, notably India and South Africa, have opted out of ISDS measures in bilateral deals and contributed to the defeat of the MAI. Australia's centre-left Gillard government also rejected inclusion of additional ISDS provisions from 2011 (Tienhaara & Ranald, 2011) though this has since been reversed by the more conservative Liberal-National regime which signed the TPP.

Most notably, European actors have suggested that inclusion of ISDS in CETA and TTIP might not prove viable. Having pioneered the technique in dealings with developing states, European countries now are concerned about potential losses from American firms use of the investor-state disputes process and attendant penalties. European discontent has induced a change in the EU negotiating position on TTIP and a renegotiation of portions of CETA to adjust the ISDS provisions; some of these changes appear to move beyond the cosmetic to substantive proposals for a more autonomous bilateral (and eventually multinational) investment court, freed

**Table 4.** Leading claims by economic sector. Source: http://investmentpolicyhub.unctad.org/ISDS/FilterByEconomicSector

| Primary resources | Secondary manufacturing | Tertiary services |
|---|---|---|
| Petroleum and gas (57) | Food Products (25) | Electric, Gas, AC (139) |
| Metal Mining (32) | Chemicals (14) | Financial /Insurance (64) |
| Other mining/quarries (14) | Base Metals (12) | Construction/engineering (63) |
| Crop and Animal (14) | Nonmetal minerals (12) | Telecommunications/IT (47) |
| Forestry/logging (8) | Pharmaceuticals (8) | Water supply/waste (45) |
| Coal mining (6) | Beverages (4) | Transport/Storage (39) |
| Mining Support (4) | Tobacco (4) | Wholesale/Retail (16) |
| Fisheries/aquaculture (4) | Textiles (4) | Accommodation/Food (9) |

from the corporate dominance of existing arbitration arrangements. How seriously this is intended and whether it becomes a "red line" for ISDS negotiations going forward remains to be seen (Van Harten, 2015).

Concern is also evident in the United States, despite its insistence on its bilateral investment treaty model in all negotiations. Alarmed by growing arbitral boldness and breadth under measures like NAFTA Chapter 11, the USTR tweaked investment treaties to decrease the constraint on policy options. They "have stepped into line with the developing countries that have sought greater tribunal deference to sovereign regulatory decisions" (Kaushal, 2009, p. 495). This has affected the US Model BIT from 2004 onwards as new deals included guarantees for greater precision on covered investments and standards of treatment, more transparency, third party intervention and guarantees for financial, labour, environment health and safety regulations. But this did not remove the private arbitration system, and the Americans included similar disputes resolution measures in new mega treaties like TPP and TTIP. Critics like Senator Elizabeth Warren warn that ISDS provisions in such deals could tilt the political and economic playing field even further towards large corporate players (Jacobs, 2015). Even some prominent promoters of freer trade have come to see ISDS as an impediment to some transnational agreements, notably the TTIP with Europe (Ikenson, 2014).

Simple measures like enshrining requirements for transparency and third party interventions have been suggested to address the biases and secrecy of processes like those under NAFTA Chapter 11 (Van Duzer, 2007). The European Commission introduced such changes to its ISDS treaties. These would ensure that public interest legislation and regulations should take precedence, and "guidance" to the arbitrators to ensure that companies are not compensated "just because their profits have been reduced through the effects of regulations enacted for a public policy objective". The original CETA draft included a clearer definition of "fair and equitable treatment" to prevent "manifest arbitrariness, abusive treatment (coercion, duress or harassment), or failure to respect the fundamental principles of due process". It also included measures to dissuade frivolous claims, including a stipulation that the losing party should bear all litigation costs; measures to promote transparency of international tribunals including public access to documents; a code of conduct for arbitrators; and safeguards to reduce erroneous rulings including opportunities for the home country of the states to make interventions in the process (EU Commission, 2013).

Under domestic pressure from critics who worried about the ISDS provisions in TTIP, the EU held a consultative process and added amendments, including creation of a permanent bilateral investment court with judges appointed by the two parties with neutral appointees from a third party (EU Commission, 2015). The Canadian Liberal government agreed to CETA amendments along these lines, but the US has balked at anything outside its model BIT and insists on the use of private arbitrators as in NAFTA and the recently drafted TPP. After an exhaustive review of the US "model bilateral investment treaty" with numerous inputs from critics and supporters, the 2012 model BIT only contained slight revisions of the 2004 version. Most importantly, the disputes resolution model was left intact, and this has continued through subsequent negotiations including the TPP (Di Rosa, 2012). Policy analysts suggest the EU proposal is not really a court and does not differ from the arbitration model which is the source of the constraint on sovereignty and democratic governance (Butler, 2016).

UNCTAD has lead efforts to revise ISDS provisions to address many of the concerns raised by critics, including increasing transparency and guaranteeing a legitimate right to regulate. Reforms would promote alternative disputes resolution, provide legal assistance to developing states, limit those investors and claims subject to arbitration, introduce appeals procedures and third party participation and eventually create a transnational investment court system to address concerns respecting the closed and costly nature of the private arbitration system (UNCTAD 2013). Recent agreements have featured adjustments to assuage concerns about impositions on sovereignty; these include "a wide range of exceptions, interpretations and detailed provisions designed to protect the exercise of authority by contracting governments, with the aim of protecting public policies regulating commercial transactions, consumer protection, environmental and health standards and the protection of human rights" (de Mestral, 2015, p. 2).

But critics remain unconvinced, suggesting that the right of investors to sue states for losses of investment values could have a detrimental effect on environment, worker rights, and regulatory flexibility. They oppose the creation of arbitral councils which would sit in judgement above and apart from governments. Legal analysts suggest that the phrasing in the CETA texts for instance, which guarantees a right to regulate subject to provisions of the agreement, does not ensure that a disputes process won't be used to overturn regulations enacted by a democratically elected government.

> "The legal analysis of this approach is extremely clear and simple: it does nothing to establish or enhance a right to regulate. Rather, it does the exact opposite: it makes it clear that the right to regulate is fully subject to the Agreement. All exercises of the right to regulate, at both the federal and provincial levels, must conform to the agreement. Contrary to what is often implied by referring to a 'right to regulate' provision, this approach in fact prioritizes conformity with treaty obligations over the right to regulate." (Bernasconi-Osterwalderm & Mann, 2014, p. 2)

For critics, this makes clear that the treaty obligations would make a "right to regulate" meaningless. Treaty provisions would take precedence over regulatory independence at the national as well as subnational levels, with ongoing implications for the balance of powers between levels of government. As to the final proposed compromise, social and union groups unequivocally see it as inadequate: "this cosmetic exercise will resolve none of the fundamental concerns about granting special privileges for foreign investors, undermining national laws and bypassing domestic courts" (EPSU, 2015).

Furthermore, states have not made strong use of provisions to influence the system and certainly exit from such treaties may be prohibitively costly for most states; and treaty provisions in many cases allow for extended application for a decade or more past termination (Gordon & Pohl, 2015). Hence the system stays in place across changes in governments and as with Australia (Thurbon, 2015, p. 466) withdrawal from ISDS provisions isn't sustained over time. While more claims are settled in favour of states, when taken together with settlements, investors may well succeed in more instances, though the secrecy respecting awards and settlements makes a clear determination impossible.

Investors certainly acknowledge that the new transnational rules can thwart state efforts to escape penalties. Investors speak positively about using arbitration not only to redress losses but to provide another means to bolster investment value and offset risks. Legal observers in the arbitration community certainly regard the arbitration regime as effective, especially as the Washington and New York Convention arbitration rules are now enforced by courts in investment exporting states. This system ensures that countries, despite efforts, cannot escape their obligation to pay awarded damages (Olivet & Eberhardt, 2012). While supporters are correct that ISDS by itself cannot impose policy requirements on states, some concede that there will be real constraints on policy choices. "It is true to the extent that ISDS clauses might indirectly influence governments when considering law changes that might affect foreign investors. Governments will need to consider the equitable treatment of investors from countries with whom they have ISDS arrangements—essentially ISDS points out the potential financial consequences of introducing laws that are clearly discriminatory and unfair" (Export New Zealand, 2015).

## 7. Conclusion: Plutocratic Transnational Governance

Hence the investor state disputes settlement system has become something more than an external constraint on the competition state. It has morphed instead into a forceful transnational system, a global governance complex implemented at the behest of international investors who are its primary beneficiaries. While states have the prerogative to sign binding international commitments in such areas, addition of investor states arbitration mechanisms permits private parties to challenge a wide range of domestic policy decisions in ways which may challenge sovereignty and democratic accountability. David Schneiderman (2008) suggests the ISDS regime has produced a form of transnational constitutionalism which limits states and diminishes the scope for democratic policy making. It has at least altered the environment for policy making as states anticipate and adjust to avoid costly penalties. Proposals for reform may potentially correct some of the imbalances if they increase transparency, limit frivolous claims, and seriously protect a right to regulate. So far analysts are divided on the potential. And the US unwillingness to move significantly from its model BIT towards the EU proposal for a transnational investment court to replace ad hoc private arbitration leaves some doubt. Certainly the provisions in the recently concluded TPP seem primarily similar to those in the US model BIT, in NAFTA and previous US treaties which are restrictive of state policy.

The system is also only one of a range of transnational innovations undertaken over the past 30 plus years, including those in intellectual property protection, regulation harmonization, trade in goods and services, etc. which have created a multifaceted transnational system, a web from which states can scarcely extricate themselves. The investment arbitration system reflects the emergence of a multifaceted "global governance complex" driven primarily by the interests of a transnational pluralistic plutocracy of global firms and lobbyists, (countered only partially by transnational civil society actors), which renders liberal democratic accountability increasingly elusive or even chimerical and augments the power of the wealthy in domestic politics. As Stephen Clarkson points out, for small states at least, this new global governance paradigm via investment and other regimes creates a democratic deficit as governments lose the ability to respond to citizens' wishes (Clarkson, 2003, pp. 152, 162). Liberal democracies may become "pluralistic plutocracies" where electoral competition becomes less meaningful in economic and related realms—a form of "post-democracy" which helps explain the narrowing of meaningful political choice in many though not all policy areas.

This essay has focussed on the ISDS system, which may impose new limits on states. Other agreements in areas like intellectual property require states to reign in citizens also on behalf of the transnational plutocratic interests which warrant further analysis in future studies. This is an example of the "paradox of the competition state". Far from eroding states, many measures on security, intellectual property and other new economy themes force states to coerce their population to conform to transnational norms, reduce competition and choice for consumers, and restrain individual liberties via intrusive, punitive enforcement mechanisms. The

implications for theories of the democratic state remain to be investigated across the plethora of multinational, regional, and bilateral investment, trade and services agreements which are transforming global governance.

**Conflict of Interests**

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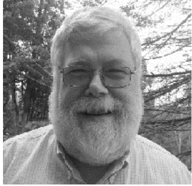
## About the Author



**Robert Finbow**, Professor of Political Science at Dalhousie University, received his doctorate from the London School of Economics. A recipient of SSHRC and Fulbright fellowships, he has published on trade, labour and environmental policies in NAFTA and the EU, comparative political cultures, social policy in North America and regionalism in Atlantic Canada. His recent research has been on European Union social and trade policy, and the Canada–European Economic and Trade Agreement, especially the implications for social policy and investment.

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Article

# Representation and Governance in International Organizations

David P. Rapkin [1], Jonathan R. Strand [2,*] and Michael W. Trevathan [2]

[1] Department of Political Science, University of Nebraska, Lincoln, NE 68588-0328, USA; E-Mail: dprapkin@gmail.com
[2] Department of Political Science, University of Nevada, Las Vegas, NV 89154-5029, USA;
E-Mails: strand@unlv.nevada.edu (J.R.S.); trevatha@unlv.nevada.edu (M.W.T.)

* Corresponding author

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**Abstract**
What does representation mean when applied to international organizations? While many scholars working on normative questions related to global governance often make use of the concept of representation, few have addressed specifics of applying the concept to the rules and practices by which IOs operate. This article examines representation as a fundamental, albeit often neglected, norm of governance which, if perceived to be deficient or unfair, can interfere with other components of governance, as well as with performance of an organization's core tasks by undermining legitimacy. We argue that the concept of representation has been neglected in the ongoing debates about good governance and democratic deficits within IOs. We aim to correct this by drawing on insights from normative political theory considerations of representation. The article then applies theoretical aspects of representation to the governance of the International Monetary Fund. We determine that subjecting IOs to this kind of conceptual scrutiny highlights important deficiencies in representational practices in global politics. Finally, our conclusion argues scholars of global governance need to address the normative and empirical implications of conceptualizing representation at the supranational level.

**Keywords**
governance; international organizations; representation; voting

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## 1. Introduction

International organizations (IOs) utilize various rules and practices that govern specific internal functions such as making decisions on lending projects. While these rules can be manipulated by powerful states and bypassed for political expediency, they are critical components to an IO's legitimacy. At times, IOs have faced severe criticism and perceptions of bias, unfairness, rigidity and other sources of dissatisfaction with internal governance. The internal governance of an IO involves such matters as how an organization aggregates the preferences of its hundreds of members to make and implement collective decisions. A lot of attention has focused on whether or not the internal governance of an IO meets certain standards associated with "good governance." This literature has highlighted the real and perceived shortcomings of internal governance using concepts such as democracy, legitimacy, accountability, transparency and, occasionally, representation (Grant & Keohane, 2005; Woods, 1999, 2000). Democracy, the broadest of these terms, is said to require legitimacy. Accountability, which is also seen as necessary to both democracy and legitimacy, is usually thought to require a large measure of transparency. Representation is sometimes thrown in for good measure, but rarely receives the close scrutiny afforded to the other properties. Whereas these properties

are rightly conceived as complex, multidimensional and worthy of conceptual explication, representation is usually considered as if it were a plain-language term, with a self-evident meaning, and therefore not in need of systematic conceptualization.

When scholars address representation in IOs, they may refer to the representation of civil society or the representation of states. We concentrate our analysis on the representation of states, although much of what we consider potentially applies to civil society actors too.[1] We start from the premise that representation is a fundamental norm of IOs' governance which, if perceived by enough members to be deficient or unfair, can interfere with the other components of governance, as well as with the performance of core tasks. Flawed representation undermines process legitimacy, i.e., the belief of members that the procedures by which the organization's rules and norms are made and enforced are fair, consistent, and thereby deserving of compliance. If representation is seen as flawed, biased and illegitimate, then the rest of the IO's decisions are likely to be regarded as the outcome of a process that itself lacks legitimacy and is not worthy of *prima facie* compliance. As Plotke (1997, p. 27) emphatically puts it (in a non-IO context), "representation is democracy," in the sense that, "it is crucial in constituting democratic practices." Without perceptions of fair representation, governance reforms to improve accountability or democratic decision-making are suspect, and decisions relating to effective performance of functional missions may also be viewed as inherently biased.

Before addressing the state of representation in IOs we first examine how the concept of representation has developed in the literature and how application of this concept might illuminate the representational practices of IOs. Conceptually, we posit that IO decision-making comprises a two-stage process. In the first stage members are assigned respective voices in the form of vote(s). The second stage consists of the translation of votes into seats on an IO's apex body. Although this is not a hard-and-fast distinction, first-stage decisions and procedures tend to be more formal, governed by codified instruments such as treaties. Second-stage decision-making is more opaque and tacit, based on norms and informal practices.

We find that two broad connotations emerge from representation that are especially relevant to IOs. One construes representation as something akin to a principal-agent (PA) relationship in which most issues revolve around some aspect of how the principal is represented by the agent in legislative bodies. The other connotation, descriptive (or mirror) representation, is instead concerned with how closely the composition of a legislative body reflects the relevant characteristics (e.g., size, wealth, race, class, gender) of the polity it serves. For example, regionalism is a central organizing principle of the UN System and used to help determine how governments are selected for non-permanent seats on the Security Council.

These two meanings of representation are not readily melded into a single concept, but each has some application to different parts of the complex array of the internal governance of IOs. More specifically, descriptive representation fits well the first-stage processes when member states' votes are allocated, while PA-type representation can be separately applied to the second-stage processes in which members are represented in an IO's apex body.[2] This article demonstrates that descriptive representation describes only the first-stage representation in IOs. Descriptive representation is not able to account for the wide-variety of ways IOs utilize the outputs from formal, first-stage determination of representation. Future research utilizing the concept of representation in IOs needs to identify this disjuncture between the two forms of representation.

The next section surveys the primary meanings assigned to the concept of representation with reference to IOs. Representation, in our view, is an evolving norm that has been understudied by global governance scholars. Following this we examine the numerous principles IOs have employed to implement descriptive representation. We then apply insights from the conceptual discussion to a single IO: the International Monetary Fund (IMF). Our conclusion points toward areas of future research and challenges others to more closely examine representation in international relations.

## 2. Representation

Over the long period stretching from the classical Greek city-states to seventeenth century Europe, the idea that representative government could substitute for direct forms of democratic participation was not widely regarded as workable or legitimate. Representation, as a way to overcome the limitations posed by scale and distance, was thought to be a decidedly second-best alternative that is unable to satisfy democra-

[1] NGOs and civil society organizations claim a representational role, often via informal venues. These forms of nonterritorial representation will have to be accounted for and incorporated into more state-centric models. For now, however, we choose to work on the conceptual foundations of representation among sovereign states; see Warren and Castiglione (2004). A case can also be made for providing representation to transnational corporations. Other candidates for enfranchisement in IOs include the world's "major cultures, religions, and civilizations" (Thakur, 1999, p. 3).

[2] Representation on an apex body involves a process that selects members from a more general body to the most important decision-making body and is used by most major IOs; those with weighted voting systems and those with one-country, one-vote rules.

cy's need for political equality (Dahl, 1989).[3] But the ascendance of the much larger nation-state form of political organization strained the classical ideal of direct democracy to an extent that, by the early nineteenth century, "it was obvious and unarguable that democracy must be representative" (Dahl, 1989, p. 29). By the end of the 20th century attitudes toward representation had changed 180 degrees: it was now regarded by its advocates as the source of the "moral distinctiveness of modern democracy, and the sign of its superiority to direct democracy" (Kateb, 1992, pp. 36-56). With the proliferation of IOs in the latter half of the twentieth century, representational issues in IOs have joined the longstanding debates over representation in democratic polities, thereby extending the search for ways to overcome the democracy-dampening effects of (global) scale and distance, and to apply, "the logic of equality to a large-scale political system" (Dahl, 1989, p. 215). As noted above, here we are concerned with representation of states in IOs and not with civil society as IOs have formal rules for the representation of states.

*2.1. Representation in Legislative Bodies*

Theories of representation have appropriately focused on the relationship between representatives and the constituents they represent in legislative bodies, and have asked questions, such as, how well are citizens represented by those chosen as their representatives? Do representatives have the *a priori* authorization of those they represent? What lines of accountability are drawn to ensure that the represented can replace those who do not provide satisfactory representation? Given the numerous avenues of investigation it is no surprise that when the concept of representation is scrutinized, authors add operative adjectives to label specific connotations (Pollak, 2007, pp. 88-89).

Thus, in what Pitkin (1967, p. 145) terms the "central classic controversy," advocates of the *delegate* interpretation contend that representatives are obligated to act so as to reflect as closely as possible the preferences of those they represent.[4] The opposing *trustee* form of representation views the representative's ideal role as requiring that she exercise her own independent judgment in service of the collectivity's broader interests rather than the narrower preferences or opinions of particular constituents. Another distinction is whether we conceive of representation in terms of the activities (deliberation, decision-making, lawmaking) undertaken by representatives or as representatives collectively "standing for" those they represent either symbolically or in terms of one possible connotation of descriptive representation (Pitkin, 1967).

This emphasis on representation as a kind of principal–agent problem, i.e., on the proper relationship between the representative and the represented,[5] provides interesting and valuable insights so long as we are concerned with questions of how representation operates in legislative bodies. But it is not as easily applied to other aspects of representation in IOs. Descriptive representation is more than merely the mirroring of the identity and attributes of the represented in the representative. Here we are not so much concerned with the relationship between a particular country (or its citizens) and the individuals that represent it in a given IO. We are instead more interested in the terms on which member states participate in IOs that are charged with making and implementing collective decisions. To what extent do the institution's procedures impact the distribution of relevant attributes and resources across its members? Do these governance processes encourage or constrain the ability of a particular member's (or subset of members') delegation to articulate its preferences and to influence outcomes? Answers to these questions get at the heart of recent debates about voice reforms in IOs and are not readily answered from a strictly PA approach. PA-type analyses of representation in IOs can be fruitful but they are limited by the fact IOs are not legislative bodies. There is a disconnection between PA-type concepts of representation and their application to IOs when we consider what Dovi (2006, p. 2) terms the four key components of representation:

1. Some party that is representing;
2. Some party that is being represented;
3. Something that is being represented (opinions, perspectives, interests);

[3] On consideration of applying democratic principles to IOs in general, see Dahl (1999) and Keohane, Macedo and Moravcsik (2009). While they do not devote much space to questions of *representation* in IOs, the authors demonstrate that domestic democracy is not necessarily weakened by the activities of multilateral institutions; also see Rabkin (1998).

[4] For modern applications, see Eulau and Karps (1977), Young (2000), and Mansbridge (2003). There are also recent studies that conceptualize aspects of representation in IOs. Kuper (2004) extends to IOs the notion of representation as responsiveness; in this formulation, responsive representation results from the activities of two types of agencies—accountability and advocacy—that aggregate and connect constituents' preferences to IO decision mechanisms. Rehfeld (2006) attempts a general theory of representation that addresses another problem that arises in IOs: how to regard the representativeness of representatives who have come to their position by other than democratic means.

[5] We use the terms *principal* and *agent* in a loose sense to categorize a family of approaches to representation. For the application of principal-agent theory to IOs, which posits member states as principals and the international organization as agent, see the selections in Hawkins, Lake, Nielson and Tierney (2006), especially Broz and Hawes (2006) and Gould (2006); see also Brown (2010).

4. Political context, the setting within which the activity of representation is taking place.

First note that the party that is represented (component 2) differs between the traditional conception of representation and representation within IOs. The former denotation puts individual citizens (or constituencies formed of citizens) in this category, while the latter denotes territorial states as the represented parties. To construe representation in the principal-agent form involves looking at components 1 and 2 and the relationship between them. Institutional context—including such structural features as methods of forming constituencies, proportional representation, one country/one vote, weighted voting, special majorities—is relevant to all varieties of representation. Most of the literature on representation entails consideration of all four components, with an emphasis on 1 and 2. If, however, we are interested in representation in IOs, component 1 becomes less important and attention is shifted to how components 2 and 3 interact with component 4. Despite the limitations of PA-type approaches, we are not ready to throw the baby out with the bathwater since they may prove to have utility in consideration of second-stage representation.

In sum, we contend that what Pitkin (1967) called descriptive representation is more suitable to questions of first-stage representation in IOs while PA-type analyses may have merit in second-stage considerations of representation.

### *2.2. Descriptive Representation*

In *descriptive* representation, "a representative body is distinguished by an accurate correspondence or resemblance to what it represents, by reflecting without distortion" (Pitkin, 1967, p. 60). Knight's (2002, p. 24) approach to the representativeness of the UN Security Council as an "apex body"[6] designates what is meant by descriptive representation: "For an apex body to be representative of the broader membership in an organization it must portray the values of the larger group; present the ideas or views of that group; be typical of that group's geographical make-up, population base, and political views; and act as a delegate of that group."

The descriptive representativeness of an IO depends on how the characteristics Knight proposes are filtered through its system of governance. Rogowski (1981, pp. 398-399) refers to this as an institution's *agreed social decision function*. How accurately do the prevailing governance procedures of an IO produce a kind of "picture or map or mirror or sample" (Pitkin, 1967, p. 75)? For any given member, is its representation comparable to that of other members of like size, contributions, or attributes? The representational criteria Rogowski (1981) suggests tap into what is meant by descriptive representation in relation to how closely an IO reflects the characteristics of its member states. Is a given member represented fairly in the sense, "that its actual power corresponds to its ostensible power" under these rules? Are its preferences equally weighted, i.e., do they "count" the same as any other member's? And, do members of like capacities enjoy equally powerful representation in that their preferences are equally likely to influence outcomes. The first of these, fairness (as indicated by correspondence of actual and ostensible power) is directly pertinent to the weighted voting systems used by many IOs.

Cogan's (2009, p. 219) notion of an "[o]perational constitution—the combination of formal and informal rules that together regulate how international agreements are made and applied," connotes much the same meaning as Rogowski's agreed social decision function. In Cogan's formulation, representation is implemented in several constitutive processes of IOs: "The election of states to exclusive decision-making bodies; the relative voting weights assigned to states; the election and appointment of individuals of particular nationalities to high- and mid-level offices in IOs; and the de facto devolution of appointment authority for such offices to particular states or groups of states." Assessments of whether a member (or group of members) of a particular IO is fairly represented; or over- or under-represented; or how accurately an IO in the aggregate "mirrors" the distribution of relative attributes across its members all depend on the prior understanding of that IO's institutional context.

Our brief survey of the literature on representation reveals two main connotations that are useful in application to IOs. Most conceptions of representation focus on the relationship between the individual representative and the constituents she represents. We will suggest a role for this approach in application to the second stage of IO decision making. The other is descriptive representation, which focuses on the extent to which an IO reflects the composition of the international system within which it operates. This variant of the concept provides a better fit with what most observers mean when referring to representation in IOs. Descriptive representation can be based on a variety of principles and is a useful concept for assessing how closely an IO follows its specified representational principles in the process that determines the voice of members.

## 3. Representational Principles for International Organizations

Some standards are needed to assess descriptive representation to provide benchmarks against which the

[6] Additionally, the Executive Boards of the IMF and World Bank can be thought of as apex bodies in relation to the membership of these IOs.

terms of members' participation can be indexed and compared. Here it is useful to think in terms of a combination of representational principles (Underhill, 2007) because it is unlikely that any one, serving by itself, will capture the complexities of institutional context in IOs. What principles are used in IOs and how might they be augmented by new ones? In other words, representational decisions are a fundamental part of how IOs organize members (Cox & Jacobson, 1974, p. 9). We consider geopolitical representation, regional representation, the role of population in determining representation, whether votes are weighted or unweighted, the capacity of members to contribute to an IO's missions, representation of non-state actors, and the representation of weaker members.

*3.1. Geopolitical Representation*

In the UN Security Council (UNSC) context, Knight (2002, p. 25) makes the case for *geopolitical representation*, defined in terms of more balanced participation along a North-South axis, and requiring that more permanent or non-permanent UNSC seats be assigned to developing countries. Much the same cleavage prevails in other IOs, such as in the World Bank's IDA where there is a division of seats between the wealthier shareholders who do not use facilities and their poorer counterparts who do; this has been a long-standing fault line in global governance. This is the key representation grievance contested in many IOs involved in development policy and reform proposals typically call for providing more voice for developing countries *vis-à-vis* their lender counterparts. The World Bank's recent voice reforms, for instance, resulted in major changes in the absolute number of votes for many emerging market economies, although this did not result in shifting the relative shares of votes in their favor (Strand & Trevathan, 2016; Vestergaard & Wade, 2013). In sum, there are long-established practices using geopolitical factors in descriptive representation.

*3.2. Regional Representation*

Gaining legitimacy during a period of widespread decolonization, the representation of geographical regions has been well-entrenched in the post-WWII international order, particularly in the UN. This principle overlaps considerably with Knight's geopolitical variant. An example of dissent over regional representation is the near consensus among those who follow the IMF that Europe is significantly over-represented in terms of both votes and Executive Board seats at the expense of emerging market governments in Asia and Africa (Rapkin & Strand, 2005). Moreover, this assessment of regional imbalances holds for virtually any representational principles one might apply. Others who argue that regions are of diminished importance to representation point out that regions are malleable entities and that regionalism is a subjective construct based on sentiment as much or more as on geography. From this standpoint, questions arise about whether geographic regions, especially outside of Europe, are actually a "unit of cohesion" (Thakur, 1999, p. 9) or "simply a convenient way of organizing the world for electoral purposes" (Agam, 1999, p. 42). Regardless of which view one takes, there are examples of IOs using regional distribution rules. The regional development banks (RDBs) take geopolitical representation into account as they bifurcate membership into regional and non-regional members, often with complex rules on the relative shares held by each (Strand, 2014). For instance, in the Inter-American Development Bank, the U.S. and Canada are guaranteed a minimum share of votes (30 percent and 4 percent respectively) and regional borrowers are guaranteed a collective share of 50.005 percent (Strand, 2003).

*3.3. One-Country/One-Vote*

The sovereign equality of states principle is employed in some IOs, such as the UN General Assembly (UNGA) and the World Trade Organization (WTO). The general criticism of this representational principle, often raised in reference to the UNGA, is that the larger and more powerful members will not cede decisive power-over-outcomes to smaller, less powerful members, and that the former therefore make certain that no matter of any consequence is determined by the one-country/one-vote rule. For other IOs, there is not universal reliance upon a system of weighted voting as many consider it too closely resembling the shareholder model characteristic of corporate governance. Hence, with a nod toward the sovereign equality of states, a number of "basic votes" are allocated to each member. Basic votes can be viewed as contributing to minority representation (see below) but for the most part they are only symbolically important in vote allocation.

*3.4. Representation by Population*

Another principle is the familiar and conceptually simple *one-person/one-vote rule*, behind which stands much liberal democratic practice. Proposals to implement this principle internationally have predictably run aground of great powers' unwillingness to concede majority control in IOs to more populous "lesser" powers. In recent years, however, the emergence of more powerful and highly populated China and India blur this distinction in IOs like the IMF and World Bank. Population, however, is rarely mentioned in discussions of IMF and World Bank reforms. Indeed, proposals to take population into account in the determination of votes have been dismissed on grounds that population is not relevant to their missions. There remains, however, a

modicum of support for inclusion of population (Bryant, 2008, Appendix 1). In the UN, various proposals have been floated to weight votes using population as at least one factor to determine representation (Schwartzberg, 2003; Strand & Rapkin, 2011). Note that using population to weight votes moves representation by population away from the principle of equality of (state) voters. For IOs to claim any sort of democratic basis it may well prove difficult to continue excluding population, as a strong case can be made that decision-making in the most important IOs should pay heed to the size of a country's population (Mirakhor & Zaidi, 2006).[7]

### 3.5. Weighted Voting

Weighted voting is a dominant representational principle shaping the distribution of votes in numerous IOs. Borrowed from methods of private corporate governance, it is also known as the shareholder model since each owner of X-number of shares of a firm's stock controls a corresponding number (X) of votes. The basis for weighting the number of shares held is relatively noncontroversial in the corporate governance case, but the shareholder model becomes more problematic when applied to governance of IOs. The fundamental question is what features of members should be used to weight votes? IOs that use weighted voting employ indicators of relative weight in the world economy, as indicated by shares of world product, trade, and reserves, but there are other factors determining the final outcomes of the process (e.g., basic votes, regional distribution rules, political pressure by more powerful governments). Whether these criteria continue to accurately represent the relative importance of countries in the 21st century is a contested question. The selection of seemingly objective economic criteria is anything but simple or apolitical, as variables as simple as national product can be operationalized in many ways and the choice of measure has voting share distributional consequences. Changes in how the indicators are operationalized can significantly affect the relative distribution of votes. In sum, weighted voting is a common way to account for perceived or real imbalances in the relative importance of members, but there is no truly impartial way to determine relative shares and currently used processes are wrought with political maneuvering by governments looking to manipulate their relative position (Rapkin & Strand, 2006).

### 3.6. Capacity Representation

Capacity representation refers to the principle that those members with the greatest capacity to contribute to the success of the organization's primary missions are entitled to greater representation because they perform "differential responsibilities" (Cogan, 2009, p. 312). This functionalist principle can be interpreted as a criterion for allocation of seats, e.g., those UN members with the greatest capacity to contribute to peace and security are deserving of seats in the UNSC (Knight, 2002, pp. 26-27). The same kind of standard often arises in the context of what types of capacities should be included in a weighted voting system. In other words, how should capacity be defined and operationalized? Capacity to contribute may vary greatly from one IO to another as the missions of IOs differ as well as what it means to contribute resources in support of an IO's mission (e.g., financial contributions, technical assistance, peacekeeping personnel, etc.).

### 3.7. Stakeholder Representation

Stakeholder representation refers to the formation of constituencies among members who share interests or functionally-defined roles. This corporatist approach to representation is easiest to implement with multiple majority decision rules. In the Global Environmental Facility, for example, if a consensus decision encompassing donor and recipient countries cannot be reached, the decision rule defaults to a double majority mechanism requiring separate 60 percent majorities of the votes of both donors and recipients. The International Seabed Authority extends further the logic of corporatist representation: successful initiatives must gain the majority approval of four groups of stakeholders: consumers, investors, net exporters, and developing countries. Different kinds of representational problems arise from the increasing number of claims of stakeholder status made by nongovernmental organizations (NGOs).[8] Yet another example of stakeholder representation is found in the International Coffee Organization where members are separated into coffee importers and coffee exporters with weighted voting within each group and decisions requiring support of both importers and exporters. Extending the concept of stakeholder beyond representatives of governments, to perhaps corporations and civil society organizations, is seen by some as one way to augment global democracy. Such a broad view of stakeholder interests, however, may attenuate the willingness of states to delegate authority to IOs and representation is likely to remain focused on the state (Zürn & Walter-Drop, 2011, p. 275.). Furthermore, non-state stakeholders in

[7] For a quite different general view on the diminished importance of population, see McNicoll's (1999, pp. 411-412) useful discussion of what he terms "demographic inconsequence."

[8] See Kahler (2004, pp. 150-154) for a discussion of whether providing representation to causes already likely to be supported by the national governments of wealthier members but opposed by many developing countries provides a kind of representational "double counting."

global governance present an assortment of accountability concerns (Grant & Keohane, 2005).

*3.8. Minority Representation*

In descriptive representation there are often concerns about the representation of minority positions which may lead to efforts "to prevent possible tyranny of the majority," by "strengthen[ing] representation of the numerically or otherwise weak and to grant them a formal role in decision-making" (Underhill, 2007, p. 8).[9] Intersecting with the concept of minority representation, as well as with stakeholder representation, is the idea that representation should be provided to those who are most affected by the policies resulting from the decisions of the majority. Protection of minority shareholders' rights is a best-practice benchmark of corporate governance that could also be applied in IOs, primarily by improving accountability and transparency. Many IOs have implemented accountability mechanisms owing in part to these concerns. In decision-making, there have been concrete measures proposed to increase minority representation in the executive boards of the Bretton Woods institutions including setting up a committee comprised of minority (debtor) executive directors to audit the activities of the majority and replacing the opaque consensual decision-making process with recorded votes.[10] Moreover, the World Bank recently expanded the number of voting groups dedicated to African governments in order to increase their representation.

## 4. Implications of Representative Principles

Consideration of representational principles reveals two main connotations that are useful in application to IOs. One focuses on the relationship between the individual representative and the constituents she represents (as reflected in the principal–agent formulation applied to second-stage representation). The other is first-stage, descriptive representation, which focuses on the extent to which an IO reflects the configuration of the international system within which it operates. For many IOs where decisions are made on how to allocate scarce resources, some form of weighted voting seems necessary to provide representation that accommodates disparities in size, power, and systemic importance of states and that is capable of adapting to changes in this composition. In this context, voting systems amount to ongoing experiments in institutional design.

The above principles are manifest in the representation systems of IOs but there is no systematic, nor in our view straightforward, way to mesh them into a single set of procedures to represent states in IOs. Put differently, there is no ideal system of representation that is technically superior and that all members of IOs agree upon. Not only will any such system be politicized to some degree, it will also be a hybrid in so far as it will necessarily consist of some mix of the above representational principles. This leaves open the possibility that the mix will be a kind of hodge-podge, resulting from lowest-common-denominator compromises and from the preferences of the most powerful members. Nevertheless, we next turn to a brief sketch of key rules and practices that constitute the two forms of representation to a single institutional context: the IMF.[11]

*4.1. Application of Representation Principles*

In order to focus our discussion, we first examine vote determination in the IMF. The authority of the IMF has waxed and waned over the last several decades. From a pivotal position in the development discourse as purveyor of the Washington Consensus and enforcer of neoliberalism, the Fund's influence diminished in the face of widespread dissatisfaction with its performance, especially since meeting its "Stalingrad" in the form of the East Asian financial crisis in the late 1990's. By the middle of the first decade of the 21st century, numerous journalistic articles, academic papers, and NGO reports described an IMF wracked by crises of confidence, identity, credibility, budget, role or purpose, and/or legitimacy, some of which, singly or in combination, were said to constitute an existential crisis. Its outstanding loans shrank, debtor countries paid their IMF loans early, and the number of borrowers seeking new loans diminished. During the same period, major economies in East Asia began to explore institutional alternatives by entering into currency swap arrangements that operate with only modest input from the IMF. The institution came to be described as obsolete, adrift, groping for a mission, and sliding into deserved irrelevance (Griesgraber, 2009; Seabrooke, 2007; Torres, 2007). Then the financial meltdown of 2007–2008 restored the perceived need for the IMF and its crisis management role (Broome, 2010). Resources were again appropriated for the IMF and bailouts of developing countries on the wrong end of payments imbalances proceeded.

Some of the IMF's problems are attributable to changes in the world economy, particularly the availability of alternative sources of finance provided by the rapid expansion of private capital markets, as well as

[9] See Guinier (1994) and Young (2000) for advocacy of special arrangements to provide minority representation. Phillips (2003) makes a similar argument regarding the exclusion of women from systems of representation.

[10] These ideas have been suggested by Marfan (2001). For discussions of Marfan's work, see Kapur and Naim (2005).

[11] For more detailed consideration of IMF rules and practices, see Strand (2014), Rapkin and Strand (2005), and Bryant (2008).

the emergence of nascent regional and global financial facilities. Yet another source of the Fund's difficulties stems from perceptions of bias, unfairness, rigidity and other sources of dissatisfaction with the IMF's internal governance, that is, how the organization aggregates the preferences of its members to make and implement collective decisions. Most often faulted on this score are perceived shortcomings in democracy, legitimacy, accountability, transparency, and representation.

The IMF is a case where some studies focus only on first-stage concerns while others highlight second-stage issues of representation. While space does not allow for a comparative analysis, we think a focus on the IMF helps illustrate why our distinction between stages of representation is warranted. Applying notions of representation to the IMF is complicated by several features of the IO's governance. First, the representation of members unfolds across two separate, but linked, stages. *First-stage representation* is reflected in the IMF's complex system of weighted voting, wherein the number of weighted votes assigned to each member is (nearly) proportional to its quota which, in turn, is supposed to be a function of members' relative size in the world economy. The methods by which quotas are determined are in principle objective and replicable, though in practice the process has been opaque at various junctures and has frequently been subject to political interference; perhaps akin to how the voting rights and representation of certain individuals in domestic political systems has been historically disrupted by powerful political forces. Second, first-stage representation provides inputs to the construction of second-stage representation in the IMF's Executive Board (EB). Over the past several years, reforms to IMF governance languished largely due to inaction by the U.S. The reforms include central aspects of representation of states and highlight how concerns about how states are represented in an IO can undermine the ability of an IO to carry out its mandates (Seabrooke, 2007). Before moving on, we note that consideration of the two stages of representation applies to other IOs, not just those utilizing weighted voting systems. Most IOs use some form process to select members from a more general body to a smaller body with a lot of authority.

### 4.2. First Stage Representation: Determination of Voting Shares

IMF voting shares are derived from IMF quotas; quotas are often referred to as the "building blocks" of IMF governance and serve multiple purposes in the institution's internal governance regime, including influencing its representation in the EB. Quotas themselves are supposed to reflect countries' relative weight in the international economy, as determined by a set of variables.

General Quota Reviews are undertaken at five-year intervals with the primary purpose of adjusting representation to reflect changes in members' relative positions in the world economy, as well as accommodating entry of new members, and making various ad hoc adjustments. At least in principle then, representation of governments in the IMF is designed to be flexible and responsive to shifts in the distribution of economic power among its members. To be sure, political leverage has been exercised by the major creditors at various points in the vote determination process. Moreover, reasonable observers disagree about whether the quota regime has inflated the quotas of the developed countries at expense of debtor countries' quotas. This issue entails consideration of the effects of the choice of variables, weights, and formulas used to determine quotas.

Until 2008, quotas were derived from, but not strictly determined by, a complex system of five formulas based on GDP, the values and variability of receipts (exports), payments (imports), and international reserves. We concur with Bryant's (2008, p. 2) contention that, "adopting a better formula [consisting of the variables chosen, their measurement, and how they are weighted] is the single most important requirement for successful governance reform for the IMF." Given their building block function, it is especially important that quotas be determined by a process that is regarded as transparent and fair (Bird & Rowlands, 2006). But no clear, persuasive rationale has ever been provided for the original set of variables included, the weights assigned to them, or the distributive outcomes produced. It is clear that these aspects of vote determination procedures were thoroughly politicized from the outset and that particular principles behind quotas were adopted out of political expediency. In 2008, reforms were introduced including the move to a single formula. The new formula includes GDP, a five-year moving average of payments and receipts, the variability of current receipts and capital flows, and reserves. Share of global product is comprised of PPP-GDP and market exchange rate GDP and the variable is weighted to account for half of members' quotas. Arguably, this simplified formula is an improvement over the previous configuration of five formulas, though it remains awkward and intricate.

The connection between these specific economic variables and the (descriptive) representation of governments in an IO is not obvious as there are other guiding factors (e.g., capacity to contribute or population) that arguably can be relevant. Principles not incorporated in IMF vote determination tell us a lot about how influential members and dominant ideas about representation lead to the selection of specific principles from a larger set of possible ways to determine representation.

One area in vote determination that suggests attention is paid to stakeholder and minority representation is the allocation of basic votes. In addition to the votes generated by the quota process, each member country

is assigned basic votes. Until recently, basic votes have amounted to an all-time low of barely more than two percent of the total votes, down from the original 11.3 percent agreed on in 1944 at Bretton Woods and from the historic high in 1958 of 15.6 percent. The 2008 reforms increased basic votes to 5.5 percent. Basic votes result in an increase in the relative voice of those members with very low quotas, but matter little in the representation of large vote holders.

In sum, the determination of voting shares as an exercise in defining the representation of governments in the IMF has, from its inception, often been subject to political manipulation and remains flawed in the ways described, especially the selection of variables, weights, and formula(s). Let us assume for the sake of argument that the vote determination process, the results of which we have termed first-stage representation, yields perfectly formed building blocks that are then used by members as they cast votes. How then does this distribution of votes translate into second stage representation on the EB? And, from a conceptual standpoint, what definition of representation best captures decision making itself?

### 4.3. Second Stage Representation: The Executive Board

*Second stage representation* involves selective representation whereby most members are aggregated into voting groups for representation on the EB. Members' votes—the product of first stage calculations—are used to form voting groups and to elect representative to the EB. These elected Executive Directors (EDs) decide on the substantive and procedural issues that comprise the business of the IMF. The EB and its constituencies use a consensual decision-making in which informal deliberations often take place outside the designated venues, votes are rarely taken, and representation therefore becomes murky and harder, if not impossible, to directly measure or replicate. Relatively, the determination of votes is transparent when compared to the more opaque and indirect representation on the EB. Descriptive representation does not shed light on second stage decision-making.

We first note that another feature of the IMF's that confounds efforts to assess representation is that there are several informal rules used by the Fund: "Formal rules are…enacted through accepted decision-making processes. Informal rules…do not pass through these processes" (Cogan, 2009, pp. 214-215). "Much of international decision making is done through informal processes…In no area is this more apparent than in the realm of agreements concerning international representation" (Cogan, 2009, p. 227). For example, it is impossible to assess the additional "representation" that has accrued to European members from the longstanding practice that the IMF Managing Director is always a European. Surely this informal convention regulating leadership selection has redounded to European advantage in manifold ways. Other informal practices have likewise had significant representational implications such as the selection of staff (Momani, 2007). Accordingly, in the balance of the article we narrow our focus to the formal operation of the EB.

In the EB, three formal rules have consequences for representation. First, the Fund requires the aggregate votes of each constituency be cast as a block. Second, elected EDs are not considered representatives. Third, the EB uses a variety of qualified majorities, which combined with weighted voting underscores the power of the larger vote holders. Formal rules and informal practices used by the EB have a variety of consequences for representation in the Fund. In this section we detail how these rules and practices distort representation principles.

The first response to questions about how first stage results plug into second stage decision making is, as Lombardi (2009, p. 16) puts it, that "[t]he distribution of quotas heavily affects the allocation of seats in the…executive board." At its inception, the 39 members of the IMF were served by twelve Executive Directors (EDs), one each for the five largest shareholders and seven others elected by voting groups. Each ED represented, on average, 3.25 members. In consequence of the many new post-colonial members, by 1964 the EB had been expanded to 20 seats (serving a total membership of 93, or 4.65 members each). Subsequent additions—Saudi Arabia (1978), China (1980), Russia and others (1990–1992)—increased the EB to twenty-four. The Board is currently comprised of seven single-member chairs: an ED appointed by each of the five largest shareholders, and one each from Saudi Arabia and Russia. EDs from the five largest shareholders are appointed for an indefinite term. Elected EDs serve a two-year term which, according to some observers, "is too short…to master all the complexities of IMF operations, to establish productive relations with management, the staff and fellow directors and to become fully effective" (Portugal, 2005, p. 79). The resulting differences in experience and learning are manifest in disparities in the ability, "to develop institutional memories and expertise in how to function in the IMF…to negotiate effectively and to shape the issues and decisions around which the consensus must form" (Bradley, 2006, p. 11).

Elected EDs generally are the members with the most votes within their voting groups. This artifact of group formation magnifies the distribution of votes that emerges from the first stage process so that creditors control EB seats. Not only is there is a strong tendency for the members with the most votes to control voting groups, but EDs cast the total voting weights held by all members in its voting group as a bloc.[12] The

[12] See Strand and Retzl (2016) for analysis of selective representation and voting groups in the World Bank.

absurdity of these arrangements from a representational standpoint is obvious when one considers that members of the same constituency have at times been engaged in conflict yet their votes were cast by their ED as a bloc. Once elected, an ED can only be replaced at the time of the next election. As Woods & Lombardi (2006, p. 10) point out, any borrower country strategy that relies on, "[j]oining forces with one another does not give them adequate voting power to set or influence the agenda." This constraint is made even more binding by the prohibition on splitting the votes of constituencies even when members within a constituency have major disagreements. As Martinez-Diaz (2009, p. 397) concludes "the voice and voting power of small shareholders is diluted in multi-country constituencies." Notably, recent reforms will change the current system of ED selection to one where all EDs will be elected. The fact that an ED has been elected by the other members in his voting group, according to Gianviti, (1999, p. 48), "does not create an obligation for him to defer to their views or to cast their votes in accordance with their instructions." These restrictive decision rules magnify the power over outcomes of lending countries while reducing that of borrowing countries. For those developing countries which are members of mixed constituencies their votes are in effect a kind of "dead wood," unable to be mobilized for building coalitions supportive of borrower interests with other developing countries. Worse yet, they can be deployed by the mixed constituency EDs in support of initiatives that favor creditor interests. In this fashion, the composition of the EB and its particular form of consensus decision making combine to strengthen the representation of developed countries beyond that already reflected in their sizeable majority of votes. As a corollary, whatever representation is indicated by developing country shares of votes is discounted and deeply distorted by the EB's consensual decision rules. Undercutting any notion of representation is the simple fact the current process does not provide mechanisms by which an elected ED can be held accountable to other members of his or her constituency.

IMF governance reforms agreed to in 2008 and 2010 tinkered with the representation of members but did not result in major realignments (Lesage, Debaere, Dierckx, & Vermeiren, 2013; Wade & Vestergaard, 2015).[13] Dissatisfaction with representational outcomes of the reforms contributed to the U.S. delay in approving the 2010 reforms. Changes to how representational principles are operationalized in the IMF that are part of the 2010 reforms were effectively blocked for years since the U.S. holds a de facto veto. Now that reforms are approved, we note that they primarily address first-stage representation and do little to ameliorate problems with second-stage representation in IMF.

[13] In the context of a legitimacy maintenance strategy, Guastaferro and Moschella (2012) consider the IMF's 2010 reforms as part of the Fund's "representative turn." In our context here, however, the reforms fail to fundamentally change the conceptual and practical divide between descriptive representation and second-stage representation.

**5. Conclusions**

We argue that the concept of descriptive representation fits reasonably well the process of first-stage representation in IOs. Though imperfect, the vote-determination process allows agreed upon representational principles to be operationalized to establish members' voices, influence, and votes as an exercise in representation. Descriptive representation, however, is not very useful to understanding second stage representation in IOs. Further analysis is needed to determine if there is a PA-type of representation that applies and helps to understand second-stage representation. Such an approach can analyze the relationship between the representative and her constituents and address traditional questions such as: how well does a representative represent her constituents: As a delegate or a trustee? Is she responsive to constituency preferences? Is she an effective advocate? Is she accountable (and to whom)? In theory such an approach to second stage representation could address these questions about representation in an IO setting. In our brief case on the IMF, however, the representational practices employed at the second-stage garbles the inputs from the first stage to a point where the concept may cease to be valuable. Application of our approach to other IOs can help shed light on how informal processes clash with formal arrangements as they do in the IMF.

In other words, what kind of representation:

- Exists when the IO itself eschews the term representation and expressly denies that EDs are representatives of their voting groups?
- Heightens the biased distribution of votes that emerges from the first stage determination process so that creditors control even more seats on the apex body?
- Allows EB matters to be decided in extra-institutional venues by subsets of members?
- Does not always permit small country representatives to play a role in formulation of their constituencies' policy positions?
- Licenses representatives (i.e., EDs) to ignore the interests of those who elected them by allowing representatives to cast constituents' own votes against their expressed preferences?
- Does not provide mechanisms by which EDs can be held accountable to voting group members for their performance?

The point is not that all decision-making tramples

on the norm of representation in the various ways described in the worst practices catalog we have assembled from the case on the IMF. But for those who are concerned with questions of whether global democracy is possible in IOs, the IMF case offers mixed lessons. Even if vote determination were perfectly aligned with members' expectations of what principles representation should be based on, the aggregation of members into voting groups stretches even the most elastic definition of representation into an unrecognizable set of processes that may undermine legitimacy of the IO. The IMF case illustrates the pathologies that can ensue when the second stage processes are divorced from descriptive representation.

We launched into this article to challenge others to deal more directly with representation in global governance. The two principal connotations of representation do fit IOs but in an inelegant, indeed awkward, way. The first stage is best construed as descriptive representation in which the objective is for the distribution of votes to mirror as closely as possible the core representation principles used by the IO. The second stage encompasses various formal and informal decision rules that use the first stage representational outputs to arrive at decisions. Instead of descriptive representation the more common view of representation involving principals and agents is germane to the operation of IOs. At present, these two formulations are simply juxtaposed and not easily melded into a single, comprehensive concept of representation. Despite the awkward fit, we did find that subjecting one IO to this kind of conceptual scrutiny highlights important deficiencies in its representational practices. We believe similar results will be found in other IOs. Clearly the concept of representation needs to be incorporated into the more general discourse about institutional design and the possibility of democratic values in IOs.

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The authors declare no conflict of interests.

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**About the Authors**

**David P. Rapkin** is emeritus associate professor of political science at the University of Nebraska. He has published widely on numerous topics in international political economy. His recent work includes *Transition Scenarios: China and the United States in the Twenty-First Century* with William R. Thompson (University of Chicago, 2013).

**Jonathan R. Strand** is professor of political science at the University of Nevada, Las Vegas. His research focuses on global economic governance and international relations of the Asia-Pacific region. His research has appeared in *World Development*, *Development and Change*, *Foreign Policy Analysis*, the *Journal of East Asian Studies* and elsewhere. In 2016 he co-edited, with Susan Park, *Global Economic Governance and the Development Practices of the Multilateral Development Banks* (Routledge).

**Michael W. Trevathan** is a Ph.D. student in the Department of Political Science at the University of Nevada, Las Vegas and is an instructor at the University of West Florida. His research interests include international political economy, global economic governance, natural resource politics, and the economic and security implications of great power transitions.

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Article

# Comparative Intergovernmental Politics: CETA Negotiations between Canada and the EU

Valerie J. D'Erman

Department of Political Science and European Studies Program, University of Victoria, Victoria, V8W 2Y2, Canada;
E-mail: vjderman@uvic.ca

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**Abstract**
The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union (EU) required long-term negotiations between two major polities of the industrialized world. During the negotiations, Canada acquiesced to the EU's demand that Canadian provinces participate directly in discussions, setting an important precedent in the dynamics of Canadian external trade. This paper examines the dynamics of intergovernmentalism in the policy area of external trade within the settings of the Canadian provinces and the EU member states, and uses the findings to suggest that in this realm the EU is a stronger example of federal synthesis of decision-making than is Canada. This is significant because it contradicts many established theories of federalism within political science, and implies that the EU could become a strong source of normative example for federal-style polities in the globalized world. As well, the strength of the EU's single market lends credence to the institutions embedded within the supranational polity, and gives the EU significant normative power as a prototype for other experiments in regional integration.

**Keywords**
Canada–EU relations; European integration; federalism

**Issue**
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## 1. Introduction

Regional integration, whether in the form of free trade agreements or political alliances, is increasingly becoming a tool used by countries and markets to respond to the challenges of globalization. The Comprehensive Economic and Trade Agreement (CETA) brokered between Canada and the European Union (EU) and tentatively finalized, represents the largest free trade agreement in the wealthy industrialized world to date. 'Largest', in this sense, refers to the sizes of the combined Canadian market and EU Single Market, as well as the scope of the areas under agreement. The estimated value of combined international trade is approximately 61.6 billion (European Commission, 2013); in addition, the agreement targets the removal of non-tariff barriers (i.e., special licensing, regulatory regimes, and anti-dumping measures) rather than conventional trade barriers (i.e., customs tariffs, quotas), many of which were already significantly low between Canada and the EU.[1] Discussions on closer economic partnership began at the 2007 EU-Canada Summit in Berlin, where leaders agreed to complete a joint study. After publication of the joint study in 2008, leaders agreed to pursue negotiations toward a comprehensive

[1] As stated in House of Commons (2011), which mentions that "the average tariffs imposed by Canada and the EU on imports were already very low and that there were very few traditional trade barriers between Canada and the EU." This is heightened when assessing tariffs in a comparative context: Canada and the EU, among other developed countries, demonstrated increasingly low tariff barriers following the WTO Doha Round (World Trade Organization, International Trade Centre, & United Nations Conference on Trade and Development, 2015).

economic agreement. As of October 2013, Canadian Prime Minister Stephen Harper and European Commission President José Manuel Barroso agreed in principle to the resulting package of CETA negotiations (Government of Canada, 2013).[2] Prior to CETA, both Canada and the EU have each successfully negotiated other free trade agreements with other significant economic areas (most notably, Canada within NAFTA, and the EU's agreement with South Korea). However, the scope of CETA's provisions for *non*-trade barriers—including, but not limited to, services, investment, and public procurement—and the political and economic impacts of trans-Atlantic free trade are thus far unparalleled.[3]

Due to the size, scope, and political precedence of CETA, an examination of *how* the two sides reached the agreement to date is worthwhile for understanding the negotiation dynamics between two wealthy—and decentralized—entities. Comparing the interaction between the provinces and the federal government in Canada with the interaction between the EU Commission and the member states of the EU, holds the potential to offer substantive implications on the EU's ability to set norms related to intergovernmental dynamics, as well as implications for the study of federalism and federal types of governance. In particular, many federalist scholars assert that Canada provides a solid prototype of a federal nation with divided powers between central and regional governments, while the EU remains a supranational experiment that mimics some federal-like processes of governance but ultimately remains a collection of distinct nation-states sharing a confined realm of shared economic (and, to some extent, political) decision-making (see, for example, Moravscik, 2007). Other scholars argue that while the conventional national form of federation is absent from the EU, the overarching application of shared authority between the EU institutions and member states in different policy areas is indeed applicable toward categorizing the EU within a comparative framework of federal-style polities (examples include Burgess, 2012; Elazar, 1995; Hueglin, 2013). This is justified not only by detailed study of EU governance, but also with the consideration that *all* federations have significant differences from each other, and yet all still offer import into the central idea of harmony in shared rule between different regions. Beyond the categorization of federalisms, the negotiation dynamics that unfolded during the build-up to CETA's finalization suggest that the EU is not just a strong market, but is also a strong normative default example for how other markets—regional or national—might choose to govern themselves during international negotiations.

The process of CETA in Canada received a great deal of coverage by municipal governments, news sources and business groups—perhaps logically, as the EU is Canada's 2nd large trading partner and represents Canada's second most important source of foreign direct investment. The EU represents 9.5% of Canada's total external trade (Government of Canada, 2013). At various points during CETA negotiations, provincial authorities and municipal governments levelled criticism at the federal government in Ottawa for conducting the negotiations with a lack of transparency and consultation. Provincial actors demanded more inclusion during negotiation as individual entities who sought to calculate their respective gains and losses in a potential free trade agreement with such a large and competitive market. By contrast, within the EU, there was relatively minimal coverage of CETA in Brussels and within most member states (with some important exceptions, outlined below). Economics alone can explain this in part: Canada is the EU's 12th trading partner, representing 1.8% of the EU's total external trade (European Commission, 2013). This asymmetry of trade balance between the two entities offers one intuitive explanation for the differential level of interest; simply put, as the EU had more leverage through which to conduct negotiations, there was arguably less provocation of insecurity, or even interest, among EU member states. This paper argues, however, that economics and leverage alone do not account for a full explanation of why internal negotiating dynamics in Canada were more contentious than within the EU. Instead, this paper argues that the delineation of competences within the EU with regard to international trade made for a more streamlined process, in contrast to the Canadian form of provincial-federal involvement in negotiations. The EU member states are not involved directly in the negotiations because they have authorized the European Commission to negotiate on their behalf, whereas the Canadian provinces and territories played a more proactive role than do the EU member states in the ongoing negotiations toward a CETA (House of Commons, 2011). This difference has two implications: first, institutional differences matter, in that the organization of delegation and responsibility had potentially more impact on resulting agreements than the idea of difference between a province and a country; second, the area of international trade competency offers a direct contrast to the intuitive hypothesis of which political entity behaves more like a federation. The EU—which is *not* a single country and remains comprised of very distinct European countries—has more integration between regional and central levels with regard to trade negoti-

[2] As of December 2015, the CETA agreement is finalized "in principle". This means that translation into all EU languages still needs to take place, as well as ratification among all EU member states and Canadian actors.

[3] At the time of writing, a Transatlantic Trade and Investment Partnership (TTIP) is in the early stages of discussion between the EU and the U.S.

ations than does Canada, which instead provides an example of sharper debates between the provincial and federal levels. The changes to provincial involvement in Canada during CETA negotiations point to the ability of the EU to export norms of intergovernmentalism.

The next section of the paper provides a brief overview of the CETA agreement from its inception, as well as a brief overview of the main tenants of federal theories. This is followed by a summary of internal negotiation dynamics within Canada and the EU, respectively. The summary includes a description of how federal-provincial processes operate within Canada with respect to external trade, as well as how the EU Commission interacts with EU member states in developing external free trade agreements. Following this is a comparative analysis of how each governing entity accommodates regional interests, attending to an overarching conception of federalism and central-regional dynamics. The conclusion summarizes the main findings and offers implications for future research in comparative federalism between Canada and the EU, and for the ability of the EU to export its own institutional norms.

**2. The Evolution of the Canada–EU Agreement**

Prior to the current agreement 'in principle', the history of Canada–EU/EC trade relations dates back to the 1976 Framework Agreement for Commercial and Economic Cooperation. This was essentially an institutional framework for cooperation in trade and regulatory harmonization, and marked the first large-scale agreement for the EU with an industrialized country. In 1998 the two entities established a customs cooperation agreement, a veterinary agreement, and a number of sectoral mutual recognition agreements. All of these developments paralleled separate developments the EU had concurrently reached with the U.S. (Woolcock, 2011, p. 27).

In 2004, discussions began on the idea of a larger bilateral agreement that would bring in a much larger degree of market access in areas still subject to regulatory barriers, such as (but not limited to) financial services, intellectual property rights issues, and public procurement. The EU stalled this effort—then called the Trade and Investment Enhancement Agreement (TIEA)—in 2006 after three rounds of negotiations failed to reach an agreement. The main reasons given for the stalled TIEA were the desire to wait for a successful result at the Doha Round of World Trade Organization (WTO) in the hopes that WTO negotiations would clarify some of the issues that had arisen over the course of TIEA discussions (Gauthier & Holden, 2011, p. 4), and the EU's stated desire to have the Canadian provinces included in any agreement as a device of pre-commitment: "As EU liberalizing measures reach down below regional/provincial level and into the local level within the EU, the Commission sought broad reciprocity that the Canadian federal government could not deliver" (Woolcock, 2011, p. 27).

In 2007, the Quebec Premier Jean Charest, along with key EU leaders, pushed for re-opening discussions on stronger economic and political ties (Hübner, 2011, p. 3). The Government of Canada and the European Commission published a joint report in 2008, "Assessing the costs and benefits of a closer EU-Canada partnership". The purpose of the report was to examine the existing tariff and non-tariff barriers between the two blocs in order to assess the effects of removing or heavily reducing such barriers. The more contentious non-tariff barriers included labour mobility, government procurement, intellectual property rights, telecommunications and electronic commerce, along with regulatory cooperation in a number of other areas. The study also identified how deeper partnership could enhance bilateral cooperation in areas such as science and technology, energy, and the environment (European Commission & Government of Canada, 2008, pp. ii-iii). Some of the key findings of the study predicted long-term macro-economic increases in real GDP of 0.02–0.03% for the EU and 0.18–0.36% for Canada, with potentially higher figures when factoring in investment gains. At the sectoral level, the study predicted the greatest gains in output and trade to be stimulated by services liberalization and by the removal of tariffs applied on sensitive agricultural products (European Commission & Government of Canada, 2008, pp. 167-171).

Formal negotiations began in May 2009 and concluded in October 2013. The global financial crisis provided a backdrop impetus during this time period: for the EU, gains in trade from reduced barriers would provide revenue; for Canada, the need to diversify economics away from disproportionate dependence on the U.S. market became paramount. Major issues during the course of negotiations included (but were not limited to) beef and pork, cheese and dairy, public procurement procedures, pharmaceutical drugs, and copyright provisions.[4] Prime Minister Harper and EU President Barroso stated in 2013 that the deal would likely be in place by 2015, after the text had been translated into all 24 languages of the EU and had been ratified by EU member states as well as Canada's provinces and territories (Waldie, 2013). News sources and public announcements concerning the deal 'in principle' hailed the CETA as a historic agreement for the depth of areas covered under an international free trade agreement. For Canada in particular, the agreement provided a notable precedent of the involvement of sub-national governments in international negotiations—one which

[4] A detailed overview of the scope of issues and debates over specific sectoral areas is beyond the scope of this paper. For more detail see Woolcock (2011).

not only created a visible role for provincial interests, but also helped clarify the barriers *between* provinces that could impede commerce (Finbow, 2013, p. 3).

**3. Federal Theories, in Brief**

The study of federalism has a long scholarly history, and studies usually involve (but are not limited to) the case studies of the U.S., Canada, Switzerland, and Germany. Definitions concerning what constitutes a federal polity are often qualified in different ways by different authors, but a general commonality is usually the central idea of a combination of self-rule and shared rule (Elazar, 1984); basically, a form of governance that balances authority between a central entity and distinct, self-contained entities. How distinct the self-contained entities are—whether described as regions, provinces, states, or simply relatively autonomous units—is the area of debate within federalist theory. Narrower definitions consider regions to be 'independent' within a federal system: "the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent" (Wheare, 1963, p. 10). The emphasis on independence, however, could potentially connote a lack of accountability to the federal level, as well as the idea of ad hoc cooperation rather than regular and formal coordination between regions, which might obscure the visibility and authority of the central government. Broader definitions such as William Riker's contextualize the independence of the region as 'autonomous' to account for the cooperation, coordination and collaboration between federal and local levels: "A Constitution is federal if (1) two levels of government rule the same land and people, (2) each level has at least one area of action in which it is autonomous, and (3) there is some guarantee (even though merely a statement in the constitution) of the autonomy of each government in its own sphere" (Riker, 1964, p. 11).

On the surface, the applicability of the term federal to both Canada and the EU seems straightforward. Canada offers a seminal example of a decentralized federal polity, with a balance of federal political authority that covers an entire country and provincial authority that is autonomous within its own policy domains. The EU offers an international example of integration of some areas of competency to the supranational level, formed by institutions whose sole purpose is to govern those policy areas delegated to the supranational level, while the domestic level retains authority on numerous areas of decision-making. Parallel to other federations (most notably the U.S.), the EU began as a group of distinct parts, whose people became citizens of the union only through their political attachment to their constituent parts—a comparison that Fabbrini refers to as the political genus "compound democracies" (Fabbrini, 2007, p. 3). The critical distinction, of course, is in the idea of statehood. Historically, federalism has been associated with state-building and integrating diverse units into nationhood (Burgess, 2012, p. 26). Canada is a single country with federalism as the trait, and an overarching 'federal' government. The EU, by contrast, is not a single state, and the institutions that comprise the supranational level operate according to what amounts to intergovernmental treaties (Moravcsik, 2007). This viewpoint holds that the areas of policy-making proscribed to the European Commission are limited and are at times subject to intergovernmental veto, while the treaties do not replace the use of a formal, conventional constitution; as well, at the public level, the absence of an intuitive idea of European citizenship all heavily limit the depth of European integration. Put roughly, the invention of European supranational institutions has not created a 'supranation'.

Nations and nationalism aside, however, the EU has many characteristics that lead scholars to comfortably group it within comparative federal polities. The major EU institutions comprise an integrated system of governance, both the motto and the practice of 'unity in diversity', and a genuine political order of structured power. The federal principle is there, if not the conventional federal state (Elazar, 1984; Haas, 1958). The absence of nationhood as described by Friedrich ("a multicentred authority, democratically legitimized and pluralistically accepting the basic fact that each citizen belongs to two communities, that of his state and that of the nation at large") (Friedrich, 1962, p. 510), or the aversion to applying the term federal to the EU (as perhaps best exemplified by the membership of the UK), becomes simply politics, rather than institutional fact. When analyzed according to behaviour in specific political situations rather than according to abstract typologies, the EU often conforms strongly to typically federal principles, as the case of CETA negotiations demonstrates. The distinction is significant for evolving paradigms of shared rule in the globalized 21st century.

**4. Canadian Federalism in CETA**

While Canada has a relatively decentralized form of federation, the regulation of trade and commerce, and thus international trade agreements, are the sole jurisdiction of the Canadian federal government as protected by the Canadian Constitution. Although the individual provinces can and do maintain their own general foreign relations independently of the federal government—Quebec and France, for example, or Ontario's numerous delegations to other countries—the federal standing Senate Committee on Foreign Affairs and International Trade is the key decision-making and legislative body with the mandate on matters relating to international agreements and international trade (Senate of Canada, 2011).

The style of Canadian federalism "works in the traditions of both federation and intergovernmental relations" (Baier, 2005, p. 206). The federal government maintains sole authority in trade and commerce and numerous other areas, and everything *not* specifically stated as belonging to the provincial levels of authority in the Constitution comes under the national Parliament (Forsey, 2012). For trade and commerce, however, the negotiation of international agreements that are increasingly more comprehensive and targeted toward regulations and other non-tariff barriers, make it more likely that commitments—and thus procedure of conducting negotiations—will be made in areas of either shared federal-provincial jurisdiction, or simply provincial jurisdiction.

> "Greater participation by the provinces and territories makes the negotiation process more complex because of the level of coordination involved in developing the Canadian position. That said, cooperation should make it possible to avoid a situation in which a province or territory is opposed to the text of an agreement and would jeopardize the implementation of some of the clauses in the agreement. Because European negotiators want a CETA with Canada to include government procurement at the provincial, territorial and municipal levels and have made it a priority, consultation with the various levels of government in Canada is of even greater importance." (House of Commons, 2011)

From the outset of negotiations, European officials demanded the participation of the provinces as a device of 'pre-commitment'. This was both a reaction to previous failed attempts at agreements due to provincial unwillingness, and a necessity due to the areas of provincial jurisdiction proposed under CETA: government procurement, public services, labour mobility, and harmonization of regulations. The role of provincial jurisdiction in the realm of international trade agreements has been ambiguous with regard to constitutional law, and inconsistently applied in trade agreements. For the most part, provinces have been limited to a consultatitve role, but the intrusion of trade agreements into areas of sub-federal authority (such as agriculture, alcohol, energy) have given provinces a weightier role in the final implementation of trade agreements (Kukucha, 2011, pp. 132-133). Kukucha, writing in 2011, stated that when earlier attempts at Canada–EU trade and investment agreements fell through in 2006, the European perception was that provinces were to blame, for failing to allow Ottawa to allow the EU to make inroads on services and procurement. When Jean Charest first began contact with the EU Trade Commissioner in 2007 towards re-igniting Canada–EU trade discussion, he was told not to bother unless other provinces were on board (Kukucha, 2011, pp. 131-132). CETA, then, became be the first large-scale trade agreement in Canada to formally include sub-national governments (Finbow, 2013, p. 2). The significance of this is both in procedure and in internal impact: procedurally, the mode of negotiation with provincial involvement created a precedent for intergovernmental federalism in the areas of trade and commerce; in terms of impact, sub-national inclusion in negotiations resulted in, if not actual greater internal policy coherence, the discussion and identification of a *need* for greater internal policy coherence for trade in Canada (Finbow, 2013, p. 3). The Canadian market is "fragmented" and "inhibits commitments to trading partners" as a result (Finbow, 2013, p. 3). Despite provincial regulations that inadvertently create barriers to trade, the Supreme Court of Canada has not taken an activist role in attending to such barriers as obstacles to the goal of a strong Canadian economic union. Intergovernmental politicking between provinces and the federal level are the dominant form of resolution (or attempts at) for provincial carriers. This is in direct contrast to the EU, where the European Commission under Jacques Delors pushed aggressively to complete the Single Market, and where the European Court of Justice (ECJ) played a critical role in forming and maintaining the strength of the Single Market: "As a result, the Canadian market is much less integrated than the EU one, which may seem surprising to European lawyers given that Canada is a fully-fledged federal state" (Hinarejos, 2012, p. 538).

The anticipated ratification and finalization of CET holds strong potential to significantly reshape the dynamics of Canadian federalism, in terms of a Canadian single market. The size and scope of the agreement, with all the attendant rationales for pursuing the agreement (sizable growth in Canadian exports, diversification of regional economic interdependence, access to EU single market), offer enormous leverage for policymakers and civil society alike to undertake large-scale procedural changes in order to maximize the benefits, and reduce the risks, of what CETA has to offer. Heightening the internal coherency and efficiency of the Canadian market is critical in this respect. In doing so, provinces could voluntarily reduce their autonomy to pursue divergent policies and would thus consequently bolster the power of the federal government. This would be an important departure from the principle of provincial legislative sovereignty that comes as a result of globalized liberalization: "With globalization increasingly pushing to the international level the governance of issues that were once considered solely domestic—and thus in provincial jurisdiction—Canada must be institutionally prepared to take a strong common position and ensure commitment at all levels of government to international agreements. Otherwise, we run the risk of losing our ability to interact economically and politically at the international level" (Leblond, 2010, p. 78).

**5. The European Union and CETA**

Trade and economic relationships with external countries are one of the longest standing policies of the European Union. The 1957 Treaty of Rome held that an internal customs union required a uniform external tariff and single trade agreements with non-EC members. The six EC members at the time delegated authority for this policy area to the European institutions, effectively enabling the European Commission—responsible for agenda-setting and initiating legislation—to speak with one voice in international economic negotiations, and setting the expectation that enlargement to future members would mandate the criterion of pooling sovereignty in the same way (Woll, 2011, p. 42).

The single EU market was one of the central goals of European integration and remains, arguably, the EU's biggest achievement. The assignment of international trade agreements to the supranational level could thus be seen as unsurprising, given the early urgency for a European Economic Community. The logic of European integration sufficed to maintain support for a supranational trade policy in the face of overlap between domestic issues in the areas of health and the environment with international trade policies. Apart from the immediate relationship between an internal market and a single external trade policy, the relative success of delegation from national to EU level is noteworthy in the context of comparative federalism, not in the least when compared to Canada.

The rules governing trade policy in the EU are laid out in Article 207 of the Treaty on the Functioning of the EU (TFEU) within the 2009 Lisbon Treaty; this treaty extended the ordinary legislative procedure to the area of trade, and created a Foreign Affairs Council that is also responsible for trade (European Commission, 2015). The European Commission, the executive institution of EU governance that is responsible for representing the interests of Europe as a whole (as opposed to the interests of individual member states), is responsible for setting the agenda and conducting negotiations as the sole representative of the EU, after receiving authorization from the Council. The Commission reports regularly to both the Council and the European Parliament throughout the course of negotiation (European Commission, 2015). The intergovernmental General Affairs Council of Foreign Ministers decides on the negotiation objectives on the basis of a Commission proposal, and ultimately approves the results through the ordinary legislative procedure.[5] When the Foreign Affairs Council attends to issues concerning international trade, it is chaired by the country holding the rotating presidency. This secures the balance of power between governmental levels; the Commission initiates the trade strategy, but the member states must approve the strategy. The scope of the Commission's executive power covers not just trade in goods, but also trade in services, intellectual property, foreign direct investment, transport, and capital movements (European Commission, 2013; Woolcock, 2011, p. 27).

The 1986 Single European Act introduced qualified majority voting within the European Council on single market policies (as opposed to unanimity voting, which was the previously used method for internal market legislation) which helped streamline the process toward achieving the single market, as it removed the possibility for a single member state to enact veto power in moving market integration forward (Dinan, 2004; European Commission, 2014). Prior to the single market, the 1979 ECJ ruling in *Cassis de Dijon* smoothed the way forward for the free movement of goods within the internal market. The case introduced the principle of 'mutual recognition', where if a product was available freely for sale in one member state then it must be allowed to do so in all member states. The principle of supremacy, where EU law ultimately trumps national law, protected the notion of mutual recognition and prevented member states from enacting egregious protections to restrict the free movement of goods (Dinan, 2004). The single internal market of the EU reached completion in 1992, with the (Maastricht) Treaty on European Union. This allowed for the removal of barriers toward the free movement of goods, services, people, and capital among all EU member states.

The degree to which member states have control over single market and external trade policies relates to both the executive authority of the Commission in these policy areas and the central idea of subsidiarity within the EU project. To the former, the institutional component of "autonomy by design" intentionally insulated the Commission from domestic political pressures in order to achieve internal trade liberalization: "all authors within this literature strand concur that the role of the supranational institutions in EU trade policy goes beyond pure intergovernmental decision-making" (Woll, 2011, pp. 43-44). To the latter, an essential concept within the current legal framework of the EU treaties is the principle of subsidiarity, which ensures that decisions should be taken as closely as possible to the citizen and that the Union is justified in its actions in light of the possibilities available at the

[5] The Ordinary Legislative Procedure of the EU, sometimes referred to as the 'Community Method' and previously referred to as 'codecision', is the style of policy-making whereby the Commission submits a proposal to the European Parliament (also a supranational institution) and the Council of the EU (the intergovernmental institution comprised of national leaders). A formal process of consultation, revision, and either adoption or dismissal proceeds between the three institutions (Dinan, 2004).

national, regional, or local levels (Dinan, 2004). The legality of this framework strikes an effective balance between competency and feedback and helps confirm that the interests of member states are driving trade policy as a whole: “Delegation is thus accompanied by a long list of formal and informal control mechanisms, as principal-agent analysis suggests and that many analysts have confirmed in the context of EU trade policy” (Woll, 2011, p. 44).

The push for a trade agreement with Canada came largely from Canadian businesses and policy makers, but had strong support in numerous EU members, beginning with the German Council Presidency in the latter half of 2007 (Hübner, 2011, p. 1). The main incentives for the EU in pursuing CETA had to do with access to a major industrialized market, access to energy and resource markets, enhancing revenue for businesses and exporters, and, arguably, using Canada as a ‘stepping-stone’ to pursue a similar free trade agreement with the much larger U.S. To the last point, the ability of the EU to negotiate a comprehensive agreement with a developed democracy, with notable successes in non-tariff areas (such as services, investment, and public procurement) represented a significant success juxtaposed against the failed WTO Doha Round, of which the EU had championed. Any specific areas of interest or concern with CETA itself came less from the actual member states and more from businesses or the European Parliament (EP). Exporters and the private sector were generally consistently enthusiastic (Irish Exporters Association, 2013), and the EP was effective in asserting European demands and concerns (Waldie, 2013, on the EP and pharmaceutical drugs). While the perceived ease in achieving consensus among member states towards CETA could be attributed to the amount of leverage the EU had in negotiations—the EU being the greater market, and with less existing reliance on trade with Canada—it can also be argued that the institutional design of the single market and external trade policies contributed to the overall lack of objection, disunity, or suspicion toward the construction of CETA. One important exception to this was the Czech Republic’s concern over the visa requirement toward Czech citizens traveling to Canada; the visa requirement was removed during the final round of CETA talks in late 2013 (Wingrove, 2013). Aside from this, the process of CETA negotiations remained remarkably less contentious in the EU than in Canada.

## 6. Comparative Federalism or Comparative Intergovernmentalism?

What do the CETA negotiations to date tell us about regional integration, and about federalism as a trait or a process? To begin with, regional integration is increasingly becoming a rational method of responding to the challenges of globalization, as evidenced through economic trade blocs and partnerships (Van Langenhove & Scaramagli, 2012). In the case of CETA, regional integration can be understood in three ways: the single market of the EU as European regional integration; the commitment to transatlantic interdependence in CETA itself; and, the potential for deeper inter-provincial integration within the Canadian market as a means of responding to CETA. The latter dynamic is arguably the most significant in terms of the visibility of what the EU can accomplish through norms as well as through material resources. The strength of the EU single market gave it an enormous amount of leverage in CETA dynamics. The institutional model *supporting* the EU’s single market—that of clearly delegated authority to centralized governance, and an internal market that has already effectively removed barriers between EU members for trade, services, and investment—became increasingly relevant as the EU Commission was able to secure the ‘pre-commitment’ of the Canadian provinces before beginning negotiations. In effect, the supranational example became the dominant example of how separate markets ought to deal with one another.

In the limited realm of external free trade policies, the EU is a stronger example of procedural federalism than Canada, if federalism is partly understood by internal coherency within the framework of ‘unity in diversity’. The lack of the federal-nation trait in the EU is, in this policy realm, compensated for by the intentionality of European integration. The strict parameters of the Ordinary Legislative Method, the principles of subsidiarity and proportionality, the central goal of the single market, and the strong legal activism of the ECJ all combine to make the single economic union less fragmented in the EU than in Canada, and as a result, the process of negotiating free trade agreements less problematic than in Canada. Provincial barriers between the full free movement of goods, services, labour and capital are such that the EU’s single market has more fluidity than the Canadian market, which in turn has helped the supranational level become the logical area of delegation for external trade decisions. While the corresponding Canadian procedure for trade negotiations is similar at the federal level, the internal dynamics between provincial and federal governments is less explicit. This is the result of a more fragmented internal market and less intrusion into provincial protectionism by the court system.

However, the difference between internal regulations of economic unions does not alone define the quality of federalism. Canada remains a definitive federal polity, heavily decentralized and with a strong federal level. Its provinces are not sovereign nation-states, and the federal idea is concretely imbued into Canadian politics, governance, and discourse. By contrast, the executive authority of the European

Commission is *not* a federal government, and the regions firmly remain sovereign, independent countries. The EU offers numerous examples of federal traits, but because it is not a nation it lacks the normative commitment to social solidarity typically found in federal nations (Hueglin, 2013, p. 191). The distinction presents an interesting paradox when considering CETA; the cautious integration of sovereign nations within the EU has resulted in intentional pooling of authority at the supranational level for reasons secondary to the single market, while the birth of a Canadian federal dominion under the 1867 British North America Act/Constitution Act established the nation *before* more recent conceptions of inter-provincial policy autonomy. The more explicit principle of subsidiarity in the EU, combined with qualified majority voting in single market policy, has set a structured course for free trade agreements—one that is likely to be mimicked elsewhere.

The better point might be the idea of *comparative intergovernmentalism*. Instead of the debates over what reasonably constitutes an entity to be considered in the comparative federal context, a complementary route is to compare the two blocs on the basis of their internal institutional dynamics. Precisely because of its supranational 'non-state' character, the EU is in many ways better institutionally equipped to introduce new agreements or arrangements that attend to the multilateral nature of economic globalization (i.e., subsidiarity, ordinary legislative procedure, qualified majority voting). Procedure and agenda-setting is the direct result of improving upon the logic of integration in a manner that assuages national interests. Canada, by contrast, is clunkier in this regard, but only insomuch as the comparison is with free trade negotiations. CETA offered the first precedent of sub-national governments being included, and with it came inter-provincial debate over the stipulations of CETA. The balance between decentralization and the federal government in Canada has strong parallels with the ordinary legislative procedure in the EU: "power allocations in Canada and the EU are not so far apart at all once the conceptual framework of federalism with its presumption of watertight divisions of powers is replaced by one emphasizing power sharing through intergovernmental cooperation and agreements." (Hueglin, 2013, p. 193) The idea of intergovernmentalism, with its connotations of cooperation through mutual deliberation, offers a better comparative platform for the EU and Canada than broad or narrow dimensions of federalism.

## 7. Conclusion

The first conclusion is that the CETA represents a watershed in international trade agreements for three reasons: for the breadth and width of areas subject to barrier removal and deregulation; for the precedent set in transatlantic cooperation; and for the dynamics of policy-making between two very different federal-style political entities. Traditionally, analyses of federal governance have held Canada to be emblematic of a federal state and the EU to be a heavily qualified outlier. Narrowing the focus on international trade negotiations shows that the balance between self-rule and shared-rule and the division of powers between centre and regions is a less problematic process in the EU due to the deliberate internal coherency of the single market. In Canada, the inclusion of sub-national governments in the free trade negotiation process from the outset worked against past procedure and required restructuring of policy-making. Considering the two entities as two forms of intergovernmentalist polities—rather than two diverse examples of federalism—gives more nuance to comparing the institutional properties of both areas.

There are two important caveats to this argument. The first caveat is the imbalance of leverage between Canada and the EU; for Canada, CETA offers many more benefits and access to the huge European market, while for the EU the benefits are to a smaller degree. Whether the same degree of smooth delegation and cooperation between EU member states will continue in ongoing Transatlantic Trade and Investment Partnership (TTIP) discussions with the U.S.—whose market size parallels the EU, and thus whose access offers exponentially more possibilities and controversies—remains to be seen. The second caveat is the recognition that civil society and the private sector may have just as much sway over free trade negotiations in either area than provincial governments or member states. The role of business chambers and employer associations on either side of the Atlantic has undoubtedly played a major role in pushing for trade liberalization and/or special considerations for specific sectors—a factor that should be accounted for so as not to over-attribute the dynamics between regional and centre governmental institutions.

The second conclusion is the implication resulting from the comparison of CETA negotiations in Canada and the EU; namely, the principle of subsidiarity in the EU setting, and the success of EU in exporting this principle to the federal decision-making system in Canada. At the outset of CETA discussions, the Commission asserted that Canadian provinces would have to be consulted throughout the process in order for the EU to begin proceedings. The compliance of the Canadian government in this new precedent in part highlights the ability of the EU to export European-style federal norms to other places. In this regard, the federal character of the EU might hold more relevance for the present context of economic globalization than for past theories of federalism.

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**Conflict of Interests**

The author declares no conflict of interests.

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**About the Author**

**Valerie D'Erman** is a postdoctoral fellow at the University of Victoria, working on a project entitled "The Politics of the Euro Crisis" and teaching several courses in Political Science and the European Studies program. She holds a Ph.D. in Comparative Politics from the University of Oklahoma. Her research focuses on European integration, comparative political economy, European social dialogue, and transatlantic relations.

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Article

# The Federal Features of the EU: Lessons from Canada

Amy Verdun

Department of Political Science, University of Victoria, Victoria, BC V8W 2Y2, Canada; E-Mail: averdun@uvic.ca

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**Abstract**
There has been a rise and fall in interest in federalism in the context of European integration. This article assesses the federal nature of the EU. It draws in particular on the work of Michael Burgess who has been one of the key thinkers on this issue. Because there are many types of 'federalisms' available across the globe, it is helpful to make a comparison with another political system to offer a base line. In this article I explore to what extent the EU already has federal features. With the help of the work of Burgess I seek to look beyond the specific characteristics of the EU and reflect on how a comparison with this other polity can offer us insights into what is going on within the EU political system. Drawing on the comparison with Canada, I seek to identify the characteristics of the EU that are already those of a federation. Therefore, the guiding question of this article is: compared to Canada, what particular features does the EU have that reminds us of a federation and what features is it still lacking? It finds that the EU has a considerable amount of federal features (federation), but that a federal tradition, a federal ideology and advocacy to a federal goal (federalism) are mostly absent.

**Keywords**
Canada; Canada–EU comparison; European Union; federalism; federation; political system

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## 1. Introduction

The European Union (EU) is typically categorised as an international organisation. For instance, the Union of International Associations (UIA), founded in 1910, states on its homepage: "an Intergovernmental Organization IGO is an organization composed primarily of sovereign states, or of other intergovernmental organizations. IGOs are established by treaty or other agreement that acts as a charter creating the group. Examples include the United Nations, the World Bank, or the European Union" (UIA, 2015).[1] Following this definition it is easy to see that the EU indeed is an international organisation—the founders and subscribers are sovereign nations and it is based on a treaty.

At the same time, those who have studied the EU more closely would not have any difficulty identifying the EU's state-like features. William Wallace famously characterised the European Community (EC), at the time, as 'less than a federation; more than a regime' (Wallace, 1983). Since then, the EC has evolved into the European Union (EU) but Wallace's characterisation still resonates with many scholars today (see Joerges, 2005, p. 14). In fact, over the past two decades, when forced to categorise what kind of political system the EU is, we find many that characterise the EU as being 'sui generis' in some form or other (for an overview see Phelan, 2012, who seeks to understand this issue from an International Relations perspective). Ingeborg Tömmel (2012) offers a nice comparison of the EU with ideal type federations and concludes it is not a fully-fledged federation; she does not expect it to

[1] The UIA subdivides 'international organizations' into three categories namely: inter-governmental organizations, international non-governmental organizations, and multinational enterprises.

become one in the near future, yet she finds that it does have some characteristics of a federation. She thus names the EU 'a federation sui generis' (Tömmel, 2011). John-Erik Fossum (2006) also seeks to impose some discipline on exactly how the EU is a sui generis polity. He differentiates between those who see the EU as departing from a nation-state, those that see it as part of state withering or transnationalization, those that view it as a case of nation-state transformation, or as a subset of fledgling states.

In light of the above brief discussion of the key concepts of intergovernmental organization versus federation what would it take for the EU to resemble more a federation than an international organisation? Very few scholars of European integration have been so bold as to state that the EU is already starting to resemble a federation.[2] Yet one could list a number of characteristics of the EU that overlap with those of federations. Thus, I pose the question in this article: what particular features does the EU have that reminds us of a federation and what features is it still lacking? I am posing this question because the answer to this question will shed light on the amount of federal development achieved in the EU, but also where this development falls short of a possible yardstick, both theoretically and in comparison to an existing case. Specifically, this article seeks to study this question theoretically by examining the concept of federalism and federation drawing on Europeanist literature on federalism, in particular through the work of Michael Burgess. It also offers a concrete comparison with an established federal state, Canada, as an example of a federal state. I am not the first to make a comparison between the EU's development to that of another federal state. However, most scholars who have embarked on such a comparison have tended to concentrate on the comparison with the United States (US). As David McKay points out, it is the political system that most resembles the EU in terms of its size, and political and economic development (McKay, 2001, p. 4).[3] I have chosen to concentrate on Canada rather than the US, not only because the comparison with the US is well documented in the literature and not terribly successful (Hueglin, 2013). Rather, because at the end of the day the EU needs to deal with multinationalism (as does Canada).[4] Furthermore, Canada is a much more decentralised federation than is the US and for the foreseeable future the EU-version of federalism would need to maintain those features. Also the experience with US politics is more idiosyncratic with its strongly polarised two party system. Finally, seen that the US has developed as one of the world's superpowers also gives that country a unique role in global politics. This superpower status, over time, has reinforced executive power in a way that is different in a country such as Canada that has a less forceful stance in the globe. Also, both the Canada and the US constitutions are subject to occasional challenges before the courts. But in the United States the courts have tended to widen federal and narrow state powers whereas the opposite has typically occurred in Canada (Parliament of Canada, 2016). For all these reasons a comparison with Canada rather than the US is much more attractive for the purposes of seeking to understand how much the EU already resembles a federation. The remainder of this article is thus structured as follows. In section 2 I provide a literature review of EU scholars who have examined the question of federalism in the EU context. In the third section I assess what federalism is; in the subsequent section I examine what federalism means in Europe; next I look at what federalism is in Canada; then I offer a comparison of the two systems (Canada and the EU) in the penultimate section; and offer some conclusions in the final section.

## 2. The Federalist Political Thought in the EU and the Work of Burgess

The early developments, post Second World War, were inspired by federalist thought, and were brought forward by people such as Altiero Spinelli (Glencross, 2009; Glencross & Trechsel, 2010; Pinder, 2007) and Jean Monnet (Duchêne, 1994; cf. Triandafyllidou & Gropas, 2015). Federalist ideas had been around for centuries, of course, but there was not a unified view on federalism as conceptualised by 16th and 17th century political philosophers, in particular Johannes Althusius and Jean Bodin. In the 1960s, scholars, for example Riker (1964), were influential in streamlining some of this diversity but at this time the federalist thought was less prominent in the EC. Burgess (2000) points to how the federalist thought of Althusius and a later philosopher, Proudhon, left more room for overlapping, divid-

[2] Examples of scholars who have described the EU this way see Kelemen (2003, 2007), Hueglin (2013), Börzel and Hosli (2003), Börzel (2005), Kreppel (2006) and Verdun (2015a). Wood and Verdun (2011) have compared Canada and the EU, thereby implicitly examining the EU as a federal-like entity, see for their more recent studies: Verdun and Wood (2013). Others who have made this explicit comparison are, among others, Simeon (2006), Wolinetz (2011), Hueglin (2013).

[3] For others who have made the comparison with the US see in particular Fabbrini (2005) and Menon and Schain (2006).

[4] Multinationalism in Canada has various characteristics, including even the perhaps banal issue of having more than one official language. The Canadian constitution stipulates that every province (except Quebec, New Brunswick and Manitoba) may decide which their official language is or if it wants more than one official language (and those need not necessarily be either English or French). In the case of Quebec, New Brunswick and Manitoba, however, the requirement is that as long as English and French are at least part of those official languages they could add one or more official languages (see Parliament of Canada 2016).

ed and shared sovereignty rather than the conception of federalism *à la* Bodin (Burgess, 2000, p. 14). Even if there were numerous federalist political thinkers with not always completely overlapping ideas, federal ideas were at the heart of the proposals to pool sovereignty, transfer sovereignty to the supranational level and to limit some national sovereignty.

Students of European Studies sometimes ask the question of the EU's *finalité*—what exactly will the EU become, with as an important follow-up question, is the EU developing into a federal state? If so, would it be created with a big bang or more incrementally? This vision of a 'big bang' was held by some during the Convention on the Future of Europe, which took place between December 2001 and July 2003 that ended in the creation of the Treaty Establishing a Constitution for Europe, which ultimately failed.[5] Others have held that European integration has always been and is likely to remain, for the foreseeable future, a gradual process. Through incremental development integration would deepen, and in so doing at some point end up being more like a federation (see Borrell, 2015; Duff, Pinder, & Pryce 1994). Given that process, the question would be, when would one identify the EU as actually being a federation?

Seeking an answer to this question is one of the reasons for concentrating on the work of Michael Burgess—a scholar who has brought together political thought on federalism and its application to the EU (and federations across the globe). In *Federalism and European Union* Burgess provides an overview of federal thinking in the EC from 1972–1987 (Burgess, 1989)—a period just before the relaunch of European integration in the early 1990s. In 2012 Burgess wrote about this revival period in the early 1990s: "The ratification of the Treaty on European Union…underlined the federal trajectory of European political integration and paved the way a decade later for the European Union (EU) to prepare the practical proposal for a Constitutional Treaty, subsequently replaced in 2007 by the Lisbon Treaty which was formally ratified in 2009" (Burgess, 2012, pp. 1-2). Later in the same volume Burgess (2012, p. 320) notes: "Rather than adopt one particular approach to federalism, we have suggested that theoretical pluralism is the most profitable way of thinking about the federal spirit". And he also thinks that: "…federalism as a process—the notion of federalizing or federalization—to have the most practical utility when applied to the new federal models….Today federalism as a process offers a convincing explanation of what is happening in…the EU" (Burgess, 2012, p. 320). Michael Burgess's interest in federalism extended much more widely than merely the study of Europe and European integration. In 1990, he edited a volume that examined federalism in Canada (Burgess, 1990). This work was followed soon after by another book on Canada, co-edited with Alain-G. Gagnon (Burgess & Gagnon, 1993).[6] His study of Canada is another reason to draw on Burgess in this article.

**3. Federalism—A Concept**

The concept of federalism is different from that of federation (Burgess 1986; Burgess & Gagnon, 1993, p. xiii; Gagnon, 2010, p. 3; Gagnon, Keil, & Mueller, 2015; King, 1982). The latter refers more to institutions; the former is broader and includes traditions, ideology including perhaps the advocacy for an end goal. Gagnon differentiates between 'territorial' and 'multinational' federations. The former seeks to treat all citizens the same and have representation by territory (a classic example being the United States) (cf. Burgess, 2006b). A multinational federation acknowledges the existence of various nations within the federation and realizes it needs to accommodate these different minorities (e.g. Belgium, Canada) (Gagnon, 2010, p. 5).

In *Comparative Federalism*, Burgess provides his insights on what federalism is (Burgess, 2006a). He stresses it has both an empirical and theoretical dimension and is multi-faceted which makes it difficult to have a full-fledged theory of federalism (Burgess, 2006a, pp. 1, 4). He defines federalism as: "the active promotion of support for federation" (Burgess, 2006a, p. 2) with federation being "a particular kind of state" (Burgess, 2006a).

Simplifying a thorough review of the literature that he provides in his study, one could summarize his views on the matter as follows. Federalism is a suitable

[5] The Treaty Establishing a Constitution for Europe failed due to a host of reasons, but not in the last place because the ambition of the leaders of the Convention incrementally added more symbolic features to the proposed revised EU constitutional structure that made it look more like a federation—something that in the end did not find sufficient support among citizens. The Heads of State or Government signed off on the text, but at the end of the day the ratification of that particular text stranded following the outcomes of the referendums in France and the Netherlands, where a majority voted against approval of the ratification of constitutional treaty. People were concerned about the labels used to describe the changes, such as the word 'constitution' in the title (see Hobolt, 2006). It also was a very difficult document for every day citizens to understand. With some delay the more 'symbolic' features were removed and essentially a 'watered-down version' (Verdun, 2013) eventually became the Lisbon Treaty, signed in December 2007, which was ratified and entered into force on 1 December 2009 (see for more details about the changes in decision-making before and after Lisbon a collection of papers in Hosli, Kreppel, Plechanavová, & Verdun, 2015).

[6] Burgess at this time also produced an important book on the UK, which focused on the British tradition of federalism, which was very timely indeed as the UK was contemplating devolution in the 1990s (Burgess, 1995).

form of government when a number of circumstances come together. Following Edward Freeman he points to federation being a mechanism of compromise between opposing forces. (Burgess, 2006a, p. 13; cf. Freeman, 1893). He acknowledges that a federation is often chosen as the political system as a deliberate choice (it is artificial), constructed (but based on some kind of reason) and its contours depend on circumstances (the context and the issues of the day will determine its exact features). For an assessment of the merits of federalism he draws on Bryce (1928). These advantages range from "uniting commonwealths into one nation under one government without extinguishing their separate administrations, legislatures and local patriotism" and "the best means of developing a new and vast country" to "facilitating self-government" and enabling people to "try experiments in legislation and administration which could not be safely tried in a large centralized country" and that having local legislatures with large powers would relieve the federal legislature from functions that could prove too heavy for it (Burgess, 2006a, pp. 15-16).

Furthermore, borrowing from the moral philosopher Henry Sidgwick (1891), he points to another major issue in federalism, namely that there is rarely a clear demarcation between the unity of the whole and the separateness of the parts. Thus, one should recognize that federalism would be realized only to different extents (Burgess, 2006a, p. 21). Finally, he posits that there has not really been a sufficient pool of experiences, in the first 30 years after World War II, to develop a single 'theory' of federalism (Burgess, 2006a, p. 45). Rather one should focus on two related factors: (1) the degree of independence of the (two) levels of government; and (2) whether the (two) levels of government can neither subordinate the other to it, nor act completely independent of the other in a range of policy areas (Burgess, 2006a, p. 45).

Applying his insights on federalism on two cases discussed in this article he comes to the following insights: the Canadian case was one in which federalism suited because it served as a way to overcome: (1) the political stalemate in the province of Quebec; (2) the proximity of the United States (possible threat thereof as well as wanting to be a separate from it); and (3) forming a national unity (Burgess, 2006a, pp. 84-85). In Canada the creation of a federal state emerged without too much controversy in two conferences (Charlottetown and Quebec in 1864; and in 1866 in London). Clearly Canada fits the broad description of being a country that was vast, wide, and new and thus federalism could serve well.

Burgess analyses the EU in federal context in two major books (Burgess, 1989, 2000). In each of these books he draws parallels between developments in the EU context and those in the area of federalism. In his 2006 book Burgess devotes a chapter to "The European Union as a Federal Model". In fact Burgess points to the fact that the EU does not fit a proper understanding of a federation and thus ends up being a "a new kind of federal model the like of which has never before been seen" (Burgess, 2006a. p. 226). He stresses that the process is slow, incremental and lacks big foundation moments. To understand the EU as a federation one needs to understand some of the peculiarities of the EU to which I now turn in the next section.

**4. What Federalism Means in Europe**

Burgess argues that the EU is a unique federal model. The characteristics include that it was built by founding fathers that saw the EU as needing to be a response to the devastation of having had many wars between countries such as Germany and France. Richard Griffiths spells out emphatically that the exact genesis of the EC, in particular the role of the founding fathers, was much more the result of the politics of the day, than the specific visionary characteristics of its founders (Griffiths, 2012). Perhaps the most well-known of them, the Frenchman Jean Monnet, who incidentally travelled through Canada as a young man (Ugland, 2011), saw the interrelation between economics and politics as key to setting up more integration in Europe. But rather than starting off building a federation, as a great visionary goal, he commenced with supranational governance of policy areas that were less political: coal, steel, atomic energy and eventually the creation of an internal market. He also included a defence community, but that plan stranded, as it did not find support in the French parliament at the time. Monnet's method was to focus on a cumulative process of integration: a step-by-step approach. Monnet thought that the big federal moment would come gradually after functional increase of supranational policies (Burgess, 2006a, p. 231). Italian political theorist Altiero Spinelli, another key figure in Europe's past, disagreed with this implicit sense of automaticity in the Monnet method. He felt it was important to organize political power at the European level. But Spinelli, in turn, underestimated the lack of political will to move to a more federal design of the EC. Though he was quite influential in these early years he was unable to push the federal idea further. In the 1980s he masterminded deeper political powers for the European Parliament and sewed numerous seeds in the 1984 Draft treaty establishing the European Union. Some of these would end up in the Single European Act and in the minds of those eventually working on the Maastricht Treaty (Glencross & Trechsel, 2010; Pinder, 2007).

One such large constitutional moment that could have defined the EU in a way similar to the Philadelphia Convention of 1787, that founded the United States of America (USA), or the British North America Act (BNA), that created Canada in 1867, was the European

Convention that took place in the early 2000s. The leaders of the Convention, indeed, realized it could be such a foundational moment and took it to the next level. Even though the mandate was relatively modest[7] they started referring to the entire legal text they were producing as being the creation of a 'Constitution for Europe'. As was mentioned above, the move towards such a constitution was not supported by various groups of citizens. Yet the eventual Lisbon Treaty, that was adopted, was in many ways similar to the Treaty establishing a Constitution for Europe (Verdun 2013). So, in a roundabout way, the Monnet Method, the incremental path, still seems to be working.

Burgess (2006a) says about the EU that "both in its original conception and its subsequent construction the EU has strong federal and confederal elements that coexist simultaneously with equally robust intergovernmental and supranational features" (Burgess, 2006a, p. 245). One of the main reasons that there are difficulties recognizing the EU as a federation lies in the state system that recognizes nation-states as sovereign entities. The origin of study of the EU is in international relations (IR)—identifying the relations among member states as relations among sovereign nation states in this state system. In other words, the EU as a model is judged within a context of a world of states. The fact that the member states of the EU are today already considered full-fledged 'states', in this sense, causes problems for the conceptualization of the EU as a federal state with sub-nation-state-level government entities. In the words of Burgess: "In one particular sense—that of inter-state relations characterized by intergovernmentalism—the EU is clearly located in the world of IR that conventionally classifies it as a confederation while in another sense—that of supranationalism—the logic of European integration seems to portend the transcendence and transformation of the national state into a new, overarching, multinational federation. Here it would be a federation of existing, mainly mature, nation states" (Burgess, 2006a. p. 246). In other words, the EU has both federal and confederal components in its political system.

## 5. Federalism in Canada

The creation of the Canadian federation was an elite-driven endeavour. There was not much involvement of a wide range of citizens or representatives of the population. Also, it was not created to overthrow a regime, even if it was aimed at creating a country that was breaking free from British colonialism. Nevertheless the model chosen still married two types of political systems: the British style Westminster model and federalism. In this sense, although both are highly decentralized, the Canadian and the US models are distinct models (Canadian is parliamentary; the US presidential with a nation-wide two-party system). The Canadian model has on occasion led to a domination of a regional party that then gets a say in federal politics in its parliamentary system.

The Canadian federal model can be seen as a multinational federation (Gagnon, 2010, p. 50). This type of federalism provides measures to ensure that the various nations or communities within the federation should have the means to ensure that members of all national communities can achieve similar standards. Multi-national federations do not necessarily manage to ensure similar standards but there can be policies and government structures to achieve this aspiration. In fact, many have argued that the Canadian multinational federation has often missed the boat on accommodating the needs of the various nations within the Canadian federation. It is one reason why there were referendums in Quebec (in 1980 and in 1995) to vote on whether Quebec should secede from Canada. Similarly, if one looks at the socio-economic and political conditions among First Nations communities in Canada, it is clear that they are far from "achieving similar standards", that is, compared to standards elsewhere in Canada (judging by, for instance, infant mortality, literacy, employment levels and life expectancy).

In this sense the constitution of Canada does not accommodate satisfactorily the needs of its nations. As Alain-G. Gagnon has argued, there is a lack of "justice" in the system (Gagnon, 2010, p. 31). With much of the focus on procedural federalism it is possible to overlook the effects these procedural measures might in effect have on minority groups—those that make up a smaller part of the federation compared to the majority group. The critics of traditional liberalism have focused on how this traditional reading does not do justice to "deep diversity" (Taylor, 1993, pp. 181-184). Authors such as Kymlicka and Tully have criticized Canadian federalism indicating how adjustments need to be made in order to support the needs of these minority groups, which could lead to more "asymmetrical" federalism (Gagnon, 2010, pp. 31-51). It should ensure democratic principles are adhered to and that the government levels are accountable by allowing for more political participation and a valuation of the diversity of cultures amongst the citizens that make up the federation. Sensitivity to these matters would ensure long-term stability in the federation.

Federalism in Canada has been labelled as 'executive federalism' (Smiley 1980; Watts 1988, 1989). It de-

[7] The mandate included: (1) better division and definition of competences; (2) the simplification of the instruments; (3) more democracy, transparency and efficiency in the European Union; and (4) preparing the way for a 'constitution' for the people of Europe (simplification and reorganization of the treaties, inclusion of the Charter of Fundamental Rights and the possible adoption of a constitutional text), see http://europa.eu/scadplus/european_convention/introduction_en.htm

scribes "the relation between elected and appointed officials of the two orders of government" (Smiley, 1980, p. 91). Or as Watts describes it: a process whereby intergovernmental negotiations are dominated by the executives of the different governments within the Canadian federal system (Watts, 1988, p. 3). Much of the way people recently characterised Canadian federalism can be traced back to the leadership style of the Prime Minister (PM). PM Jean Chrétien was seen to meet the Premiers of the provinces if he could have some control of the outcome and in a decade he only met the Premiers seven times (Wells, 2008). PM Paul Martin wanted to meet the premiers more but had a different style of trying to get results out of them. The most recent conservative federal government for ten years under then PM Stephen Harper (2006–2015) had a tendency to focus on its own competence and make decisions independent of a thorough discussion of the matters at the lower level (provinces and territories). In return, provinces and territories have had a tendency to execute policies without much deliberation among the other provinces and territories. Indeed, we have found that institutions that facilitate conversations among first ministers of the provinces and territories ('first ministers conferences') have not been called, as the Harper did not bring the premiers together at all in the last six years of the ten years that he was in office as Prime Minister. The current Canadian PM, Justin Trudeau, has already met his Premiers and, although it is still early days, seems more likely to be keen than his predecessor to include this group (Geddes, 2016; The Star, 2015).

## 6. Comparing the EU to Canada

Turning to a comparison of Canada to the EU we find various interesting overlapping characteristics. If one were to assume that we could compare the two political systems—that is, the European supra-national level could be compared to the federal level in Canada and the level of the member states could be compared to the provinces and territories in Canada—one could come up with the following comparison.

Let us first turn to the Michael Burgess's theoretical insights on federalism in the cases of Canada and the EU. In section 2 we reviewed how a single theory of federalism is still lacking. Across the globe a federal design may be used in cases where there is a process of federalisation, which can be the case when an institutional structure is to be created that seeks to mediate between multinational entities or a diverse territorial space. The European Union had such a moment on different occasions, most recently with the Constitutional Treaty in 2003. Had the Treaty Establishing a Constitution for Europe, signed by heads of state or government, been ratified by all (at the time fifteen) member states, this document would have constituted a founding document for the next step in federalisation (cf. Trechsel, 2005). But, as was mentioned above, there is ample evidence that despite the absence of the symbols present in the Constitutional Treaty, the essence of it has been incorporated into the Lisbon Treaty that *was* ratified. The Canadian equivalent can be found both in the Quebec conference in 1864 (that founded Canada), but also the Charlottetown Accord (1992); the latter aimed at making changes to the Canadian constitution—to settle the division of powers between the federal and provincial governments. This Accord eventually also was defeated in a public referendum in October 1992. What we learn from Burgess is that the building of a federation is a process; just because there have been attempts that failed does not stop it from being part of the federal process.

We looked above at the difference between the concept of federalism and federation (Burgess & Gagnon, 1993, p. xiii; Gagnon, 2010, p. 3; King, 1982). The latter refers more to institutions; the former is broader and includes traditions, ideology including perhaps the advocacy for an end goal. In the EU context, the more ideological dimension, in fact, is weak. Very few scholars, citizens, and politician wish to invoke 'federalism' as an ideology—a path towards deeper integration. What describes the developments in the EU much better is the concept of 'federalism'. Furthermore, another aspect of federalism, mentioned above, had been the fact that a multinational federation is a vehicle to acknowledge the existence of various nations within the federation and offers a way to accommodate these different minorities (Gagnon, 2010, p. 5). Both Canada and the EU easily fit this characterisation of multinational federation. Each has distinct nations. The EU today has 28 member states; Canada has numerous nations in its midst even though the federal structure only accommodates the provinces and territories and not so much the first nations.

Turning to the more institutional characterisation of federation, the way Canadian federalism has been characterised as 'executive federalism' (Smiley, 1980; Watts, 1988, 1989), which is dominated by intergovernmentalism, is a characterisation that would fit well as a descriptor of the way the EU is governed. Even with the recent financial crisis, the subsequent economic crisis, the sovereign debt crisis and the most recently the migration crisis, the EU's mode of governance seems dominated by deliberative intergovernmentalism (Bickerton, Hodson, & Puetter, 2014). Notwithstanding this descriptor of intergovernmentalism (or 'executive federalism'), the EU did end up creating a number of supranational (read: federal) institutions (Gocaj & Meunier, 2013; Verdun, 2015b) as well as permit one of its federal institutions, the European Central Bank, to play a more prominent role in dealing with the various crises (Hodson, 2013).

Furthermore, in Canada there is a clear distinction

between the competence of the federal level and that of the provincial/territorial level. In the EU context we see a similar distinction in a number of policy-making areas. Let us turn to a few policy areas. One of the policy areas in both Canada and the EU for which responsibility lies with the federal/supranational level of governance is international trade policy. Both in the EU and in Canada customs, tariffs, quantitative restrictions and trade agreements are the responsibility of the highest government level. In Canada, day-to-day policy-making in the area of trade policy is done by a federal department recently renamed into 'Global Affairs' (that was in 2013–2015 called the Department of Foreign Affairs, Trade and Development and before July 2013 that it was for many years called 'the Department of Foreign Affairs and International Trade'); in the EU the European Commission counterpart is the Directorate General 'Trade'. Decisions on international trade agreements, such as the recent 'political agreement' on the Comprehensive Economic Trade Agreement (CETA) between Canada and the EU in October 2013, were decided upon by Prime Minister Stephen Harper of Canada and José Manuel Barroso, then President of the European Commission (see also D'Erman, 2016).

It is remarkable that the EU has focused so much on "completing the internal market". One of the strongest drivers of integration in the past four decades has indeed been this goal. The Canadian case is less focused on this same goal. In fact, one could easily find examples of the Canadian internal market having more impediments to mobility than does the European Union market in those similar cases. For instance, taking a bottle of alcohol from one province to another could mean one encounters obstacles at the 'border' between the provinces.[8] There are also other regulations that need to be put in place to improve the mobility across the Canadian internal market (Internal Trade Secretariat, 2014). These have not been given priority in Canada despite the federal government's goal to sign international trade agreements to enhance free trade across the Canadian border with other nations. Yet the negotiators of the CETA agreement in Canada have noted that these negotiations with the EU have put pressure on Canadian provinces to remove barriers to (internal) trade (Quiring, 2016).

Another typical federal policy is monetary policy (cf. McKay, 2001). The Bank of Canada sets interest rates for all of Canada, for its currency: the Canadian dollar. In the EU context, not all member states are members of the euro area, but those that are face a similar 'supra-national' policy to its Canadian counterpart. In the EU context the European Central Bank (ECB) executes monetary policy (sets interest rates for the euro area). National central banks do not have authority to set their own individual policies insofar as the currency is concerned.

Though monetary policies are unified for the member states that have joined the euro area, flanking policies, such as fiscal policy and the role of what would be the federal ministry of finance are different in the EU. Within EU economic and monetary union (EMU) these policies remain firmly secure at the member state level, even if there are some rules put in place that aim to have the effect that they will lead to a coordination of budgetary and fiscal policies (Heipertz & Verdun, 2010). Furthermore, the EU supra-national level also only has a fraction of the budget of what the Canadian federal government has to spend, seen that the EU only has a supranational budget of one per cent of Gross Domestic Product. On the flip side, most EU member states have national budgets that are higher than what Canadian provinces and territories spend. Other policy areas are mainly the responsibility of lower level governments in both political systems: education, social policy, health, local infrastructure and so on (Verdun & Wood, 2013a, 2013b). These few examples indicate how there are similarities between both systems that make it not too far-fetched to imagine that the EU and Canada are in a number of ways similar to each other in their type of multi-level governance.

In terms of institutional comparisons, both Canada and the EU have a parliament at the federal/supra-national level. The parliament in Canada is one based on the Westminster model. In Europe the European Parliament (EP) has over time acquired more powers (since 2009, with the entering into force of the Lisbon Treaty, it is now the 'normal' procedure in the EU to need approval from the EP for legislative acts to become law). Although the EP has that 'normal' function for passing most EU legislative acts, the EP is atypical in other ways: parliamentary political party groupings are still more an amalgamation of national parties, that 'sit' together by familiarity rather than a proper, coherent, political party with a unified focus (see also Kreppel, 2006, for an analysis of the EP as a federal body). Similarly, other EU supra-national institutions resemble those in federal states: the Court of Justice of the European Union is the highest court of appeal for EU law and in that way is a court similar to the supreme court of Canada (O'Brien, in press). Nevertheless, the Court of Justice of the EU does not have the power to decide over matters that cannot be traced back to some kind of legal basis in EU treaties (this means that laws that originate in member states and are not regulated by EU law, cannot be brought before the Court of Justice of the EU). Finally, the European Commission in a number of ways resembles a supra-national or 'federal' government. It has directorate-generals that resemble the ministries. Yet the political body of commissioners have not been brought forward through elections in

[8] Although a New Brunswick Provincial Court judge recently dismissed restrictions on intra-Canada cross-border alcohol allowances for personal as unconstitutional (CBC, 2016).

the parliament. Rather those candidates are brought forward by the member states governments without there being a formal link to the political background of these candidates—meaning that the proposed commissioner would not necessarily have the same political affiliation as the government of the day. Moreover, the European Commission does not run on a political platform but rather offers services as if there were no political mandate for the period of its duration in office.

Of course, there are indicators that make the two polities very different: EU citizens identify more with the national, regional and local levels than they typically do with the supra-national level. Many Canadians identify just fine with Canada although some minority groups (First Nations; some Quebecers) less so. Having said that, it is noteworthy that the EU citizens tend to trust their European level institutions more than their national level institutions, and this trend has been going on for a number of years (see Figure 1), although most recently trust in European Union institutions is falling quicker than trust in national parliaments and national governments.

All in all, the case can be made that both the European Union and Canada have supra-national/federal characteristics that are similar, even if a number of profound differences remain.

The relations between Quebec and Canada have put significant pressure on the Canadian federation even if Canadian federalism has been "one of the most resilient and enduring of modern federations" (Burgess, 1990, p. 1). Looking at this case through the work of Burgess has shown us that Canadian federalism's strength lies in the way centripetal and centrifugal forces offset one another. Canadian federalism has managed, even if often imperfectly, to accommodate the needs of minorities (in particular the prominent Quebec nation), thus making the centralising forces ultimately have the upper hand. Recent political developments in Canada reflect these insights as the outcome of elections both provincially and federally can be interpreted to mean that there is very limited appetite at the moment in another referendum on Quebec separation. What still needs more attention is the relationship with First Nations, a group of minorities that is still dissatisfied with its status and living standard within the federation. This relationship is one that needs continuous attention and a correction of historical wrongs.

## 7. Conclusions

This article started off examining the concepts of federalism and federation drawing in particular on the work of Michael Burgess. The Europeanist literature offers different insights into when we might call the EU a federation. As of yet very few scholars offer the conclusion that the EU has already met the threshold that the EU could indeed be called a federation. Its leading political bodies still miss the autonomy that is typically attributed to the highest political body; its citizens are not yet identifying with the EU and are not in all bodies directly represented.

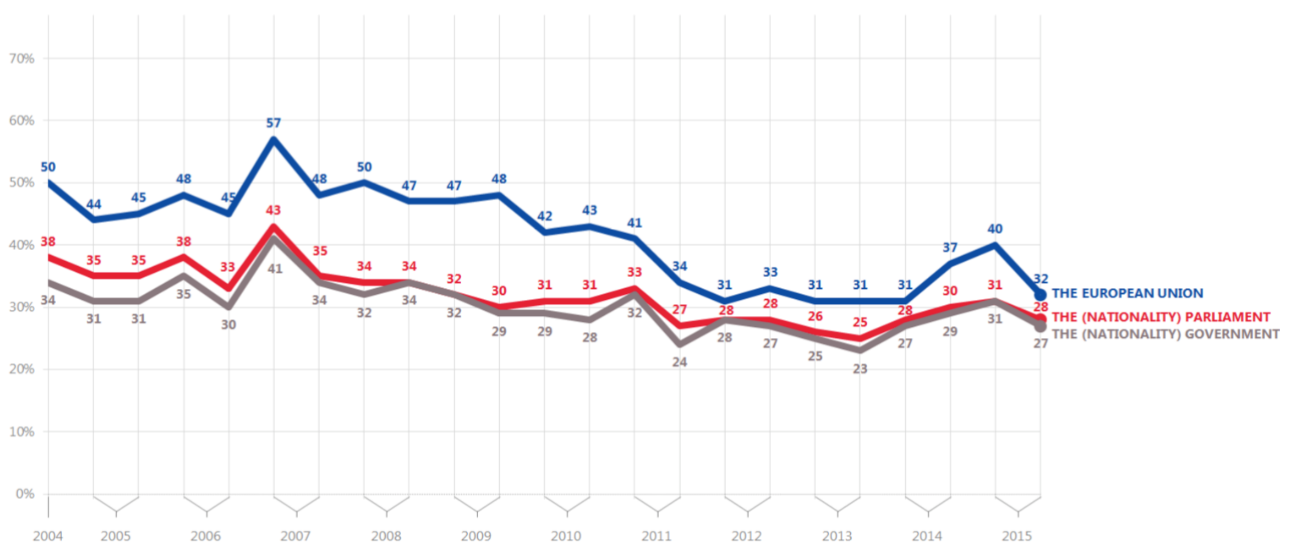


**Figure 1**. Trust in institutions: EU, national parliaments and national governments. Source: European Commission (2015, p. 8).

Nevertheless, what we have learnt from this study is that numerous types of federations exist over time and space. It does not do any of them justice to try to define the terms federalism and federation in a rigid fashion. With the help of the comparative work of Burgess we are able to identify building blocks that contribute to an understanding of the specific type of federation in a given time and space. In the cases of Canada and the EU, Burgess's insights prove very helpful indeed. By focusing at once at the institutional, administrative and governmental sides of the equation we are able to see how some federations use division of labour of who is responsible for what part of the tasks and thus have federalism be 'executive' or 'administrative'. On the other side of the equation it is important to realize that federations are made up of different groups, sometimes differing in size, identification, social and political needs and thus simple territorial federalism might not work; one needs multi-level federalism to accommodate diverse groups.

Burgess's work thereby is ideally suited to examine the case of the EU. Although there are hardly any scholars who would openly state that the EU today resembles a pseudo federation, with the help of Burgess's insights we can point to the federal features of the EU. Comparing the EU to the case of Canada is attractive. Canadian federalism is quite decentralized and 'confederal', multinational, and 'executive' so that some comparisons are actually striking. Many have argued that the EU is a sui generis political system. But in comparing the nature of the Canadian federation to that of the EU enables us to look beyond the specific sui generis characteristics of the EU. It offers us a toolkit that facilitates a comparison with other polities that in turn can offer us insights into what goes on within the EU political system. Such an analysis enables us to see that the EU is in fact already on a clear federal path. Even if it has not been a big bang, its incremental steps can clearly be identified as having federal characteristics. In other words, the EU has a considerable amount of federal features (federation), but that a federal tradition, a federal ideology and advocacy to a federal goal (federalism) are mostly absent.

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The author declares no conflict of interests.

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**About the Author**

**Amy Verdun** is Professor of Political Science and Jean Monnet Chair Ad Personam in the Department of Political Science at the University of Victoria, Canada. She has published 18 books, more than 120 peer-reviewed articles and chapters on various aspects of European integration. Her articles have come out in journals such as *International Studies Quarterly*, *Journal of European Public Policy*, *Review of International Political Economy*, *West European Politics*, and *World Politics*. She is the co-editor of *JCMS: Journal of Common Market Studies*.

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