Legitimacy in Global Environmental Governance

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Writing in 1999, Daniel Bodansky predicted that the question of legitimacy would 'emerge from the shadows and become a central issue in international environmental law.'[1] Specifically, Bodansky worried that as authority over environmental policy moved increasingly from domestic to international settings, perceptions that decision-making processes are 'insufficiently democratic' would increase. Such concerns were already simmering in other arenas of global governance. Jürgen Habermas, for example, used similar language nearly ten years earlier in anticipating a legitimacy problem in Europe, commenting that, 'the democratic processes constituted at the level of the nation-state lag hopelessly behind the economic integration taking place at a supranational level.'[2] Both authors, in different ways, worried that the reconfiguration of political authority might not keep pace or adapt appropriately to globalizing pressures. Few topics could be more appropriate for the inaugural issue of a journal devoted to the intersection of International Relations (IR) and International Law (IL).

Whereas Bodansky in 1999 could cite only a handful of works that addressed legitimacy in global governance, as one author recently put it, 'currently there is hardly an essay on international or global governance that does not at least mention the issue of legitimacy.'[3] Still,

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[1]   Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 Am. J. Int'l L. 596 at 596

[2]   Jürgen Habermas, 'Citizenship and National Identity', reprinted as Appendix II in Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by W. Rehg. (Cambridge, Mass.: MIT Press, 1996) 491 at 491.

[3]   Jens Steffek, 'Why IR Needs Legitimacy: A Rejoinder' (2004) 10 European Journal of International Relations 485 at 485. Examples of recent works include Jean-Marc Coicaud & Veijo Heiskanen, eds., *The Legitimacy of International Organizations* (Tokyo: The United Nations University Press, 2001); Roger B. Porter *et al*., eds., *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium* (Washington: Brookings Institution Press, 2001); Jens Steffek, 'The Legitimation of International Governance: A Discourse Approach' (2003) 9 European Journal of International Relations 249; Ian Hurd, 'Legitimacy and Authority in

passing references far outnumber systematic treatments. Empirical applications are even more rare. Moreover, existing scholarship on legitimacy draws on diverse disciplinary literatures in political science and philosophy, law, and sociology, which has produced confusion over its meaning and dynamics. This article attempts to sort through different conceptions of legitimacy and evaluate how contemporary environmental governance stacks up to these notions. Ultimately, it proposes that the overall legitimacy of global environmental governance is a consequence of the joint appearance of components emphasized in these different conceptions, but inadequately identified in any alone.

It might seem ironic to focus on environmental governance as a site of legitimacy problems. No equivalent to the 'Battle of Seattle'—the massive public protests at the 1999 World Trade Organization (WTO) Ministerial that became a watershed for public challenges to the legitimacy of international economic institutions—has ever confronted global environmental institutions. They seem largely immune from the protests dogging not only the WTO, but virtually every significant organization or initiative identified with the economic globalization agenda. Moreover, while environmental governance by no means achieves a democratic or deliberative ideal, it is among the most transparent, participatory, and accessible realms of global governance to state and non-state actors alike. It has also generally been responsive to justice and equity concerns—values sometimes linked to notions of legitimacy—especially when compared to other domains of global governance. Global environmental norms, institutions and agreements, especially in the post-Rio Summit (1992) era, often entrench differential obligations and recognize differential capacities of developed and developing countries. They also frequently attempt to combine global concerns with local decision-making and accountability, where activities are focused.

Part of the reason legitimacy concerns have increased despite these conditions is a widespread belief that global environmental governance remains weak, lacks authority, and is unable to make

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International Politics' (1999) 53 Int'l Org. 379; Benjamin Cashore, 'Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority' (2002) 14 Governance 502. Older treatments are rare, although a broad survey of work that directly discusses legitimacy would include Henry Kissinger, *A World Restored* (New York: Gosset Dunlap, 1964); Inis Claude, Jr., 'Collective Legitimization as a Political Function of the United Nations' (1966) 20 Int'l Org. 367; Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990); Abram Chayes & Antonia H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995).

significant inroads into solving many of the problems for which institutions and agreements have been established.[4] This suggests greater legitimacy is needed to establish more extensive, enforceable, and effective environmental action at the global level. At the same time, many scholars and activists argue that ostensibly non-environmental institutions such as the WTO or World Bank, which nonetheless play a significant role in international environmental governance, pay insufficient attention to environmental concerns or subordinate them to the goals of open markets, corporate freedom, efficiency and economic growth. Environmental protection and sustainable development thus join human rights, labour rights, and poverty reduction, as unmet goals driving the broader legitimacy challenge to international liberalism and the global governance institutions established to promote and maintain it.[5]

I will argue that a focus on legitimacy can help to understand and address these dilemmas. However, legitimacy must be examined not only from the common perspective of democratic theory, but also from legal and sociological perspectives that may diverge from the democratic normative ideal. Whereas these different conceptions of legitimacy can sometimes push in contradictory directions, the key to legitimate governance is in their convergence. After defining legitimacy, I identify principled, legal, and sociological notions of legitimacy and evaluate environmental governance in light of these notions.[6] I conclude with some observations on what integration of these conceptions of legitimacy might entail and implications for the legitimacy challenge ahead.

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[4]   One could cite dozens of works on the inadequacies of efforts to address global environmental problems, failures of global environmental governance, and the need for reform. For an overview of these arguments focused specifically on governance, see James Gustave Speth, 'The Global Environmental Agenda: Origins and Prospects' in Daniel C. Esty & Maria H. Ivanova, eds., *Global Environmental Governance: Options & Opportunities* (New Haven: Yale School of Forestry & Environmental Studies, 2002) 11 and other contributions to that volume; Frank Biermann & Steffen Bauer, eds., *A World Environment Organization: Solution or Threat for Effective International Environmental Governance* (Aldershot, UK: Ashgate, 2005).

[5]   John G. Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 Int'l Org. 357; Steven Bernstein & Louis W. Pauly, eds., *Global Governance: Towards a New Grand Compromise?* (Albany: SUNY Press) [forthcoming].

[6]   For a detailed discussion and defence of these conceptions of legitimacy, see Steven Bernstein, 'The Elusive Basis of Legitimacy in Global Governance: Three Conceptions' (Globalization and Autonomy working paper series, Institute for Globalization and the Human Condition, McMaster University, 2004).

I LEGITIMACY AND WHY IT MATTERS

Legitimacy can be defined as the acceptance and justification of shared rule by a community. This definition self-consciously combines an empirical measure of legitimacy (acceptance of a rule or institution as authoritative) and a normative argument concerning whether the authority possesses legitimacy (providing reasons that justify it). It therefore eschews the traditional dividing line in political science writing on the topic between a Weberian social scientific approach and a Habermasean position that a belief in legitimacy is assumed to have an 'immanent relation to truth.'[7] As a practical matter in global governance, this conceptual distinction is untenable. Arguments about why actors *should* accept a decision or rule as authoritative (as opposed to because they are coerced) necessarily include possible reasons why the decision *is* accepted, and vice-versa. That being said, particular conceptions of legitimacy invoked by global governance scholars entail trade-offs in the leverage they provide for normative or positive projects, as will be seen below.

Beyond definitions, the new legitimacy concerns need to be placed in the context of the ongoing debate over the reconfiguration of global authority.[8] The question of authority beyond the state is not especially new. Since the emergence of the 'regimes' literature in the 1980s, IR scholars have asked how, given formal anarchy, institutions gain 'authority' to create obligations on community members to adhere to their rules or norms. Legitimacy is one logical answer, whether the community consists only of states, or includes firms, civil society groups, local populations or sub-state actors who may be involved in rule-making or who might be affected by decisions. Yet, IR scholars until very recently largely ignored legitimacy, assuming instead that states—the nearly exclusive focus of regime theory although not of the newer global governance scholarship—largely obeyed commands out of self-interest, fear, or incentives from more powerful actors.

Whether or not legitimacy was always necessary for international stability and patterned behaviour,[9] the extended scope and reach of contemporary 'global governance' has made that need much

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[7]   Jürgen Habermas, *Legitimation Crisis*, trans. Thomas McCarthey (Boston, Mass.: Beacon Press, 1973) at 97. Bodansky, *supra* note 1, and Steffek (2003), *supra* note 3, make much more of this distinction.

[8]   Miles Kahler & David Lake, eds., *Governance in a Global Economy: Political Authority in Transition* (Princeton, NJ: Princeton University Press, 2003); Edgar Grande & Louis W. Pauly, *Complex Sovereignty and the Foundations of Global Governance* (Toronto: University of Toronto Press, 2005).

[9]   For arguments that it was, see especially Kissinger, *supra* note 3; Claude, *supra* note 3.

more visible. This need is apparent not only within international organizations (such as the UN, IMF, WTO, or World Bank), but also within hybrid, private, and networked forms of governance that include varying mixes of non-state actors. Many of these governance nodes until recently existed on the fringes of consciousness, except among a few select elites. Others, especially of the hybrid and non-state variety, are only now emerging. These developments create a situation not unlike the legitimacy problems described by Habermas following the expansion of post-war welfare states into more and more areas of economic and social life, in order to maintain economic performance. That expansion, 'enhance[d] the visibility of the conventional and political dimension of social life and encourage[d] citizens to ask the state to legitimize the particular conventions supported by its action.'[10] Similarly, legitimacy demands on international institutions increase to the degree they appear authoritative to ordinary citizens who view them as the institutional embodiment of globalization. Hence, civil society looks to these institutions to provide social justice, equity, or other broad societal values, including ecological integrity, not just functional goals such as financial stability.[11]

Even since the events of 11 September 2001, when the 'anti-globalization' movement appears in retreat, legitimacy pressures in global governance have not abated, nor are governance institutions less 'visible'. For instance, developing countries, which are now better integrated into the world economy than ever before, are demanding with renewed vigor changes in the structure of international institutions to more equitably represent their needs and concerns. Pressure also continues to mount, especially from non-state actors, to make institutions more accountable to domestic populations and transnational civil societies, as well as to increase transparency and access to participatory mechanisms for all affected actors.

Under these conditions, the question of legitimacy concerns who is entitled to make rules and how authority itself is generated—a significant departure from an earlier and much narrower emphasis in IR and IL on legitimacy as a mode of compliance.[12] That earlier literature tended to juxtapose legitimacy to interests or fear of 'punishment' as sources of compliance.[13] The new focus on governance, in contrast,

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[10]   William Connolly, 'Introduction: Legitimacy and Modernity' in W. Connolly, ed., *Legitimacy and the State* (Oxford: Basil Blackwell, 1984) 1 at 13, commenting on Habermas's, *Legitimation Crisis*, *supra* note 7.

[11]   Richard Devetak & Richard Higgott, 'Justice Unbound: Globalization, States, and the Transfer of the Social Bond' (1999) 75 International Affairs 483.

[12]   Franck, *supra* note 3; Hurd, *supra* note 3.

[13]   Hurd, *ibid.* at 379.

highlights that legitimacy is intimately connected to power and political community. Max Weber, in his seminal writings on the topic, focused especially on how legitimacy justifies authority and domination,[14] a point not lost on an earlier generation of IR scholars who viewed legitimacy as making rulers 'more secure in the possession of power and more successful in its exercise.'[15] Legitimacy can also be a source of power, enabling some policies or practices while proscribing others.[16] In terms of community, legitimacy always rests on shared acceptance of rules and rule by affected communities and on justificatory norms recognized by the relevant community. However, defining who is a member of a relevant community, on what basis community identification must rest, and to what degree shared norms of appropriateness must be present to achieve legitimacy are all subjects of debate.

Perhaps the most important reason the newer legitimacy agenda applies to environmental governance is that it throws traditional notions of the international community into question by increasingly targeting or affecting non-state actors, whether firms whose production is affected by chemical bans, emission limits or campaigns for corporate responsibility; fishers whose catch is monitored or limited by fisheries regimes; or local communities affected by decisions of an international financing institution such a the Global Environmental Facility (GEF). Under these conditions, traditional sovereign state diplomacy and consent may be an inadequate source of legitimacy. Moreover, international legitimacy may no longer be easily divorced from justice, as some legal scholars have argued it should be.[17] If '[t]here are no settled social bonds [community] in an age of globalization' and therefore 'the Westphalian "givens" of justice [as a concern within states

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[14]   Guenther Roth & Claus Wittich, eds., *Max Weber: Economy and Society* (Berkeley: University of California Press, 1978) at 953.

[15]   Claude, *supra* note 3 at 368.

[16]   A more radical position is that legitimating discourses are a form of productive power, producing subjectivity by defining identities and practices. Michel Foucault's notion of governmentality comes closest to capturing this process. See M. Foucault, 'Governmentality' in Graham Burchell, Colin Gordon & Peter Miller, eds., *The Foucault Effect: Studies in Governmentality* (London: Harvester Wheatsheaf, 1991) 87. On productive power compared to other conceptions of power in global governance, see Michael Barnett & Raymond Duvall, eds., *Power and Global Governance* (Cambridge: Cambridge University Press, 2004).

[17]   Franck, *supra* note 3 at 208-9; Bodansky, *supra* note 1. Interestingly, Franck subsequently acknowledged that an emerging global community means the value of fairness applies in international law and institutions (*Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995)).

but not beyond] no longer pertain,'[18] meeting conditions of democratic legitimacy beyond the state is at least hypothetically possible.

II A PRINCIPLED CONCEPTION: LEGITIMACY AS DEMOCRACY

A focus on democratic legitimacy tends to dominate the new literature on legitimacy in global governance. As alluded to already, concerns over globalization are now commonly expressed in terms of justice and democracy by utilizing the rationale that institutions of global governance are usurping domestic democratic institutions. Two conclusions follow. Either international institutions should become more democratic—a view expressed most commonly by cosmopolitans[19]—or state governments must be protected from usurpation—a position most strongly expressed by conservative nationalists such as the 'new sovereigntists' in the United States.[20] The latter position rests on a philosophical claim that global governance can only be of peoples, i.e. governance of a community of states whose representatives can engage in rule making, but the legitimacy of those rules ultimately must rest on domestic constitutional order.[21]

In both cases, legitimacy requires democracy because it is the central principle in contemporary politics that justifies authority.[22] However, there is little indication on the horizon of truly democratic institutions at regional, let alone global scales when even the highly institutionalized European Union continues to struggle with a 'democratic deficit.' Cosmopolitan proposals for participatory mechanisms, including referendums and elected representative institutions such as People's Assemblies or a Global Parliament that can hold global regulatory institutions accountable or ensure the protection of local autonomy and individual rights,[23] appear even less likely outside the European context in the short to medium term, even when

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[18] Devetak & Higgott, *supra* note 11 at 484.

[19] Most notably, David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford: Stanford University Press, 1995).

[20] For example, Jeremy Rabkin, *Why Sovereignty Matters* (Washington: AEI Press, 1998). For a summary of their views, see John G. Ruggie, 'American Exceptionalism, Exemptionalism and Global Governance', in Michael Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005) 304.

[21] John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999).

[22] Held, *supra* note 19 at 1.

[23] E.g. Held, *supra* note 19 at 267-286; Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2001) at 265-75; Esref Aksu & Joseph A. Camilleri, eds., *Democratizing Global Governance* (New York: Palgrave, 2002).

they include principles such as 'subsidiarity'.[24]

Given these practical limitations, actual proposals in environmental governance for institutional reform have not generally included a democratic assembly. For example, discussions around a 2003 French proposal to the United Nations (UN) General Assembly for a new UN Environment Organization (UNEO)—the only initiative for a global environmental organization actually tabled—have so far focused instead on coordinating and strengthening existing agreements, compliance systems, and organizations with an environmental mandate, or improving responsiveness to developing countries. The thrust of the proposal is toward turning the United Nations Environment Programme (UNEP) into a UN specialized agency rather than radical democratic reform, centralization or legal reform along the lines of the WTO. Even this modest proposal has generated limited political momentum, is strongly opposed by the United States, and received no mention in the High-level Panel report on UN reform released in December 2004.[25] Although supporters argue a universal membership UNEO is needed precisely for legitimacy reasons—as put by German Environment Minister Jürgen Tritten, 'the legitimacy of decision-making processes is a key point and therefore all UN Member States should effectively be given the same rights'[26]—any move in that direction has been resisted. States could not even agree at the 2005 UNEP Governing Council meeting whether the Council should be expanded to include universal membership, with the EU strongly in favor and the United States' and developing country governments opposed.[27]

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[24]   The principle, most notably institutionalized in the European Union, envisions central authority being subsidiary to local authority in the absence of a compelling case for the contrary. Cosmopolitan proposals thus usually argue for multiple, non-hierarchical, and overlapping authorities at various scalar levels, with decision-making following democratic norms at all levels.

[25]   International Institute for Sustainable Development, 'Summary of the Eighth Special Session of the UNEP Governing Council/Global Ministerial Environment Forum: 29-31 March 2004' 16:35 *Earth Negotiations Bulletin*; United Nations, *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-level Panel on Threats, Challenges and Change*, UN Doc. A/59/565 (2004), online: United Nations <http://www.un.org/secureworld/>.

[26]   German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, Press Statement, 'Trittin Calls for a UN Environment Organization' (15 March 2004), online: Bundesministerium für Umwelt <http://www.bmu.de/english/press/pm/5669.php>.

[27]   International Institute for Sustainable Development, 'Summary of the 23rd Session of the UNEP Governing Council/Global Ministerial Environment Forum: 21-25 February 2005' 16:47 *Earth Negotiations Bulletin*.

In the absence of radical cosmopolitan reform, many scholars argue that democratic legitimacy can nonetheless be improved with relaxed requirements for full-fledged deliberative and democratic mechanisms. Thus, they focus on the elements of legitimacy in democratic theory, such as accountability, transparency, access to participation, deliberation and, sometimes, fairness. As opposed to direct accountability to publics through elections, proposals are increasingly rooted in deliberative models of legitimation based on Habermas' theory of communicative action, where legitimacy ideally requires that decisions rest on 'good arguments' made under conditions in which free and equal autonomous actors can challenge validity claims, seek a reasoned communicative consensus about their understandings of the situation and justifications for norms guiding their action, and are open to being persuaded.[28] IR scholars generally recognize that such 'ideal speech' situations are unlikely to obtain in international negotiations or forums, but nonetheless suggest that when argumentation occurs in situations approximating these conditions, such as when participants of different capabilities refrain from coercion or pulling rank, it can serve as a source of legitimacy.[29] Whether arguments and justifications occur between state representatives, members of transnational organizations or individual citizens, legitimacy requires a situation where persuasion is possible and common understanding is the goal.[30] Another variant of particular relevance to emerging forms of environmental governance, is 'stakeholder' democracy, 'centered … on new participatory deliberative practices' among stakeholders that include not only governments, but civil society groups, local communities and businesses.[31]

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[28] Jürgen Habermas, *Theory of Communicative Action*, vol. 1 and 2, trans. by Thomas McCarthy (Boston: Beacon Press, 1981 and 1987). On deliberative democracy generally, including formulations critical of Habermas, see Seyla Benhabib, ed., *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996).

[29] Thomas Risse, '"Let's Argue!": Communicative Action in World Politics' (2000) 54 Int'l Org. 1.

[30] Interpretations of Habermas and deliberative democracy more generally disagree whether consensus is required for legitimacy, or whether there is scope for difference or 'agreeing to disagree'. However, adjudicating that debate is beyond the scope here. For a good discussion, see Simone Chambers, *Reasonable Democracy: Jürgen Habermas and the Politics of Discourse* (Ithaca, NY: Cornell University Press, 1996) at 155-72; Benhabib, *supra* note 28.

[31] Karin Bäckstrand & Michael Saward, 'Democratizing Global Environmental Governance? Stakeholder Democracy at the World Summit for Sustainable Development' (Paper presented to the Fifth Pan-European Conference on International Relations, The Hague, 9–11 September 2004); Nancy Vallejo & Pierre Hauselmann, Governance and Multi-stakeholder

Given wide disagreement in this literature on precise criteria of legitimacy, the evaluation below assesses environmental governance across the full range of criteria identified above. By most measures, although varied across institutions and agreements and generally stronger in participation and transparency than deliberation, environmental governance fares relatively well.

Peter Haas, for example, citing the increasing role of scientists in national decision-making and in treaty advisory bodies as well as the proliferation of environmental non-governmental organizations (NGOs), has argued that states, though still the primary locus of authority, 'are increasingly accountable to domestic and transnational constituencies.'[32] Moreover, delegations to multilateral negotiations frequently include members of civil society and the business community. Moreover, these non-state actors sometimes serve as important sources of expertise, especially for developing countries with limited diplomatic and technical resources. NGOs also play formal and informal roles in monitoring and implementation. Transnational corporations have also significantly increased their participation and political organization in a variety of environmental governance forums.[33]

More broadly, international environmental institutions have frequently been leaders in providing non-state actors access to information and participation. Both the 1972 UN Conference on the Human Environment in Stockholm and the 1992 UN Conference on Environment and Development in Rio de Janeiro were breakthrough events for NGO participation in their times. The Stockholm conference originated the idea of a parallel NGO forum, which attracted some 400 groups, and has since become a regular feature of such events.[34] At Rio, 1420 accredited NGOs, about one-third from the South, participated in the official proceedings as a result of the Secretariat's unprecedented decision to relax accreditation rules to allow non-ECOSOC NGOs to

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Processe*s* (Winnipeg: International Institute for Sustainable Development, 2004).

[32]   Peter M. Haas, 'Social Constructivism and the Evolution of Multilateral Environmental Governance' in Aseem Prakash & Jeffrey A. Hart, eds., *Globalization and Governance* (London: Routledge, 1999) 103.

[33]   Mikoto Usui, 'The Private Business Sector in Global Environmental Diplomacy' in Norichika Kanie & Peter M. Haas, eds., *Emerging Forces in Global Environmental Governance* (Tokyo: United Nations University Press, 2004) 216.

[34]   *Report of the United Nations Conference on the Human Environment*, UN Doc. A/CONF.48/14/REV.1 (1972); Satoko Mori, 'Institutionalization of NGO Involvement in Policy Functions for Global Environmental Governance' in Kanie & Haas, *supra* note 33 at 159.

participate (another 11,000 participated in the parallel Global Forum).[35] Again, the relaxed rules became the norm for subsequent world conferences.

The 2002 World Summit on Sustainable Development (WSSD) in Johannesburg marked a further innovation, multi-stakeholder deliberation and public-private partnership agreements. While it did not invent these concepts, it did much to promote the idea then emerging that environmental governance should not be limited to inter-state agreements. Stakeholders ought to be engaged, not only by informing inter-governmental decisions, but also through collaborative ventures, especially focusing on the implementation of sustainable development.[36] While innovations outside of WSSD also included voluntary measures in the corporate sector and non-state governance,[37] WSSD particularly promoted public-private partnerships or what became known as type II agreements. Some 300 of these partnerships were identified before or at the Johannesburg Summit.[38] WSSD also included 'multi-stakeholder' dialogues as an integral part of the preparatory process and the summit itself. The dialogues promoted deliberations among the nine 'major groups' identified by Agenda 21, reflecting various segments of society, and government officials. Although states never relinquished their sole authority to make decisions, these innovations can be read as an opportunity for 'stakeholder democracy' that moves beyond mere participation to 'collaboration' and truer 'deliberation' among states, business, and civil society.[39]

Multi-stakeholder dialogues had already been part of the Commission on Sustainable Development's regular sessions since 1998, and in 2002 UNEP's Governing Council (GC) institutionalized a Global Civil Society Forum (endorsing an initiative started two years earlier) in conjunction with meetings of the GC and Global Ministerial Environment Forum (GMEF).[40] In 2004, 206 civil society

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[35]   *Ibid*. at 159, 173, n. 3; Peter M. Haas, Marc A. Levy & Edward A Parson, 'Appraising the Earth Summit: How Should We Judge UNCED's Success?' (1992) 34:8 Environment 6 at 32.

[36]   Bäckstrand & Saward, *supra* note 31.

[37]   See Steven Bernstein & Benjamin Cashore, 'The Two-Level Logic of Non-State Global Governance' [under review] for distinctions among these types of governance.

[38]   Peter Doran, Briefing Paper, 'World Summit on Sustainable Development: An Assessment for IISD' (Winnipeg: International Institute for Sustainable Development, 2002).

[39]   Bäckstrand & Saward, *supra* note 31 at 5, 13.

[40]   The GMEF is a ministerial level meeting of Governing Council members. UNEP, 'Engaging Civil Society in the Governing Council/Global Ministerial Environment Forum' (background document for the regional meetings in preparation of the sixth Global Civil Society Forum, 14

representatives from forty countries attended the Forum, while 126 representatives from about sixty countries attended in 2005. Whereas representatives of civil society elected in regional meetings drafted the civil society statement forwarded to the GC/GMEF, any accredited organization can submit written inputs into working documents in the lead-up to the GC/GMEF meetings, receive working documents at the same time as government representatives, comment on these drafts, and have the comments circulated to governments before they meet to finalize the documents. They can also comment on the final documents.

Environmental governance seems even to make a difference for democratic reform in development finance institutions, where change has otherwise been more difficult. The most notable example is the Global Environmental Facility (GEF), a cooperative venture between UNEP, United Nations Development Program (UNDP), and the World Bank, established in 1991 to be the primary channel for multilateral aid for environmental protection in developing countries. A comparative study that assessed democratization in global governance according to a model of deliberative democracy identified the GEF as 'perhaps the most inclusive and open international organization.'[41] The study's authors note that Southern states' suspicions over environmental 'conditionality' gave way to stronger support after a series of reforms, including a balance of donor and recipient countries in its governing council (although there is still a slight bias towards wealthier countries and affirmative votes require a majority of members and contributors), increased transparency, and direct participation by NGOs through formal consultations. As evidence of its increased legitimacy, membership grew from twenty-nine states in the pilot phase (1991–4) to over 173 members by 2002. Where critics still maintain that actual practices have not lived up to the deliberative ideal, the GEF 'has adopted and implemented democratic procedures virtually unmatched in global politics.'[42]

In addition to these organizational reforms, global environmental norms and treaties support ongoing improvements in public participation and transparency. For example, Rio Declaration Principle 10 asserts that 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level' and promotes access to information, participation in decision-making, and access to judicial and administrative proceedings at the national level. While only soft law, many states have adopted its spirit. The 1998

October 2004). See also UNEP's 'Resources for Civil Society', online: <http://www.unep.org/DPDL/ civil_society/GCSF/index.asp>.

[41]   Roger A. Payne & Nayef H. Samhat, *Democratizing Global Politics* (Albany, NY: SUNY Press, 2004) at 7.

[42]   *Ibid*. at 98.

Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which came into force in 2001, takes up its provisions formally. Negotiated under the auspices of the UN Economic Commission for Europe, it includes provisions for transparency and participation at the international as well as national levels. Subsequently, the EU adopted implementing directives on access to environmental information and public participation (directive 2003/4/EC), with a 2005 deadline for national implementation. In 2003, parties to the convention adopted a *Protocol on Pollutant Release and Transfer Registers* to create publicly available national inventories of pollution releases from industrial and other sources.

In line with these norms, multilateral environmental negotiations are already remarkably open and transparent. Although practices vary across environmental agreements, detailed information about most negotiations and side meetings is readily available to broader publics, most notably through a non-governmental reporting service run by the International Institute for Sustainable Development, the *Earth Negotiations Bulletin*. Owing to its access and the quality of its reporting, official delegates rely on it as much as NGOs and academics.

These examples suggest that environmental governance stacks up extremely well by most criteria of democratic legitimacy, especially in comparison with economic and security institutions, many of which have weighted voting and much less access for non-state actors. Yet, a sense that legitimacy problems remain in environmental governance reveals limitations of a conception of legitimacy based solely on a democratic or deliberative justificatory discourse.

One problem concerns a possible legitimacy-effectiveness trade-off. Greater participation, whether of larger groups of states or NGOs, can slow down decision-making, make consensus more difficult, and generally increase the challenge of collective action. The assumption that participation leads to influence or meaningful deliberation can also be questioned. If innovations such as stakeholder dialogues provide little influence on government-to-government negotiations, do they really increase legitimacy? Many participants at WSSD, for example, saw their limited impact as a 'disappointment', and as 'more monologues than dialogues' because of limited participation by high-level officials.[43] However, the legitimacy-effectiveness trade-off may be overblown if 'efficient' decision-making lacks support from relevant groups of actors.

Problems of political community and the difficulty in establishing a *demos* (a popular unit that exercises political rights) beyond the state, pose a potentially more significant limitation on

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[43]   Bäckstrand & Saward, *supra* note 31 at 17.

democratic legitimacy.[44] Who or what constitutes a political community is a major point of contention in political philosophy, although most literature agrees that communities exist by virtue of a shared identity and communication. The debate is most advanced in Europe, where political institutions with significant authority appear to be moving ahead of a *demos*. One response is that for limited and functional authority, such as that currently demanded in environmental governance, simple recognition of a shared fate may generate sufficient trust and willingness to sacrifice to support the requisite authority for governance.[45] To demand some notion of peoplehood or strong emotional bond is too high a standard for the type of authority being sought.

The problem is exacerbated, however, by unresolved tensions between the community of states and broader transnational society. Global environmental governance is well advanced in recognizing that its legitimacy increasingly rests on authority being granted by the broader communities it addresses beyond state governments. Still, the direction of reform to address these demands has provoked the ire of 'new sovereigntists'. Whatever the merits of the charges,[46] their concerns are best understood from the perspective of legal legitimacy.

III LEGAL LEGITIMACY

Legitimacy gets surprisingly short-shrift in the IL scholarship, which perhaps accounts for the caricature of international lawyers as tending 'simply to translate legitimacy as *legality*.'[47] It does not help that recent attempts to create dialogue among IR and IL scholars have focused on analyzing and explaining 'legalization' in world politics,[48] a discussion almost completely devoid of whether the trend toward institutionalization of legal constraints is legitimate.[49]

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[44] For example, see Lars-Erik Cederman, 'Nationalism and Bounded Integration. What it Would Take to Construct a European Demos' (2001) 7 European Journal of International Relations 139 at 144.

[45] E.g. Melissa S. Williams, 'On Peoples and Constitutions, Sovereignty and Citizenship' (Paper presented to the American Political Science Association annual meeting, Chicago, 2–4 September 2004)[unpublished].

[46] There is good reason to be suspicious of their agenda, which targets environmental and human rights NGOs and treaties such as the *Kyoto Protocol*, but has no problem with international rules that protect multinational corporations. Ruggie, *supra* note 20 at 30.

[47] Claude, *supra* note 3 at 368.

[48] Judith Goldstein *et al.*, 'Introduction: Legalization and World Politics' (2000) 54 Int'l Org. 385.

[49] Martha Finnemore & Stephen Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 Int'l Org. 743.

This relative neglect started to change in response to the same real world legitimacy challenges that motivated political scientists, leading some IL scholars back to the question of on what basis law can be justified as legitimate. The dominant answer to the question of 'legal legitimacy' is some variant of legal process. Unlike most principled conceptions, which appeal to notions of truth or justice, 'legal legitimacy' supports a sharp dividing line between what is just and what is legitimate. As Bodansky explains, legal legitimacy does not concern whether a decision is unjust, misguided or 'correct'; rather, it 'reflects more general support for a regime, which makes subjects willing to substitute the regime's decisions for their own evaluation of a situation.'[50]

International legal scholars identify state consent as the basis of obligation. Analyses of legitimacy thus focus on the nature of consent and its distance or removal from the particular rule in question. Bodansky, for example, differentiates 'specific consent' such as ratifying a treaty from 'general consent' such as ratifying the *Charter of the United Nations*, which 'creates institutions with quasi-legislative and adjudicatory authority.'[51] The move toward general consent and constitutionalism[52] is one potential source of legitimacy problems if the connection between consent and the rule or institution becomes distanced or obscured, an argument made most vociferously today in regard to the WTO's dispute resolution process.[53] The problem of consent is also linked to notions of 'legality'. Legality is potentially violated when a treaty body, group of experts such as scientists

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[50]   Bodansky, *supra* note 1 at 602.

[51]   *Ibid*. at 604.

[52]   Legalization blends into constitutionalism when rules define obligation 'as an attribute that incorporates general rules, procedures, and discourse of international law', which invokes what H.L.A Hart identified as secondary rules of a legal system (Kenneth Abbott *et al.*, 'The Concept of Legalization' (2000) 54 Int'l Org. 401 at 403). Whereas primary rules are regulative, obligating to do or refrain from certain actions, secondary rules are 'about rules;' they 'confer powers' to create or change primary rules (H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 79). As constitutionalization progresses, those rules appear further removed from their original source of legitimacy in state consent and more deeply institutionalized.

[53]   Robert Howse & Kalypso Nicolaïdis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far' in Roger B. Porter *et al.*, eds., *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium* (Washington: Brookings Institution Press, 2001) 227. For an argument that the WTO is not constitutionalizing, see Jeffrey L. Dunoff, 'Constitutionalism's Conceits' (Paper presented to a conference on Changing Patterns of Authority in the Global Political Economy, Tubingen, Germany, 16 October 2004).

empowered by a treaty (as is the case in the whaling and Antarctic regimes), or even a representative body of state delegates, makes a decision that appears to go beyond the mandate given them by the statute to which states consented.[54] Thus, whereas expertise and rational science (as defined by the rules of the institution in question) have been recognized as possible sources of legitimacy rooted in a Weberian conception of legal-rational authority—a source of legitimacy also emphasized in a newer literature on international administrative law owing to science's presumed ability to 'deliver good results'[55]—legality poses a limit on its legitimating power.

At the same time, there is pressure to move away from specific consent *for* legitimacy reasons, because the pressures of globalization raise questions about whether states can *legitimately* consent to policies that increasingly affect not simply their behaviour vis-à-vis other states, but also directly affect domestic policies, local communities or corporate activities. While some forms of participatory reform, including some already noted, may help shorten or thicken the long 'chains of delegation' that threaten legitimacy under such conditions,[56] it seems unlikely that any reforms that leave even general state consent as a centerpiece of legitimacy can overcome the more fundamental problem of international authority: there is no legitimate basis for states to actually transfer (as opposed to delegate) authority in any tradition of liberal democratic thought.[57] The very notion of state consent engages domestic political processes such as ratification, which is the case in virtually all multilateral environmental agreements (MEAs).

Part of the difficulty in resolving these dilemmas may be rooted in dominant understandings of the normative foundations of international law. While a detailed discussion of competing schools of thought in international legal philosophy is beyond the scope here, one intriguing alternative has been applied to address the problem of

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[54]   Bodansky, *supra* note 1 at 605.

[55]   Daniel C. Esty, 'Towards Good Global Governance: The Role of Administrative Law' (draft, 19 May 2005) [forthcoming] at 35-6; see also Steffek, The Legitimation of International Governance, s*upra* note 3.

[56]   Robert O. Keohane & Joseph S. Nye, Jr,. 'The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy' in Porter, *supra* note 53 at 276.

[57]   Unlike social contract theory as it developed to legitimize government authority in the state, no political philosophy recognizes the legitimacy of a process where states give over their authority comparable to individuals entering a contract to give up (authorize) sovereignty to a ruler (Thomas Hobbes, *Leviathan*, ed. by C.B. McPherson (London: Penguin, 1968) at 187), or to self-legislation, following Rousseau and Kant. Thus cosmopolitan democracy proposals must always appeal back to individuals, which creates a conundrum for IL rooted in state consent.

legitimacy in international environmental law. Drawing on the legal theory of Lon Fuller, Jutta Brunnée and Stephen Toope have proposed an 'interactional' theory of international law that emphasizes law's 'internal morality' based on criteria such as avoidance of contradiction, generality, and congruence with underlying rules. Legitimacy also depends on 'cooperation between the governing and the governed' rooted in social practices and conventions among actors.[58] Such cooperation and interaction between actors, within the context of norms and institutions they have created, makes rules understandable, creates stable expectations, and 'thick' acceptance of norms. Thus, instead of holding legitimacy as a yardstick to measure or critique international law, this approach in effect redefines law as legitimacy: 'the stronger the adherence to the criteria, the more legitimate and, thus, the more persuasive and influential—the more legal—are rules likely to be.'[59]

In international environmental law, Brunnée argues that Conferences of the Parties (COPs), which are regular negotiations of the parties to MEAs, offer a possible forum for resolving legitimacy dilemmas around consent by embodying conditions conducive to the 'interactional' processes; that is, parties are engaged in a process both guided by the norms of the MEA and that reproduce and possibly modify the MEA.[60] In some respects, COPs may take on characteristics of legislatures. For example, their decisions may be binding on states, as is the case with 'adjustments' of ozone depleting potential on substances already subject to the Montreal Protocol. Other COPs have been charged with elaborating rules and provisions of an agreement, such as the Framework Convention on Climate Change COP in regard to mechanisms under the Kyoto Protocol.[61] A key point is that they do not operate strictly under general *or* specific consent. Arguably, formal consent will be less necessary under conditions where 'procedural and substantive expectations can develop, and factual as well as normative understandings can grow' leading to shared understandings. To the degree COP processes mirror those identified by interactional scholars, rules gain legitimacy with or without formal consent, and take on characteristics of bindingness.[62] Some of these procedural requirements link back to deliberative conditions noted earlier (for example, treatment of parties as equals, transparency to affected actors), but this perspective

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[58]   Jutta Brunnée & Stephen Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 Colum. J. Transnat'l L. 19 at 49-53, 66.

[59]   Jutta Brunnée, 'COPing with Consent: Law-making Under Multilateral Environmental Agreements' (2002) 15 Leiden J. Int'l L. 1 at 46.

[60]   *Ibid.*

[61]   *Ibid*. at 23.

[62]   *Ibid*. at 39.

also stresses interactions with the broader community, both explicitly in terms of transparency but also more implicitly in terms of linking to shared norms. Thus, interactional legal theory takes on a sociological flavour.

This understanding of legitimacy has the advantage of overcoming the tendency of traditional notions of legal legitimacy to strictly focus on the rule or principle in question and deviations from it, not on underlying social purposes or the substance of rules that link those rules to other institutions or norms in society. Strict legal legitimacy ignores the possibility that the substance of rules frequently reflects what John Ruggie has called legitimate social purposes, or the purposes which institutions legitimately may pursue.[63] Sociological conceptions similarly root legitimacy in shared understandings and goals of a community. Still, critics may argue that an interactionist characterization obscures structural power in the creation and effectiveness of international legal rules. A sociological conception allows more explicit attention to this possibility, although it is open to the opposite criticism, that it still lacks a link to 'internal morality' or 'truth,' and thus may not provide a sufficient justification for authority.

IV A SOCIOLOGICAL CONCEPTION OF LEGITIMACY

From a sociological perspective, legitimacy is rooted in a collective audience's shared belief, independent of particular observers, that 'the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.'[64] Legitimization involves institutionalization of formal and informal rules or practices that become authoritative or understood to obligate by members addressed, whether or not they choose to comply. A sociological conception turns attention to the substance of rules, or the values and goals promoted. To be legitimate, rules and institutions must be compatible or institutionally adaptable to existing institutionalized rules and norms already accepted by a society. This understanding of legitimacy derives primarily from the literature in organizational sociology, the new institutionalism, and its uptake in the constructivist IR literature.[65] It should therefore not be confused with a simple empirical measure of a community's support for, acceptance of, or belief in an institution or rule, although that might be one indicator of legitimacy according to this view.

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[63]   Ruggie, *supra* note 5 at 382.

[64]   Marck C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 Academy of Management Review 571 at 574.

[65]   *Ibid.*; Martha Finnemore, 'Norms, Culture, and World Politics: Insights from Sociology's Institutionalism' (1996) 50 Int'l Org. 325.

Extrapolating these insights to the problem of governance, the rules in question define authority relationships and empower actors and institutions that participate in those relationships and construct governing institutions through their interactions. These practices in turn become institutionalized (or accepted) as 'appropriate' by the community in an ongoing process of legitimization and de-legitimization. Thus, there is a constant interaction of rules with the social purposes and goals of relevant audiences. Legitimacy therefore depends on the historically contingent values, goals, and practices of the relevant society. In terms of global governance, different audiences of state, global civil society, or marketplace actors may share different criteria or weightings of 'input' (procedural), 'output' (performance, efficiency), or more traditional notions of 'substantive' (values of justice and fairness) legitimacy.[66]

By putting a spotlight on the problem of community or relevant audiences, a sociological conception of legitimacy highlights the cosmopolitan argument that the boundaries of states and political communities may no longer coincide. An appropriate research strategy, then, is to identify political communities wherever they form, whether in professional or technical networks, relevant marketplaces, or the traditionally demarcated 'international society' of diplomats and state officials, and ask on what bases legitimacy within those communities rests.

From this perspective, legitimacy problems in global environmental governance arise not owing necessarily to a lack of democracy or the distance between state consent and new rules, but owing to tensions within the normative environment that environmental governance insufficiently navigates. For example, emerging norms and soft law around the creation of a 'global public domain'—or realm of social policies at the global level to moderate global liberalism—have focused attention on the need to moderate or 'embed' liberalism in broader societal values at the global level.[67] Such values may include environmental concerns, human rights, labour rights, and the social and material needs of the 'losers' or marginalized under globalization. In this context, what I have elsewhere labelled the 'compromise of liberal environmentalism' institutionalized since the 1992 Rio conference, which has premised environmental governance on embedding the

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[66] The input/output distinction comes from Fritz Scharpf, but it tends to ignore other substantive values that may produce legitimacy. Fritz W. Scharpf, 'Economic Integration, Democracy and the Welfare State' (1997) 4 Journal of European Public Policy 18.

[67] John G. Ruggie, 'Reconstituting the Global Public Domain: Issues, Actors, and Practices' (2004) 10 European Journal of International Relations 499.

environment in liberal markets, now faces legitimacy problems.[68]

This compromise originally fit very well with underlying shifts in the international economy and associated neoliberal normative environment reflected in economic and social policies, especially in the late 1980s and 1990s. That institutional environment has gradually started to shift, ironically owing in part to a sense that the environmental side of the equation of sustainable development had been buried under the shift to liberal environmentalism. The original framers of sustainable development were sensitive to the need to combine ecological sustainability with Southern concerns over economic growth, and saw multilateralism as a way to cushion the effects of liberalism and guide global policy. But, they failed to anticipate how forces of global economic integration, the hegemony of neoliberal economic orthodoxy, and the failures of aid-driven development policy would militate against global multilateral management and interventionist policies. Their failure is understandable in light of underlying structural changes associated with globalization, wherein the strength of norms that reinforce the global market have become a powerful legitimating force in their own right, even if their sustainability is questionable.

The immediate effects on environmental governance were to promote market mechanisms, policies on privatizing global commons and the creation of private property rights over resources rather than to attempt centralized management, and to promote the idea, most notably stated in Principle 12 of the Rio Declaration, that free trade and environmental protection were perfectly compatible. That principle states in part that, 'States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation.'[69]

The 2002 WSSD further reinforced global liberalism, the importance of the private sector, and the declining emphasis on multilateral management, reflecting underlying structural conditions of freer and accelerated transaction flows, globalizing markets and the fragmentation of political authority. Rio provided the normative foundations for environmental governance to adapt to such conditions. Thus, environmentalists should not have been surprised that a number of Northern delegations went to great lengths to ensure that the Johannesburg Declaration and Plan of Implementation, the two

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[68]   Steven Bernstein, *The Compromise of Liberal Environmentalism* (New York: Columbia University Press, 2001).

[69]   *Rio Declaration on Environment and Development*, 12 August 1992, in *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. 1) at Annex 1.

negotiated texts produced by the conference, did not contradict or undermine existing trade agreements.[70] Such arguments simply reinforced Rio Principle 12 which, following the Earth Summit, began to serve a legitimating function for major trade agreements, including the WTO.[71]

The WSSD endorsement and promotion of public-private partnerships for sustainable development is also perfectly consistent with these underlying normative shifts. Partnerships work under the assumption that combining the resources, skills, and commitment of non-state actors with the authority of states will succeed where state action has not. While such projects appear to be the pinnacle of sustainable development—combining economic, environmental and social goals and usually involving community stakeholders and NGO input— skeptics worry that their success depends on the goodwill and voluntary participation of the private sector. Notably, partnerships were not only opposed by many NGOs critical of the 'privatization' of environmental governance and fearful that it let states off the hook in imposing binding regulation, but also by a coalition of Southern states who worried that partnerships would lead to less aid and technology transfer for sustainable development.[72]

Arguably, the ultimate aim of partnerships is to embed the marketplace in broader social and environmental goals. Thus, the engagement of the corporate sector at WSSD should be read as part of the larger response to globalization within the UN system, especially in development policy. The Global Compact, in which the corporate sector is directly enlisted to sign onto an abridged version of environmental principles derived from the Rio Declaration (along with labour, human rights, and anti-corruption principles) is yet another example of this trend. Ideally, partnerships and the Global Compact also aim to respond to demands for greater corporate responsibility and accountability. Yet,

[70] Paul Wapner, 'World Summit on Sustainable Development: Toward a Post-Jo'burg Environmentalism' (2003) 3 Global Environmental Politics 1; James Gustave Speth, 'Perspectives on the Johannesburg Summit' (2003) 45 Environment 24.

[71] For example, see World Trade Organization, *Decision on Trade and the Environment* (15 April 1994), adopted by ministers at the meeting of the Uruguay Round Trade Negotiations Committee in Marrakech, online: WTO <http://www.wto.org/english/tratop_e/envir_e/issu5_e.htm ref>.

[72] Melanie Steiner, 'NGO Reflections on the World Summit: Rio + 10 or Rio – 10?' (2003) 12 RECEIL 33; Jan Martin Witte, Charloote Streck & Thorsten Benner, 'The Road From Johannesburg: What Future for Partnerships in Global Environmental Governance?' in Witte, Streck & Benner, eds., *Progress or Peril? Partnerships and Networks in Global Environmental Governance* (Washington, DC: Global Public Policy Institute, 2003) 59 at 60.

the WSSD made much less progress in these areas, which lends some support to the skeptics' view.

Not content with leaving corporate engagement to governments or international institutions, some nongovernmental groups have opted to directly target firms in the global marketplace through the creation of non-state governance schemes. The most common are 'certification' governance systems, where products, processes, or services get 'certified' as meeting specific standards of sustainability established by the scheme, and sometimes get a label so buyers can identify products or services that meet those standards. Such systems arose partly in response to the lack of progress in multilateral negotiations, but also because NGOs worried about the limitations of voluntary codes of conduct, self-regulation, or learning networks, even when backed by the United Nations. Their most unique feature is that their authority derives from their manipulation of global markets independently of states, leading Benjamin Cashore to label them 'non-state, market-driven (NSMD) governance.'[73] A small but accelerating number of such schemes have started to operate at the transnational level over the last ten to fifteen years as demands for governance of the global marketplace increase. They currently cover aspects of forestry, food security and production, labour standards, tourism, fisheries, and human rights. Others are in development in the energy/electricity and mining sectors. Most include specific performance criteria and employ systems of third-party verification and regular auditing and monitoring of compliance in which firms must participate to maintain 'certified' status. They also frequently have governance structures that include representation from corporations, broader civil society, and affected local communities. To the degree they exhibit the above characteristics, they can be considered 'governance' systems with significant authority as opposed to strictly voluntary or self-regulatory schemes.[74]

Such schemes take advantage not only of globalizing markets, but also the spread and influence of global consciousness and civil society organizations to create pressures on companies to participate. In practice, they attempt to combine elements of stakeholder democracy and accountability legitimated by such shifts with the power of the marketplace to create legitimate authority independent of international agreements among states. They thus offer a good example of an innovative form of governance that arose in large part owing to legitimacy and performance limitations in traditional forms of inter-state governance.

While by no means a panacea (NSMD is unlikely to become

[73]   Cashore, *supra* note 3.
[74]   Bernstein & Cashore, *supra* note 37.

the dominant form of environmental governance), these governance systems show promise in responding to legitimacy concerns from both a principled and sociological perspective. First, NSMD is well positioned to achieve a high standard of stakeholder democracy relative to other governance experiments. For example, the Forest Stewardship Council, which certifies forest products, created environmental, social and economic decision-making chambers, each with equal voting weight, to ensure business interests would not dominate decision-making. The dominance of business interests is a potentially serious drawback to public-private partnerships, voluntary codes including on corporate social responsibility, and even to traditional inter-state governance. In NSMD systems, decision-making is frequently designed to force different stakeholder groups to engage and deliberate, and many develop specific standards at the local level with community involvement rather than through top-down processes.

As Karin Bäckstrand and Michael Saward argue, in the absence of electoral and representative legislative processes, processes that systematically involve stakeholders' range of voices and perspectives create 'ownership' of outcomes, and can 'draw upon principles protecting the vulnerable.'[75] Whereas other forms of standard-setting tend to favour expert-driven decision-making as a source of legitimacy (a move towards international administrative law), both legal and principled conceptions of legitimacy suggest that absent transparency and accountability, such processes risk legitimacy problems. Thus NSMD may have a legitimacy advantage among the full range of relevant communities over the business-dominated International Organization for Standardization (ISO), for example, unless it reforms to be more inclusive and responsive to stakeholders.

From a sociological perspective, NSMD governance systems are clearly enabled by the existing normative environment, both in terms of the shift to liberal environmentalism and the elevation of the global marketplace as an arena for governance, as well as in terms of emerging norms of a global public domain that favour some form of deliberative democracy. Under such circumstances, such systems may even succeed where states could not, as has arguably been the case in attempts to promote global sustainable forest management.[76]

Nonetheless, non-state governance networks are never

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[75]   Bäckstrand & Saward, *supra* note 31 at 6.

[76]   Steven Bernstein & Benjamin Cashore, 'Non-State Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?' in John Kirton & Michael Trebilcock, eds., *Hard Choices, Soft Law: Combining Trade, Environment, and Social Cohesion in Global Governance* (London: Ashgate Press, 2004) 33.

completely dis-embedded from wider economic, social and political systems. For example, an attempt to build legitimate governance of sustainable forestry through a transnational network of producers (forest companies) and consumers (retailers and consumers of forest products) must not only generate legitimacy among those parties, but also must navigate existing rules of international trade legitimated through inter-state processes as well as regulatory and social environments of nation-states in which companies operate. In this regard, the tension generated by liberal environmentalism becomes apparent when the Committee on Trade and the Environment of the WTO, for example, is unable to make progress on issues such as labeling and certification, let alone on how to reconcile in practice environmental measures with trade norms based on non-discrimination.

Neither are NSMD systems dis-embedded from wider publics that any governance scheme may affect, which means they must either be included in the network or some other mechanism of accountability must be developed. Ultimately, a sociological perspective suggests various notions of legitimacy may be at least somewhat interdependent when applied to the practice of global governance, since there is an ongoing dynamic of legitimation and delegitimation as norms and institutions vie for legitimacy within the wider institutional contexts in which global politics and authority relations play out.

CONCLUSION: PROSPECTS FOR CONVERGENCE?

Despite the analytic distinctions made above, the conceptual traditions of legitimacy identified are not mutually exclusive. Indeed, considerable borrowing across fields occurs in the literature, with each conception offering some insight into what legitimacy in global governance requires. Still, I conclude on a cautionary note that it is unlikely that a universal formula to satisfy all legitimacy concerns will emerge. This conclusion is contrary to the tendency to develop abstract criteria of legitimacy for global governance, usually derived exclusively from the democratic legitimacy literature. Rather, insights from the sociological perspective suggest that criteria of legitimacy ultimately are contingent on historical understandings at play and the shared norms of the particular community or communities granting authority. In practice in global governance, these reflect components identified in each conception, but appropriate responses to contemporary legitimacy challenges are conditioned by a variety of contextual factors, discussed below. I highlight four points in this regard.

First, the best way to view the relevance and importance of principled conceptions of legitimacy is through a sociological lens. Whatever the merits of normative arguments on democratic legitimacy, there is an indisputable general normative trend to democratize global governance. Examples range from demands for democratic reform and

greater public accountability (whether to states and/or broader affected publics) of international institutions, to calls for 'stakeholder democracy' and 'deliberation'. The relevant point here, which also resonates with the interactionist legal literature, is that these values stem from the communities directly involved and/or affected by global governance, as well as emerging norms of a 'global public domain.' The rationale is also linked to the argument that transparency, participation, accountability in rule-making, and adequate resources to enable participation produce a sense of 'ownership', which links decision-making and outcomes of a governance scheme to the communities that authorize it, and over which it is granted authority.[77] For example, a study of perceptions of legitimacy of the ISO 14000 environmental standards found a strong direct correlation among developing country delegates between involvement in the creation of the standards and their legitimacy.[78] As long as the institutionalization of such norms persists, legitimacy, as a practical matter, will depend on responding to democratic pressures.

Second, the nature and location of political community conditions democratic pressures. The legal legitimacy literature best highlights the general tension created when globalizing pressures create demands that governing authority and decision-making be opened up to wider groups of actors, because its starting point is the existing 'constitutional' order where states have legal status and international law is rooted in state consent. Thus, the tension regarding who participates reflects not only a possible trade-off between effectiveness and participation, as is sometimes portrayed, but also an evaluation of the conditions in which legitimacy would demand that decisions be opened up to wider groups of actors. The simple response is that when decisions directly address or affect actors other than states, which is increasingly the case as the reach and scope of global governance expands, affected communities ought to have access. The practical dilemma remains, however, of whether states can adequately and legitimately represent such groups or who else could, and whether involvement in policy processes or deliberation should translate into actual decision-making authority. This is one question where different conceptions of legitimacy show little sign of convergence. What is clear is that to the degree inter-state processes appear not to reflect the values of relevant communities, alternative forms of governance that are more

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[77]   Ngaire Woods, 'Good Governance in International Organizations' (1999) 5 Global Governance 39; Susan Summers Raines, 'Perceptions of Legitimacy in International Environmental Management Standards: The Participation Gap' (2003) 3 Global Environmental Politics 47; Bäckstrand & Saward, *supra* note 31.

[78]   Raines, *supra* note 77.

inclusive are emerging.

Still, even innovative forms of governance such as NSMD systems face significant challenges of political community.[79] Unlike self-regulatory networks where businesses, technical experts, and governments likely share common norms and goals such as efficiency and profitability, relevant audiences of NSMD systems differ significantly in terms of identities (producers, consumers, environmentalists), geographic location, and interests. Consensus may even be lacking on what constitutes either procedural or substantive legitimacy. If they are to succeed, institutionalized learning processes and community building are necessary within the governing institutions. Thus, the problem of community may be as daunting, if not more so, than in traditional international governance. The one advantage is potentially greater access of those directly affected to interact with the governance system.

A third point concerns the need for greater attention to the substance of governance in understanding legitimacy problems. In the case of the environment, evaluations of legitimacy historically have been based not only environmental performance, but also the linking of environment with other goals that are highly valued, especially development goals. Presumably, increased participation and influence of developing countries in international environmental negotiations reinforced the legitimacy of institutions that reflected these developments. When these dynamics combined with the broader normative shifts toward neoliberalism, it created legitimacy for what I labelled 'liberal environmentalism.' The contemporary legitimacy challenge, however, stems in part from the very success of liberal environmentalism, if governing arrangements have gone too far towards elevating the normative status of markets, in effect subordinating environmental purposes to economic goals, even within ostensibly environmental institutions. Moreover, if there is indeed some resilience to the idea that global liberal markets need to be embedded in societal purposes, which my cursory application of a sociological conception of legitimacy to the current context of global governance suggests, then the legitimating normative foundation of environmental governance is fragile unless more substantial inroads can be made in economic institutions, not only through voluntary initiatives such as the Global Compact. The discussion of the global challenge to international liberalism also aimed to highlight that societal norms and values inform what 'outputs'—environmental, economic performance, and so on—or combination thereof are deemed as legitimate. This finding clearly has

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[79]   See Bernstein & Cashore, *supra* note 37, for a fuller discussion of challenges that face NSMD governance.

implications for the broader legitimacy problems facing the WTO and other international economic institutions.

Fourth, power cannot be absent in any governance equation. This turns attention back to the balance between states and markets, and whether newer forms of private or hybrid authority can manage that balance absent the public authority of states. For example, many NGOs remain highly suspicious of ever truly reconciling ecological goals with the marketplace. Thus, while the new initiatives promise to be responsive to principled conceptions of legitimacy in terms of inclusiveness, a critical assessment is required of whether the shift towards public-private partnerships and market-based governance systems in practice privileges the market over alternative bases of governance, biases (without good reasons) governance towards market mechanisms and voluntary initiatives over regulatory instruments, or gives corporate voices a disproportionate say in policy development and implementation at the expense of state representatives and public participation.[80] If WSSD is any indication, there is reason for concern. Private sector interests reportedly had 'very strong behind-the-scenes influence' and managed to prevent any strong language on corporate accountability in the Plan of Implementation.[81] Similarly, scholars have noted the largely superficial impact of UNEP's participatory reforms, though laudatory in terms of principled legitimacy, in moving it from an intergovernmental to a more supranational organization and, moreover, its relative inefficacy and failure to become the primary forum for international environmental policymaking.[82] Ultimately, as Erika Sasser found in a recent study on non-state governance (and there is no reason to believe these findings would not extend to state-led governance), most NGOs will not be ready to grant full legitimacy to a governance system until the on-the-ground effects are shown to improve environmental or social integrity.[83]

The question of power highlights that legitimacy ultimately concerns political authority. It, in turn, results from the meshing of power, legitimacy, and community. Deliberation may be fine as a normative goal, but if deliberative processes cannot produce authoritative outcomes owing to a lack of buy-in from relevant actors

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[80]   Harris Gleckman, 'Balancing TNCs, the States, and the International System in Global Environmental Governance: A Critical Perspective' in Kanie & Haas, *supra* note 33 at 203.

[81]   Steiner, *supra* note 67 at 36.

[82]   Esty, s*upra* note 55 at 99.

[83]   Erika Sasser, 'The Certification Solution: NGO Promotion of Private, Voluntary Self-Regulation' (Paper prepared for presentation to the 74th Annual Meeting of the Canadian Political Science Association, Toronto, Ontario, 29–31 May 2002).

with power resources, the exercise may be empty. Compromises are thus likely necessary between a deliberative ideal and forms of governance acceptable to major states from North and South for legitimate *governance* to emerge.