Legitimacy in intergovernmental and non-state global governance

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ABSTRACT

Do requirements for legitimate global governance vary across intergovernmental and non-state governance institutions? The author introduces a framework to address this question that draws attention to the social forces and power dynamics at play in determining what standards of legitimacy apply. Rather than beginning with a focus on democratic legitimacy, which pre-judges what legitimacy requires, the framework posits that what constitutes legitimacy results from an interaction of communities who must accept the authority of the institution with broader legitimating norms and discourses – or social structure – that prevail in the relevant issue area. To illustrate its plausibility, the framework is applied to a comparison of intergovernmental and non-state institutions in the social and environmental issue area: the intergovernmental Kyoto Protocol on climate change and members of the non-state International Social and Environmental Accreditation and Labeling Alliance, an umbrella organization created to develop agreement on 'best practices' for its members. Implications of the findings for legitimacy of global economic governance are also explored.

KEYWORDS

INTRODUCTION

What is required to count as a legitimate institution of global governance and why might that answer vary across intergovernmental and non-state institutions? How are standards of legitimacy selected and what social forces and power dynamics are at play in determining them? I introduce a comparative framework to investigate these questions. To illustrate its plausibility, I apply it to a comparison of legitimacy requirements for the

Kyoto Protocol (KP) of the UN Framework Convention on Climate Change (UNFCCC), an intergovernmental institution, and for members of the International Social and Environmental Accreditation and Labeling (ISEAL) Alliance, a non-state umbrella organization created to develop agreement on 'best practices' for transnational non-state regulatory systems in the social and environmental areas and to gain credibility and legitimacy for their standards. Its members include organizations that create standards and certification programs for sustainably managed forests and fisheries, sustainably produced commodities, such as coffee and cocoa, and the promotion of worker rights.

The motivation to address these questions stems from the centrality of legitimacy concerns in ongoing efforts to reform international institutions since the end of the Cold War. Two recent examples illustrate. First, the statement from the 2008 Commonwealth Heads of Government Meeting on Reform of International Institutions identifies obtaining legitimacy 'not only [from] their member states but also [from] the wider international community' as the first guiding principle for 'reform and construction of new international institutions' (Commonwealth Secretariat, 2008). It then lists principles commonly associated with legitimacy (responsiveness, fairness, transparency, accountability) as top priorities, even before effectiveness. Similarly, the communiqué from the G-20 (2009) London Summit on the financial crisis put legitimacy concerns at the center of commitments to reform international financial institutions, linked legitimacy to effectiveness and emphasized the need to improve representation, voice and accountability.

These examples only reinforce the widely held view among scholars that the extended scope and reach of contemporary 'global governance' has increased the need for political legitimacy beyond the state, as states pool or delegate authority, or allow regulatory authority to shift to private or networked governance in the marketplace. Increased legitimacy demands have followed from states *and* civil society actors who increasingly look to institutions of global governance, in addition to national governments, to provide social justice, equity, ecological integrity and other societal values (Devetak and Higgot, 1999). Works have examined the resulting legitimacy concerns not only among international organizations such as the UN Security Council (Hurd, 2007), International Monetary Fund (IMF) (Best, 2007; Seabrooke, 2007), or World Trade Organization (WTO) (Elsig, 2007; Esty, 2002; Howse, 2001), but also within non-state and mixed public/private (hybrid) governance systems (Bernstein and Cashore, 2007; Black, 2008; Cashore, 2002; Dingwerth and Pattberg, 2009; Porter, 2007; Risse, 2006).

Whereas much scholarship has focused on economic institutions, I focus on environmental and social governance for three reasons. First, it is an area of rapid change and innovation in which to explore new legitimacy demands and how they might be evolving. Second, owing to a

proliferation of private and hybrid experiments in global governance, it offers an excellent opportunity to compare non-state governance in the marketplace and intergovernmental institutions within a similar social structural environment. Third, it throws up interesting empirical puzzles. For example, why despite extensive criticism of the KP does it (and the UN-FCCC) remain the legitimate overarching forum for global climate change governance?[1] Why, despite their limited scope, do non-state forms of social and environmental governance face far more stringent democratic and deliberative requirements than state-led forms of governance and more than their economic counterparts?

Although I do not explicitly investigate economic governance in this paper, I also show the implications of the framework and findings here for the question of how legitimacy requirements may vary across issue areas. The cases should also be of interest to international political economy (IPE) scholars on their own merits: they involve market mechanisms; they explicitly address attempts to embed environmental and social regulation in the international political economy; and the framework is designed to capture forces equally relevant to economic governance.

The framework makes the central argument that what constitutes legitimacy results from an interaction of the community of actors affected by the regulatory institution, i.e. the public who grant legitimacy, with broader institutionalized norms – or social structure – that prevail in the relevant issue area. These interactions create different legitimacy requirements across different issue areas and forms of governance. Using interpretative methods, as well as primary (e.g. interview data, legal texts, statements of officials) and secondary material from the cases, the paper will examine the interaction of affected communities with prevailing norms in wider social structure in order to see how they can generate different expectations for what legitimate global governance requires. The framework also draws attention to the power dynamics implicated in those interactions.

The framework does not assume any a priori bases of legitimacy, thus differs from the typical focus on democratic legitimacy. However, my approach, while sociological in its *explanatory* underpinnings, does not aim to 'measure' legitimacy.[2] Thus, it is not strictly situated on one side of the traditional empirical – normative divide in legitimacy research. Rather, it can be considered critical rather than normative theory: it asks not what *should* count as justification for recognizing the authority of an institution of global governance, but how particular requirements came to be viewed as justifications, or, in the words of Robert Cox (1992: 3), 'how [the current] order came into being [and] how it may be changing'.

I proceed as follows. First, I make the case for a focus on 'political legitimacy', which concerns governance and authority relationships. Second, I show the limitations of a focus on democratic legitimacy in global governance and suggest why a critical sociological approach does better. Third,

I introduce a framework to investigate what basis of legitimacy prevails. Fourth, I apply the framework to the cases. In the conclusion I discuss implications of the findings, including for comparisons to economic governance cases.

POLITICAL LEGITIMACY

Political legitimacy is the acceptance and justification of shared rule by a community (Bernstein, 2005). This definition self-consciously straddles the traditional divide between empirical measures of legitimacy and normative theory. The former concerns whether actors accept a rule or institution as authoritative and has its roots in Weberian social science. The latter asks whether the authority possesses legitimacy, a view best reflected in the Habermasean position that a belief in legitimacy has an 'immanent relation to truth' and cannot be grounded in mystification or ideology (Habermas, 1973: 97). In this tradition, legitimacy is 'the justification of actions to those whom they affect according to reasons they can accept' (Williams, 2009: 43). My definition recognizes that, as a practical matter, arguments about why members of a community *should* accept a decision or rule as authoritative includes possible reasons why the decision *is* accepted and vice versa. The relationship between justifications and acceptability should therefore be a matter of investigation.

A focus on *political* legitimacy also places attention squarely on authority relationships where an actor or institution makes a *claim* to have a right to govern (Uphoff, 1989). It concerns situations in which a community[3] is subject to decisions by an authority that claims to have a right to be obeyed and actors, intersubjectively, hold the belief that the claim is justified and appropriate. It reflects the 'worthiness of a political order to be recognized' (Habermas, 1979: 178, 182) or 'a more general support for a regime [or governance institution], which makes subjects willing to substitute the regime's decisions for their own evaluation of a situation' (Bodansky, 1999: 602). This idea of substitution is important because it directs attention to the difference between voluntary and authoritative institutions. If actors – whether states, firms, or non-governmental organizations (NGOs) – evaluate with each decision whether to maintain or withdraw support, governance or authority in any meaningful sense of the word is absent.

Legitimacy is also the glue that links authority and power. By justifying authority in the eyes of the governed, legitimacy empowers authorities and increases the likelihood their commands will be obeyed.[4] Legitimacy 'matters' in global governance because coercion and inducements – the two alternative tools of order maintenance or social control – are often unavailable, in short supply, or costly to use (Hurd, 2007). It can also make rulers 'more secure in the possession of power and more successful in its exercise' (Claude, 1966: 368). While this latter understanding points to the

legitimation of force or sanctions, it also suggests that legitimacy can reinforce or reflect underlying power relationships. This linkage is particularly important for the core question here of why particular understandings of what is legitimate prevail as well as how legitimacy justifies particular forms of political authority.

The most relevant types of power for the question of what legitimacy requires are 'institutional' and 'productive'.[5] They are well suited to understanding the influence and constitutional properties of rules and discourse, which are directly relevant for how particular justification make their way into institutions of global governance. Institutional power operates indirectly in the form of rules or laws or the empowering of particular actors such as technical experts or private authorities. The idea of productive power resonates with Michel Foucault's (1991) notion of 'governmentality', or the idea that 'disciplines' or 'epistemes' – the background knowledge that passes 'the command structure into the very constitution of the individual' – extend into sites of authority, thereby empowering and legitimating them (Barnett and Duvall, 2005: 20–2; Douglas, 1999: 138). Power could also be structural in the sense used by Neo-Gramscians, where production relations in capitalism empower leading states, classes (e.g. finance capital) or industry to shape social conditions. However, its relevant effects, for the purposes of the questions asked in this paper, should show up in social structure and therefore can be captured through an analysis of its institutional and productive power.[6]

In terms of community, legitimacy always rests on shared acceptance of rules and rule by affected groups, who constitute the community that grants legitimacy and on the justificatory norms they recognize. The coherence or incoherence of that community matters, since incoherence or strong normative contestation among groups within a legitimating community make establishing clear requirements for legitimacy difficult. Thus, defining who is a member of the relevant community, on what basis community identification must rest and to what degree norms of appropriateness must be shared to achieve legitimacy all become central concerns.

A final caveat: legitimacy does not necessarily increase the scope of authority, which is a function of the claim made by the institution. A legitimate authority might govern many issues or one, include extensive or limited claims on behavior, or cover a broadly defined political community like the state or a narrow community of members who agree to be bound by the authority. Legitimacy refers only to the justification and acceptance of the scope of authority claimed.

THE LIMITS OF DEMOCRATIC LEGITIMACY

The dominant answer to what legitimacy requires in global governance is democracy.[7] As put most succinctly by Held (1995: 1): 'Democracy bestows

an aura of legitimacy on modern political life: laws, rules, and policies appear justified when they are democratic'. Hence, if globalization reflects increased economic integration or the extension of political authority, democracy ought to follow (Habermas, 1996 [1990]: 491). Recognizing practical limits to extending the models of democratic legitimacy beyond the state, scholarship has singled out the importance of increased accountability to states and, sometimes, other affected publics. But it also frequently invokes related values including responsiveness, transparency, participation, deliberation and engagement with global 'civil society'. The resultant scholarly debate on the proper combination and content of procedural and substantive legitimacy, deliberation, rights and duties or accommodation of difference that would justify political authority is sophisticated, rich and complex. However, while it would be naïve to dismiss the legitimating power of democracy outright, its assumed relationship to legitimacy in global governance deserves critical examination on at least three grounds.

First, democracy beyond the state scholarship often implies that satisfying the normative criteria they identify will satisfy actual legitimacy demands in international institutions. The normative theories they build upon, however, are better suited for the development of ideal theory or to provide 'the basis for principled criticism of global governance institutions and guide reform efforts', as the best work in the genre acknowledges (Buchanan and Keohane, 2006: 405). Their mode of reasoning closely parallels efforts by political philosophers to develop normative theories of legitimacy and the state. Unsurprisingly, they arrive at nearly identical core principles as those theories, albeit tempered by limits imposed by long chains of accountability or weak political community. Hence, Buchanan and Keohane's (2006) 'global public standard' of legitimacy includes calls for deliberation, participation and accountability in the sense of public justification of institutional policies. While they separate legitimacy from justice,[8] they insist institutions should have 'minimal moral acceptability' or not be blatantly unjust. Institutions should also provide benefits relative to what would be provided in their absence. Others' criteria overlap significantly (Esty, 2006, 2007; Zürn, 2000; Zweifel, 2006).

Regardless of the merits of particular formulations, normative theory development is a very different exercise than critically assessing actual legitimacy demands and what determines them. Moreover, as Koppell (2008: 192) points out, these exercises reveal that 'there are no universally shared criteria' of legitimacy in global governance.

Second, the democratic legitimacy literature is largely unhistoricized. As Christopher Hobson (2009: 632) observes, 'The now widespread agreement over the normative desirability and political legitimacy of democracy is noticeably different from the historically dominant understanding that regarded it as a dangerous and unstable form of rule which inevitably led to anarchy or despotism'. Whereas a number of studies acknowledge

that legitimacy requirements change over time, they develop their standards based on contemporary understandings of democratic or deliberative theory and consider change primarily in the context of changing goals and functions of institutions. Yet, this ignores changing understandings of democracy or bases of legitimacy in history. Not long ago, shared rule in the international context was understood exclusively as rule by sovereign states and shared only in the sense of establishing a consensus among the great powers (Claude, 1966; Kissinger, 1964).

Third, empirically, we know justifications for authority in international institutions can rest on different sources. Esty (2006, 2007: 511), for example, has identified 'expertise and the promise of social welfare gains; order and stability; checks and balances; and political dialogue and a "right process" for decision-making'. One also observes different mixes of what Scharpf (1997) has labeled input (process) and output (performance and efficiency) legitimacy appearing to justify authority in different cases. Some institutions are allowed to operate largely shielded from public view, some operate in the marketplace almost exclusively among private actors, and others seem to be evaluated based solely on the idea they serve functions that constituents value (what Barnett and Coleman [2005: 597–98] call functional legitimacy).

The empirical evidence of what legitimacy requires similarly varies in the literature. For example, Hurd (2007), in one of the only systematic treatments of this question, compares outcomes, procedures, and fairness as sources of UN Security Council legitimation in 1945. He finds deliberative procedures were the most important, especially in gaining legitimacy in the eyes of small states, but qualifies his answer owing to difficulties in distinguishing among the three in practice and taking account of the importance of adaptation of requirements to contextual and historical circumstance (Hurd, 2007: 90). Moreover, in comparing the 1945 findings to the legitimation of the International Criminal Court (ICC), he notes 'the much broader inclusion of elements of civil society in the ICC process'. The difference resulted from 'changes in the 'globalizing' world of international politics with new demands for the participation and inclusion of non-state actors' (Hurd, 2007: 184). A critical sociological approach is thus better suited to capture these dynamics.

A FRAMEWORK FOR COMPARATIVE RESEARCH

The framework below is designed to explain variance in legitimacy requirements across global governance institutions rooted in state-centric authority and non-state authorities, and across different issue areas (although here I only apply the framework to a single issue area, environmental and social regulation).[9] The categories of state-centric and non-state governance are ideal types: few intergovernmental institutions operate

absent influence of non-state actors and few non-state institutions maintain complete autonomy from sovereign state authority. Still, the categories are useful for comparative purposes, and easy to discern in practice.

The framework builds on insights from sociological institutionalism and its adaptation by Constructivist International Relations scholars. In that literature, legitimacy refers to 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' (Suchman, 1995: 574). This understanding usefully highlights that legitimacy is rooted in a society or community in which the rule or institution operates (Franck, 1990: 198). Whether in reference to a corporation seeking legitimacy from consumers, competitors, and regulators, a government seeking legitimacy from its citizens, or an international organization seeking legitimacy from governments and transnational non-state actors, legitimacy entails that those communities accept the organization as appropriately engaged in the task at hand. In a similar vein, interactional legal theorists have pointed to processes in which practices become institutionalized, or accepted as 'appropriate' by the community in an ongoing process of legitimization and delegitimization. From this perspective, rules constantly interact with the social purposes and goals of relevant audiences or communities (Brunnée and Toope, 2000) and standards of legitimacy may vary as a result.

Extrapolating this perspective to the problem of global governance, what mode of legitimation becomes institutionalized depends on the historically contingent values, goals, and practices of the relevant society. Within that society, different audiences of states, civil society, or marketplace actors may share different criteria or weightings of 'input' versus 'output' legitimacy, or more traditional notions of substantive (values of justice and fairness) legitimacy.

In state-centric global governance, broader rules and norms of international society generally coincide with norms of the legitimating community, since states create them through state-social structure interactions. Non-state or hybrid networks may also generate their own normative environment, but those interactions are never completely disembedded 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 of forest products) must not only generate legitimacy among those parties, but also must navigate rules of international trade legitimated through inter-state processes and regulatory and social environments of states in which companies operate. Neither are they disembedded from affected publics, who increasingly demand inclusion or some other mechanism of accountability.

Building on these insights, the framework argues that legitimacy requirements vary across forms of governance and issue areas owing to the

interplay of governance institutions with international social structure, on the one hand, and the community of actors affected and/or regulated by the institution on the other.

SOCIAL STRUCTURE

Social structure is composed of global norms and institutions. It serves a constitutive function by defining what appropriate authority is, where it can be located, and on what basis it can be justified. It also serves a regulative function by prescribing and proscribing the boundaries of governance activities. A number of Constructivist International Relations scholars employ such a notion of social structure under various formulations including an 'environment' in which organizations operate, 'normative structure', and 'social structure' (Barnett and Coleman, 2005; Finnemore, 1996; Meyer *et al.*, 1997; Reus-Smit, 1999; Ruggie, 1998: 22–5). Their basic insight is that already institutionalized norms define appropriate and inappropriate courses of action, legitimate and delegitimate institutional forms, and create a context in which cost-benefit analysis occurs. Structuring can be understood to operate through an idea of 'fitness', where legitimacy is understood as embedded in social systems that provide a basis of appropriateness, or that make the purposes, goals, or rationale of an institution understandable and justifiable to the relevant audience in society (Weber, 1994: 7).

Social structural norms can be found not only in specific declarations or principles that apply to the sector, product or process in question (for example, the Statement of Forest Principles or Convention on Biodiversity in the case of forestry or International Labor Organization (ILO) conventions in the case of labor), but also include broadly accepted norms of global environmental, labor and human rights governance. These norms may be embodied in the 'hard' law of international treaties as well as legalized trade rules, since attempts to regulate across borders must navigate WTO rules or be subject to possible dispute. Norms may also be found in 'soft' declaratory international law (Kirton and Trebilcock, 2004), as well as action programs, or statements of leaders. While legality should not be confused with political legitimacy (Claude, 1966: 369), the legal environment may inform what legitimacy requires. However, tensions between law and norms can still arise in relevant political communities through which legitimacy is generated and from which rule is accepted or challenged. In the case of governance institutions in the environmental and social arena, three specific elements of social structure are most relevant.

First, as in virtually all issue areas, the deep structure of the system remains norms that have legitimated the sovereign authority of states (Ruggie, 1998: 20). Governance rooted in sovereign state authority remains the privileged form of legitimate global governance. Nonetheless, there is

nothing immutable about states as the sole repository of authority (Hurd, 2007; Reus-Smit, 1999). The literature on fragmenting authority and private governance under globalization (e.g. Cutler *et al.*, 1999; Grande and Pauly, 2005; Hall and Biersteker, 2002) recognizes that political authority may occur in interaction with or relatively independently of sovereign states, and raises questions about what would then legitimate it. Thus, whereas intergovernmental institutional legitimacy may still rest primarily on state consent, delegated state authority is only one possible foundation for non-state or hybrid institutional legitimacy, especially when relevant communities demand governance after states have failed to act. ISEAL member institutions generally emerged in such a context.

Norms defining the international political economy of an issue comprise a second relevant element of social structure. In the cases explored here, social structure reflects a general shift in global environmental norms since the 1970s that reflects broader changes in the IPE toward support for liberalized markets, deregulation, and working with markets and the private sector, including the use of market-based policy instruments, to achieve policy goals (Bernstein, 2001). While there has been some pushback on the limits of neoliberal policies and modes of governance from a variety of quarters, the basic norms of 'liberal environmentalism', which predicate environmental protection on support for a liberal economic order, continue to define appropriate global environmental and social governance.[10] For example, Principle 12 of the 1992 Rio Declaration on Environment and Development – the most widely accepted consensus statement on sustainable development norms – asserts 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' (United Nations, 1992). The WTO Agreement preamble (WTO 1994a) and ministerial Decision on Trade and Environment (WTO 1994b) contain nearly identical wording, as do policy statements across the Bretton Woods and UN system. The 2002 World Summit on Sustainable Development further reinforced this understanding of appropriate governance when it promoted public–private partnerships to implement sustainable development in the shadow of poor progress in many areas of intergovernmental cooperation (Bäckstrand, 2006a). Similar moves toward public–private partnerships are evident throughout the UN system, not least the creation of the UN Global Compact, which enlists businesses directly to support environmental, human rights, labor and anti-corruption principles (Noël and Thérien, 2008: 166–97).

Third, since the end of the Cold War, a growing normative consensus has emerged on the need to 'democratize' global governance. These norms include demands for democratic reform and improved public accountability of international institutions to states and/or broader affected

publics (e.g. Held and Koenig-Archibugi, 2005; Payne and Samhat, 2004), as well as 'stakeholder democracy' that calls for 'collaboration' and truer 'deliberation' among states, business, and civil society (Bäckstrand, 2006b; Vallejo and Hauselmann, 2004). Such normative pressure is especially prevalent in international environmental institutions, treaties, and declaratory law, which have been on the forefront of promoting increased public participation and transparency at all levels of governance since the 1972 Stockholm Conference on the Human Environment (Mori, 2004). Examples of codification include Rio Declaration Principle 10 (which states that environmental issues are best handled with participation from all 'concerned citizens at the relevant level') and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which came into force in 2001.

These elements operate in part through social structure's discursive and disciplining role. For example, while there may be no formal hierarchy of international laws, there are institutions that play a dominant – perhaps even hegemonic – role in legitimating and delegitimating practices. For example, in the case of ISEAL members who aim to set standards, WTO agreements, especially on Technical Barriers to Trade (TBT), define requirements to be recognized as a legitimate standard setting body.

Social structure, however, is not wholly determinative of what constitutes legitimacy. Organizations also may respond to demands from their constitutive communities – which may or may not reflect institutionalized norms in broader social structure. To capture this interaction, the framework turns attention to relevant political communities that grant or withhold legitimacy.

LEGITIMACY AND COMMUNITY

New modes and sites of governance throw traditional notions of the international community into question because they increasingly target or affect (directly or indirectly) non-state actors or communities, whether firms whose production is affected by emission limits or campaigns for corporate responsibility; fishers whose catch is limited by fisheries regimes; accountants who must practice in accordance with transnational standards; or local communities affected by decisions of an international financial institution. Hence, there is a mixing of international and 'global' communities from which justification and acceptance of rule stems (Clark, 2007). Environmental and social institutions, by their very nature, experience a legitimacy challenge with which international economic institutions are only now confronting: their 'realm of political action' extends beyond the conduct of states, thus they must shift their view of their 'social constituency of legitimation' (Seabrooke, 2007). An appropriate research strategy, then, is to identify political communities wherever

they form, whether in professional or technical networks, relevant marketplaces, transnational or local civil society, or the traditionally demarcated 'international society' of diplomats and state officials, and ask on what bases legitimacy within those communities rests.

Establishing the boundaries of the relevant communities is an empirical and interpretive endeavor, and unlikely to be without controversy. It poses a particularly significant challenge for non-state governance, which may target non-state as well as state actors for regulation, and which often depends on a diverse group of actors to support or promote it (Black, 2008: 147).

As a first cut, the relevant community consists of rule makers and those over whom authority is claimed, or targets of rules. However, even when an institution seeks legitimacy from a defined community (say, states for the KP or participating firms and the sponsoring NGOs in the case of a certification system), its rules may have implications for a wider community (say, environmental NGOs in the case of the KP or non-participating sectoral actors, standard setting organizations, or states in the case of certification systems). This complexity forces attention to how different audiences of states, global civil society, or marketplace actors may share or differ in criteria or weightings of the elements of legitimacy that justify political domination. For example, many global civil society organizations highly value accountability, participation, transparency and equity, while business actors may value efficiency, the rule of law, and fairness in the marketplace. Moreover, discourses of rights, global environmental stewardship, or traditional knowledge may play different legitimating roles in different local contexts. There is no abstract mix of procedural, substantive, or performance criteria of legitimacy that can be known to produce legitimacy outside the context of particular political communities.

Evidence for community norms can come from public statements, practices of key actors, or interviews. However, interview data is indicative, not definitive, owing to difficulties in identifying a full population or conducting useful opinion surveys with potentially diverse groups with unclear boundaries. The challenge of identifying community norms may also vary across issue areas. For example, the private regulation of business practices usually involves relatively small well-defined communities of firms and/or professionals, and sometimes a small, defined group of government officials, wherein pragmatic and performance legitimacy criteria tend to dominate (Porter, 2007). Procedural legitimacy concerns might focus on the functioning of mechanisms to address conflicting standards or technical requirements. Fairness might be defined as not unduly providing competitive advantage. However, what legitimacy requires may become further complicated when there is a potential for conflicts with wider societal values (e.g. health, environment, food safety, etc.). This may occur even in ostensibly hard-core economic areas such as financial regulation, to

the degree that actors currently outside or on the margins of governance (e.g. private actors from developing countries, NGOs, etc.) perceive the regulatory regime to affect their interests, broader public policies, or economic opportunities (Underhill and Zhang, 2008: 539–40). For non-state forms of governance that stem from stakeholder networks – such as the ISEAL Alliance case below – the community is almost always more complex, with a greater potential for contestation over legitimacy requirements.

APPLICATION: COMPARING THE KYOTO PROTOCOL AND ISEAL ALLIANCE

To illustrate the plausibility of this framework, I compare legitimacy requirements for the Kyoto Protocol (KP) and for members of the ISEAL Alliance. Thus, I am comparing like cases in terms of issue area that operate in a similar social structural environment of governance, but that differ in form (intergovernmental versus non-state) and the boundaries of relevant communities that grant legitimacy.

THE KYOTO PROTOCOL

The Kyoto Protocol of the UN Framework Convention on Climate Change, which came into force in 2005, is a legally binding multilateral agreement designed to limit concentrations of greenhouse gases (GHGs) in the atmosphere to prevent 'dangerous' human alteration of the climate. At its core, the KP rests on a compromise that links quantitative reductions or limits in GHG emissions in developed countries to three main market mechanisms that involve transferring 'credits' for emissions or emission allowances to help countries meet their targets: emission trading among developed countries; joint implementation (JI) among developed countries, where emission reductions financed by foreign investments would be credited to the source country; and a clean development mechanism (CDM) to finance projects in developing countries, where the investor, from a developed country, would receive 'certified emissions reductions' for emission reductions produced by the project in the developing country. These mechanisms are designed to facilitate the creation of regional and transnational carbon 'markets' that, in effect, put a price on carbon emissions and, in theory, create incentives for investment in clean technology and reductions where it is most efficient to do so. The treaty also embodies a second, and more controversial, compromise based around the norm of 'common but differentiated responsibility',[11] wherein developed countries face emission targets while developing countries do not, although all countries have monitoring and reporting requirements.

The Kyoto Protocol's robust legitimacy

The KP faces a number of potential legitimacy challenges, including the 2002 decision by the Bush administration not to ratify and uncertainty over whether many countries will meet their targets in the first commitment period (2008–2012). In addition, the US creation of the Asia-Pacific Partnership on Clean Development and Climate in 2005 raised worries it would undermine UN processes and the KP in particular. Focused on technology, voluntary action and public–private partnerships, it brings together the world's fastest growing and largest expected future emitters of GHGs, China and India, with the United States, Japan, Australia, South Korea, and, since 2007, Canada. The Bush administration also sponsored a 'major economies meeting' on energy and climate, renamed the Major Economies Forum by the Obama administration (invitees have varied slightly, but include the largest economies accounting for 80% of total world emissions).[12] Critics feared it too was a cover to undermine the drive toward further binding commitments and UN processes (e.g. Greenpeace, 2008).

North–South conflict over how the burden for stabilization of GHGs should be shared, commitments should be sequenced, who should pay, and how to best enable resource and technology transfer also continue to plague the KP. A central plank of US congressional opposition to Kyoto is that even the wealthiest developing countries who are economic competitors, including China, India and Brazil, lack an obligation to reduce emissions.[13] Counter-arguments are equity-based, such as that per capita emissions in developing countries remain well below those in industrialized states or that developing countries should enjoy the same opportunity as wealthy countries historically had to develop, which necessitates differential obligations. Finally, NGO and academic critics, from the left and right, have questioned the legitimacy of market mechanisms, especially the CDM or similar non-Kyoto 'offset' markets (where credit is given for reductions elsewhere), as well as 'marketization' generally as a means to address climate change (Newell, 2008; Paterson, forthcoming; Wara and Victor, 2008). As Paterson (forthcoming) points out, many of the criticisms, 'at their root amount to well-known critiques of privatization, increasing global inequalities, and commodification of "nature"'.[14]

Despite these challenges, interviews of officials and delegates to international negotiations,[15] and secondary evidence from public statements, negotiations, policies and related activities suggest it continues to enjoy a high level of political legitimacy. Even a US State Department delegate interviewed did not question its legitimacy, stating simply that the US government could legitimately choose not to join. It also became apparent at the first Major Emitters Meeting that states did not view the meeting as a vehicle for alternative agreements. Rather, the Chairman's summary

noted that, 'All [national statements] underlined the central role of the UNFCCC as the global forum for addressing climate change' (US State Department, 2007). The Obama administration has made explicit its goal of using the Forum to 'provide a vehicle to help us get prepared to be successful at [the next UN climate negotiations] meeting' (Clinton, 2009), reinforcing the legitimacy of the authority of the UNFCCC and KP, even as it uses the meetings to move negotiations forward among key players. The Asia-Pacific partnership is also increasingly perceived as complementary rather than a competitor to the KP. Many interviewees commented on the desirability of multi-pronged approaches to action, but the legitimacy of UN processes as the overarching governance forum. Notably, many governments argued the 2009 Copenhagen Accord was illegitimate for similar reasons: they saw it as a backroom deal largely between the United States and China that undermined the norms of transparency and consultation that underpin the negotiating processes of the UNFCCC and KP. As a result, the state parties only "took note" of the Accord, almost in protest. In contrast, the 2010 Cancun negotiations marked an explicit and conscious return to transparency. The final stocktaking plenary where the Cancun Agreements were finalized erupted into a standing ovation when the President of the negotiations underscored that the negotiating process had been and would remain "transparent and inclusive" (Earth Negotiations Bulletin, 2010, 15). In effect, the Cancun Agreements spell out some details and reflect compromises on the Copenhagen Accord, but more importantly for the argument here, bring it back squarely under the UNFCCC framework.

Thus, the puzzle addressed here is: what are the requirements for legitimacy that appear met despite underlying tensions and criticisms that the KP is weak, ineffective, or contradictory to achieving its ultimate goal? Identifying those requirements can also highlight where to look for pressures on that legitimacy, which may not be in the substantive arguments often leveled by critics, but in broader trends in the international political economy and social structure on which legitimacy of global governance rests.

Social structure

The KP adheres well to what legitimacy demands of an international treaty in this issue area. Recall, the baseline legitimacy requirement is the same as for any multilateral treaty: state consent. Legitimacy is closely linked to legality for multilateral institutions, and delegates to climate change negotiations largely understand it that way. As one developing country delegate put it, in a typical response, 'the Kyoto Protocol is quite legitimate because it was established according to international law; it was established by a body that is recognized by international law'.

However, decision-making according to specific state consent – for example, through formal treaty amendments – has proven cumbersome for rapidly evolving issues. The climate change regime hence utilizes the innovation of Conferences of the Parties (to the UNFCCC) and Meetings of the Parties (to the KP), or COP/MOP process. Decisions taken in the annual COP/MOPs have characteristics of bindingness, but do not require further ratification. They create forums for deliberation and overcome the need for specific consent, while not resorting to general consent or constitutionalization, which is generally not seen as legitimate beyond the state except in very restricted circumstances. The COP/MOP process, in theory, is consistent with an interactional law understanding of how legitimacy is created in practice (Brunnée, 2002). However, it raises the bar very high along the lines of what deliberative democracy theorists say is required, including treatment of parties as equals, the need to give reasons and opportunities to present arguments, and transparency to affected actors. It also implicitly depends on linking procedures and the substance of deliberation back to shared norms (Brunnée, 2002). Even then, tension remains with sovereignty norms embodied in social structure. Thus, while COP/MOP processes have been adapted successfully to move negotiations forward on elements left undecided in the original KP negotiations – by, for example, finding ways to include the United States in the process through its membership in the UNFCCC despite its stated refusal to ratify the KP – the Bush administration in 2001 expressed reservations about any, 'Rules that purport to change treaty commitments through decisions of the parties rather than through the proper amendment procedure' (US State Department, 2001).

Social structure has also evolved to include a norm of universal participation for governance of environmental issues framed as global problems requiring global solutions, such as climate change and ozone (Hoffmann, 2005). Any move away from universal participation in global climate change governance has thus met with resistance. For example, the KP negotiations allowed universal participation even though its premise was obligations would only fall on industrialized states to reduce emissions (Bodansky, 1999: 617). Even some critics who point to the logic of limiting negotiations to a 'k group' like the Major Economies Forum, recognize that, 'Such efforts outside the UN would still have to be coordinated closely with the Bali Roadmap [agreed to by the 2007 COP/MOP] in order to maintain the legitimacy of the entire enterprise' (Haas, 2008: 5).

Other elements of social structure inform legitimacy requirements for substantive norms that underpin the treaty. For example, the drafters of the UNFCCC, following difficult negotiations, created a baseline for how to address North–South equity concerns: the norm of 'common but differentiated responsibilities and capabilities' of developed and developing countries. While the precise implications of the principle remain contested,

it acknowledges that the promotion of economic growth is a legitimate priority for developing countries and asks developed countries to take the lead in combating climate change. Virtually all country delegates interviewed,[16] consistent with their negotiating positions, emphasized that the legitimacy of the KP depended on developed countries taking the lead and differentiation of commitments being built into any climate change agreement. Everyone also understood differentiation to leave room for developing country commitments, although views diverged on timing, scope, distribution, and financing of those commitments.

The necessity of developing country emission reductions over the long run does create a potential legitimacy dilemma, however. As Lavanya Rajamani (2007: 133) puts it, 'the Indian and Chinese negotiating stances, given the continuing stark differences in emissions levels between countries, fits squarely within the climate regime's burden sharing architecture, and is therefore legitimate'. However, 'It is nonetheless not a sagacious position to hold. Poorer nations, and the poorest within them, will be the worst hit by climate change'. Moreover, there is widespread agreement that long term effectiveness requires commitments from the major emitters in the global South. This raises the question of to what degree effectiveness or performance (output legitimacy) is a legitimacy requirement.

Interviews and secondary literature (e.g. Eckersley, 2007) suggest that legitimacy does not require effectiveness in the short term. As one developed country senior delegate put it, there is no current 'scenario' in reaction to countries not reaching their Kyoto targets that would 'translate into undermining the legitimacy of the Kyoto Protocol'.[17] However, developing country and NGO delegates forcefully argued that longer term failures of developed countries to deliver on their commitments will undermine the KP's legitimacy and decrease the likelihood of strong commitments from developing countries. One possible reason for tolerating short term ineffectiveness is that delegates see the UNFCCC and KP as part of a legitimate process to produce outcomes over the long term. Many also see current negotiations toward a post-2012 agreement, and its perceived ability to deliver effective results towards the ultimate goals of the UNFCCC, as a crucial test.

Attention to social structure also reveals how institutional and productive power are important in determining what counts as legitimacy. It highlights how the norm of common but differentiated responsibility is not simply about equity, but also reflects more general North–South compromises of liberal environmentalism and is closely bound up with the explicit framing of the UNFCCC, in Article 4(2) (a and b), as resting on the link between developed countries 'modifying' greenhouse gas emissions while recognizing *inter alia* 'the need to maintain strong and sustainable economic growth'. The discourse of compatibility between the

trade regime and the climate regime has also been an important part of the latter's legitimation (Eckersley, 2009). Language in the UNFCCC thus closely mirrors Principle 12 of the Rio Declaration: Article 3.5 states parties should 'promote . . . [an] open international economic system that would lead to sustainable economic growth . . . enabling them better to address the problems of climate change' and includes General Agreement on Tariffs and Trade (GATT) language on non-discrimination. Whether or not future trade measures that result from the KP or national climate policies could be justified under WTO rules in practice is a matter of some controversy (Eckersley, 2009; Hufbauer *et al.*, 2009; Werksman and Hauser, 2009). The point here is that to the degree that policies, such as border tax adjustments on imports not subject to rules limiting emissions, reveal contradictions within that legitimating discourse or lead the WTO to rule against such a measure, the legitimacy and authority of the KP could be undermined. This risk underlines the enormous normative pressure on KP rules to be compatible with international trade rules.

A similar analysis accounts for the legitimacy of market mechanisms in the KP. They 'fit' very well with social structure and its discourse of the compatibility of markets, development goals and environmental protection. Despite myriad criticisms, especially of the CDM, there is no evidence of backtracking on market mechanisms in international climate negotiations. Moreover, Kyoto has played a part in spawning a proliferation of carbon markets at multiple levels of jurisdiction and scales, private as well as public, which suggests productive power at work. By one count there are 21 'active'[18] cap and trade systems worldwide that cover some, or all, of the six greenhouse gases listed in the KP. In addition, the Obama administration announced in its 2010 budget proposal a plan to work with Congress to create a US national system (OMB, 2009:21, 100). The liberal norms in the KP appear sufficiently robust that criticisms of market mechanisms should lead to stricter standards rather than to the delegitimation of carbon markets. If not, the contradictions would undermine Kyoto's legitimacy or force a shift in its legitimating norms (Paterson, forthcoming).

Political community

Sovereign states are the privileged constituency of legitimation for intergovernmental institutions. As a result, community and social structural norms of legitimation are closely intertwined because social structure arises primarily[19] through interactions of members of an international society of states.

Two factors potentially have complicated this equation in the case of climate change. First, different groupings of states may have different understandings of what legitimacy requires. For example, developing countries have focused more on equity while developed countries are more

concerned with performance and transparency. However, by paying attention to social structure, it often becomes clear how these potential differences are being sorted out, as the discussion of common but differentiated responsibility and expectations around democratization of global environmental governance suggests.

The discourse and institutionalization of democratization in this issue area, however, has led to a second complication. Kyoto is part of a class of treaties, typical of environmental and social regulation, that not only affect states *vis-à-vis* one another, but also potentially affect domestic policies and transactions that transcend borders. Thus, even before negotiations on the UNFCCC, groups of scientists, and those purporting to directly represent affected communities and interests – social, environmental, or business-based – have been recognized as potentially important in supporting or challenging the legitimacy of climate change governance, and have helped define what legitimate governance of the issue requires.

Long-standing participation has not, however, led to a unified view of what legitimacy requires among environmental NGOs, let alone within complex and shifting coalitions across environmental organizations, business groups and states. For example, the dominant broad-based coalition of environmental groups at international negotiations – the Climate Action Network (CAN) – has long accepted market mechanisms, even as some members have expressed concern about offsets, verification, and pushed developed countries for stronger binding commitments and action at home. However, a smaller coalition of NGOs strongly opposed to marketization has recently become better organized and more vocal. At the 2007 COP-13/MOP-3 meeting, they began publishing a counter-newsletter to the CAN publication ECO, which delegates regularly read during negotiations, called 'Alter-Eco: Offsetting Omissions'. Power plays a role here too. Well-funded Northern NGOs still dominate in official forums, and business engagement has increased, encouraged by governments who see an important role for the private sector. Although legitimacy does not require unanimity, and the dominant discourse consistent with the KP process and substance remains robust among mainstream civil society, one could imagine scenarios either where civil society becomes more fractured or where a counter-discourse becomes dominant in civil society. Either case would lead to legitimacy problems.

At the same time, the intergovernmental nature of the agreement has meant that legitimacy is still understood mainly as operating through states. Within this institutional environment, NGOs can legitimately provide accountability, information and expertise, and attempt to influence states, but not be part of the authority structure. Interviews revealed differences among NGOs and among states on the most appropriate way in which NGOs should interact with states in governance processes (e.g. through states, alongside states, or with more or less access to information

or avenues of participation), but the exclusive standing and authority of states as parties to the UNFCCC/KP is taken for granted as appropriate. Moreover, negotiators have been careful to limit the scope of the KP's authority so states retain flexibility in how they achieve goals to which they have agreed and to not impose specific policy requirements (unlike, say, the IMF through conditionality or the WTO through rules with 'behind-the-border' implications). Thus, while the 'realm of political action' spills into domestic policy concerns, there is no attempt to 'legislate' directly on public policies or rules for firms. Should the next round attempt to create a greater scope of authority, one would expect legitimacy requirements to increase, problems of political community to require greater attention, and the KP (or its successor) to potentially face the dilemmas experienced by international economic institutions as they grapple with contradictions between the scope of authority and questions about whether accountability only to states – and some states more than others – adequately responds to the social constituency of legitimation.

THE ISEAL ALLIANCE

The ISEAL Alliance offers a fruitful comparison to the KP because its member organizations are similarly designed to create authoritative social and environmental standards, but primarily in the global marketplace as opposed to through inter-state agreement. Members are usually producer certification and product labeling systems that include third party auditing to ensure compliance, making them very similar to state-based regulatory and legal systems (Meidinger, 2007). They include the Fairtrade Labeling Organizations (FLO) International, which aims to improve conditions for workers and poor or marginalized producers in developing countries through certifying commodities including coffee, cocoa and sugar; the Forest Stewardship Council (FSC), which aims to combat global forest deterioration and promote sustainable forestry; the International Federation of Organic Agriculture Movements (IFOAM), which certifies organic food; the Marine Aquarium Council (MAC), which targets the hobby aquarium trade to promote sustainable management of marine ecosystems and fisheries; the Marine Stewardship Council (MSC), which combats fisheries depletion; the Rainforest Alliance, which has developed certification systems for a wide variety of agricultural products from tropical countries to promote sustainable agriculture and biodiversity; and Social Accountability International (SAI), which aims to improve worker rights and community development through certification programs for a wide range of manufactured products.

These systems operate by tracking a product or service through the supply chain in order for it to get 'certified' as meeting their standards. Although they work with markets and the private sector, they engage directly,

or indirectly with NGOs, in active campaigns to manipulate the market; through targeting high-profile firms, boycotts, and working with governments and international organizations, they promote their standards in an effort to create legitimate authority independent of intergovernmental agreements.

They aim to be *authoritative* in the sense of creating rules with sufficient compliance pull (Franck, 1990: 24) to create an obligation to comply on the part of firms who sign on, and regulatory capacity to back up those binding obligations with enforceable rules. Institutionally they are notable for establishing their own governing systems that typically include representation from corporations, civil society, and affected local communities, but not governments. Scholars in law, political science and business have variously labeled them 'transnational regulatory systems' (Meidinger, 2007), 'non-state market driven' governance systems (Cashore, 2002), and 'civil regulation' (Vogel, 2008). 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.

Social structure

The demands of relevant communities and their interactions with core elements of social structure in this issue area (sovereignty norms, compatibility of markets and social and environmental goals, and democratic norms) create a somewhat different set of legitimacy expectations for ISEAL members than for the intergovernmental KP.

Sovereignty norms work in ironic ways in this case. On the one hand, ISEAL members, because they target firms instead of states, bypass sovereignty concerns that have been a major impediment to intergovernmental agreement on the social and environmental issues they address. Their relative autonomy from intergovernmental processes also allows them to tap into emerging norms more quickly. Thus, many ISEAL member organizations emerged because certification corrected inattention to widely recognized social and environmental problems or provided a way forward when inter-state efforts failed. On the other hand, ISEAL members are disadvantaged in gaining legitimacy because they have no pre-existing basis in public authority. This problem is particularly acute among constituencies in the global South, who often view these mechanisms as reflecting Northern interests (Joshi, 2004).

That concern combines with broader democratization trends in social structure to create higher requirements, relative to intergovernmental institutions, of democracy, especially access and participation, transparency, accountability and deliberation directly among stakeholders. In addition, legitimacy requires that ISEAL members actively ensure developing country and/or small producers have the capacity and information to

participate in decisions that affect them. These requirements explain the Forest Stewardship Council's eventual adoption of its three-chamber (environmental, social and economic) decision-making process and regional standard setting processes, rather than one-size-fits-all standards. Similarly, the domination of Unilever in the development of the Marine Stewardship Council contributed to its limited uptake from environmental and social groups. Following complaints of a 'democratic deficit', the MSC undertook a governance review that resulted in an overhaul designed to better ensure openness, transparency and accountability to all stakeholders (MSC, 2001).

The internal attention to democratic norms is increasingly matched by external expectations, consistent with evolving social structure. States and international organizations, including the WTO, World Bank, ILO and the Food and Agricultural Organization, increasingly demand that the development and implementation of standards be inclusive, transparent, include stakeholder participation, and be adaptable to local conditions. As one senior staff member of an ISEAL member organization explained, 'it's a chicken or egg'[20] situation, where democratic expectations created by these governance systems create expectations for all social and environmental standards.

Finally, liberal environmentalism and a discourse of market and environmental and social value compatibility legitimate private sector participation in governance, which means these market-based governance institutions fit the broader normative context. There is also evidence that interaction among non-state governance systems – in which ISEAL plays a role – has led to diffusion and mutual reinforcement of these legitimacy requirements, consistent with social structural constraints (Dingwerth and Pattberg, forthcoming).

Institutional and productive powers are at work here. Non-state environmental and social governance operates in an institutional context of hierarchy, with dominant economic institutions and norms setting the rules through which ISEAL members must navigate. Power is most concretely manifested in WTO agreements, especially the TBT, which define conditions for recognition as legitimate standard setting bodies.[21]

The TBT Annex 3 (the Code of Good Practice for the Preparation, Adoption and Application of Standards), and the non-binding Annex 4 of the TBT Committee's Second Triennial Review (WTO 2000), which specifically concerns principles for the development of international standards, include the following guidelines: adhere to the Most-Favored Nation and National Treatment principles; avoid unnecessary barriers to trade; encourage consensus decision-making; promote transparency through regular publication of work programs; promptly publish standards once adopted; and provide opportunities for all interested parties to comment on proposed standards. Annex 4 of the Second Triennial Review specifically encourages

multi-stakeholder participation at every stage of standard development. Both documents encourage international harmonization of standards and avoidance of overlap and duplication. These guidelines also include special provisions for participation of developing country governments and stakeholders in standardization bodies and technical assistance to prevent unnecessary obstacles to trade for developing countries. They also say standardization bodies should be open to membership from all relevant bodies of WTO members, which suggests that ISEAL members may require greater openness to government participation.

A core part of ISEAL's mission is to help members navigate this normative environment so their standards will be recognized as legitimate. Its flagship document, the Code of Good Practices for Setting Social and Environmental Standards (ISEAL, 2006), encourages members to incorporate the above TBT provisions, as well as *ISO/IEC Guide 59: Code of Good Practice for Standardization* (ISO, 1994), which covers similar ground. ISEAL's code goes further than either in its emphasis on performance and process standards and balancing stakeholder interests among sectors, geography and gender.

With democratic legitimacy requirements so high and the fear of trade disputes lurking in the background should the standards not be recognized as legitimate, governments and international organizations have largely avoided referencing or adopting ISEAL members' standards. For example, the ILO considered but rejected a proposal to certify countries rather than firms with a 'global social label' owing to developing country concerns it would constitute a non-tariff trade barrier and contravene WTO rules.[22] Similarly, in 2003, the European Commission abandoned an initiative under its Sustainable Trade Action Plan to devise a community guideline to help consumers select between various systems. After extensive stakeholder consultation, the Commission decided it was an inappropriate activity for a government body, that such a guideline would be unduly discriminatory, and that they may in practice dilute standards.[23] In perhaps the only case of an international organization venturing back into this territory, the World Bank's assessment tool for forest certification includes guidelines that go beyond WTO rules, and requires adherence to the ISEAL code of good practices as well as a number of International Organization for Standardization (ISO) guidelines (WWF/World Bank Global Forest Alliance, 2006).

Political community

Uncertain boundaries of political community and normative contestation among its members means that core criteria for legitimacy are not as 'given' as in multilateral institutions. At the same time, community support is vitally important for legitimacy since ISEAL members claim authority

directly in the marketplace. The relevant community includes producers (or other market players along the supply chain), consumers, environmental and labor activists, and local communities where certification takes place. States are also interested actors, though generally not actively engaged in granting legitimacy. Nonetheless, ISEAL explicitly aims to make its standards acceptable to states, should they choose to adopt them. This creates a complicated picture of what legitimacy requires, and suggests difficulty in achieving it.

A central element of normative contestation is between business and environmental NGO understandings of what legitimacy requires. Business stakeholders often see trade-offs between market and environmental and social goals. Moreover, their core interests lead them to heavily weight 'output legitimacy', efficiency, or gaining advantage in the marketplace when evaluating whether to join or accept as legitimate a regulatory system it is not legislated to follow. Cashore *et al*. (2004) provide the most systematic evidence on industry norms for legitimacy based on their research on forest company support for the FSC. Through a combination of surveys, interviews, and analysis of statements of forest company executives and forest land owners, they found that business's perception of the legitimacy of the FSC in five countries[24] depended primarily on 'pragmatic' considerations, specifically whether it could ameliorate potential economic losses from boycotts or other targeting activities, or whether they could benefit from improved reputation or niche market opportunities (2004: 34–6, 221). While there were exceptions of companies who were receptive to non-state governance because they shared the normative goals of the FSC, this group was a small minority.

Governments and NGOs were also initially driven pragmatically in turning to non-state governance systems as second-best solutions after failures to entrench social clauses in trade agreements, and saw them as consistent with neoliberal norms and trade rules (Bartley, 2007). For example, Austria funded the FSC with $1.2 million (US) it had allocated to implement a ban on tropical timber after it rescinded the law under international pressure in 1993 (Bartley, 2007: 321).

Environmental and social NGOs evaluations of legitimacy are, however, deeply rooted in their conceptions of appropriate environmental and social practices. NGOs and unions have shown repeatedly that they will not accept a system that appears lax on performance criteria, producing on-the-ground improvements in environmental or social integrity, or monitoring. In a variety of cases, especially in labor certification, groups have withheld or withdrawn support when systems do not meet those standards (Bartley, 2007; Sasser, 2002).

The area of strongest consensus among businesses and NGOs is on the goal of inclusiveness and participation. Not surprisingly, a core claim of ISEAL members is that they correct inadequate openness and

state-domination of intergovernmental or national regulatory bodies. ISEAL also argues its members respond better to their political communities than ISO (an argument ISO officials reject), which has faced criticism for its domination by industry and for lacking developing country influence in standard setting.[25] An ISEAL (2007) survey of NGO and non-NGO individuals involved in certification on the 'credibility' of standards reinforces the shared importance of these criteria. It showed the strongest consensus among both subgroups that process elements, especially fair representation of stakeholders in standard development, are most important for credibility. Independent auditing to verify adherence to the standard is the next most highly ranked.

An institution may also generate legitimacy through learning, trust-building, and socialization processes. Given normative contestation, legitimacy would demand that these institutions not only develop democratic procedures and accountability, but build institutional capacity for learning, norm-diffusion, and processes, perhaps including deliberative modes of decision-making, that lead to increased mutual understandings and ownership of decisions.

CONCLUSIONS

The case studies provide preliminary findings on why different types of institutions of global governance are judged by different criteria of legitimacy. The comparison also suggests some contingent hypotheses that could apply to other cases, although the framework's emphasis on history and context militates against easy generalizations. Rather, its strength is in identifying where to look to generate expectations in particular cases, to understand how legitimacy requirements evolve, and to identify tensions that might produce or limit the legitimate authority of institutions.

Empirically, the analysis shows that relevant audiences hold ISEAL members to a very high standard of stakeholder access, transparency, deliberation, and North–South equity. The need to create more direct lines of accountability to stakeholders is perhaps unsurprising since non-state standard setters are not authorized by already legitimate state authorities. Still, these requirements in the social and environmental area seem especially high, as evidenced by criticisms of ISO 14000 standards (an environmental management standard), even though ISO follows similar processes in other issue areas.

The ISEAL case also revealed less demand for accountability to states and a greater emphasis on performance than the KP, both in terms of opportunities for business and improved social and environmental practices. However, to the degree ISEAL members begin to target states as well as firms for adoption of their standards, their embeddedness in the international trade regime and wider expectations of accountability to governments will increase pressure for state involvement.

Moreover, their criteria for gaining legitimacy are further complicated by significant challenges of political community. Unlike self-regulatory business networks where managers, technical experts, and governments generally share common norms and goals such as efficiency and profitability, normative contestation, even on what legitimacy means, is likely to be higher among relevant audiences of ISEAL members. At the same time, self-regulation by industry in the social and environmental area, by the same logic, will be disadvantaged in gaining legitimacy compared to ISEAL members owing to its lesser ability to respond to the wider constituency of legitimation while being held to higher standards of democratic legitimacy and performance.

In terms of possible comparisons of inter-state economic versus environmental and social governance, the former are now facing legitimacy problems owing to disjunctures between their expert-driven policies and decision-making processes and their shifting view of their social constituency of legitimation (Best, 2007; Seabrooke, 2007). Again there is an irony: whereas the scope of authority of many international economic institutions remains much greater, environmental and social regulatory institutions have a longer history and better entrenched practices to ensure legitimacy among relevant communities for the authority they claim. Applying the framework across issue areas is warranted to analyze these possible differences.

Some broader theoretical implications emerged as well. First, a checklist of legitimacy requirements cannot be developed a priori. The framework developed here highlights that legitimacy requirements evolve over time, in the interaction of affected communities and social structures. For example, state consent is no longer sufficient for legitimacy even in multilateral settings, with the advent of a growing normative consensus on the need for greater democracy in global governance and the shifting realm of political action of institutions under globalization.

Second, the framework drew attention to the substance of legitimacy requirements – what in another context John Ruggie (1982) has called legitimate social purposes – in addition to processes of decision-making or utilitarian goals such as economic performance. The relevant aspects of social structure in this regard may vary across issue areas. Moreover, even a similar social structural environment will interact with community norms, potentially producing varying legitimacy criteria.

Third, power is implicated in any form of governance and what its legitimation requires. In the case of social and environmental regulation, the analysis of legitimacy and power highlights that although newer non-state initiatives make serious efforts to address environmental and social concerns and respond to democratic pressures, 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 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 (Gleckman, 2004).

An analysis that considers institutional and productive power in particular can help understand an important irony in environmental and social global governance in this regard. On the one hand, social structure may legitimize forms of governance that may not coincide with what many environmentalists view as optimal ecologically, while on the other hand non-state governance systems with a greater direct ability to tap into ecological and social concerns of core constituencies also face more stringent 'democratic' legitimacy demands.

A critical sociological approach also directs attention to the possibility of tensions in social structure. For example, it points to how responses to the 2008–2009 credit crisis could help delegitimate unregulated markets. In other words, whether or not Polanyi (1944) is correct that such a 'double movement' in reaction to disembedded markets is inevitable, the framework here directs attention to shifts in norms of social structure as a gauge of whether legitimacy crises are brewing or governance is resilient in particular issue areas, based on a governance system's fit or discord with what social structure legitimizes.

In this way, the framework can account for how it can happen that legitimacy requirements of an institution are dysfunctional for the achievement of its ultimate purpose. For example, many have argued that the universal participation norm of the KP has hamstrung negotiations (Cerny, 2009; Haas, 2008; Victor, 2006). Moreover, the requirement to work with market forces through market mechanisms, because they focus on efficiently meeting pre-set goals, 'may distract attention from clearly identifying and achieving' those goals (Haas, 2008: 4), or reflect an unwillingness to develop any policy that directly threatens economic sectors they target (Cerny, 2009: 787–89). Nonetheless, these requirements serve to legitimate, and help solidify, the KP's claim to authority over global climate governance. There is no necessary relationship between legitimacy and solving the world's environmental or social problems. Indeed, the analysis above suggests they can easily legitimate the very order the institution was ostensibly created to change.

NOTES

1 In December 2009 (after this article was accepted for publication) governments at the UNFCCC fifteenth Conference of the Parties agreed to the Copenhagen Accord (UNFCCC, 2009), a non-binding political statement on future commitments, policy direction and financing to address climate change. While it remains unclear whether it will evolve on a parallel track to the KP, the following points are important for the argument here: it was negotiated within the UNFCCC and Kyoto Protocol negotiating process; the umbrella UNFCCC remains the primary platform for climate change negotiations; the Accord does not supersede the Kyoto Protocol but rather operates along with it; and the Accord reaffirms the UNFCCC's and Kyoto's basic principles, although it goes further in providing a framework for developing country commitments while backing away from binding commitments for any party. Thus, the Accord does not undermine the KP's legitimacy, even as it highlights its limitations and that an evolution in climate change governance is underway.

2 Attempts in global governance scholarship include Zweifel (2006), Moravcsik (2004) and Bäckstrand (2006a).

3 I use the term community rather than public to avoid a necessary association with the state, but still retain the denotation of 'publicness' in the sense that its members collectively empower political authority.

4 Weber (1978). Scholars disagree over whether legitimacy is constitutive of authority (Hurd, 2007: 60) or authority can exist absent legitimacy (Koppell, 2008; Uphoff, 1989). While I tend toward the former position since authority is generally understood as a 'right' to rule, the debate is largely irrelevant to this paper's focus on requirements for 'legitimate' authority.

5 These conceptions come from Barnett and Duvall's (2005) fourfold typology of power in global governance.

6 This discussion is not meant to imply that structural power is unimportant in environmental governance (see Newell, 2008). Moreover, the various forms of power are agnostic in the mix of ideational and material resources or source of power that ultimately produces social structure. Determining that mix is beyond the scope of this paper.

7 Representative examples include Held (1995), Bodansky (1999), Buchanan and Keohane (2006), Zürn (2000), Greven and Pauly (2000), Young (2001), Payne and Samhat (2004), Risse (2006) and Bäckstrand (2006a).

8 Others (Devetak and Higgott, 1999; Franck, 1995; Singer, 2004) argue conditions under globalization have sufficiently changed that justice and legitimacy may be linked globally as they are within the state.

9 This is the first common framework, of which I am aware, for this purpose.

10 Current debate over whether or how to re-regulate the global economy is potentially important in this regard since it may produce further pushback on norms of liberal environmentalism. However, it is equally plausible that path dependencies in global environmental institutions and entrenched interests may reinforce it.

11 It is articulated in UNFCCC Article 3.1 and KP Article 10, as well as Principle 7 of the 1992 Rio Declaration.

12 David Victor (2006), who has been a vocal and influential KP critic, had previously argued that international efforts should focus on a 'k group' or minimum winning coalition that makes collective action rational.

13 The Copenhagen Accord (UNFCCC, 2009) responds in principle to this conflict since under it major developing countries can pledge emission targets, while the idea of differential commitments for developed and developing countries remains. However, this breakthrough came at the expense of making commitments for all countries, developed or developing, non-binding.

14 Paterson's analysis focuses on potential structural legitimacy problems rooted in contradictions between capital accumulation (which drives marketization) and the environmental goals of climate governance. My focus is different: to analyze what legitimates the Kyoto Protocol as the accepted authority in global governance to address the issue.

15 Twenty-five semi-structured interviews were conducted with delegates to annual climate change negotiations in 2005, 2006 and 2007, in addition to informal discussions with other delegates. Interviewees were from government (including major emitters such as the United States, China, Canada, Russia and India), NGOs and UN offices.

16 Only one developed country delegate argued that equity and legitimacy were separate issues.

17 Confidential telephone interview following COP 12, 15 December 2006.

18 Betsill and Hoffmann (2009). 'Active' refers to any of the following stages of development: deliberation, rule-making or operation.

19 The overlap is not perfect because other actors (e.g. international organizations, transnational actors), directly or through states, may also influence the content of social structure.

20 Confidential interview, 12 January 2006.

21 For a detailed analysis of trade rules and transnational standard setting, see Bernstein and Hannah (2008).

22 The impetus came from the Clinton administration as part of its promotion of labor standard certification, which eventually led to its financial support of the Fair Labor Association and SAI (Bartley, 2003: 450).

23 Interview, Gareth Steel, Policy Desk Officer, European Commission, DG Trade, Unit G3: Sustainable Development, 3 June 2005, Brussels.

24 Canada, the United States, UK, Germany and Sweden.

25 Confidential interviews with staff of ISO and ISEAL; Clapp (1998).

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