Governance and Democracy

Comparing national, European and international experiences

Edited by Arthur Benz and Yannis Papadopoulos

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Governance and Democracy

A major change is taking place in the organization of political power. This transformation has often been labelled as a shift from 'government' to 'governance'. But to what extent are new patterns of network and multi-level governance compatible with democratic standards?

This important question is attracting attention both in political science and in political practice. In political science, the question is mainly dealt with in distinct sub-disciplines, which focus on different levels of politics. So far, no serious exchange has taken place between authors working on these different levels. The editors of this book – both specialists of network and multilevel governance – show that although the issue is raised differently in the institutional settings of the nation state, the European Union, or transnational governance, new insights can be gained by comparison across these settings.

This new contribution includes cutting-edge work from junior scholars alongside chapters by leading specialists of governance. It also contains a collection of new case studies, theoretical conceptualizations and normative proposals for solutions dealing with the issue of democratic deficits. They all give the reader a better understanding of the most crucial problems and perspectives of democracy in different patterns of 'governance' beyond conventional 'government'.

This book is a powerful tool for policy analysts, students of the European Union and international relations, and students in social and political science.

Arthur Benz is Professor of Political Science at the FernUniversität in Hagen, Germany. **Yannis Papadopoulos** is Professor of Political Science at the University of Lausanne, Switzerland.

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First published 2006
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
270 Madison Ave, New York, NY 10016

This edition published in the Taylor & Francis e-Library, 2006.

"To purchase your own copy of this or any of Taylor & Francis or Routledge's collection of thousands of eBooks please go to www.eBookstore.tandf.co.uk."

Routledge is an imprint of the Taylor & Francis Group

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British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data
A catalog record for this book has been requested

ISBN 0–415–36291–1

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Series editor's preface

Democratic government has never been easy. Motivating citizens to participate in democratic decision-making procedures and to cross the border between private and public interests appears to be as difficult as convincing elected representatives to behave in transparent and accountable ways. Even in relatively small and simple communities democracy relies on complex and delicate balances of power between many actors. Nowadays communities are neither small nor simple. National states are confronted with ever expanding demands and expectations of their citizens and with rapidly changing international environments. Besides, globalization, localization, and the rise of multilevel political systems are all intermixed with a substantial growth of the number of organizations, interest groups, experts' lobbies, political action groups, citizens' initiatives and a wide range of (international) non-governmental organizations. Politics no longer governs these complex communities, but mainly regulates and mediates through 'horizontal' coordination. The concept 'governance' indicates this transformation of the role of the state and the use of political power.

The transformation of 'governing' into 'governancing' raises a number of questions about the democratic legitimacy of political decision-making processes. The debates about these questions are seriously hindered by the fact that concepts such as governance and democratic legitimacy are not very clear and used in ambiguous ways. Furthermore, these questions and concepts are approached very differently by, say, political scientists working in the fields of political participation, policy analyses, democratic theory or European integration. The contributors to this volume clearly differ in their research interests, study designs, selected material and the scope of the analyses presented, but they all cope with the complicated relationships between governance and democratic legitimacy. Evidently, these relationships are different for different levels of the political world. The organization of this volume in three parts reflects this attention for distinct but interdependent levels and focuses, respectively, on governance and democratic legitimacy: (i) at the national and sub-national level; (ii) at the European level; and (iii) at a global level. In this way,

governance and democratic legitimacy are analysed from different perspectives without losing interdependencies between various levels out of sight.

Before the specific analyses are presented, Arthur Benz and Yannis Papadopoulos summarize the major questions and approaches in their introduction to this volume by discussing a general conceptual framework and clarifying the crucial concepts (Chapter 1). The four consecutive contributions of Part I address governance and democratic legitimacy at national and sub-national levels. B. Guy Peters and Jon Pierre examine changes in the ideas about the centrality of the state in the last decades (Chapter 2). Results from a detailed analysis of regional policy in the German federal system are presented by Katrin Auel (Chapter 3), whereas Anne-France Taiclet focuses on the ways territorial economic development has been handled by experts and politicians in France (Chapter 4). The roles of experts and politicians are also at the centre of Herman van Gunsteren's discussion of the opportunities for anchoring governance in political democracies (Chapter 5). The next four contributions of Part II deal with the European level. The quality of interest mediation and the efficiency of decision-making in the European polity are scrutinized by Arthur Benz (Chapter 6). Stijn Smismans discusses the impact of interest groups in the development of occupational health and safety regulations in Europe (Chapter 7). The cake is cut in a different way by Christine Neuhold who focuses on the role of committees in the implementing phase of legislation in the European Union (Chapter 8). The last contribution in this part, by Philippe Schmitter, directs the attention towards the more general question of whether governance will strengthen the legitimacy of European institutions and policies (Chapter 9). Part III of the volume consists of four contributions dealing with the global level. Thomas Risse deals with the lack of congruence between those being governed and those in power in 'global governance' and transnational politics (Chapter 10). Continuing this line of argument Klaus Dieter Wolf presents an extensive analysis of the role of private actors and civil society for the legitimacy of the international system (Chapter 11). Tanja Brühl considers the empirical evidence for the impact of business actors and non-governmental organizations in the international governance system dealing with environmental policies (Chapter 12). Concentrating on accountability Rob Jenkins analyses the way disputes are settled within the World Trade Organization and the challenges facing those who want to change the existing system of trade governance (Chapter 13). Finally, Arthur Benz and Yannis Papadopoulos return to the major problems and prospects for governance and democratic legitimacy in their concluding chapter. While the various chapters concentrate on specific questions or policies, the concluding chapter focuses on general conclusions and conceptual issues, and emphasizes the role of power in decision-making processes (Chapter 14).

The results obtained with the detailed studies presented in this volume all show that moving towards governance in very complex situations does not make the conventional questions about democratic legitimacy and accountability obsolete. On the contrary: exactly because governance is such a complicated phenomenon with many different actors in diffuse relationships and at various levels, democratic legitimacy and accountability have become major concerns. Democracy claimed to be government of the people, by the people, for the people – only if governance can be shown to be governance of the people, by the people, for the people can it be accepted as a valuable innovation. The contributions to this volume make clear that governance still has a long way to go on this road, but the prospects to combine governance and democratic legitimacy look better than many observers presume. Neither democracy nor governance is easy.

Jan W. van Deth, *Series editor*
Mannheim, June 2005

Preface by the editors

This volume intends to contribute to the intensifying debate on changing modes of governance and policy-making and on the consequences of these changes for democracy. The issues considered in the chapters concern politics and policy-making at the international, the European, the national and subnational levels of politics. Although they are of general interest, they are mostly approached through the conceptual lenses of the different fields of political science. In order to cope with the complexity of real political structures and processes, empirical research inevitably becomes more and more specialized. For this reason, concepts linking separate research fields are gaining importance. Governance arose in political science as one of those bridging concepts. Even though it is often criticized for being merely a fashionable and rather vague notion, it has proved to be a useful framework that can stimulate communication across established boundaries between subdisciplines and research fields, as should be demonstrated by this volume.

The book originated in two workshops, in which we realized the productivity of this kind of scientific communication and cooperation. The idea to collect articles by scholars working on international, European and (sub)national governance emerged in a meeting on 'Governance and democratic legitimacy' organized in April 2001 by Yannis Papadopoulos and Philippe Warin and attended by Arthur Benz at the ECPR joint sessions of workshops in Grenoble. The structure of the book and the contributions were further elaborated in a second workshop in Lausanne co-organized by Arthur Benz and Yannis Papadopoulos. We are grateful to the Fondation du 450e anniversaire de l'Université de Lausanne and to the Institut d'Etudes Politiques et Internationales of this university for their generous financial support. While the book cannot fully document the intense and fruitful discussions held in Grenoble and Lausanne, we hope that it reveals their relevance and will induce further research work along these lines.

Editing a collection of essays is by itself a practical experience of governance, the success of which does not depend on the editors alone. We profited from the support of a number of persons. First of all we are

grateful to the European Consortium of Political Research and to the ECPR series editor, Jan van Deth, for endorsing the publication of this book. Jan van Deth and the anonymous reviewers gave us helpful comments which encouraged us to proceed with our work on this volume. We also owe gratitude to the always supportive and patient managing editors of Routledge. In Lausanne Alexandre Afonso, Juanita Béguin, Aurélien Buffat and Arnaud Nicolay helped us at various steps of our project: we are grateful to them too. Yannis Papadopoulos is also grateful to the French Centre national de la recherche scientifique (CNRS), for having generously funded a six months' stay devoted to research on 'Governance and the democratic question' at the Centre universitaire de recherches administratives et politiques de Picardie (CURAPP). He also wishes to express his gratitude to the director of CURAPP, Professor Pascale Laborier, for her active support. The excellent language editing by Andrew Melling (Oxford) and the technical support by Woef-Hagen von Anjem, Mark Hildebrandt and Henning Wallmeier (Hagen) helped us very much in preparing the final manuscript and we want to express our warmest thanks to all of them. Finally we would like to thank our authors for contributing to this collective undertaking.

Arthur Benz
Yannis Papadopoulos
Hagen and Lausanne, March 2005

Abbreviations

AC	Advisory Committee for Safety, Hygiene and Health Protection at Work
AEIDL	Association Européenne d'Information sur le Développement Local
CBD	Convention on Biological Diversity
CEC	European Confederation of Executives and Managerial Staff
CEEP	European Confederation of Public Enterprises
CFC	Chlorofluorocarbons
CoR	Committee of the Regions
CPER	Contrat de Plan Etat-Région
DATAR	Délégation à l'Aménagement du Territoire et à l'Action Régionale
DDP	Dams and Development Project
DFID	Department for International Development (UK)
DSB	Dispute Settlement Body
DSS	Dispute Settlement System
DSU	Dispute Settlement Understanding
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EESC	European Economic and Social Committee
EGA	European Governance Arrangement
EP	European Parliament
ERDF	European Regional Development Fund
ESC	European and Social Committee
ETD	Entreprises, Territoires et Développement
ETUC	European Trade Union Confederation
EU	European Union
EURADA	European Association of Development Agencies
GATT	General Agreement on Tariffs and Trade
GCC	Global Climate Coalition
ICJ	International Court of Justice
IR	International Relations

IUCN	World Conservation Union (formerly 'International Union for the Conservation of Nature and Natural Resources')
LDC	Least Developed Country
NGO	non-governmental organization
NIC	Newly Industrialized Country
OECD	Organization for Economic Cooperation and Development
OH&S	occupational health and safety
PCF	Prototype Carbon Fund
QUANGO	quasi-NGO
SDT	Special and Differential Treatment
STEPS	Shell Tradable Emissions Permits System
TNC	transnational corporations
TRIPS	Trade Related Intellectual Property Rights
TUTB	Trade Union Technical Bureau
UEAPME	European Union of Associations of Small and Medium Enterprises
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNICE	Union of Industrial and Employers' Confederations
WCD	World Commission on Dams
WTO	World Trade Organization

1 Introduction

Governance and democracy: concepts and key issues

Arthur Benz and Yannis Papadopoulos

Introduction

It is widely acknowledged that we are observing a major change in the organization of political power. This transformation has often been labelled as a shift from 'government' to 'governance'. Although not predominating in all policies and arenas of policy-making, governance has become the prevailing mode of political regulation in our wealthy, functionally differentiated, multicultural and democratic societies. Scholars in political science also increasingly agree that the emergence of new structures and modes of governance raises the question of democratic legitimacy.[1]

The results of the debates on the democratic legitimacy of governance are so far not very convincing. One reason for that can be found in conceptual problems. The notion of governance is not very clear, and nor is there agreement about what democratic legitimacy requires, and especially how it can be achieved when applied to politics and policy-making beyond the nation state. Moreover, the issues of governance and democracy are debated in specialized discourses within political science which relate to different research fields and to different levels or arenas of policy-making. Not surprisingly, particular scientific communities (policy analysts, European Union specialists, internationalists) often use diverging concepts and focus on varying aspects of governance and democracy.

This volume intends to bridge the gap between these discourses. It collects essays from researchers working on governance within the nation state, on European governance and on international governance. By comparing across levels we are better able to clarify the particular conditions of democratic governance, and especially the influence of institutional frameworks. Moreover, focusing on specific types of governance and taking their differences into account can help us to avoid unjustified generalizations and to produce more differentiated conclusions.

In this introductory chapter we outline the conceptual framework guiding the whole volume and explain the basic research questions. We start by clarifying how we use the term governance. We then sketch the

elements of a concept of democracy which are relevant to governance and we summarize the main problems of democracy in governance. Finally we briefly describe how the different chapters deal with these problems at the national and subnational, European, and international level.

What is governance?

The term governance was introduced into political science and, more recently, practical political discourses[2] when it became obvious that the traditional model of the nation state is no longer adequate to describe reality or to guide reform policies. The nation state has been challenged by the increasing complexity of social problems, the differentiation of societies followed by the rise of new organized interests, the overload and inflexibility of hierarchical structures, the growing international interdependencies and competition, and finally the diffusion of new theories of public management and policy-making (see Pierre and Peters 2000: chapter 3). In order to avoid ungovernability, the plurality of competing interests and preferences has to be organized through 'horizontal' coordination and cooperative policy-making cutting across institutions, sectors and territories. Thus institutions, procedures, or forums are created at various levels (such as policy networks, roundtables, intergovernmental conferences, expert committees, and so on), whose major aim is to produce coordination by transcending what could be labelled as 'parochial' attitudes. At the same time, public bodies lack the necessary resources (such as finance, knowledge, organization or authority) to produce social coordination through steering from above. Under these circumstances, governance aims to enhance public resources in terms of knowledge (learning about complex and uncertain causal relations), organization (ensuring adequate expertise and capacity to implement policy choices), and authority (avoiding blackmailing by veto groups and inducing compliance by policy-takers) in policy-making. As a result, governance entails the inclusion of non-governmental actors (such as organized interests, third-sector associations or firms among others) in policy networks, and collaborative relations with them that can take the form of delegation, contracts or partnerships. It is a structure of policy-making that consists of several independent decision centres.

The following points concerning structures, actors and modes of policy-making are the most relevant for a systematic portrait of the major traits of governance:

- Regarding structures, governance implies a *plurality of decision centres.* It is designed to regulate conflicts between social groups, organizations or individuals without a sovereign, monocentric government. There is *no clear hierarchy* between these various centres although governance structures can be embedded in a formal hierarchy. The core

of decision structures consists of *networks*, in other words relatively stable relationships between formally autonomous organizations or actors.

- The *boundaries* of decision structures are defined not so much in territorial but in *functional* terms. They are also *fluid* concerning both the inclusion of actors and the effects of decisions.
- *Actors* in governance include experts, public actors (government officials and state administrators) who can represent different territorial levels, and representatives of private interests (of business groups, lifestyle communities, and so on, depending on the policy area). Elected politicians are deemed to play a secondary role.
- Although decision-making processes and networks involve individual actors, those who define issues and preferences and who really exert power are *collective actors*. The participation of interest groups is an important feature in governance, so that governance implies the rise of corporate actors.
- Governance can encompass a mixture of different modes of control and coordination. Unilateral decisions are not excluded, but usually mutual adjustment in processes of *negotiation* prevails. Within networks, participants are expected to demonstrate an accommodative orientation, an inclination to compromise and possibly a shared willingness to learn from each other. However, organizations and collective actors interact at the same time by competition and cooperation, a pattern of interaction that has been called 'antagonistic' cooperation (Marin 1990).
- Finally, governance usually leads to *less formal modes of decision-making*, within structures that are hardly visible to the public and that are not congruent with the official institutions of representative democracy (causing the democratic problem that will be discussed in more detail later). In governance the initiative and control functions of parliaments are expected to be weak, with parliaments instead being confined to the role of ratifying bodies.

Due to its network-like, non-hierarchical, flexible, boundary-spanning character, governance is often regarded as politics and policy-making outside institutions, as 'governance without government'. However, this is only in part correct. For analytical reasons, governance should not be identified with informal patterns of interactions of public and private actors. Institutions are relevant for the understanding of governance, for at least three reasons. Firstly, there is often an institutional framework which defines who is included and who is not, and which shapes power relations and guides the interactions of actors. Secondly, actors usually represent collective entities and are subject to the institutional rules governing internal organizational structures and processes. Finally, it is the interplay of formal and informal patterns that constitutes the dynamics of

governance. Institutions can support the emergence and stability of networks, but it is also possible for networks to create tensions within the institutional framework, or for networks to develop 'against' existing institutions. Moreover, intraorganizational rules of collective actors can be incompatible with the rules of (interorganizational) interactions between actors, a good example of this being the tensions between party competition and intergovernmental cooperation in the German federal system (Lehmbruch 2000).

Hence, when speaking about governance, political institutions should be taken into account. They are of particular relevance when dealing with the question of democratic legitimacy. Institutions define who is authorized to act and to make collectively binding decisions, they make actors' behaviour predictable and visible, and they link those who hold power to those who are subject to decisions. For this reason it is important to note that governance is not just politics beyond the nation state; rather it is, in different ways, coupled to the institutions of the nation state. At the national and subnational level, the nation state provides the institutional framework for governance. At the European level and in international relations, national institutions influence the linkage between actors from member states and other transnational or private actors, and of course European institutions and international 'regimes' are key actors too. In any case, the degree of institutionalization and the probability of conflicts between cooperative networks and formal institutions varies. In order to better understand the complexity of governance, research that includes different types of governance embedded in different types of institutional settings is essential. The collection of essays in this volume is a step in this direction.

Some considerations on the concept of democracy

Anyone who attempts to deal with the democratic legitimacy of governance is confronted with a second conceptual problem: to define what is meant by democracy. If what is assumed in political science is correct, namely that the rise of governance goes along with a transformation of democracy (Dahl 1989: 311–322), then it cannot simply be assumed that the standard model of democracy in the nation state can be applied. A concept which conforms to the normative standards of democratic theory but which at the same time is adjusted to the subject of inquiry is needed.

In order to clarify the normative implications of governance on democratic legitimacy, the famous definition of Abraham Lincoln is here taken as the point of departure. In his Gettysburg address, Lincoln defined democracy as 'government of the people, by the people and for the people'. A government of the people is acknowledged by them as 'theirs' (identification), *because* it is viewed at the same time as government *by*, and *for* the people. The notion 'by the people' indicates that rulers take into

account the interests of the individuals or groups that brought them to power. It refers to the so-called 'input-legitimacy' of political systems (Scharpf 1999). By contrast government 'for the people' refers to 'output-legitimacy', in other words the notion that government should govern in a way that is profitable for the collective wellbeing of the people. Hence not only do the intrinsic values of democracy matter, but 'our approval of democratic institutions is equally conditional [. . .] on their delivering the beneficial effects associated with democratic decision-making' (Bellamy and Castiglione 2000: 73, and discussed by Abromeit 2002: 64).

A concept of democracy adequate for the evaluation of governance should also take into account the functional and institutional differentiation between those who govern, as representatives, and those who are governed. Democracy then refers to the interaction between these groups of actors. It is characterized by structures and processes in which collectively binding decisions are made by responsive actors in the interest of those citizens who authorized them to rule in their place. Thus the democratic legitimacy of a polity and of particular policies requires a circular relationship between decision-makers and the citizenry. The latter aims to ensure the responsiveness of the rulers to their constituents, and the primary means for that is the availability of mechanisms that effectively ensure rulers' accountability. If responsiveness is about substance, accountability is about the availability of codified procedures that compel policy-makers to give reasons for their choices and that allow citizens to express their views on policy outputs. If mechanisms for accountability offer incentives for elite responsiveness, it is because they must give to the citizenry the opportunity to look backwards to what has been done, compel office holders to justify it, and in turn enable the citizenry to reward or punish office holders for their actions.

To avoid an idealistic and unrealistic image of the relationships between those in power and their constituency, however, a number of points have to be clarified. Firstly, the role of representatives cannot merely be that of 'spokesmen' of constituencies. The modern conception of representation rules out any forms of binding mandate, in order to allow for 'brainstorming' of representatives (Elster 1998) without the Damoclean sword of a loss of power hanging permanently over their heads. Such a view of representation, which is usually applied to parliamentary bodies, is also valid for interest group representation at large within governance networks (Mayntz 1999). This argument also goes against that understanding of representatives which requires them to reproduce a sort of 'microcosm' of their environment. Such a view is illusory, because the reference groups themselves to which representatives are attached are becoming increasingly heterogeneous (Young 2000: 121 ff.). Secondly, it is questionable whether the represented can confer clear mandates to their representatives, for this requires, in turn, that they be able to express well-established preferences. Nor, ultimately, should it be

assumed that the governors themselves always desire or have the capabilities to pursue clear objectives, and to find the appropriate means to achieve them (Papadopoulos 2003: 488–489).

For these reasons, democratic legitimacy cannot be understood merely in terms of an existing identity or at least similarity between the content of collectively binding decisions made by those holding power, and the preferences of those affected by decisions. Such decisions can only ever be expected to express the provisional result of mutual adjustment between the preferences and intentions of government and those of its constituencies. Democracy should therefore be regarded as a continuous learning process in the interplay between those who govern and those who are governed, a process during which both sides develop and change preferences.

This normative criterion of a continuous adjustment of preferences is only realized when certain structural conditions are met:

- *Correspondence of jurisdictions and constituencies.* The democratic process of preference formation and mutual adjustment has to link representatives with all of the represented. Every person affected by a collective decision should have the opportunity to express his or her will, and no person not subject to the power of a government should have a say in decision-making. This principle of correspondence has been realized in the modern state through the territorial organization and boundaries which define the community of citizens and the domain of public authorities.
- *Stability of communication between represented and representatives.* Democracy requires continuous learning. Institutional rules therefore have to create durable relationships within a public space where decision-makers can communicate their policies to the constituency and the represented can proclaim their preferences to their representatives. Electoral campaigns and regular voting provide a minimum of such a communication circle. To become effective it must be supplemented by public deliberation and communication via the media.
- *Ability of representatives to propose solutions for problems and to make the necessary decisions.* Representatives have to aggregate the plurality of interests articulated in a constituency and they have to offer solutions for collective problems. Democratic policy-making depends upon decisions which anticipate the reactions of the affected community (Friedrich 1937: 16).[3] If decisions are blocked, citizens are deprived of their opportunities to have their preferences translated into policies.
- *Effectiveness of representatives' power to control offices holders.* Those in power have to be compelled by a countervailing power. Hence representatives must have at their disposal an effective means with which to check decision-making bodies. It is not only the right to withdraw

support but also the transparency of policy-making that is decisive for these controls to be effective. Individual responsibility for policies and the extent of that liability must be visible for citizens and for their representatives.

Mutual adjustments in circular patterns of communication and mutual control between citizens and the political elite (as well as inside the elite: Goodin 2003) are an essential prerequisite of a well-functioning democracy. Moreover, if democratic institutions provide the most appropriate design for generating 'resilient regimes' based on 'looking backwards' (namely retrospective voting) and on competition between alternatives (see van Gunsteren in this volume), they should not be relegated to a secondary role in governance by networks.

The problem of democracy in governance

As suggested by Renate Mayntz (1997), governance arenas are not conceived primarily in terms of their potential to democratize policy-making, but are meant to be solutions to functional problems, such as the management of interdependence between various collective actors and the acceptance of policy choices by their addressees. 'The primary normative guideline for governance is not democracy but legitimacy' (Wolf 2002: 40). The present volume should, however, contribute to the emerging debate about how democracy can be maintained despite the growth of patterns of governance.

It goes without saying that even representative democracy does not create a relationship between citizens and governors that meets all of the normative criteria. It comes as no surprise that the well-known Italian philosopher Norberto Bobbio (1987) spoke about the 'broken promises' of democracy. When dealing with governance, however, some additional problems arise. In governance there is neither a single government nor a 'people', and therefore no congruence between jurisdictions and the scope of decisions. Moreover, power is also exerted by private actors, which are not integrated in the circular relationship between elected governments and the people. Whereas in a nation state there is one circular relationship between government and the people, when governance structures develop there are then several circular relations between decision-makers and different constituencies or reference groups. This means that decision-makers are not empowered by the whole community, but rather by narrower circles of 'stakeholders'; that each group can control only those decision-makers who represent them (but they must also leave their representatives some room for bargaining); that the chain of authorization allowing some actors to take part in decision-making can be complex (series of delegations); and that some actors participate by virtue of *sui generis* forms of justification (for instance, experts whose knowledge is

necessary, or firms whose investment is crucial). These points raise several fundamental questions:

1 *Which communities and reference groups are included* in decision-making structures, who decides on inclusion and according to which criteria (for instance, territorial or functional definitions of communities and reference groups), and to what extent are decisional structures open for including additional participants?
2 *What kind of considerations* legitimize the empowerment of various sorts of decision-makers?
3 In which way are the policy preferences of the participating collective actors formed? Does the process of preference formation guarantee *inputs from the constituency*?
4 How are the choices of decision-makers in governance structures linked to the preferences of their constituencies (*responsiveness*)? What kind of *resources* do constituencies have to check the activity of decision-makers (voice, veto or exit), and to make them effectively *accountable* for the outcomes of policy-making in governance?
5 How are *preferences transformed into decisions* in governance? To what extent do structures of decision allow the *adjustment of policies to changing preferences* of affected groups (or are there reasons to expect 'joint-decision traps' and policy blockades: Scharpf 1988)?

To question 1: Governance includes communities by giving their representatives access to policy-making. However, inclusion tends to be not only elitist but also selective with respect to the consideration of interests, since not all constituencies have the same potential for imposing their representation. Although admittedly the degree of pluralism varies, governance rarely involves weakly organized interests. Besides, the more that policy-making consolidates networks, the more that collusion between their members and the formation of distributive coalitions are likely to stimulate rent-seeking, particularistic capture, and the transfer of costs to actors and groups excluded from the network (Benz 1998: 206; Pierre and Peters 2000: 20). The functional necessity for internal network cohesion can cause prejudice to external responsiveness. Also of note is that the legitimacy of governance mechanisms is primarily contingent upon compliance by actors possessing a high blackmailing potential, and able to veto policy formulation or implementation. As a result, the major push in favour of more 'horizontal' procedures comes from major veto players, whose 'voice' or 'exit' can jeopardize public action or policy choices.

To question 2: Typical of governance is the incorporation of various organized interests in decision-making (with delegation of public tasks to 'private interest governments' as the most pronounced form). They are usually welcomed as an indicator of a more horizontal, pluralistic political structure. Moreover, efforts to give consideration to expert knowledge are

appreciated as signs of a more reflective policy-making (Willke 1997). This analysis however does not say much about the relationship between governance and the democratic circuit. Indeed, it has been argued that the sphere of (problem-solving oriented) *politique des problèmes* is to a large extent disjointed from the sphere of (symbolic) *politique d'opinion* (Leca 1996: 345–346). Not only are both the rules of the game and the goals different in the two spheres, but the set of actors that intervenes in the governance arena (administrators, interest representatives, and experts) differs to a large extent from the set of actors that intervenes in the 'politics' arena (politicians, journal editors and, increasingly perhaps, 'spin doctors'). There is consequently a risk that decisions are made by actors other than those regarded as legitimate decision-makers by the people or the affected communities.

To question 3: In governance structures, policy preferences are introduced into political processes by collective actors of different kinds. Some of them decide on their preferences by processes which give a voice to those whom they represent. Others empower an elite to make the decisions, and the represented can react only by leaving the organization (exit) if they deem their demands to have been insufficiently satisfied. At first glance, it seems that democratic processes of preference formation within the collective actors represented in governance structures contribute to the democratic quality of governance. However, non-democratic collective actors who speak with a single voice can often be observed articulating their interests more effectively than the representatives of organizations who have to stick to the will of their constituency. Autonomous leaders of organizations can react better to the usually unpredictable developments in negotiation processes which are typical of governance structures than leaders of democratic organizations. The latter have to cope with a gap between the 'logic of influence' that animates them and the 'logic of membership' that animates their reference groups (Schmitter and Streeck 1999).

To question 4: The problems of a lack of inclusiveness and of insufficient consideration of interests in governance are intimately linked to problems of responsiveness and accountability. Some actors taking part in policy networks are not necessarily mandate holders, they are not constrained by any electoral pledges, and they do not have to anticipate any electoral sanctions. When they do have these considerations, for example as interest representatives, then they are accountable to sectoral and not to widely encompassing interests. In addition, traditional requisites of delegation are undermined by awarding a central role to elite bargaining or deliberation: actors involved are then more often accountable to their discussion partners than to their reference groups. Finally, the frequent fluidity and informality, or at least the weak degree of consolidation, of governance procedures tend to make policy-making less visible to ordinary citizens. Belief in procedural fairness can enhance the acceptance of

decisions (Fearon 1998: 57), and this belief also rests upon the conviction that, whatever cost may entail from a decision, it was taken under conditions that can be estimated fair. In that respect, policy networks – as pluralistic as they may be – are more easily subject to the criticism of lack of fairness than parliamentary majorities, which can more easily appear to be 'natural' expressions of the people's will, even though they are sometimes 'manufactured' by electoral laws. Due to the strength of democratic ideology, considerations of transparency and of equal access to deliberation are very likely to prevail in the assessment of decisional procedures, thereby rendering the legitimacy of governance mechanisms problematic.

To question 5: Policy-making by governance can be considered to be more conducive to effective governing. It has, for example, been argued that negotiations in networks, if they are pluralistic enough, will be able to yield Pareto-optimal outcomes that cannot easily be achieved by the institutions of majoritary democracy, and that this particularly applies to the fragmented or absent *demos* beyond the nation state. Assuming that prevailing perceptions of the common good rely more upon considerations of interest than upon considerations of identity, the legitimacy of the political system would be primarily achieved through the efficient performance of governance (Scharpf 1999). Empirical studies have also shown that governance mechanisms can yield outputs more favourable to socially stigmatized groups than representative or participatory mechanisms where the temptation for demagoguery (and thus majoritarian conformism instead of respect for differentiation) is high (Wälti *et al.* 2004). Governance may also be more favourable to 'resilience', and produce more 'future-regarding' decisions, because decision-makers are not constrained by the short-term calculations of electoral competition. Finally, actors within networks such as experts and interest representatives are considered particularly competent in pooling the technical, sectoral and local knowledge necessary to produce adequate outputs. In sum, governance would be favourable to 'fact-, future-, and other-regardingness' (Offe and Preuss 1991).

However, there are also reasons to suppose that governance can obstruct decision-making. Legitimacy is seriously reduced if non-decisions impede the addressing of important concerns within society. Such an outcome is probable if powerful veto-players exist whose cooperation is indispensable. Moreover, actors can be constrained by the rules of their home organization and are thereby prevented from making agreements with other actors. The sheer complexity of governance structures may cause overload and, as a consequence, stalemate in policy-making. Finally, policy-making may be blocked if those affected by decisions are able to mobilize under the banner of anti-establishment parties against those elites who are criticized for being unresponsive (Papadopoulos 2002), a criticism that is credible not only when it is applied to national elites

within a context of declining vertical trust, but perhaps above all with respect to more remote European and transnational elites.[4]

There is little doubt that a non-negligible portion of the mass public is not aware of these crucial issues. Yet it remains highly questionable whether the public would appreciate the uncoupling of governance arrangements from democratic institutions, especially since deliberation – which is valued as a positive and indeed crucial attribute of governance arrangements – remains a pure abstraction for most citizens (Hermet 2001: 16). It should not be taken for granted that particular recipients of policies, or the citizenry as a whole, would acquiesce – if they were aware of the problem – to decisions largely made through non-transparent procedures typical of a 'post-parliamentary governance' (Andersen and Burns 1996) that does not correspond to their image of what is legitimate democratic policy-making.[5]

Variations of governance and democracy

When policy-making is performed within the context of governance, numerous important issues – related to the political representation of interests, to the autonomy of representatives or 'agents' with respect to their constituencies or 'principals', and to the redefinition of accountability and responsiveness of incumbents, bureaucracies and policy-makers at large – are likely to be controversial. The way such questions are framed depends *inter alia* upon the institutional framework in which governance arrangements are embedded. To speak of an institutional framework may, at first glance, contradict the notion of governance which tends to be associated with cooperation, negotiation, competition or networks, admittedly more or less fluid. However, it is important to note that governance is by no means an anarchic pattern of policy-making. It is structured by rules, some of them being set by external authorities or deriving from basic norms of society, some of them emerging in the process of governance. The institutional framework differs according to policy domains, levels of governance, and between different nations or parts of the world.

In this volume, the focus is upon three different fields of governance: intra-national, European, and international. Whereas intra-national governance is often the result of institutional reforms of the public sector and is constrained by the 'shadow' of national and subnational governments, and while governance in the EU is based on the institutionalization of a specific political system, international governance is characterized by weak institutionalization or by sector-specific international organizations or regimes. Moreover, depending on the institutional framework, governance at these various levels includes different types of public and private actors. Although the influence of institutional frameworks on governance should not be overestimated because they do not determine processes, elements of these frameworks can be conducive to different types of

structural constellations that can provoke democratic deficits but also stimulate novel legitimating arguments.

Governance in the nation state

With regard to the national or subnational arena, the novelty of decision-making through governance should not be exaggerated, in spite of numerous authors stressing the shift from vertical to cooperative steering. This feature may simply have become more visible now because of a change in analysts' conceptual lenses (Peters 1998: 13; Rhodes 2000: 65n.). For example, concertation with non-state actors (and delegation of implementing tasks to them) is a well-established tradition in political systems with pronounced neo-corporatist features, such as Austria, the Netherlands, Switzerland, or the Nordic countries (Pierre and Peters 2000: 199). In federal states too negotiations can be observed in the course of the formulation or implementation of policies, and in the various forms of intergovernmental relations between central, regional or local levels. The role of governance is probably more pronounced than in the past in democracies traditionally considered as typical cases of the majoritarian model, such as the United Kingdom, as well as in polities like France which originally were strongly statist.

What is no doubt novel, however, is the introduction of new modes of control in the public sector justified by the 'New Public Management' theory (Pollitt and Bouckaert 2000). More emphasis is put on to performance and efficiency in public management, and on to output-related criteria of legitimacy. Instead of hierarchical control, governance in the public sector fosters the autonomy of decentralized units, coordination by contracts and competition for best practices. These changes result in an increasing fragmentation of the institutional framework but also in a more intense interaction between public and private actors. In their chapter, B. Guy Peters and Jon Pierre suggest that a number of attempts at reforming state structures and procedures have altered the possibilities for making accountability effective. This change in the accountability regime is already operating, but remains poorly conceptualized. For example, although contracts have come to be used increasingly as a means of delivering public services, the means necessary for holding contractors accountable have often not developed adequately. The authors argue that understanding the problems of contemporary accountability and legitimacy requires a departure from the political and institutional logic that has characterized the liberal democratic state. However, a performance-related model of *political* accountability has yet to be formulated. The new, increasingly predominant, paradigm of public-sector management is based on several concepts that tend to minimize accountability. For example, managerial autonomy and market-based accountability as a function of customer choice minimize conventional forms of political account-

ability. The problem of ensuring the accountability of career public servants with the devaluing of politicians in these models and the empowerment of managers was never properly resolved. Irregularities in public-service delivery can be indirectly resolved through institutionalized channels as long as politicians exercise some degree of control over the public administration. When that political control is relaxed, input control becomes replaced by output control. The key question here is how such a version of accountability can support the legitimacy of elected government.

What is also novel is the increasingly 'multilevel' structure of governance arenas, due to Europeanization combined in several countries with domestic federalist arrangements, or at least decentralization and devolution. In its 'multilevel' version, the format of governance is even more complex because public–private partnerships are supplemented by negotiated intergovernmental agreements between multiple levels of decisional units (for example, European Union bodies, national, regional, and local institutions). Needless to say, the 'multilevel' aspect accentuates accountability problems, as actors are tempted to shift blame to other decisional levels involved (a practice of blame shift that could be called 'inter-level blame'). Moreover, due to the influence of 'New Public Management' ideas, decentralized cooperation can be observed between regional and local governments on the one hand and private actors on the other, a development motivated by increasing competition ('benchmarking') between regions or administrations. Such cooperation is yet a further step in the direction both of complexity and of accountability deficits.

Katrin Auel's chapter deals with the problem of democratic legitimacy in German regional policy, a case study that represents a typical example of 'multilevel' governance in a federal system. Policies are made in an institutional setting which establishes intergovernmental negotiations between Federal and *Länder* governments and – in the case of the European structural funds – the European Commission. In addition, networks which include actors from local governments as well as actors from the private sector have emerged at the regional level below the *Länder* since the late 1980s. The aim of the development of patterns of regional governance was not only to make policy-making more effective, and thereby raise the output legitimacy, but also to bring policy-making closer to the people by providing new forms of participation. As a consequence, the vertical 'multilevel' system of governance which is dominated by governmental actors is complemented by horizontal arenas of regional governance which takes place through intra-regional cooperation. Moreover, policy-making requires the involvement of *Länder* parliaments, as decisions on the amount and the allocation of the structural funds affect their budgetary competencies. The author analyses the linkages between these different levels and arenas of policy-making in order to assess the democratic legitimacy of regional policy in Germany.

Anne-France Taiclet also deals with the problem of democratic legitimacy, in this case in governance networks in French territorial development policy. Taiclet considers that the analysis of governance arrangements should not be made using only a functional approach that focuses on their efficiency. Power issues should also be addressed and the analysis should integrate the various sources of legitimacy that are mobilized by actors in governance networks. As in the German example, the expectations from this policy are not only substantive but procedural, as it is also supposed to enhance the democratic character of public regulation. A number of features (such as a 'multilevel' framework, the use of enlarged partnerships, the preference for bottom-up approaches) are intended to ease the access to governance networks and to enhance participation in policy-making. The regional level is in fact expected to improve both the efficiency and the democratic dimension of governance arrangements. Allegedly, the proximity of decision-making arenas allows a better knowledge of the needs and resources of the territory. Regional development policies are also expected to be open to a greater variety of actors, including politicians and bureaucrats but also local-firm managers and associations. They are also considered to be more legible by ordinary citizens and more responsive to their preferences.

Finally Herman van Gunsteren advocates a redefinition of the notion of politics that would imply the re-politicization of governance. He argues that while the aim of many recent reforms is to enhance regime resilience, by which is meant the capacity to cope with the unexpected in such a way that the core values of the regime are preserved, few are unambiguously successful. The movement from government to governance is one such reform, and the author raises the question of how well it serves regime resilience. If governance is to enhance regime resilience, the author maintains, it needs to be coupled with the real world variety that political democracy represents. The emphasis on democracy will have to shift towards its function as a reserve circuit for spotting and dealing with unwelcome but inevitable surprises. This function requires a more central role for accountability, for governing by looking backwards. Van Gunsteren holds that anchoring governance in political democracy is possible. One condition for achieving this, however, is that partners and experts in governance drop simplistic, media-driven images of what politics in a free society is about, and instead become aware that the openness of governance, with its carefully selected range of relevant participants, differs from the rough confrontations that democracy forces upon its office holders.

Thus, even if policies are transferred to patterns of governance, the institutional framework of national democracy provides legitimized institutions and processes for final decision. However, the interplay between governance and established institutions of government is not always one of mutual support. It is often difficult to transfer decisions from structures

of governance to institutions that are responsible for formal decisions. The parallel existence of 'governance' and 'government' gives rise to conflicts between different logics of action and accentuates problems of transparency and democratic accountability. It is interesting to note that such problems are raised differently across countries. They also exist at the European and international level, although in a quite different way.

European governance

It is widely agreed that the institutions of the European Union cannot be compared with the structures of a nation state. Whether the peculiar political system of the EU can be depicted as a system of governance is subject to academic debate. While intergovernmentalists tend to view the integration process as a result of nation-state initiatives with governments being the key actors, the 'multilevel governance' paradigm emphasizes the role of networks and lobbying. Indeed, in comparison with national political systems, the weak and developing institutional framework of the EU is closer to the model of network governance (Kohler-Koch and Eising 1999) than to the classic model of government.[6] However, empirical studies provide a more differentiated view. Richardson (2000) for example emphasizes the additional access points provided to interest groups by the EU, while at the same time acknowledging a strengthening of the dirigist style of national governments. Moreover, Peterson (2001) argues that network forms of governance are more relevant for understanding the 'sub-systemic' level of EU decision-making than they are for the systemic (interinstitutional pattern) and the 'super-systemic' level (intergovernmentalist). In any case, the relationship between the institutionalized political system of the EU and cooperative patterns of policy-making (for example, comitology and social partnerships) is less clear than in nation states with more established decisional routines. While in national settings governance can be thought of as 'government plus', in the EU it is possible to speak of 'government minus governance' (Sbragia 2002: 6).

The picture which scholars draw about democracy in the EU depends upon the manner in which they characterize its political system. Intergovernmentalists challenge the idea that the European 'democratic deficit' is higher than in member-states, because they estimate that the accountability mechanisms existing at the national level are sufficient given the strong role of national governments in the integration process (Moravcsik 2002: 606; for another perspective see Zweifel 2003). Against this interpretation, Meny and Surel (2002) argue that the EU 'de-democratizes' the national game, without providing any satisfactory alternative democratic procedures. Unlike national systems of member-states, the EU has no 'elected central government with legitimate constitutional power', no 'incorporation of society through regular elections as well as a range of other

mechanisms (political parties, interest groups, corporatist structures, etc.)', and no 'existence of a national identity' (Sbragia 2002: 2). On the other hand the political system of the EU has several points where it is open to organized interests. There are also channels of communication from national or regional administrations and parliaments to European decision-makers that contribute to the intermediation of interests (input-legitimacy). Furthermore, despite all of its critics, the EU has proved to be rather effective, and policy-making in EU governance does not often end in deadlock. Recent research has shown that it has developed 'escape routes' (Héritier 1999) to avoid blockades that could undermine its output-legitimacy. However, the presence of a system of 'compounded' (Benz 2003) or 'composite' (Héritier 2003) governance weakens transparency and accountability (Lodge 1994), especially as the mechanisms of representative democracy by no means have a role equivalent to their national counterparts.

Following the 'multilevel' governance approach, Arthur Benz argues that in the EU the quality of interest intermediation and the efficiency of decision-making is not as poor as it is often assumed to be. The differentiated structures are advantageous for the 'input' of interests, because they provide opportunities for participation and they also integrate actors from various institutions into the effective core of the political system. Consequently, the process of policy-making opens up to a plurality of interests. In addition, Benz holds against the veto-player theory that 'multilevel' governance does not necessarily impede effective decisions. Powerful veto players such as governments and parliaments tend to avoid the obstruction of decision-making, because a stalemate is usually considered to be a failure (parliaments, for instance, shift to post-decision scrutiny and informal influence). However, efficiency is attained at the cost both of transparency in the political processes and of democratic accountability. Hence the author also discusses how accountability can be 'restored' in 'multilevel' governance.

While Benz focuses on the interplay between different institutionalized arenas, Stijn Smismans discusses the phenomenon of governance through the functional participation in bi- and tri-partite arrangements within the EU of social actors who are only weakly embedded in the institutional structures. By comparing the Advisory Committee for Safety, Hygiene and Health Protection at Work and the European social dialogue, he reveals the performance and deficits of these governance arrangements regarding output-legitimacy, input-legitimacy and accountability. The differences can be explained by the particular rationales employed, in other words the normative reasons that justify these modes of functional participation. Concerning the input-side, they can aim at including either specific interests or expertise. Accordingly, policy output can be effective either if it reflects a compromise between contradictory interests or if it is based on deliberation. Finally, accountability can be realized through the control of

represented organizations, or through democratic institutions. In order to alleviate the deficits of specialized governance arrangements, the author discusses the possibilities of combining interest-based and expert-based modes of governance.

The problems of linking governance and democratic institutions are more obvious in the comitology system.[7] Christine Neuhold focuses on this particular type of governance in the EU. The committees under scrutiny include actors from national administrations and private interest groups in a joint-decision system which operates along cooperative and deliberative principles, and which aims at output-effectiveness. They are active in the implementing phase of EU legislation, and as such form part of the European executive. Nevertheless, Neuhold's study reveals the increasing tensions between committees and the European parliament that undermine the legitimacy of comitology. On the one hand the European Parliament has demanded its increased involvement in this system ever since these committees were established. On the other hand, (preliminary) studies have shown that members of the European Parliament seem to be overwhelmed with the scrutiny or even the filing of draft implementing measures. The Council of Ministers can be viewed as a further institution within the EU's political system to which committees are made accountable. Similarly, committees can be seen to have some accountability toward national governments when their members are delegates of these governments. These points in turn raise the question of how national parliaments can exercise control. Neuhold's chapter focuses upon these issues and upon how they are resolved in practice.

Consequently, rather than positing a general 'democratic deficit' within the EU as a whole, scholars should instead consider the extent to which such a deficit affects specific EU institutions and practices (Lord 2001: 644). Given the prevalence of the governance circuit within the EU, it is worth exploring the opportunities for an incremental re-engineering of governance arrangements, so that they better fit standards of pluralism and accountability. In that respect, the 'new modes of governance' which the European Commission's 'White Paper on European Governance' of 2001 proposed as remedies to the 'democratic deficit' and as alternatives to classic accountability institutions are unlikely to reach their ambitious goal. They remain limited to 'stakeholders' and organized interests, and even these actors are not awarded many decisional competencies (Magnette 2003). In his chapter, Philippe C. Schmitter agrees that improvements in the legitimacy of the EU are more likely to come from changes in the innovative though admittedly indistinct practices of governance than from reforms in the much more clearly delineated and conventional institutions of government. However, he suggests a more radical proposal, one that deviates both from the cosmetic approach of the Commission and from the standard discussion on institutional reforms. Schmitter proposes an institutional framework that he labels European Governance

Arrangements (EGAs), and develops an innovative concept of legitimate governance relying upon a list of principles to which EGAs should conform. These arrangements should comprise political institutions set up to deal with specific tasks, they should include public officials and representatives of relevant private interest groups, and they should follow standards of best practices. Contrary to the advocates of 'output-legitimacy', the author maintains that just performing well will not in itself generate compliance, if only because EGAs have redistributive effects. Schmitter's proposal is consistent with descriptions of the emerging political system of the EU and of its peculiarities in comparison to a democratic nation state. EU governance is organized in particular policy sectors, it aims at policy-making by negotiation among governments and non-governmental actors, it uses networks for coordinating and accommodating diverging interests, and it legitimizes decisions by securing the agreement of the affected social groups. Although such reform proposals do not exclude other forms of democratization of the EU system, they seem to be especially well adjusted to the particular features of governance in the EU. They should therefore supplement the efforts towards a 'constitutional' reform.

International governance

In international politics, traditional features of 'stateness' are even less discernible than in the EU. Horizontal consensus seeking, negotiation and deliberation are not only established parallel to hierarchic subordination, but actually replace it. Compliance is ensured primarily through intergovernmental commitments.[8] Therefore problems encountered in the EU are amplified because the 'chain' of delegation is longer and the institutionalization of the rules of the democratic process is weaker. No institutional framework guides the decision on inclusion or exclusion of communities in a satisfying way. Trends toward the privatization of governance are more pronounced than at other levels.[9] Moreover, there is no institutionalized political competition that can be considered as a mark of pluralism. Although an embryonic intermediate system exists at EU level (party federations, lobbies), nothing similar has emerged so far at the international level, apart from the recently enhanced role for NGOs. 'Only representatives of national governments have guaranteed access to the institutions of international governance, the involvement of other actors is at best selective and subject to state review' (Wolf 2002: 40). The relation between policy-makers and policy-takers is 'nebulous' (Abromeit 2002: 156). Although national governments are represented in the boards and decisional fora of transnational agencies and international regimes, the accountability of their officials is – as in the EU – only indirect,[10] and the negotiating power of some of them is much weaker than that of member states in EU intergovernmental negotiations. The interests of a great

number of policy-takers are not given due consideration, and the outcomes of decisions by international bodies are often viewed as negative, so that 'output' legitimacy is lacking too (Verweij and Josling 2003: 7–8).

One important source of legitimacy for the international system of governance resides in the participation of NGOs or other private actors (Josselin and Wallace 2001; Keck and Sikkink 1998; Verweij and Josling 2003). Increasingly, their 'moral' and informational resources act as a countervailing power, and they press to establish a transnational public space where policy-makers are induced to give reasons for their options and where deliberation can take place. The increasing participation of NGOs has indeed changed the debate not only on substantive decisions but also on the policy process (Zürn 2003: 248–252). Usually promoted by NGOs, these debates supported changes in the structure of international regimes and organizations, aiming to open up political processes for groups expressing concerns on peace and basic human rights, ecological interests, consumer interests, and feminist issues. Due to the lack of an equivalent to state authority, international 'governance' best exemplifies the particulars of that type of regulation as opposed to regulation by 'government': 'the question of ensuring that all the relevant holders will be part of the governance arrangements relies less upon democratic mechanisms as such – which pertain to the field of democratic theory – than upon the availability, in civil society, of opportunity structures for holder's participation' (Gbikpi and Grote 2002: 25). However, for the public–private dialogue to be legitimate some conditions have to be fulfilled that are not present in any pattern of public–private interaction.

In his chapter Thomas Risse discusses the concepts of accountability and legitimacy with reference to international governance. Starting with a clarification of the peculiarities of governance beyond the nation state and of new modes of governance (no hierarchy, public and private actors), he proposes to distinguish further between internal and external accountability (according to Keohane) when dealing with problems of international democracy. Actors are internally accountable to those whom they formally represent. External accountability refers to those who are affected by decisions but who are not involved in formulating mandates or controlling decision-makers. The author goes on to argue that most actors in transnational governance lack external accountability whereas NGOs, which rank high in meeting the demands of external accountability, are deficient in internal accountability. Finally, Risse asks whether these deficits can be compensated by output legitimacy. While he accepts that the participation of affected public and private actors as well as deliberation can increase the effectiveness of decisions and compliance with rules, he points out that the demands of deliberative democracy can only be met under certain conditions, which negatively affect internal accountability. Risse therefore concludes that policies which are intended to improve democracy in international governance have to deal with various trade-offs

between different requirements. Klaus-Dieter Wolf for his part discusses the reasons that may justify the contribution of private actors to governance beyond the state. According to Wolf, they may claim legitimacy even if they are not elected holders of mandates or even if they belong to organizations which do not have internal democratic structures. Rather than simply rejecting the legitimacy of private authority or identifying democracy with more involvement of private actors, the author argues that patterns of public–private interaction differ with regard to their input legitimacy, their output legitimacy, and legitimacy provided by procedures (which can be called 'throughput' legitimacy).

The two case studies in this section scrutinize issues of legitimacy and accountability in international governance. Tanja Brühl examines the role of NGOs and of transnational corporations in international environmental governance. Although private actors have always been important players in environmental governance, in recent decades their number has increased and their roles have been enlarged. The author believes that both types of private actors are contributing to the privatization of governance systems, despite differences in their size, power, political aims, and political strategies. For most of the twentieth century, private actors only tried to influence agenda-setting processes by lobbying states and international institutions; today, they are involved in all stages and all phases of world politics. Private actors monitor states' behaviour and set rules on their own. Consequently, the character of regulation is changing: today an increasing number of regulations are voluntary and lack any compliance mechanisms (de-governmentalization). Furthermore, a growing number of regulations are based on market principles and self-interest rather than regulatory principles and public interest (commercialization). These changes have considerable effects on the legitimacy of international governance. Rob Jenkins for his part recalls that, like many institutions of international governance, the World Trade Organization (WTO) has suffered legitimacy problems since its inception. Charges that the system of multilateral trade governance administered by the WTO is lacking accountability usually centre on the inability of the WTO's institutional structures, which theoretically constrain all member-states equally, to resist the undue influence exerted by a small number of powerful states. Critiques of the rules governing, and the actual operation of, the WTO's Dispute Settlement System (DSS) provide a valuable lens on the way in which accountability relationships are being reordered in response to changing patterns of governance. The author assesses proposals for reform of the DSS along the three dimensions of a 'new accountability agenda', forged through experimentation, rather than executed by design: (1) a more direct role for ordinary people and their associations in demanding accountability; (2) using an expanded repertoire of methods across a constantly shifting set of jurisdictions; (3) on the basis of a more exacting standard of social justice. The chapter concludes by examining whether these three dimen-

sions could come together to create a new 'hybrid' form of accountability that, with the DSS as its linchpin, could integrate both national and multilateral processes.

Learning from comparison

Issues related to governance are currently debated with respect to the intra-national, the European and the international field. The chapters of this volume reveal the different loci of these debates. Differences particularly concern the interplay between formal institutions and governance: at the national and subnational level, research deals with the often conflicting relationships between the rule systems of established democratic government and governance; in the debate on European governance the strengthening of institutions is often regarded as a precondition or a chance for democratization; and in the debate on international governance the growth of robust democratic institutions seems illusory. In international governance, private actors consequently draw attention as actors who can improve legitimacy, while in national and subnational arenas these actors are often deemed to cause legitimacy problems. The dilemma between the 'logic of membership' and the 'logic of influence' in which organized actors are caught is taken into account much more in national and subnational debates, and to a certain degree also in European debates. In the international field, more emphasis is put on the need for an involvement of constituencies and on the flexibility of the 'two-level game' between national and international politics (Putnam 1988). At the national and subnational level the output-side of the political process seems to be considered more problematic, since governance is identified with the existence of powerful veto players, whereas in the EU and international governance legitimacy is more often supposed to be generated by the quality of outputs of policy-making.

All of these arguments are subject to controversy. We therefore assume that experiences from these different fields can contribute to our understanding of the way that governance works as a whole, and of the problems and perspectives of democracy in different patterns of politics beyond classic government. However, we can only learn from these experiences if we clearly take into account the structural differences between the three 'fields' of governance mentioned above.

Given the complexity of the issue of governance and democracy, we do not claim to cover all topics of academic discussion. This book does not intend to fully document the state of the art in research, and its basic aim is to reveal the potential for mutual learning through scientific exchanges between those fields of research within political science which are currently separated. In that respect, we think that each chapter addresses, from different theoretical and empirical perspectives, the most crucial aspects of the democratic problems of governance, as those problems are

raised at each level, and several of these chapters also elaborate possible solutions for existing democratic deficits.

Notes

1 See the editors' previous work, in particular Benz 1998 and Papadopoulos 2003, and Skelcher and Mathur 2004.
2 Where it is generally used improperly as a generic term for any activity of governing, or in a normative way ('good governance': see Doornbos 2003).
3 Of course, in political practice there is no guarantee that incumbents will anticipate the retrospective judgements of citizens on their policies.
4 Etzioni-Halevy (2002: 203–204) calls international elites 'second order' elites and explains that '[w]hile national elites are once removed, transnational elites are twice removed from the public'.
5 For a similar point about the EU see Lequesne and Rivaud (2001: 879). Other changes in decision-making, such as an enhanced role for non-majoritarian institutions (like constitutional courts, more recently independent regulatory agencies, or increasingly independent central banks), also require forms of legitimization, but those changes are not the object of that book. See on this subject the work of Giandomenico Majone and the special issue of *West European Politics*, 25: 1, January 2002, especially Thatcher and Stone Sweet (2002).
6 Majone (2002) finds that the system of government of the EU resembles the 'mixed polities' of the pre-modern era.
7 Rhinard (2002) for instance identifies three democratic principles (the decision-making system must be intelligible, political processes must be deliberative, and citizens must have control over policy-making) and finds that none of them characterizes the EU committee system because of the weight of informal procedures, the selectivity in participation, and the lack of accountability.
8 Zürn (2003: 234ff.) speaks about 'executive multilateralism'.
9 Standard setting is a case in point of this trend in private regulation, as illustrated by the examples of the ICANN (Internet Corporation for Assigned Names and Numbers) which regulates access to the internet, the ISO (International Standardization Organization), the International Accounting Standards Committee (which sets global accounting rules), the European Telecommunications Standards Institute (ETSI), and the major rating agencies in the domain of finance. More generally 'thousands of standards were authorized for thousands of commodities and productive processes by autonomous and non-governmental organizations well before quasi-state bodies became involved in monitoring and implementing the standards' (Rosenau 2002: 82). International commercial arbitration is another case in point: Arbitration bodies – mainly large multinational legal firms – proliferate and compete with each other (Dezalay and Garth 1996).
10 Joseph E. Stiglitz offers an interesting insider's view on the indirect and very partial accountability mechanisms in these bodies, above all in the IMF. According to him, such bodies are overseen by executive boards which maintain closer oversight than the board of directors of virtually any company, and which are accountable to governments. Nevertheless their accountability is limited to particular agencies within those governments:

> The IMF responds more to whom it is directly accountable than to whom it ought ultimately to be responsible. Its governors are finance ministers and central-bank governors, and they represent a particular segment of society. Their interests are very different from those of labour ministers.

> The whole culture of the IMF would be markedly different if it was accountable to different agencies within the government.
>
> (2003: 118)

Stiglitz suggests that

> either alternatively or in addition, representatives from labour ministries and commerce or industry ministries should also sit on the board. Finally, to ensure that broader national interests are taken into account, direct representation from the prime ministers' or presidents' offices should be sought as well.
>
> (ibid.: 133)

In the World Bank accountability is also indirect, but more pluralist, which makes this body more sensitive to broader demands (ibid.: 120).

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Part I

Governance in the nation state

2 Governance, accountability and democratic legitimacy

B. Guy Peters and Jon Pierre

Introduction

Over the past several decades scholars have been involved in an extensive debate concerning what is believed to be important changes in the processes and instruments through which the contemporary state governs society. The debate features a wide range of different theories and perspectives on governance and the role of government in that process (see Peters and Pierre 2000; Pierre 2000a). The concept of governance claims, sometimes explicitly and sometimes implicitly, to be a means of resolving complex problems of governing, but the discussion is often confused. The debate among governance scholars is probably caused by the slippery nature of the concept of governance. We have in a previous context expended some energy on a conceptual analysis of governance (Pierre and Peters 2000) and the present space will not allow us to re-enter that discussion. By governance, we refer to the process of defining collective goals, making political priorities, and bringing together resources from a large number of different actors necessary to attain those objectives. Governance therefore is a perspective that accords the state a steering and coordinating role without assuming *a priori* that it is the state, and the state alone, that governs society. What the state does have, *de facto* or *de jure*, is the responsibility for steering the society and economy – no other institution in society has the capacity to establish overall goals nor to resolve fundamental differences in preferences among the relevant actors.

The governance debate so far has been a slightly confusing sequel to the interest among political scientists during the late 1980s and 1990s in ‘bringing the state back in’. In retrospect it appears as if parts of the governance debate have attempted to move the state back *out* of governing into the relative oblivion it found itself during the heyday of the ‘behavioral revolution’ (Almond 1988; March and Olsen 1989). We believe that this movement is unfortunate, simply because it is an implicit argument that the state has lost political leverage. This loss may have occurred, but the extent of the loss that is sometimes suggested appears counter-intuitive, if not empirically incorrect (see Mann 1997). A more realistic

and intriguing approach to the role of the state in contemporary governance appears to be to identify how the state is transforming itself and its role to adapt both to globalization and to the new and lower profile it tends to assume domestically.

In order to understand the process of change resulting from globalization and other pressures on the state, this chapter traces different ideas concerning the centrality of the state over the past couple of decades. By revisiting the debate on state–society relationships that occurred during the 1980s and 1990s we believe that we can outline a more realistic trajectory of how the debate on these issues has changed and what has been believed to be the key governance problems in different political and institutional contexts. We also believe that this avenue of analysis can be extremely rewarding for coming to grips with what is causing the current problems with accountability and legitimacy of the state and its public policies. The issues this analysis confronts are hardly new ones, but the nature of the debate has been changing significantly.

It is important in this context to differentiate between the rather negative 'hollow' conception of the state and the more positive 'enabling' conception. The former assumes that government has become incapable of governing, that its centre and its very purpose have been hollowed out (Weller *et al.* 1997). The enabling conception, on the other hand, is more Scandinavian and assumes that the state remains a crucial actor but that its role has shifted to be one of mobilizing governance resources from a number of sources in order to provide direction and services to society in ways that might not be possible without coordination through that 'central mind of government'.

In the following sections we initially rehearse the debates on 'overloaded government' (Birch 1984) and the 'ungovernability' of society (Crozier *et al.* 1975) that were influential several decades ago but still have some relevance for understanding questions of governing. We then look at the New Right political ideology and New Public Management in the context of ideological frameworks and strategies employed to resolve the problems of overload and accountability. Here, we identify governance as the third link in the chain of reform attempting at resolving problems of overload and ungovernability. Although the ultimate goal of these three strategies of reform is rather similar – lowering the expectations on the state, exploring alternative sources of service delivery, and downplaying the centrality of the state in society – these are three distinctly different models, as we shall see below. Following this analysis we will develop the argument that all three models are unclear with regard to accountability, something which, in turn, raises questions about the legitimacy of the three models of governing.

This chapter argues that an understanding of the contemporary accountability and legitimacy problematique requires a departure from the political and institutional logic that has characterized the liberal

democratic state. For all of its flaws and problems, that liberal model of governing provided at a minimum a reasonably clear institutional linkage between elected officials, public policies, and the electorate. Holding elected officials of an 'enabling state' to account is, democratically speaking, not a very satisfactory arrangement. Similarly, a performance-related model of *political* accountability has yet to be formulated. The list of unsettled incidents of public service errors which has not been politically resolved is already extensive (see, for instance, Barberis 1998; Mulgan 2000; Polidano 1997; Thomas 1998) and there is little reason to believe that the New Public Management school of public-service production will come up with a satisfactory answer to these problems.

Overload, ungovernability and governance

We will now proceed to discuss a variety of challenges to governing that have evolved as capitalist societies have encountered shifts in their apparent capacity to govern and to survive economically. Despite the apparent successes of most of these governments when compared to governments in most of the rest of the world, the governments in the advanced industrial democracies were perceived by many citizens to be ineffective and even illegitimate. Paradoxically, these governments were deemed to be failing by many members of the public and political critics on the right and the left. This indictment for failure was made despite the obvious successes in creating and managing the welfare state, the management of unprecedented economic successes, and a period of relative international peace.

Overloaded government

The general idea in the 'overload' literature is that government becomes unable to respond to all demands and expectations placed on it by the public, organized interests, or other actors in the external environment of the state. Such an overload of functions undermines the legitimacy of the government since government fails to respond to demands placed upon it. Thus, here is a clear hypothesis for the relationship between efficiency and legitimacy (Dahrendorf 1960): the legitimacy of the state is sustained not just by democratic constitutional arrangements and politically responsive government, as liberal-democratic theory argues, but on the ability of government to keep the public satisfied, broadly defined. In contemporary language, the performance of government means a great deal in how the public views it. 'Performance' in this particular context refers not only to public-service quality but also, and more importantly, the ability of the state to respond appropriately to demands, to resolve political conflict and produce consent, to define political goals and objectives, and to pursue those goals.

To some extent, the concept of 'overloaded' government echoes the political system analysis of the 1960s and 1970s (see, for instance, Easton 1965). In this theoretical perspective, 'overloaded government' is the result of societal demands exceeding the problem-solving capacity of government. It is interesting to revisit this literature because it describes aptly some of the problems which since have risen to the forefront of political analysis and administrative reform:

> Every political system must have some finite capacity with respect to the number of demands it can accept for processing into decisions or consider as possible basis of choice. It will have only some finite amount of time available to devote to settling differences politically [. . .] what we may designate as *demand input overload* could be said to describe a system if, within a specified time interval, the number of demands exceeded an empirically determinable limit.
>
> (Easton 1965: 58, italics in original)

Obviously, overload can be caused either by an increasing number of demands on the state, or by a decreasing capacity of the state to respond to demands, or because the 'gatekeepers' fail to keep demands at a sufficiently low level to allow the political system to process those demands. For systems theorists, organized interests and political parties are the key 'gatekeeping' structures. However, with the emergence of populist parties (Taggart 1996) and also interest organizations more concerned with the pursuit of narrowly defined interests than assuming societal responsibilities, these emerging forms for gatekeepers may in fact exacerbate the problem of massive input instead of reducing and aggregating the flow of demands into government.

Moreover, overload is to some extent a consequence of the state's own actions, and the state's own successes. The expansion of the political sphere in society that characterized Western Europe through the 1960s and 1970s involved rising expectation for the state as a provider of goods and services for the public. Somewhat ironically, perhaps, the relative success of the state as a mediator of social conflict and, more generally, as a governing body, triggered further expectations. These included demands for more distributive and redistributive programmes, and for regulation as a means of promoting collective interests in a wide variety of policy sectors. In many countries in Western Europe, the policy style of resolving socio-economic problems by permitting greater public-sector control and/or funding generated massive expectations for similar state actions in an ever larger number of additional sectors.

Time seems to have caught up with this academic debate or, more correctly, overload seems to have re-emerged as a problem for the state during the 1990s. The decreasing 'policy capacity' of many contemporary states increases the risk of overload because the state must to a growing

extent solicit policy advice from external sources. This use of external advice is both tedious for individuals in government and also associated with considerable uncertainties about the quality and direction of the advice (Boston 1994). Thus, the rather dramatic cutbacks in policy-advice capacity throughout the Western world have, in fact, not reduced the risk of overload but exactly the opposite (Pierre 2000b).

Thus, overload can be caused by factors and developments outside state control, but it may also be the unintended result of the state's decreasing policy capacity, or, indeed, its success in delivering programmes and services which in turn lead the public to ask for more of the same. Indeed, many of the governance problems of the 1960s and 1970s were products of hubris by the political and administrative elites rather than demands coming from the society. Those elites believed that they had found a solution for many of the problems of the society and the economy, and were more than willing to wield that newfound knowledge. While in general that hubris is now much less there are still any number of instances in which actors in the public sector see the opportunity to impose their own favourite solution on a problem in society.

The 'ungovernable' society

If overload has been a characteristic of the state, ungovernability has been a feature of society. Overload and ungovernability both denote a situation in which some kind of imbalance exists between state and society, in terms of policy capacity and societal demands. With respect to the ungovernability problem, it is fair to argue that it is primarily a quality of society rather than of the state, so that even the most capable political system may be incapable of ruling effectively with other than draconian means. Ungovernability may, of course, be in part perceptual as some political systems will attempt to impose greater levels of uniformity on society than others.

'Ungovernability' is caused, first and foremost, by the growing complexity of society. Kooiman's 'societal governance' (1993) departs from an image of society as so complex that it has become virtually impossible for the state to bring order and a common direction into it. The state itself is embedded in a non-hierarchical, multi-tier institutional system where negotiation has replaced previous patterns of steering and control. The market, too, is becoming increasingly characterized by a global economy penetrating domestic (national and local) economies, creating greater volatility and unpredictability. If the more interventionist policy style of the 1960s and 1970s had the important advantage of making the economy slightly more predictable for the state, the deregulation and less obtrusive macro-economic style of the 1980s and 1990s has both reduced the number of points of contact between the state and the market and allowed the economy to develop more according to its own logic. Both of

these factors have contributed to making the economy less predictable and less governable.

Furthermore, across the Western world we see declining trust in political institutions and a declining party membership. Developments which together suggest that the legitimacy of the political system of the twentieth century seems to be less stable compared with a couple of decades ago. Society is thus becoming increasingly complex, incoherent and unpredictable at the same time as the traditional pillars of government appear to be losing their grip over political representation and decision making. Governability is to some degree not just a matter of society's complexity, it is also about the state's leverage over society and about the legitimacy of those levers and the institutions controlling them. Further, social institutions themselves may be in decline, as evidenced in the large debate over the nature of social capital in a range of countries (Putnam 1994).

To some extent, the notion of ungovernability as a fairly recent phenomenon exaggerates the governability of society – and the capacity of the state to govern – in times past. Ungovernability appears rather to have become a problem at the confluence of two developments. One of these developments saw the state take on a higher profile in society, as was the case in the 1960s and 1970s both in the United States and Western Europe, and assume that government action could indeed solve large-scale social issues. The other development affecting the governability of society was the increasing complexity of those societies and a loss of social cohesion and homogeneity, so that ever more complex and nuanced responses to problems are required by the society. Those differentiated responses, in turn, require application of the instruments of 'new governance' described by Salamon (2002).

A slightly different version of the ungovernability argument can be found in the now large literature on networks. Several observers argue that the governance of the modern state occurs primarily at the level of the policy sector where cohesive and powerful 'policy networks' effectively control the sector. Indeed, these networks are sometimes sufficiently powerful to resist policy changes initiated by government and political institutions (Marsh and Rhodes 1992; Rhodes 1997). In addition, administrative reforms over the past several decades have exacerbated this problem by extolling the need to empower both senior managers and lower-echelon workers in organizations, as well as ascribing more rights to the recipients of government benefits. From the vantage point of the government (taken as an entity), this lack of coordination and coherence clearly represents a case of ungovernability.

As is the case with overload, ungovernability is – albeit to a lesser extent that was the case with overload – to some extent, directly or indirectly, caused by the state itself. Certainly, the growing complexity of society cannot be said to be a deliberate consequence of public policy. However, if governability denotes some kind of 'equilibrium' existing between

society's complexity on the one hand and the policy capacity of governments on the other, then it appears fair to say that the dismantling, or at least minimizing of the policy capacity which we have been witnessing across the Western world over the past couple of decades (Peters 2001; Peters and Savoie 1998) has contributed to the exacerbated governing, and governability, problems we have encountered in many cases.

Governance as a solution

The dual, and intertwined, problems of government overload and the ungovernability of society generated a variety of responses from the public sector. Some of those responses have been political and ideological, including the rather extreme reactions expressed through Thatcherism and Reaganism (Savoie 1994). The assumptions motivating these political responses were that government had assumed responsibilities that it could not easily fulfil and had, in the process, undermined its own legitimacy as well as the capacity of other socio-economic structures – most obviously the market – to operate effectively to solve human needs. Further, it was argued that the more intrusive public sector undermined the capacity of the Third Sector to play the strong role of which it might be capable if the more intrusive state were less active.

Other approaches to reducing or eliminating these problems have been more technical and managerial. For example, the spread of the ideas associated with the 'New Public Management' (NPM) may be seen as, at least in part, a reaction to perceived failures in governance, and the associated desire to make government perform more efficiently (Pollitt and Bouckaert 2000). Performance management is one of the central features of the most recent round of reforms, with budgets and other allocations becoming dependent upon the assessment of their performance (Bouckaert and Halachmi 1996). These mechanisms tend to introduce one form of accountability into the central allocative processes of government and to create a potentially mechanistic conception of what governing means.

The above two reactions to problems in governing represent two alternative mechanisms for coping with problems of overload and ungovernability. On the one hand, government can cope with overload by shedding some of the load – the obvious reaction of Reagan, Thatcher and other members of the New Right. In a number of countries governments have eliminated activities, privatized state-owned firms and sought to reduce a range of obligations of the public sector. This strategy often was less successful than its advocates thought it might be, given that many programmes had powerful constituencies inside and outside government and in addition many programmes were entitlements that were difficult for any government to terminate. Thus, despite their commitments to the contrary, public spending actually increased in both the absolute and

relative sense, during the administrations of those paragons of conservative virtue.

In addition to the entitlements problem encountered by would-be reducers of overload, the obvious political difficulty in this approach to coping with problems of governance is that the public may be somewhat schizophrenic about the 'load' of public-sector activities. In most cases the public want their services continued but resist pay for those services through taxation. When we examine the range of public opinion data taken over the past several decades this inconsistency of views becomes very apparent (Newton and Kaase 1996; Peters 1991: Ch. 6). Citizens want few if any reductions in public services, and in many cases they want to have the services expanded. At the same time, the public argue that taxes are too high and they want to pay less for what they get for government.

Another significant approach to those two problems has been to make public programmes perform better and more efficiently, and to eliminate at least a part of the total costs of governing by reducing the costs of each service being delivered to citizens. This is one potential way of squaring the circle of a public that demands more service for less money. NPM has, among its other attributes, a self-proclaimed capacity to make the public-sector organizations function more efficiently. So, for example, instilling greater competition into government – in both the structures for delivering policy and the management of personnel – is assumed to be able to provide the same services to the public at less direct costs in taxes to the public.

Like reducing programmes to save money, NPM may not be an undivided benefit for the public, and generates problems for effective governing. For example, the disaggregation of the public sector implied by the concepts of NPM creates significant problems of coordination and coherence, so that although individual programmes may perform better the government as a whole may actually perform less well. In addition, the autonomy granted to actors within the public sector can limit the accountability of public programmes, and with that the capacity of elected officials to control the actions of bureaucracies and other public-sector entities. These changes, and other types of reforms associated with this range of ideas, have now created the need to introduce yet further reforms to the public sector, many directed at enhancing accountability.

The former two reactions to problems of governing certainly had some benefits for society and for government, but also carried with them some major problems. The two prior reactions to problems produced responses that made the process of governing less directly connected to political responsibility but at the same time also began to introduce new standards by which to judge the activities of governments. This involved shifting from a strictly political internal conception of accountability to a more external and performance-based conception of accountability. The virtue of the latter is that it focuses on what government organizations do on a

day-to-day basis, rather than attempting to discover spectacular failures that could embarrass a government. Still, divorcing representative political institutions and procedures from the accountability debate does present some problems for democratic conceptions of government.

Governance and accountability

Accountability has become a key problem in contemporary governance, primarily for three reasons. First, unlike statecraft within the liberal-democratic state, governance is primarily about processes and dynamics: while political institutions are an important aspect of governance, the emphasis in governance is clearly on processes rather than institutions. Governance today frequently includes a wide variety of actors such as public–private partnerships, voluntary associations, private businesses, political institutions existing at different levels of government, and so on. Governance is about developing processes through which those actors can cooperate in order to govern the society and do so in a more democratic and inclusive manner than might be possible in conventional state-centric conceptualizations (and practices) of governing.

Some of these actors – most of the political actors – can be held to account through the election process (leaving aside for a moment the perennial problem of bureaucratic accountability (Gruber 1992)) but most of them cannot. True, the problem of allowing non-elected actors access to the policy-making process is not in any way new – we need only think of the corporatist states – but that having been said, governance poses a real problem in terms of accountability. The advocates of NPM argue that governance in fact has a more immediate and visible system of accountability than the liberal-democratic state because customer choice sends clear and direct signals on customer preferences. Accountability, then, becomes almost exclusively a performance-related problem. NPM supporters also point at stakeholderism as an alternative model of accountability in governance.

The problem with these models of accountability is that they only look at one aspect of what governments do, namely public-service delivery, and ignore the other important sector of government activity, namely the exercise of political power. Furthermore, these models are about as far as we can come from traditional notions of party government, where the idea was that it was political parties as collectivities that were responsible (and responsive) more than individual elected officials. The key problem in all of this change in modes of governing is that we still have not developed a model of *political* accountability in a governance perspective. The focus on process is one problem for governing, the focus on performance (and service to the public) is another.

Second, governance has emerged as an important perspective because it concentrates on performance, both in terms of public services and in

terms of finding alternative ways and political resources for the state to maintain some steering capacity. While governance should not be confused with NPM (see Peters and Pierre 1998), both strands of thought emphasize the importance of performance. In NPM (see Pollitt and Bouckaert 2000) the emphasis is on the performance of individual civil servants and/or their organizations, with little or no concern about the cumulation of that performance, or indeed about its integration across the range of interconnected organizations within the public sector (see Peters 2001: Ch. 6). One of the consequences of the emphasis on individual organizations and managers appears to be an increasing incoherence in policies and actions within government, and hence paradoxically greater difficulties in creating effective governance for the public as a whole.

The third problem, finally, relates to the emerging image of the state in governance as 'the enabling state'. This term is to a great extent an adequate description of the image that state actors in many national contexts are attempting to 'sell' to their publics. The state today is engaged in less rowing and more steering, to quote Osborne and Gaebler (1992). The state now attempts to capitalize on, and to coordinate, resources controlled by a wide variety of actors, and to employ those resources in the pursuit of collective goals for the society. Again, we must ask where this version of the state leaves the concept of accountability for the state. For example, the state may be successful in its role of 'enabling' other actors that possess resources necessary for governance, that is if the state provides ideal preconditions for the corporate sector. These actors, however, may turn out to perform inadequately, but who is to be held accountable for that policy failure?[1] Economic development is a top political priority for most governments today and we have observed huge efforts being made at removing what is believed to impair economic growth, not least regulatory frameworks. But who is to be held to account if such enabling measures do not help stimulate growth? As Claus Offe (1985) pointed out quite some time ago, private capital's option *not* to act in accordance with incentives provided by political institutions is an important source of political influence. Placed in the context of the accountability of the enabling state, this type of influence becomes all the more important as the very nature of this form of governing is dependent upon the involvement of non-state actors. These influences are all the more relevant as the range of actors having influence through the threat of non-participation is increased.

Governance and legitimacy

One of the key differences between the 'overload' and 'governability' debates on the one hand, and the contemporary governance debate on the other, revolves around the issue of legitimacy and accountability. In

the earlier debates about the capacity of the public sector to perform its tasks adequately, legitimacy was identified as a problem because the state appeared to be incapable of accommodating the expectations placed upon it, either in terms of appropriately processing inputs from society, or in terms of producing effective programmes and policies. This is clearly a political approach to the question of legitimacy, with the assumption that if the appropriate processes are followed then legitimacy could be established. At an intermediate level, there are symbolic elements to the adoption and implementation of programmes, so that merely pursuing certain types of programmes may enhance the legitimacy of a sitting government, whether that programme is in fact effective or not.

From the governance perspective, however, legitimacy emerges as a problem because the state is underperforming. The raison d'être and legitimacy of the state in a governance perspective is derived primarily from its performance in terms of outputs – services, decisions, and actions. There are, however, still some important questions about procedures and democratic capacity in the contemporary discussion of the state. For example, movements such as communitarianism (Etzioni 1995) and deliberative democracy (Hunold 2001) point to the need to make government democratic, open, and transparent as well as more effective. The governance emphasis may, on the other hand, tend to bureaucratize the practice of democracy, with a good deal of public participation now being directed toward the bureaucracy and the central role of implementation in defining how policies actually work for citizens. Further, even more than with the corporatism characterizing much of the political discussion of the 1970s and 1980s, social groups have come to be considered essential to the functioning of the state.

It is not only in theory that there has been a continued concern with the democratic performance of government, so that the general public and political elites have both raised questions about the means of ensuring and enhancing democracy in contemporary political systems. For example, the need to dismantle many aspects of the welfare state has tended to make many citizens question the capacity of governments to govern in a manner that responds to the demands of the public.[2]

While the emphasis on performance in contemporary governance theory has not entirely excluded the concern with democracy and participation, that concern with performance is not itself entirely novel either. For example, the by now rather dated literature on political development had one strand that stressed the connection between legitimacy and effectiveness (Huntington 1966; Lipset 1959), assuming that the legitimacy of emerging governments ultimately would be based on their ability to deliver goods and services to the population. Further, the extensive literature on public policy that began to be developed at about the same time tended to equate the capacity to make and implement policies effectively with the success of the political system (Mitchell and Mitchell 1969).

Indeed, a good deal of the public-administration literature (implementation most notably) has been concerned with the effectiveness of public organizations, as well as with their adherence to procedural and legal criterion of appropriate behaviour. By no means does this discussion imply that the strong emphasis on state performance in the governance approach is not significant, but rather it points to the extent to which we are dealing with relative emphases in theory rather than sharp, absolute breaks with the past.

However, the approach to governing contained within governance theory represents a significant difference compared to the liberal-democratic state model described above, where legitimacy rests primarily with the state's ability to produce consent. That is, the success of the state in the liberal-democratic process of governing depends primarily upon its political performance or the ability of constitutional frameworks to provide elected political leadership reflecting popular opinions and preference (what we might call legalistic performance). That model of governing requires that political elites be open to political pressures and demands and attempt to incorporate them into the governing process, but does not appear to imply a direct one-to-one correspondence between demands and their decisions. Other approaches to governing (again practical as well as theoretical) generated prior to the contemporary concern with governance did attempt to link inputs and outputs. Corporatism, for example, was a reaction to governing in the liberal-democratic style, and assumed a close linkage between the demands placed upon government and the decisions that are made, even if the source of those demands was relatively restricted.

Again, however, we should be careful not to overemphasize the differences between the governance models and the liberal-democratic model of the state. Certainly there was a concern with policies among both citizens and elites in the liberal-democratic state, but the principal source of legitimacy was procedural. Even if government policies were ill conceived and went wrong, as they certainly did any number of times, the mechanisms for coping with those failures were more primarily political, and remained internal to state institutions to a greater extent than might be true for the contemporary 'enabling state' with its reliance on social partners. In the latter style of governing the accountability for policy failures would have to be shared rather widely among state and non-state actors, with the concomitant problems of assigning responsibility and then providing some means of enforcing accountability for actions. The problem of 'many hands', as well as that of 'dirty hands', is endemic in public life, and is becoming exacerbated by a movement toward the 'enabling state' style of governance, in which the central actors are mobilizers and honest brokers as much as they are the wielders of authority. In a democracy, however, accountability is meant to be commensurate with authority.

Conclusion

This chapter has examined the changing nature of government and governance in the contemporary world influenced by globalization, declining public confidence in almost all social and political institutions, and growing adherence to neo-liberal political ideologies. These environmental changes have obvious consequences for governments and their capacity to generate compliance from the public. One of the characterizations of these problems was the ungovernability of society, while another was that governments were overloaded with problems and expectations. In both instances traditional means of influencing the society appeared to have exhausted their utility.

Governments have not been totally quiescent and have developed their own strategies for coping with these forces limiting their governing capacity. Some of those strategies involved a virtual denial of the role of the state, assuming that the market and society are more suited to providing goods and services than are governments. Other strategies involved making government perform better the tasks that it had undertaken, assuming that if those services could be provided at lower cost and in a less 'bureaucratic' manner then the public would accept them more readily. Both of these strategies experienced some successes, but also created a range of new problems in the process.

A third strategy has become more popular. Generally parading under the banner of governance, this approach to steering society emphasizes just that – steering. As such it does not imply the more direct imposition of control from above characteristic of more traditional forms of ruling, but rather depends upon mobilizing, organizing, and enabling resources available in all segments of the political economy. While in many ways also successful, governance approaches have other problems, most notably difficulties in isolating and enforcing accountability. Thus, merely advocating that state and society should be more supportive of one another may only be a beginning towards understanding and then redesigning patterns of governing that are at once efficient and democratic.

Notes

1 For a discussion of policy success and failure see Bovens *et al.* (2001).
2 On the other hand these difficult policy decisions represent the capacity to govern even in the face of potentially powerful public opposition (Ross 2000).

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3 Multilevel governance, regional policy and democratic legitimacy in Germany

Katrin Auel

Introduction

This chapter deals with the problem of democratic legitimacy in German regional policy that represents a typical example of multilevel governance in a federal system. Policies are made in an institutional setting, which establishes intergovernmental negotiations between the federal and *Länder* governments and – in the case of the European structural funds – the European Commission. In addition, networks including actors from local governments as well as actors from the private sector have emerged at the regional level below the *Länder* since the late 1980s. These networks have developed as a reaction both to the increased critique to which domestic regional policy was subjected and to a new policy approach that was introduced through the European structural funds. The aim of the development of patterns of regional governance was not only to make policy-making more effective, thus raising the output-legitimacy, but also to bring policy-making closer to the people by providing for new forms of participation. As a consequence, the vertical multilevel system of governance dominated by governmental actors is complemented by horizontal arenas of regional governance through intra-regional cooperation. Moreover, policy-making requires the involvement of *Länder* parliaments, as decisions on the amount and the allocation of the structural funds affect their budgetary competencies.

In the following, I will analyse the linkages between these different levels and arenas of policy-making in order to assess the democratic legitimacy of regional policy in Germany. Following a brief outline of the vertical multilevel structures and horizontal structures of regional governance in regional policy, it will be argued that in reality both forms of governance are not well linked. Instead, the German system produces conflicts between *Länder* governments and regional networks at the sub-*Länder* level, between old forms of joint policy-making and new patterns of regional governance.[1] This is as much due to the hegemonic role, which the *Länder* governments exercise in regional policy as it is to the clash of different notions of democracy upon which the various forms of gover-

nance are based. As a result, regional policy in Germany is mainly carried out in executive-dominated structures of multilevel governance. In the last section of the chapter, I will therefore analyse the linkages between the structures of multilevel governance and parliamentary democracy, concentrating on the central actors in German regional policy, the *Länder*. Given their institutional structure, the democratic institutions at the *Länder* level might be expected to guarantee the democratic legitimacy of German regional policy. It will be shown, however, that the fact that decision-making remains firmly in the hands of the *Länder* governments is by no means a victory for representative democracy.

The chapter draws on my own research as well as on other empirical studies on regional policy in different German *Länder*. It does not, however, aim at exploring the differences between single *Länder* with regard to the linkages between the different arenas in a strictly comparative way, but rather at highlighting some general characteristics of German regional policy.

Vertical structures of multilateral governance in regional policy

Since 1969, the German Basic Law (Grundgesetz, GG) defines the 'improvement of regional economic structures' as a 'Joint Task' (Gemeinschaftsaufgabe 'Verbesserung der regionalen Wirtschaftsstruktur') of the *Länder* and the federal level. Although Article 91a GG states that regional policy is essentially a responsibility of the *Länder*, ruling out any overall federal competence, it allows for a limited involvement of the federal level (Ewringmann *et al.* 1986: 13). Resources are provided by the federal government and the *Länder* in equal part. A Joint Planning Committee ('Gemeinsamer Planungsausschuss'), consisting of the federal and *Länder* Ministers of Economic Affairs, is responsible for the allocation of funds to the *Länder*, for setting the criteria for the eligibility of assisted regions as well as for the selection of instruments and measures to be financed. The institutional structure of the Joint Task created an executive-dominated multilateral negotiation system, which since the convincing study of Fritz W. Scharpf *et al.* (1976) is considered as one of the prime examples of German joint policy-making ('Politikverflechtung'). Since the development of the European structural policy during the late 1980s, this negotiation system has been extended to include the European level, namely the European Commission. As European funding was simply integrated into the existing pattern of joint policy-making (Benz 1998b; Nägele 1996), the policy community of the Joint Task also prevails in the intergovernmental relations of the European multilevel system.[2]

The central actors in this multilevel system are the *Länder*. While decisions on the eligible regions as well as the allocation of funds are made in the federal–*Länder* negotiations, the *Länder* dominate the

subsequent stages of programming and implementing regional policy within the framework of the Joint Task (Thielemann 2000: 10n.). In addition, European policy-making has not challenged but rather strengthened their position as the *Länder* could successfully establish themselves as 'European Regions'. Equipped not only with the necessary democratic legitimacy, but also with the administrative capacity and expertise, they were the institutions fit and able to assume the responsibilities according to the partnership principle of the European structural funds. Thus, they not only represent regional interests in the European Union (for example, via the Committee of the Regions), but they are also the subnational authorities responsible for the elaboration of the structural funds programmes as well as for the negotiations with the European Commission.[3]

Horizontal structures of regional governance

Domestic and European impulses

Until the late 1980s, the basic objective of the joint regional policy was the transfer of economic resources to underdeveloped regions. In order to create the prerequisites for sufficient economic growth in these regions, the objective was to stimulate private investments by offering subsidies to firms and to improve the local and regional infrastructure by offering funds to local governments. This approach concentrated exclusively on narrowly defined economic factors, while coordination with other policies, such as spatial planning, social and environmental policy or technology and science policy, remained insufficient (Benz 1999: 222). During the 1980s, however, this sectoral and state interventionist approach of compensating regional disparities was increasingly criticized (Becher and Rehfeld 1987: 19n; Benz *et al.* 2000: 54n.). New theories in regional economics (Camagni 1991; Cooke and Morgan 1993; Pyke and Sengenberger 1992; Rehfeld 1995) pointed out that the competitiveness of regions depended on a coherent regional network of local firms and enterprises and an adequate infrastructure, but, more importantly, also on a regional communication culture and the integration of production and work flows in a regional cooperation innovation context. Regional economic development was to be fostered by flexible specialization and the support of 'endogenous potential' instead of the creation of 'equal economic structures and living conditions' (Benz 2000a: 28).

This new orientation in regional policy had not been initiated but was greatly supported by European structural policy, which pursued a similar approach (Tömmel 1998). The 1988 reform of the structural funds introduced new rules for their implementation that called for multi-annual programmes based on an integrative and strategic approach to regional assistance measures. In addition the funds are based on the principle of

partnership that had been defined as the 'close consultation between the Commission, the member states concerned and the competent authorities designated by the latter at national, regional, local or other level, with each party acting as a partner in pursuit of a common goal' (Council Regulation (EEC) 2052/88, Art. 4–1). In line with the Commission's view of subsidiarity, partnership would ensure the involvement of those actors closest to the problems of disadvantaged regions. Since the reform of 1993, 'partnership' refers not only to the requirement to involve sub-national, national and European actors in decision-making, but also promotes the participation of the 'economic and social partners' in all stages of the implementation.[4]

The increasing critique to which the Joint Task was subject, combined with the new approach through the European structural funds, led to the development of new forms of governance at the sub-*Länder* level. In the late 1980s and early 1990s the *Länder* reacted to the new ideas of regional mobilization and implemented policies of regionalization (Fürst 1992).[5] Under the slogan 'self-contained regional development' (Fürst 1996: 72) most *Länder* governments tried to activate the regional potential for self-help through regional development concepts involving private and semi-public regional actors, the 'social and economic partners'. In particular, the necessary communication and decision-making processes were to help trigger synergetic effects by building up networks between the actors of different and sectorally fragmented structures of the political-administrative system (*ibid.*).

Regional governance in Germany

Although the Länder had similar objectives, the process of regionalization had by no means been a coherent development guided by clear objectives. On the contrary, it has been and indeed still is a process leading to the development of various organizations and bodies at the regional level, ranging from regional working groups to regional and conferences and committees that cover different territorial areas and have varying tasks.[6] However, these different approaches shared two main features.

First of all, forms of regional governance were developed not at the *Länder* but at the sub-*Länder* level. As a result, the *Länder* are not identical with regions in terms of development policy, which – in contrast to the French case (see Chapter 4 by Taiclet in this volume) – led to a split between the organization of the German 'regional state' (i.e. the *Länder*) and the arenas of regional cooperation (Benz 1998b: 14). A second feature is that the regionalization process generally did not include a transfer of resources or decision-making competencies. The aim of the regionalization process was twofold (Heinze and Voelzkow 1997; Hoppe 2000: 109n.; Krafft and Ulrich 1993; Voelzkow 1994): On the one hand, local actors were motivated to coordinate local development policies across local boundaries to overcome the restrictions of local action

capacities to raise the effectiveness of local structural policy. On the other hand, the region had the task of providing bottom-up input for the regional policies of the Länder. Local actors were encouraged to analyse the 'endogenous' potentials of their region, to integrate them in regional development strategies or concepts and to identify the necessary instruments and projects for their implementation in the form of a priority list. The main aim of the regionalization process was to raise the efficiency of public resources, to activate regional information and innovation potentials and to restrict welfare-state paternalism. In order to achieve these goals, the regional conferences, committees or networks included a wide range of public, semi-public and private actors in an effort to involve all relevant regional interests. They were not, however, given any decision-making competence with regard to the *Länder* policies as the regional development concepts were seen as recommendations only. Still, the *Länder* committed themselves to integrate these development concepts into their regional policies and to base their subsidy policy on them.

Regionalization in Germany is therefore not to be understood as the creation of a new institutional structure in the narrow sense of the word. Rather, it is characterized by the creation of cooperation and negotiation structures in the form of regional conferences, committees or networks. Contrary to the institutional definition of regions, as for example by the European NUTS schema,[7] they constitute intermediate action arenas complementary to existing institutions at the *Länder* and local level.[8] As a result of the regionalization process, regional policy-making in Germany is organized in two different arenas. Decision-making is firmly kept within the intergovernmental arena where vertical negotiations between the federal, *Länder* and – in the case of the structural funds – the European level provide the framework for regional policy and the *Länder* dominate the subsequent stages of programming and implementing regional policy for both the Joint Task and the European structural funds (Thielemann 2000: 10n.). The regions on the other hand constitute the space for spatial networks between public, semi-public and private actors, and provide for bottom-up input.

Linkages between multilevel governance and regional governance

The hegemonic role of the Länder governments

Despite the mobilization of regional actors, the *Länder* have maintained their role as key players in regional policy. First of all, their central role in regional policy has allowed them to successfully prevent the new regional actors and organizations from becoming too powerful. The Joint Task led to the development of tight sectoral networks between the federal and *Länder* governments administrations. These networks were strictly inter-

governmental while 'firms, local governments and other sub-national actors were excluded' (Anderson 1996: 167). The result had been a strong sectoralization of the policy process. As allowing public and private actors access to intergovernmental negotiations would severely challenge the central position of the *Länder* governments, these networks were not opened up for regional actors. The same is true for European structural policy. Due to the absorption of European structural policy by the domestic pattern of the Joint Task, federal and *Länder* ministries of economics monopolize decisions on the allocation of national as well as European funds. Accordingly, the *Länder* applauded the introduction of the partnership principle in 1988, which opened up policy-making towards the involvement of sub-national authorities, but severely criticized its extension to 'social and economic partners' in the 1993 reform and argued against any regulation that would force them to include private actors and interest groups. Instead they demanded a purely voluntary involvement according to national rules and routines (Auel 2003: 179ff.; Staeck 1996). As a result, the *Länder* have monopolized the access to the federal and especially the European level, completely excluding regional actors. While the involvement of the social and economic partners is organized in regional entities below the *Länder* level, the *Länder* governments control the intergovernmental arena, that is the negotiations on development schemes with the federal government, in the context of the Joint Task.

Second, due to this separation between vertical intergovernmental coordination and horizontal intra-regional cooperation, the *Länder* governments not only play the important role of gatekeepers between the regions and the federal or European level, but are also caught in a two-level game (Putnam 1988).

On the one hand, they committed themselves to integrate the regional development concepts set up at the regional level into their programmes for the Joint Task and the structural funds. These regional development concepts are the result of regional cooperation processes and – often quite difficult – negotiations. At the same time, however, the *Länder* are not autonomous in setting up their programmes as they have to be coordinated within the multilateral negotiations system of the Joint Planning Committee or negotiated with the European Commission that pursues its own objectives in structural policy. Therefore proposals of regions become the subject of intergovernmental negotiations among *Länder* governments and the Commission. The problem is that effective negotiation in one arena might reduce the room for manoeuvre in the other arena, because participants are bound to agreements. If *Länder* governments take up proposals emerging from regional partnerships, they may fail to find the approval of the Commission. Thus, the more the *Länder* involve the regional arena in setting up the programmes, the more they are bound to the regional consensus and the more difficult

the intergovernmental negotiations become. If, on the other hand, results of intergovernmental negotiations deviate from regional agreements, participants in regional cooperation may become frustrated and reduce their engagement in regional policy.

The problems of the two-level situation are further intensified by the fact that the regionalization process led to a decentralization of distributive conflicts to the regional level by making the regions responsible for setting up regional development concepts as well as listing priority projects. Both entail distributive decisions as the selection of instruments and measures opens up funding opportunities for different local authorities and private actors. The decentralization of distributive conflicts was not, however, accompanied by a transfer of any decision-making competencies, as the *Länder* governments were not willing to restrict their own scope of autonomous decision-making over the subsidies. As the regions cannot decide on how scarce resources are to be allocated, they are able to avoid distributive decisions, which discriminate between different regional actors and thereby threaten the cooperation process at the regional level, by simply including all interests into the regional development concepts. The concepts therefore often present long 'wish lists' containing every project that can possibly be financed through the Joint Task or the structural funds (Auel 1997, 2002a; Voelzkow 1999). The *Länder*, on the other hand, are increasingly less able to meet the ever-growing demands for funds emerging at the regional level. In particular, the European Commission severely restricts the *Länder*'s ability to grant subsidies to the private sector through European state-aid control. Insufficient gratification of regional co-operation, however, then again threatens to lead to frustrations at the regional level. This tendency can be observed in quite a few regions in Germany, where the expectation to attract new funds from the Land has motivated numerous actors to participate in regional cooperation. The larger the number of actors participating, the more projects were elaborated and proposed, resulting in an increasing gap between regional expectations and the capability of the *Länder* governments to fund regional policies (Auel 1997, 2002b). The resulting disappointments often led to a de-motivation of the regional actors and a stagnation of the cooperation processes.

As empirical studies on regional policy in different *Länder* demonstrate (Ast 1999; Auel 2003; Knodt 1998; Lang 2003; Staeck 1996; Voelzkow 1999), the *Länder* governments and administrations have reacted to the two-level demands by more or less isolating themselves from bottom-up pressures. The territorial incongruence between the key players in regional governance, the *Länder*, and the arena of regional cooperation creates problems for using the opportunities of regional governance. Instead, the German system produces conflicts between *Länder* governments and regional networks at the sub-*Länder* level, between old forms of joint policy-making and new patterns of regional governance. Due to the

coordination problems within the regional arenas, the involvement of regional partners is not seen as an extension of the *Länder* administrations' action capacities or as an improvement in the quality of regional assistance. On the contrary, the *Länder* possess the necessary expertise and well-established administrative routines for the implementation of regional policies. Therefore, '[p]articipation by [. . .] the municipalities or the social partners would only complicate the issue' (Staeck 1996: 275) and is therefore perceived as a restriction to effective administrative policy-making and implementation. As a result, the regional level is almost completely excluded from the actual decision-making processes regarding the elaboration of the programmes. Where the economic and social partners are involved, government officials tend to restrict participation to a formal procedure of consent to governmental proposals and projects (Tömmel 1998: 67; Voelzkow and Hoppe 1996). As a consequence, bottom-up participation by local and private actors has to be regarded as mainly symbolic.[9]

This is especially true for EU structural policy, where the Monitoring Committees, set up for the structural funds programmes, provide for an institutional link between regional partnerships and the *Länder* executive. From the European Commission's point of view, the Committees, whose task is to supervise and evaluate the implementation of the programmes (Council Regulation (EC) No 1260/99, Art. 35), are the main mechanism for implementing the partnership principle (European Commission 1996: 229). The *Länder* governments, however, not only used their position as Chairs of the Committees to prevent the economic social partners from becoming too powerful and influential, but they also kept important decisions out of the Committees and thus under their exclusive control (Auel 2003: 247n.; Thielemann 2000: 16fn.). Instead, the Monitoring Committees fulfil merely an alibi function from the *Länder* administrations' point of view: 'A, I don't feel like going there. For me, that's a complete waste of time, and B, it's nothing but a forum for discussion. I don't see any efficiency in that. If we want to discuss or decide something, we have our small group.'[10] As a result

> the role played by social partners is marginal and at best they have a role as consultees prior to the development of the programmes. Their role in the structural fund partnerships is one which is situated at the periphery of the partnerships and, on occasions, they lend only an illusion of inclusiveness to partnership operations.
>
> (Tavistock Institute 1999: 47)

Two concepts of democratic legitimacy

The clear separation into two different and isolated policy-making arenas is, however, not only due to the dangers inherent in complex multilevel

systems, but is also a result of a clash of different concepts of democratic legitimacy.

The debate about the regionalization process had always been accompanied by arguments of democratic legitimacy. Supported especially by the approach of the partnership principle fostered by the European Union, one of the objectives of the regionalization process had been the development of new forms of participation and interest mediation. Regional partnerships were meant to counterbalance some of the flaws of parliamentary democracy – the dominance of political parties or powerful interest groups and the lack of transparency resulting from elitist structures – by opening up new forms of legitimacy (Benz *et al.* 2000: 36). Regional networks were to be organized as a form of 'negotiated democracy' (*ibid.*) in which relevant social groups and associations were directly involved in the process of developing policy objectives. The aim was not only to make regional policy-making more effective, but also to bring policy-making closer to the people by improving the communication between citizens and their representatives and by extending channels of influence.

It soon became apparent, however, that from the *Länder* administrations' point of view this concept of participatory or deliberative democracy only applied to the regional level. With regard to decision-making processes at the *Länder* level, a more traditional notion of democratic legitimacy prevails that mainly relies on the concept of parliamentary democracy and is accompanied by an aversion of state actors against the involvement of interest groups and private actors (Auel 2003: 284; Benz *et al.* 2000: 37). Thus, different concepts of democracy clash at the *Länder* level: patterns of regional governance are based on a notion of democracy that stresses inclusion, participation, and consent. Within the administration, however, a notion of democracy prevails that emphasizes formal democratic institutions as well as the effectiveness and efficiency of policy-making and is, accordingly, accompanied by an administrative culture of bureaucratic and hierarchical intervention.

This clash of the two different concepts of democracy is especially apparent in European structural policy where the *Länder* are faced with the European Commission's demand to organize a consultation of societal and private actors in the programming process and to involve them in the Monitoring Committees. During their fight against the extension of the European partnership principle to 'economic and social partners' in the 1993 reform of the structural funds, the *Länder* mainly based their arguments on norms of democratic legitimacy. Due to their democratic institutions and parliamentary system, the *Länder* presented themselves as the sub-national authorities that could legitimately make decisions on regional policies. At the same time the *Länder* governments challenged the democratic legitimacy of private actors and interest associations (Auel 2003: 179n.; Heinelt 1998: 133). The refusal of the *Länder* governments to involve the 'social and economic partners' even led to severe conflicts

between the European Commission and the *Länder* during the negotiations for the structural funds programmes 2000–2006. With the 1999 reform of the structural funds, the Monitoring Committees grew in importance due to the decentralization of monitoring and control tasks. While the European Commission insisted on the equal involvement of the 'social and economic partners' through a right to vote in the Monitoring Committees, the *Länder* argued that only their own parliamentary legitimized governments and administrations had the right and necessary legitimacy to make decisions affecting the regional budget (Auel 2003: 243; Lang 2003). This concept of democratic legitimacy based on formal representative democracy can also be observed in the implementation of the funds. While in France, for example, regional advisory bodies consisting of various public and private partners have been set up for the selection of eligible projects for the implementation of the structural funds (*'Commissions de la Programmation'*), such a procedure, where the allegedly non-partisan bureaucracy does not decide on the subsidies alone, is regarded as illegitimate in Germany (Auel 2003: 285n.).

Multilevel governance and parliamentary democracy

As outlined above, regional policy in Germany is carried out in structures of multilevel governance that are dominated by governmental actors at the federal, European, and, especially, the *Länder* level. The losers in this structure are regional actors involved in horizontal regional cooperation (local authorities, associations, public–private partnerships) as they are uncoupled from the decision-making procedures. As a result of this uncoupling, regional governance networks cannot effectively provide for new channels of participation and interest mediation with regard to *Länder* policy-making, as is intended by the partnership principle of the European structural funds.

As actual decision-making in regional policy remains firmly in the hands of the German *Länder*, one might expect that democratic institutions at the *Länder* level guarantee the legitimacy of regional policy. The need for democratic legitimacy and thus for parliamentary involvement is evident, since regional policy requires both decisions on the future development of the assisted areas and the appropriate measures to achieve this development as well as decisions on the allocation of the necessary funds. Both have to be counted among the genuine tasks of the *Länder* parliaments. Accordingly, the regulations of the Joint Task provide for the involvement of parliaments before the actual decision-making: 'The consultations in the Joint Planning Committee take account of parliamentary resolutions' (29. Rahmenplan: 6, my translation). This is also true for European structural policy where the need for democratic legitimacy in the implementation of European programmes is often ignored. However, as the European level only decides on the general framework,

the implementation of the funds, which includes the elaboration of the regional programmes, is a genuinely political process and cannot be regarded as mere technical execution (Lang *et al.* 1998: 43n.). In addition, the budgetary powers of parliaments are touched, as the structural funds have to be co-financed through domestic resources.

Astonishingly however, the *Länder* parliaments are completely absent in this process (Auel 2002b, 2003). There are two main reasons for this.

First of all, the tight intergovernmental networks between the federal and *Länder* level have not only been quite successful in isolating themselves from regional and private actors, but from parliamentary influence as well. The specific problem in the Joint Task is that the negotiations touch upon fundamental *Länder* interests: regional development and money. As argued especially by Benz (1998c, 2000b) and Lehmbruch (2000), governments that have to justify the outcomes of negotiations to their parliaments are more inclined to follow the genuine interests of their constituency than to seek solutions conforming to the 'common good'. The reason is that party competition within the parliamentary arena may force the government into a keen competition on who is the better representative of the specific *Länder* interest. As a result, governments are induced to adopt a strict bargaining strategy in the negotiations which, in turn, may lead to a failure of negotiations and intergovernmental coordination as even actors willing to cooperate easily become trapped in a negotiator's dilemma (Lax and Sebenius 1986: 38–39; Scharpf 1997: 137–140) if they try to maximize their own interests and gains through hard bargaining. To avoid this dilemma, the policy community of the Joint Task tries to shield intergovernmental cooperation from influences of parliaments and party competition (Auel 2003; Benz 1998b). Decisions on the amount and the allocation of the Joint Task and European regional policy funds are therefore presented to the *Länder* parliaments only ex post when they can hardly change the carefully designed compromises between the federal and the *Länder* governments. Parliamentary influence and control is therefore reduced to the option of altering the single development programmes through their budgetary powers and thereby not making funds available for parts of the programmes, which is, obviously, no option at all as the reduction of funds allocated to the programmes will lead to the loss of federal or European grants. Thus, some *Länder* parliaments have even given up their budgetary power altogether by automatically co-financing all Joint Task and European Structural funds that can possibly be acquired (Auel 2003: 237).

The same is true for the stage of programming. On the one hand, the elaboration of regional development plans is a complex process calling for a high level of expertise that can normally be found only in specialist ministerial departments while parliamentarians feel overstrained by the complexity of the programmes and the amount of information they have to deal with. On the other hand, the administrations are rather reluctant to

involve the parliaments during the stage of the elaboration of the programmes. In the case of the Joint Task, the basic framework of the regional development plans has to be coordinated within the Joint Planning Committee; in the case of the structural funds, it has to be negotiated with the European Commission. This institutional setting helps executive actors to protect their programmes against possible interventions from the parliamentary arena by presenting them ex post as an established consensus among multiple governments or as a result of the demands of the European Commission, both of which are very difficult to modify. Moreover, as responsibilities are shared between federal and *Länder* governments, no side can exclusively be blamed for results that are not acceptable to parliaments. Due to the lack of continuous parliamentary involvement and debate of the programmes, the parliaments are in no position to really control the substance of the programmes or to develop alternatives. Generally, the programmes are therefore merely taken formal notice of, and a debate will, if at all, emerge only on specific issues (Auel 2003: 236).

A second and even more important reason is the fact that parliamentarians simply are not interested in the implementation of regional policy. This is a result of the traditional 'division of labour' in the parliamentary system, where parliament and government are responsible for 'high politics' while the 'low' policy implementation is left to the administration, which also accounts for the fact that there is only little cross-*Länder* variation with regard to parliamentary involvement in the implementation of regional policy (Auel 2002b, 2003; Eckstein 2001). In contrast to the French Regional Councils (Conseils Régionaux) that consider the implementation especially of the European funds as an opportunity to strengthen their position in the multilevel system and even to appear as '*chefs de file*' of regional policy (see Taiclet's Chapter 4 in this volume; Auel 2003), the *Länder* parliaments, owing to their self-conception as parliamentary representatives of strong and sovereign states, see their tasks mainly in the deliberation of more general policy issues negotiated in the Bundesrat at the federal level or even at the European level (Auel and Benz 2000; Greß 1998; Johne 1994, 2000; Stächele 1998).

This is most obvious with regard to European structural policy. To be able to get involved in European policy-making, for example, the German *Länder* parliaments have established rules for parliamentary participation: in all *Länder*, the government has to inform parliament in time about activities within the European Union that are of (vital) *Länder* interest, and most *Länder* parliaments have a right to draft resolutions (and to receive feedback) on European issues.[11] During the debate on the Agenda 2000 and the 1999 reform of European structural policy, for example, the *Länder* parliaments have used these rights quite actively (Auel 2003). Thus, regional policy is an issue of vital importance for the *Länder* parliaments, but they concentrate on the policy-formulation at a level where

their influence is – at best – marginal. Still, they fulfil important parliamentary functions of public deliberation and control. The process of setting up the regional development plans for the structural funds, on the other hand, is seen as mere technical execution and therefore as the responsibility of the administration. Single members of parliaments do get involved if set in motion by specific demands of their constituency, but all in all the administration enjoys a high degree of autonomy unchallenged by parliamentary interference.

Conclusion: the democratic legitimacy of regional policy in Germany reconsidered

As outlined above, German regional policy represents an example of a very closely interlocked negotiation system where decision-making calls for the close cooperation between the governmental actors at the federal and *Länder* level. The rise of forms of regional governance and the emergence of European structural policy added further arenas and levels and led to the development of an even more complicated multilevel system.

At first glance, there seems nothing wrong with democratic legitimacy of regional policy in Germany. Decisions are made in an institutional setting where the democratic institutions at the different levels safeguard the legitimacy of policy-making. In addition, networks and forms of public–private partnerships have developed in order to provide for the involvement of various public and private interests at the local and regional level. The aim of these patterns of regional governance has not only been to make policy-making more effective, thus raising the output legitimacy, but also to bring policy-making closer to the people by providing for new forms of participation.

Upon closer inspection, however, the problems inherent to this structure become apparent. Regional policy in Germany requires not only a vertical cooperation of governmental actors at the European, federal and *Länder* level, but also the coordination with parliamentary arenas as well as regional governance networks. The central actors in this complicated system are the *Länder*. For them, the requirement of policy-making in such structures creates risks of overload and problems of complexity resulting from the high number of actors and arenas that have to be coordinated. Not only do emerging regional actors and networks challenge their central position in regional policy-making, but the *Länder* governments also act at the interface between different levels and arenas. They thus find themselves caught in a two-level game in which they have to take account of not only the interests emerging from regional governance networks and their parliamentary arenas, but also of the interest of the national or European level. The *Länder* governments react to these problems by isolating themselves from regional networks and partnerships and by reverting to vertical control and hierarchical modes of policy-making.

The hierarchical mode of policy-making in German regional policy, which is adopted by the *Länder* governments vis-à-vis the regional units, however, is not only a result of a strategic reaction of *Länder* governments to the pressures of the two-level situation. It is also based upon firm views about democratic legitimacy, which are not easily brought in accordance with more participatory forms of governance at the *Länder* level. While forms of regional governance were fostered at the regional level with – inter alia – the argument of enhancing democratic legitimacy in regional policy by improving participation and interest mediation through the involvement of new actors, these new regional actors are then kept out of the *Länder*'s policy-making, with the argument that they lack the formal institutional legitimacy of the *Länder* governments and their parliaments.

This is clearly not a victory for representative democracy, as the executive-dominated structures of multilevel governance are not well linked to parliamentary deliberation and control either. On the contrary, parliaments at the *Länder* level are in fact uncoupled from decision-making as well. This is as much a result of the isolation of the tight administrative networks from parliamentary influence and control as of a self-restraint by parliamentarians themselves. As a result, regional policy in Germany is characterized by a disconnection of executive-dominated multilevel governance from representative political institutions and party government as well as by technocratic government at the *Länder* level. This raises serious problems for democratic legitimacy.

Notes

1 In this essay, I will not focus on the problem of democratic legitimacy of regional governance networks. As with other forms of governance, it has its flaws (Benz and Papadopoulos 2003; Papadopoulos 2003). Regional cooperation lacks the formal legitimacy of institutionalized decision-making structures, it is easily dominated by regional and local elite structures, and it privileges economic interests and powerful associations (Voelzkow 1998). At the same time, the legitimacy of individual actors who serve as representatives of private firms, associations and interest groups is often not clear. To be effective, cooperation often has to take place in oligarchic, non-transparent and selective political structures (Benz 1998a: 212). Regional governance should therefore not be confused with genuine 'deliberative' democracy where 'all citizens have an equal opportunity, and are equally encouraged, to contribute to public deliberation on matters of common concern' (Cooke 2000: 956).

2 The development of European structural policy therefore did not lead to a substantial reform of the Joint Task. The decisive reason had been that joint policy-making conformed to the interests of both the federal and the *Länder* governments (Benz 2000a). While the federal level could safeguard its influence on regional policy, the *Länder* accepted this influence in order not to lose the financial aid provided by the federal government. This is especially the case with regard to the new Eastern *Länder* where the federal government carries the largest part of the financial burden of reviving the East German economy. Equally important, however, is that the multilateral consensus required for

decision-making allows the administrations not only to defend their programmes against any financial cuts, but it also safeguards them from being held accountable for the outcome of regional policy. By slightly improving the traditional pattern, the Joint Task was stabilized and safeguarded against any fundamental reform (Conzelmann 1998). The fact that the *Länder* could later enforce a decoupling of the structural funds from German regional policy because the structural funds allowed them to finance a much wider array of projects than was permissible within the rigid framework of the Joint Task and to experiment with innovative measures (Haverland 1994: 14; Thielemann 2000: 12) has had only minimal consequences as the implementation of both policies is still closely linked. The structure of the Joint Task has, however, been quite dramatically challenged by the development of European state aid control. Since the early 1980s, the European Commission has repeatedly intervened in German regional policy by declaring the amount of subsidies incompatible with the rules of the Common Market and has severely reduced the number of assisted regions as well as the funds (Auel 2003: 220n.; Tetsch *et al.* 1996). This has led to innovations as regional policy is now more focused on specific areas (Conzelmann 1998).

3 Although the federal government formally represents German interests in European institutions, the *Länder* governments de facto hold the negotiations on the structural funds programmes. The federal government does control if the programmes comply with the community rules set down in the structural funds regulations, but this is more of a service for the *Länder* as the federal government is neither able nor tries to substantially alter the *Länder* programmes (Auel 2003: 190). In the stage of programming, the federal government thus serves more as a mediator between European and *Länder* interests.

4 Council Regulation (EEC) No 2081/93. In the 1999 reform, partnership had been further extended to environmental agencies and other non-governmental agencies to reflect the 'need to promote equality between men and women and sustainable development through the integration of environmental protection and improvement requirements' (Council Regulation (EC) No 1260/99: 12).

5 This process had first been initiated in the *Länder* of North Rhine-Westphalia and Lower Saxony, both of which experienced special problems (e.g. the dramatic rise of unemployment in the coal and steel industry) leading to the establishment of numerous local initiatives, lacked the institutions to structure, coordinate, and implement this new policy approach (Benz *et al.* 2000: 71; Krafft and Ulrich 1993).

6 For an overview see Benz *et al.* 2000; Ziegler *et al.* 1996.

7 The acronym NUTS stands for 'Nomenclature of Territorial Statistical Units' and refers to the geographical scales, which Eurostat uses for statistical purposes.

8 Therefore regionalization differs from decentralization as the latter generally involves the transfer of competencies, and resources on lower (decentral) levels. Decentralization in Germany is implemented by the transfer of functions within the hierarchical federal structures, while regionalization is complementary to existing political and administrative structures (Benz *et al.* 2000, Chapter 1).

9 Patterns of regional governance do, however, play an increasingly important role in the coordination of *local* development policies, especially in urban or metropolitan areas (Auel 2002a; Benz 2001; Diller 2002; Frenzel 1998; Schubert and Fürst 2001).

10 Personal interview, Land Ministry of Economic Affairs, my translation.

11 The most far-reaching parliamentary participation can be found in Baden-Württemberg, where the participation rights were constitutionally guaranteed (Art. 34).

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4 Governance, expertise and competitive politics

The case of territorial development policies in France

Anne-France Taiclet

Introduction

Governance has been defined as 'the management of interdependencies' (Mayntz 1997). This approach insists on the complexity of structurally differentiated social units (Papadopoulos 1995). The specialization of activities being a prominent feature of modern societies, governance refers to the various coordination techniques that make political regulations and policy-making possible (Le Galès 1995). It may be assumed that different kinds of legitimacy underlie governance arrangements, so that the latter are not only sustained by traditional (input-) democratic legitimacy.

This chapter is based upon observation of a specific policy area: territorial economic development.[1] It focuses on two specific categories of actors, whose role appears to be crucial in governance: experts and elected politicians. These roles are approached in terms of political 'entrepreneurship' in order to scrutinize how the transformations of governance patterns provide these actors with opportunities and constraints that they must take into account when formulating their strategies. The impact made on legitimacy by these strategies is then assessed, and the focus on experts will reveal the extent to which territorial governance rests upon alternative forms of legitimacy. With respect to democratic legitimacy, instead of questioning the overall extent of the openness of governance networks, this chapter will scrutinize the effective role played by those who root their legitimacy claims in democracy – in other words, the role played by elected politicians.

Territorial development policies can be seen as a new form of governance, in which the potential exists to foster the democratic character of public regulation. A number of features (such as a multilevel framework, the use of enlarged partnerships, the preference for bottom-up approaches) have opened access to governance networks and have enhanced participation in policy-making. This chapter will suggest that if access to governance networks has been made easier, it has also become more competitive. A specific group of actors (those labelled here as 'experts') has managed to capitalize upon the value of its own particular

resources and skills in this competition. Consequently, these actors have gained a crucial position at the core of governance networks, even though their legitimacy claims do not directly refer to democracy. The growing importance of expert legitimacy entails a relative closure of governance networks, as new kinds of resources are required for an actor to be acknowledged as a legitimate participant. However, this discovery should not be interpreted as a sign of the depreciation of democratic legitimacy. In fact, democratically elected representatives are not absent from governance networks, even though their influence may differ from that of the experts. In the following pages, some illustrations are given of how and when elected politicians can play a decisive role in governance networks. It will be argued that, when studying the legitimacy of governance networks, the degree of their politicization should always be checked. Politicization can be understood in two ways: firstly, it is linked to the participation of elected political actors in governance networks, and especially to the effectiveness of their involvement and their weight in decision-making processes; and secondly, politicization is related to the symbolic shaping of public problems and to the visibility that can be given to governance activities by political actors.

Territorial-development policies as a new form of governance

Within the French context, there are a number of features, which make territorial-development policies an interesting ground for the study of governance. These policies are at the core of the two main processes, which currently affect the political and administrative organization of France: decentralization and Europeanization. As a consequence, the territorial governance of development is affected by the general reconfiguration of the relationships between multiple decision-making levels. Regional-development policies are also a typical illustration of the direction in which the concept of public intervention in economic matters has evolved. The first noticeable shift is from sectoral to territorial forms of intervention (Ferner *et al.* 1997): intervention increasingly consists not of allocating massive financial aid to a specific economic sector, but instead of aiming to provide a given regional territory with the resources that will enable it to attract investment and to foster economic activity. The second important evolution is the diversification of the networks involved in regional economic development. Regional development is no longer understood as a mere state-led transfer of resources. At a time of political empowerment for regional and local authorities, regional development is expected to be a bottom-up and multi-sectoral endeavour. Furthermore, some authors have argued that the restructuring of governance arrangements is not only functional but also political: it complements the relocation of political power and legitimacy (Crouch and Streeck 1997), the

standpoint being that democracy must be rooted at the local level and embedded in adequate institutions, laws, and regulations.

At the beginning of the 1980s, a number of converging dynamics set the agenda for a new conception of regional development, which was different from the traditional top-down territorial planning. In the domestic political and administrative landscape, the French decentralization laws empowered regional and local authorities with a new legitimacy and policy-making capacity. Admittedly, subnational political markets and networks were structured long before the 1982 reform (Tarrow *et al.* 1978). Nevertheless, the decentralization laws offered a symbolic acknowledgement of subnational territories as genuine political units. Moreover, the transfer of competencies and resources increased the attractiveness of regional political and bureaucratic positions.

In the area of economics, the interventionist conception of the state was challenged by the adoption of neo-classical public policies (Schmidt 1996). At the same time, a number of regions were undergoing the harsh consequences of restructuring in steel, mining, and textile industries (Smith, W.R. 1995). Moreover, the growing openness of markets and the increasing mobility of production factors entailed a global competition, in which the regions had the potential to become major participants. These were among the main factors which called for a new approach to regional development.

The central idea was to devise bottom-up solutions, which relied upon the widest possible mobilization of regional actors. Subnational territories, and especially the regions, are today considered to be the proper framework in which efficient development policies can not only be implemented but also elaborated. The regional level is expected to improve the efficiency as well as the democratic dimension of governance arrangements. The proximity of decision-making arenas is supposed to provide a better knowledge of the needs and resources of the territory. Regional development policies are also expected to be open to a greater variety of actors, including local firm managers, associations, and many others. The interaction between various categories of actors is not supposed to be a mere formality but is intended to entail actual cooperation. Moreover, regional development policies are meant to be more legible and more responsive for ordinary citizens. For all of these reasons, subnational authorities have increasingly been acknowledged as relevant policy-making institutions, whose legitimacy relies to a great extent on democratic claims. The democratic legitimacy of territorial governance is therefore deemed to rely equally upon governance networks' proximity and expected openness to a higher number and to a greater variety of participants (Papadopoulos 2003).

The general context of decentralization favoured experimentation with new governance patterns, which were extended to various policy sectors. The most significant one is undoubtedly that of contractual policies

(Gaudin 1999). Contracts are administrative tools (framed by public law and controlled by administrative jurisdictions), which link the central state to a number of partners, and which set up common priorities and mutual commitments within a given period of time. Regional and local authorities have become the main partners of most contractual policies, but often these policies implicate other actors too, such as social housing agencies or firms providing services like transportation, street cleaning, and so on. Consequently, the process of contractualization leads, on the one hand, to an enhanced interlocking of the policies of the central state with policies initiated by regional and local authorities; and, on the other hand, to institutionalized negotiations with private actors. Most of the time, contractual procedures have a territorial basis (regional, urban, or whatever boundaries are designated by the procedure) and some of them proceed from a territorial positive-discrimination approach (the best-known example being the specific policy implemented in urban distressed areas since the mid-1980s and labelled as the '*politique de la ville*'). The consolidation of enlarged governance partnerships appears to be the hallmark of this conception of public intervention.

Indeed, some governance models rest upon the hypothesis that it is possible to coordinate the efforts of a number of actors (not only public ones), even when those actors operate in different sectors and have quite specific interests. According to this hypothesis, different kinds of actors could work collectively and pursue a superior common goal (Lascoumes and Le Bourhis 1998). Regional development can constitute such a goal, and it can mobilize a great variety of actors and incite them to cooperate. This collective and cooperative dimension is all the more salient since, most of the time, development policies rely on contractual procedures, cross-financing, and enlarged networks.

Contractual procedures convey political images that are linked to a particular source of democratic legitimization. Governance appears as a political *imaginaire* (Gaudin 1999), a process of setting up values, alimented by specific 'narratives' (Rhodes 2000), which emphasize the ideas of agreement, of free involvement, of widened participation and deliberation, and of a facilitated access to the decision-making arenas. These images are combined with, and reinforced by, other narratives that could be named 'narratives of the territory': local and regional territories are singled out as the most relevant framework for efficiency in public action but also as the most democratic ones with regard to political participation. This general framework needs to be confronted with the actual implementation of policy tools. Economic-development policies are designed and conducted within a sophisticated set of rules and institutions. The patterns of governance have become more complex with each transformation, and it is important to note that certain categories of actors have been able to take advantage of the greater complexity of governance arrangements. In the case of economic development, the role played by experts has become

central to the formulation and implementation of policies. These experts import their own interests and resources into governance networks, alongside a specific definition of legitimacy. This legitimacy relies upon technical knowledge and professional excellence, and differs structurally from democratic legitimacy, which is provided through electoral support. For this reason, governance arrangements should be analysed with more than just a functional approach that focuses on their efficiency. Power issues should also be addressed, and the analysis should integrate the various sources of legitimacy that are mobilized by actors in governance networks.

Expert legitimacy and the shaping of governance by professionals

The notion of multilevel governance is often used to depict complex arrangements that imply various levels of political regulation (Marks *et al.* 1996). In the most typical configuration, policies are implemented at three territorial levels – European, national, and subnational (regional and local). Regional-development policies are a good example of this model, since they entail the intervention of the European Union, of the central state, and of regional and local authorities. The notion of multilevel governance is interesting because it takes into account multiple institutional origins, financial sources, and categories of actors (Pierre and Peters 2000). Thinking in terms of multilevel governance therefore helps to analyse complex and overlapping games, in which different kinds of actors display legitimization strategies, exchange resources, and set standards for public action.

If 'the setting of policy-making is defined by the existence of highly organized social sub-systems' (Kohler-Koch and Eising 2000), it may therefore be assumed that the setting of policy-making is also defined by the different types of legitimacy which underlie the social sub-systems under consideration. The players in multilevel governance are differentiated not only by their territorial affiliations but also by their sectoral or professional characteristics.

For example, the role of development professionals is central to the practice of regional development policy-making. Territorial development is now a professionalized sector, as indicated by the existence of professional journals, conferences, associations, mailing lists, and university degrees. The European Commission grants subsidies to a number of transnational networks, which are composed of professionals and which exchange information with their peers. These networks include AEIDL, EURADA, or the Innovating Regions in Europe/IRE Network. In France, there are several associations, which connect experts in territorial development. ETD, which is one of the most significant and is institutionally linked to the DATAR,[2] frequently organizes thematic seminars, workshops, and national congresses. The result is a specialization of skills,

which makes territorial governance networks more selective so far as participation is concerned, but which, at the same time, favours a greater cognitive homogeneity and a standardization of practices. This process of professionalization is synonymous with a greater number of contacts and sharing of professional experiences. Some institutions, such as the DATAR, the European Commission or the OECD, encourage such contacts between specialists, and try to facilitate the circulation of models and policy tools. Among the consequences of such a process can be observed the growth of specific action repertoires (Laborier 2003; Tilly 1986),[3] especially when institutions encourage it with financial and methodological support. In the case of France, the DATAR launched a large national programme to promote local clusters, which find their inspiration in the well-known model of Italian industrial districts (Bagnasco 1988). The DATAR has chosen to make the implementation of this device a priority in territorial-development policy-making.[4] More generally, the devices that are implemented often result from what may be considered as a form of mimetism or recycling (Lascoumes 1994). This trend is reinforced by the relatively high turnover of specialists in charge of territorial development, who work in different regions and are sometimes hired in one region to reproduce a device that they have successfully implemented in another one. In interviews, it is common to observe that these professionals value or even fear evaluations by their peers and tend to compare their own practice with that of their colleagues. This observation is again indicative of the institutionalization of professional expertise.

Another significant example of the weight of professional legitimacy can be found in the European Commission's use of best-practice exchange as an instrument of coordination. Best-practice exchange is the process of seeking out and studying those internal practices that produce superior performance. The definition of 'good practices' relies upon impact-assessment (Obradovic 2003). The expected consequence of adopting these best practices is greater efficiency and the consequent production of output-legitimacy. Exchange of best practices can be analysed as a demonstration of the Europeanization of policy-making (Goldsmith 1993), but should be considered also as a means by which local initiatives are promoted. On the one hand, transnational networks of experts function as a diffusion channel for European methods and therefore can be viewed as contributing to the 'centralisation of local governance' (Smith, A. 1999). On the other hand, far from generating a one-sided circulation of policy models, such networks allow the promotion of local competencies and innovative practices. As the President of the EURADA network puts it,[5] transnational benchmarking offers outsider regions the opportunity to nurture the common list of successful initiatives. In that respect, European regional programmes enable a greater variety of actors to enter governance networks. Nevertheless, the latter remain largely populated by technicians displaying legitimization strategies that are based upon profes-

sional excellence and reputation. Although such professional legitimacy is not necessarily opposed to democratic legitimacy, the links between functional and democratic forms of legitimacy are not apparent.

The following section presents an example which illustrates the competitive dimension of governance: the greater openness of governance arrangements in a multilevel framework entails competition for legitimacy among various categories of actors and especially among different kinds of public institutions. The strategies underlying the moving of institutional design conjure up legitimacy stakes, while establishing the professionalization of governance networks.

Institutional cross-legitimization and the centrality of technocratic resources: the case of EU structural funds

Within the broad configuration of development policies, a helpful case when focusing on actors' competitive strategies is the use made of European structural funds for regional development. Its study necessitates an approach that includes the analysis of power relations between governance actors. In effect, public policies are not only functional solutions to supposedly clearly identified problems. They also have to be considered in their structural aspects, by which is meant the positions and relationships of different kinds of actors, sustained by their unequal power resources (Hassenteufel 1997). The focus here will be on these structural aspects and on their consequences for governance and legitimacy.

Governance as a competition for legitimacy

The implementation of EU regional policy has not led to a weakening of the central state in France (or, at least, not as yet). The bureaucratic procedures used so far have even reinforced some state administrations, especially the *Préfectures de Région* and the DATAR, whose roles in the allocation of the structural funds are central. The organization of the distribution of structural funds has been left to the member states, provided that the main principles set by the European Commission are respected (multi-annual planning, concentration, partnership, additionality, evaluation). The French government seized the EU regional policy as an opportunity to reorganize the state administration and especially to strengthen its position at the regional and local level. The progress of decentralization and the transfer of competencies towards subnational authorities increasingly challenged the state's central position within the regions and, as a consequence, since the beginning of the 1990s the French state has tried to become a major participant within the EU regional development policy (Smith, A. 1997). The DATAR has occupied the strategic position of mediator between the national bureaucracies, the regional and local authorities, and the Commission services. At the

regional level, the authority of the state is illustrated by the central position devoted to the *Préfet de Région*, who is in charge of the preparation, implementation, and evaluation of the European programmes. His mission has been to organize the partnerships and coordinate all the actors involved with the structural funds at the regional level. The most crucial arenas in the regions (the Programming Committee and the Monitoring Committee) are under the authority of the *Préfets*. They allocate the funds on behalf of the European Commission and are responsible for the correct spending of public money. Hence, far from excluding the state, the EU regional policy has contributed to bringing it back into the regions.

Nevertheless, the European structural policy did not support state bureaucracies only. The need for the Commission to find local partners prevented it from being too selective when choosing subnational interlocutors. Therefore in some cases subregional actors, especially those from the *Départements*, were able to carry out successful partnerships with the Commission (Smith, A. 1995). As far as ERDF Objective 2 programmes are concerned, the new generation of programmes (2000–2006) are proceeding on a par with the growing importance of the decentralized regional authorities (*Conseils régionaux*). Most *Conseils Régionaux* currently seem to consider the European funds and networks as an opportunity to strengthen their position in the multilevel system and even to appear as *chefs de file* of regional governance, while decentralization is expected to be deepened in the coming years. Indeed, the *Conseils Régionaux* have a crucial stake in holding a leading position in territorial governance, since their political legitimacy still needs to be consolidated. In fact, whereas direct election by their members provides regional parliaments with democratic legitimacy, these institutions still lack visibility and popular acknowledgement. For that reason, they need to strengthen their policy-making capacity so that they can be held responsible for policy outputs (Keating and Loughlin 1997). It is instructive that all *Conseils Régionaux* have set up special offices for European affairs and recruited highly skilled bureaucrats. They are consequently becoming more and more apt technically to deal with European procedures and to defend their positions against state bureaucracies. Studies have shown that often the ability to mobilize technical skills, in combination with the political capital of local leaders (especially their access to decision-making arenas), was much more decisive in obtaining aid than the objective needs of the territory (as measured by the official criteria). As a result, the larger regions, which have better political and technical resources, managed to establish their eligibility for European funds, at the cost of downsizing the proportion received by other regions that were more in need (Jouve and Négrier 1998a).

This does not imply however that the structure of the relationships between the *Préfectures* and the Regional Councils has been inverted to a

significant degree. The *Préfets de Région* remain the key participants: the *Préfet* is still the only official with power to authorize expenditure on the European funds. In this period of transition, while the *Conseils Régionaux* are not in a dominant position, their growing power generates ambiguous situations, by which they are able to benefit. The institutions of the central state still have legal responsibility for the use of the funds. The prefects have to justify this use in the event of an audit, and must face the consequences of misuse or underuse. On the other hand, it is often the *Conseils Régionaux*, who obtain the political advantage from these actions, which have been funded by EU credits. The present situation is not likely to evolve further until 2006, although future programmes will take place in the context of enlargement and will probably induce major financial transfers towards the new member states. European regional policy will consequently take new forms and the financial means available to France will be cut down. As most of the interviewed French civil servants expect, this new regional policy is likely to benefit the decentralized institutions, all the more since they now have the necessary knowledge of the procedures, principles, and policy style of EU programmes, and they have secured their positions in regional-development networks.

The impact of competing strategies on governance

Many institutions in economic development alternately display cooperation and competition strategies, with which they expect to enhance their political legitimacy. From this perspective, the changing alliances underlying territorial governance may be understood as mutual acknowledgement mechanisms and internal cross-legitimization processes (Ansell *et al.* 1997). On the other hand, some of the competitors qualify as major participants whereas others remain rather marginal. Jobert's (1999) typology can be used to depict the governance arrangements linked to regional development. Jobert suggests a distinction between a deliberating 'forum' and a negotiation 'arena'. In deliberating *fora* many opinions and standpoints can be expressed publicly, whereas negotiation *arenas* are open to a narrower circle of technicians and professionals whose interests are directly connected to the issue dealt with. Of course, as Jobert underlines, this distinction is mostly an analytical one, which is employed to isolate several dimensions of governance: the circulation of ideas and the processes of symbolic shaping on the one hand, and the negotiation of political compromises on the other.

These notions are also useful for formulating hypotheses on the effective influence of the various bodies, which are formally involved in the policy-making process. Some of these bodies (councils, committees, working groups, and so on) are in effect devoted to consultation (*fora*), while others are more directly connected to decision-making (*arenas*). The elaboration process of the two documents sustaining regional

development in Burgundy (the *Contrat de Plan Etat-Région* (CPER) and the 'Single Programming Document') illustrates this dual dimension of partnerships. Although partnership is explicitly mentioned as a compulsory principle in both procedures, official documents and interviews with the territorial protagonists highlight the existence of two very different kinds of partnership. A consultative partnership based on collective debate within working groups takes place at the first stage of the process. The composition of the groups is made as wide as possible, in order to integrate proposals from a diverse number of actors, who originate in public institutions as well as in civil society. However, when it comes to the formalization of the document, at the actual decision-making stage, the partnership is reduced to bilateral bargaining between the two most powerful actors at the regional level: the *Préfet de Région* (representing the central state) and the President of the *Conseil régional*. The preparation and negotiation of both documents were conducted not only in the same period but sometimes even together. As the CPER and the 'Single Programming Document' were considered primarily as financial instruments, the central state and the regions managed to link both bargaining rounds and to dispatch their choices and priorities through both procedures. For example, when a project could not be thoroughly funded by the CPER, they were able to complete the financing plan with the 'Single Programming Document'. This form of cooperation has definitely instituted the *Conseils Régionaux* as major partners in the regional networks of EU policy and, with regard to the symbolic dimension, the elected leaders of the regional authorities (*Présidents de Conseils Régionaux*) have become the co-chair of the Monitoring Committees, alongside the *Préfets de Région*.

Therefore it seems that a redefinition of the relationships between institutions occurs, rather than a true enlargement of the game. Moreover, *de facto* access to governance networks depends on the ability to mobilize technical resources. As a consequence, the democratic character of governance is challenged by the nature of the resources, which are required to cope with the interinstitutional competition. Furthermore, the legibility of the whole system appears to be rather poor for uninitiated citizens. However, it should not be inferred that territorial governance is disconnected from democratic legitimacy, as elected politicians and representative institutions remain major actors in governance networks. The role played by democratically elected political representatives in territorial networks will now be scrutinized more closely. In fact, political dynamics do shape territorial policy-making processes and, at the same time, the specific features of network governance also have an impact on the operation of political representation.

Governance, politicization, and legitimacy

The political shaping of territorial policies

In territorial development, politics cannot be separated from policy-making even though the day-to-day operation of policies is dominated by bureaucratic and professional rationality. The very definition of the territories, upon which the policies are implemented, expresses the impact of politics on policy-making. Most of the time, development policies are implemented within the boundaries of constituencies. This practice is reinforced by the professionalization of the bureaucrats of decentralized authorities, who authorize a great number of subnational as well as subregional political authorities to claim their right to conduct a development policy. The setting of public programmes dedicated to economic development can certainly be analysed, *inter alia*, in terms of symbolic action (Edelman 1971). Territorial policies also serve to legitimize individual political entrepreneurs or the political institutions attached to the territories under consideration. For example, within the Burgundy region, the *Conseil général*[6] of the *Département Saône et Loire* has increased the means allocated to economic development and has created a specific department for that purpose, even though economic development only belongs to the realm of facultative competencies of the *Conseils Généraux*. This institution has also displayed a conspicuous strategy of making visible its involvement in economic development.[7] Such an effort to increase the institution's visibility can be understood as a response to the current evolution of the political and administrative organization of territories. One aspect of this evolution is the empowerment of the *Conseils Régionaux* and the strengthening of their position in European governance networks (as mentioned above). Another aspect is the increasing role which cities and metropolitan areas are able to play following the empowerment of intercommunal institutions. Both transformations are perceived as threatening the legitimacy of the *Département* as a political level. The political officials elected in the *Département* assembly see their legitimacy challenged and sometimes denied by the promoters of institutional reform. At stake here is the definition of the territorial levels, at which democratic legitimacy can be most properly represented. The issue of economic development illustrates the interlocking of political stakes with functional problem-solving issues (Jessop 1998). The geographical boundaries imposed by politics on policy-making are sometimes criticized for undermining efficiency, because they lead to a fragmentation of actions and means over a large number of small territories while European and global economic competition requires a concentration upon unified actions across larger territories. Hence the output-legitimacy of policy-making is emphasized for use as an argument in a more general debate about the whole legitimacy of territorial political institutions. As far as economic development is

concerned, the *Département* is presented as an irrelevant level of governance.

Conversely, democratic legitimacy can be used as a resource to influence the structure of governance patterns on some issues. For example, some elected members of the *Conseils généraux* happen to be members of the national parliament as well. They can therefore use their national position to resist territorial reform and to influence the steering of national policies that have a territorial impact. Although governance patterns have undoubtedly become more polycentric, the central state still appears to be a major actor in development policies (Jouve and Lefèvre 1999b): no structural initiative (regarding road infrastructure, communication networks, education, technology, and so on) can be carried out without the financial and technical support of the state. As a consequence, the elected officials representing various institutional levels (municipal, *départemental*, regional) compete for the allocation of state resources and seek to influence the design of the state's territorial policies. Accordingly, the ability of politicians to hold more than one elected position simultaneously (*cumul des mandats*), which to a large extent shapes French politics, has an impact upon territorial policy-making. In this respect, the logic of politics, and particularly of political competition, has a strong impact on governance.

The need to conform to governance transformations in order to maintain democratic legitimacy

Most of the development programmes are based upon specific geographic zones, and so elected officials try to have their constituency (or a part of it) included in the relevant zone. Of course, their possible influence is limited because these zones are defined according to objective criteria such as GDP per capita, employment rate, and so on. Yet the complexity of the legal framework and the ambiguity of certain criteria allow for a loose interpretation. Most of the administrators in charge of development programmes reported in interviews that they frequently face petitions from local politicians, and that lobbying is sometimes used to influence the interpretation of the existing criteria. Moreover, the increasing number of overlapping procedures allows deals to be made among political leaders, so that most of the constituencies can eventually be eligible for one programme or another. To that extent, the polycentrism of territorial governance does not reduce the importance of political bargaining within policy-making processes. Nevertheless, when based upon partnerships, new forms of governance usually lead to the building up of new territories, overlapping several political constituencies. In that respect, the evolution of governance practices also has an impact on the conditions of political work and on the way elected representatives maintain their legitimacy. Mandate holders have to adjust their practices and their *savoir-faire*

to the new forms of governance, all the more since their monopoly over political representation is in question (Duran and Thoenig 1996). Parliamentary arenas are no longer the only *loci* for the definition of public choices and for the allocation of resources. They are sometimes even kept aside of certain programmes, even though they are legally requested to discuss and to ratify the related documents. The work of elected representatives regarding public policies cannot therefore be reduced to their participation in political assemblies (whether they be local, regional, or national). They are compelled to involve themselves in more complex governance arrangements and to attend an ever increasing number of committees or monitoring bodies that are in charge of the implementation of projects (Nay and Smith 2002).

These new governance arenas affect the interests of elected officials and their ability to maintain their position and their legitimacy. Politicians have strong incentives to hold a position in the emerging arenas. First of all, they must participate in order to voice the demands of their electorate, to gain resources for their constituency, and to improve their policy-making capacities. These considerations are especially true in territorial development, since an important aspect of these policies consists in the granting of subsidies and the allocation of various kinds of resources. From a strategic perspective, political leaders must secure their own position in governance networks in order to stand their ground and to neutralize potential rivals. Scholars using the concept of entrepreneurship in the study of public policies have shown the means by which territorial policies are sometimes used as political resources (Jouve and Lefèvre 1999a), which can then be invested in strategies that aim to extend political leadership beyond the traditional boundaries of constituencies (Baraize and Négrier 2001). These are among the main reasons why elected representatives cannot stay away from the multiple governance bodies. Consequently, even though technical and professional rationality often prevail in these arenas, the practical necessity for political involvement ensures that governance arrangements are not disconnected from democratic representation. If not the success, then at least the failure of governance arrangements strongly depends on the involvement of elected politicians. Political leaders cannot guarantee the efficiency of the networks, which they support, but a network lacking political support will be deprived of decisive resources (financial, social, and symbolic). The power of elected politicians can therefore be portrayed (in technical terms) as a necessary, though not a sufficient, condition for the effectiveness of governance.

Politicization and accountability

The collective and polycentric character of territorial governance is bound to challenge accountability. The mapping of responsibilities in a context of ever more complex interdependencies cannot be easily

achieved. The high number of interlocking procedures in development policies, the multiplicity of institutional sources and the redefinition of territorial boundaries do not help to improve the legibility of public action, nor do these factors ease the operation of impact-assessment. Complexity is also to be found in the evaluation of governance outputs: definitions of efficiency (which is valued as engendering output-legitimacy) differ in practice between civil servants, politicians, development professionals, and other groups. Territorial authorities are incited (and often legally requested) to evaluate their own policies, yet evaluation results are not automatically used to redefine the goals and means of these policies (Gaxie and Laborier 2003). Elected officials implement symbolic strategies, with the aim of strengthening their legitimacy as representatives. For example, it is important for them to show that problems really are being addressed by governments and to consolidate the belief that problematic situations can be improved by political means. As a result, political actors are much more inclined to emphasize the launching of public policies than to scrutinize their impact publicly (Edelman 1977). On the other hand, it has also been shown that political leaders may increase their legitimacy (in other words their ability to gain support, especially in elections) by appropriating the positive outputs of complex governance networks (Le Bart 1992).

In this complicated environment, elected representatives may in addition play a crucial role in enhancing the visibility of governance achievements. Indeed, they not only act as brokers for citizens' demands but they are also able, via their mediation positions, to report publicly on the operations within governance networks. However, observation of the regional and local political debates[8] about economic matters and public policies reveals a paradoxical situation: whereas regional and local policy-making is quite intense, the public debate about regional economic policy appears to be rather weak. Of course, economic issues are not absent from political discourses: all political 'entrepreneurs' voice their concerns about unemployment and express their determination to defend local jobs and to enhance the economic performances of their territory. Yet when it comes to adopting a more precise standing or when political entrepreneurs engage in controversial discussions, those discussions are seldom about regional or local economic policy. When a public debate takes place, it is more often about the economic mechanisms and policy tools that regional and local elected officials do not control.

Conclusion

The conclusions that can be drawn from the study of governance in French territorial development policy are rather ambiguous. It is not easy to identify one single dominant category of actors in territorial governance. Network governance can be seen as an intricate configuration of

'arenas' and 'fora' where no one can be said to have the upper hand in the whole process. On the one hand, multilevel governance allows a larger number of actors to enter policy networks. On the other hand, bureaucratic, technical, and professional resources still prevail in policy-making processes, all the more so because the opening of governance networks not only entails cooperative partnerships but also competition and rivalry, the settlement of which often depends upon the ability to mobilize expertise.

Generally, ordinary citizens and local populations are absent from governance networks (Gaudin 1999). However, elected representatives adjust their practices to the new forms of governance in order to maintain their legitimacy. Consequently the sphere of political representation is not disconnected from governance, even though parliamentary arenas may sometimes be kept aside from it. The complexity of the networks and the increasing number of actors and institutions participating in partnerships has fostered the opening of the governance game. As a result, a higher number of interests can be represented. Moreover, institutions relying on electoral support, especially local and regional authorities, are among the most important of the new participants. For these reasons, the arrangements supporting development policies can be seen as reinforcing the democratic legitimacy of governance.

However, there is another process at work underneath this general evolution. Experts prevail over the elaboration and the day-to-day operation of policy tools and devices. To that extent, the governance of territorial economic development may be viewed as promoting technical resources and a form of legitimacy that does not rely on a democratic basis. However, elected politicians are also powerful in governance networks, although their intervention differs from that of experts. They specialize in setting priorities, making decisions, validating some programmes, and boosting others. The rules and requirements of political competition therefore would appear to be crucial in the shaping of governance. The nature of the power exerted by experts on the one hand and by elected politicians on the other is not the same. The specialization of both activities (expertise and political representation) makes them rather autonomous, but at the same time increasingly interdependent (Elias 1991). Experts and politicians may share some common goals (such as creating jobs in a given area) but they do so for different reasons and with different expectations regarding their legitimacy.

With respect to this legitimacy, a number of recent works on governance suggest a link between the two dimensions of politics and policy-making. This twofold focus is to be found in the distinction made between 'politics of opinion' and 'politics of problems' (Leca 2000), between input- and output-legitimacy (Scharpf 1999), or between authority (the right to take decisions and the chances that the latter will be obeyed) and power (the government's capacity to act) (Duran 1999). According to this

perspective, the legitimacy of political authorities should rest on their capacity to be 'responsive' and 'problem-solving' at the same time, and the study of French territorial economic-development policy confirms this double requirement. The hypothesis more or less explicitly underlying these analyses is that public action should be increasingly exposed to external judgements, so that the legitimacy of governance will depend more and more upon the improvement of accountability. From this perspective, it is argued that the study of governance may also benefit from surveys of the reception of public policies by ordinary citizens, an issue that has not hitherto been addressed seriously.

Notes

1 This chapter is based upon research into territorial development policies in France. The data was collected through interviews, consultation of official documents, direct observation (meetings, professional congresses), and analysis of the local press. Along with the study of European and national policies, two in-depth regional case studies were conducted in Picardy and Burgundy.

2 The DATAR (*Délégation interministérielle à l'Aménagement du Territoire et à l'Action Régionale*) is a state agency in charge of territorial planning. Placed under the authority of the government, its mission is to coordinate the intervention of state bureaucracies in regional development by following a transversal approach and to conduct prospective studies.

3 The notion of repertoire, which is usually applied to the study of social protest, is used here by analogy. It suggests that the existence of available models constitutes a resource as well as a constraint for action. For a discussion and illustration of the uses of this notion in policy analysis, see Laborier 2003.

4 The concept of local clusters originates in industrial-relations theory, and defines a geographic concentration of small firms operating on the same market or in the same industrial path. These firms may be in competition but they can also gain advantages by cooperating and by sharing some costs (such as those associated with research and innovation, with communication, and so on). Geographic proximity, a high degree of specialization, cultural homogeneity, and strong economic interdependency are among the features which identify a local cluster. The French DATAR has chosen to rely on local clusters (labelling them as 'local systems of production') as a tool for economic development. The agency provides some funding and methodological support to encourage cooperation among firms, mobility of human resources, the quick circulation of information, and the transmission of specific knowledge. In 2000, 96 clusters had been acknowledged as 'local systems of production (SPL)' by the DATAR. A world congress on local clusters was organized in Paris in 2001 and 2002 by the OECD and the DATAR.

5 Interview with Göran Ekström in Inforegio Panorama no 9. Available online at: http://europa.eu.int/comm/regional_policy.

6 The *Conseil Général* is the democratically elected authority at the territorial level of the *Département*.

7 Similarly, when controlling the implementation of the structural funds, Commission bureaucrats try to see that the European logo is properly displayed upon the buildings financed by Community credits, so that EU involvement can be acknowledged by citizens.

8 These observations are based upon the most publicized statements about

economic matters, particularly those made in the local press as well as in the various papers and brochures edited by regional and local institutions in Burgundy.

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5 Resilience through governance with democracy

Herman van Gunsteren

Introduction

Order, justice, and resilience are the criteria for evaluating a political regime. Does it guarantee an order that controls violence and stabilizes mutual expectations? Does it pursue justice by fighting all forms of tyranny (including the tyranny of the fighters themselves) and slavery (the dishonourable dependence in which many people are caught)? Does it provide for resilience, that is the capacity to cope with the unexpected in such a way that core values are preserved? Since 1989 regime resilience has become problematic. In a turbulent era it is needed more than ever before, but the way to provide it has become less certain. Many recent reforms have aimed to enhance regime resilience, but few are unambiguously successful. Governance is one such reform. How well does it serve regime resilience? Consider the following. And wonder.

1. These days most people are for democracy but many among them are against politics. They distrust politicians and political processes and therefore want to limit the reach of both. When politics is thus cut down, however, democracy is trivialized. It has no room for manoeuvre and hardly anything of importance to decide. Being for democracy in these circumstances is like being for classical music – a nice extra, but not essential for living except for those who love it.
2. The Dutch republic in the sixteenth and seventeenth centuries had an unworkable constitution and plenty of discord and infighting. How could this chaotic contraption generate and sustain a Golden Age in which the Dutch were a major power and a flourishing centre for the arts and sciences? That capitalism would collapse was a well-founded prediction. How did it avoid this fate and manage to transform itself? Free societies have more often than not turned out to be more resilient than their competitors. It has taken a long time to begin to understand how they do it. And because it is counterintuitive this understanding is easily forgotten.
3. Assume that governance is good for people – better than the old ways

of governing which it sought to replace or to improve. Why then is it difficult to relate governance to democracy? Are citizens incapable of choosing what is good for them? Is there something missing in the goodness of governance? Does expertise in governance generate professional incapacity to heed democratic danger signals?

4 Reflection upon these three puzzles leads to the conclusion that governance, if it is to be robust and resilient, needs anchoring in political democracy. Is such anchoring possible and, if so, how and to what extent? If democracy were a welcome extra for governance, those questions would be merely interesting. They are however essential if governance uncoupled from democracy puts free societies at risk and cannot in the longer run deliver the goods that it promised to its people.

This chapter maintains that anchoring governance in political democracy is possible. One condition for achieving this, however, is that partners and experts in governance drop simplistic, media-driven images of what politics is about in a free society. A deeper understanding of politics will allow for safer anchoring. Democratic politics is said to be fickle, unreliable, too short-term oriented, unable to provide for stable expectations – a slippery surface on which anchors will not find a hold. A deeper, longer-term perspective on political democracy may reveal the underlying stability beneath this turmoil. The art of the politician, the statesman, the leader, is to reveal this stability by moving, like a surfer, on the waves of daily politics. Political institutions and principles of constitutional law embody this art and make it available to lesser artists, such as ordinary citizens holding public offices. Some of these institutions may have become outdated, a hindrance to both good governance and democracy. This is reason for reform. It is not reason for conceiving of politics in free societies as either mindless ritualism or formless desire for instant wish-fulfilment.

Regime reforms

Taken as a whole, order, justice, and resilience form the distinctive contribution that politics can make to a people's ability to live together. Regimes, however disliked in practice, are valued because they actually provide these collective goods. They constitute the grounds for legitimacy and support.

Recently the nation state has found it increasingly difficult to continue to provide these three goods. The growth of 'no-go areas' thwarts the provision of order and the monopoly of violence. So does the rise of terrorism. The reform of welfare-state programmes and the turn towards a 'market state' that provides opportunity structures (Bobbitt 2003) fails to do justice to those who could not use whatever opportunities they may have had. It

also fails to provide justice for the illegals, the officially invisible second-class citizens living on the territory of the state. This chapter considers problems with the continuing provision of the third good, resilience.

Traditionally, the nation state provided resilience in several time-honoured ways. Its institutions were organized to cope with surprises and disturbances through forward-looking policy-making. Support for policies was acquired through democratic decision-making in elected bodies. Once knowledge and power had been thus brought together in the most feasible policy, a professional corps of administrators controlled its implementation. This approach has increasingly run into difficulties. Government is time and again caught by surprises which it can neither ignore nor neutralize. Scandals abound. Politicians and bureaucrats are held accountable more frequently than they were previously. When they have to explain why they failed to do what was expected of them, they are often at a loss for a really convincing answer. They themselves seem to be surprised and they do not understand how things went wrong nor where precisely their professional mistakes occurred. How could things have gone so badly, when they have been forward-looking and democratic, when they have opted for the best combination of knowledge and support? Could it be that the massive combination of knowledge and support, far from being an asset, has become a liability – at least in an increasing number of situations? Governing through analysis and instruction (A/I) too often leads to disappointment. It turns out to be slow, cumbersome, difficult to set in motion, and difficult to stop.

Efforts to repair such an established way of governing have not convinced either. If there is not one single future that can be predicted, then a shift to a diversity of future scenarios may be contemplated. But these do not protect against the continuing stream of disturbing surprises that policy-makers have encountered since 1989. They may develop policies for risk management. By doing so, however, they invite a return to comprehensiveness. They get stuck in a quagmire of comprehensiveness similar to the one that brought the planning dreams of the 1970s to a halt.

When repairs are not enough, it is time for reform. In the following pages, three efforts to alter or supplement the established ways of policy-making in liberal democracies are considered: (1) dealing with an unknown future by building up resilience, rather than by relying upon prediction; (2) searching for grounds of support other than democratic decision; and (3) engaging in multilevel governance. All three, it will be concluded, are valuable but also vulnerable because of their problematic relation with political democracy.

Restoring resilience

The question of how to prepare for a future that will inevitably surprise, that will thwart both expectations and carefully developed policies, is high

on the agenda of administrators. If an A/I approach does not work, then what will? By accepting that the recurrence of surprises is inevitable, we can – instead of trying to outmanoeuvre, avoid, or neutralize them – try to improve our capacity to deal with them in such a way that core values of the regime and society are preserved when they do happen. Resilience has to be achieved not by more precise prediction but rather by building up a repertoire of responses and by using a selection of them according to circumstances. This strategy is being worked out along two lines. Both acknowledge the shortcomings of governing by way of A/I and propose a shift towards governing through variety and selection (V/S). They disagree on how and where this can take place.

The first argument for restoring resilience posits a reshuffling of tasks. Each subsystem of the regime should do that at which it is best and what others cannot perform better. The market is seen as the system that is best equipped for coordination through V/S. Tasks that can best be taken care of in this way should be shifted from government to the market. What remains for government is to provide the framework for markets (property, contract, antitrust) and to say what variety (for instance, black money, inside information on the stock exchange) and selection (for instance, discrimination, refusal to provide health insurance to the elderly) will remain taboo. Competition and fighting each other belong to the market. In public organizations this behaviour would be a wasteful overlap and unnecessary bureaucratic infighting. Government should offer reliable expertise, avoid sending ambiguous messages, and not tolerate even minor infringements of the law (zero tolerance). Civil servants should be obedient and form a closed rank towards the outside world. All efforts should be turned in the same direction. This direction is indicated by political decisions based on common values. Who is not with us is against us, as Bush said. No room for indifference here, nor for the 'neither for nor against' of free societies; rather the 'we against them' of totalitarian regimes.

The second argument for restoring resilience conceives the market as one system of V/S next to others. Law, politics, science, and the immune system can all be seen as forms of V/S. In a free society the selective legal decision only occurs after hearing both parties; in politics a legitimate government requires a legitimate opposition; sciences flourish due to the confrontation of various visions of the truth in journals, conferences, and experiments. The immune system works by recognizing an intruder, sending out the full repertoire of available antibodies and producing additional quantities of that which proves most able to neutralize it. This is known as 'selective amplification on value'. Likewise a free society disposes of a repertoire of alternatives from which selections can be made according to circumstances. An impossible man like Churchill is a blessing in wartime. When it is too early to do battle a cautious general is needed, but for the decisive battle a fighter is required. Just as in the first argu-

ment for restoring resilience it is the task of government to provide frameworks for V/S systems, to protect a sufficient amount of variety, and to indicate the values that may guide selection, so in this second argument there are various V/S systems, each with its own characteristics and requirements, and not just the market. Moreover – and this is a crucial difference – government itself is seen as a kind of V/S system as well.

This path to the re-establishment of government resilience requires a revision of some well-established truths and guidelines. In this vision conflicts are normal and positive. Consequently there is no fear of a 'legal claims' culture. Civil servants are asked to take the initiative. He, who in retrospect never turns out to have made mistakes, simply has not tried. No praise for a civil servant, whose primary concern is to avoid being held accountable and who always remains in a position to shift the blame on to others. The emphasis passes from planning to learning; from foresight to governing by looking back in accountability fora; from the primacy of politics to its ultimacy, the last word and judgement. In modern government overlap, conflict, sticking one's neck out, making mistakes, and being held accountable for them are avoided as much as possible. The second argument for restoring resilience, on the contrary, asks us counter-intuitively to value these. Actors on the market have learned to value competition and bankruptcy as parts of a vital system, even against their natural inclination and after much falling and getting up. A comparable change of culture is needed to restore resilience in government.

Whereas the first argument for restoring resilience makes politics more consensual by transferring conflict and variety towards the market, the second argument emphasizes the value of conflict in politics. It asks us to value what ultimately we want to avoid. The first argument appeals directly to many people, the second only to those who like to fight. In democratic societies there are supposedly few of the latter. Major support for the second argument will have to come from those who have counter-intuitively learned to value civilized forms of conflict. It is not surprising, therefore, that the first strategy for restoring resilience is presently the dominant one – certainly after September 11 when mobilization to fight an invisible enemy gained priority over the protection of freedoms and over genuine arguments between government and opposition. The long-term risk of this strategy for defending freedom is that it may destroy what it claims to defend. Moreover, with its emphasis on unity, democratic politics may become either ossified or totalitarian – in both scenarios deprived of those features that made it vital and resilient.

Support through legitimacy

Modern regimes require a close relationship between government and society. This relationship may be governed by fear and intimidation, as in dictatorships, by discipline and inspiration, as in totalitarian regimes, by

honour, as in monarchies, and by consent given after a free choice among alternatives, as in liberal democracies. In this last instance, legitimacy refers to the good grounds for that choice.

At the end of the twentieth century, democracy is the uncontested ground for legitimacy. Government action deserves support if and only if it is democratically legitimated. This doctrine, which no one openly dares to reject, makes the legitimacy of the European Union (EU) problematic. Even if it could be shown that it brings a variety of essential goods to many people, there remains a democratic deficit. Efforts have been made to repair this shortfall by introducing the election to the European Parliament, which convenes in Strasbourg (because of a deal with France) far from the centre of power in Brussels (where it is allowed to convene for limited periods only); through hesitant enlargements of the powers of that Parliament, enlargements which are incomprehensible to citizens; and through crooked arguments about the half-yearly European summit meeting, which is said to be democratic because the present government leaders have been democratically elected and are democratically accountable in their own countries. The accounts given in their national parliaments, however, abound in references to what could have been maximally achieved and to *faits accomplis* that are actually the outcome of difficult negotiations, which the members of parliament cannot check because these remain secret. They must trust their prime minister – or send him away. There is no room here for transparency, independent inspection triggering a healthy dose of suspicion and distrust, from which really critical democracies distinguish themselves from regimes, where going along with the powers is the factual norm.

It has been argued that as long as citizens of a regime which is called democratic accept policies and show themselves to be content, or at least acquiescent, there is not much to worry about. Thus the absence of intense protest has come to be seen as a sufficient, although not ideal, sign of legitimacy. In order to acquire this kind of legitimacy, policymakers have prepared the ground for their projected policies by way of campaigns, ads, and the financing of television series. More recently they have turned to polling, to recurrent testing of what people will accept. Policies are adjusted to fit the patterns that emerge from such research. Some find this way of policy-making so democratic that they would make parliaments superfluous. Thus 'democracy' is stretched to include any form of taking citizens' opinions into account. Even dictators who want the best for their people can then be called democrats.

The fundamental error of this adulterated conception of democracy is to identify the acceptance of government policies and activities with the democratic legitimization of them. The first is passive, a perceived condition of people, whereas the second is active, a political act that acquires its meaning in a context of rules concerning agenda setting, election, majority decision, and accountability. Slaves often accepted their lot, as

did the citizens of the Roman Empire, who in situations of evident injustice held that their Emperor was good and that wickedness emanated only from his advisers. Resisting what is inevitable makes no sense. In a democracy, on the contrary, resisting what before appeared as inevitable is the order of the day. Its institutions invite critique and the changing of existing power relations. Democracy aspires to transform the limits of what was possible and impossible through the power of common action. This power is only to be exercised after a majority decision, preceded by the critique of injustices, the design of remedies and the opportunity to publicly win the assent of fellow citizens for these solutions. Democratic legitimacy does not depend only on the question of whether decision-making has respected the rules for democracy, but also on whether it is reasonably understandable, how this decision is supposed to diminish injustice. If it is evident that decision-makers have been interested in no way in the question of justice, then there is something amiss with democratic legitimacy, notwithstanding the fact that the input is formally correct.

Similarly, output legitimacy, also known as functional legitimacy – in other words, whether people are content with the product of policies, like customers in a supermarket – is not to be equated with democratic legitimacy. Defenders of the EU, who expected that people would support it once they realized the advantages it brought them, had vested their hopes in such legitimation by way of content clients-citizens. What they had lost sight of was that legitimacy in a democracy cannot be attained in this way because it springs from an act of citizens based on their own autonomous judgement, even if this judgement is made on dubious grounds, like television popularity.

The emphasis on results, on what a regime has to offer its citizens, has increased over the last decades. Politicians present themselves – preferably in front of television cameras – with number-precise targets, ready to be held accountable for their success or failure in reaching them. Actual research into policy results has increased as well. There are more parliamentary investigations into 'scandals', and reports from general accounting offices have gained both more attention and more authority. That is positive news, all the more when feedback from results to input goes through democratic deliberation and decision. Nevertheless, there still remains the question of what kind of results citizens are interested in these days. Do they still primarily want representation of their interests and lifetime security, as in the high noon of the national welfare state with its parties and consultation structures? Or are citizens of the twenty-first century, or at least those whose voices and money count, not so much interested in benefits as in chances, opportunities? If this is indeed increasingly their aim, their accounting of the state's performance will be in terms of creating and guaranteeing structures of opportunities. That is the primary contribution of the state, for which it receives support. Covering big risks and taking care of those who do not succeed in the

opportunity race are then seen as secondary tasks. Only when underperformance in those areas threatens the functioning of opportunity structures will support be withheld. If this development continues, keeping citizens content by providing material benefits can no longer function as a substitute for real democratic legitimacy. Will we then face a choice between real democracy and a market-guaranteeing government like the EU? Or will it be possible to invent or discover viable combinations of these?

Governance: between expertise and politics

The movement from government to governance can also be seen as part of the effort to restore regime resilience. Here also, as was the case with output legitimacy and consensual politics, the price for this improvement is a limitation of the reach of politics – and thereby of democratic deliberation and decision-making. This is obviously the case where governance is truly multilevel, due to the existence of various erstwhile sovereign centres of political decision-making. If multilevel governance is supposed to succeed, each of these has to accept a different and more modest role and to abide by new rules – both procedural and substantive – that have not been made at home. Between blunt veto-power and complex and often secret deal-making there is much less room for democratic deliberation and decision than there used to be. However, even where governance is not or is less prominently multileveled, many of its advocates reserve a surprisingly modest and amorphous place for politics. A brief look at the work of Majone, Gunningham, and Grabosky may illustrate this.

Optimal regulation, they claim, brings gains in efficiency, from which (nearly) all profit. Such regulation requires smart mixes of policy instruments – ranging from command and control via self-regulation, voluntarism, and education, to economic instruments like property rights, market creation, fiscal incentives, liability, deposit-refund systems, and the removal of perverse incentives. If they are to work, such policy mixes also require the empowerment of and cooperation with third parties – commercial and public-interest actors – as quasi-regulators. Smart regulation brings efficiency gains that are Pareto optimal and would therefore unanimously be voted for by truly informed and rational citizens. Why then do smart regulators distrust democratic decision-making?

Majone (1989, 1993, 1996) provides an answer. If policies are to work in a world in which obedience to authority is no longer granted automatically, they need credibility. A first requirement of credibility is stability over time. Actors will only comply when they can be reasonably certain that the policies are there to stay and will be enforced. The political process itself is too short-term oriented to provide such credibility. The established way to enhance consistency over time through rule-making cannot work effectively in areas that frequently require situational

judgement, such as the environment. In those areas an alternative way to ensure credibility is increasingly used: entrusting discretionary application of general policies to independent and politically neutral experts. These experts used to be brought together in regulatory agencies and courts of law. Nowadays, they are also found in networks which gain their stability and independence through a tapestry of connecting threads, which individually would not be strong enough to hold the parts together.

Majone makes a sharp distinction between regulation and politics. Redistribution is a political task that regulatory agencies are unable to fulfil. Efficiency gains, on the other hand, can only be achieved by non-majoritarian institutions. In politics, interest groups negotiate and make deals. Regulatory networks, in contrast, are places where experts engage in policy deliberation.

In order to remain credible, democratic politicians, according to Majone, entrust efficiency tasks to non-majoritarian institutions. This process happens not only internally, at the national level, but also internationally. The prime example that he gives is the EU, in which such regulatory networks do indeed abound.

This vision of the relation between politics and expertise has been known since Plato. It views democratic politics as a formless, short-term oriented process, which cannot be kept on course by constitutional provisions and other institutional arrangements for debate, voting, and decision-making. Also, Majone's assumption that the systems for redistribution and for efficient regulation can be kept separate requires explicit argument. Without such argument it simply lacks credibility in view of the devastating criticism that Gunnar Myrdal (1953) long ago levelled against precisely this assumption.

Smart Regulation (Gunningham and Grabosky 1998) is an impressive contribution to understanding the pitfalls and possibilities of environmental governance. Going into interesting detail in the chemical and agricultural fields the authors argue that 'recruiting a range of regulatory actors to implement complementary combinations of policy instruments, tailored to specific environmental goals and circumstances, will produce more effective and efficient policy outcomes' (15). However, when their notion of politics is examined, it turns out to be just as bleak and formless as Majone's. When asked what counts as an 'optimal' or 'successful' policy, they state four criteria: effectiveness, efficiency, equity in burden-sharing, and political acceptability (which 'includes factors such as liberty, transparency, and accountability' (26)). Immediately after this venture into the terrain of politics, they withdraw inside the safe bastion of regulatory expertise by writing: 'Of these, we chose to make effectiveness and efficiency the pre-eminent criteria, because we believe that in the majority of cases, the effectiveness of regulatory policy in reaching an environmental target, and its efficiency in doing so at least cost, will be the primary

concerns of policymakers' (*ibid.*). Effectiveness and efficiency 'are the essence of the term "optimality" ' (*ibid.*).

Goal-setting is the task of politics; the regulatory experts' task is to optimally implement them. Towards the end of their study Gunningham and Grabosky stipulate the role of politics as follows:

> The purpose of the design processes and principles is to guide policymakers in developing an optimal policy mix to achieve *a given environmental goal* (or goals), not to determine what that goal should be. Fundamentally, the design processes and principles do *not* address the issue of how governments should establish environmental policy goals. Rather, it is assumed that government has already determined a specific environmental goal or goals. It is only after this goal has been articulated that our set of design processes/principles can come into play.
>
> (377)

This leaves politicians and governments in the cold. How are they to choose goals intelligently, in the light of what is feasible in terms of effective regulation, if expertise only enters after the goal-setting? And how are the experts to proceed when they are asked to devise implementation policies for goals that cannot be achieved, or that can be achieved only at prohibitive cost?

Advocates of governance through smart regulation entertain a notion of politics as formless and static. Politics is characterized by a short-term perspective, interest-group stalemate, backroom negotiations, and lack of credible commitments. To them, this is not what politics may be at times, but rather what politics, according to its nature, inherently *is*. The task of smart regulators then becomes to make up for those defects of politics and to keep it constricted to its role of voluntaristic and uninformed goal-setting. They ignore that established ways of doing politics are robust precisely because they respect many constitutional and institutional constraints. Most politicians are well aware that ways of doing politics that labour under the illusion that spontaneity and honest democratic intentions are enough do not last.

For reformers of governing like Majone, Gunningham, and Grabosky, politics is a bothersome and formless residual category. Their contributions to better policy-making are impressive, but tend to undermine politics. Is this necessarily the case? Does smart regulation require a more limited and formless role for politics? There are good grounds for thinking otherwise. The regulatory perspective, with its emphasis on viable combinations of actors and instruments, can be brought to bear on politics itself, helping it to bring order and intelligence to the process of goal-seeking. Goal-seeking can only come down to earth if it also considers instruments by which they are to be achieved. It is precisely in the

consideration of, and conflict about, mixes of means that goals are clarified in political debates. Most regimes have noble goals. The crucial difference between democratic republics and other political regimes lies in the acceptance and rejection of mixes of means.

What has been established here for proponents of smart regulation will tend to be true for many other varieties of governance as well. Of course this expectation needs to be verified. If, for the sake of argument, it is assumed to hold true, then the relation between governance and politics needs further scrutiny. What notion of politics do those who extol the virtues of governance entertain? Is politics an extra or is it indispensable? If it is an extra, is it welcome or is it a nuisance? Both in theory (such as in the work of Majone) and in practice (for instance, governance in the EU) the role of politics becomes smaller and smaller. Democratically chosen leaders have made themselves immune to public scrutiny when working together at the European level in the Council of Ministers. At national levels, political tasks are increasingly transferred to independent public or semi-privatized organizations. Public tasks are increasingly exercised by non-governmental organizations and even by business firms. The dynamic of governance reveals a tendency to leave politics behind in a truncated and formless state – a relic of the past that is maintained to fulfil a limited task and to legitimize decisions that have already been taken elsewhere.

Without politics?

Evidently, quite a few advocates of governance do indeed see politics as a disturbing force that should be kept in check. Together with their numerous colleagues who do not see politics as particularly inimical to governance, but who do assign it an insignificant place in their schemes, they constitute a strong current in the tide, which at the present time tends to leave politics high and dry, far away from where the action is.

The other two currents in this attack on politics by withdrawal from it are formed by citizens, who turn away from politics in disgust or indifference, and by politicians themselves, who misrepresent the nature of their own work and who fail to acknowledge and honour politics as the dirty activity that it is. These three currents – the rise of governance, citizens withdrawing from politics and politicians misrepresenting it – make politics disappear from view. They induce people to believe that politics is simply becoming irrelevant – that it is better to live and work without it.

Its reach and authority have become uncertain. People ridicule politics, shrug their shoulders, and turn away from it. They have more important things to do. They cultivate their differences and become indifferent to democratic politics.

Is this bad? Can politics not be taken care of by professionals? Why should everyone be a democrat? Is it not enough that citizens support democracy as a system while being uninterested in or disgusted by the

performance of politicians? There is a danger that, if citizens are put to sleep and lose the habit of replacing politicians and their programmes with better alternatives, then when they wake up, it may be too late. Power and the ability to use force to attain objectives may then be in the hands of groups who will not let themselves be controlled democratically.

One of the classical dangers of democracy, according to Plato, is that citizens mindlessly elect a popular saviour who turns out to be a tyrant. A second danger of democracy, signalled by de Tocqueville, is the bureaucratic rule by schoolmasters who leave no choice other than their own prescriptions. A third danger to democracy, prominent at the present time, is the illusion that we can do without politics – and by implication without democracy. Many contemporaries who, as communicators, producers or consumers, operate and travel in the globalizing network society are not anti-democratic, but simply think that politics is of very limited use in the organization of common life. They think of politics, if they think about it at all, as inherently limited. They do not think of it as something that is limited for practical purposes and in normal times, and that in principle has a much wider scope – a scope which is revealed in turbulent times.

Doing without politics, however, is an illusion. When politics disappears from view, it does not cease to be. It has only become less visible, less accountable and more difficult to address through critique and argument. Politics, in the sense of conflict over how to live together, will always be part of the human condition. It may be more or less visible and institutionalized, it may be more or less a question of force, threats, argument, or exchange. But it will always be there in one form or another. What may disappear, however, is democracy. Citizens in a democracy who criticize the political process as dull and dirty, and who think that they can do better without it, are in fact turning away from democracy. By ignoring and condemning politics *per se* they certainly do not make it disappear from the earth. They merely make it less democratic and less visible.

Unfortunately, politicians themselves contribute to the disappearance of politics. The media-driven society tends to re-create a particular representation of what politicians do. This standard image unfortunately misrepresents the exclusiveness of politics, and obscures what is special about it and why we need it. In the past politicians and political office were honoured because they fulfilled an awesome and very special task in society. The use of force was entrusted to them because the judgement and say over it should remain inaccessible to citizens outside public office. It was the nature of the task – using violence and deceit when necessary – that was acknowledged in keeping the distance that honour required.

In contemporary democracies things are different. Politicians pose, on television and elsewhere, as ordinary people who mean well and are always honest. Thus they misrepresent the nature of politics, which, as all more or less know, occasionally requires Machiavellian behaviour – for instance, lying and using force when necessary. The politicians pose as surgeons

who say that they never cut bodies. They lie about what they do and often even deceive themselves by believing their own lies. They in their turn become inept politicians, who are unable to do what it takes to bring political enterprises to a satisfactory end.

On the other hand, when they do not deceive themselves and do what the nature of politics requires, they risk exposure by the media when their unethical Machiavellian doings are uncovered. If questioned, their responses are usually evasive, and all can see and hear their discomfort. Politicians not being able to give a straight answer to a straight question is the characterization that has become dominant. Consequently, ordinary citizens turn away from this kind of (representation of) politics. It would be better if politicians would come out of the closet in order to acknowledge and explain the nature of their work. It is not easy to do so because this very special work, which is done by ordinary citizens serving in an extraordinary office, is often dirty and dull. But misrepresenting it will help no longer. If politicians explain and accurately represent the nature of their work, politics may once again be honoured as the dirty activity that it has always been.

Conclusion: governance with democracy

It is time to pull the threads of argument and observation together. A long detour was made to show how several currents feed the contemporary turn away from politics. Citizens are turning away from politics in boredom and disgust. They entertain the illusion that they can do better without politics. Politicians are afraid to present the true nature of their work in the media. They present an image of politics no one holds as true. Schemes and practices of governance tend to restrict the domain of politics to goal-setting and endorsing decisions reached elsewhere. All three currents hold a simplistic and false image of politics: goal-setting, childish impatience and demands for immediate wish-fulfilment, evasiveness when confronted with real results – an unpalatable mix of formlessness and mindless ritualism. This image of democratic politics dominates presentations in the media. Increasingly it is also the notion of politics that informs serious proposals for regime reforms.

With regard to governance this is unfortunate, because it needs political democracy for support, correction, and contact. Customer satisfaction is no substitute for democratic support. The customer considers only his own satisfaction whereas the citizen legitimizes majority decisions that he may personally have opposed. Democracy corrects abuses of powers by using its freedom to choose new incumbents. Non-democratic systems find it more difficult to replace experts who have an established position in the power structure. Democracy brings contact with real surprises, which experts tend to ignore because they do not know how to deal with them. The openness of governance, with its carefully selected variety of

relevant participants, differs from the rough confrontations that democracy forces upon its office holders. If governance is to enhance regime resilience, it needs to be coupled with the real-world variety that political democracy represents.

Is such a desired combination of governance and political democracy possible? Its impossibility has not been established. What has been established is that politics as childish bickering for wish-fulfilment is dangerous and that constraints are required. But that was known all along. The constitutional checks and balances of liberal democracies have been established precisely to provide such constraints. These have become part of what politics is in such regimes. The balance of the checks may need resetting – this is surely the case with regard to the media as a political institution – but this is no reason to regard politics as a formless blank slate. Liberal-democratic politics is a highly developed product of cultural evolution, of collective and painful learning through revolutions and world wars. There is no reason to assume that this learning has come to a full stop. If it is to continue, however, the images of politics have to be reset – including the self-image of democratic politics. The primacy of politics in nation states, its forward-looking and goal-setting pretensions, can no longer be maintained. The exclusiveness of democratic politics, its contribution to viable living together, has to be sought elsewhere. The emphasis will have to shift towards its function as a reserve circuit for spotting and dealing with unwelcome but inevitable surprises. Such a shift will require a more central role for accountability, for governing by looking back. As yet the logic of such processes of being held accountable is imperfectly understood. It will remain so as long as the language in which these processes are reported and the institutions that guide them are still infused with the forward-looking notion of politics.

There is still a long way to go. Ongoing regime reforms require a resetting of checks and balances, not a relapse into a simplistic notion of politics. Prospects for governance can only improve if politicians better present the nature of their work. Such changes would make it easier to conceive of politics not as an outside nuisance but rather as an indispensable part of designs for governance. Governance without democratic politics is dangerous. Like the Stasi in East Germany it may lapse into tyranny and rigidity. Democracy can check incipient tyranny. Through confrontation with real surprises it also exposes hidden rigidities. It should be thought of as an indispensable element of a resilient regime.

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Part II

Governance at the European level

6 Policy-making and accountability in EU multilevel governance

Arthur Benz

Introduction: the problem of democracy in multilevel governance

During the last two decades, the European Union (EU) has evolved from a community of states towards a supranational federation. While there are still disputes on the character of the emerging polity, it goes without saying that the EU shares most of its powers with the member states. As a consequence, policy-making implies the interplay between national and European institutions in multilevel governance. As regards democratic legitimacy, the complexity of these structures raises three basic problems. Firstly, interests, in order to be sufficiently taken into account in policy-making, have to seek access to political processes at different levels. Secondly, due to the involvement of many actors with veto power ('veto points': Immergut 1990), the costs of decision-making in multilevel governance are high and the effectiveness of policy-making is reduced by stalemates. Finally, the complexity of these structures apparently impedes transparent processes and makes it difficult both for supervisory organizations and for citizens to hold accountable those making decisions.

In the following sections, each of these three reasons for the democratic deficit in the European polity will be examined. It will be shown that the quality of interest intermediation and the efficiency of decision-making are not as poor as it is often assumed. The differentiated structures are advantageous for the 'input' of interests, as they provide opportunities for participation and as they integrate actors from various institutions into the effective core of the political system. Thus, the process of policy-making opens to a plurality of interests (e.g. Héritier 1999b). In addition, it will be argued against the veto-player theory (Tsebelis 2002) that multilevel governance does not necessarily impede decisions that effectively change the status quo. Powerful veto players such as negotiating governments and parliaments tend to avoid an obstruction of decision-making, because stalemate is usually considered to be a failure. Parliaments shift to post-decision scrutiny and informal influence. Governments and other actors participating in negotiations use differentiated

structures of interaction to manage the problems of the 'multilevel game'. These 'escape routes' (Héritier 1999a) reduce the probability of deadlocks. However, effectiveness is attained at the cost of the transparency of political processes and of democratic accountability.

Constitutional policies which aim to democratize institutions of the multilevel EU polity contribute to this development. They foster informal policy-making outside the legitimate institutions and generate forms of governance that give representatives in governments and parliaments ample opportunities to avoid responsibility for their decisions.[1] The real challenge is to democratize governance, not government. The final part of this chapter will discuss how accountability in multilevel governance might be 'restored'. It will propose a new division of power in governance and the establishment of institutionalized linkages between intra- and inter-level policy-making. In order to put these ideas into effect it is not primarily the institutional framework of the EU that has to be changed but the practice of politics within the institutions.

Compounded representation: a normative concept of democracy in multilevel governance

Most scholars agree that a simple transfer of institutions developed during the process of democratization in Western nation states could hardly solve the problem of legitimacy in multilevel governance (summarized in: Abromeit 1998, 2002; Føllesdal and Koslowski 1998; Lord 1998; Wolf 2000). The social basis of multiple 'demoi' does not justify the election of representatives by majority rule (e.g. Kielmansegg 1996; Offe 1998; Scharpf 1998) and, given the institutional fragmentation of multilevel governance, democratization cannot be achieved by establishing a parliamentary government. In fact, the structure of the EU does not correspond to that of a parliamentary democracy. It has more in common with a system of government, which, like that of the USA, separates power between the executive and the legislature and between different levels (Coultrap 1999; Decker 2000; Hix 1998). But in contrast to the American system, it includes elements of a consocional democracy (Schmidt 2000). Moreover, the parliamentary systems of the member states have been integrated into EU multilevel governance, which thus has evolved into a complicated mixed polity.

For this reason, it seems to be more promising to look upon the EU as a compounded government of a new type (Benz 2003a; Kincaid 1999). This conception resembles Arend Lijphart's definition of a consensus democracy (1999). However, using the term 'compounded government' avoids the assumption that such a mixed polity constitutes an integrated system in which decisions are solely based on consensus and cooperation. In fact, the combination of diverse institutions – some of them entailing processes of negotiation and accommodation, but some also implying

political competition – causes internal tensions. Whereas conflict induced by divergent 'rule systems' (Lehmbruch 2000) is a typical feature of multi-level governance, the EU in particular fuses incompatible components of competitive and consensus democracy. In order to better understand European policy-making, the interplay of the various parts of the compounded polity must be analysed and, in case of incompatibilities, the ways in which they are integrated must be found.

This analytical framework implies that we can use the normative concept of representative democracy to evaluate the democratic quality of the compounded polity. Democratic representation concerns the relationship between citizens and their representatives, in particular their government. Referring to David Easton's model of a political system (Easton 1965), this relationship can be analysed with regard to the input of citizens' interests, the output of policy-making by representatives in the political system, and the reactions of the represented, such as the feedback between citizens and their representatives (Scharpf 1970; Schmidt 2000: 204–214). These relations can be qualified as democratic so far as they conform to three criteria.

With regard to the input-side, the political system must allow an effective transmission of relevant interests of the citizens into the process of governance ('input legitimacy'). Policy-making should be made by taking into account the real plurality of interests of citizens and associations.

With regard to the results of policy-making, institutions and procedures have to produce acceptable solutions to problems ('output legitimacy'). They should at least prevent powerful veto players from blocking decisions that are on the agenda.

With regard to feedback, office-holders representing citizens have to be accountable for their decisions. Representatives have to give reasons for their decisions and the represented have to be able to punish them if they are not convinced by these decisions or by the reasons which endorse them. As a minimum this requires transparency of policy-making, clear responsibilities of decision-makers, and effective ways to control representatives.[2]

Intermediation of interests and decision-making in multilevel governance

Multiple access points

Regarding the input side of the political system, the first consideration must be that the European multilevel polity consists of a differentiated structure of representation:

- In the *Council*, heads of governments or ministers from the member states' governments represent the people of the nations forming of the EU.

- In order to legitimize their power, the members of the Council depend upon the support of a majority in their national parliament. Hence, in the multilevel structure of the EU, *national parliaments* are important institutions for transmitting and representing citizens' interests and for rendering the Council accountable.
- The *European Parliament* (EP) represents 'the people' of the EU. Although members of the EP may advocate the interests of their national or regional constituency, they more often than not promote transnational concerns (Bailer and Schneider 2000; Katz and Wessels 1999; Shephard 1998).
- Interests of specific groups in society are introduced into European policy-making via a multitude of consultative *committees*. While most committees assemble experts from specific policy fields, the European and Social Committee (ESC) is an institution designed to represent groups from the economic and social sector. Also of importance is the *Committee of the Regions* (CoR), the assembly of representatives of regions and local communities.

The multilevel structure of the EU has the advantage of providing organized interests with a multitude of points of access. The inter-organizational structure includes a plurality of institutions which attract associations promoting special interests in policy-making. In the EU, policies are initiated by the Commission and processes start by intensive consultations of the responsible Directorate General with representatives of national and regional governments, public administrations, and associations. The Commission, in order to be able to set an agenda for the EU, is compelled to establish good relations with experts from these organizations. Consequently, many of the committees and networks thereby established are designed to support the preparation of policy initiatives. Only on the basis of these external relations is the Commission able to define policies negotiable among national governments. Recent policy studies have shown that these consultations in both formal and informal committees contribute quite substantially to the 'output-legitimacy' by accumulating the knowledge of a great variety of experts. However, they should be regarded as structures appropriate to improve the input-legitimacy as well (Héritier 1999b; Kohler-Koch and Eising 1999).

Of course, the intermediation of interests is biased in the same way as it is in the case of national governments. Economic interests are better represented not only on the national but also on the European level (Eising 2000), especially as they can use the formal consulting procedures of the ESC. Moreover, experts from individual associations establish informal relationships with members of the EP and of the Commission. In addition, economic pressure groups lobby at the national level in an attempt to influence the formation of the national government's preferences. Groups supporting the protection of the environment or defending

the interests of the unemployed have a more limited influence. Non-economic interests are partially introduced into the policy process by actors from regional governments, who use the arena of the CoR as well as more informal channels for advancing the interests of the regions they represent.

Although the EU policy processes are not open to the participation of all interests at all stages, interest groups have considerable impact due to the multilevel character of policy-making, which allows them to exert influence before any proposals are fixed and introduced into the formal procedures. The structure-induced selectivity of the EU is low compared to those of nation states, in particular as the aggregation of interests takes place during the different stages of the policy process. In regional policy, the same patterns that Adrienne Héritier has described for environmental policy can be found (Benz 2003a; Héritier 1996). In the early stages, the agenda of the European policy process is defined by competing interests introduced by public organizations at the European, the national, and the regional levels as well as by organized interest groups. The various proposals are then discussed in negotiations between experts. They define a framework, which is finally subject to bargaining among national governments in the Council. Whereas the rule in the second stage is integrative bargaining with actors searching for a consensus, policy-making in the Council can be characterized as distributive bargaining, in which actors look for their individual profit rather than pursuing common interests (Walton and McKersie 1965; regarding the EU: Elgström and Jönsson 2000). Package deals, resulting from the intergovernmental bargaining process between the heads of governments and ministers, are thus to a considerable degree shaped by the pluralistic intermediation of interests and the informal negotiations of experts in policy communities.

Veto players and their decision strategies

In the European multilevel process of policy-making, decisions are made in the Council with the participation of the EP, the rights of which vary from policy to policy. In most cases, the Council decides by a qualified majority or by unanimity. This gives a minority of member-state governments or even an individual government a veto power. Ministers representing national governments in European policy-making are accountable to their national parliaments and need the support of a majority according to the rules of their parliamentary system, even though the constitutions of different member states assign their parliaments differing powers in EU policies (Maurer and Wessels 2001). National parliaments are thereby involved in multilevel governance.

The majority of the EP and the members of the Council can express vetoes in the European decision process and therefore can be classified as ‘internal veto players’. They can block decisions directly, but at the same

time they exploit their opportunities to influence policy-making by negotiation strategies. Hence they usually use their veto power as a bargaining chip. National parliaments constitute 'external veto players'. In principle, they are able to impede major integration steps and institutional reforms of the EU that they have to ratify (provided that these are not subject to a referendum), while their legislative and budget powers are relevant in the implementation of EU directives. However, they cannot overthrow European laws or programmes. Only by deciding on the position of their government or by controlling the negotiating behaviour of the responsible minister are they able to produce serious repercussions in the negotiation processes of the Council. External veto players can disturb policy-making in arenas outside their jurisdiction although they cannot immediately shape policies.

EP and Council as internal veto players

In order to avoid a government becoming divided between the internal veto players, the EP and the Council have to coordinate their policy-making. This is, however, difficult, since both institutions imply different structures of interests and different modes of operation. The Council assembles national representatives who are in general interested in joint policy-making at the European level where it concerns issues with which a nation state cannot deal, but who also pursue national interests in specific policies. Although they collaborate for a solution to those problems which reach beyond the boundaries of the nation state, they favour a decision which maximizes the advantages for their individual nation. Hence, governments have to deal with a typical collective choice dilemma: even if all member states' governments prefer a European policy to national or regional policies, this joint policy may fail due to the distributive bargaining strategies of individual governments. To overcome this 'Negotiator's dilemma' (Lax and Sebenius 1986), governments have to adopt cooperative strategies and evaluate issues not only from a national point of view but also from a 'European perspective' (Scharpf 1997: 124).

The result of this bargaining among Council members is not necessarily identical with the European interest as it is defined by a majority of the members of the EP. In the co-decision and assent procedures the relationship between the Council and the EP resembles the two-chamber legislature in the German federal system (see also Hix 1999: 98). However, conflicts are not structured by an integrated party system, such as occurs in the case in Germany, where results of decision-making in each institution are usually predictable. In the EU, the associations of national parties are heterogeneous and rather weak. Majorities in the EP are not determined by election results but are negotiated for specific policies. In the Council, specific groups of member states can be identified according to size, economic situation, time of accession, and other criteria, but exactly

which coalitions are formed depends upon the negotiation situation. The negotiation positions of both institutions not being reliable, they have to find compromises or package deals in situations which are often difficult and uncertain. Under these conditions, policy-making is likely to end in a deadlock, if the negotiations in both institutions evolve in different directions.

Indeed, actors in EU governance are able to cope with the quandaries which are inherent in the linkages between the EP and the Council. This can be explained by intense informal negotiations on the agenda under the leadership of the Commission and also by the participation of the European Parliament at this early stage of policy-making, when the Commission drafts its proposals. Certainly, the EP from time to time uses its power to threaten with a veto or to delay legislation. However, more important is the informal coordination between the Parliament and the Council, mediated by the Commission. Inter-institutional package deals or compromises are negotiated in committees with the plenary being able only to ratify or to reject. Moreover, relations between the Council and the EP have evolved into a certain functional division of powers with the EP focusing on the definition of the agenda and the Council making the final decision. Therefore, cooperation between both legislative institutions of the EU works fairly well and does not preclude effective decisions. More problematic is that policy-making in EU governance turns out to be highly informal. Informality results in opaque procedures which render the accountability of EP members difficult and thus diminish the democratic quality of representative structures.

National parliaments as external veto players

As external veto players, national parliaments are not exposed to the mixed-motive situation of the European negotiation processes. In contrast to governments participating in the European Council, they are not motivated to take the joint profits of a European solution into account. Certainly, the party or the coalition of parties forming the majority usually is loyal to their government and gives ministers sufficient leeway for negotiations at the European level. However, the government and its majority factions in parliament must also take into account possible reactions of their electorate. Decisions that promote European concerns at the cost of particular national interests can be exploited by opposition parties competing for the support of voters. Even when the majority parties agree with their government on accepting a European policy, the opposition parties may blame the government for relinquishing essential national objectives. In this way they compete to be identified as the better representative of the national electorate. Party competition induces government to adopt a bargaining strategy in EU negotiations, and the loyalty of majority parties in parliament does not counterbalance this orientation (Benz 2002). For

this reason, the dilemma of joint policy-making in the mixed-motive situation to which governments are exposed in the Council is intensified due to the accountability of governments to their national parliaments (Benz 1998).

In practice, members of national parliaments realize the dilemma of binding proposals and vetoes in multilevel governance, particularly if their decision implies the risk of a deadlock.[3] While they have enacted institutional reforms in an effort to improve their participation in the preparation of European decisions, they have used their acquired rights quite carefully. Members of national parliaments are aware of the fact that propositions forcing a government into distributive bargaining may bring about outcomes problematic even from the national point of view. Therefore, they formulate statements that define goals in broad terms, resort to *ex post* scrutiny of European policies and give their own government a wide scope for action. In addition, parliaments with the necessary institutional capacities (for example, the German Bundestag) use informal channels to influence their government and other European actors (Auel and Benz 2005).

By such means, national parliaments evade the 'traps' of multilevel governance either by turning to symbolic politics or by using informal links to European and national executives. The first strategy implies that parliaments formulate a strict nationalist position at the outset of European policy-making but abstain from enforcing its execution. Alternatively parliaments may blame an EU decision when it is settled without openly criticizing its own representatives in the Council. If national parliaments resort to informal channels to influence EU policies, they often depend on the activities of individual members of the responsible committees, in particular if they seek to address actors in negotiations at the European level.

These strategies have their costs concerning the quality of democracy. They lead either to a decoupling of national parliaments from European politics or to an increasing informalization of their participation. Both consequences undermine the accountability of political actors in multilevel governance.

Thus, the preliminary conclusion can be drawn that democracy in EU multilevel governance is neither impeded by a loss of parliamentary power to executives (Moravcsik 1997) nor is it doomed by 'joint decision traps' (Scharpf 1988). Effective decisions are possible in spite of a multitude of actors being involved. Vetoes are merely potential strategies and they induce actors to find ways to overcome or evade deadlocks in policy-making (Benz 2003b). The connection between negotiations on substantial issues and structural changes, which seems to be a particular feature of policy-making in the EU (Héritier 1999a; Laffan 2000), does not only concern the development of institutions but also the ongoing evolution of informal patterns of joint policy-making. In the case of democracy, this dynamic leads to either a decoupling of the parliamentary arena from the

Table 6.1 Veto players in EU multilevel governance

Veto players in EU multilevel governance	EP (in co-decision and assent procedures)	National governments in Council[4]	National parliaments
Type of veto player	Internal veto player	Internal veto player	External veto player
Action orientations	Mixed motives, but strong European orientation	Mixed motives	Nationalist
Possible veto strategies	Bargaining	Distributive bargaining	Binding mandates *ex post* veto
Possible consequences of veto power	Compromise	Compromise; package deals	Blockade or defeat of national position
Observable consequences	Informal conciliation mediated by the Commission		Symbolic politics of national parliaments; informal influence

process of effective decision-making or to a deinstitutionalization of governance (or both). These processes make democratic accountability illusory.

The problem of accountability

According to the normative concept of democracy which is outlined above, legitimacy requires the accountability of decision-makers, even if the process of decision-making provides sufficient access for interests and even if a policy seems to be efficient. In a representative democracy, accountability is the crucial device which binds governments to their citizens. It ‘depends on institutional arrangements that create a circular relationship between governors and the governed’ (Scharpf 1997: 183). Elected governments ‘of the people’ should be effectively controlled ‘by the people’, and thus be induced to act ‘for the people’. For that reason it is essential that those who are responsible for decisions can be identified, that their contribution to decisions is perceivable, and that those represented can effectively control the relevant decision-makers (Pitkin 1972).

In a nation state characterized by a single centre of policy-making, these requirements can be fulfilled in the relationship between the governing and the governed, in other words by a responsible government. This government and nobody else is accountable for its decisions to a single parliament or to citizens. In a multilevel system like the EU there is no single centre of power. With regard to accountability, we have to consider the ‘problem of many hands’ (Bovens 1998: 45–50). At the same

time, citizens' representation is organized in parliaments at different levels. Finally, accountability is not primarily rendered effective via elections. Whereas in a unitary nation state a government is immediately dependent on the outcome of parliamentary elections (if not of the election of a president), in a multilevel system there is no direct link between the election of representatives and the output of governance. Therefore, the possibility of influencing and, if necessary, vetoing decisions by institutions representing citizens is much more important.

Decisions in the EU are made by the EP and the Council. Moreover, the Commission is relevant. Although designed as an administrative body, and not as a democratic institution or as a European government, it sets the agenda for negotiations, organizes a considerable part of the participation of interests, and, most importantly, acts as mediator in the case of conflicts between the EP and the Council. Finally, national parliaments function as intermediary bodies between the Council and citizens. As a result, the chain of control from citizens to the members of the Council can only conform to the standards of democratic theory if members of these parliaments are held accountable for their policy in European affairs.

Deficits of accountability in EU multilevel governance are mainly caused by the interplay of these institutions and the inter-institutional dynamics already described. They make it difficult for citizens and members of national parliaments to identify the specific contribution of each responsible actor and to control or sanction the behaviour of the relevant actors.

The Commission as a collective actor is accountable to the EP, which has gained the power to force the Commission to resign if the parliament casts a vote of non-confidence. Nevertheless, the individual members of the Commission still have strong connections to national governments, which do after all nominate them. It is not unlikely that future amendments of the EU Treaties will turn the Commission into a fully responsible government of the EU. However, more problematic than weak parliamentary control is the fact that the activities of the Commission which render policy-making effective evolve mostly in informal interactions.

Among the institutions making decisions in EU multilevel governance, the members of the EP are directly accountable to their electorate. Where accountability is concerned, there are good reasons to doubt whether voters are adequately informed about the activities of the EP and whether they are sufficiently motivated to control their representatives by participating in elections (Lodge 1996). This is mainly caused by decision processes which do not make it sufficiently transparent to citizens how majorities are formed. Beyond the failure of European parties to organize reliable factions, this is to a considerable extent attributable to the inter-institutional relations between the EP and other European institutions, in

particular the Council. The EP alone cannot be held accountable for decisions in multilevel governance. Moreover, its real power is based on the work of its committees and their engagement in informal processes.

The members of the Council are individually accountable to their national parliaments. The German Constitutional Court correctly argued in its decision on the Maastricht Treaty that the democratic legitimacy of the EU had to be guaranteed mainly by national parliaments (for a similar reasoning see Kielmansegg 1996; Steffani 1995). However, as has been explained above, national parliaments face a dilemma: if they use their formal powers, they threaten to undermine the effectiveness of European policy-making. An *ex post* scrutiny of the negotiation behaviour of ministers in the Council may have the effect of informing the citizens about the policy of government. However, if such information is directed against the government, the majority party or coalition interested in securing the government's re-election is hardly willing to make it public. This is the reason why conflicts between governments and national parliaments are usually treated confidentially and are dealt with in informal consultations (variations between national parliaments are outlined in Auel and Benz 2003). In addition, the informality of relations between national governments and parliaments in European affairs undermines the transparency of the parliamentary process at the national level, even though it is essential to make multilevel governance effective. As long as European policies are rarely debated in public, the citizens will be in no position to use their voting behaviour to influence matters.

These deficits of accountability in multilevel governance can be explained by the institutional development of the EU, which tends to bring about a fusion of the powers of various actors or institutions. This dynamic is caused by the combination of a 'federal' division of power between levels with a 'horizontal' division of legislative functions. In a federal structure, lower-level organizations always seek to increase their participation in decision-making in proportion to the additional powers and competencies that a government claims. Participation in multilevel processes is intended to compensate for the loss of responsibilities by centralization. The horizontal division of power in the legislature tends towards a fusion of powers, as all institutions concerned are inclined to extend their share in decision-making. Normative theories dominating the discussion on institutional policies like parliamentary democracy (participation of parliaments), federalism or regionalism (participation of lower-level governments), or pluralism and consocialism (participation of associations) support this trend. However, the more actors are integrated into decision-making, the higher the 'decision costs' (in particular due to divergent action orientations, incompatible decision rules that ignite conflicts when combined, and the rising number of internal and external veto players). The production of policy outputs being the primary goal of politicians, they resort to procedures outside the formal institutions that

reduce the likelihood of vetoes. Any advantage from these patterns of multilevel governance is attained at the cost of accountability.

How to restore accountability

The analysis presented so far can be summarized as follows. The multilevel system of the EU is characterized by a structural dynamic that increases the number of actors participating in policy-making. While this development improves the intermediation of interests by associations and experts, the multilevel system is at the same time burdened by veto players in institutions which operate according to different and partially incompatible decision rules. In order to reach satisfactory decisions, actors have to use their veto power carefully and remain aware of the potential for deadlock. While internal veto players are able to change their strategies during negotiation processes, external veto players, such as the majorities of national parliaments, usually resort either to informal influence or to symbolic but not very effective scrutiny. This weakens the accountability of national governments, which represent citizens of member states in the Council, in the same way that the informal and opaque procedures for coordinating policies between the Commission, the Council and the EP, as well as between national governments and their parliaments deteriorate the accountability of elected members of parliaments to citizens.

For a policy aiming at democratizing the EU, the crucial issue, therefore, is how accountability can be 'restored'. If the fusion of power described above is caused by a particular institutional division of power conforming to standard theories of democratic constitutions, alternative arrangements must be found which avoid the interference of incompatible institutions both between the levels and on the different levels, yet without reducing the opportunities to introduce a plurality of interests. The strict coupling of institutions caused by the fusion of power has to be turned into a more loosely coupled structure of governance (Benz 1998).

Between the levels, the principle of subsidiarity is often considered as a guideline for sorting out powers. However, experience shows that such an abstract rule does not prevent conflicts over competencies. These are regularly settled by compromises leading either to overlapping competencies or to a compensation of the level losing power by granting participation rights. A more stable division of powers can be realized by distinguishing between the types of legislative functions fulfilled on the different levels. For example, if the EU is responsible for laws creating markets, European laws correcting markets (regional, social, labour market, and environmental regulation) can be limited to setting standards for national policies, similar to the 'Open Method of Coordination' but with the use of legislative procedures. Standards do not establish strict

rules like directives but define corridors for action that give the lower-level governments sufficient leeway to decide on how to fulfil them. If governments' motivation to satisfy standards is stimulated by 'benchmarking', multilevel policy-making may be rendered transparent not only for the supervising European institutions but also for the national parliaments and citizens.

Concerning the organization of politics on the different levels, a fusion of the processes in different institutions and the clash of incompatible decision rules can also be constrained by a functional division of powers. Conflicts among rule systems can be reduced if one institution focuses on defining agendas and evaluating policy outcomes in public debates, while the other makes the final decisions. In the EU, this would require a distinction between a 'federal' (intergovernmental) and a 'parliamentary' (supranational) type of legislation. In the first case, the Council would decide, whereas the EP would have the right to initiate proposals and provide for public discussion and evaluation. In the second case, the EP would make the final decisions and the Council would initiate and evaluate. The same principle of dividing functions could apply to the relations between national parliaments and their respective governments. In addition to their already existing responsibility for public evaluation of European policies, parliaments could be given an independent power to initiate European policies and thereby contribute to setting the European agenda.

Beyond this division of powers accountability can be restored by transforming the informal linkages between institutions and levels into arenas of public deliberation. Opening informal processes of negotiation to the public can have negative repercussions on multilevel governance, if participants in negotiations are constrained to strictly pursue the interests of their constituency (Benz 1998). However, public scrutiny can also force actors to argue in terms of the public interest (Elster 1998: 12). This is most likely to happen if party-political cleavages are kept at bay and if the public is not divided along national, regional, or social lines. Therefore, public arenas should be designed so that they cut across established political structures and levels of government. Following this argument, existing expert committees could be turned into 'independent commissions' including actors from associations, governments, and parliaments. A similar purpose could inform joint meetings of members from national parliamentary committees and from committees of the EP, if such gatherings are to be used to stimulate public deliberation on how national and European concerns can be integrated.

These ideas do not amount to a design for a constitution of the EU. As democratic deficits in the EU are caused more by the dilemmas emerging from linkages between institutions rather than by the character of the institutions themselves, constitutional reforms have their limits. Multilevel polities are always burdened by internal and external veto players and by

more or less incompatible rule systems, and whether they work or not depends more on actors' strategies than on institutions. Therefore policies intended to democratize multilevel governance have to rely, to a considerable degree, upon the 'intelligence of democracy' (Charles Lindblom) in a differentiated political system, for instance upon the structural dynamics instigated by the ongoing struggles of a plurality of actors to advance or protect their interests and to make and implement decisions against veto powers.

Notes

1 The arguments presented in this chapter are based on a study on the reform of the financial and institutional framework of EU structural funds that was part of the Agenda 2000 (Benz 2003a).

2 The following analysis does not deal with the societal preconditions of democracy but solely with the institutions of democratic governance and their effect on politics and policy-making. These institutions should provide *opportunities* for citizens or interest groups to influence policy-making, to create and limit political power, and to hold governments accountable. It is assumed that the multinational character of the European political space is no insurmountable obstacle for democratizing the EU.

3 The impact of parliamentary vetoes varies according to decision rules in the Council and the stages of EU policy-making. In EU legislation, the influence of a national parliament upon its government can block a European decision, if the Council decides with unanimity. In case of majority decisions, parliamentary vetoes can impede their government from finding a compromise that at least partially conforms to the interests of the respective member state. Hence the national parliament risks that its position may be defeated. In the transposition of EU law, national parliaments have effective veto rights. If these are applied, the national government is forced to enter into new negotiations with European institutions or with parties in the national parliament in order to find a solution conforming both to the European framework and to the preferences of a majority in parliament – otherwise the member state concerned may be punished by the EU.

4 In order to simplify the argument, neither the Council as an institution nor the individual representatives of national governments are considered as veto players. Since the power of the Council depends upon a qualified majority or the unanimity of its members, the latter can be taken as the true veto players.

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7 The legitimacy of functional participation in European risk regulation

A case study of occupational health and safety

Stijn Smismans

Introduction

The legitimacy question of the European polity has gained increasing importance in both the political and the academic debates. Both debates have mainly focused on issues of territorial representation, predominantly using the parliamentary model (Dehousse 1998) as a framework for defending a steady increase of the European Parliament's competencies, but equally stressing the importance of the member states as 'Masters of the Treaty' and their representation in the Council, the principle of subsidiarity (in territorial terms), the role of sub-national authorities, and the need to strengthen the involvement of national parliaments in European decision-making. However, far less attention has been paid to the issue of 'functional participation', that is the participation of (non-territorial) collective actors in the decision-making process.

For sure, there is a very broad literature on interest-group participation in the European polity (Claeys *et al.* 1998; Greenwood 1997; Greenwood *et al.* 1992; Mazey and Richardson 1993; Van Schendelen 1993; Wallace and Young 1997). Yet this literature is generally of a descriptive nature. It provides case studies of lobbying activities, focusing on a particular (type of) interest group or on a certain policy sector (Cawson 1997; Green Cowles 1995; Schneider *et al.* 1994), or it addresses more generally the overall pattern of interest articulation at the European level, inducing a debate on whether the European polity could be described in terms of pluralism or neo-corporatism (generally concluding in favour of the former) (Falkner 1998; Gorges 1996; Grande 1996; Greenwood 1998; Streeck and Schmitter 1991). Only in the last years some attempts have been made to address the question of functional participation in European policy-making from a more normative angle. Thus some authors have suggested that the participation of interest groups in European policy-making may constitute an additional source of legitimacy for the European polity (Andersen and Burns 1996: 227; Héritier 1999; Wessels 1999: 64). Moreover, some European institutions, in particular the European Commission

and the European Economic and Social Committee, have recently developed a legitimating discourse around the concepts of 'civil society' and 'civil dialogue', referring to their institutionalized interactions with intermediary organizations (Smismans 2003b). Finally, both academics and community institutions have claimed that 'new modes of governance', such as the Open Method of Coordination, involve novel ways to expand participation by elements of civil society in policy-making and thus contribute to 'participatory democracy' (Eberlein and Kerwer 2002; Scott and Trubek 2002; Smismans 2003a for a critical assessment of these claims).

However, there remains a distance between, on the one hand, these general considerations on the potential of functional participation as source of legitimacy in the European polity and, on the other hand, the complexity of institutions through which such participation is structured. There are many different ways through which interest groups have access to European policy-making, going from informal lobbying to well-institutionalized consultation procedures. Forms of functional participation vary strongly according to the policy sector. Therefore, rather than making considerations on the legitimacy of functional participation in European policy-making in general, I will analyse different forms of functional participation separately and look at how they are combined within one policy area in particular, namely European occupational health and safety (OH&S) regulation.

The field of OH&S has been chosen because it is a typical example of risk regulation that has largely characterized European policy-making.[1] Although European intervention in this field entails increasingly 'persuasive policy-making' (Hervey 1998: 30; Smismans 2003c), it has been characterized above all by the adoption of a large number of legislative directives. It has thus constituted for long the core of European social policy-making. Since the legitimacy of European intervention has particularly been questioned in the field of social policy, it is interesting to analyse precisely in this area how functional participation in policy-making may play a 'legitimating role'.

This chapter starts with an analysis of the general *rationale* for functional participation in European OH&S regulation. While there exists such a common *rationale*, the normative foundations for the different forms of functional participation are not completely the same. This is illustrated here by analysing the two main institutionalized forms of functional participation in OH&S regulation, namely the Advisory Committee for Safety Hygiene and Health Protection at Work and the European social dialogue, which can respectively be described as a model of 'tripartite expertise' and of 'bipartite corporatism'.

The aim of this chapter is thus to bring the attention for the legitimacy of functional participation in European governance beyond the macro-level considerations on assumed benefits of civil society and the strengths and weaknesses of an overall pluralist or corporatist system. At the micro-

level I will look at the normative foundations of two different forms of functional participation and assess them on the basis of input- and output-legitimacy as well as accountability (see also Chapter 6 by Benz in this volume). Legitimacy, that is a generalized degree of trust of the governed towards the political system and political institutions, results from the availability of democratic procedures, which accommodate and facilitate the fullest possible participation of interested parties (input-legitimacy) (see Bobbio 1987: 19), and from the efficiency and performance with which policy-making addresses citizen's concerns (output-legitimacy) (compare with Preuss 1998: 6; Weiler 1991: 186). Accountability entails being liable to give an account or explanation of actions and, where appropriate, to suffer the consequences (e.g. non re-election), take the blame or undertake to put matters right if it should appear that errors have been made (compare Harlow 2002: 9; Oliver 1991: 22).

However, forms of functional participation do not exist in complete isolation from one another. Whether they may be an additional source of legitimacy also depends on how they are combined in the policy-making process. Therefore, I will subsequently look at this meso-level, that is the way in which the AC and the social dialogue relate to each other in OH&S regulation. Finally, I will conclude that given the different normative foundations by which the various forms of functional participation are inspired, it will prove extremely hard to formulate generic principles which would ensure the legitimacy of such participation or even broader of 'European governance arrangements (EGAs)', as argued by Philippe Schmitter in Chapter 9 of this volume.

The **rationale** *for functional participation in (OH&S) regulatory policy-making*

As national experience has shown, risk regulation – such as protecting the workforce against health and safety risks – can hardly be established via extensive and detailed legislation drawn up and/or debated by territorial representatives (Joerges 1999; Fisher 2000; Vos 1997). Risk regulation is a cognitive demanding process, in which scientific arguments are combined with normative considerations. Scientific expertise is needed to make a risk assessment (what are the risks associated with specific substances or with certain working conditions) and to provide instruments for risk management (what can be technically realized to avoid these risks). Risk regulation, however, also entails normative considerations, namely what risk can we as society accept? The answer might differ according to national or regional traditions and culture. The answer also depends on the costs of regulation. OH&S regulation entails costs for producers, for consumers (products might become more expensive), for national administrations (implementation and control measures), and sometimes even for workers (OH&S standards might influence competitiveness and therefore

employment). Assessment of economic costs is thus inherent to the process of risk regulation.

Also at the European level the Parliament, or more general, territorial representatives (including the Council) are not well equipped to provide all the expertise and considerations associated with risk regulation. The Commission on the other hand has not enough staff to develop such expertise in the variety of fields it is dealing with. Therefore risk regulation in the field of OH&S has been characterized by a combination of territorial and functional representation.

Community OH&S regulation has mainly[2] been developed via the legislative road so that territorial representatives in the EP and in the Council (following co-decision since the Amsterdam Treaty) would be able to judge the acceptability of risks and to take account of national differences. Moreover, by using the Directive as a legislative instrument, the member states have also considerable discretion on how the objectives of the legislation should be reached.

However, in this normal legislative road forms of functional participation have been institutionalized in order to reply to the need for expertise and the involvement of concerned policy actors. The combination of forms of functional participation in OH&S legislation consists in the consultation by the Commission of a tripartite Advisory Committee (AC) on the moment of drafting the legislative proposals and a subsequent consultation on the formal legislative proposal of the European Economic and Social Committee (EESC). In addition, since the Amsterdam Treaty the European social dialogue procedure applies. Due to limits of space I will focus on the AC and the social dialogue and will not deal here with the EESC, which has shown to have a marginal influence on OH&S regulation (for the legitimacy of the EESC in broader terms see Smismans 2000).

The Advisory Committee for Safety, Hygiene and Health Protection at Work (AC): 'tripartite expertise'

Composition and role

The Advisory Committee for Safety, Hygiene and Health Protection at Work was created in 1974 by a Council decision,[3] with the task to assist the Commission in the preparation and implementation of activities in the field of OH&S. Following a recent revision of these AC statutes in the light of EU enlargement,[4] the Committee consists of three representatives per member state, namely one government representative, one trade union representative, and one representative of employers.[5] AC members are appointed by the Council, who, in practice, always respects the candidates proposed by the member states. Government representatives originate from the national ministries responsible for OH&S, or in some cases from semi-public authorities or agencies having responsibility for national

OH&S policy (e.g. in the UK, Ireland, and Sweden). The representatives of management and labour mostly come from the national social partners' confederations, though in a small number of cases (and especially for management) they originate from sectoral national organizations and even from private firms. Though the Commission is not formally obliged to consult the AC, it generally takes no action in OH&S without the involvement of the Committee. It consults the AC at the stage of drafting legislative directives or implementation measures, and when it establishes its working programme in OH&S.

The AC as additional source of legitimacy: 'tripartite expertise'

The potential value of the AC as an additional source of legitimacy resides in a complex combination of elements of representation and deliberation, which would also provide better policy-output. The AC aims to ensure a 'balanced representation' of those most directly dealing with OH&S, namely the OH&S experts of the national social partners' organizations and of the national administrations. Such involvement allows to take account of the opinions and interests of those concerned – which can be considered to be an element of democratic participation (input-legitimacy) – but also to improve the policy-output by including the expertise of these actors (output-legitimacy).

The input-legitimacy of the AC relates to its representative character: by providing an equal representation of management and labour, the AC has the advantage over lobbying in that it creates a guaranteed access for the 'weaker party' in this field, namely labour. This has been facilitated by the Commission's funding of the Trade Union Technical Bureau (TUTB) – a group of OH&S experts working for the European Trade Union Confederation, who assist the labour representatives in the AC. Moreover, by appointing *national* (instead of European) representatives of the social partners and by including a group of government representatives, the AC is also supposed to express the diversity of national traditions and practices.

The input-legitimacy of the AC does not only depend on the way in which it represents the interests concerned but also on the way it makes these interests interact. Theories of deliberative democracy (Fishkin 1991; Habermas 1996; Nino 1996; Cohen and Sabel 1997; Bohman and Rehg 1997; Elster 1998) have clarified that interests should not be taken as given, but they can change through deliberative or communicative processes. While it is beyond the scope of this chapter to provide an analysis of different models of deliberative democracy, one could roughly argue that these theories claim the added democratic value of deliberation which would ensure that decision-making is not the mere outcome of power games but is based on rational argument or on references to the common good. From this angle the AC creates a deliberative forum, in

which interest groups have to readjust their opinions to each other, and is therefore 'superior' to lobbying, where interest groups directly formulate their demands vis-à-vis the Commission. The AC reduces the discretion of the Commission to pick and choose between different interest-group positions, while the deliberative process in the European Parliament and the Council is reinforced by an additional forum of deliberation.

Yet, deliberation in the AC is a complex process. It allows that both technical arguments and interest-based positions come to the fore. The process starts at the level of the working parties within the AC. A working party, composed of 12 AC members,[6] has to prepare a proposal for a common decision of the AC. As results from interviews held, technical deliberation strongly prevails within the debate in the working party. Working-party members are chosen among those AC members having technical expertise in the particular OH&S question dealt with by the working party. Moreover, often experts from outside the AC are invited to participate in the working party. The nature of the deliberation changes when a proposal arrives at the plenary session of the AC. At the eve of the plenary session, the three 'interest groups' within the Committee, namely management, labour, and national administrations, have separate meetings to discuss the proposal of the working group. The role of the interest groups in the Committee has gradually strengthened over the years, and has now been formalized in the new AC statutes. Within the meetings of the interest groups, the 'technical proposal' of the working party is debated with more interest-based arguments. The debate within each Group meeting is coordinated by a spokesman, who on the labour side has often been a representative from ETUC and on the management side a representative from UNICE (respectively the European confederations of labour and management).[7] The group of national administrators is coordinated by the representative of the country holding the EU presidency. The three spokesmen are in informal contact, so that the debate and the position of the Group meetings can be adapted to the search for consensus to be expressed in the AC opinion the day afterwards in the plenary session. The presentation of coherent and constructive AC opinions largely depends on the skill of the spokesmen. Often the plenary session can suffice to note, after the presentations of the spokesmen, that there is a common agreement on the text. In some cases, one of the three groups – and in particular, management or labour – may like to add a separate opinion or comment to the AC opinion. The AC is thus not merely a scientific committee, but it allows a deliberation in which technical arguments arise and interest-based positions can be expressed. To a certain extent the AC resembles what happens in certain comitology procedures involving scientific committees. It has been said that 'arguing' among scientific experts (within scientific committees) reduces the potential for conflict on specific issues before they enter policy arenas (comitology committees) that are dominated by strategic bargaining (Bücker *et al.*

1996: 47; Gehring 1999). Though normative arguments and strategic bargaining remain the exception in the AC, one can distinguish between the very technical working-party level preparing a 'technical common agreement', which facilitates the more interest-based deliberation at the level of the interest groups, and the plenary assembly.

The input-legitimacy of the AC can thus neither be reduced to a mere question of 'representing given interests' nor to an ideal-type 'rational deliberation among neutral experts', but could be described as a model of 'tripartite expertise', that is it inserts into the policy-making process expertise, which is based on a deliberation by a balanced tripartite representation of interests concerned. As results from interviews hold with policy-makers, this form of functional participation has had a useful and decisive role in OH&S policy (output-legitimacy). It leads mainly to technical adjustments of Commission drafts. Normally it does not lead to fundamental changes of the Commission's initiative. However, if the AC can express a large consensus, in particular of management and labour, this will be considered by the Commission as so 'representative' that it may lead to a serious readjustment or even a withdrawal from the proposed initiative.

Legitimacy problems

Despite the satisfying performance of the AC (output-legitimacy), and despite its search for a balanced representation and deliberation, the legitimacy of the Committee can also be questioned on several aspects.

First the input-legitimacy of the AC can be questioned with regard to the assumption that the Committee is representative of national differences. While the AC statutes ensure that each member state has an equal number of AC members, there are no effective procedural guarantees to ensure such a balance through the functioning of the AC. Although there is an equal number of representatives from national administrations, management, and labour also within the working parties, there is no rule to have an equal representation according to nationality in these meetings. In the eight working parties active at the end of 1997, for instance, only once was a Greek AC member a member of a working party (in this case a representative from the national administration). At the other extreme, 17 times a UK member was active at the working-party level. In two working parties the UK was even represented on employers', workers', and government side (AC Annual Report 1997). The functioning of the working parties is illustrative of a more general problem of the AC, namely the dominance of those member states that have the best expertise in OH&S issues (mainly the Northern countries),[8] and the passivity of those that do not have this expertise (mainly the Southern countries).[9] The legitimacy of the AC as representing national differences can be questioned if the Committee is generally used by the Northern member states

to impose their regulatory approaches and standards on the Southern countries, especially since this generalization of the higher standards gives competitive advantages for those member states, which already have such norms.[10]

Second, one can also ask whether social partners' organizations, together with national administrations, represent all those concerned by OH&S regulation. Shouldn't interest groups other than the traditional social partners be represented, such as the disabled, that is those suffering the consequences of occupational accidents and diseases and those desirable to be (re-)integrated into the workplace (requiring particular protective measures)?

Third, one can question the accountability of a decision-making process involving the AC. AC members are not directly elected; the 'government representatives' are simply part of the national administration, whereas only a small part of the social partners' representatives is elected within their organization. In any case the control on their action in the AC is minimal. However, this needs not imply a serious accountability gap. The AC does not replace territorial representation, that is it has only advisory competence in a decision-making process, where, in the end, territorially elected representatives take the decision. Legal competence is obviously no guarantee since in technical issues territorial representatives might simply rubber-stamp what has been decided by technical experts but, as just explained, the AC practice is one of having influence without dictating the solution. Functional representation thus does not bypass territorial representation.

However, there is one element of accountability which remains equally important for mere advisory structures, namely transparency as a way of accountability to the general public and to the decision-making institutions (Gronbech-Jensen 1998). Transparency is 'a way of informing the public', so that the citizen can know which decisions are taken, why and on basis of which arguments. Transparency can also enable scrutiny by other institutions.

However, EU committee procedures have been largely criticized for their opaque nature (De Búrca 1999; Dehousse 1999; Schaefer 1996; Vos 1997). Their opinions are not published, their composition remains often unknown, everybody ignores their real influence, and there even remains doubt on the exact number of committees active in European policy-making. Access to committee documents has rarely been granted to researchers and much less to the public or media. 'The opaque and confusing nature of the committee system results in its non-accessibility to the scrutiny of other institutions' (De Búrca 1999: 76). Neither the EP nor the media is in a position to review, evaluate, or monitor what is happening in the committee rooms.

Among the various types of committees, the consultative committees to the Commission, such as the AC, appear to be a bit more transparent

than, for instance, comitology committees, where there is great reluctance to uncover the positions taken by the member states (Schaefer 1996: 22).

It has even been argued that the publicity requirements regarding the AC could be called exceptional (Falke 1996: 162) compared with the opaqueness of other committees. According to Article 3 of the original AC statutes, 'the Committee produces an annual report on its activities, which the Commission forwards to the European Parliament, the Council, the Economic and Social Committee and the Consultative Committee of the European Coal and Steel Community'. Such publicity should enable some scrutiny by and accountability to the other institutions. It is surprising, then, that in a time when transparency seems to have become the cure of all ills, the new AC statutes have omitted this publicity requirement. One should admit that the 'transparency guarantee' of the annual report had serious limits. The report contained the list of all AC members, but without mentioning the organizations they originate from. Moreover, the succinct summaries of the AC opinions reproduced in the annual report were not of a nature to enable a profound scrutiny of the AC activities. Yet, the mere requirement in the new AC statutes that the list of AC members should be published in the official journal does not resolve the core transparency problem of the AC.

The opinions of the AC are not published, and it is very difficult to get access to them. Moreover, the Committee sessions (both plenary and working groups) are not public. Requesting increased transparency of the AC seems thus entirely justified, and the publication of the AC's composition and of its opinions on the internet are measures which would not require excessive efforts.

The European social dialogue: 'bipartite corporatism'

The social-dialogue procedure

The European social-dialogue procedure, enshrined in Articles 138 and 139 EC Treaty, combines a consultation process in the social field with the possibility to leave regulation to the autonomous bipartite dialogue between employers' organizations and trade unions. The procedure starts with a double obligation for the Commission to consult the social partners on all 'proposals in the social field',[11] first on the possible direction of Community action, and secondly on the content of the envisaged proposal. On the occasion of this consultation, management and labour may inform the Commission of their wish to deal with the issue by bipartite collective agreement. If they do so, the Commission will suspend the normal legislative procedure (within a renewable time-limit of nine months). If the negotiation among the social partners fails, the normal legislative procedure via (the Economic and Social Committee, the

Committee of the Regions) the European Parliament and the Council goes ahead.

If, on the contrary, a European collective agreement is reached, it can be implemented in two ways: either in accordance with the procedures and practices specific to management and labour and the member states, or 'at the joint request of the signatory parties, by a Council decision on a proposal from the Commission'. Since the legal consequences of the former route remain unclear, diverging according to national traditions, and often simply depending on whether the affiliated organizations will press their members to respect the agreement (Blanpain and Engels 1995: 294; Ojeda-Avilés 1993: 280), in general the latter option has been chosen (although only available if the EC has competence in the social-policy issue the agreement is dealing with). In that case the collective agreement's provisions will become part of Community law and will have a generally binding nature due to implementation via a Council Directive,[12] so all member states are obliged to reach the objectives of the collective agreement, although they have the freedom to choose the instruments to reach them.

In the field of OH&S, the social-dialogue procedure can be applied since the Maastricht Treaty (following the Social Agreement attached to it) and has become obligatory since the Amsterdam Treaty, so the Commission is obliged to consult the social partners at the initial stage of drafting a legislative OH&S proposal, on both its direction and content, and should leave the option for bipartite dialogue.

The social dialogue as additional source of legitimacy: 'bipartite corporatism'

The legitimacy of the social dialogue, in particular with regard to the double-consultation stage of the procedure, could be based on the general common *rationale* for functional participation in risk regulation, that is it provides expertise and thus better policy-output (output-legitimacy) and involves the actors concerned (input-legitimacy). However, this double consultation is inherently linked to the option to leave regulation to the autonomous bipartite dialogue of the social partners. The normative assumptions of such a procedure would lie in the idea that 'self-regulation' via associations has democratic and representative advantages over democratic systems (merely) based on territorial representation, such as argued by theories of functional democracy (Cole 1920) and associative democracy (Cohen and Rogers 1995; Hirst 1994) (input-legitimacy), and ensures better (and even more just) policy-output, as often argued in corporatist literature (Cawson 1986: 146; Olson 1995: 31; Schmitter 1983: 45), and more efficient policy-making (output-legitimacy). The latter has been particularly argued with regard to the European social dialogue: it would allow bypassing deadlock that has so strongly characterized European social policy (Lo Faro 1999).

Although both the AC and the social dialogue are forms of functional participation, the latter does not correspond to the model of 'tripartite expertise' but could rather be described as a model of 'bipartite corporatism'. This does not imply any claim that EU interest intermediation as a whole would be a replica of national neo-corporatist settings, in which the 'encompassing' organizations of management and labour monopolize tripartite concertation with the government on macro-economic policy, but it merely means that the social-dialogue procedure of Articles 138–139 is built on neo-corporatist inspirations, such as privileging access for certain interest groups, encouraging the formation of encompassing organizations and creating a self-regulatory space based on bargaining between opposed interests.

The European social dialogue creates a privileged relationship between public authority – in this case the Commission – and a limited number of encompassing organizations, and encourages the formation of the latter. The Commission sets out a set of criteria to establish a list of organizations to be consulted. They should, among others, be organized at European level and represent either the interests of management or labour organized cross-industry, or relate to a specific sector or category.[13] Whereas this list of organizations consists currently of 44 associations, the Commission has stated it is 'conscious of the practical problems posed by a multiplicity of actors [. . . and] will endeavour to promote the development of new linking structures between all the social partners so as to help rationalize and improve the process', that is reduce the number of players it has to deal with by making the bigger organizations more comprehensive. The Commission has for a long time – and especially since the mid-1980s – played an incentive role in the development of the European central associations. In particular, the strengthening of the ETUC (vis-à-vis its own constituents and vis-à-vis the employers), via substantial funding, was considered by the Commission to be a primary condition to make the social dialogue take off (Ross 1995: 377).

Contrary to the AC, which aims in particular at technical deliberation, the social dialogue reflects more the 'interest-based' dimension of the corporatist model. Although there is no such thing as 'pure interest representation of given interests', or 'pure rational deliberation', the examples of the AC and the social dialogue show how models of functional participation may exemplify either the 'interest representation' or the 'deliberative aspect'. In the AC, committee members are chosen for their technical expertise, have no clear mandate from 'their organization' and may even not be members of the association they are supposed to represent. They are individuals brought together from different associations, administrations, and countries, to provide a balanced deliberation. In the consultation stage of the social dialogue, in contrast, organizations are directly consulted by the Commission and are not asked to deliberate before coming up with a common opinion. Each European association is

supposed to represent directly the 'given' interest of its sector. Moreover, the consultation stage is linked to the option of bipartite dialogue, which is traditionally conceived as a process of bargaining, in which the two main opposite functional groups in society, namely management and labour, make successive offers and counter-offers, the outcome of which depends on the balance of power between the two groups, exemplified by the weapons of industrial conflict.

Such a self-regulatory space has characterized neo-corporatist systems which – although with strong differences in national industrial-relations systems – recognize that public authority should to some extent abstain from intervention in certain work-related issues, which can better be dealt with by bipartite negotiation between management and labour. The European social-dialogue procedure provides such a 'horizontal subsidiarity' in favour of management and labour; namely at the request of the social partners regulation via bipartite negotiation is given priority over the normal legislative road of policy-making. Moreover, the collective agreements reached can even be implemented *erga omnes*. Finally, the option for bipartite negotiation provided in the treaty has reinforced the privileging of encompassing organizations. The Commission, the Council, and the Court of First Instance (UEAPME-case) have recognized the ETUC, UNICE, and CEEP as representatives of management and labour cross-industry, capable of signing European collective agreements binding for all employers and workers. This recognition has encouraged other European associations of management and labour to collaborate with these three organizations in order to have their opinion represented in the ETUC–UNICE–CEEP negotiations. The Commission has explicitly welcomed this evolution to inter-organizational coordination and centralization.[14]

Legitimacy problems

The input-legitimacy of the social dialogue, which ensures a privileged access to policy-making for a limited number of 'encompassing organizations', which, moreover, have the opportunity to sign agreements with effect *erga omnes* bypassing the normal legislative route, depends on two conditions that seem difficult to meet at the European level. First, it assumes that management and labour have a balanced bargaining position (Kahn-Freund 1972: 134). Only under this condition will they be willing to sit down at the negotiation table and can their self-regulation be considered legitimate. At the European level, however, labour lacks any such social-economic pressure, particularly in the form of industrial action or threats thereof. It is not strong enough to make a European strike a real threat, in particular since trade unions from different member states may consider their interests to be divergent. While labour needs to strive for further European social regulation, building difficult alliances across borders and trying to convince rank and file to develop a sense of Euro-

pean labour solidarity (Turner 1998: 119), management can profit from 'negative integration' and finds itself in the comfortable position that non-action is generally to its benefit (Streeck 1996; Streeck and Schmitter 1991).

Second, also the assumption that the 'encompassing organizations' are representative is problematic. Despite the recognition by the Commission, Council and Court of First Instance, the three umbrella organizations UNICE, CEEP and ETUC cannot be said to represent all categories of employers and employees. Although the ETUC now formally represents over 90 per cent of union members in the EU (Ebbinghaus and Visser 2000: 774), certain categories of workers such as those in public services or managerial staff are mainly organized in specialized trade unions, such as the CEC. On the employers' side the situation is even more heterogeneous. UNICE has attempted to set up a 'European Employer Network' in 1989, which functions as a forum for information exchange among over 150 sectoral employers' organizations, but it has not been able to coordinate all these different interests (Ebbinghaus and Visser 2000: 773). At the same time, it struggles internally with its decision-making procedures in order to combine the heterogeneity of its members with the need for a clear negotiation mandate in the social dialogue (Turner 1998: 124). At the sectoral level, the possibility to sign representative agreements is even more difficult since labour faces organizational weakness at the sectoral level and can hardly find coherent employer interlocutors (Dolvik 1997: 361).

Moreover, the problem of representativity is not limited to the question of which employers' or trade-union organization is 'the biggest' within a certain sector, or which cross-sectoral organization is most encompassing. Even if the ETUC represents 90 per cent of unionized workers in Europe it still does not represent the broad majority of workers (Betten 1998: 32) since many employees within the EU are not unionized (Schmidt 1999: 261). Trade-union membership is in decline, while non-unionized atypical workers are, as far as their number is concerned, no longer that atypical.

Representativity can indeed be measured at several levels: in relation to the number of unionized workers, in relation to the entire workforce, or in relation to the population at large. Moreover, as theories of associative democracy suggest, representativity can also be considered in terms of internal accountability within the social partners' organizations. Internal efficiency does not always go hand in hand with internal democratic procedures. Thus it has been argued that the larger and more encompassing the representative association, the less sensitive the leadership will be to demands from particular sub-constituencies (Immergut 1995: 205). The picture of neo-corporatist interest intermediation as a process of negotiation among elites, which subsequently 'sell' the compromise obtained to their members and ensure the respect of the agreement by their fellows, is well known.

Could the legitimacy of the social dialogue then be based on its particular efficiency and better policy output (output-legitimacy), as has often been argued in relation to corporatist systems?

If one expects the European social dialogue to resemble the kind of collective bargaining established at the national level, linked to the acquisition of rights from the welfare state, the European social dialogue has not too much to offer. However, if one sees the social dialogue as an alternative regulatory technique and compares its outcome with what would have been reached if the procedure did not exist, the assessment is more shaded. The social dialogue has been able to regulate certain issues via collective agreement, which were blocked for years under the normal legislative procedure, such as parental leave, part-time work, and fixed-term contracts. However, it is difficult to see to what extent this has been due to the new social-dialogue procedure as such or has resulted (also) from the introduction of more qualified majority votes on social issues (and the temporary opt-out of the UK). In the end we are talking about a handful of European collective agreements in a decade. One should note that, given the imbalance in bargaining power between management and labour, the former is only willing to sit at the negotiation table under the threat of legislation. Such 'bargaining in shadow of the law' (Bercusson 1994: 20) is unlikely to occur if policy priorities tend to go in the direction of more persuasive policy-making and coordination of national policies, as has been the case for European social policy since 1992.

Within the sector of OH&S policy, European collective agreements will remain an exception. OH&S is traditionally not a sector in which bipartite negotiation is well developed. Especially due to its technical nature, but equally due to the particular role of public authorities (e.g. control on implementation), OH&S norms are generally established via legislative intervention.[15] ETUC and UNICE also agree that at European level negotiation will be the exception to the rule[16] and can at best occur regarding procedural matters, information, consultation, participation, and training.[17] For the European social partners, vocational training in OH&S seems currently the most probable issue on which negotiation in that sector might occur.[18]

Finally the European social dialogue raises serious problems of accountability. Although the consultation stage of the social dialogue offers more transparency than mere lobbying since the list of consulted organizations is published by the Commission, their opinions on policy proposals are not documented publicly. However, whereas the transparency of consultation via the AC may be increased by publishing AC opinions, the solution to publish all the opinions of consulted organizations under the social-dialogue procedure may complicate rather than clarify decision-making. Publishing everything is not necessarily the best guarantee for transparent decision-making: it is easy to lose one's way when there is 'too much information'. While it is difficult to improve the

transparency of the consultation stage, the accountability of the social-dialogue procedure is particularly problematic where regulation is left to the autonomy of the social partners. If European collective agreements are implemented 'in accordance with the procedures and practices specific to management and labour', they are not generally binding and accountability is a question of the relation between representatives and members within the associations. Such accountability cannot be taken for granted since representatives may not be elected and may lack clear mandates, whereas their action remains largely invisible for the associations' members, in particular if such technical issues as OH&S are at stake. Yet, the accountability problem is most profound when collective agreements are implemented by Council decision, in which case they will be generally binding. There is no guarantee for individual citizens and workers to be able to blame or punish those who have taken the decision, namely the European social partners' organizations. The European Parliament has no decision-making power in the social-dialogue procedure. One could argue that accountability is ensured by the role of the Commission and the Council in the procedure; namely the implementation of a collective agreement *erga omnes* is only possible by Council decision at the proposal of the Commission, and Council members are accountable to their national parliaments, whereas the Commission is accountable to the EP. However, such accountability is very remote, in particular if one takes into account that the Commission and the Council will not have written a word of the legislation via collective agreement. They can (respectively) only refuse to propose/adopt the implementation of the collective agreement without changing its wording. Although this is not explicitly stated in the treaty, the Commission has stressed that in order to respect the 'contractual autonomy of the social partners', it would withdraw its proposal for implementation as soon as the Council intended to change the wording of the agreement.[19]

Tripartite expertise and bipartite corporatism; complementary?

In the preceding sections the legitimacy of the AC and the social dialogue have been assessed separately, as if they were alternative forms of functional participation. However, in practice these two forms of functional participation are combined in the policy-making process. To assess the legitimacy of functional participation one should also look at how different forms of participation are combined.

Legal complementarity and practical inefficiency

Since the Amsterdam Treaty the consultation of the AC and the social-dialogue procedure are assumed to be complementary in legal terms.

Whenever the Commission intends to take a legislative proposal in the field of OH&S it will consult the AC and the European social partners via the social dialogue. The former is a long-established practice, although only optional and not obligatory from a strictly legal point of view; the latter is obligatory under the EC Treaty.

This parallel consultation leads to duplication. The European social partners' organizations consulted under Article 138 contact their national member organizations before taking a position, and in particular the OH&S experts of these organizations. Often these national OH&S experts are appointed by their national organization as an AC member. The same persons are thus consulted twice (in the same phase of the policy-making process). This duplication tends to make the role of the AC superfluous; since the AC plenary only meets twice a year, the social partners will already have expressed by then their opinion via the double consultation of the social dialogue.

One can thus seriously question the legitimacy of the current combination of forms of functional participation in OH&S regulation. None of the involved actors (in particular the Commission and the social partners) are satisfied with the procedure. This situation illustrates that a pluralist multiplication of access-channels does not necessarily contribute to more legitimacy, since better input-legitimacy may easily be counterbalanced by lack of efficiency and thus low output-legitimacy.

A reform proposal

The Commission and the social partners have debated several proposals to reform the current procedure, but without agreeing on a satisfactory solution. One could opt to do without the AC, since its consultation is not obligatory. Yet, the AC has proved its efficiency and the involved actors prefer to retain this form of functional participation. Vice versa one could argue not to apply the social-dialogue procedure. Its consultation stage is less transparent and less deliberative, and collective agreements in OH&S affairs are likely to remain an exception. Yet, this would only be possible by changing the treaty provision, which requires the application of the social-dialogue procedure in OH&S or by substantially changing the established criteria for the procedure set out by the Commission. This would constitute a serious step back in the established practice of the social dialogue, which is neither desirable for the Commission nor for the social partners. Moreover, even if the latter are convinced that collective agreements will not play a primary role in OH&S, they are in favour of leaving the formal option for self-regulation. One is thus looking for a procedure in which tripartite expertise and bipartite corporatism could be complementary in a satisfactory way.

One of the reasons to reform the AC in 2003 was precisely to resolve this problem, but the newly adopted AC statutes have not dealt with this issue.

A solution may be to reform the AC in such a way that the double-consultation procedure of the social dialogue could take place within the Committee. This would be possible by strengthening the role of ETUC and UNICE as coordinators of the trade-union group and the employers' group within the Committee.[20] The Commission would still consult 44 organizations following the social-dialogue procedure, but among them the ETUC and UNICE would formulate their opinion on the basis of agreement in respectively the trade-union and employers' group of the AC. At that point they could opt to deal with the issue by bipartite negotiation. If they don't opt for negotiation, the tripartite deliberation in the AC would take over to formulate a common opinion, together with the representatives from national administrations, addressed to the Commission in the normal legislative proposal.

Such a reform would obviously change the normative grounds on which the AC is based, increasing its 'interest-based character' to allow the formal expression of the separate interests of management and labour. Or to put it in the guiding terms of this chapter: beyond the general *rationale* for functional participation in risk (and OH&S) regulation, one should take into account that each form of functional participation is based on different normative grounds, giving different weight to elements of interest representation, expertise, deliberation, and output-legitimacy.

Conclusion

This chapter has brought the debate on the potential of functional participation as an additional source of legitimacy in policy-making beyond general claims on the role of civil society or on the overall pluralist or corporatist features of the system of interest intermediation. It has shown that the legitimacy of different forms of functional participation is based on different normative grounds. Thus the AC can be said to correspond to a model of 'tripartite expertise' whereas the social dialogue corresponds to 'bipartite corporatism'.

That these different forms of functional participation are based on different normative grounds has important consequences.

First, it would prove extremely difficult to formulate and apply generic principles to guarantee the legitimacy of different forms of functional participation, let alone of very different 'European governance arrangements (EGAs)', as proposed by Philippe Schmitter in Chapter 9 of this volume. Each form of functional participation – and, even more so, each EGA – has its own function and 'raison d'être', to which are related different arguments of legitimacy.

Second, precisely because forms of functional participation are based on different normative grounds, it is not easy to argue whether one form should be preferred to another. In the case analysed, it is difficult to argue from a normative point of view whether the AC should be preferred to the

social dialogue or *vice versa*, since tripartite expertise and bipartite corporatism are very different options. Yet, if each of them is measured against its own normative criteria, using the general grid of input- and output-legitimacy and accountability, the social dialogue has appeared more problematic than the AC.

The AC has been considered an efficient advisory structure (output-legitimacy) that provides expertise and insights from the actors concerned. It does so in a more transparent manner than mere lobbying, without upsetting the accountability of policy-making guaranteed through territorial representation. Its shortcomings could be improved: the imbalance among national representatives within the AC could be corrected by ensuring balanced national representation at the level of the working groups in the Committee and by providing European funding to build up national expertise (as has been done for labour with the TUTB). The transparency of its action could be improved by publishing its composition and its opinions on the internet.

In contrast, the consultation stage of the social dialogue appears less transparent, which seems hard to improve. But its most problematic features reside in the fact that it does not realize the two main conditions under which such self-regulation would be legitimate, namely a balanced bargaining position and representativity of management and labour. Moreover, by excluding any role for the EP and reducing the Commission's and Council's role to rubber-stamping, the procedure lacks accountability. Finally, as an alternative regulatory technique its output is very modest, given that management is generally only willing to negotiate under the threat of legislation.

Third, while one can assess the legitimacy of a form of functional participation against its own normative criteria, one should take into account that in practice different forms of functional participation can be combined in the policy-making process. Such combination does not automatically imply the sum of 'added legitimacy' provided by each form of functional participation separately, since it may mean overlap and lack of efficiency, as shown by the case study at hand. The reform proposal suggested illustrates, once again, the particular normative grounds on which an alternative combination of functional participation would be based.

Notes

1 The case study has profited from interviews with (several of) the main policy actors in European occupational health and safety policy: four Commission officials in the division responsible for Occupational Health and Safety (OH&S); six members of the AC (two on the employers' side, two on the workers' side, and two on the government's side); two representatives from the European Employers' Confederation UNICE (Union of Industrial and Employers' Confederations) and three from the European Trade Union Confederation (ETUC) active in this field; two members of the European Parliament; and

two members of the European Economic and Social Committee responsible for OH&S legislative proposals in their institution.

2 Most OH&S directives provide a procedure, through which the technical annexes to the directive can be adapted to technical progress. It consists in a comitology procedure, thus not involving the EP and involving the Council only when agreement cannot be reached in the comitology committee. However, the directives also stress that the comitology procedure can only be used for 'purely technical adjustments', whereas more 'fundamental policy choices', such as adding supplementary minimum requirements, should be taken via legislation.

3 Council Decision of 27 June 1974 on the setting up of an Advisory Committee on Safety, Hygiene and Health Protection at Work, 74/325/EEC, OJ L 185/15, 09/07/1974.

4 Council Decision of 22 July 2003 on the setting up of an Advisory Committee on Safety and Health and Work, OJ C218/1, 13/9/2003. These new AC statutes enter into force on 1 January 2004. The new statutes aim mainly to adapt the AC to enlargement. It also adjusts the formal rules to the actual practice of how the AC *de facto* worked over the last years. The following description is based on how the AC has worked until now and will indicate the rare issues in which the new statutes may change that practice.

5 Until 2004, the AC has been composed of six representatives per member state, two for each group. It was possible to appoint an alternate member for each full member. Under the new statute, two alternate members are appointed for each full member.

6 Until 2004 there was no formal rule on the number of AC members in a working party. Mostly they were composed of about 15 members.

7 This practice may slightly change following the new AC statutes. Until now representatives from ETUC and UNICE have acted both as coordinators and spokespersons, although they were as such not members of the Committee (composed of representatives from the national organizations) and this role was not formally recognized. The new statutes recognize that 'each interest group shall designate a coordinator who will take part in meetings of the Committee, the Bureau and the interest groups' (clearly drafted to allow the role of ETUC and UNICE representatives, although not members), but also states that 'each interest group shall select one of its members to be its spokesperson' (which seems to exclude the representatives of ETUC and UNICE).

8 Namely the UK, France (mainly for machinery), and Denmark (Germany only on chemical products) (interviews with AC members hold in Bilbao).

9 Greece, Portugal, and Spain (interviews with AC members hold in Bilbao).

10 For a comparable phenomenon in environmental policy, see Héritier *et al.* (1994).

11 In practice only on proposals of a legislative nature.

12 The choice of the word Council 'decision' in Article 139 paragraph 2 has been odd if the procedure was aimed at giving collective agreements a generally binding nature, since Article 249 EC Treaty defines formally a 'Decision' as 'binding in its entirety [only] upon those to whom it is addressed' (my adding). In a joint declaration the Council and the Commission have stated that it is up to them to choose from the binding acts referred to in Article 249, namely regulation, directive, or decision, in order to realize the 'implementation by Council decision' of Article 139. (See Declaration 54/96, Council Document 8979/86.) Until now, they have always chosen a directive.

13 Other criteria include that the European association should consist of organizations which are themselves an integral and recognized part of member states' social partners, have the capacity to negotiate agreements, and are representat-

ive of all member states as far as possible. See the Commission communication concerning the application of the agreement on social policy, COM (93) 600 final.

14 Commission Communication Adapting and Promoting the Social Dialogue at Community Level, 20/5/98, indent 5.3.

15 ETUC internal document.

16 Position de la CES sur l'application du traité d'Amsterdam dans le domaine de la santé et de la sécurité sur le lieu de travail; document adopté par le comité exécutif les 16–17 septembre 1999. Commentaires de l'UNICE du 27 avril 1998 sur 'la consultation des partenaires sociaux dans le cadre de la politique communautaire de protection de la santé et de la sécurité des salariés sur le lieu de travail'.

17 Internal document ETUC.

18 Interviews with the European social partners (two representatives from ETUC and one from UNICE), held in Brussels.

19 Commission Communication on the Application of the Social Agreement, COM (93) 600 final.

20 As mentioned above, the new statutes explicitly recognize the role of coordinators within the interest groups. Yet, this has not been linked to the problem of overlap with the social-dialogue procedure.

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8 European governance by committees

The implications of comitology on the democratic arena

Christine Neuhold

Introduction[1]

The previously neglected phenomenon of governance by committees has recently received increasing attention in the academic literature (see Christiansen and Kirchner 2000; Pedler and Schaefer 1996; Rhinard 2000; Van Schendelen 1998). In various guises, committees are active at every stage of the EU decision-making process, from the expert groups of the Commission and the working groups of the Council to comitology committees.[2] The increasing role which committees play within the European arena can be seen as a response to 'the need for an even higher level of technical expertise, which stems from the growing complexity of regulating contemporary western societies'.[3]

This chapter will focus on the legitimacy problems which are inherent in the particular governance arrangements of the committees active in the implementing phase of EU legislation. It will not dwell on the very complex decision-making rules within the so-called 'comitology committees' which, although they have just recently undergone extensive reform, are still a phenomenon that requires empirical research (Weiler *et al.* 1995: 9).

The following study is guided by the assumption that the system of comitology committees reveals a tension between 'input-' and 'output-based' legitimacy. Before developing this argument further, it is necessary to explain what is implied by these terms. With regard to the input-side, a decision-system has to be open to the widest participation of interested groups and their interests have to be considered in the process of governance ('input-legitimacy'). With regard to the results of policy-making, institutions and procedures have to bring about socially acceptable solutions to problems ('output-legitimacy' – see Chapter 6 by Benz and Chapter 7 by Smismans in this volume). In addition, representatives have to be held accountable for their decisions (Hix 1998). For the EU system, this would imply that actors delegated to these committees have to be accountable to democratic institutions.

This chapter focuses on these problems and on how they are resolved

in practice. The tension between output-based and input-based legitimacy and the phenomenon of democratic accountability is illustrated by a case study of committees active in the field of health and consumer protection.

The following sections will begin by examining the main aspects characterizing the comitology system and by identifying features of output- and input-legitimacy prevalent in these committees. Subsequently the focus will be on the accountability of committees to democratic institutions. The case study will examine the problem of accountability in particular, as this issue has become very pertinent since the development of these committees. The chapter will conclude with a discussion of possible solutions to the problems identified. In this context, the proposals which the Commission put forward in 2002 regarding the reform of comitology will be briefly analysed.

Comitology committees in the context of the debate on democratic legitimacy in the EU

The development of comitology committees

Comitology committees have emerged as a reaction to the particular requirements which must be met when secondary legislation is implemented on the European level. Representatives delegated to these committees together with Commission officials are engaged in a process of 'pre-implementation' of European law.[4] They have to clarify further and adapt aspects of secondary legislation. In this context, Pedler and Schaefer (1996: 7) distinguish the different tasks of comitology committees as follows:

- policy implementation, where the framework provisions of a legal act will be further specified and laid down in greater detail in a regulation or decision that will be adopted by the Commission;
- policy application, which encompasses measures that lead to the concrete application of Community programmes;
- policy evaluation and updating, which involves the possible revision of a legal act that has been in force for a longer period of time.

Comitology committees have developed on an *ad hoc* basis and are based upon the principle that 'necessity is the mother of invention'.[5] Although they have been the object of much controversy due to legitimacy issues, they have become an intrinsic feature of the EU system of governance. The actual origin of these committees, designed to control and assist the Commission in the implementing phase of secondary EU legislation, dates back to the early days of the Common Agricultural Policy (CAP). At the beginning of the 1960s, European activities in this field already required extensive and detailed technical regulation. The

Council, then the one and only legislator, lacked not only the relevant information, but also the resources necessary to respond to the needs of day-to-day management in this area, including the ability to take quick action. However, the Council did not wish to delegate to the Commission the implementation of acts which it had itself adopted, without first retaining some form of control.

Several proposals were put forward as to how this control could be accomplished. After intense debate a rather unorthodox compromise was finally reached which provided for the creation of committees known as *management committees*. These were (and still are) made up of representatives of the governments of member states and their task was, very simply put, to advise and control the Commission.

However, the Commission was still entitled to adopt its own proposals immediately, even if a committee gave a negative opinion by a qualified majority.[6] In the latter case, the proposed measures had to be referred back to the Council, which by qualified majority could then take a different decision within a specified time – usually one month. This procedure, which might appear inconsistent, allowed the Commission to take particularly urgent steps without delay, but at the same time provided the Council with the possibility of intervening and modifying the Commission's decision. Most sectors of the CAP were subsequently established on this basis and the implementation of decisions was carried out using a variation of this (only provisional) committee procedure in each sector.[7]

As further Community policies outside the field of agricultural policy were established, different procedures for their implementation were created. Due to growing complaints among several member states that the existing procedures allowed the Commission too much leeway, the Council's control over implementing measures was strengthened. In 1966, the Council debated the question of which committee procedure ought to be chosen for implementation in the field of customs, veterinary legislation, and legislation on feeding-stuffs and foodstuffs. As a compromise, the first *regulatory committee* was established in June 1968. According to the new procedures, the Commission could only implement its proposals if the committee approved them by a qualified majority; if it did not, then the Commission had to submit its proposals to the Council. The Commission could nevertheless implement its proposals if the Council had failed to reach a decision within a certain period of time. This possibility was called a *filet* (safety net) procedure. While the Council could agree to this type of committee in the area of customs, some member-state governments opposed its adoption in veterinary matters and in the fields of plant health and feeding stuffs, which were all deemed to be issues of high political sensitivity. Hence the member states wanted to retain the utmost form of control over the decisions taken by the committee. Here, the *filet* procedure was thus complemented by the *contrefilet* ('double safety net') procedure. This meant that when the Council could not reach a positive

decision by qualified majority on the proposed measure, it could prevent the Commission from adopting the measure by a simple majority.

The basic procedures for comitology committees were established on the basis of this compromise. However, the decision specified neither their quantitative development nor the criteria for determining their functioning, efficiency, financing, and the type of procedure to be chosen in a specific policy field. In the following years, and in fact until the Council's Comitology Decision of 13 July 1987,[8] the Council used (usually minor) variations of these committee procedures whenever it delegated implementation powers to the Commission (Demmke *et al.* 1996: 61–62).

It would go beyond the scope of this chapter to provide a detailed analysis of both the original comitology decision of 1987 and the revised version of 1999.[9] At this point it will suffice to say that the decision following the Single European Act (SEA) of 1987 codified the procedures, but by no means led to a simplification of them. The Council maintained not only the three procedures proposed by the Commission,[10] but added two variants to the management and regulatory committee procedures. With regard to the latter, particular mechanisms allowed member states to exercise the most effective control over the Commission. Furthermore, the Council reiterated its prerogative to reserve implementation for itself and inserted restrictive rules to govern the conferral of implementing powers in the case of safeguard measures. The reform of 1999 led to a certain streamlining of these very complex practices as the number of procedures was reduced to three and the variants were abolished (Haibach 1999). However, as will be shown below, pertinent questions remained unanswered concerning the accountability of these committees to democratic institutions.

Comitology committees and problems of legitimacy

Based on the observations outlined above, the system of comitology committees will be examined from the perspectives of both input- and output-related legitimacy criteria.

Seen from a functional or technocratic perspective, it could be assumed that these committees obtain their legitimacy by constituting a 'problem-solving arena' and by generating a constant flow of effective (implementing) legislation. This assumption is supported by the quantity of output produced by these committees. According to the Annual Report of the Commission on the workings of committees issued in 2003, 247 comitology committees were contributing to the constant output of legal acts in 2001 (Commission of the European Communities 2003). From an examination of the annual reports published by the European Commission, it becomes apparent that from 1983 to 1996 the Commission produced an average annual output of around 6,000 legal acts.[11] Such a vast

number is to be explained by the fact that a majority of them were in fact implementing acts 'produced' by the Commission with the 'assistance' of comitology committees. In 2001 these committees gave around 4,500 opinions[12] and in a vast majority of cases a solution was actually found within the committees themselves (as illustrated below). This justifies the at least preliminary conclusion that, by making decisions on a large number of problems, representatives participating in comitology committees fulfil the minimal criteria of output-legitimacy, if such legitimacy is identified with the ability to come to a decision.

As a study carried out by the European Institute of Public Administration for the European Parliament has revealed (European Parliament 1999: 21), these committees mostly deal with matters that require a high degree of technical expertise. The study has covered 204 implementing acts, mainly relating to the environmental sector and to economic and monetary affairs. These are sensitive areas where it can be assumed that infringements of the legislative and the budgetary rules occur more regularly than in other areas.

In a majority of the cases studied, however, it became apparent that the committees dealt with highly 'technical' issues that did not give rise to any political controversy, for instance the establishment of the ecological criteria by which the Community Eco-label could be awarded to single-ended light bulbs.[13] These issues require high levels of expertise, which is provided by those representatives of the member states' administrations who deal with related problems on the national level.

Nevertheless, it should be noted that representatives in these committees deal not only with matters that require detailed expertise such as laying down recommendations 'to publish best-practice in interconnection (telephone) pricing', but also with issues which are both highly technical and strongly politicized such as problems of biotechnology, BSE and dioxins. More often than not the boundary between purely technical issues and those with political implications is far from clear. This is one of the reasons why the accountability of these committees to democratic institutions is a salient issue.[14]

With regard to the criteria for input-legitimacy, the comitology system provides access for the positions and interests of the member states into the implementation process of secondary legislation. Comitology committees are composed of government representatives, who are delegated by the administrations of the member states (available online at: http://europa.eu.int/comm/agriculture/minco/index_en.htm). According to the standard rules of procedure for committees, each member state is to be represented by one official. It is up to the chair (in other words, the Commission) to decide whether the committee can be opened to a wider public – that is, whether an expert working within the respective field can accompany the delegation. However, experts are not allowed to vote.[15]

The Commission itself also plays an important role, chairing the meetings and drafting the proposals for deliberation and decision within the committee. In addition to deciding whether member states should be accompanied by experts, the Commission must also invite experts to speak on particular matters, either at the request of a member or upon its own initiative.[16] It should therefore be emphasized that the system of comitology as it currently exists does not provide a forum for many varieties of input, nor does it allow a particularly extensive range of actors to supply that input. Interest groups who might have issues at stake within the areas subject to deliberation are excluded, and there is no provision for broader participation on the part of citizens. Proposals to open committees at least to a partial public and to provide for a wider range of input (Toeller 1998) have not as yet been implemented.

Comitology committees and their accountability to democratic institutions within the EU

When dealing with political issues, representatives participating in the committees have to be accountable to democratic institutions. In European governance, one of these institutions is the European Parliament, and the other is the Council. Moreover, the role of member states' national parliaments must also be considered in this context.

Accountability to the European Parliament

The European Parliament has adamantly criticized the system of comitology for the following reasons:

- The committee structure is not considered to be transparent, and committees are regarded as a 'Trojan horse' by which national interests are 'carried into' the implementation process of community law, without the European Parliament being able to exercise its power of parliamentary scrutiny.
- Comitology is seen as a strategy on the part of the Council to 'devalue' the European Parliament's participation within the legislative process, since agreements reached at the implementation stage could 'distort' the legislative decision. In such cases, MEPs could no longer be held accountable for the decisions which they had made within the legislative process, since these decisions would have been substantially modified by the manner of their implemention.
- The European Parliament fears that a transfer of decision-making powers from the Commission to the committees could undermine its right to hold accountable the EU executive.

(Toeller 1999: 342)

The European Parliament expressed its opposition to these institutions as early as the beginning of the 1960s, before the committees were even established (European Parliament 1961). Over the course of time the European Parliament has resorted to several tactics in an attempt to get across its demands. Examples include blocking the budget for committees and also bringing annulment proceedings against the comitology decision of 1987 before the European Court of Justice (ECJ).[17] Furthermore, it vetoed legislation due to 'inadequate' comitology procedures.[18]

The conflict came to an end after the Maastricht Treaty (1993), which put the European Parliament on an (almost) equal footing with the Council in the legislative process, although the implementing measures remained unchanged. The European Parliament had primarily demanded the same rights of scrutiny, approval, and veto with regard to proposed implementation measures as the Council. For the practical political process, these rights meant that when an executive measure adopted under codecision was referred back to the Council by the respective comitology committee, it should also be referred back to the European Parliament (European Parliament 1993). The European Parliament had feared that measures which had been decided under codecision with the Council would later be amended substantially by using the 'backdoor' of comitology committees.

When the 1987 Comitology Decision came up for reform at the end of the 1990s,[19] the European Parliament made far-reaching demands, which can be summarized as follows:

1 Legislative and executive matters should be clearly separated, so that the executive authority would be strictly responsible for implementation.
2 When implementing acts have been adopted by way of codecision in the legislative process, the European Parliament should be put on an equal footing with the governments of the member states.
3 The committee system should be simplified by abolishing all management and regulatory committees.
4 The Commission should provide 'regular and timely' information, which should not only include the drafted measures of implemention themselves, but also details of their composition and legal basis, committee minutes, and committee voting results, and a register of committee members' interests.

(European Parliament 1998; Hix 2000: 73–74)

Although these demands might seem justified at a first glance, detailed scrutiny reveals that they are problematic.

With regard to the first proposal, it is quite understandable that the European Parliament as the parliament of the EU aims to limit the scope

of executive acts, restraining their implemention to issues with only minor political implications. However, as emphasized above, the distinction between 'political' and 'non-political' (that is, technical) issues is not as clear-cut as it may appear. Extremely technical issues may require decision-making upon crucial matters which have important political implications and touch, for example, upon questions of an ethical and moral nature.

The above-mentioned study conducted by the European Institute for Public Administration, for example, identified two cases which might be regarded as 'highly technical' but actually affected the powers of the legislator. The first case dealt with the labelling of beef and beef products, and was considered as problematic due to the wide scope of the implementing powers that had been delegated. In this particular case the European Parliament had made no objections to this broad delegation.[20] However, it remained an open question how the legislators – in this case the Council in consultation with the European Parliament – could protect these prerogatives.[21] In the second case, which dealt with the steering equipment of motorcycles, it is interesting to note that the Commission proposed to the committee to change the scope and content of the basic directive.[22] By doing so, it violated the rights of the European Parliament by proposing measures which went beyond the powers actually delegated by the legislator (European Parliament 1999).

When it comes to the second issue (that is, the implementation of legislative acts adopted in the codecision procedure), the European Parliament is still very far away from attaining the equality which it has demanded. At present it only has a right to 'call back' the issue with regard to the scope of the measure, and cannot do so with regard to the substance.[23] This situation implies that the European Parliament can only intervene if a comitology committee has exceeded its powers and gone beyond the specific tasks which are laid down in the basic legal act; it cannot object if the committee has modified the legal act with regard to the content. Different lessons can be learnt from the financial-services sector, where important exceptions have been made since 2001 to the rule that the European Parliament has no say on the substance. In this field, the Commission (as chair of the comitology committee) has to take the 'utmost account' of the Parliament's position with regard both to the content and to the substance. It is also interesting to note that the European Parliament has incorporated into the legislation a 'sunset clause', according to which the delegation of implementing powers becomes invalid after four years unless it is renewed both by the European Parliament and by the Council. Consequently, the European Parliament can refuse to renew an operation which has not conformed to its demands (Corbett 2003).

The third proposal, intended to strip power from the member states' governments by abolishing all management and regulatory committees,

is highly problematic. In the implementation of single-market legislation, the governments play a crucial role in supporting the Commission. The Commission possesses neither the personal nor the administrative and financial means to be solely responsible for the implementation of legislation. Due to the fact that its staff includes only approximately 20,000 civil servants, the European Commission is highly dependent upon a network of experts. Moreover, by relying on the representatives of member states – representatives who have been described as the 'Europe of administrations' – the Commission gains insight into the positions adopted by those states. This insight makes the implementation of legislation more effective, as any conflicts can be resolved at an early stage of the policy process.

The limitations to the fourth demand of the European Parliament – that it should be able to scrutinize all drafts of implementing measures – can be found in the practical political process. The European Parliament itself admits that it is not equipped for such an ambitious task: 'Neither the European Parliament nor its standing committees is yet adequately equipped to scrutinize technical proposals forwarded to expert committees. In particular, it lacks the scientific and technical expertise to do so [. . .]' (European Parliament 1998: 21). If the European Parliament were to analyse, even only superficially, each implementing measure in an attempt to judge whether it '*exceeds the implementing powers provided for in the basic instrument*',[24] a huge burden would be placed upon its personnel and financial resources – as foreseen in the 1999 Comitology Decision.[25] Furthermore, these resources would at least to some extent be taken from those needed for legislative duties.

A study conducted in 1998 on the impact of implementing measures shows that, from approximately 1,376 measures which the Commission forwarded to the European Parliament, only 204 could be retrieved, and the bulk of these acts (114) fell within the responsibility of the European Parliament committee on the Environment, Public Health and Consumer Policy (European Institute for Public Administration 1998).[26] These results support the assumption that MEPs are somewhat overwhelmed with just the scrutiny and ex post control of implemention, especially given that even the mere filing of some of the documents seemed to be a problem. It is therefore apparent that the practical political process would place great restraints upon the *general* involvement of the European Parliament in the system of comitology.

The Comitology Decision of 1999 incorporated some of the European Parliament's demands, and it can be regarded as one step towards fulfilment of the European Parliament's request that actors in the committees should be held accountable. The Council decision of 28 June 1999 improved the current system by providing for greater transparency, and by allowing the Parliament to receive full information about the committees (including all of their agendas and minutes, together with details about

their composition and about all draft measures on the agenda). However, with regard to the European Parliament's right to call back a measure, it recognized only that the European Parliament could claim – within an extremely limited time-period of one month – to re-examine an implementing measure which exceeded the scope of the powers delegated. Consequently, with the exception of the financial-services sector, the European Parliament has no control over the substance of the actual decisions taken, and its rights amount to little more than an *ultra vires* control (Haibach 1999: 16).

Accountability to the Council of Ministers

When examining the accountability of the committees, the Council of Ministers can be considered as a further 'democratic institution' to which committees are made accountable. The involvement of the Council has been obligatory, under specific circumstances, since the establishment of these committees. Within these specific conditions, the representatives of national governments who participate in these committees are held fully accountable to the Council. This practice was confirmed by the Comitology Decision of 1999. The current management-committee procedure states that, if a comitology committee gives a negative opinion, the proposal can be passed on to the Council which can then take a decision by qualified majority. The same holds true for the regulatory procedure: if a regulatory committee gives a negative opinion or abstains to formulate an opinion at all, the measure has to be referred to the Council. In the event that the Council opposes the committee's proposal by qualified majority, the Commission has three options: it can amend the proposal, resubmit the same proposal, or refer the matter back to the legislative process.

In the process of practical policy-making, comitology committees make use of the (legal) possibility of referring a matter to the Council only in exceptional cases (see Table 8.1 below). A detailed inquiry of the data which the Commission puts forward in its 2001 annual report on the committees reveals that five out of the ten issues referred back to the legislator concerned health and consumer protection,[27] in other words issues of a particular political sensitivity. The rules mentioned above imply that all contested measures will be passed on to the Council.[28]

Table 8.1 Opinions of Comitology Committees (2001)

Number of consultations of Committee	*Positive opinion by Committee*	*Matter referred to Council*
4,561[29]	3,322	10

Source: Commission of the European Communities 2003

Regarding the issue of accountability, it therefore has to be stressed that even though both the management and the regulatory committee procedures foresee a referral to the Council under certain circumstances, this possibility is only resorted to in very exceptional cases. Although the Council can hold the committees accountable in principle, it depends upon the representatives of each committee to alert it to issues that have caused great controversy within the committees.

From the procedural rules and their implementation in the practical political process, it is therefore obvious that comitology committees build upon a very simple reality: member states can 'defend' their interests within the framework of the procedural rules, because they are represented in the committees by civil servants who assist and can control the Commission within the implementing process. Only with regard to matters that cause great political controversy do they resort to the possibility of referring issues to the Council of Ministers.

Accountability of comitology committees to national parliaments

When discussing the issue of accountability to democratic institutions, the influence which national parliaments could exercise over the national representatives in the committees should not be neglected. This issue has not so far been regulated within the Treaties, though national parliaments do not have the ability to control directly representatives who participate in comitology committees.

The protocol on the role of national parliaments was introduced by the Amsterdam Treaty, and it extended the information rights of national parliaments with regard to EU affairs. However, these rights are linked exclusively to proposals put forward by the Commission within the legislative process, and do not include the implementation of the law.[30] Nevertheless, the way in which national parliaments exercise control over their governments in the legislative process provides an insight into how they may control the implementation process. Looking at the rights of scrutiny and control that national parliaments currently possess and also at the practical application of these rights, conventional wisdom holds that considerable differences exist between the parliaments of individual member states (Maurer and Wessels 2001). It therefore goes without saying that the effectiveness of the control depends on the parliamentary procedures established in each member state. Whereas the parliaments of countries such as Denmark, Finland, Sweden, or Austria are considered to possess far-reaching powers, other national parliaments such as that of Greece are considered as 'laggards' as far as the control of their government is concerned (Blichner 2000).

In this context, it is noteworthy that in Sweden, Finland, and Denmark, the parliaments have not only secured a relatively strong role for themselves, but the respective governments have also introduced effective

mechanisms to keep 'their' parliaments informed within the legislative process. In terms of the practical political process, these mechanisms mean that the Swedish government, for instance, has to submit explanatory memoranda for all new important Commission proposals, whereas the Finnish government has to do so for so-called *U-matters*.[31] Ideally, these memoranda should briefly describe the proposal and its implications for the respective member state. The Danish government is obliged to keep the European Affairs Committee informed about pending proposals for EU legislation. The Committee can ask the government to provide it with a written statement about the state of the negotiations and can request a meeting with the competent minister at any time (Laursen 2001: 106). These three member states have therefore developed mechanisms by which draft measures are not arbitrarily submitted to the parliament, but by which parliaments can also get an insight into the nature of a particular proposal and its implications. Provided that the information arrives in time and is substantially detailed, the possibility exists for the respective parliaments to select those measures upon which they want to make use of their constitutional rights of holding 'their' respective governments accountable (Hegeland and Neuhold 2002). These are, however, positive examples and constitute an exception rather than the rule.

A majority of the national parliaments of EU member states are already confronted with serious constraints when holding the executive accountable in the legislative process, and this situation would be very much aggravated by their general involvement in the ('pre'-) implementing process. However, if parliamentary control were substantially improved, for example by introducing the mechanism of explanatory memoranda for all member states, then national parliaments could exercise their controlling powers more effectively in the legislative process. They would be able to follow up the implementation of a particular act and thereby hold accountable their national representative in the respective committee or in the Council.[32] The provision of explanatory memoranda by national governments would enable 'their' parliaments to select those matters which they deemed it necessary to follow up within the ('pre'-) implementation phase. These memoranda would not only provide national parliaments with a concise insight into the proposal, but they would also inform them about the possible implications for their own member state.

The cases selected for 'follow up' would probably encompass issues that have become very salient both on the European and on the national level. Examples of such issues could include those legal acts which fall within the field of health and consumer protection, and which consequently can have direct implications for the health of individual citizens. This observation is not only confirmed by the fact that a majority of the issues which were referred back to the legislator (that is, the Council) under the system of comitology in 2001 fell into this domain, but also by the case study outlined in the following section.

Lessons from the BSE case

The BSE crisis of the mid-1990s highlighted many of the sensitive issues which surround democratic legitimacy within the comitology system. Although the crisis combined a series of rather unusual problems, it can be used to investigate one particular question with greater precision – in other words, how committee system works in practice. Given the saliency of the matter, it is revealing of the weaknesses inherent within the system as it currently exists.

The background of the crisis can be summarized as follows. Meat-and-bone meal was produced in the UK using hexane processing and heat treatment at 130°. In 1980, the British authorities gave authorization for the treatment to take place at a significantly lower temperature (80–90°), under circumstances and for reasons which remained somewhat obscure. The European Community introduced the first directive (90/667/EC) regulating the production of meat-and-bone meal in 1990, stipulating that these substances must be treated at a certain temperature (130°). This directive was, however, accompanied by questionable derogations.[33] Furthermore, although the UK banned the use of meat-and-bone meal in ruminant feed in Britain, exports of these products continued to be permitted. On 20 March 1996, the British Secretary of Health reported on a study which had established the possible link between BSE and a new form of Creutzfeldt-Jakob Disease.

As is well known, an embargo on the export of gelatine, tallow, and semen from Britain was decided on 27 March 1996. It was at this point that the committees became involved, and this far-reaching measure was revoked within a very short period of time. The Commission passed its proposal on the lifting of the embargo on to the Standing Veterinary Committee, which worked according to the procedural rules of a '*contre-filet*' (IIIb) committee. As this committee was not able to find a qualified majority in support of the proposal, the measure had to be passed on to the Council of Ministers.

The Agricultural Council, which subsequently convened on 3 June 1996, could neither agree on an amended version of the Commission's proposal nor find a simple majority for vetoing it. The Commission was then, according to the stipulations of the so-called *contrefilet* procedure, enabled to adopt the proposal by itself and the embargo could subsequently be lifted on 11 June 1996 (OJ L 139, 12 June 1996).

This case pinpoints the weakness of the committee procedures – a weakness that remains even after the new comitology decision abolished the so-called 'safety net' (whereby the Council could reject the measures with a simple majority). If the Council can neither adopt the implementing act nor find a qualified majority to signify its opposition within the given timelimit, the Commission can adopt the measure. Moreover, it should also be noted that the Council needs to attain unanimity in order

to change the substance of the draft implementing act. Therefore the executive can, under certain circumstances, adjudicate upon a measure even if the issue has been referred back to the legislature. What might thereby be gained in terms of efficiency (which, however, remains to be proved on a case-by-case basis) comes to the detriment of democratic legitimacy.

The BSE case also reflects the fact that the decisions were taken without any involvement on the part of the European Parliament, which was only informed after the decision to lift the embargo was actually taken. The European Parliament consequently resorted to its legal right of installing a (temporary) Committee of Inquiry on BSE. This committee uncovered severe weaknesses not only with regard to the decisions taken within the system of comitology, but also with regard to the integration of expertise. In this specific case the Commission was assisted by the Scientific Veterinary Committee. Being composed of high-ranking scientists in the field of veterinary medicine and microbiology, British representatives played a major role. The committee had the task of advising the Commission on the necessary steps to take, and of providing it with information on scientific and health-related issues. This advice was not always of a scientific nature. In the words of a scientist from the Stuttgart-Hohenheim University, who spoke at the subsequent inquiry conducted by the European Parliament, it went against all 'standard microbiological practices and borders on the irrational' (Agence Europe, No. 6847, 6 November 1996: 13). This inquiry led to a complete transformation of the system of scientific advisory committees in the Commission – a reform which reflects the corrective capacities of the system. A scientific steering committee was established in 1997 as a coordinating body for the many specialized scientific committees. Members of scientific committees are now selected in a way that ensures a high degree of transparency. Advertisements for available positions on a scientific committee are placed on the internet, where the selection criteria are also clearly outlined (http://europa.eu.int/Comm/food/fs/sc/index_en.html).

The BSE case is also revealing of many important aspects which relate both to the nature of the issues decided in these committees and to the accountability of comitology committees to democratic institutions:

- Although the legal possibility exists for measures decided upon in these committees to be passed on to the Council of Ministers, the provisions are such that even in regulatory committees, where the member states are deemed to have the greatest amount of control over the work of the comitology committees, the executive can under certain circumstances pass a measure that could have significant implications for European citizens. By requiring unanimity to change the substance of a proposal and by setting a very narrow deadline of three months, the 1999 Comitology Decision leaves the Council with

only limited room for manoeuvre when attempting to reach a decision – often in circumstances in which member states have divergent opinions.

- Given that the committees take decisions on measures with important political implications, there is some justification for the European Parliament's claim that decision-making in the committees has to become more transparent. Representatives of democratic institutions must gain an insight into how decisions are taken and by whom they are made.
- Closely linked to the question of the opaqueness of the committees' working methods is another issue, which stems from the sheer complexity of the procedures: it is difficult to convey to the 'average' citizen why the Commission should suddenly adopt a measure with (possibly) far-reaching implications for the European consumer, such as lifting the embargo on the import of certain beef products from Britain.

Conclusion

As this chapter has shown, the system of comitology leaves unanswered many questions about its accountability, and in particular reveals the existence of tension with regard to the involvement of the European Parliament. This concluding statement is intended to summarize the main problems examined in this chapter and to outline some possible solutions:

- The system of comitology as it currently stands exhibits great deficiencies with regard to the criteria of input-legitimacy, as it currently encompasses 'two levels' of bureaucrats: representatives of the member states on the one hand, and the Commission on the other, with the latter deciding whether 'experts' working within the respective field can be invited to attend the committee meetings. There are currently no criteria according to which the selection of representatives is regulated in the (pre-)implementation phase of EU legislation. Important lessons could be learnt, however, from the way in which the Commission 'recruits' experts in the initiative phase – such as when a proposal is drawn up in the field of Consumer Health and Safety where selection criteria are stipulated and vacant positions are advertised on the internet.[34]
- When examining the accountability of these committees to democratic institutions, it becomes clear that the Comitology Decision of 1999 currently foresees merely an *ultra vires* control for the European Parliament[35] and does not provide the co-legislator with effective control in the (pre-)implementing phase of EU legislation. In this context, it is important to note that the Commission put forward a

proposal in December 2002 on reforming the comitology system; it did so in part because the current system does not adequately meet accepted standards of accountability. This proposal is interesting insofar as it is particularly intended to reform the existing regulatory procedure for those implementing measures which have been decided upon under codecision (Commission of the European Communities 2002). The new procedures, which at present are still pending under the consultation procedure (as some issues still need to be clarified), would fulfil the requirement that the Council and the European Parliament should occupy an equal footing in the supervision of the Commission's implementation of acts adopted under codecision. The Council would then be able to object to an implementing measure by a qualified majority of the votes, and the European Parliament would be able to do so by a majority of its members.[36] Moreover, it would be a substantial improvement for the European Parliament to be able to take a decision on the substance of a proposed measure, and not just to simply state that it exceeded the powers that were delegated to the comitology committee (within the legislative process).

- Furthermore, the draft for a new Comitology Decision (Commission of the European Communities 2002) would substantially enhance the controlling powers of the European Parliament. It introduces a distinction between measures of a general scope, which implement or adapt essential aspects of the basic legislation (and which would be subject to the new regulatory procedure), and measures which have only an individual scope or which concern procedural or administrative arrangements. Neither the Council nor the European Parliament would be able to 'call back' these measures, while the representatives of the member states would fulfil an advisory function (Corbett 2003).[37] The European Parliament would therefore be directed to those issues upon which it might be necessary to exercise its powers of scrutiny, since a clear distinction would be drawn between implementing legislation that might have 'political' implications and measures that have a purely procedural or administrative nature. As a result, the implementation of this draft decision would provide major improvements in many of the conflicting issues which characterize the system of comitology.

This reform might have, however, only a temporary nature, as this issue is also linked to the new Constitution, which is expected to introduce a new system for delegating powers. The Draft Treaty establishing a Constitution for Europe in effect foresees in Article 36 (2) that the 'European laws shall lay down in advance rules and general principles for the mechanisms for control by Member States of Union implementing acts'.

Notes

1 I would like to thank Peter Biegelbauer, San Bilal, and the participants of the ECPR Joint Session Workshop 'Governance and Democratic Legitimacy', which was held at Grenoble in March 2001, for their very helpful comments on an earlier version of this essay.

2 A study on the role of committees within the European system of governance was conducted under the Fifth Framework Programme of the European Commission: Research Project 'Governance by Committee, the role of committees in European policy-making and policy implementation' (Programme: Improving Human Potential and Socio-Economic Knowledge Base), Project No. SERD-1999–00128.

3 See the technical annex to the above mentioned project.

4 It should be noted, however, that the term 'implementation' is currently used in this context.

5 For an overview of the history of comitology, see for example Demmke *et al.* 1996.

6 It is important to note that when the decision-making rules for committees require qualified majority voting, the same weighting of votes as in the Council applies.

7 On 31 December 1969, just before the end of the transition period for which the management committees had actually been established, the Council decided to maintain the committees on a permanent basis. Management committees eventually came to be used for the entire field of agricultural policy. By 1970, 14 such committees already existed, and seven years later the number amounted to 18.

8 Official Journal (O.J.) 1987, L 197: 33.

9 For an analysis of the comitology procedures according to the so-called 'Comitology Decision of 1987,' see for example Pedler and Schaefer 1996: 61–82. For an overview, see Hix 2000: 69. For an analysis of the new Comitology Decision of June 1999 see Haibach 1999.

10 Guided by the practice which had been followed since the 1960s, the Commission proposed three types of committee procedure: an advisory committee procedure, the traditional management committee procedure, and a regulatory committee procedure with a filet.

11 The figures available for the output of the Council in the same period show that it contributed to around 300 legal acts per year. These figures were compiled by the European Institute for Public Administration upon the basis of the annual reports of the European Commission. However, since 1996 the number of legal acts laid down by the Commission has dropped drastically, falling to 1,430 and 1,354 in 1997 and 1998 respectively. This reduction can be attributed to the circumstance that two varieties of legal act are no longer counted, namely those which are not published in the Official Journal and those 'routine' legal acts which are only valid for a short period of time.

12 These figures are taken from the Annual Report of the Commission on the workings of committees.

13 Commission of the European Communities 1993: Document no XI/200/93 – Rev.1.

14 This issue will be discussed in the third section of this chapter, 'Lessons from the BSE Case'.

15 OJ C 38, 6.2.2001, p.3. These standard rules of procedure were drawn up by the Commission.

16 See Article 8 of the standard rules of procedure.

17 For a detailed analysis, see Neuhold 2001: 127–186.
18 This legislation included the proposal for the directive on the Open Network Provisions on Voice Telephony (OJ C 263, 12.10.1992: 20–31) and a proposal for amending two directives in the security sector (OJ L 141, 11.06.1993: 1 and OJ L 141, 11.06.1993: 27).
19 The Intergovernmental Conference of 1996 failed to tackle the issue of comitology. A declaration relating to the Comitology Decision was merely annexed to the Treaty of Amsterdam: 'The Conference calls on the Commission to submit to the Council a proposal to amend the Council decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission.' The member states agreed on a new Decision in the summer of 1999; see OJ L 184, 17.7.1999: 23–26.
20 The European Parliament had had the opportunity to give an opinion in the consultation procedure that led to the adoption of the basic regulation (820/97) (OJ C 85, 17.03.1997: 77).
21 For more details regarding this case, see European Parliament 1999: 17.
22 For more details regarding this case, see European Parliament 1999: 19.
23 For acts adopted according to codecision, see Article 5 and Article 8 of the 1999 Comitology Decision.
24 This requirement is stipulated in Article 8.
25 The Comitology Decision applies to acts adopted under codecision (Article 251 TEC).
26 This data is based on a list which the General Secretariat of the European Parliament forwarded to EIPA.
27 Two cases concerned enterprise policy, two cases concerned agriculture, and one case related to transport policy.
28 This procedure would also be the case in regulatory committees.
29 1,984 of these consultations took place in the field of agriculture.
30 See protocol number 9 TEU.
31 These *U-matters* encompass all proposals for EU measures on subjects which would fall within the competence of the parliament were Finland not a member of the EU. See Section 96 of the Finnish constitution.
32 One way would be to require the representatives to provide comprehensive information on the decisions taken, and to give reasons for their opinions, to the appropriate committee responsible for EU affairs within the respective national parliament. This obligation would of course only apply in respect to those issues which are actually dealt with in comitology committees.
33 Article 19 of the directive enables member states to use other methods for heating which allow similar guarantees.
34 A good example would be the selection procedure for the Scientific Committee on Consumer Health and Food Safety. (See http://europa.eu.int/comm/food/fs/sc/index_en.html.)
35 The Comitology Decision implies that the European Parliament may not adjudicate on the substance of the respective issue, but must instead simply state that the committee exceeded the powers which were originally delegated to it within the basic legal act.
36 One point of contention, however, is whether the Commission has to take the objections of the European Parliament and the Council into account in cases of disagreement. Since the Commission's proposal contains the word 'possibly', it could mean that Commission would not have to take the objections on board.
37 The 'old' management procedure would virtually cease to exist, given that the Common Agricultural Policy and the Fisheries policy would fall under codecision under the provisions of the draft constitution.

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9 Governance in the European Union

A viable mechanism for future legitimation?[1]

Philippe C. Schmitter

Introduction

The chapters in this volume dealing with the EU seem to agree that something called 'governance' is a more accurate descriptor of how the European Union (EU) operates than the term 'government'. The latter evokes a political order similar to that of its component national states with a defined territory and population and an institution, whose monopoly over the legitimate application of violence allows it to control behaviour through a distinctive and hierarchic system of public offices and commands. Even federal systems with their more dispersed distribution of competences across multiple levels of aggregation still have a central government that exercises ultimate authority over subordinate states, provinces, *cantons*, or *Länder*. The former, governance, has a distinct advantage as a label since it is novel in usage, vague in meaning, and less threatening than government. Moreover, these qualities seem to fit the peculiarly diffuse, obscure, and multi-layered way that the EU goes about its business. Decisions binding for all are made in Brussels, but their impact upon individual citizens and social groups is almost always mediated by and implemented through national and sub-national authorities. This remoteness and absence of direct connection, no doubt, contributes to the (correct) perception that 'European governance' is something different from national government.

But many scholars carry the argument about governance one important step further. Not only is 'it' descriptively apposite, but also normatively appealing. Explicitly or implicitly, these authors seem convinced that by 'governancing' rather than 'governing' the EU gains in legitimacy, that is acquires a superior normative justification for what it is doing and, thereby, is more capable of ensuring that its directives and regulations will be voluntarily obeyed – even by those who did not participate in their making or approved of their promulgation.

This provides the major question that this essay seeks to address: will this thing called 'governance' strengthen or weaken the legitimacy of the institutions and policies of the EU?

Two definitions

Legitimacy

Legitimacy is a shared expectation among actors in an arrangement of asymmetric power such that the actions of those who rule are accepted voluntarily by those who are ruled because the latter are convinced that the actions of the former conform to shared and pre-established norms. Put simply, legitimacy converts power into authority and, thereby, establishes simultaneously an obligation to obey and a right to rule.

As one of the most frequently used and misused concepts in political science, legitimacy ranks up high together with 'power' in terms of how much it is needed, how difficult it is to define and how impossible it is to measure. Cynically, one is tempted to observe that it is precisely this ambiguity that makes it so useful to political scientists. For legitimacy usually enters the analytical picture when it is missing or deficient. Political scientists tend to invoke lack of legitimacy as a cause for the crisis only when a regime or arrangement is being manifestly challenged by its citizens/subjects/victims/beneficiaries. When it is functioning well, legitimacy recedes into the background, and persons seem to take for granted that the actions of their authorities are 'proper', 'normal', or 'justified'.

Now, if this is true for its national member states that have fixed boundaries, unique identities, formal constitutions, well-established practices, and sovereignty over other claimants to authority, imagine how difficult it will be to make any sense of the legitimacy of a polity that has none of these characteristics! The EU is, if nothing else, a 'polity in formation'. No one believes that its borders and rules are going to remain the same for the foreseeable future. Everyone 'knows' that it is very likely to expand the scope of its activities and to modify the weights and thresholds of its decision-making system. If this were not enough, there is also the fact that the EU is an unprecedented experiment in the peaceful and voluntary creation of a large-scale polity out of previously independent ones. It is, therefore, singularly difficult for its citizens/subjects/victims/beneficiaries to compare this *object politique non-identifié* with anything they have experienced before.

All of this makes it a serious problem to specify what the apposite 'shared and pre-established norms' should be in the case of the EU. As argued above, the basis for the voluntary conformity of actors is normative, not instrumental or strategic. In a legitimate polity actors may agree to obey decisions that they have not supported and that are made by rulers whom they have not voted for. They also agree to do so even if it is not in their (self-assessed) interest to do so – and they are expected to continue to do this, even if the performance and effectiveness of the polity is in manifest decline. Needless to say, it will not always be easy to assess if this is the case. Rulers often can control the means of communication and

distort the flow of information to make it appear as if they were following prescribed norms. The ruled may only be pretending to comply in order to build up a reputation that they can subsequently 'cash in' for material or other self-regarding purposes. Conversely, resistance to specific commands – whatever the accompanying rhetoric – may have nothing to do with challenging the legitimacy of the authority that issued them, just with disputes over the performance of individual rulers or agencies.

Needless to say, in the case of the EU, the substance and compelling nature of norms is even more difficult to observe. The intergovernmental nature of its key institutions virtually licenses actors to pursue national interests exclusively – or, at least, to proclaim to their citizens that they are doing so. The confidentiality of its many committees makes it almost impossible to detect when interaction produces a shared norm rather than a strategic compromise or a hegemonic victory. Add to all this, the propensity for national rulers, who can no longer 'deliver the goods' by themselves, to blame the obscure and distant processes of European integration when they have to take unpopular decisions, and you have a polity that is bound to appear less legitimate than it is.

So, if we are to make any sense of the present and future legitimacy of the European Union, we first have to reach a consensus concerning the apposite criteria – the operative norms – that actors should apply when establishing their shared expectations about how its authority should be exercised. I say 'should', because it is abundantly clear that in the present circumstance both scholars and actors within the integration process tend to presume a normative isomorphism between the EU and its national member states.

At least since the collapse of the Soviet system at the end of the 1980s, it has become virtually axiomatic that democracy has become 'the only game in town' for these states. Allegedly, the only operative norms that are capable of legitimating authority in this part of the world are those associated with 'liberal, representative, political democracy' as they emerged historically in the 'real-existing' polities of Western Europe and North America. We can take it for granted that policy performance or effectiveness – so-called 'output legitimacy' – can account for a good deal of day-to-day voluntary compliance by subjects. But this is contingent upon prior conformity to expectations of 'input legitimacy' rooted in the right of citizens to participate in politics, to choose among competing representatives and, thereby, to hold their rulers accountable.

Since the EU does not afford its citizens this opportunity to influence directly the formation of 'their' government and to hold 'their' rulers accountable for their subsequent exercise of power, one is inevitably led to the conclusion that the EU must suffer from a 'democratic deficit'.[2] Despite the formal existence of direct elections to choose representatives to the European Parliament and the informal existence of multiple channels for influencing EU policy-making, the system as a whole does not

function like a conventional 'Western democracy'. At best, the EU borrows its legitimacy from that of its member states via their representatives in the Council of Ministers and their role in selecting the President and members of the Commission. From this perspective, the only way of filling the 'input' deficit at the supranational level would be to insert 'conventional democratic institutions' into the way the EU makes binding decisions, for example assert parliamentary sovereignty, institute direct elections for the President of the Commission, and, above all, draft and ratify a 'federal' constitution.[3]

An alternative would be to try to convince both the governments and the citizens of this unprecedented experiment in 'pooled sovereignty' and 'joint decision making' to accept the notion that the conventional norms and institutions of real-existing liberal democracy are simply not apposite for a regional polity of such large scale, interest diversity, and cultural heterogeneity. And this is where governance enters the picture.

Governance

Governance is a method or mechanism for dealing with a broad range of problems/conflicts, in which actors regularly arrive at mutually satisfactory and binding decisions by negotiating and deliberating with each other and cooperating in the implementation of these decisions.

The working hypothesis is that, if improvements can be made in the future in the legitimacy of the EU, they are much more likely to come from the admittedly 'fuzzy' but innovative practices of *governance* than from the much more clearly delineated and conventional institutions of *government*. And this is not just academic speculation. With the publication of its 'White Paper on Governance' the Commission has virtually announced to the world that it intends to be perceived and wishes to be evaluated by standards other than those applied to the governments of its member states. Just what those standards are and whether, if applied, the citizens of the EU will consider them an adequate substitute for the liberal-democratic ones that they are used to remains to be seen.

Governance is not a goal in itself, but a means for achieving a variety of goals that are chosen independently by the actors involved and affected. *Pace* the frequent expression 'good governance', resort to it is no guarantee that these goals will be successfully achieved. It can produce 'bads' as well as 'goods'. Nevertheless, it may be a more appropriate method than the more traditional ones of resorting to public coercion or relying upon private competition. Moreover, it is never applied alone, but always in conjunction with state and market mechanisms. For, as we have argued above, governance is not the same thing as government, that is the utilization of public authority by some subset of elected or (self-)appointed actors, backed by the coercive power of the state and (sometimes) the legitimate support of the citizenry to accomplish collective goals. Nor is it just

another euphemism for the market, turning over the distribution of scarce public goods to competition between independent capitalist producers or suppliers.

It goes without saying that, if this is the case, the legitimacy of applying governance to resolve conflicts and to solve problems will depend upon different principles and operative norms than they are used to justify the actions of either governments or markets. It will be my purpose in the remaining portion of this essay to elaborate upon this implication by specifying what these principles and norms might be.

Returning to the above generic definition, the core property of governance consists of horizontal forms of interaction between actors, who have conflicting objectives, but who are sufficiently independent of each other, so that neither can impose a solution on the other and yet sufficiently interdependent, so that both would lose if no solution were found.[4] As we shall see, in modern and modernizing societies the actors involved in governance are usually non-profit, semi-public, and, at least, semi-voluntary organizations with leaders and members. It is the embeddedness of these organizations into something approximating a civil society that is crucial for the success of governance. These organizations do not have to be equal in their size, wealth, or capability, but they have to be able to hurt or help each other mutually. Also essential is the notion of regularity. The participating organizations interact not just once in order to solve a single common problem but repeatedly and predictably over a period of time, so that they learn more about each other's preferences, exchange favours, experience successive compromises, widen the range of their mutual concerns, and develop a commitment to the process of governance itself. Here, the code-words tend to be trust and mutual accommodation – specifically, trust and mutual accommodation between organizations that effectively represent more-or-less permanent social, cultural, economic, or ideological divisions within the society.

Note also that governance should not be just about making decisions via deliberation or negotiation, but also about implementing policies. Indeed, the longer and more extensively it is practiced, the more the participating organizations develop an on-going interest in this implementation process, since they come to derive a good deal of their legitimacy (and material rewards) from the administration of mutually rewarding programmes.

The fact that governance arrangements are typically thought to be 'second-best solutions' has been a serious impediment to their legitimation. If states and markets worked well – and worked well together – there would be no need for governance. It only emerges as an attractive option when there are manifest state failures and/or market failures. It is almost never the initially preferred way of dealing with problems or resolving conflicts. States and markets are much more visible and better justified ways of dealing with social conflicts and economic allocations. Preference

for one or the other has changed over time and across issues following what Albert Hirschman has identified as a cycle of 'shifting involvements' between public and private goods. Actors, however, are familiar with both and will 'naturally' gravitate towards one of them when they are in trouble. Governance arrangements tend to be much less obvious and much more specific in nature. To form one successfully requires a good deal of 'local knowledge' about those affected and, not infrequently, the presence of an outside agent to pay for initial costs and to provide reassurance – even coercive backing – in order to overcome the rational tendency not to contribute. As we shall see, this almost always involves some favourable treatment from public authorities as well as (semi-) voluntary contributions from private individuals or firms. What is novel about the present epoch is that, increasingly, support for governance arrangements has been coming from private and not just public actors and from trans- and supranational sources – and not just from national and sub-national ones. And the EU has been among the most active promoters of such arrangements.

Whether the EU has been as successful in convincing its citizens that its decisions are legitimate exercises of its authority is not clear, although one should note the impressive extent to which member states and mass publics have consented to the 'authoritative allocations' of its myriad committees and the decisions of its Court of Justice. It would certainly be premature to claim that the EU is a 'producer' rather than a 'consumer' of legitimacy – depending as it does so heavily on the borrowed authority of its member governments. As David Beetham and Christopher Lord (1998) have argued so persuasively, it is the interaction between the different levels of aggregation and identity that reciprocally justifies the process of European integration. In such a complex and contingent polity, it becomes rather difficult to discern who is loaning and who is borrowing legitimacy – and for what purpose.

Moreover, much of what is happening within the EU is more the result of expediency, pragmatic tinkering, the press of time, the diffusion of 'best practices', *ad hoc* and even *ad hominem* solutions than of shared principles and explicit design. My (untested) presumption is that, if the EU were to elaborate and defend such principles and, then, design its arrangements of governance accordingly, this would improve their legitimacy.

Three generic design principles

My assumption is that the EU will be more successful in convincing its governments and citizens that governance can be a legitimate way of making decisions, that are binding on such a large number and wide diversity of actors, if it self-consciously and overtly follows certain generic principles when creating and operating what could be called European Governance Arrangements (EGAs).

Let us begin with the somewhat heterodoxical notion that EGAs are political institutions and, as such, have to root their legitimacy in distinctively political principles. Just performing efficiently and efficaciously will not be sufficient to ensure that their commands will be voluntarily obeyed – if only because their regulations and assignments inevitably have uneven distributive and even redistributive consequences. Their beneficiaries/victims will eventually question not just the substance of what they do, but how they have made their decisions. Admittedly, agencies such as the World Bank that initially promoted the idea of governance insisted that their 'recommendations for good governance' were apolitical and had nothing to do with 'interfering in the domestic politics of member states'. Making this claim for the EU would fool no one, since its very nature is to penetrate deeply within the politics of its member states and to bring about a convergence in their policies across a wide range of issues. What the EU needs, in the absence of a constitution that explains and justifies the domain of its intervention, is an acknowledgement of the extent of this intervention and its limits. 'Subsidiarity' has been proposed for this purpose and it remains to be seen whether its application will generate a consensus across member states that embody quite different mixes of policy competences at different levels of aggregation.

What needs to be made clear to all concerned (and affected) is that setting up a new governance arrangement or extending an old one inevitably involves making significant political choices with even more potentially significant political consequences, if it is done wrong. At a minimum, three features of political design are involved if the agent creating a governance mechanism expects to obtain legitimacy for its decisions:

1. What is the purpose of delegating power to such an arrangement (chartering)?
2. Who should participate in it (composition)?
3. How should they reach decisions (rules)?

Chartering

The logically prior notion of 'chartering' rests on the presumption that a particular issue or policy arena is 'appropriate' for a governance arrangement, *ergo* that it is not better handled by good, old-fashioned market competition or government regulation.[5] Some particular composition of actors, each acting autonomously, is thought to be capable of making decisions according to rules, voluntarily accepted or consensually deliberated, that will solve the conflicts and provide the resources necessary for dealing with the issue or policy arena designated by its charter. Moreover, these decisions once implemented will be accepted as legitimate by those who did not participate and who have suffered or enjoyed their consequences. And, if this were not enough, a successful EGA would also have

to demonstrate that its capacity to resolve conflicts and provide resources is superior to anything that a national or sub-national arrangement could have done. Looked at from this perspective, there may not be that many arenas that should acquire 'their' EGA!

Someone who has given considerable thought to this question is Eleanor Ostrom (1990, 2000; it is from this latter source that I have derived my comments). Through her empirical research on 'self-organized, common-pool resource regimes', she has come up with a list of attributes that increase the likelihood that such governance arrangements will be formed and will perform better than either markets or states.[6] Let us look at this list and comment on the validity of its assumptions for the 'pre-design' of EGAs (my comments are in italics):[7]

Feasible Improvement: Resource conditions are not at a point of deterioration such that it is useless to organize or so underutilized that little advantage results from organizing. *It would not be appropriate to create an EGA to accomplish something no one cared about or that had degenerated so much under national or sub-national management that a Europe-wide approach would be doomed from the start.*

Indicators: Reliable and valid indicators of the condition of the resource system are frequently available at relatively low cost. *Here, the issue involves 'Europeanizing' the flow of quantitative and qualitative information by eliminating national peculiarities and thereby encouraging the emergence of Europe-wide standards of 'best practice'.*

Predictability: The flow of resource units is relatively predictable. *For EGAs the major problem with this is the likelihood that predictability may differ from one member state to another or that, even where the indicators have been Europeanized, they may be subjected to 'local' interpretation.*

Spatial Event: The resource system is sufficiently small, given the transport and communication technology in use that appropriators can develop accurate knowledge of external boundaries and internal micro-environments. *Taken at face value, this attribute would literally preclude a European level of governance. Needless to say, until the enlargement process is terminated, no one can know what the external boundaries of any EGA will be. The integration process (and technological developments) may have considerably decreased transaction costs (and will do so even more in the future), but they will always be higher than inside each member state. What this suggests is that the implementation of EGA decisions should be administered and 'articulated' in such a fashion as to encourage adaptation to national and sub-national contexts, while running the risk of systematic cheating if monitoring mechanisms are inadequate. This also suggests the wisdom of tolerating, even encouraging, 'flexibility' in the establishment of EGAs in such ways that they may be composed of different member states.*

Salience: Appropriators are dependent on the resource system for a major portion of their livelihood. *Participants should be 'stake-holders' and 'knowledge-holders' with both, a significant interest in the issue and the capacity to*

deliver the compliance of their followers–employees–clients to decisions made by the EGA.

Common Understanding: Appropriators have a shared image of how the resource system operates and how their actions affect each other and the resource system. *Obviously, given differences in language and historical practice, 'Europeans' are more likely to be deficient in this attribute than 'nationals' – even though convergence across member states in both performance and intellectual understanding has been impressive and growing. Also, one could question whether this should be taken as a 'prerequisite' of, or as a 'product' of, EGA activity.*

Low Discount Rate: Appropriators use a sufficiently low discount rate in relation to future benefits to be achieved from the resource. *What is likely to be in short supply for Europe as a whole is trust – either that other national actors will willingly comply or that supranational ones will not exploit EGAs to expand their own tasks and revenues. The temptation to 'grab and run', that is to pursue short-term 'opportunistic' benefits, is likely to be greater than at the national or sub-national levels, unless the Commission acquires a strong reputation for probity and protecting weaker parties.*

These criteria proposed by Ostrom help to specify which policy domains might be effectively and legitimately subject to EGAs, but they contribute relatively little to an understanding of the norms, that should be applied to the actual process of chartering. Below I propose six principles that should guide the initial formation (and subsequent reformation) of EGAs. My presumption is that, the closer the EU comes to following these rules, the more legitimate these arrangements will be in the eyes of European citizens.

Six principles for the chartering of EGAs

The principle of 'mandated authority' No EGA should be established that does not have a clear and circumscribed mandate, that is delegated to it by an appropriate EU institution. Any EU institution should be entitled to recommend the initial formation and design of an EGA, that is its charter, its composition, and its rules, but (following the provisions of the Treaty of Rome) only those approved by the Commission should be actually established, whether or not they are subsequently staffed, funded, 'housed', and/or supervised by the Commission.

The 'sunset' principle No EGA should be chartered for an indefinite period, irrespective of its performance. While it is important that participants in all EGAs should expect to interact with each other on a regular and iterative basis (and it is important that the number and identity of participants be kept as constant as possible), each EGA should have a pre-established date at which it should expire. Of course, if the EU institution that delegated its existence explicitly agrees, its charter can be renewed and extended, but again only for a definite period.

The principle of 'functional separability' No EGA should be chartered to accomplish a task that is not sufficiently differentiated from tasks already being accomplished by other EGAs and that cannot be feasibly accomplished through its own deliberation and decision.

The principle of 'supplementarity' No EGA should be chartered (or allowed to shift its tasks) in such a way as to duplicate, displace, or even threaten the *compétences* of existing EU institutions. European governance arrangements are not substitutes for European government, but should be designed to supplement and, hence, to improve the performance of the Commission, the Council, and the Parliament.

The principle of 'requisite variety' Each EGA should be free – within the limits set by its charter – to establish the internal procedures that its participants deem appropriate for accomplishing the task assigned to it. Given the diversity inherent in these functionally differentiated tasks, it is to be expected that EGAs will adopt a wide variety of distinctive formats for defining their work programme, their criteria for participation, and their rules of decision-making – while (hopefully) conforming to similar principles of generic design.

The 'high rim' or 'anti-spill-over' principle No EGA should be allowed by its mandating institution to exceed the tasks originally delegated to it. If, as often happens in the course of deliberations, an EGA concludes that it cannot fulfil its original mandate without taking on new tasks, it should be required to obtain a specific change in its mandate in order to do so.[8]

Composition

In many regards, the rules surrounding the selection of those who are entitled to participate directly in EGAs are the most critical for their legitimacy. On the one hand, the chartering principles enunciated above are often forgotten once the arrangement is up and functioning. On the other hand, as we shall see, most EGAs operate in a twilight zone of semi-obscurity and semi-indifference, where ordinary citizens are 'rationally ignorant' about how their decisions are made. What the general public is likely fixed on, if and when EGA decisions become effective and are called into question, is the composition of the actors who have participated in their making. The entire 'trick' of governance rests on the dubious presumption that, because some subset of actors possess some distinctive characteristics, they should be granted privileged access to a given EGA and they will be uniquely capable of making decisions that will be binding on those who have not participated but, nonetheless, will be affected. Legitimacy, in other words, depends on getting the composition right.

First, let us examine the criteria that might be applied to their

selection. In conformity with the current jargon, these persons or organizations should be 'holders' of some appropriate quality or resource. That could be:

- *Rights* that are attached to membership in a national political community and that presumably entitle all those having them to participate equally in all decisions made by that community. In this case, the holders are usually called *citizens*.
- *Spatial location* that involves all those living on a regular basis within a demarcated territory and presumably affected in some common fashion by policies made by whatever authority. In this case, the holders are *residents* (and this means both citizens and denizens with an indefinite status for illegal immigrants).
- *Knowledge* that is uniquely possessed by persons or organizations with certain forms of information or skills in resolving problems and that is presumably needed if the policies taken are going to be technically effective. In this case, the holders are usually called *experts* or, better, *guardians*.
- *Share* that certifies that the bearer has a property right to some part of the assets that are going to be affected by any change in the allocation of resources or imposition of regulations. In this case, the holders are *owners*.
- *Stake* that involves all those – regardless of where they live, what their nationality is, or what their level of information/skills may be – that could be materially or even spiritually affected by a given measure (and not just now, but in the indefinite future). In this case, we lack a common label, but let us call these holders *beneficiaries/victims*.
- *Interest* – that means any person or organization that demonstrates sufficient awareness about the issue being decided and makes known the desire to participate in the name of some constituency. These holders could be called (voluntary) *spokespersons*.
- *Status* that would include all persons (but usually organizations) that have been recognized by the authorities ultimately responsible for decision and formally accorded the right to represent a designated social, economic or political category. These holders are usually called (corporate) *representatives*.

By my calculation, all of these 'holders' have some legitimate claim to participate in governance arrangements. Since no arrangement could possibly include all of these rights-holders, space-holders, knowledge-holders, share-holders, stake-holders, interest-holders, and status-holders, some are going to have to be privileged over others. The 'question of political design' involves choosing the apposite criterion according to the substance of the problem that has to be solved, or the conflict that has to be resolved. Democratic theory, however, privileges the criterion of citizen-

ship ('rights-holders') and deviations from it usually require some explicit justification, if the legitimacy of ensuing decisions is to be assured. The four principles enunciated below should provide a reliable basis for such a justification.

Four principles for the composition of EGAs

The minimum threshold principle No EGA should have more active participants than is necessary for the purpose of fulfilling its mandated task. It has the autonomous right to seek information and invite consultation from any sources that it chooses; however, for the actual process of drafting prospective policies and deciding upon them, only those persons or organizations judged capable of contributing to the governance of the designated task should participate.[9]

The stake-holding principle No EGA should have, as active participants, persons or organizations having no significant stake in the issues surrounding the task assigned to it. Knowledge-holders (experts) specializing in dealing with the task should be considered as having a stake, even if they profess not to represent the interests of any particular stake-holder.

The principle of 'European privilege' All things being equal, the participants in an EGA should represent Europe-wide constituencies.[10] Granted that, in practice, these representatives may have to rely heavily on national and even sub-national personnel and funding and may even be dominated by national and sub-national calculations of interest, and granted that the larger the constituency in numbers, territorial scale, and cultural diversity, the more difficult it may be to acquire the 'asset specificity', that provides the basis for stake-holding. Nevertheless, the distinctive characteristic of a European governance arrangement is contingent on privileging this level of aggregation in the selection of participants.

The adversarial principle Participants in an EGA should be selected to represent constituencies that are known to have diverse and, especially, opposing interests. No EGA should be composed of a preponderance of representatives who are known to have a similar position or who have already formed an alliance for common purpose.[11] In the case of 'knowledge-holders', who are presumed not to have constituencies but ideas, they should be chosen to represent whatever differing theories or paradigms may exist with regard to a particular task.

Rules for making decisions

A full-scale European Governance Arrangement should be capable of making binding decisions, implementing them (usually with the

collaboration of their participant-members and through the *bons offices* of member governments), and legitimating them in the eyes of the citizenry. At present, many (if not most) of the units involved in the 'comitology' of the European Commission, as well as those independent regulatory agencies, that have emerged at the margins of the European Union have only a limited capacity to make, monitor, and enforce decisions on their own. Especially in cases covered by the Open Method of Coordination, the entire problem of legitimacy is finessed by rendering the outcome of deliberations purely voluntary – thereby, shifting the burden of legitimacy to those member governments that decide to accept them.

Probably, the Directorate for Competition Policy is the most unambiguous (and salient) case of an EGA – analogous to the Federal Trade Commission in the United States or the *Kartellamt* in the Federal Republic of Germany – but there exist a large number of potential candidates for this status in the future. If there is one thing to be learned from this experience, it is that full-grown EGAs should expect to be legally and politically contested and that it will not be easy to make decisions that will be voluntarily obeyed by the citizens of the embryonic European *demos*.

So, once an EGA has been chartered for good reasons and once it has invited the right groups of 'holders' to participate in its activities, it has still to design and apply the proper decision rules. The following eight principles are intended to guide this process.

Eight principles concerning decision rules

The principle of 'putative' equality All participants in an EGA should be considered and treated as equals, even if they represent constituencies of greatly differing size, resources, public or private status, and 'political clout' at the national level. No EGA should have second- and third-class participants, even though it is necessary to distinguish unambiguously between those who participate and those who are just consulted.

The principle of horizontal interaction Because of the presumption and practice of equality among participants, the internal deliberation and decision-making processes of an EGA should avoid as much as possible such internal hierarchical devices as stable delegation of tasks, distinctions between 'neutral' experts and 'committed' representatives, formalized leadership structures, informal arrangements of deference, and so on. They should encourage flexibility in fulfilling collective tasks, rotating arrangements for leadership and *rapporteurship*, extensive verbal deliberation, and a general atmosphere of informality and mutual respect.

The consensus principle Decisions in an EGA will be taken by consensus rather than by vote or by imposition.[12] This implies that no decision can be taken against the expressed opposition of any participant, although

internal mechanisms usually allow actors to abstain on a given issue or to express publicly dissenting opinions without exercising their veto. Needless to say, the primary devices for arriving at consensus are deliberation (i.e. trying to convince one's adversaries of the *bien-fondée* of one's position), compromise (i.e. by accepting a solution in between the expressed preferences of actors), and accommodation (i.e. by weighing the intensity of actor preferences). Regular and iterative interaction among a stable set of representatives is also important, although this should be temporally bounded.

The 'open door' principle Any participant should be able to exit from an EGA at relatively modest cost and without suffering retaliation in other domains, either by other participants or EU authorities. Moreover, the ex-participant has the right to publicize this exit before a wider public (and the threat to do so should be considered a normal aspect of procedure), but not the assurance that, by exiting, he or she can unilaterally halt the process of governance.

The proportionality principle Although it would be counter-productive for influences to be formally weighed or counted, it is desirable that across the range of decisions taken by an EGA there is an informal sense that the outcomes reached are roughly proportional to the specific assets that each participant contributes (differentially) to the process of resolving the inevitable disputes and accomplishing the delegated tasks.[13]

The principle of shifting alliances Over time within a given EGA, it should be expected that the process of consensus formation will be led by different sets of participants and that no single participant or minority of participants will be persistently required to make greater sacrifices in order to reach that consensus. Thanks to the 'Open Door' principle, this situation should be avoided, if only because it will be so easy and 'cheap' for marginalized actors to exit.

The principle of 'checks and balances' No EGA should take a decision binding on persons or organizations not part of its deliberations *unless* that decision is explicitly approved by another EU institution, that is based on different practices of representation and/or of constituency. Normally, that EU institution will be the one that 'chartered' the EGA initially, but one can imagine that the European Parliament through its internal committee structure could be accorded an increased role as co-approver of EGA decisions.

The reversibility principle No EGA should be empowered to take decisions (even when co-approved according to the preceding principle) that cannot be potentially annulled and reversed by 'rights-holders', that is by

European citizens acting either directly through eventual referendums or indirectly through their representatives in the European Parliament.

Concluding with some caveats

Governance is no panacea. It may contribute positively to enhancing the legitimacy of the EU, but only if it is done according to justifiable principles. It also will have to be 'seconded' by reforms in the EU's institutions of government and 'rewarded' by the results of market competition. Moreover, EGAs will not work to resolve all policy issues and they will not work unless firmly based on political as well as administrative design principles. And that means that difficult choices involving their chartering, composition and decision rules cannot be indefinitely avoided or finessed. Unless EGAs are 'properly' designed, there is no reason to be confident that their decisions will be more sustainable or accepted as legitimate by those who have not participated in them and joined in the consensus they are intended to promote. And, as emphasized above, governance arrangements never work alone but only in conjuncture with community norms, state authority, and market competition.

I can foresee two key dilemmas that still must be addressed – even if (as I suspect) EGAs will proliferate in the future and if progress is made on the difficult choices involved in designing them:

1. The proliferation of EGAs tends to occur within compartmentalized policy arenas (and more so in the EU than in member states). This leaves unresolved the larger issue of how eventual conflicts between their decisions are going to be resolved. Multiple 'governances' at the micro- or meso-levels, no matter how participatory, sustainable, and legitimate on their own, may end up generating macro-outcomes, for example *via* externalities, that were not anticipated and that no one wants.
2. The criteria for the inclusion of participants and the making of decisions in EGAs are not generally compatible with the conventional norms for liberal-democratic legitimation used within national and sub-national polities, although experimentation with governance arrangements is occurring at all levels of aggregation. Before EGAs can be reliably deployed and generate a sense of obligation among broader publics, it will be necessary to spend a good deal of effort in changing people's notions of what democracy is and what it is becoming.

Notes

1 This is a much revised version of an essay originally published as 'Participation in Governance Arrangements: Is there any Reason to Expect it will achieve

"Sustainable and Innovative Polities in a Multi-level Context?"', in J. Grote and B. Gbipki (eds) (2002) *Participatory Governance: Political and Social Implications*, Opladen: Leske + Budrich. I am much indebted to the participants in this 5th Framework Programme on Research and Development of the European Commission, especially to its director, Hubert Heinelt, for encouraging me to think about these issues.

2 The evidence usually adduced to 'prove' the existence of this deficit is far from convincing (to me). Most of the items cited (e.g. decline in voter turnout in Euro-elections, decline in favourable attitudes toward EU institutions, rising difficulty in ratifying treaties by national referendum, increase in electoral support for extreme nationalist parties) are either also true with regard to 'domestic' democratic practices or only partially related to European integration. In short, it is quite possible that the alleged 'democracy deficit' is as much or more national than supranational.

3 In other words, I agree with William Nelson's observation that institutions that 'look' most democratic in one context, i.e. the national, may not be appropriate at all in a different setting, i.e. the supranational (Nelson 2000: 198). Introducing direct elections for the European Parliament is one good illustration of this. Those whose principal formula for democratizing the EU is to increase the powers of that body should reflect on the consequences of this proposal when there are no corresponding parties, constituencies or even consistent platforms at the European level.

4 One frequently encounters in the literature that focuses on national or subnational 'governance' the concept of *network* being used to refer to these stable patterns of horizontal interaction between mutually respecting actors. As long as one keeps in mind that with modern means of communication the participants in a network may not even know each other – and certainly never have met face-to-face – then it seems appropriate to extend it to cover transnational and even global arrangements.

5 Another way of expressing this choice is to think of it as a form of 'functional' as opposed to 'territorial' subsidiarity.

6 Not all EGAs, existing or eventual, fit their generic specifications. Only some of them deal with resources that are 'subtractable', i.e. whose consumption precludes its use/enjoyment by others. Many, but not all, involve goods from which it is difficult to exclude non-contributors. And virtually none of them are, strictly speaking, 'self-organizing' since all of them involve some mandate from EU institutions that defines the scope of their activity and imposes political and legal limits on their decisions.

7 Another literature I thought seriously about exploiting in my search for operative norms-*cum*-design principles was that on 'deliberative democracy'. Although there is much there that could eventually be useful from the perspective of ideological justification, I found it virtually impossible to extract relatively concrete suggestions from these treatises. Not only are the arguments usually advanced at a high level of abstraction with no attention to the specifics of how one might actually design an arrangement to be more 'deliberative', but many of their root suppositions seem to render it irrelevant. For example, it would be a serious distortion to presume that most of the interactions within the various forums of the EU are aimed at establishing truth or persuading one's opponents. Bargaining and negotiation are the rule, and the 'successful' result is usually a compromise, not a new norm, a shared truth, or a conversion in position. Interlocutors in EU committees, no doubt, learn from each other and change their perceptions of interest, but it would be hazardous to presume that this creates a novel 'communicative rationality' – least of all, one that 'rationalizes domination'. As it is often the case with 'philosophy-based

arguments' in political life, they are based on a counterfactual ideal that cannot be approximated in the real world of imperfect information, limited rationality, and continuous exchange of promises and threats. By establishing such a high level of validity, they tend to exclude the search for 'second-best' solutions ('*le mieux est l'ennemi du bien*', the French would say) – and that is what governance is all about. From an even more practical perspective, EGAs are never composed of 'all the affected parties' – just a very selective subset of their representatives. Indeed, they would not work if everyone (or every organization) got to deliberate. The trick is to compose them and, then, to conduct them in such a way that negotiations among a small group of self-interested actors can nonetheless produce a decision that will prove (until future contestation) to be acceptable to those who have not participated. For a heroic, but in my view ultimately frustrating, effort to apply the 'deliberative' label to the EU, see Eriksen and Fossum (2000). In their favour, it should be noted that the editors did insert a question mark after the title.

8 This does not mean that 'log-rolling' and 'package-dealing' should not be an integral part of the integration process, just that EGAs are not the appropriate sites for such activity. Decisions involving the negotiation of trade-offs across circumscribed issue areas should be the purview of other EU institutions, i.e. the Commission, the Council of Ministers, the European Council, and, hopefully in the future, the European Parliament.

9 Another way of stating this point is to stress that all participants must possess some type or degree of 'asset specificity' – i.e. they must demonstrably have material, intellectual, or political resources that are apposite to the tasks to be accomplished. Needless to say, defining 'the stakes' and those who hold them is bound to be politically contested, since the number of representatives and experts who can make that claim ('interest-holders' in my terminology) is potentially unlimited thanks to the growing interdependence of policy domains. As an approximation, I propose that a relevant stake-holder be defined as a person or organization whose participation is necessary for the making of a (potentially) binding decision by consensus, and/or whose collaboration is necessary for the successful implementation of that decision. In practice, this is likely to be determined only by an iterative process, in which those initially excluded make sufficiently known their claims to stake- and knowledge-holding so that they are subsequently included. Presumably, those initially invited to participate who turn out not to be indispensable for policy-making and implementation will leave of their own accord, although a persistent problem in EGAs is likely to be the absence of an effective mechanism for removing non-essential participants.

10 This should not be interpreted to mean 'EU-wide constituencies' since there may be significant stake-holders and knowledge-holders in prospective member states and even in those that have explicitly chosen not to join the EU.

11 To fulfil this principle, it may be necessary for the designers of EGAs to play a pro-active role in helping less well-endowed or more dispersed interests to get organized and sufficiently motivated to participate against their adversaries. Needless to say, this element of 'sponsorship' intended to encourage a greater balance in adversarial relations can conflict with the subsequent principle of equality of treatment and status. It can also generate serious questions concerning the autonomy of such 'sponsored' organizations from EU authorities.

12 This principle serves to distinguish EGAs from other institutions operating at the European level. For example, parliaments, courts, central banks, and independent regulatory agencies ultimately take their decisions by vote, even if they engage in extensive deliberation and seek to form a consensus beforehand. Some expert commissions and many executive bodies may decide by

imposition when the actor designated as 'superior' exercises his or her 'sovereign' authority.

13 A more orthodox way of grasping this principle would be to refer to 'reciprocity' – although this seems to convey the meaning of equal shares or benefits across some set of iterations. 'Proportionality' is similar, but allows for the likelihood that stable inequalities in benefit will emerge and be accepted on the grounds of differential contribution/assets.

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Part III

Governance at the transnational level

10 Transnational governance and legitimacy[1]

Thomas Risse

Introduction

Governance beyond the nation state provides an excellent laboratory in which political scientists can probe a host of issues and concepts of concern, such as legitimacy, accountability, and the participatory quality of various governance arrangements. There is no (world) state in the international system with a legitimate monopoly over the use of force and the capacity of authoritative rule enforcement. As a result – and with the exception of the European Union (EU) – there is no 'shadow of hierarchy' available to which governance arrangements can refer and in accordance with which actors can be made to comply. This implies that the problem of governance beyond the nation state is not only about complementing or temporarily replacing some functions of the modern nation state in the provision of common goods. Governance beyond the nation state is about seeking functional equivalents to nation states in terms of providing political order and common goods in the international realm. In other words, the nation state has no fallback option if international governance does not work. In the international system, there is either 'governance without government' (Czempiel and Rosenau 1992), or there is no rule-making at all. This also means that rule enforcement has to rely on incentives and sanctions, on the one hand, or on voluntary compliance resulting from the norm's perceived legitimacy, on the other (for a discussion see Hurd 1999). In sum, governance in the global system is about creating social and political order in the absence of modern statehood.

This reasoning also implies that there is no global 'demos' in terms of a world community of citizens in whose names governance could take place. At best, governance beyond the nation state relies on a rather 'thin' layer of collective cosmopolitan identity of 'world citizens'. As to territorial loyalty, people still identify mostly with their local communities and their nation state, maybe with their world region (particularly in Europe, see Herrmann, Brewer, and Risse 2004), while solidarity with the global community is restricted to particular issue-specific groups organized in

transnational networks of like-minded peoples. Therefore, democratic governance beyond the nation state faces serious hurdles. At least, mechanisms to enhance democratic legitimacy cannot simply be transposed from the domestic level onto the international level. The main problem of transnational governance concerns the lack of congruence between those who are being governed and those to whom the governing bodies are accountable.

Does this incongruity mean that democratic governance beyond the nation state is an illusion and that transnational governance needs to rely solely upon 'output-legitimacy', in particular effective problem-solving, as some have argued (Scharpf 1998, 1999)? There is good reason to think otherwise. Yet ensuring input-legitimacy as the participatory quality of transnational governance requires different mechanisms from those known in domestic polities.

This chapter tries to tackle two issues. First, it attempts to map the problems of transnational governance in the global system. What does it mean to talk about 'new modes of governance' beyond the nation state? Second, it discusses the legitimacy deficit of transnational governance and critically evaluates the various solutions offered.

Transnational governance and the new modes of governance debate

The debate over global and/or transnational governance contains a good deal of confusion, which must first be clarified before its repercussions for democracy and legitimacy can be discussed.[2] 'Global governance' in particular is often used simultaneously as an analytical concept and as a normative prescription for how global problems should be handled (on the latter see World Commission on Environment and Development 1987). But even as an analytical concept, the term 'governance' has become such a catchword in the social sciences that it connotes a whole variety of things (Kooiman 1993; Pierre and Peters 2000). In the broadest possible definition, 'governance' relates to any form of creating or maintaining political order and providing common goods for a given political community on whatever level (Williamson 1975). A narrower view has been promoted by international-relations scholars, such as James N. Rosenau and Ernst-Otto Czempiel (Czempiel and Rosenau 1992). Accordingly, 'governance without government' refers to political arrangements which rely primarily on non-hierarchical forms of steering (see the excellent reviews by Mayntz 1998, 2002). In other words, governance beyond the nation state means creating political order in the absence of a state with a legitimate monopoly over the use of force and the capacity to enforce the law and other rules authoritatively. Of course, there is no state or world government in the global realm, even though the United Nations Security Council has limited authority to impose world order and peace.

To the extent that the international system contains rule structures and institutional settings, it constitutes 'governance without government' by definition.

But why use the language of 'governance' if it is instead possible to speak about international institutions, such as International Organizations (IOs) or international regimes? While IOs are interstate institutions 'with a street address', international regimes are defined as international institutions based on explicit principles, norms, and rules – that is, international legal arrangements agreed upon by national governments (Keohane 1989). The Nuclear Non-Proliferation regime, the world-trade order, the regime to prevent global climate change, or the various human-rights treaties all constitute international regimes, and so form part of global 'governance without government'. The characteristics which these regimes share are that they are based on voluntary agreements by states and that there is no supreme authority in the international system capable of enforcing these rules. Hence the elaborate schemes to monitor and verify compliance with the rules and regulations of international regimes.

There is one emerging category of international institutions which is not covered by the language of international interstate regimes or organizations as commonly used in the international-relations literature. The Internet Corporation for Assigned Names and Number (ICANN) regulates the internet, but it is a non-governmental institution. Private rating agencies claim authoritative, consensual, and therefore legitimate knowledge about the credit worthiness of companies and even states and consequently play an enormous role in international financial markets. The UN Global Compact consists of firms voluntarily agreeing to comply with international human-rights and environmental norms. Thus, the emergence of governance structures in international life which are based on private authority, private regimes, or on some mix of public and private actors can be observed (see Cutler *et al.* 1999; Hall and Biersteker 2002; Haufler 1993; Reinicke 1998; Reinicke and Deng 2000; see also Chapter 11 by Klaus Dieter Wolf and Chapter 12 by Tanja Brühl in this volume). In particular, there seems to be an increasing number of 'public–private partnerships' (PPPs) in international life, some of which are concerned with international rule-setting. Other PPPs – the Global Compact, for example – focus on rule implementation or service provision (Börzel and Risse 2005; Rosenau 2000).

'Transnational governance' refers to those governance arrangements beyond the nation state in which private actors are systematically involved.[3] A clear distinction should be drawn between lobbying or influence-seeking activities of private actors – firms and non-governmental organizations ([I]NGOs) – on the one hand, and their direct involvement in rule-setting, rule-implementation, and service-providing activities, on the other. Only if and when non-state actors have a say in the

decision-making bodies of global governance should 'transnational governance' be spoken of.[4]

Transnational governance as 'new modes of governance' is 'distinct from the hierarchical control model characterizing the interventionist state. Governance is the type of regulation typical of the cooperative state, where state and non-state actors participate in mixed public/private policy networks' (Mayntz 2002: 21). Thus, 'new modes of global governance' refers to those institutional arrangements beyond the nation state that are characterized by two features (see Table 10.1):

- the inclusion of non-state actors, such as firms, private interest groups, or NGOs in governance arrangements (actor dimension);
- an emphasis on non-hierarchical modes of steering (steering modes).

Most of the literature on 'new modes of governance' is concerned with the actor dimension and, consequently, with the inclusion of private actors in global governance. However, the steering modes must also be looked at. Modes of political steering concern both rule-setting and rule-implementation processes, including ensuring compliance with international norms. Hierarchical steering refers to classic statehood in the Weberian or Eastonian sense (politics as the 'authoritative allocation of values for a given society') and connotes the ultimate ability of states to enforce the law through sanctions and, if necessary, the threat of force (Weber 1921/1980: 29). Hierarchical steering is notably absent in the international system except, for example, in supranational organizations

Table 10.1 The realm of new modes of global governance

Actors involved *Steering modes*	*Public actors only*	*Public and private actors*	*Private actors only*
Hierarchical: top-down; (threat of) sanctions	• traditional nation state; • supranational institutions (EU, partly WTO)	• contracting out and out-sourcing of public functions to private actors	• corporate hierarchies
Non-hierarchical: positive incentives; bargaining; non-manipulative persuasion (learning, arguing, etc.)	• international regimes • international organizations	• corporatism • public–private networks and partnerships • benchmarking	• private-interest government/ private regimes • private–private partnerships (NGOs–companies)

Note
Shaded area = new modes of governance

such as the EU where European law constitutes the 'law of the land' and some elements of hierarchy are therefore present.

However, no modern state relies solely on coercion and hierarchy to enforce the law. The main difference between modern states and global governance is not that non-hierarchical modes of steering do not exist in the former. The main difference is that global governance – whether through interstate regimes or PPPs – has to rely *solely* on non-hierarchical modes of steering in the absence of a world government. As to these non-hierarchical modes, it is possible to make a further distinction between two forms which rely on different modes of social action and social control.

First, non-hierarchical steering can use positive incentives and negative sanctions to entice actors into compliance with norms and rules. The point is to use incentives and sanctions to manipulate the cost–benefit calculations of actors so as to convince them that rule compliance is in their best interest. As to rule-setting, 'bargaining' in which self-interested actors try to hammer out agreements of give-and-take based on fixed identities and interests should be mentioned here, too. This mode of steering essentially follows a logic of instrumental rationality as theorized by rational choice. Actors are seen as egoistic utility maximizers or optimizers, who agree to rules because they are in their own interests. Voluntary compliance follows from self-interested behaviour in this case.

A second type of non-hierarchical steering focuses on increasing the moral legitimacy of the rules and norms in question. The idea is that actors will comply voluntarily with norms and rules, the more they are convinced of the legitimacy of the rule (see Hurd 1999). The legitimacy of a rule can result from beliefs in the moral validity of the norm itself, but it can also result from beliefs in the validity of the procedure by which the rule had been worked out. Voluntary rule compliance is based on the acceptance of a particular logic of appropriateness (March and Olsen 1989, 1998). Actors accept a new logic of appropriateness if they acquire the social knowledge to function appropriately in a given society or if they start believing in the moral validity of the norms and rules in question. In either case, the micro-mechanism underlying this type of social steering involves learning and persuasion based upon arguing.

'Arguing' implies that actors try to challenge the validity claims inherent in any causal or normative statement, and thereby seek a communicative consensus about their understanding of a situation as well as justifications for the principles and norms guiding their actions. Argumentative rationality also means that the participants in a discourse are open to be persuaded by the better argument and that relationships of power and social hierarchies recede into the background (Habermas 1981; Risse 2000a). Argumentative and deliberative behaviour is as goal-oriented as strategic interactions, but the goal is not to attain one's fixed preferences, but to seek a reasoned consensus. Actors' interests, preferences, and their

perceptions of the situation are no longer fixed, but subject to discursive challenges. Where argumentative rationality prevails, actors do not seek to maximize or to satisfy their given interests and preferences, but to challenge and to justify the validity claims inherent in them – *and* are prepared to change their views of the world or even their interests in the light of a better argument. In other words, argumentative and discursive processes challenge the truth claims which are inherent in identities, interests, and norms.

To summarize the analysis so far, 'global governance' refers on the one hand to international regimes and international (interstate) organizations, and on the other to transnational arrangements, which directly involve non-state actors in rule-setting, rule-implementation, and service provision. Both interstate and public–private governance beyond the nation state must rely on non-hierarchical modes of steering, whether it is via incentives and sanctions or via learning and persuasion. Both types of arrangements pose challenges to democracy, accountability, and legitimacy. The following, however, will concentrate on transnational governance involving non-state actors.

Transnational governance and the challenges to accountability and legitimacy

Can there be democratic governance beyond the nation state? The answer to this question is by no means self-evident. As mentioned above, many argue that democratic governance beyond the nation state is impossible because there is no global 'demos' based upon a collective and cosmopolitan identity of 'world citizenship' which includes a sense of common purpose. If this is the case, then the familiar mechanism of liberal states cannot work in the global system. In liberal states, democratic processes and procedures guarantee the legitimacy of laws and norms and thereby induce voluntary compliance with those rules, even if they are costly for the citizens (this follows Max Weber's definition of legitimacy in Weber 1921/1980: 16). In democratic systems, a social order is legitimate because the rulers are accountable to their citizens, who can participate in rule-making through representatives and can punish the rulers by voting them out of office. This scenario implies a congruence between the rulers and the ruled through mechanisms of representation. These mechanisms are mostly absent beyond the nation state and, as a result, transnational governance faces legitimacy problems.

The problem can be pinpointed further by using the concept of *accountability*. Following Keohane, who also builds upon Weber, accountability refers to a principal–agent relationship 'in which an individual, group or other entity makes demands on an agent to report on his or her activities, and has the ability to impose costs on the agent' (Keohane 2004: 12; see Weber 1921/1980: 25). Keohane then distinguishes between

internal and external accountability. 'Internal' accountability refers to the authorization and support which principals give to agents who are institutionally linked to one another. Democratic governments are accountable to their citizens who elect them and provide political support. Firms are accountable to their shareholders who provide financial resources. 'External' accountability refers to people or groups outside the acting entity who are nevertheless affected by it. US foreign policy affects people across the globe who have no means to elect or otherwise influence the American government. The investment decisions of multinational corporations directly influence the lives of many groups and many peoples who likewise have little input into those policies. The concept of accountability is useful because it is actor-centred. It allows the analyst to identify the particular responsibilities of corporate actors involved in transnational governance. Moreover, accountability as a concept avoids the problems which the notion of democracy faces in a political space without a demos or a nation (see Benz 1998 on this point).

The concepts of accountability and legitimacy are related, but need to be distinguished. While accountability focuses on a particular relationship among actors, legitimacy refers to the particular quality of the social and political order. Institutions and rules are legitimate, not actors.[5] A legitimate order induces the actors to behave in certain ways – in particular, it secures their voluntary compliance with costly rules. Fritz Scharpf's familiar distinctions between 'input' and 'output' legitimacy, which refer to its respective sources (Scharpf 1999), can then be used. 'Input' legitimacy concerns the participatory quality of the decision-making process leading to laws and rules. Those who have to comply with the rules ought to have an input in rule-making processes. 'Output' legitimacy refers to the problem-solving quality of laws and rules. In democratic systems, both sources together ensure the legitimacy of the political order.

One way of combining the two concepts of accountability and legitimacy is to refer to input-legitimacy as consisting of both internal and external accountability (see Figure 10.1). If the agents involved in governance arrangements are both internally accountable to their 'clients' – be it shareholders of firms or citizens of governments – and externally

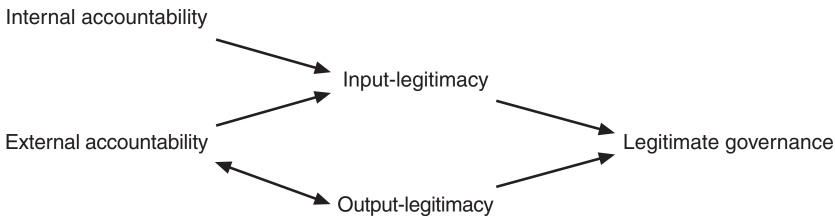

Figure 10.1 Accountability and legitimacy.

accountable to those who are affected by their decisions – the various 'stakeholders' – then input-legitimacy should be assured. At the same time, external accountability also affects output-legitimacy. If the governing actors feel responsible to and have to justify their decisions towards those who are affected by them, then the perceived problem-solving capacity of governance arrangements is likely to be enhanced. However, improving accountability as such does not ensure the effectiveness of governance arrangements. It is not clear *per se* that the environment becomes cleaner, or that human rights are guaranteed, simply because governing actors – both public and private – feel responsibility toward an imagined global community. Accountability might enhance compliance with the rules, but output-legitimacy is more about effectiveness in problem-solving capacity. Compliance is a necessary but not a sufficient condition for effectiveness (on these distinctions see Börzel 2002; Raustiala and Slaughter 2002). For example, even if perfect compliance could be secured with the global climate-change regime, it would probably remain rather ineffective in tackling the problem.

The following section will discuss how well transnational governance – public–private partnerships and private regimes – performs with regard to accountability and legitimacy, and will consider the particular problems which arise.

Internal and external accountability

As accountability is a property of actors involved in governance, the following discussion concentrates on states, international organizations, (multinational) firms, and (I)NGOs.

States

In this category, a distinction should be drawn between democracies and autocratic regimes. The former are internally accountable to their citizens and their elected representatives, who can sanction governments through the mechanisms of liberal systems, while the latter have an internal accountability gap by definition. To the extent, then, that international *intergovernmental* regimes are based on bargains between democratically elected governments (as has been mostly the case in trade regimes and human-rights regimes, though less so in the environmental realm or in arms control), internal accountability should not be regarded as the main problem of international regimes. While national governments might use international arrangements to increase their autonomy *vis-à-vis* society through 'cutting slack' (Putnam 1988), they can still be held accountable for their actions.

If there is a participatory gap, it concerns *external* accountability. The more powerful that states are, the more they can resist demands to make

them externally responsible for their actions, and the more they can avoid dealing with the negative externalities that their behaviour creates. The USA is a case in point (see Keohane 2004). Moreover, while the structure of international negotiations usually allows for 'two-level games', which raise questions of internal accountability, there are few mechanisms to ensure that those who are potentially affected by the international norms have a say in the making of these rules. In fact, the constitutive institution of the interstate system – national sovereignty – works as a powerful norm *against* external accountability (Krasner 1999).

Several strategies can be adopted to make states more accountable externally. First, multilateral institutions based on diffuse reciprocity provide at least one mechanism to increase the external accountability of states *vis-à-vis* each other (Ruggie 1992). The more states are embedded in multilateralism, the more they internalize these rules, and the more they can be held externally accountable for their behaviour. Institutionalizing multilateralism serves the interests of weaker states, allowing them to influence the more powerful states (Kagan 2003). However, while multilateralism might increase the mutual external accountability in a society of states, it does not necessarily affect their responsibilities toward citizens. Multilateralism is still confined to a state-centred world.

Second, the inclusion of non-state actors in global governance is also intended to increase the external accountability of states. Trisectoral public-policy networks and global public–private partnerships are precisely meant to close the participatory gap identified by critics of international regimes (Kaul *et al.* 1999; Reinicke 1998; Reinicke and Deng 2000). They are said to increase external accountability through input-legitimacy. By ensuring that those affected by the rules have a say in making them, compliance would be improved. Yet it is unclear whether simply including non-state actors like firms and the non-profit sector organizations in transnational governance arrangements closes the accountability gap *per se*, since these actors face their own accountability problems (see below). Moreover, including the 'stakeholders' as a means to increase external accountability in transnational governance mechanisms is easier said than done. Who decides about exclusion and inclusion and, thereby, who the 'stakeholders' are concerning a particular problem? There is no universally acknowledged mechanism of representation in the international system. As a result, other mechanisms need to be added, such as improving public transparency or the deliberative quality of the governance process (see below).

Finally, an additional mechanism to increase external accountability of (democratic) states concerns transnational social mobilization. Transnational social movement organizations, advocacy networks, and epistemic communities serve to transmit otherwise silenced voices into the democratic polities of liberal states (Boli and Thomas 1999; Haas 1992; Keck and Sikkink 1998; Smith *et al.* 1997). Transnational social mobilization

linking local communities with the global public provides one way of influencing democratic governments to take the views of a wider audience into account. Many international regimes, including the climate-change regime, the treaty banning landmines, and the treaty setting up the International Criminal Court (ICC), would not have been possible without the agenda-setting activities of transnational social movements reminding governments of their responsibility toward the 'global commons'.

International organizations

While much of the current criticism of global governance and economic globalization is directed at international (intergovernmental) organizations (IOs), IOs might actually face less accountability problems these days than either states or private actors. First, IOs are internally accountable to the states that fund them and authorize their policies. To the extent that the most powerful states in the current global system are liberal democracies, a direct line of authority exists from the citizens of democratic states to IOs such as the United Nations (UN), the International Monetary Fund (IMF), the World Bank, or the World Trade Organization (WTO).

Second, there is the problem, once again, of external accountability. Of course, many more people are directly affected by the policies of the World Bank, the IMF, or the WTO than those who can influence them via lines of internal accountability. Yet IOs seem to have a much better track record in responding to this criticism than either states or multinational corporations. The UN and the World Bank in particular have greatly increased their responsiveness to these concerns by, for example, incorporating (I)NGOs into their decision-making processes – sometimes to the dismay of their principals, the states (see O'Brien *et al.* 2000; concerning the UN, see Martens 2003). In fact, in many cases NGO pressure misses its targets if directed solely against IOs rather than their principals, the powerful states hiding behind the allegedly 'unaccountable' international organizations (see Keohane 2004 on this point).

IOs like the UN and its organizations are more sensitive to external accountability problems than other actors in transnational governance, because they claim to be oriented toward the world's common good rather than to the egoistic interests of the principals to whom they are internally accountable. In the case of the UN, this has resulted in a situation in which the military actions of its member states are only considered legitimate if they are approved by the UN and its Security Council. However, if IOs provide legitimacy in the world system, this also increases their power *vis-à-vis* their principals in terms of agent autonomy.

(Multinational) corporations

Multinational corporations (MNCs) usually do not face an internal accountability problem, since their boards of directors and their managers are accountable to the shareholders. The main issue here is external accountability, since investment decisions of big firms have huge consequences for people around the world. Until recently and in contrast to both states and IOs, big corporations have been almost immune against criticism that they lack external accountability. Most transnational social movement campaigns on human-rights and international environmental issues have been directed against states and IOs, not against MNCs, even though the latter face responsibilities in these policy areas.

This picture has dramatically changed during the 1990s. Transnational campaigns have been conducted against child labour in sweatshops owned by the sportswear industry and their suppliers (such as the Nike campaign) or against oil companies such as Royal Dutch Shell (for instance, the Brent Spar oil platform or Shell's behaviour in Nigeria). These campaigns have set the agenda for the emergence of a new transnational norm governing the behaviour of firms, namely 'corporate social responsibility'. While the idea itself is much older than these campaigns, it has been filled with new content, namely that big firms should integrate international human, social, and gender rights as well as environmental norms into their corporate practices. 'Corporate social responsibility' is precisely about increasing the external accountability of MNCs and other firms. The emergence of this new transnational norm appears to follow the life cycle suggested by Finnemore and Sikkink (1998) for international norms in general. Many new global-governance arrangements and trisectoral public-policy networks have sprung up to increase corporate social responsibility including, for example, the UN's Global Compact (Ruggie 2002), the Global Reporting Initiative, the Dow Jones Sustainability Index, and others. While their effectiveness remains to be seen, these arrangements reflect the growing awareness that firms face an external accountability problem in a globalized economy (see Chapter 12 by Tanja Brühl in this volume; also Lipschutz and Fogel 2002).

(International) non-governmental organizations ((I)NGOs)

Interestingly enough, (I)NGOs appear to face the opposite problem as firms and states when it comes to accountability. Many accuse (I)NGOs for lacking legitimacy (see, for instance, Brühl *et al.* 2001), yet what is meant here is probably internal accountability. This point is not new. Karl Kaiser argued more than thirty years ago that the increasing relevance of transnational actors in world politics seriously hampered democratic accountability in international affairs (Kaiser 1971). Most transnationally operating NGOs – the 'conscience of the world' (Willetts 1996) – are

internally accountable to a rather small group of members and to those who fund them, mostly middle-class publics in Western societies, private foundations, and often public agencies (Smith 1997). Large membership organizations such as Amnesty International are the exception to the rule, but even Amnesty's 'principals' are relatively wealthy people in Western societies. Consequently, if we compare (I)NGOs to democratic states, they certainly lack internal accountability. As a result, many public agencies, such as the European Commission, now demand that NGOs comply with certain internal accountability rules including transparency and democratic governance as a precondition for their public funding.

Yet, this emphasis on internal accountability arguably misses the mark. Compared to states, IOs, and MNCs, NGOs lack material resources. All they have to wield influence in world politics is moral authority and expert knowledge in their respective 'issue-areas' of concern. (I)NGOs' moral authority, however, is directly linked to claims that they represent the common good in global affairs as well as the 'voices of the weak and powerless'. In other words, their moral authority implies a high degree of external accountability in a similar way to that of IOs. At the same time, moral authority is not sufficient. It has to be combined with accepted knowledge in the particular issue area. Moral authority and consensual knowledge of rights violations has made Amnesty International the widely recognized giant among the human rights NGOs (Risse 2000b). Yet, moral authority and claims to authoritative and consensual knowledge are highly vulnerable to reputational problems. (I)NGOs claiming to represent the global common good can lose their reputation within very short periods of time, if they are found to be manipulated by states or firms, or if they are themselves found guilty of manipulating knowledge. This is what happened to Greenpeace after it became public that the NGO had made up data during the Brent Spar campaign against the Shell company. In sum, the influence of (I)NGOs in world politics is directly linked to their external accountability and legitimacy. Their vulnerability to threats to their reputation serves as a powerful control mechanism to keep them honest.

Table 10.2 summarizes the discussion so far. It demonstrates that – except for the NGO community – internal accountability is a lesser problem for the actors involved in transnational governance. The main issue of concern here is external accountability. If there is a lack of input-legitimacy in global governance, it results from the deficits in external accountability of the actors involved. It is not surprising, therefore, that most critics of a 'legitimacy deficit' in global governance demand higher transparency and public accountability as a precondition for democratic governance in international affairs (for example, Reinicke and Deng 2000; Wolf 2000; see also Klaus Dieter Wolf's Chapter 11 in this volume).

But what else can be done to compensate for the lack of external accountability in transnational governance? There are two remedies discussed in the literature which will now be considered:

Table 10.2 The accountability score

	Accountability	
	Internal	*External*
(Democratic) states	high	low
International organizations	high	middle (increasing)
Multinational corporations	high	low (increasing)
(I)NGOs	low	high

- increasing output-legitimacy;
- deliberative democracy as a functional equivalent to democratic representation.

Output-legitimacy

Fritz Scharpf (1999) in particular has argued with regard to the EU that it lacks input-legitimacy, because there is no European demos and little collective European identity which he sees as the precondition for an effective participatory democracy on the European level. As a result, the EU should focus on enhancing its output-legitimacy in terms of developing effective problem-solving capacities. If Scharpf's argument holds true for a supranational polity, it should be all the more valid with regard to global governance which neither consists of supranational institutions nor can rely on a global cosmopolitan identity of 'world citizens'. If global-governance arrangements – be it international interstate regimes or public–private partnerships – can be made effective in tackling the world's problems of international security, of the globalized economy, of human rights, and of the international environment, this increase in output-legitimacy could compensate for a perceived lack of participatory input by those affected by the rules. To put it more precisely, if the problem of global governance regarding input-legitimacy concerns primarily the lack of external accountability of the actors involved, then enhancing output-legitimacy might help to offset this deficiency. If global governance were effectively dealing with the problems of the 'global commons' and providing global public goods (Kaul *et al.* 1999; Ostrom 1990), it could compensate for reduced external accountability.

But what about the problem-solving capacity of global-governance arrangements? While this chapter cannot survey the effectiveness of global governance in general, it is probably safe to argue that international regimes are better at solving coordination rather than collaboration problems (on the distinction, see Stein 1983), and at dealing with regulatory rather than distributive issues. However, most global problems in the areas of social rights, public health, development, and the international

environment require both collaboration and the solving of distributive questions, including fairness issues (on the latter, see Albin 2001; Steffek 2002). Moreover, a precondition for effectiveness is compliance with international norms and rules. Most scholars agree that global-governance arrangements which include international regimes probably do not face compliance problems that are much worse than those associated with domestic law (Zürn and Joerges 2005; see also Raustiala and Slaughter 2002). Yet numerous scholars also agree that many international regimes face a gap between almost universal norm recognition and compliance with these norms (overview in Börzel and Risse 2002). The stage of cascading norms in the issue areas of human rights and the environment has been reached, in that there are very few states who are not partners to any treaty in these areas (see Finnemore and Sikkink 1998). However, being partner to an international treaty does not necessarily mean that one automatically complies with the rules.

Interestingly enough, many international organizations, including the UN, its various organizations, and the World Bank, have long recognized the gap between universal norm recognition in many issue areas of global governance and compliance with these rules. To enhance compliance with international regimes and consequently to increase the effectiveness of these regimes, they have suggested the inclusion of rule addressees in both norm-generating and norm-implementation processes. Participation of those affected in rule-making and implementation should induce them to abide by the rules. Moreover, non-state actors – firms, (I)NGOs and expert communities – command resources such as information and knowledge which states and IOs require to improve compliance. Therefore, the increasing trend toward 'new modes of governance' in international affairs, including public–private partnerships or even private regimes, is partially meant to address the compliance gap.

At this point, however, the argument has come full circle. Calls for public–private partnerships or even private regulation of international issues ('de-governmentalization' of governance; see Chapter 11 in this volume by Klaus Dieter Wolf) are trying to improve output-legitimacy through increased input-legitimacy. Yet the starting point was that output-legitimacy might compensate for a lack of input-legitimacy, including the external accountability of many international actors. This paradox leads to a final set of proposals, which suggest that the discrepancy between input- and output-legitimacy can be tackled through deliberative democracy.

Deliberation as a remedy for the legitimacy lap?

Proponents of deliberative democracy claim that deliberation constitutes a significant means to increase the democratic legitimacy of governance mechanisms, particularly in situations in which democratic representation and/or voting mechanisms are not available options (see particularly

Held 1995; Wolf 2000; Bohman and Regh 1997; Elster 1998; Joerges and Neyer 1997; for the following, see Risse 2004). Deliberation is based on arguing and persuasion as a non-hierarchical means to achieve a reasoned consensus rather than a bargaining compromise. The general idea of this literature is that democracy is ultimately about involving the stakeholders, in other words those concerned by a particular social rule, in a deliberative process of mutual persuasion about the normative validity of particular rules. Once actors reach a reasoned consensus, this should greatly enhance the legitimacy of the rule thus ensuring a high degree of voluntary compliance. As Ian Hurd put it, 'When an actor believes a rule is legitimate, compliance is no longer motivated by the simple fear of retribution, or by a calculation of self-interest, but instead by an internal sense of moral obligation . . .' (1999: 387). Such an internal sense of moral obligation follows the logic of appropriateness behind a given norm. Advocates of deliberative democracy argue, therefore, that deliberation and arguing not only tackle the participatory deficit of global governance (input-legitimacy), but also increase voluntary compliance with inconvenient rules by closing the legitimacy gap. In this way, deliberative democracy is meant to strengthen both input- and output-legitimacy.

However, institutional solutions to increase the deliberative quality of decision-making in transnational governance face major obstacles. There are several trade-offs between deliberation, accountability, and legitimacy to be considered. First, selecting the relevant stakeholders for transnational rule-setting processes is difficult. It is often unclear who the stakeholders are and whom they actually represent. While the actors involved in trisectoral networks rarely face serious internal accountability problems (see above), external accountability remains an issue. Deliberation requires the participation of those in the policy-making process who are potentially affected by the rules. Take the World Commission on Dams, for example, a trisectoral body designed to develop rules for the construction of large dams. It was established by the World Bank as a deliberative body to maximize arguing and learning. It produced a policy report, but there is little agreement in the literature and the policy world alike whether it actually achieved its goal of reaching a reasoned consensus that would allow the World Bank to construct a sustainable policy toward large dams without antagonizing the various stakeholders (see, for example, Dingwerth 2003; Khagram 2000).

Second, and related to the first problem, decisions about the selection of members in deliberative bodies with policy-making authority concern inclusion and exclusion. Who to include, who to exclude, and who actually decides about inclusion and exclusion represent the most contentious processes in the establishment of trisectoral public-policy networks of global governance. This problem is exacerbated by the fact that specific stakeholder interests can usually be organized and represented much more easily than diffuse stakeholder interests.

Third, once the stakeholders have been selected, specific institutional settings are required that enable actors to engage in the reflexive processes of arguing. These settings must provide incentives for actors to critically evaluate their own interests and preferences, if the arguing process is supposed to go beyond simply mutual information and each stakeholder explicating their preferences to the others. At this point, a trade-off between transparency and argumentative effectiveness in deliberative settings has to be considered. Many negotiation systems show that arguing and persuasion work particularly well behind closed doors – that is, outside the public sphere (see Checkel 2001). A reasoned consensus might be achievable more easily if the secrecy of the deliberations prevails and actors are not required to justify their change of position and the like in front of critical audiences. Behind closed doors, negotiators can freely exchange ideas and thoughts more easily than in the public sphere where they have to show resolve and stick to their principles. Yet transparency is usually regarded as a necessary ingredient for increasing the democratic legitimacy of transnational governance. If the deliberative quality of global governance can only be increased by decreasing the transparency of the process even further, the overall gain for legitimacy and external accountability might not be worth the effort.

This consideration leads to the final point, namely the potential tensions between accountability and deliberation. Negotiators – be it diplomats or private actors in trisectoral networks – usually have a mandate from their principals to represent the interests of their organizations and are accountable to whoever sent them to the negotiating body. As a result, there are limits to the extent to which they are allowed to engage in freewheeling deliberation. What if negotiators change sides in the course of negotiations because they have been persuaded by the better argument?[6] Of course, it makes no sense to consider negotiators as nothing but transmission belts of their principals' preferences with no leeway at all. But it does raise issues of accountability, if negotiators are so persuaded by the arguments of their counterparts that they change sides. At least, they would have to be required to engage in a process of 'two-level arguing', that is of trying to persuade their principals that they should change their preferences too.[7] It is not enough to institutionalize deliberative processes in multilateral negotiations, including trisectoral public-policy networks. There needs to be a communicative feedback loop into the domestic and other environments to which negotiating agents are accountable. Otherwise, accountability and legitimacy would be sacrificed for efficiency. 'Two-level arguing' might also be necessary to overcome the tension between the effectiveness of deliberation in secrecy, on the one hand, and ensuring the transparency of the process, on the other.

Conclusion

This chapter has tried to unpack the concepts of accountability and legitimacy in order to get an analytical handle on the problem of democracy in global governance. In particular, it has argued that democratic accountability is strongly related to the concept of input-legitimacy. Yet the main problem of transnational governance is not so much the internal accountability of the actors involved – be they states, international organizations, firms, or (I)NGOs. The problem for legitimate governance beyond the nation state is to improve on external accountability, to make sure that the various governance bodies – from international regimes to public–private partnerships and cooperative arrangements among non-state actors – can be held responsible by those who are affected by their decisions and rules. Enhancing output-legitimacy in terms of the problem-solving effectiveness of global governance is not an easy way out either. Many scholars and practitioners alike have long realized that the effectiveness of governance is directly related to the participatory quality of the decision-making process. As a result, transnational governance arrangements ought to include 'external stakeholders' as a way of improving both their participatory quality and their effectiveness. At this point, the various mechanisms proposed by advocates of deliberative democracy have to be considered as a means to enhance external accountability. Yet deliberative democracy does not constitute a ready-made solution to the legitimacy problems of global governance, because important trade-offs between deliberation, accountability, and output-legitimacy have to be considered.

In summary, there is no easy solution to the legitimacy problems of global governance. From a normative standpoint, the various trade-offs have to be weighed against each other. However, it makes little sense to hold the 'new modes of governance' which include non-state actors in rule-making and rule-implementation to such high standards that neither domestic democracies, nor international regimes among states, nor international organizations are able to meet them. Instead, these governance arrangements must be measured comparatively in order to weigh their advantages and disadvantages.

Notes

1 I would like to thank Tanja A. Börzel and Diana Panke for critical comments on the draft of this chapter.
2 This part of the chapter builds upon Risse 2004. See also Börzel and Risse 2005.
3 For the classic definition of transnational relations see Keohane and Nye 1971; also Risse 2002.
4 See also Table 11.2 in Klaus Dieter Wolf's Chapter 11 in this volume. In the present chapter, the term 'transnational governance' refers to the contributions of private actors whose autonomy reaches at least 'middle levels'.

5 Even though the legitimacy of an order might rest on the charismatic qualities of a leader; see Weber 1921/1980: 124.
6 A famous story regarding the World Commission on Dams concerns a representative of construction companies who 'switched sides'. As a result, the consortium of dam-construction companies did not accept the Commission report as valid.
7 'Two level arguing' is analogous to Putnam's 'two level games'; see Putnam 1988. I thank Mathias Koenig-Archibugi and David Held for alerting me to this point.

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11 Private actors and the legitimacy of governance beyond the state

Conceptional outlines and empirical explorations[1]

Klaus Dieter Wolf

Introduction

Intergovernmental cooperation and coordination in international institutions and regimes enable states to adapt their problem-solving capabilities to new regulatory demands. However, at the same time, the procedures of intergovernmental governance give rise to problems of legitimacy. On the one hand, internationalization goes along with de-democratization of governance in so far as it protects governments against societal interference and control. The potential gain of autonomy vis-à-vis society and the opportunity to withdraw certain issues from domestic politics may even motivate national governments to enter into mutual self-commitments.[2] It is in this sense that intergovernmental cooperation may result in the de-democratization of governance. On the other hand, the problem-solving abilities of governance mechanisms which are monopolized by national governments and international bureaucracies are questioned as well. By excluding them from participation in governance beyond the state, the problem-solving resources of private actors remain unused and it becomes more difficult to make these actors comply with international agreements.

From this, it follows that a *de-governmentalization* ('*Entstaatlichung*') of governance beyond the state may help to solve the legitimacy problems of international governance. The basic aim of this chapter is to look more deeply into the potential of this option. Would more weight for civil society or even for private actors (including economic corporations) in governance beyond the state improve the legitimacy of the still state-dominated political system of world society? Can this effect be expected? Can more participation of non-state actors, apart from strengthening the input-legitimacy of governance beyond the state, solve the notorious dilemma between effectiveness and participation (see Dahl 1994)? Or does the inclusion of private actors who are usually neither elected nor organized according to democratic principles, and who do not necessarily act in the public interest, instead jeopardize the legitimacy of new governance patterns?

Discussing the pros and cons of the de-governmentalization of

international governance would remain little more than an academic exercise if there was not at least some reason to assume that de-governmentalization could advance into a political space in which intergovernmentalism is still the dominant if not the only mechanism of governance. This article will suggest some reasons why the 'privatization of world politics' (Brühl *et al.* 2001) is not at all an unrealistic expectation. The answer to this question will be approached on a *conceptional* level and employ an argument by analogy: the emergence of new forms of public–private governance patterns beyond the state is part of the same process of political modernization which – as a result of government failure ('*Staatsversagen*')[3] – has long been taking place *within* most of the OECD countries. In the course of this process the traditional notion of a hierarchical state–society relationship has given way to the idea of the negotiating, enabling, or cooperative state. Political modernization in the domestic context still counts – and depends – on the state, but it does so in terms of a new functional division of labour and authority between public and non-state actors. Applied to the level of governance beyond the state, this argument implies a tendency towards de-governmentalization in at least two respects: on the one hand, the scope of states' governance contributions is reduced to those functions which can only (or most efficiently) be performed by the state; on the other hand, new patterns of public–private governance partnerships emerge.[4]

The aim of this chapter is to discuss the prospects of de-governmentalization and its implications for the legitimacy of governance. Does it make any sense to assume that the de-governmentalization of international governance, in the above-described sense of increasing the governance contributions of non-state actors, will make governance beyond the state any 'better' in terms of legitimacy? On a purely conceptional level, this question may be answered in the affirmative: pooling public and private resources in synergetic relationships could improve the overall problem-solving capacity and at the same time increase societal participation. But it is also very likely that not all patterns of private–public partnerships will meet these normative standards of legitimate governance in the same way. In addition, there may be regulatory demands which can only be met by employing sources of legitimacy exclusively provided by political institutions associated with states.

In order to examine the interrelationship between the *de-governmentalization* and the *legitimacy* of governance beyond the state, both variables have to be operationalized. In the present chapter, *the degree of de-governmentalization* of public–private governance will be measured by the *scope* and the *level* of the contributions of non-state actors. This distinction provides quantitative (how many governance functions are contributed by non-state actors?) as well as qualitative (what is the weight of these contributions?) criteria.

In order to describe the implications of certain forms of

de-governmentalization for the legitimacy of governance beyond the state, a concept of legitimacy has to be developed which is applicable to this context and allows the attribution of a *certain degree of legitimacy* to any governance pattern on the continuum between intergovernmental governance and private self-regulation. The *output* dimension of political legitimacy will be addressed first. This criterion will be subdivided into the *issue-specific* effectiveness of governance, on the one hand, and the *general* performance regarding broader goals, such as the avoidance of negative externalities, on the other. However, claims to legitimize private authority also have to meet certain *input* demands on legitimacy. A distinction will be drawn here between the different sources of input-legitimacy which can justify the regulatory claims of private actors. Moreover, this chapter will then proceed to deal with demands on the legitimacy of governance *processes* in which private actors are participating (*throughput* dimension of political legitimacy).

Finally, these conceptual considerations will be confronted with some empirical observations in order to answer the following questions: do the modified descriptive and normative categories prove to be useful, and can some preliminary ideas be developed about the limits to the de-governmentalization of governance beyond the state set by it? The focus will be on sectoral codes of conduct which have resulted from the direct interaction between private economic actors and civil society, because these regulatory activities represent a type of governance which can be characterized as highly de-governmentalized. Here private actors claim functions which are usually associated with the core functions of the state, for example police functions such as monitoring of rule compliance. Furthermore, 'hard cases' for identifying the limits of de-governmentalization will be considered.

The de-governmentalization of governance in the domestic context and beyond the state as political modernization

Why should an increase be expected in private-actor contributions to governance beyond the state? The following passages will provide reasons for the likelihood of de-governmentalization. By referring to the analogous case of political modernization in the domestic context, the limits of de-governmentalization will also be shown. International governance can roughly be defined as the transfer of governance functions from the domestic context, where their performance has been under the increasingly ineffective control of society, into the intergovernmental sphere. Its emergence is arguably the most remarkable achievement of an interstate system characterized by the lack of a centralized structure of authority, an achievement by which Hedley Bull's label 'international society' has been reaffirmed in an impressive way (Bull 1977). Intergovernmental cooperation has come under severe criticism concerning its problem-solving

capacity (including the willingness of national governments to tackle certain problems) as well as its democratic legitimacy. The search for alternatives is guided by the assumption that intergovernmental regimes and organizations may only be temporary phenomena, signifying a transitional stage, as in the long run they will turn out to be inadequate political instruments for the management of 'de-nationalized' (see Zürn 1998) economic and social processes.

In principle, however, thinking beyond intergovernmentalism could follow very different directions. As one out of two ideal-typical options, for instance, Otfried Höffe (1999, 2000) and Rainer Schmalz-Bruns (1999) have advocated a further hierarchization of the still horizontally organized interstate system, establishing at least rudimentary elements of statehood beyond the state.[5] On the other hand, one could look in the opposite direction and advocate an improvement of the existing horizontal patterns of governance by strengthening the role of non-state actors in decentralized public–private policy networks. This way, effectiveness and citizen participation may be improved simultaneously.

Several arguments can be adduced in favour of the second option. Empirically, the concept of world government still has little or no reference to any existing structures of governance beyond the state. In empirical and normative terms, the concept of global statehood ignores the process of political modernization within most of the OECD countries resulting in what Fritz Scharpf appropriately described as a *de*-hierarchization of state–society relations ('*Enthierarchisierung der Beziehungsmuster zwischen Staat und Gesellschaft*'; see Scharpf 1991). The new regulatory state is less keen on running things 'from above' than on enabling, regulating, and monitoring self-regulation.

In the domestic context, the rise of corporate actors, their integration into sectoral political processes, and the ensuing de-hierarchization of interaction between private and public actors also point to a *societal* modernization, giving rise to functional subsystems that change decision-making structures. Policy networks have emerged due to the weakness of the state and also to 'societal actors claiming participation in the political process, while, on the other hand, cooperation with these actors offers the state the opportunity to obtain informational resources and can improve the acceptance of certain political decisions' (Mayntz 1993: 41, my translation). By introducing categories such as functional differentiation, policy networks, negotiating systems, multilevel governance, or the cooperative state, the research on governance ('*politische Steuerung*') and the changing state ('*Staatlichkeit im Wandel*') has identified an increasing tendency to bypass traditional political institutions and hierarchical patterns of interaction with negotiating systems which are characterized by the modes of bargaining and arguing.

The concept of global statehood ignores these changing governance patterns. Taking this change seriously, it only can be concluded that in

order to avoid government failure on the international level, intergovernmental governance will probably be transformed into a new functional division of labour and authority, and has to be supported by policy networks in which public and non-state actors contribute to policy-making. If it is true that statehood is in transition in the way described by Scharpf, and also that traditional political institutions and governance patterns have shown themselves to be ineffective, then the argument that the very same model of hierarchical governance should be reproduced and should have a promising future on the level beyond the state is not very convincing.

From a problem-solving point of view, purely intergovernmental patterns of governance appear as anachronistic remnants of states claiming omnipotence. It is more than likely that the very reasons which, on the domestic level, induced governments to reassert problem-solving capability by entering into more cooperative relationships with societal actors, will also apply on the international level. In the political space beyond the state the process of political modernization may have only just begun, but the symptoms of government failure (in this case of '*Staatenversagen*') are obvious. As Claire Cutler *et al.* put it, 'Private actors are increasingly engaged in authoritative decision-making that was previously the prerogative of sovereign states' (1999b: 16).

Where the traditional political institutions of the state(s) seem to be unable (or refuse) to regulate the globalization of markets, for instance by securing minimum standards for labour, for the protection of the environment or for distributional justice, civil society addresses corporations directly in order to bind them to formal or informal agreements. Economic corporations have also taken matters into their own hands in instances where states have failed to provide a regulatory framework, upon which they can rely in their calculations. In various ways private actors – corporations and civil society – already contribute to the above-mentioned privatization of governance beyond the state.

Scope and level of private-actor contributions as criteria of de-governmentalization

In order to investigate the implications of de-governmentalization for the legitimacy of governance beyond the state both variables must be operationalized. This section will start with the concept of de-governmentalization. Public, economic, and civil-society actors may cooperate in various patterns of governance beyond the state which fall between the two extremes of pure intergovernmentalism and complete private self-regulation.

Fortunately, there is no need to reinvent the wheel when it comes to identifying and classifying different patterns of public–private interaction and to measuring the significance of private-governance contributions.

On the one hand, the above-mentioned debate on the horizontalization of governance, although primarily concerned with the change of domestic governance patterns, provides concepts which also may be useful for the systematic description of governance patterns beyond the state. On the other hand, the literature on 'private international authority' is helpful in distinguishing different degrees of de-governmentalization with regard to the *scope* of governance contributions of private actors as well as their intensity or *level*. The question of private actors' contribution to governance beyond the state was introduced into the International Relations debate by Virginia Haufler (1993), who suggested that the study of international regimes should also include 'private international regimes'. The regime literature previously had been more or less state-centric. Recently, Claire Cutler *et al.* (1999a) have provided further groundwork for the development of the concept of 'private international authority'.

However, it is most interesting to note that Haufler (1993) as well as Cutler *et al.* (1999a) exclusively concentrate on private *economic* actors when they discuss different patterns of private–public networks, and completely neglect transnational regimes in which members of civil society participate. In their view, this neglect of private non-profit actors is justified because the 'literature on global civil society tends to implicitly underestimate the qualitative difference between the power and influence of corporations and other non-governmental organizations (NGOs)' (Cutler *et al.* 1999b: 17). Earlier, Haufler had already referred to the widespread view that NGOs were too weak 'to have a serious impact on world affairs' (1993: 96). Although she no longer strictly supports this position, she still maintains that only corporations are capable of private self-regulation, whereas 'the difference in goals and resources makes it unlikely that PVOs (private voluntary organizations, for instance NGOs) would establish an independent private regime' (*ibid.*: 100). Civil-society actors are simply not regarded as strong enough: 'Either they will be used as instruments of state policy, or they will "use" states to implement their own goals' (*ibid.*: 106). For the purposes of this chapter it is of course necessary to widen this horizon. Otherwise, neither seemingly important interaction patterns in the triangle between state, economy, and civil society, nor the specific resources which civil-society actors can contribute to governance beyond the state, could be identified.

Having made these preliminary remarks, this chapter will now turn to the *quantitative* criteria for distinguishing different degrees of de-governmentalization. The measure to be applied here is the *scope* of the contributions of non-state actors to governance beyond the state. Accordingly, the degree of de-governmentalization depends on the number of functions fulfilled by private actors. Table 11.1 collects those functions which can be extracted from the two strands of literature quoted above. It displays issue-specific contributions as well as functions which refer to governance in general.

Table 11.1 Scope of private-actor contributions to governance beyond the state

Issue-specific contributions	*General contributions*
• Identification of problem • Provision of resources relevant for problem-solving: provision of information; mobilization of public support; reduction of transaction costs • Decision-making: norm generation; articulation of rules of conduct; prescribing behaviour by binding decisions • Implementation: enforcing rules of conduct; monitoring compliance; mediation and arbitration; sanctioning non-compliance	• Supporting the orientation of governance towards the common good • Provision and protection against violence of the regulatory framework ('meta rules') in which governance activities can take place • Avoidance of negative externalities • Contributions to the acceptance and legitimacy of the political system in general

However, as has already been indicated, the mere numerical record of governance contributions by non-state actors does not tell us anything about the *quality* of de-governmentalization and, in particular, about the degree of *autonomy* of private governance activities. For instance, the de-governmentalization record would be less impressive if private actors fulfilled only consultative or operative governance functions, while the state decided on the regulatory framework within which such competencies were allocated. Where more far-reaching competencies, including the right to stipulate behaviour, were in the hands of private actors, these competencies could rest on a permanent legal entitlement by the state, or they could be withdrawn at any time. The power of states to impose, permanently grant, temporarily lend, and eventually withdraw regulatory competencies would only reinforce their dominant role. Most of these conditions would question rather than support the autonomy of private contributions to governance.

Even in the domestic context, governance usually implies that private actors perform governance functions in the shadow of hierarchy, for instance under the supervision of a public legislator, who not only controls the delegation of competencies to private actors but also defines both the boundaries of the playing fields and the rules of the game. Although in the international sphere national governments by themselves do not interact under a shadow of (authorized) hierarchy, they could cooperate in order to throw such a shadow on the governance contributions of non-state actors. Scharpf claimed that many non-governmental negotiating systems owe 'their very existence, composition and rules of procedure to state intervention' (1991: 629). With explicit reference to governance beyond the state, Haufler (1993: 94–97) distinguishes between two patterns in which states and non-state actors can interact. On the one hand, states can establish an international regime on the basis of

norms and practices of non-state actors and exploit the latter to fulfil certain functions of the regime. In this case the state would obviously dominate private actors, and the degree of de-governmentalization would be low. On the other hand, non-state actors could establish transnational regimes, generate norms, and even establish effective, decentralized monitoring systems. Such private regimes could be called ‘self-regulatory’ to the extent that ‘cooperation among private actors is institutionalized, and [. . .] states do not participate in formulating the principles, norms, rules, or procedures which govern the regime members’ behaviour’ (Haufler 1993: 100). This scenario opens up a wide range of interaction patterns, from purely private regimes to all kinds of mixed public–private partnerships and parentships with differing degrees of governmental restraint or dominance.

Accordingly, the qualitative dimension of de-governmentalization of governance refers to the autonomy of private-actor contributions to governance beyond the state and depends on the role the state claims (and is capable of playing) *vis-à-vis* private actors within a certain division of functions. With reference to domestic governance, Christoph Knill and Dirk Lehmkuhl (2000: 13–17) have distinguished four ideal types of private–public interaction, in which the degree of the autonomy of private actors is measured by the distribution of resources between them and the state. The autonomy of private-governance contributions is regarded as low when they are performed within a *hierarchical* state. In this case the problem-solving capacity of private actors is assumed to be limited. The state is capable of providing public goods and also has the power to decide on their substance and the institutional form of their provision. Autonomy is higher when a *cooperative* state is the partner of private actors. In this case the problem-solving capacities of private and public actors are assumed as equally high and they jointly define the regulatory framework. The autonomy of private-governance contributions rises even further in constellation with a *complementary* state, which is assumed to have only weak problem-solving resources of its own, but is willing to monitor and enforce the largely private provision of public goods. In the fourth pattern of public–private interaction, labelled the *interfering* state, the problem-solving capability of both private and public actors is low. In this case, the state is just strong enough to disturb or obstruct private-governance activities, the autonomy of which is again regarded as high. These four domestic-interaction patterns can easily be applied to governance beyond the state and can add useful criteria to assess the qualitative dimension of de-governmentalization.

Table 11.2 summarizes the different criteria for identifying the weight of private-governance contributions. According to these criteria, the quality of de-governmentalization may depend on the weight of functions, on the distribution of resources between public and private actors, and on the way regulatory competencies have been attained.

Table 11.2 Autonomy level of private governance contributions

Functions performed by private actors	*Level of autonomy of, indicating the degree of de-governmentalization*
Constitutional functions (e.g. 'meta governance')	High
Decision-making functions	Low
Operative functions within governance structures dominated by states	Low
Advisory functions	Low
Contributions within a:	
Hierarchical pattern of interaction	High
Cooperative pattern of interaction	High
Complementary pattern of interaction	High
Intervening pattern of interaction contribution rests on:	
Imposed competence	Low
Permanently granted competence	High
Temporarily granted competence	Middle
No delegation of competence by the state/by states	High

Normative demands on the legitimacy of de-governmentalized governance beyond the state

This section will deal with the operationalization of the second variable, namely the legitimacy of governance patterns beyond the state in which private actors are involved. For this purpose three catalogues of criteria will be offered. The first one relates to the *output*-legitimacy of governance. The second one aims at measuring the *input*-legitimacy of private-governance contributions, focusing on the concepts of authority and authorization as potential sources of the legitimacy of private actors' regulatory claims. The third one addresses *throughput*-legitimacy and is concerned with the quality of governance procedures in which private actors are involved.

'Does it work?' Criteria for the assessment of the effectiveness of governance (output-legitimacy)

For a comprehensive assessment of the output-legitimacy of governance involving private actors, effectiveness and efficiency have to be taken into account, both with regard to the achievement of issue-specific goals and with regard to the capability of fulfilling general functions beyond issue-specific problem-solving (see Table 11.1). The problem-solving capacity of non-state actors is obviously debatable regarding functions which go beyond problem identification, the provision of resources, and legitimization, or norm generation. Ideally, private actors should fulfil the following requirements:

- make binding decisions, enforce rules, and monitor compliance;
- guarantee the general welfare orientation of governance;
- avoid negative externalities;
- establish and protect the constitutional framework in which (private) governance activities can take place ('meta governance').

The capability of private actors to make *binding decisions* and to *enforce rules* is frequently questioned with the argument that, in the event of conflict, they cannot rely on the monopoly of force which only national governments have at their disposal. However, this objection ignores the circumstance that, in the context of international governance, national governments cannot use this instrument either if they want to constrain the behaviour of other governments or of any other national or transnational actor outside of their own jurisdiction. This deficit could only be overcome by establishing a world government with a legitimate monopoly to use force, but not within the context of governance *without* government. After all, international governance is quite correctly characterized by the absence of *any* government institutions.[6] In governance beyond the state, no single state is authorized to make legitimate use of the instruments of coercion even if all states are authorized to use it domestically. In this sense, public and private actors are more *alike* in the international than in the domestic sphere.

But if all this is correct, how can rule compliance in interstate relations be explained? Coercion, the threat of using force or the actual use of (non-authorized) force, only accounts for part of it. In most cases the binding force of regulations originates from the sense of obligation created by the norms and rules on which they are based, or from actors' rational calculation of the gains they can expect from rule compliance. In principle, even non-state actors have all of these instruments at their disposal when they want to alter the behaviour of others. Whether they can make rule addressees comply depends on the extent to which these instruments, covering the whole range from persuasion to coercion, can be brought into play. They can try to persuade with normative or utilitarian arguments, exert moral pressure, mobilize public opinion, or mobilize market forces against firms *and* governments. However, the effectiveness of these strategic options cannot be assessed in general but only in view of the specific sensitivity and vulnerability of the addressees. For instance, governments are sensitive to the withdrawal of public support and the loss of reputation in the eyes of potential voters. Economic actors are accessible via shaming or consumer boycotts, and the more an issue may mobilize and attract public attention, the more likely it is that the conduct of the addressees can be altered.

Monitoring rule compliance may be a trickier – yet by no means a hopeless – task for private actors. Independent private inspections systems work quite successfully in many fields. They can be even more effective than

their public counterparts, in particular when the state is weak or unwilling to act decisively. The main problem is to get access to information, as, for instance, NGOs have no right to interfere in intra-company affairs. If they are not authorized to act on behalf of the state, it is only by way of negotiation with their addressees that non-state actors have a chance to be accepted as independent monitoring agencies. However, if they do succeed their limited financial and personal resources will probably be overloaded.

Concerning the provision of *common goods* by private governance, it has already been mentioned that national governments, usually regarded as the only actors responsible for the common good in domestic politics, turn into representatives of particular interests ('their national interest') as soon as they enter the international stage. Interestingly, in many relevant fields – such as labour or the environment – the normative standards generally referred to have emerged from cooperative efforts of public *and* private actors in international forums (such as ILO and UNCED). Just like intergovernmental negotiating processes, negotiations within networks in which private actors are involved can support the self-interest of those participating *or* may be geared towards the general interest (see also Haufler 1993: 99–105). However, three preconditions can be identified which favour problem-solving and orientation towards the common good (see Mayntz 1993: 51). First, a sufficient number of the participating actors must commit themselves to the common good and regard themselves as responsible for effective problem-solving, rather than representing specific interests. Second, the public must have the means to check that the participants' actual conduct conforms to their self-commitments and to identify actors who pursue particular interests. Finally, participants must realize that some kind of benefit (for instance, reputation) accrues from achieving the above-mentioned goals.

It might be argued that governance contributions of private actors may be quite effective and successful with regard to *sectoral* problem-solving, but will fail to deal with the trans-sectoral consequences (*negative externalities*) of their regulatory activities. Indeed, to the extent that sectoral 'private regimes' have an impact upon political arenas outside their realm, there is demand for coordination and linkage which requires more than 'single issue' competences. It is also doubtful whether private actors are able to provide and to protect the regulatory framework within which they operate – in other words, it is questionable whether they are capable of '*meta-governance*'. The effective regulation of power – that is, the allocation of institutional capabilities (Héritier 1993: 16) to secure formal equality and to protect the weak against the strong, to establish and protect functioning markets and to open public discourses in a free world society – depends on the existence of a constitutional framework which can only be provided by public actors. Hence, 'privatization requires a public framework' (see Hummel 2001: 26).

Input-legitimacy of private-governance contributions: authorization and authority as sources of legitimacy

The exercise of power is traditionally regarded as legitimate if it is carried out by a legally authorized body. This concept of legitimacy is reflected in the general recognition of the state as the only political actor which can legitimately claim to use physical power. The notion of 'private' authority would be then be a *contradictio in adiecto,* if the concept of 'authority' implied that private actors are in principle 'not entitled to prescribe behaviour' (Friedman 1990: 58, 79). Consequently, the authorization of private regulatory power could only take place with an explicit delegation of competencies by the only body with the authoritative competence to allocate such powers – the state.[7] However, this method – by which the input-legitimacy of non-state ('private') regulatory activities is founded upon a formal ('public') authorization by the state – becomes highly problematic in the international sphere. There are two reasons for this. First, the boundaries between 'public' and 'private' are much less clear in the political space beyond the state, where the national governments follow 'private' purposes of their own ('the national interest') and private actors often are the only protagonists of what they perceive to be the common good. Second, authorization of power delegated by an intergovernmental body cannot provide the same legitimacy as authorization by the state in the domestic context.[8] As has already been mentioned, in the international sphere *all* governance contributions take place without government institutions. There is no *international* public authority which can successfully claim to have a competence-competence or a monopoly of legitimate power. Once again, public and private actors turn out to be *similar* units in the international sphere.

A two-step delegation, from states to intergovernmental institutions or international agreements and from them to private actors, fails to provide input-legitimacy. If it is correct to characterize intergovernmental decision-making and self-commitments as strategic instruments by which national governments attempt to reassert state autonomy in the face of societal pressures (see Wolf 1999b), then international agreements themselves must suffer from a severe lack of input-legitimacy. Against this background, acquiring authority through intergovernmental agreements would only pass on the democratic deficit of the latter to the governance competencies which private actors had been granted.

If the authority of private contributions to governance beyond the state were solely derived from the *formal* authorization of a body which is *de iure* authorized to authorize (namely, a state or – with a loss of legitimizing capability – an international institution), the quality of such an authorization would have to depend on whether the decision-making procedures themselves could claim democratic legitimacy. The grade of input-legitimacy which private actors can obtain from formal authorization by

intergovernmental decision-making procedures can never be higher than the democratic quality of the decision-making procedures from which it is derived. Therefore, additional sources of input-legitimacy have to be found – ones which do not depend on the formal delegation of competencies by the state or by interstate agreements.

In fact, there are sources from which legitimacy can be derived when formal authorization is not available or when it is of questionable value – as in the international sphere. In order to identify them, it is helpful to distinguish between input-legitimization through *formal* (inter-) governmental *authorization*, which may result in private actors 'being entitled' or 'being in authority' to regulate, and the *substantially* grounded acceptance of 'being an authority' (see Friedman 1990: 77–80; Cutler *et al.* 1999b: 18).[9]

An actor without formal authorization can claim an involvement in governance, for instance, upon the basis of a credible commitment to basic norms or to the general welfare, or upon the recognition of his expertise and other problem-solving resources.[10] These factors are the real and genuine bases of legitimacy upon which private actors can rely. Input-legitimacy then results from the power of the moral and factual (or knowledge-based) authority of private actors.[11] Such authority 'operates through a sense of obligation rather than coercion' (Cutler *et al.* 1999c: 359). Its impact is primarily revealed in deliberative processes. It is inherent in the attitude and the integrity of the actors, and it rests on the general – or, at least, the widespread – recognition of the appropriateness of their programmatic goals.

The quality of input-legitimacy based on this kind of authority may be measured by questions such as the following. Do the claims of private actors make reference to generally accepted norms, or to the common good? Are these references consistent with their conduct? How do they determine the substance of the common good? How strong or how disputed are the truth and validity claims of their beliefs and knowledge?

Table 11.3 summarizes the potential sources of private authority and also roughly attributes degrees of legitimacy to the different variants in which they may be observed.

Throughput-legitimacy: procedural prerequisites

In the previous section, it was argued that the input-legitimacy of private actors' contributions to governance beyond the state can be founded on formal authorization only in a very limited way. Obviously, this conceptualization of *input*-legitimacy does not conform to the liberal notion of *democratic* legitimacy. But, although the model of the majority-democracy in the nation state to which this notion refers is not appropriate for democratizing governance beyond the state (see Wolf 2001), it informs us about some fundamental demands on the quality of procedures without which

Table 11.3 Input-legitimacy

Source of authority	*Quality of legitimacy by the state*	*Quality of legitimacy by intergovernmental agreement*
Formal entitlement ('being in authority')		
• Regulatory competence acquired through delegation by a body which is *de iure* authorized to delegate competencies • Legitimate to the extent to which competence-competence is legitimately claimed • Procedure of authorization:	Generally high	Generally low due to the democratic deficit of inter-governmental decision-making procedures
a) explicit authorization by law		
aa) permanent authorization	aa) high	aa) low
ab) limited authorization	ab) high	ab) low
b) implicit authorization (state does not object)	b) middle	b) low
c) *ex post* recognition by authorizing body	c) middle	c) low
d) 'authorization' via recognition by those governed	d) middle	d) middle
e) 'self-authorization'	e) low	e) low
Substantial authority (being acknowledged as 'an authority' on the basis of expertise or moral credibility)		
a) claim based on *a priori* rights and norms	a) high	
b) claim based on generally accepted notion of the common good	b) high	
c) claim-based on self-defined notion of the common good	c) middle	
d) claim based on accepted professional expertise (knowledge and other resources which are relevant for problem-solving)		
da) with commitment to the common good	(da) high	
db) without this commitment	(db) low	

input-legitimacy in the international realm cannot be assessed in the international realm either. Such procedure-dependent criteria include responsiveness and reliability: how can it be guaranteed that political decisions come close to people's demands and that necessary action is taken? In fact, private actors act voluntarily. They may choose (and therefore have the power) not to act at all and cannot be obliged to address scope

with a certain issue. There is also the question of responsibility and accountability: how can the responsible actors be identified, and how can they be rewarded or punished? In fact, private actors are not accountable to any general constituency, but only to their supporters, members, or shareholders.

Even in the domestic setting, these demands cannot be met easily. This becomes even more problematic in regard to governance beyond the state. However, these procedural deficits do not affect the legitimacy of private actors alone, but refer equally to private and public governance beyond the state in the same way. Moreover, the legitimacy of governance beyond the state can be improved by institutional designs which ensure transparency, quality of deliberation, and procedural fairness.

Keeping these mentioned restrictions in mind, there is little reason to assume that private actors should not be able to perform well, as long as certain procedural requirements are fulfilled. Private actors may be called to account for their governance activities in a number of ways, depending on whether their authority rests on formal delegation of competencies through intergovernmental decision-making, whether it is explicitly recognized by those governed, or whether the input-legitimacy is based on normative or professional authority. Formal entitlement may be withdrawn, legal action may be taken against them, and the credibility of their moral and professional authority may be lost, with consequences for their public acceptance, their financial support, or their reputation in the market. Similar to the checks and balances within the political system of the democratic state, public debate and a functioning market can help to secure the accountability of private contributions to governance beyond the state. These prerequisites, however, will have to be guaranteed by a state-like body.

Table 11.4 Throughput legitimacy

Procedural requirements	*Legitimacy of procedures*
• Transparency: activities in public/ behind closed doors	High/low
• Deliberative quality: arguing/ bargaining/exerting pressure	High/medium/low
• Responsiveness and reliability: private actors can be placed under obligation to act/can act voluntarily	High/low
• Responsibility and accountability: actors may/may not be identified and held responsible	High/low
• Congruence demand is met/not met	High/low

Codes of conduct for corporate social and environmental responsibility: legitimacy and de-governmentalization of governance in practice

This section will introduce some explorative empirical evidence in order to further explicate the usefulness of the descriptive and normative categories established in the previous sections. Case studies on the relationship between legitimacy and de-governmentalization, which refer to highly de-governmentalized patterns of governance beyond the nation state, are most instructive here. This section will therefore deal with transnational regulatory activities which have resulted from the direct interaction between private economic corporations and civil society and, in particular, with codes of conduct for the regulation of corporate social and environmental responsibility. Such 'private regimes', in which non-state actors try to perform transnational governance activities (almost) autonomously, have been established in numerous areas during recent years (see Blanpain 2000; Compa and Hinchcliffe-Darricarrère 1995).

Regulatory initiatives which have led to codes of conduct, certification systems, and labelling practices can be observed in many different economic sectors.[12] In 1999, for example, importers and producers of flowers, human-rights organizations and trade unions agreed upon a 'Flower Label Programme', in which importers and producers in exporting countries laid down standards with regard to freedom of association, fair wages, the prohibition of child labour, and pesticides;[13] compliance to these standards is overseen by NGOs such as *terre des hommes*. In contrast to this almost completely privatized form of governance beyond the state, other transnational initiatives, such as environmental codes in the tourism industry,[14] are often co-products of NGOs, international organizations like UNESCO and WTO or governmental institutions.[15] As Hepple (2000) shows, business corporations may operate under many regulatory frameworks, among them national law, international conventions, bilateral investment treaties, codes negotiated with NGOs, or codes issued by individual corporations themselves. However, even within the latter category of completely private codes of conduct, substantial differences can be observed: while in the cases analysed below the initiative comes from sources outside of the multinational corporations, there are other examples in which codes of conduct have been initiated by the corporations themselves, either in response to consumer pressure or in order to conform to the company's ethical values. This widespread private (corporate) self-regulation is of course interesting because of its high degree of de-governmentalization, but it will not be dealt with here. Compared to private regulatory efforts in which, for instance, NGOs are involved, it obviously does not have much potential for meeting the basic demands on procedural legitimacy.

The passages below will concentrate on the Rugmark Foundation and its initiative against child labour in Third World countries and on the

regulatory activities of the anti-sweatshop movement, in particular the transnational 'Clean Clothes Campaign'. Both cases represent far-reaching attempts at private self-regulation and, as emerging governance patterns, may therefore be informative with regard to the limits which de-governmentalization of governance beyond the state puts on democratic legitimacy. In both cases the underlying problem may be described as a 'responsibility gap': in the course of economic globalization, private corporations have been able to evade national, social, and environmental standards without running into binding regulations in the international realm (see Braun 2001: 262).

The elimination of child labour in the carpet sector by 'Rugmark': self-regulation by codes of conduct and labelling systems

The transnational regulatory activities of the Rugmark Foundation, an organization which aims to eradicate child labour in the carpet sector, can serve to shed some light on three factors: first, on the potential limits to the de-governmentalization of governance beyond the state; second, on the legitimacy deficits that are likely to occur; and finally, on those governance functions which still depend upon some kind of government involvement for their successful fulfilment. The Rugmark Foundation is a non-profit-making organization in which numerous labour, human rights, and other organizations cooperate, including the International Confederation of Free Trade Unions as well as producers and importers. It was launched in the face of an obvious government failure regarding the implementation of national laws, international recommendations, and conventions (ILO Convention 138) concerning child labour. In countries where an effective inspection system on carpet production has not been established, self-regulatory activities try to ensure that companies do not employ children, and that the importing and the exporting countries comply with labour protection laws. Referring to widely acknowledged international norms, the Rugmark Foundation directly addressed the manufacturers and distributors in Germany, India, Nepal, Pakistan, Canada, and the USA in order to involve them in legally binding contracts to produce carpets without child labour, to pay minimum wages to adult workers according to the standards set by governments, to register all looms with the Rugmark Foundation, and to allow access to looms for unannounced inspections carried out by Rugmark representatives.[16]

In order to avoid consumer boycotts and a commercially detrimental loss of reputation, the addressees of this transnational regulatory programme and, in particular, the exporting companies cooperate with the initiative in the framework of private codes of conduct. Once a company has committed itself to using the 'Rugmark' label, the code becomes legally binding, and the illegal use of the trademark is sanctioned accord-

ing to criminal law. In addition, the importers will refuse to buy carpets which have been produced knowingly violating the guidelines. The funds raised through the licensing fee paid by participating carpet manufacturers are used for education and rehabilitation programmes for former child workers.[17]

Degree of de-governmentalization

The broad scope and significance of the regulatory functions performed by the Rugmark Foundation make this transnational sectoral 'regime' a case of highly de-governmentalized governance, even if it also includes cooperation with governmental institutions and international organizations, such as UNICEF (which provides financial support). Such private-governance activities are a reaction to state failure, whose functions are taken over by civil society. These functions include 'soft' governance contributions like problem definition or the provision of information, but they also cover legislative and executive functions such as the formulation of rules of conduct, the prescription of behaviour and the monitoring of rule compliance. Given the dependence upon governments is weak and private governance activities do not oppose the policies of nation states, they do respond to the lack of capacity or unwillingness of such states to manage certain issues. Governmental involvement is restricted to the obligations which, in case of the participation of the national governments, are laid down in ILO conventions and to financial support like the one of the German Ministry for Economic Cooperation, for example.[18]

Degree of legitimacy

With the Rugmark initiative, the civil-society groups, which established the foundation, authorized themselves to formulate, prescribe, and implement generally accepted human and social rights in a specific sector of transnational relations. As a consequence, the initiative's input-legitimacy essentially rests upon the widespread recognition of its 'common good' orientation and also upon the moral authority that it derives from the legal and ethical norms to which it refers. In this instance these norms are indeed widely accepted. The activities of Rugmark are in accordance with national law and intergovernmental agreements (such as ILO conventions). A further source of legitimacy consists in the recognition of private regulatory power on the part of those to whom the rules are addressed. So far as the deliberative quality of the decision-making process is concerned, it is sensible to assume that bargaining and arguing had to go hand-in-hand with each other in order to 'persuade' carpet manufacturers, exporters, and importers alike of the advantages, which the eradication of child labour would bring. Although (and indeed because) the participating economic actors may have committed themselves in public to their

social responsibilities, this fact alone does not necessarily mean that their behaviour will subsequently be guided only by normative considerations. Their allegiance to the initiative may be little more than mere rhetoric, in which case the effectiveness of persuasion would only be increased by the threat of shaming, of loss of reputation, and of consumer mobilization – all of which would ensue were non-compliance to be made public.

Although 'Rugmark is widely praised for having raised attention to the child labour problem and for having helped reduce the use of child labour in the Indian carpet industry' (van Liemt 2000: 189; see also Betz 2000: 26), in *absolute* terms the success of the initiative is not much more than a drop in the ocean. By October 1998 more than a million carpet manufacturers in India had been labelled, some 200 importers had obtained the Rugmark licence and almost 20,000 looms had been registered; yet 90 per cent of the more than 180,000 looms in the Indian carpet belt remained unregistered, and the majority of those which were registered could only be inspected approximately once a year by a small group of trained and supervised Rugmark Foundation employees. Further criticism can be directed at the insufficient financial compensation which is given to families who have lost the income of their children and are in need.

However, if problem solving is not measured in absolute terms, but is compared to the complete failure of governments in the manufacturing and importing countries, the success of Rugmark International is quite remarkable. It becomes even more so if Rugmark's activities are put into the context of the global 'ethical network' of initiatives which are determined to promote the environmental and social responsibility of economic actors (see Fair Trade 1999). They have changed the attitudes of many corporations and have contributed to the emergence (or claim) of a recognition of social responsibility on the part of corporations all over the globe and, to that extent, have supported the commitment to normative standards by which future conduct can be measured. The regulatory activities of civil society may not have spread epidemically, but in many cases private contributions to problem solving have been more successful than those of states.

Regarding the general demands on legitimate governance, it can therefore be concluded that orientation towards the common good can obviously be guaranteed by reference to generally accepted norms and by ensuring transparency and public awareness. However, two problems throw a shadow on this impressive record. On the one hand, the sustainability of improvements cannot be guaranteed so long as the general conditions of the labour market remain poor and families have no alternative sources of income. On the other hand, the carpet example shows that transnational single-issue-activities cannot control the negative externalities of their success. For instance, they have not been able to prevent the transferral of child labour into other sectors. In addition, and as may be

expected, private contributions to governance beyond the state do not include meta-governance functions such as providing for the conditions under which legitimate governance can take place. As a consequence, private-governance activities themselves as well as their success depend on certain activities that states undertake (agree upon general norms which provide legitimacy for private initiatives) or do not take (implementation, enforcement, and monitoring). Even if, as shown in this case, states leave the regulatory policies to private actors, they can try to change the rules of the game at any time. Finally, the Rugmark initiative and the cooperation of its addressees are voluntary. Neither party can be obliged by law to regulate or to comply, nor can the regulators be held responsible for any damage they may cause.

The 'Clean Clothes Campaign': Codes of labour practices and systems of certification in the apparel industry

As in the carpet sector, the regulatory activities of civil-society groups intending to advance the interests of workers in the apparel industry addressed, on the one hand, the gap between the national and intergovernmental regulation of working conditions (the core standards and guiding principles have been established by the ILO in a number of Conventions, for example 29, 87, 98, 100, 105, 111, and 138; see Blanpain 2000: 329) and, on the other hand, the ongoing oppression, exploitation, and abuse of workers in this industry. The addressees of the many efforts from civil society to overcome this gap are companies and their contractors, suppliers and licensees, retailers, industry associations, and employer organizations, who are all held responsible for the violation of fundamental human and labour rights in so-called 'sweatshops' all over the world – often in so-called free enterprise zones, in which clothes are produced for all kinds of labels. A typical list of substandard labour conditions in sweatshops, against which a 'campaign of embarrassment' has been launched, reads as follows: low wages, forced overtime, physical coercion, child labour, unsafe use of pesticides, suppression of trade unions, and so on.

Once again private self-regulation follows the failure of national governments, not only but primarily, in Third World countries. The corporations themselves and international organizations (ILO, WTO) try to effectively improve factory conditions. And once again private actors derive the substantial part of their legitimacy from taking up generally accepted and intergovernmentally codified norms, which national governments refuse (or seem unable) to implement in the face of global economic competition. The activities of the 'Anti-Sweatshop Campaign' are manifold but, as in the case of the carpet sector, the starting point was to embarrass well-known, image-dependent companies and to encourage normative self-commitments to social responsibility. In negotiation processes companies and organizations of retailers are persuaded to take

responsibility for the labour conditions, to accept and adapt codes of conduct and to commit themselves to actively implement these codes.[19] This commitment implies the acceptance of minimum standards and of a system of independent monitoring.

Forming a coalition of more than 159 consumer organizations, trade unions, solidarity groups, researchers, and other activists, the various 'Clean Clothes Campaigns' are the most important concerted transnational effort to protect workers 'where national laws are inadequate or are not enforced'. Their 'Code of Labour Practices for the Apparel Industry, including Sportswear' ('CCC-Code') explicitly 'does not seek to become a substitute' for national laws or international agreements. It sets forth minimum standards for wages, working time, and working conditions, devised for application throughout the industry and in all countries. It is addressed to retailers as well as manufacturers 'and all companies positioned in between those in the apparel and sportswear supply chain' (Code quotes from Blanpain 2000: 329–339). Explicitly referring to the relevant ILO Conventions, the CCC-Code regulates the following issues:

- employment is freely chosen
- no discrimination
- no child labour
- freedom of association and right to collective bargaining
- wages sufficient to meet basic needs
- hours of work in compliance with applicable law
- safe and hygienic working environment
- no physical abuse or harassment
- regular employment relationship

Independent monitoring takes place directly or indirectly by a 'Foundation', which is jointly established between companies that have adopted the Code, trade-union organizations, and NGOs.

The American NGO 'Co-op America'[20] also aims at exploiting market forces for the success of their 'Corporate Responsibility' programme. It informs consumers about 'how to vote with their dollars' and encourages companies 'to become socially and environmentally responsible' by issuing a so-called 'Ladder of Labor Responsibility', which is a ranking system applied to various product groups. The upper ranks of this ladder can only be reached by companies which have implemented a set of basic labour standards and which have agreed to independent monitoring. The 'White House Apparel Industry Partnership', an initiative of the Clinton administration in 1996/97 (see Varley 1998: 11–14, 470–475), serves as a prototype code which includes basic enforcement principles and which establishes a partnership between NGOs and apparel companies coordinated by the Department of Labor.

To mention another prominent example, Gap Incorporated has gained a reputation as one of the first companies to establish a corporate code of conduct ('Code of Vendor Conduct') and a global monitoring system of their own.

> Unlike most retailers, Gap Inc. has a global network of employees who are dedicated full time to monitoring factory compliance [. . .]. We forbid forced labor and child labor in factories that produce our clothing, and we focus our compliance efforts on factory work environments and the fair treatment of workers. Our monitors generally visit factories at least once every three months, and conduct random, unannounced inspections as well.[21]

Degree of de-governmentalization

Compared to the almost complete dominance of private actors in the Rugmark case, the 'Anti-Sweatshop Campaign' and the 'Clean Clothes Campaigns' are characterized by a greater variety of governance patterns. On the one hand, 'private' regimes, which result from negotiations between companies and civil-society groups without any direct participation by states, or codes of conduct in which even civil-society actors are not directly involved (corporate self-regulation), can be found. On the other hand there is also the American 'Apparel Industry Partnership', a public–private partnership which conforms to the model of the ILO and in which the national government plays the role of the cooperative state.

In general, the scope and level of governance contributions of private actors reflect the same degree of de-governmentalization which could be observed in the earlier example of Rugmark. Transnational regulatory initiatives by civil-society groups emerge in response to the failure of the traditional intergovernmental policy-making process in the ILO and – even more so – in the WTO. The functions taken over by private actors include publicizing information to consumers, but also the implementation, enforcement, and monitoring, which are traditionally attributed to the state. The role of the international organizations in these governance activities at best can be described as complementary.

Degree of legitimacy

Private-governance contributions in the transnational apparel industry are no less effective than those in the Rugmark case. The various campaigns have had a substantial impact on the conduct of the corporations addressed and presumably have improved at least the working conditions in a number of other places as well. Although it is difficult to decide whether the new social responsibility indicates a 'normative turn' in the logic of action and results from arguing and persuasion, or whether it just

reflects some kind of rhetorical action in the face of a potential loss of reputation, the commitments made by almost all well-known companies document a general acceptance of norms against which future conduct can be measured. Even in cases where a code of conduct came into being with the participation of a governmental mediator, 'corporate voluntarism' still prevails over coercion. However, this 'deficit' is not typical of private-governance contributions, but characterizes the horizontal mode of governance beyond the state in general. In principle, the regulatory efforts within the ILO are not very different: their recommendations and conventions become legally binding only for states which transpose them into national law and enforce them: 'ultimately, the ILO is an instrument that relies on good will and cooperation' (Varley 1998: 34).

As far as input legitimacy is concerned, what has been said already in the Rugmark case can be repeated. On the one hand, private actors can make reference to the same sources of authority (generally accepted norms and notions of the common good) to support the legitimacy of their contribution to governance beyond the state. On the other hand, in at least some cases, they can also point to the additional legitimacy, which they have gained from participation in public–private policy networks. The congruence of decision-makers and those affected by decisions is taken care of by the direct involvement of the addressees in the policy-making process. Transparency and market forces enhance the chances of placing them under obligation, and also improve the reliability of compliance – at least as far as this is possible *vis-à-vis* 'corporate voluntarism'.

Conclusion

The different examples of codes of conduct initiated by civil society show how existing forms of de-governmentalized governance beyond the state work in practice, and these examples also provide evidence about the legitimacy potential of transnational governance. Private codes of conduct were chosen as a highly de-governmentalized form of governance. Surprisingly, they deeply penetrate into the realm of the state. There seems to be considerable room for reducing the role of states in favour of private governance beyond the state, and there also seems to be no fundamental contradiction between a private form of governance and a public purpose. De-governmentalization of governance need not be detrimental to the legitimacy of governance at all; on the contrary, it can mobilize additional sources of legitimacy. However, the case studies also confirm the expected limits to private self-regulation.

First, private actors can neither organize themselves nor undertake regulatory initiatives without certain public guarantees, in particular the establishment and protection of a constitutional legal framework for private activities which, for instance, guarantees functioning markets and free public discourse.

Second, civil-society actors can only provide financial and personal problem-solving resources in a very limited way ('drop in the ocean'). The more successful they are as, for example, monitoring agencies, the more their capacities come under pressure. In addition, as Hummel (2001: 42) has pointed out, professionalization tends to move them further away from their sources of input-legitimacy, such as independence and non-profit orientation.

Third, sectoral regulatory efforts by private actors can cause negative externalities and create a demand for intersectoral coordination, which can only be met by (public) actors, who have more than just a 'single issue' competence.

Consequently, private contributions to governance beyond the state can add to, but will not replace, public governance. They can reduce government overload as well as the ungovernability of a complex world society. However, private self-regulation depends on the existence of a shadow of hierarchy which can only be provided by some kind of government – the adequate institutional form of which has yet to be found in the sphere beyond the nation state – whose role might consist less in substantial policy-making but rather in fulfilling the above-mentioned core functions of meta-governance ('*Ordnungspolitik*'). In this sense, private contributions to governance beyond the state should be considered as *embedded self-regulation*, in which public actors, private corporations, and members of civil society are involved in different arenas and functions.

Whereas Höffe (2000: 14) claims that the 'supporting, subsidiary and complementary' functions, such as mediating and arbitrating, should be laid in the hands of a 'world federal state' ('*Weltbundesstaat*'), there is actually no reason why the performance of the above-mentioned functions should be dependent on a hierarchical political system of world society. However, only systematic empirical research on the developments portrayed in this chapter will confirm: (a) whether the residual enabling and supporting demands on statehood have been identified correctly in this chapter; and (b) whether they require global statehood; or (c) whether governance 'from above' can be successfully replaced by horizontal patterns of governance including states, private corporations, and members of civil society.

Notes

1 The first version of this chapter was presented to the ECPR workshop on 'Governance and Democratic Legitimacy' at the Joint Sessions of Workshops in Grenoble, 6–11 April 2001. An earlier German version 'Zivilgesellschaftliche Selbstregulierung: ein Ausweg aus dem Dilemma des internationalen Regierens?') is included in Jachtenfuchs and Knodt (2002). For a broader empirical treatment see Brozus *et al.* (2003: Chapter 6).

2 See Wolf (1999a, 2000).

3 The concept known as '*Staatsversagen*' in the German debate can alternatively be referred to as 'government failure', 'state failure', or 'policy failure'.

4 Among these partnerships, governance patterns without any reference to statehood or public contributions to the provision of public goods, such as pure private self-regulation, should be regarded as an ideal type, unlikely to be observed in reality. But anyway, such patterns are not in question here. Instead, the concept of de-governmentalization is introduced in order to identify and categorize the different governance patterns in which states and non-state actors participate.

5 Whereas Schmalz-Bruns (1999) speaks of minimal global statehood in this context ('*globale Minimalstaatlichkeit*'), Höffe goes somewhat further by advocating the establishment of a global democracy ('*Weltdemokratie*'), or global republic ('*Weltrepublik*', see Höffe 2000: 14). To be fair, even Höffe would regard it as unwise to rely completely on *etatist* solutions.

6 Of course, one could argue about the representativeness of hierarchical institutions such as the International Court of Justice, or the European Union.

7 If they had to depend on this kind of formal authorization, private contributions to governance would gain the necessary input-legitimacy only at the expense of being degraded to mere variations of public-governance activities with a similar legal quality. As a result they would not be 'private' contributions to governance any more. This understanding does not leave any room for the notion of a genuinely private authority. As Cutler *et al.* have shown, it seems to be widely acknowledged that private authority in the international realm depends on the state in the very same way. After all, 'the private sector actors must be empowered either explicitly or implicitly by governments and international organizations with the right to make decisions for others' (1999b: 19).

8 Therefore, statements such as the one quoted by Cutler and others, according to which 'political authority by definition cannot be "private", it must be public' (Cutler *et al.* 1999b: 18), cannot be transferred from the domestic to the international sphere as easily as it appears.

9 Given the fact that formal authorization by governments is not as strong a source of input-legitimacy in the international sphere as the delegation of authority is in the domestic context, an additional source of input legitimacy beyond the state – where the public and the private realm are merging anyway – could be 'private' authorization and control by the addressees of private-governance activities.

10 These sources strengthen the legitimacy of private and public regulatory claims. The overall input-legitimacy of governance depends on activating the different sources of authority of all participating actors.

11 All of the above-mentioned justifications of participatory claims are of course also related to the quality of the output of governance, as they may improve the quality of decisions and the likelihood of implementation and compliance. Although in this case the reason why private actors should be given a right to participate is of course their expected contribution to certain results, normative and factual authority are treated here as possible sources of input-legitimacy related to the criteria of inclusion or exclusion of private actors.

12 See also Blanpain (2000); Chapter 6 of Brozus *et al.* (2003); van Liemt (2000: 167–192).

13 See also: www.oneworldweb.de/tdh/presse/blumenlabel.html (accessed May 2001).

14 For a summary of tourism industry codes, see UNEP (1995).

15 See UNEP (1995) and www.insula.org/tourism/pagina_n9.htm (accessed May 2001).

16 See www.rugmark.org/certify/index.html (accessed September 2001). Hand-

knotted carpets are mainly produced in India, Pakistan, and Nepal for export into OECD countries. Child labour involves several hundred thousand children being sold into slavery to pay off the debts of their parents. See also Betz (2000).

17 According to Rugmark (available online at: www.rugmark.org/press/press082896.html), 30 per cent of German carpet imports from India take place within the certification system.

18 In September 2001, the Ministry for Economic Cooperation announced that it would only continue to support Rugmark with an annual 200,000 DM if Rugmark was ready to cooperate with the 'Care and Fair' initiative, which works in the same field but with less strict guidelines and, above all, without practising unannounced inspections and sanctions.

19 See Varley (1998: 59–82 and 401–427) and Blanpain (2000: 297–386), where numerous codes of conduct are collected and evaluated.

20 For further information see: www.coopamerica.org/sweatshops/ssladder.htm.

21 See: www.gapinc.com/community/sourcing/stopping_sweatshops.htm (accessed March 2000). See also Varley (1998: 281–307).

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12 The privatization of governance systems

On the legitimacy of international environmental policy

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Introduction

International governance systems have changed tremendously in recent years with regard to the loci of governance and the role of non-state actors. It is widely accepted that governance is no longer restricted to the state level. Instead, local, regional, and international levels are becoming more important. In environmental politics, for example, almost all important regulations are negotiated and accepted on the international level, but they can only be implemented at the local level. Local government bodies and non-state actors play an important role in the implementation of these international regulations. Non-state actors have further tried to influence the norm- and rule-setting processes and have monitored states' behaviour, as numerous case studies have demonstrated (see, for example, Princen and Finger 1994; Willetts 1996). Most of these studies examine non-governmental organizations (NGOs). Only a few investigate the impact of business actors, or transnational corporations (TNCs), although their importance is growing. In this chapter, I will investigate the roles and importance of both kinds of actors in international governance systems. I will treat NGOs and business actors as forming one single group, private actors, because, despite differences in their size, power, political aims, and political strategies, they are both contributing to a transformation of governance systems. To put it differently, the group of private actors is very heterogeneous and encompasses both non-profit and profit organizations, which differ in relation to the topics they are concerned with, the goals they want to achieve, and the strategies they use in order to reach these goals.[1] The private actors have in common – and this is the reason for treating them as one group – that they are neither founded nor financed exclusively by states or intergovernmental organizations and, even more important, that they are contributing to the privatization of governance systems (Brühl *et al.* 2001).

Up until now, the term 'privatization' has been mainly used as a description of a political strategy at the state level (changes of ownership), which often goes hand in hand with liberalization and deregulation.[2]

I prefer to use the term as a way of shedding light on the transformation of international or global governance systems. Privatization means that private actors are increasingly involved in governance systems, both as makers and addressees of norms and rules. The inclusion of private actors in governance systems transforms these structures in two ways. First, the character of regulation is changing. Whereas up to the 1980s most conventions were of a compulsory character, today an increasing number of regulations are voluntary. These regulations propose a specific action without providing for any follow-up strategies in case an actor fails to observe the norms and rules (lack of compliance mechanism). This means that each actor may decide whether to accept a specific regulation, and behave accordingly, or not. This trend is called 'de-governmentalization' ('*Entstaatlichung*'). One example is codes of conduct in which companies declare their willingness to comply with specific norms, especially with regard to social and environmental standards. Companies accept these codes of conduct voluntarily. In addition, codes of conduct typically make no provision for monitoring, reporting, or sanctions (OECD 1998: 6). Second, the underlying assumptions of the obligations are changing. A growing number of regulations are based on market principles and self-interest rather than regulatory principles and public interest. I refer to this trend as the 'commercialization' ('*Kommerzialisierung*') of world politics. Patent protection, especially of biotechnological processes and products such as genetically modified organisms, is an example of commercialization. In the TRIPS (Trade Related Intellectual Property Rights) agreement plants and animals are seen as genetic material only, which can be used for breeding new and patentable organisms. Indigenous peoples and NGOs have criticized this regulation for failing to provide regulations protecting those who preserve biodiversity, for contributing to a monopolization of firms in the biotechnology sector, and for threatening traditional agricultural cultivation (Koechlin 2001). The two trends of de-governmentalization and commercialization are results of privatization, and may occur at the same time and reinforce each other. To what extent can privatization of governance systems be observed in world politics? What roles do private actors play in international (or global) governance systems? How should we assess the trend towards privatization? Does it enhance the problem-solving effectiveness of world politics? Does privatization contribute to an increase in the democracy of international governance systems?

In order to discuss these questions, I will proceed in two steps. First, I will present some examples of privatization by focusing on environmental politics. I choose this issue area because the privatization of world politics, the growing inclusion of private actors in all stages of governance systems, firstly was observed and is well developed in environmental politics. I will demonstrate that private actors have been important in environmental politics from the start, but that their impact on regulation has increased in

recent years. After this, I will discuss the consequences of privatization for the legitimacy of governance systems. This assessment of the impact of privatization on legitimacy leads to contradictory results. On the one hand, privatization is expected to enhance the governance system's effectiveness (or output-legitimacy), since private actors deliver new resources to the governance systems. On the other hand, Northern ideas are becoming even more influential and dominant in the area of norms and rules since most private actors come from industrialized countries. Thus privatization is contributing to a growing imbalance between Southern and Northern representation.

Privatization in international environmental governance

The privatization of world politics is particularly well developed in the environmental area, in which private actors perform key roles as independent bargainers and as agents of social learning (Princen and Finger 1994). Although private actors have always been important players in environmental governance, in recent decades two new developments can be observed. The number of private actors is higher than ever before in environmental governance (quantitative dimension), and private actors' roles have been enlarged so that the impact of their work has been broadened (qualitative dimension).

The increase in the number of private actors

To start with the quantitative dimension, it is easy to demonstrate that a growing number of private actors are becoming active participants in governance systems. In 1972, during the first environmental world summit (United Nations Conference on the Human Environment) in Stockholm, hundreds of NGOs tried to lobby international negotiators (Morphet 1996). Since then, the number of private actors and the extent of their influence on international environmental governance have grown. At the UN Conference on the Environment and Development (UNCED) in Rio de Janeiro in 1992, more than 1,400 NGOs were officially accredited to the international negotiations and tried to influence the conference from the inside. Several thousand NGOs participated in the parallel NGO conference, where they tried to develop alternative ideas as well as demonstrating against governmental actions. The organizations accredited as NGOs at the world summits have also included business actors, which have founded their own organizations and networks such as the Business Council on Sustainable Development in order to influence environmental politics. The number of business actors participating in governance systems has risen since the 1990s. At the last world conference dealing with environmental questions, the World Summit on Sustainable Development in 2002, more than 8,000 private actors came to Johannesburg.

In addition to world summits, private actors try to influence the establishment and working of other international institutions such as international regimes. Regimes are the most important pillars of environmental governance and today most of them involve cooperation with private actors. Private actors are allowed to participate in the conferences of the parties of international regimes, to circulate papers, and to make speeches. In the climate change and the biodiversity regime, which are the most important and popular regimes, a growing number of private actors are taking part in the conferences of the parties. Fewer than ten private actors officially tried to influence the negotiation processes leading to the biodiversity convention (by being accredited), 50–75 organizations tried the same with regard to the climate-change convention, and the number of accredited private actors has tripled in the follow-up processes of the Rio conference. Since the mid-1990s, the sheer number of private actors' groups attending these meetings has been larger than the number of states (Brühl 2003).[3]

This does not mean that private actors are automatically more successful in their attempts to influence the decision-making processes than they were some years ago. On the contrary, due to their heterogeneity private actors can represent opposing positions in the negotiation processes. The climate-change negotiations clearly show this. The Global Climate Coalition (GCC), a coalition of the US oil and coal industries, resisted moves to restrict fossil fuel use by arguing that a climate-change convention would harm US industry, and tried to discredit the scientific basis of climate change negotiations (Carpenter 2001). On the other hand, the Climate Action Network as the umbrella organization of environmental NGOs tried to lobby states so that they would agree to more stringent measures to prevent the greenhouse effect.[4] None of the subgroups of private actors was successful on its own. Both tried to find allies to get their points into the conventions.

Why has the number of private actors engaged in international environmental policy increased in recent decades? There are a number of reasons for this development: some are of a general nature and others are connected to the issue area of environmental politics. In general, private actors are becoming more salient because of three different driving forces. Most importantly, globalization processes or, to be more precise, deregulation and economic liberalization strategies implemented on the domestic and international level have increased the number and influence of business actors, especially of TNCs, in world politics. At the same time globalization has led to an increase in the number of civil-society organizations and individuals protesting against its negative effects, such as the growing gap between the rich and poor. In addition, democratization processes, which took place in many developing countries during the 1980s and supported the formation of civil societies, are a source of privatization, and the technological revolution is another (since it leads to

the increased availability of information and a shorter time lag in communication). With the end of the Cold War privatization tendencies have speeded up, since ideological controversies are less important now and commercialization has spread across the world (Hummel 2001: 35–38).

In addition to these general driving forces, the increase in the number of private actors in environmental governance systems has been caused by some issue-area-specific reasons. In recent decades, it has become obvious that environmental problems cannot be solved at the state level. The territorial form of governance by autonomous and sovereign nation states is inadequate (Goldblatt 1997: 73). Since the 1970s, nation states have agreed on multilateral treaties instead of acting unilaterally because the scope and nature of most environmental problems is regional or even global (such as the loss of biodiversity, the greenhouse effect, or the ozone hole). Other problems have local effects, such as growing water scarcity or the degradation of soil, but because they occur universally, global strategies need to be implemented (Simonis and Brühl 2002: 102). To cope with environmental problems effectively global arrangements need to be established, which is difficult for technical and political reasons. Technically, a complex array of causal factors leads to environmental degradation. Sometimes, governments are simply inadequately informed about specific problems and do not know how to solve them. Politically, it is difficult to agree on regulations since there are only a few strong proponents of vigorous or comprehensive environmental management (Haas 1999: 107). Since private actors offer resources such as technical and political knowledge and because they are (at least partly) interested in establishing regulations, they are welcome as partners in environmental governance systems (Brühl 2001).[5]

Private actors are more extensively involved

In addition to the quantitative dimensions of privatization, we can observe a qualitative dimension: private actors are now becoming more extensively involved. For most of the twentieth century, private actors only tried to influence agenda-setting processes by lobbying states and international institutions. Today, they are involved in all stages and all phases of world politics. They are now active partners in agenda setting, norm and rule formulation, and implementation. In addition to being partners of states and international institutions, private actors set rules on their own. This means that private actors' contributions to governance systems vary along a continuum whose two extremes are pure intergovernmentalism and complete self-regulation or private authority (see Cutler *et al.* 1999a; Reinicke and Deng 2000; Wolf 2000: 7). Public–private partnerships are somewhere in the middle, as both governmental and private actors are involved.

An important factor influencing the degree of state-centrism is the type of problem requiring regulation. In general, private actors play a more

prominent role in human-rights or environmental policy than in security policy or welfare. But the influence of private actors is also growing in the issue area of security. Private security companies, for example, are taking charge of securing public spaces in the mega-cities and mercenary forces are fighting in civil wars (Lock 2001).

In environmental policy, we can observe the shift from pure intergovernmentalism to public–private partnerships more clearly.

(1) Although private actors tried to influence environmental policy from its beginning, governance systems were up until recently state-centric. Early regulations were agreed by states only: in the 1960s states implemented norms and rules domestically; in the 1970s they agreed on international conventions. Private actors tried to influence the negotiation processes from outside. This means that they used lobbying as a strategy to influence environmental policy. They were not real partners in the norm- and rule-setting processes. The case of biodiversity policy shows the role private actors can play in intergovernmental agreements. In the 1980s, the NGO International Union for Nature and the Conservation of Natural Resources (IUCN) first articulated the need for a global strategy to prevent the loss of biodiversity. The United Nations Environment Programme (UNEP) took up the idea and initiated international negotiations in 1989. In addition to their (successful) agenda setting, IUCN and other NGOs played a prominent role in the negotiation process leading to the Convention on Biological Diversity (CBD), which was signed in Rio in 1992. The first draft of the convention was even written by IUCN. In the negotiation process, NGOs had access to the intergovernmental meetings. Most of the time, NGOs were allowed to give oral as well as written statements during the negotiations (Brühl 2003: 260–313). Whereas business actors were only moderately interested in the negotiation process leading to the CBD, they were much more active in the process leading to the biosafety protocol, which was agreed in 2000. The reason for the new role of business actors is that they are affected by the new regulations relating to the transfer of genetically modified organisms. In addition to rule formulation, private actors are also partners in the implementation of the rules. Since states accepted the relevance of private actors in the implementation process, they dedicated chapter 27 of the Agenda 21 to these actors at the Earth Summit in 1992. Private actors also play an important role in monitoring states' behaviour. Under the ozone regime, for instance, private actors can inform the secretariat about the failure of a specific state to reduce CFC to the agreed targets. The secretariat can then inform the Implementation Committee, which proposes sanctions to the members of the parties (Brühl 1999). Although private actors are now involved in all stages of negotiations, these remain state-centric since states can decide which roles private actors play in the governance systems. States can decide on the rules of procedure, which prescribe the roles private actors play in intergovernmental institutions.

(2) Since the 1990s, private actors have not only been trying to influence the norm- and rule-setting processes from the outside but have also been directly involved in governance systems via tri-sectoral networks. The most prominent example is the World Commission on Dams (WCD) (see next section, 'Privatization as de-governmentalization)'.

The Rio + 5 conference in 1997 was a turning point for the role of private actors in governance systems. Because environmental problems are getting worse, private actors have increasingly bypassed governments altogether and have been forming partnerships with other private actors (Florini 2000: 236).

(3) In addition, private actors are setting norms and rules on their own. Most significantly, TNCs are increasingly agreeing on codes of conduct, thus undertaking a commitment to comply with specific labour and environmental standards in the production process. By signing codes of conduct TNCs show that they are prepared to act in accordance with inter- and transnational rules, hoping that this will attract new customers and markets (Braun 2001). Sometimes, codes of conduct are agreed in order to save a company's reputation and prevent a consumer boycott, as was the case in the textile industry (Haufler 2000: 130).

Privatization as de-governmentalization

As noted earlier, privatization, the growing inclusion of private actors in governance systems, contributes to the transformation of the character of regulation, to de-governmentalization. There has been an increase in the proportion of voluntary regulations in relation to compulsory measures. Compulsory regulations agreed on by states and intergovernmental organizations often include precise timetables and limits, which the actors have to comply with. The actors' behaviour is monitored and, in the case of non-compliance, sanctions will be imposed. In contrast to this, voluntary regulations are less precise and often include no compliance mechanisms. Examples of voluntary agreements are codes of conduct and most public–private partnerships, such as the World Commission on Dams (WCD).

The World Commission on Dams is a good example of the de-governmentalization of world politics. The WCD was founded in 1998 in response to the NGO Declaration of Curitiba, with its key demands to establish an independent commission and to conduct a comprehensive review of all large dams. The task of the WCD had been to conduct a global review of dams and to develop internationally accepted criteria and guidelines for decision-making on the planning, design, construction, and operation of dams. It consisted of twelve commissioners, who represented all stakeholders (states, NGOs, and TNCs) as well as all affected regions of the world (Dingwerth 2003; Khagram 2000). In its report, launched in November 2001, the WCD makes rather general recommendations

instead of formulating specific and compulsory rules. Accordingly, seven key principles were identified that need to be upheld, such as gaining public acceptance and exploring alternatives to dam building. For those who called for strong regulations, namely NGOs, this result is therefore rather disappointing. The effectiveness of this process remains unclear, since there is no guarantee that stakeholders will comply with these new principles. This is because neither review nor compliance mechanisms have been established, nor does the WCD's successor, the Dams and Development Project (DDP) (established in September 2001), have the right to review compliance with the WCD recommendations or to sanction non-compliance. Its task is only to disseminate information and to act as a catalyst to support multi-stakeholder dialogues.

Voluntary regulations can have positive effects for the actors and common goods. In the case of large dams, one might hope that less environmental degradation and less violation of human rights will take place. However, because of the lack of compliance mechanisms, the effectiveness of such regulations is not guaranteed. By comparison, intergovernmental regulations tend to establish a growing number of compliance mechanisms that sanction non-rule-based behaviour.[6]

Privatization as commercialization

In addition to de-governmentalization, privatization leads to commercialization. This means that the underlying assumptions of regulations are being transformed. Today, more and more agreements reflect market principles and self-interest instead of regulatory principles and public interest (Hummel 2001: 32–33).

The commercialization of world politics can be observed in the climate-change regime. In 1992 at the Earth Summit, governments signed the United Nations Framework Convention on Climate Change (UNFCCC). The convention's aim is to stabilize concentrations of greenhouse gases in the atmosphere at a level that would prevent dangerous human interference with the climate system. Five years later, states agreed in Kyoto on specific emission reduction targets. Industrialized countries (so-called Annex I countries) were obliged to reduce their emissions by an average of about 5.2 per cent from 1990 to the commitment period 2008–2012. The Kyoto Protocol allows states to reduce their emissions through domestic policies and measures and also by using flexible mechanisms such as joint implementation and clean-development mechanisms. This means that industrialized countries may implement projects that reduce emissions in other countries and use the resulting emission reductions to help meet their own greenhouse-gases targets. In addition, states may use the instrument of emission trading. The underlying idea is that industrialized countries may transfer some of their emissions under the assigned amount to another state that cannot meet its emissions targets. This is very

helpful for countries in transition, such as the Russian Federation, whose emissions are today much lower than the formulated targets due to economic decline.

Private actors will play an important role in the implementation of these flexible mechanisms, since the very object whereby emission reduction is achieved is mostly built and owned by private companies. By investing in other countries, these companies are becoming key actors in global efforts to reduce emissions. States that seek to reduce their emissions will have to interact with these companies. This means that the decision of TNCs to invest in other countries determines how and where emissions will be reduced. Decisions will not be taken according to the public interest. Rather, emissions will be reduced in accordance with market interests. In addition, private actors will probably be involved in the drawing up and functioning of the certification system which will monitor the states' reduction rates, since states' bureaucracies will not be able to deal with this adequately (Maier 2001: 293). Finally, one could even argue that emission trading will be organized by private actors only, since they are more familiar with market mechanisms (*ibid.*).

One example of a private emission-trading system is being implemented by the Royal Dutch/Shell Group, which launched a pilot phase of an internal emission-trading system (Shell Tradable Emissions Permits System, STEPS) in 2000. Participants in STEPS are committed to reducing 2 per cent of their emissions in the next three years, either by buying permits or by investing in their business to reduce emissions and then selling their surplus permits (Carpenter 2001; Margolick and Russell 2001: 21). The first prototypes of new public–private partnerships to reduce emissions were also established in 2000 by the World Bank. The Prototype Carbon Fund (PCF) aims to leverage new public–private investments in emission reduction projects. Six governments and 17 companies are contributing about $180 million for the PCF, which currently has about 30 projects, mainly establishing renewable energy projects in developing countries.[7] Those contributing to the project will receive a pro rata share of the emission reductions.

As the example of new public–private partnerships in the climate-change debate demonstrates, privatization of (environmental) governance can lead to a more effective implementation of international treaties. Governments need to interact with private actors who are both contributing to a great extent to the problem itself (such as the greenhouse effect) and can offer solutions. Since many states argue that they could not fulfil their obligations to reduce emissions by domestic means only, the effectiveness of the climate-change treaty seems closely linked with public–private partnerships.

The impact of privatization on the legitimacy of governance systems

At first glance, therefore, it might appear that privatization is improving the results of regulation, meaning that it is enhancing the effectiveness of the governance system. This impression may even be strengthened if one takes into account the fact that private actors play an important role in the agenda-setting processes and that they provide valuable input (expertise) in formulating international norms and rules, as the WCD has demonstrated. At the same time, however, including private actors in governance systems also challenges the democratic legitimacy of the decision-making procedures, since these actors are not elected to take part in these procedures. Although some NGOs claim to represent civil society, they tend to be self-selected and often unrepresentative elites (Keohane and Nye 2000: 23).[8] In contrast to states, private actors are only accountable to their own organization or the market and not to the people. This means that the inclusion of private actors in regulations may reduce the governance systems' legitimacy. Therefore, it is necessary to investigate the legitimacy of privatized governance systems. I will first discuss how legitimacy is defined and then describe how privatization alters the governance system's legitimacy.

Legitimacy in international relations

Legitimacy as a normative and theoretical concept tries to explain why and when a system of rule is acceptable and why people adhere to rules. In other words, it is the 'process through which political differentiation – the fact that there are people who govern and others who are governed – is justified' (Coicaud 2001: 259). Since nation states have over a long period been the most important loci of authority, most scholars have discussed the question of the conditions under which nation states' systems of rule or political differentiation can be considered as legitimate. According to Max Weber (1980) legitimacy derives from the people's belief in legitimacy.[9] In other words, legitimacy is defined as 'the fact that people voluntarily accept domination on the grounds that they believe in its normative rightfulness' (Steffek 2000: 5). This belief may be held on affective, religious, or rational grounds. Today, the rational version is the most important. Accordingly, the belief in the legality of rule and norm systems is important. That perception may come from the substance of the rule or from the procedure or source by which it was constituted (Hurd 1999: 381).

If we want to assess the legitimacy of the privatization of world politics, we need to transfer the concept of legitimacy from the state to the global level. However, this is problematic since the structures of the two levels vary enormously. Most importantly, an attempted analogy between the two

levels is misleading because no central hierarchy exists at the global level. The absence of a world state[10] does not mean that no structures of authority exist at all. Obviously, a growing number of social institutions exist between states and other actors. International regimes and organizations play a prominent role in norm- and rule-setting processes. Instead of a central authority, 'the domination structures are multiple, issue-specific and by no means all-encompassing' (Steffek 2000: 8). The second important difference between the nation state and the global level refers to the people. Whereas the demos can be easily identified at the nation state level, there is no sign of a global demos (or world civil society).

Since the characteristics of the nation state and the global level differ greatly, and especially because no clearly defined group equivalent to 'the people', whose belief in legitimacy determines whether a governance system is accepted as legitimate, can be identified globally, Weber's concept of legitimacy needs to be replaced. Sadeniemi (1995) has proposed an alternative typology of legitimacy at the international level that draws a distinction between institutional and task-related legitimacy. Institutional legitimacy is claimed and granted for the exercise of political power as such and can be based (following Weber's conceptualization) on democratic, traditional, or charismatic legitimacy. Task-related legitimacy is claimed and granted for the accomplishment of specific goals or on the basis of goals achieved. A similar differentiation between (successful) goal attainment and the acceptance of (democratic) decision-making has also been developed by Fritz W. Scharpf, who proposes distinguishing between the input and output dimensions of legitimacy (Scharpf 1997, 1998). These categories are the ones that have been most frequently used by IR scholars to investigate legitimacy beyond the nation state. Input-oriented legitimacy implies that 'collectively binding decisions should originate from the authentic expression of the preferences of the constituency' (Scharpf 1998: 2). In other words, those who are affected by a decision should participate in the decision-making process. Output-oriented legitimacy 'refers to substantive criteria of buon governo, in the sense that effective policies can claim legitimacy if they serve the common good and conform to criteria of distributive justice' (Scharpf 1997: 153).[11] Input- and output-oriented legitimacy should not be seen as two different concepts, since they influence each other. Democratic processes, for instance, guarantee input-legitimacy. For output-legitimacy these processes are of instrumental value, because compliance and enforcement mechanisms can only work if people have been involved in the decision-making procedures.

Limited legitimacy

Since the mid-1990s, the legitimacy of international governance as a state-centric system has been a topic of heated discussions. Most authors agree

that the legitimacy of international governance is undermined by several factors. At the nation-state level, governments are gradually losing their monopoly on the representation of their societies due to globalization as a consequence of the de-bordering of states (Albert and Brock 1995; Zürn 1998). The congruence between the rulers and the ruled is therefore being undermined. This trend is being intensified by the growing number of decisions that are taken on the international or global level, since the general public or particular stakeholders are frequently excluded from the deliberations. This phenomenon is referred to as a participatory gap that undermines input-legitimacy (Brühl and Rittberger 2002: 26; Kaul *et al.* 1999: xxxvi; Reinicke and Deng 2000: viii). In addition, international governance systems have obviously not been effective enough in dealing with existing problems and have thus failed to achieve output legitimacy. Three major governance gaps have contributed to undermining the output-legitimacy of international governance systems (Brühl and Rittberger 2002: 25): (1) the term jurisdictional gap is used to refer to the fact that public policy-making is still predominantly national in focus and scope, so that transnational or global risks cannot be regulated adequately (Kaul *et al.* 1999: xxvi); (2) policy-makers and public institutions lack policy-relevant information and analysis as well as the necessary policy instruments to respond to the daunting complexity of policy issues (Reinicke and Deng 2000: vii), which indicates that an operational gap has opened up; (3) finally an incentive gap exists, meaning that the operational follow-up of international agreements is underdeveloped. The result is that moral persuasion, or shaming, is frequently the only mechanism available to force states to comply with international obligations.

Although most scholars accept this analysis of the status quo, no consensus exists on the question of whether or how governance gaps can be narrowed. There are two particularly controversial questions relating to the legitimacy of international governance systems: the (non-) existence of the demos beyond the state level (which is relevant for input-legitimacy), and the impact of international institutions on democracy (which is relevant for both input- and output-legitimacy).

Input-legitimacy can only fully be established at the global level when a common identity, a transnational demos, exists. Although most scholars agree that no such transnational demos exists today, they disagree on the prospects of its future emergence. From a pessimistic perspective scholars argue that no evidence of an emerging identity beyond the nation-state level can be found, even at the European level in which – due to integration processes – its existence would be feasible. According to these scholars, identity-formation at the nation-state level has been a historical peculiarity that has been closely linked with democracy and nation-state building (see, for example, Kielmansegg 1996). They argue that the lack of a 'we-identity' also has a strong influence on decision-making processes. As long as no transnational demos exists, majority decisions cannot be

used as a political instrument because minorities will only accept being outvoted if they are part of a 'we-identity' (Scharpf 1998: 6). Since distributive agreements mostly rely on decision-making by the majority, public policy requires political coordination on the international or global level. From an optimistic point of view, other scholars share the pessimists' assumption that there is no common identity, but argue that either a transnational demos is evolving or that at least some sectoral demoi come into existence. The first group assumes that some elements of a transnational demos exist in specific world regions (Brock 1998). Michael Zürn (2001: 195–200) distinguishes five elements that characterize a demos: acknowledgement of mutual rights, trust, public spirit, public discourse, and solidarity. These components also exist beyond the nation state, though their development differs according to region and sector. In the OECD world, Zürn states, some of these elements are well developed, whereas others such as solidarity and public discourse are only weakly developed beyond the nation state. The second group is not optimistic about the emergence of a transnational demos (Abromeit and Schmidt 1998). Instead, they discuss the emergence of several sectoral demoi. These evolve not in a specific territory but in issue areas (the principle of functionality instead of territoriality), exist only for a period of time (latency period instead of stability), and the members do not know each other personally (anonymity). The 'we-identity' is grounded on either rational-interest calculation or emotional beliefs, which is why communication processes are very important.

The second controversial aspect with regard to legitimacy is whether international institutions undermine or guarantee input- and output-legitimacy. Klaus Dieter Wolf (2000) argues that governments do not cooperate in international institutions just to regulate conflicts, but also to protect themselves against societal interference and control. By binding themselves in institutions, governments therefore construct a new structure of authority, which contributes to the democratic deficits of governance systems. These democratic deficits are thus not accidental but result from the strategic actions of governments. This means that international institutions, although they contribute to problem solving, undermine the democratic legitimacy of international (or global) governance. Michael Zürn (2001: 190) argues against this view, claiming that 'institutions are not the problem, but part of the solution to the problems of modern democracy'. International institutions are helping to address the problem of incongruence between social and political spaces, and bringing those affected by a political decision into the decision-making (*ibid.*). In addition to enhancing democracy at the international level, international institutions are seen as a prerequisite for democracy at the nation-state level because they guarantee specific rights (Brock 1998: 287).

Obviously, all these authors discuss the legitimacy of international governance systems in which states and intergovernmental institutions are the

most important actors. This discussion is nonetheless useful for an assessment of the impact of privatization on the legitimacy of governance systems, because it clarifies how private actors are challenging this legitimacy. In the following section, I will argue that international institutions play a very important role in international environmental governance. Since most institutions have been opened up for private actors, they reduce the participatory gap. By regulating behaviour, they also contribute to output-legitimacy. It therefore seems plausible to think that institutions enhance legitimacy at the global level. Private actors are increasingly involved in the work of the institutions. Most of these actors have organized themselves in different networks, which indicates that a sectoral demos exists. At least in the industrialized countries, some sectors of societies have been active participants in environmental movements and these have created some transnational NGOs. Most environmentalists know a lot about the sources of environmental degradation and how to handle these problems. They act at all political levels, from local to global (Princen and Finger 1994).

The impact of privatization on legitimacy

The privatization of world politics challenges the legitimacy of governance systems. This does not mean that traditional state-centred international governance has been fully accepted as legitimate, but at least states and intergovernmental institutions were accountable to the people since they had the opportunity to vote them out of office. Privatization challenges legitimacy since new actors enter the stage of world politics. They contribute resources and represent certain sectoral demoi, but lack accountability. How should we assess the privatization of world politics in terms of legitimacy?

With regard to the input dimension, it is generally acknowledged by IR scholars and diplomats alike that bringing private actors into intergovernmental decision-making procedures enhances legitimacy. This is why many international institutions have opened up their deliberations to private actors. However, it is important to note that the degree of openness differs between the institutions (Florini 2000: 215). From a theoretical point of view, the growing inclusion of private actors can be interpreted as a step towards the establishment of deliberative democracy at the global level (see Table 12.1, p. 244). In general, deliberative democracy assumes that legitimate decisions result from the public deliberation of citizens (Bohman and Rehg 1997: ix). The members of a pluralistic association have diverse preferences, convictions, and ideals. In free and reasoned debates they reach consensus on a particular solution (Cohen 1997). For deliberative democracy beyond the state level, Barbara Finke (2001: 178–179) identifies three pillars: (1) in communication and negotiation processes, arguing is more important than bargaining; (2) those

who are affected by a decision take part in the decision-making processes; (3) participants inform the transnational public about the deliberative processes.

In environmental governance systems, these elements of deliberative democracy beyond the state level can be detected to some degree, at least the second and third pillar. Private actors are allowed to observe the decision-making processes and, even more important, to actively take part in the deliberations. Thereby negotiations are transformed from intergovernmental consultations into (more or less) public deliberations of citizens and state representatives. By bringing in additional information and knowledge and participating in the debate, private actors contribute to the identification of possible ways to handle problems. Because states assume that private actors bring in additional knowledge and thus enhance negotiations, they open up their deliberations (Brühl 2003). The composition of the private actors has changed over time. Whereas NGO representatives have taken part in international negotiations for a long time, the activity of business actors is a rather new phenomenon in international negotiations. Private actors also contribute to the transparency of the political process by informing the public about the deliberations (Take 1998). One important tool at their disposal is the publication of daily coverage of the negotiations both in print and in the electronic media, such as the *Earth Negotiation Bulletin* or *ECO*. According to their own estimates, they inform 25,000 people around the world about the latest developments. However, these publications are also often used to inform the participants in the negotiations about what is going on.

This positive assessment of the impact of privatization on governance systems' legitimacy, however, is only partly convincing because of the non-accountability of private actors and their regional imbalance. Some critics argue that private actors should not be included in decision-making beyond the state level because they are not accountable for their behaviour. While state representatives are elected, members of NGOs and TNCs are only accountable to their own organization or the market (Cutler *et al.* 1999b: 369), which is why the character of regulation is shifting towards de-governmentalization and commercialization.

However, three different arguments challenge the claim that private actors are illegitimate. As long as private actors do not decide authoritatively on public policy, they neither have to be structured democratically nor do they have to be elected by (sectoral) demoi (Beisheim 1997). Furthermore, NGOs are legitimated by the moral authority acquired through a credible commitment to basic norms or general welfare, their expertise, and representational skills (Wolf 2001: 16). In addition, most NGOs have some government's implicit approval through the legal recognition extended to such organizations (Florini 2000: 233). One can therefore conclude that as long as decisions are taken by governments in such a way that private actors do not take part in voting procedures, it is not

convincing to claim that private actors are reducing legitimacy. However, in cases where private actors are either partners of states (and intergovernmental organizations) in the norm- and rule-setting processes or setting their rules on their own, the problem of non-accountability becomes more important. Private regulations may then be considered as illegitimate and the growth of private regulations may reduce the legitimacy of governance systems.

Another criticism concerning the positive assessment of private actors' impact on legitimacy is that it does not take into account the composition of the private actors. This is even more justified. Most private actors are from industrialized countries, so that the interests of people from developing countries are underrepresented. At the third and fourth conference of the parties to the UN Framework Convention on Climate Change (Kyoto 1997 and Buenos Aires 1998), for example, only approximately one-third of the private actors came from Asia, Africa, or Latin America. The other two-thirds were from Europe or North America (Walk and Brunnengräber 2000: 141–147). This reflects the limited resources in terms of money and ability private actors from the South have to articulate their interests in international negotiations, and can be also related to language problems. The regional imbalance is only one indicator of the underrepresentation of the societal interests of developing countries. In addition, NGOs from developing countries cannot get their voices heard as well as Northern NGOs because transnational NGO networks dominate the discussions at the conferences of the parties, which also influences the topics that are discussed. While local NGOs are interested in dealing with a variety of specific regional problems, transnational NGOs are mostly interested in a more limited range of topics (*ibid.*). The biodiversity negotiations offer an example: local and indigenous communities were interested in getting their voices heard in the negotiations towards the biosafety protocol. They wanted to block attempts to make living organisms patentable and plans for genetically modified organisms to be transferred to other countries, thereby risking their spread and cross-fertilization with traditional organisms. Although some Northern NGOs supported the indigenous and local communities' point of view, states were convinced by business actors that transfers across borders should be allowed, as is now implemented in the biosafety protocol. The existence of this regional imbalance indicates that not all of those who are affected by a decision take part in the decision-making process. Actors based in developing countries either take no part in the deliberations or, in case they do, find that the deliberations are dominated by Northern ideas. In the future this imbalance could even increase, because business actors are taking part more and more in international environmental negotiations.

To sum up, private actors' inclusion in governance systems enhances input legitimacy because more actors are heard who are affected by the negotiation. On the other hand, differences in resources lead to an

unbalanced representation of private actors. In addition, the fact that private actors are not accountable is a problem as soon as they are not only lobbying negotiations from the outside but agreeing on private regulations or taking part in public–private partnerships. Thus privatization does not automatically lead to deliberative democracy. The three pillars of deliberative democracy beyond the nation state that are identified by Finke (2001) do not fully exist. Only some of their elements, especially the fact that some of those who are affected by a decision take part in the decision-making process and interested individuals (instead of the transnational public) are informed can be detected. To enhance input-legitimacy, ways need to be established to ensure that all interested private actors have access to the governance systems.

The situation is also complex in relation to the impact of privatization on the output-legitimacy of governance systems. On the one hand, private actors enhance the output-legitimacy of formerly intergovernmental governance systems by bringing in additional resources such as knowledge and values (Brühl 2003), so that problems are dealt with more adequately. This is especially true in environmental negotiations in which science is essential to understanding the nature of environmental problems and identifying ways of dealing with these problems (Haas 1999: 103). Since many NGOs 'provide scientific and earth-centred knowledge via their own research' (Princen 1994: 34), they are contributing to a learning process and thus to more effective international agreements. Private actors are sometimes part of epistemic communities (Haas 1992) that play an important role in creating the consensual knowledge which is the basis of (international) negotiations. In addition to taking part in negotiations, private actors enhance output legitimacy by acting as partners in the implementation of agreements. Private actors help to diffuse international norms into domestic behaviour, and they also monitor states' behaviour and initiate non-compliance mechanisms. In the field of human rights, a complex 'Spiral Model' has been developed that specifies the conditions under which private actors (local human-rights NGOs and transnational advocacy organizations) exert pressure on a norm and rule violating state so that it is forced to change its behaviour (Risse *et al.*

Table 12.1 The impact of privatization on the legitimacy of governance systems

	Positive impact of privatization	*Negative impact of privatization*
Input dimension	Deliberative democracy	Regional imbalance Non-accountability of private actors
Output dimension	Availability of resources	Particularistic interests Absence of compliance mechanisms

1999). In environmental policy, the explanatory power of this model has not yet been tested. However, it is widely acknowledged that NGOs play an important role in monitoring states' behaviour.

Whereas output-legitimacy is enhanced by the inclusion of private actors in formerly intergovernmental governance systems, the growing number of private regulations undermine the output-legitimacy of governance systems. As already mentioned, more and more private regulations have come into existence in recent years (Braithwaite and Drahos 2000; Cutler *et al.* 1999a). Most of these private regulations deal with specific topics. Private regulations are particularly concerned with four identifiable goals: establishing international standards, ensuring the security of transactions, maintaining industrial autonomy by pre-empting or preventing government regulations, and responding to societal demands and expectations of corporate behaviour (Haufler 2000: 126). Private actors seldom regulate questions concerning welfare, social justice, or sustainable development, to name just a few other topics. If private regulations predominantly deal with them, as in the case of social and environmental standards in most codes of conduct, the new mechanisms exist alongside intergovernmental agreements (Gereffi *et al.* 2001: 65). This means that codes of conduct of companies that are working in countries with stringent, rigorously enforced labour and environmental standards, just duplicate the existent regulations. It is only in countries with nascent or ineffective labour and environmental laws that codes of conduct may make a difference and enhance the situation of workers and the environment. In addition, private regulations do not (always) serve the common good or meet the criteria of distributive justice. Rather, they may serve particularistic interests. This is especially true in cases in which private regulation interferes with the industry's maximization of profit, as has been demonstrated in a case study of the infant-food industry (Richter 2002). In this respect privatization and particularly commercialization are undermining output-legitimacy. Moreover, output-legitimacy is also undermined because governance systems, as a result of degovernmentalization, often have no compliance mechanisms they can use, as demonstrated by the example of the WCD. That means that even if an agreement serves the common good, its implementation is not guaranteed since there are no sanctions that can be imposed in case of non-compliance.

Conclusion

It has been demonstrated that the impact of privatization on the legitimacy of governance systems is complex. On the one hand, privatization of governance systems is contributing to the establishment of several pillars of deliberative democracy beyond the state. Those who are affected by decisions have more opportunities to take part in decision-making

processes today than they had in previous decades. Additionally, international governance systems are more transparent than they were in the 1970s and 1980s. Furthermore, private actors enhance input- and output-legitimacy by providing resources and helping to implement the agreements. However, they also contribute to the dominance of Northern ideas in governance systems so that only certain problems are dealt with. This is particularly true of purely private regulations. An additional problem is the fact that private actors are only accountable to their own constituencies, meaning members of their organizations and the market. Thereby they undermine democracy beyond the state. Finally, as a result of the de-governmentalization of world politics, compliance mechanisms are absent.

To avoid these negative effects, privatization needs to be regulated and a kind of checks and balances system needs to be established. Such a system should seek to ensure that negotiation systems are as inclusive as possible by providing a balanced representation of Northern and Southern ideas. At the moment, only states and intergovernmental organizations could establish and form such a system, since they are the only actors accountable to an electorate. Due to the transboundary or even global character of most problems, states cannot construct such a system by themselves. Instead of states, the United Nations as the only legitimate world organization should therefore play a more important role and supervise the existing trend towards the privatization of world politics. The UN should have the duty and the power to set guidelines for private regulations, should monitor whether the existing regulations are in conformity with these guidelines, and should take measures to ensure that all relevant problems are dealt with.

Unfortunately, it seems that UN will not and cannot play this leading role. Instead of trying to force private actors to comply with existing rules, the UN is reinforcing the trend towards de-governmentalization. An example of this development is the Global Compact, signed by the United Nations, states, and private actors in July 2000. In the Global Compact, corporations declare their support for nine core international principles in the areas of human rights, labour, and the environment. They commit themselves to change their business operations so that the Global Compact principles become part of their strategy and day-to-day operations, and to make public in their annual reports the ways in which they are supporting the Global Compact. The United Nations has no supervising function in the Global Compact, since it has decided to be only one partner among many. Instead of playing an important role in the rule setting, monitoring, and steering processes, the UN has given up the possibility of controlling the compliance of the companies taking part in the Global Compact. Thus the UN has contributed to the de-governmentalization and so to the privatization of world politics instead of checking it effectively.

Notes

1 In addition, they differ with regard to their motivation. NGOs, as non-profit organizations, act in order to establish or enforce specific norms to promote a common good. These norms may be of public interest or may serve the particularistic interests of a specific group. TNCs are interested in maximizing their profits, so they calculate costs and benefits very carefully (Hummel 2001: 32). They are motivated by instrumental goals and try to promote the well-being of the organization itself (self-help motivation; Risse 2002). However, sometimes private organizations cannot be classified clearly as belonging to one of the two categories since they have characteristics of both types.

2 This 'traditional' form of privatization still takes place in environmental policy, especially in the area of water and sanitation. Developing countries are privatizing their water systems, which means that transnational corporations are buying the formerly state-owned systems. The results of this form of privatization for the population are mostly negative (see, for example, Hoering 2001).

3 This applies to the number of delegations, but not to the number of individuals. Some states' delegations contain more than a dozen individuals, but most private actors' delegations are smaller.

4 An overview of non-state actors involved in climate change policy can be found in Gough and Shackley 2001: 341–345.

5 It is widely acknowledged that this is the reason why epistemic communities play such a prominent role in environmental policy. For the concept of epistemic communities, see Haas 1992.

6 States tend to establish specific compliance mechanisms in newly founded international institutions based on jurisdictional or quasi-jurisdictional dispute settlement bodies, thus taking an important step toward the legalization of world politics (Goldstein *et al.* 2000). They thus acknowledge that non-compliance frequently does not derive from a conscious decision to disregard norms and rules but from the member states' inability to abide by them, as well as from a certain incomprehensibility of the norms and rules themselves (Chayes and Handler 1995).

7 Most of the 17 companies come from the energy or oil sector, such as British Petroleum – Amoco, Gaz de France, and Norsk Hydro. For an overview of all participants, see http://prototypecarbonfund.org/router.cfm?Page=Partic (accessed 1 December 2003).

8 To shed light on the problem that NGOs are sometimes founded and/or financed by states, some authors speak about QUANGOs (quasi-NGOs). In addition to states, private corporations often provide financial resources, so the proclaimed independence of NGOs is highly problematic.

9 This normative notion of legitimacy is problematic. As David Beetham (1991: 9) argues, people's *belief* in legitimacy may derive from a 'good public relations campaign'. He therefore introduces an empirical version of legitimacy, which refers, *inter alia*, to the way in which people's behaviour conforms to the established rules. See also G.C.A. Junne (2001: 191), who states that legitimacy is thus a highly subjective concept.

10 Most IR scholars agree that creating a world state is neither feasible nor desirable, because the establishment of a world state would require a worldwide legal monopoly of force that could only be accomplished by restraining forcibly various forms of local and national resistance to this idea (Brühl and Rittberger 2002: 30).

11 It is quite difficult to assess whether a governance system is producing 'effective' solutions. For international (environmental) regimes, Oran R. Young (1994: 140–160) distinguishes six dimensions of effectiveness, including

problem-solving and process effectiveness. These dimensions could be helpful in analysing output-legitimacy more closely.

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13 Accountability and the WTO Dispute Settlement System

Rob Jenkins

Introduction

Like many institutions of international governance, particularly those of recent vintage (Bodansky 1999: 596–624), the World Trade Organization (WTO), born in 1995 as the successor to the General Agreement on Tariffs and Trade (GATT), has suffered considerable legitimacy problems since its inception.[1] Indeed, controversy dogged the WTO even before it came into being: many countries, such as India, experienced heated political debates and public protests following the 1993 publication of the 'Dunkel Draft Text' of the treaty that would eventually create the WTO. The global trade body's failure to win popular support was demonstrated most graphically in the large-scale protest actions that accompanied its Seattle ministerial meeting in 1999.

The WTO's status as a lightning rod of anti-globalization activism, it could be argued, merely reflects the widespread dissatisfaction with existing power inequalities between states, rather than representing any rectifiable failing on the part of the institution itself. The ability of large and prosperous member states (most notably the United States and the 'European Communities', the latter operating as a recognized bloc in the WTO) to dominate the WTO negotiating agenda, and to force more concessions from their developing-country trading partners than they themselves are willing to offer, is a constant source of complaint among the organization's critics. But the realities of power politics are not so easily wished away. Developed countries, which account for the bulk of world trade, have very little incentive to enter what are, after all, voluntary associations of states, such as the WTO, if rules are to be made by minor trading partners.

The WTO's legitimacy problems are partly due to difficulties that arise in all systems of multilevel governance. One key issue in the operation of such systems is accountability. As Hirst puts it: 'in a multilevel system it is very, very difficult to say who is responsible for what decisions. Indeed, many decisions simply get lost in the plumbing. So for the public, it is as if nobody made them.'[2] This general principle holds true, though to varying

degrees, in a range of policy domains. In the security field, Krahmann has argued that 'network governance' – involving private-sector actors as well as public authorities from both above and below the national level – implies a 'dissolution of clear lines of responsibility' (Krahmann 2002: 19). Rather than resting ultimately with identifiable agencies, accountability gets 'distributed among a multiplicity of public and private actors', and because such a diverse array of stakeholders 'cooperate in the making and implementation of security policies . . . no single actor can be held accountable for the outcomes of this process' (*ibid.*). Even where decisions can be traced back to specific actors, coordination problems emerge because 'governments, international organizations, NGOs, armaments corporations and private security companies are accountable to different agents. . . . Only the former three are in some sense accountable to the general public . . .' (*ibid.*).

In the field of development policy, Johnston, whose work examines the means by which transborder corruption can be checked, echoes the concerns of both Hirst and Krahmann. Problems of vertical coordination (among different levels of governance) have, according to Johnston, become intertwined with problems of horizontal coordination (across parallel national jurisdictions), to thwart efforts at enforcement. Summarizing the issue, Johnston argues that a

> world in which capital, people, information and enterprises move freely and rapidly from place to place offers new development opportunities of many sorts, but also makes accountability more difficult. Because the agents of cross-border corruption are capable of doing business almost everywhere, it is difficult to hold them accountable anywhere.
>
> (1998: 1)

The WTO's Dispute Settlement System (DSS), which operates under the provisions of the Dispute Settlement Understanding (DSU) – itself part of the Marrakesh agreement of 1994 – provides a valuable lens on the way in which accountability relationships are being reordered in response to changing patterns of 'power and governance in a partially globalized world', to use Keohane's (2002) turn of phrase. Anne Marie Goetz and I have argued that these trends constitute a 'new accountability agenda' – something that is being forged through experimentation, rather than executed by design (see Goetz and Jenkins 2005). This chapter examines trends that may be leading to a similar 'reinvention of accountability' in the DSS as well as the challenges facing those who would like to create a fairer system of trade governance. Critiques of the rules governing, and the actual operation of, the WTO's DSS reveal several aspects of the evolving accountability landscape. These questions will be addressed by examining proposals for reform of the DSS in relation to the three elements of

the new accountability agenda – (1) a more direct role for ordinary people and their associations in demanding accountability, (2) using an expanded repertoire of methods across a constantly shifting set of jurisdictions, on the basis of (3) a more exacting standard of social justice.

The chapter is organized as follows: the second section introduces some key concepts in the analysis of accountability; the third section outlines critiques of the DSS, examining the roles of capture and bias in the DSS's failures as an accountability institution; the fourth section assesses the DSS reform agenda against the three elements of the new accountability agenda; the final section concludes by examining whether the three trends contained within the new agenda could potentially come together to create a new 'hybrid' form of accountability that, with the DSS as its linchpin, could integrate both national and multilateral processes.

Accountability and its dimensions

In order to proceed with an analysis of the DSS, we must first introduce accountability. Accountability describes a relationship where *A* is accountable to *B* if *A* is obliged to explain and justify his actions to *B*, or if *A* may suffer sanctions if his conduct, or explanation for it, is found wanting by *B* (or by some other agent influenced, but not dictated to, by *B*) (Schedler *et al.* 1999: 14–17).

Note first the distinction between the two key *actors* in the accountability drama, between the *target* of accountability, the one obliged to account for his or her actions and to face sanction, and the *seeker* of accountability, the one entitled to insist on explanations and/or to impose punishments. In the standard 'principal–agent' accountability framework, the principal is trying to keep tabs on his or her agent, who has less (or no) stake in the outcome of the endeavour and so tends to pursue his own interest at the expense of his principal's. In the version of accountability used in this chapter, the target and seeker correspond, respectively, to the agent (the one to whom power has been delegated) and the principal. While the central dilemma of the principal–agent framework is accepted, different terms are used in this chapter – for two main reasons. First, doing so makes it is easier to comprehend the unaccustomed roles existing actors are playing in the new landscape of accountability-seeking. Some, for instance, may seek accountability without actually being a principal, highlighting their moral claim to demand answers or impose sanction on holders of power. Second, the principal–agent (or formal contract) model does not help us to understand accountability relationships – or how to bring accountability to relationships – where power is not explicitly delegated, but has been assumed by default.

There is also a distinction between the two *elements* of accountability: (1) having to provide information about one's actions and justifications for their correctness; and (2) having to suffer penalties from those

dissatisfied either with the actions themselves or with the rationale invoked to justify them. These aspects of accountability are sometimes called *answerability* and *enforcement* (Schedler 1999 *et al.*: 14–15). In practice, answerability and enforcement are equally important. Both are necessary; neither is sufficient.

Two further distinctions help to understand how the concept of accountability is evolving in response to changes in the relationship between states and citizens, between public and private sectors, and between states and global institutions. Reality has a way of complicating the definitional precision and elegance of the principal–agent model, not least because relationships become difficult to map when multiple levels of governance are involved.

First, actually existing accountability systems force us to confront the difference between *de jure* and *de facto* lines of accountability. In the real world there is very often a difference between whom one is accountable to according to law or accepted procedure, and whom one is accountable to because of his/her/its practical power to impose a sanction. In *principle*, of course, politicians are answerable to citizens. But in *practice* they are often more immediately concerned with the sanctions wielded by corporate interests, such as the withdrawal of campaign finance. When we hear people talking about the need to increase accountability, they are usually referring to one of two things – either ways of making *de facto* accountability relationships correspond more closely with those stipulated in law, or else insisting that moral claims be encoded into law, or at least followed in practice. 'Accountability' is thus shorthand for *democratic* accountability – accountability to ordinary people and to the legal framework through which governance is effected. It is conventionally conceived as a way of providing citizens a means to control the behaviour of actors, such as politicians and government officials, to whom power has been delegated, whether through elections or some other means of leadership selection. That actors in the private sector have come to assume many more powers than they once did in large part explains why they have come to be seen as legitimate targets of direct, rather than mediated, accountability.

The second distinction of relevance to the practical operation of accountability systems is between *vertical* forms of accountability, in which citizens and their associations play direct roles in holding the powerful to account, and *horizontal* forms of accountability, in which the holding to account is indirect, delegated to other powerful actors (O'Donnell 1994). Elections are the classic form of vertical accountability. But also in this camp are the processes through which citizens organize themselves into associations capable of lobbying governments, demanding explanations, and threatening less formal sanctions such as negative publicity. Vertical accountability is the state being held to account by non-state agents. Horizontal accountability is one part of the state holding another to account. Through ombudsmen, oversight committees, and the like, state

institutions of accountability are designed, in theory, to overcome collective action problems that make it impossible for citizens to both live normal lives and investigate the finances of the people and institutions around them.

The DSS and its critics: capture and bias as sources of accountability failure

Charges that the system of multilateral trade governance administered by the WTO is lacking in accountability usually centre on the inability of the WTO's institutional structures, which theoretically constrain all member states equally, to resist the undue influence exerted by a small number of powerful states. This, allegedly, gets reflected in: (a) the conduct of negotiations; (b) the review of trade performance; and (c) the adjudication of disputes between member states. Another way of stating this is to say that Southern states – both the 'Developing Countries' and the 'Least Developed Countries' (LDCs), to employ the nomenclature used by the WTO to distinguish the poor from the extremely poor – lack the capacity to hold either the WTO's machinery to account for its failure to ensure procedural fairness, or to hold rich member states accountable for their failure to honour their treaty obligations.

Compared to the dispute settlement procedures used by the GATT, the WTO's Dispute Settlement System certainly represents a step – though perhaps only a half-step – in the direction of greater 'legalization'. According to the typology outlined by Keohane *et al.* (2000: 152–189), the new DSS is not more 'independent' than its GATT predecessor – the 'independence spectrum' used in that paper referring to the selection method and tenure of judges. In terms of the 'access continuum' – the question of whether it is just states or other parties that can file cases – the DSS also scores at the same level as its GATT predecessor. It is, however, in terms of the third criterion – legal embeddedness – that the WTO's DSS represents an advance on earlier models: whereas the GATT was deemed to score 'Low' in terms of its 'level of embeddedness', because 'Individual governments can veto implementation of legal judgement', the WTO's DSS moves up to the 'Moderate' category, described as 'No veto, but no domestic legal enforcement'. The WTO and International Court of Justice (ICJ) systems are both placed in this category. Only the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) make it into the 'High' embeddedness category.

The key difference between the WTO's DSS and its GATT predecessor is the element of compulsion: under the GATT system, a member state against whom a complaint was raised could opt out. It was, in effect, a system of voluntary mediation, reliant on goodwill and mutual attendance to the reputational consequences of non-participation. The size and detail

of the submissions by litigating parties in WTO disputes, and the complexity of the rulings from the panels, represent a quantum leap by the DSS (in terms of institutional density) over its GATT predecessor. The other key difference is the potential threat of Dispute Settlement Body (DSB)-authorized sanction as a means of incentivizing the losing party in a dispute to comply with the panel's decision by correcting the offending regulatory measure.

The DSS's legitimacy problems stem from the fact that it is seen as subjected to two types of failures: those caused by 'capture' and those caused by 'bias'. These two categories have been a central part of the analysis Anne Marie and Goetz and I have conducted on why accountability institutions so often fail to address the concerns of less powerful actors. Capture is when corruption of one form or another has undermined the impartiality of decision-making within an accountability institution. Bias is when an accountability institution either (a) has no remit for considering in its deliberations the effects of fundamental power inequalities, or (b) presents substantial access barriers to less powerful actors. Arguably, most of the complaints about the DSS's failures as an accountability institution involve questions of bias: that is, the institution, as currently constituted, has no remit for addressing issues of inequality between states, which undermines basic procedural fairness. Of course, some of the complaints concern allegations of systematic capture, or the use of undue influence to obtain better outcomes through the subversion of norms governing the operation of existing institutions.

The extent to which the DSS is the victim of bias rather than capture is as much a matter of debate as is the question of how to analyse its legitimacy. While the intensity of criticism has risen since the late 1990s, developing countries' continued engagement within WTO processes could also be seen as evidence of the institution's legitimacy. Institutional participation is often held up as an indicator of legitimacy. People who vote in elections are presumed less likely than those who do not to regard the political system as illegitimate. Hirschman's classic 1970 framework of exit, voice, and loyalty is relevant here. Those who find institutions illegitimate tend to exercise their right of exit, rather than to continue seeking to influence the institution through the exercise of voice. In the case of the WTO, of course, many states continue to combine the use of voice with displays of loyalty to those with greater power within the institution: such states side with the United States and the EU on a selective basis, when it suits their interests. They reserve their right to do so, making clear to the richer countries that they will not refrain from criticizing the institution, and to fellow developing countries that they may be willing to forgo benefits that loyalty might make available to them (through, for instance, preferential trading agreements) on particularly important issues of common concern to less powerful countries.

Usage is a good basic indicator of legitimacy for courts as well. The

WTO's DSS has shown a large increase in usage, compared to the old GATT system. This does not necessarily tell us what types of countries are using the system: was it mainly the developed, the developing, or the least-developed countries who initiated cases? Who won? With what consequences? How has this changed over time? These are surprisingly difficult questions to answer.

The old GATT system, according to one of the pioneers in the study of international trade-dispute mechanisms, was biased against poorer countries: 'the quantitative analysis ... makes it pretty clear that the GATT dispute-settlement system is, at the margin, more responsive to the interests of the strong than to the interests of the weak ... in the rates of success as complainants, in the rates of non-compliance as defendants, in the quality of the outcomes achieved, and in the extent to which complainants are able to carry complaints forward to a decision' (Hudec 1993: 153).

Busch and Reinhardt argue that there is also a significant bias against poor countries in terms of usage of the WTO's DSS (Busch and Reinhardt 2002: 457–481). They compare developing countries' use of GATT dispute processes with their use of the DSS. Whereas LDCs were the targets of 8 per cent of cases under the GATT system, they were the target of 37 per cent of cases under the WTO's DSS. Only part of this is accounted for by the fact that LDCs form a larger percentage of WTO countries than they did, for most of the time, under the GATT. By contrast, Holmes *et al.* (2003) find that the share of cases initiated by developing countries has been increasing over the life of the WTO (their study covering the period up to the end of 2002). The headline finding from the Holmes *et al.* study is that there is little evidence of bias against developing countries in terms of who wins and who loses cases at the DSM. They note that, for instance, Canada and the US lose a greater-than-average share of the cases they initiate. But Holmes *et al.* introduce methodological caveats that make their determination that bias does not exist far less comforting. First, while the data 'gives some support to the proposition that poorer and perhaps smaller countries do better in the dispute settlement game ... (i)t may also reflect the possibility that richer countries can afford to take on more speculative cases to placate domestic lobbies' (Holmes *et al.* 2003: 17). Second, the conclusion drawn on this matter depends on what one means by 'bias'. Holmes *et al.* measure *outcomes*. Critics focus on *process*, and stress that outcome measures are unable to take account of cases that could have been, but were not, initiated because developing or least-developed countries lack adequate funding, are fatalistic about their inability to enforce compliance, or fear retribution by their more powerful trading partners through other, non-WTO channels.

What makes the no-bias finding even more suspect is the methodology for classifying winners and losers. This is not a fault of the authors of the study, who are constrained by the nature of the data – and, as they put it,

their limited expertise in legal matters – to look only at the formal ruling by the dispute-settlement panel that heard the case or the Appellate Body that reviewed the original panel's findings. The authors rightly point out two shortcomings of this approach. First, it means that, where a case has multiple sources of complaint, only one such source of complaint need be upheld by the panel in order to qualify as a 'win'. Second, and more importantly, there has been no attempt in the data analysis to take account of whether rulings have been complied with by losing parties – again, for good reason: it would be difficult to code consistently for compliance-propensity. Moreover, the authors are scrupulous in reporting that 'the question (of who wins and who loses) is inevitably bound up with whether the respondent complies and even if it does comply, whether it does so in a way that leaves the barrier effectively in place' (Holmes *et al.* 2003: 17).

Holmes *et al.* also note a shift in the type of cases being brought – that is, on the legal basis of the complaints. The share of cases that complained about 'behind the border' issues – those that involve 'domestic' regulations that a member state feels unfairly disadvantages its firms in another member state's market – has been on the decline.

This is significant for examining the legitimacy of the DSS as an accountability institution. One of the most controversial aspects of the WTO has been the tendency for the agreements it administers to encompass issues that affect the way in which states pursue domestic regulation. Such provisions were included in these agreements on the grounds that regulatory systems can discriminate in favour of domestic firms or, alternatively, in favour of firms from some, but not all, WTO member states. But to many countries, particularly in the developing world, this inclusion of behind-the-border issues within trade agreements appeared severely to constrain their ability to regulate in ways that many had long considered necessary in order to move their economies up the 'value chain' – from primary commodity production and relatively capital-unintensive product fabrication, to more complex types of economic activity, including high-technology manufacturing, and marketing, branding, and other cross-border services. Holmes *et al.* found that disputes over behind-the-border issues – in which member states litigate on grounds that their trading partners have not fulfilled their obligations to remove discriminatory domestic regulations – have given way to complaints over more traditional sorts of issues. In particular, 'trade-defence' cases have been on the rise: these concern alleged abuse by member states of the provisions within WTO rules that permit them, under a limited set of circumstances, to deviate from the normal principle that trade is to be progressively liberalized. Such provisions include countervailing duties, special safeguard clauses, anti-dumping remedies, and so forth. The cases involved disputes over whether the circumstances necessary to make such defensive actions legally permissible were in evidence.

In the eight years from 1995 to 2002 (inclusive), roughly one-third of all DSS cases were based on complaints concerning the alleged abuse of 'trade defence' provisions. But this overall figure masks significant inter-year variation. In the first year of the DSS's operation (1995), only 4 per cent of cases registered were based on these grounds. The proportion rose only slowly at first – to 13 per cent for 1996. But by 2000, nearly half of cases involved allegations that trade defences were being used unwarrantedly to shield member states who enact them from competitive pressures. In 2001, more than two-thirds of cases (68 per cent) involved such allegations, and this figure remained above the 50 per cent mark in the final year for which data was available (53 per cent in 2002). This shift in the nature of cases, moreover, has had an impact on *who uses the DSS*. Holmes *et al.* argue that, 'The more recent surge in trade defence cases has brought the NICs (newly industrialized countries) and LDCs (less developed countries) more clearly into the picture, especially proportionately, as the EU/US cases have fallen' (2003: 21).

Holmes *et al.* argue that the trend away from behind-the-border cases shows a learning process at work in the DSS. This has several interrelated facets. Complainants are more careful in assessing their chances of winning a behind-the-border case, particularly as they have seen that 'the DSB has issued a number of rulings . . . that have interpreted various agreements in such a way as to emphasize the legitimate scope for governments to adopt non-discriminatory, but trade-impeding regulations' (*ibid.*). This combines with another process of adaptation: 'government generally getting used to the rules and learning to play the game better in terms of keeping their regulations within permissible bounds' (*ibid.*: 22).

Why, then, is the legitimacy of the WTO's institution of accountability compromised to the point of being regarded as rigged against poor states? There is a long list of grievances – issues of legal standing, the availability of funds, the appointment of panels, and the rules governing enforcement. In accountability terms, it could be said that several rules governing the operation of the DSS adversely affect the interests of LDCs and developing countries, making them unable either to: (a) obtain answerability; or to (b) impose sanctions against rich countries that fail to honour their treaty commitments.

There are three main complaints against the WTO's fairness as an accountability institution – all of which indicate the difficulties of distinguishing bias from capture. The first is the cost of mounting a case, and the disparity in the ability of different states to meet this elementary hurdle. This is a classic issue in any dispute system, but the huge disparity between states, combined with the need for rich member states to continue in a cordial relationship with poor member states on a regular basis, makes this a starker problem than it is in domestic legal systems. There have been some efforts to try to redress the obscene disparity between rich and poor member states. The Advisory Centre on WTO Law was estab-

lished to act as a form of legal aid for states lacking the funds to pursue legitimate claims. But the level of funds – and the strings attached – made this a not hugely popular alternative.

The second set of concerns has to do with structural issues. For instance, there have been worries that the procedures used in selecting panellists – both in general terms, and in terms of assignment to particular cases – have worked against the interests of developing countries: Chakravarthi Raghavan and others have complained about appointments procedures within the Secretariat and the Dispute Settlement Body, which administers the Dispute Settlement Understanding (Raghavan 2000). (It is the operation of all of these components, including the actions of member states who either use or are influenced by the existence of these institutions, that I collectively refer to as the Dispute Settlement System.) There have been similar complaints about other elements of the WTO Secretariat, particularly concerning the appointment of ex-delegates. The appointment of Stuart Harbinson (a former member-state delegate) was one such high-profile case.[3] There are a range of other structural issues that could fall into this category: the procedure for adding member states as co-complainants on a case; the lack of clarity in the relationship between WTO treaty law and other multilateral agreements (particularly those dealing with the environment).

The third, and arguably the most contentious, variety of complaint about the DSS's fairness concerns the system for enforcing judgments. As we know, this is a central element in an accountability system. Currently, most developing and LDC member states are disadvantaged in terms of their ability to compel compliance by developed member states with their WTO commitments. Though there are several reasons for this – not least their lack of legal and administrative capacity – a major cause for concern is the bilateral nature of enforcement. The only way for a member state to enforce a Panel decision that has found violation by another member state (in the absence of that state's voluntary compliance with the actions specified in the Panel report) is to impose retaliatory sanctions – that is, to withdraw trade access. When a developing or LDC member state has its complaint upheld, but nevertheless has a small domestic market, the lack of access to which is not a priority for the developed member state against whom a Panel report has ruled, the developing country or LDC deemed by the Panel to have suffered 'nullification or impairment of benefit' has little leverage to enforce compliance on the part of its richer trading partners.

Some of these issues are covered in the next section's discussion of accountability trends (under methods). For now we can note a particular point of controversy with regard to the non-equity of enforcement – in this case the alleged spillover of rich-country influence from other *non*-WTO domains, particularly those based on less democratic (shareholder-based) governance models, like the World Bank or IMF. Moreover,

governments – all governments, but particularly those representing rich (or 'developed') member states – fail to follow practices that would allow less-advantaged people, or associations purporting to act on their behalf, to hold them to account. Poorer-country governments, however, are constrained by these power imbalances in their dealings with DSS officialdom and in dealings with member states with which they may be in dispute.

Proposed reforms to the DSS and the new accountability agenda

From within the mass of governance experiments worldwide a 'new accountability agenda' is in the making. As indicated above, this consists primarily of three interrelated elements: (1) a more direct role for ordinary people and their associations in demanding accountability (2) using an expanded repertoire of methods across a constantly shifting set of jurisdictions, on the basis of (3) a more exacting standard of social justice. Despite the undeniable diversity among these initiatives, and the widely differing contexts in which they have been undertaken, it is possible to discern the defining characteristics of an emerging agenda. There is, of course, a great diversity of policy and advocacy agendas related to governance reform, and these are constantly in flux, changing in response to the unfolding of events. They exist mainly in fragments of conceptual innovation and practical experiment. Efforts to put the elements of the new agenda into practice are, however, more widespread than ever.

International aid organizations, such as the UK's Department for International Development, have put forth a strong commitment to making the WTO's DSS a fairer place. This is found in a number of areas of work. The principle underlying this work is expressed most clearly in para 236 (p. 70) of DFID's 2000 White Paper 'Eliminating World Poverty: Making Globalization Work for the Poor', where there is a commitment to helping 'poor countries . . . exercise their rights, on more equal terms' within the WTO's DSS. DFID has already taken steps in this regard by helping to establish the 'Advisory Centre on WTO Law', but this is widely seen as inadequate. DFID and other donors must also target the DSS in particular when pressing 'for special and differential [treatment] provisions to be real and binding' (para 238). In other words, rather than simply using the dispute procedure to adjudicate on the *applicability* of existing special and differential treatment provisions, new such provisions should be devised that would apply to the operation of the DSS *itself*.

Proposals for reforming the DSS that have emerged both during the ongoing Review of the DSU[4] – one of the processes that emerged from the November 2001 Doha ministerial – nicely reveal key issues in the evolving accountability landscape. Reform proposals are thus examined in terms of the agenda's three elements – new *roles* in accountability relationships,

new *methods* for obtaining answerability and enforcement, and new *standards* of accountability against which actors can be judged.

New roles

The new accountability agenda consists, above all else, of new types of accountability relationships – with familiar actors playing new roles. In the case of the WTO, the actor is new, though it has a pedigree due to its institutional inheritances from the GATT. Citizens are old actors, but they are making similar demands with respect to the WTO that they have made with respect to other powerful actors who are ultimately accountable to people, but through mediated forms (a shareholders' vote, a national election). Hence, people are demanding less mediation of accountability relationships: they are insisting on being more directly involved in accountability processes. In this case the key point of intermediation challenged is the state's position as a member of the WTO, a status reserved for states by the institution's rules. This is thus a slightly different matter from what one finds in the purely domestic version of this accountability trend, where the role shift consists primarily of citizens demanding to take part in audits of state agencies that are conducted by *other* state institutions – that is, to be at least a secondary spectator and preferably an active participant as the state scrutinizes its own workings. In the multilevel governance case of the WTO DSS, however, the issue is the state's role in a broader sense.

As we have seen, institutional features of the DSS are seen to violate widely shared views on basic fairness. One of these, alluded to briefly earlier, was *legal standing* for participating within WTO disputes. One complaint often heard in this connection is that developed countries are able to obtain – free of charge, as it were – the services of corporations and their lawyers in the preparation of cases. Developing countries do not have those kinds of resources to draw on. Moreover, where a complaint touches on an issue of 'sustainable development', one of the ideas found in the preamble to what is in effect the WTO's constitution, there is almost always insufficient voluntary legal assistance available for cases to be researched and pursued. Non-governmental organizations (NGOs) have sought to insert themselves as friends of the court in some cases, as in the asbestos case and others with environmental consequences, and in some cases have managed to be heard, most notably the 'shrimp–turtle' dispute (Sampson 2000).

Many DSM reform proposals focus on involving non-governmental actors in the process by which Panels and the Appellate Body assess the claims made by disputing parties. This would require the specification of structured procedures for supporting non-state actors – for instance, by regularizing an open and transparent system for submission of *amicus curiae* (friend of the court) briefs that panels would be permitted, but not

required, to consult in considering a case, or even rely upon in rendering a judgment on a specific matter (Umbricht 2001: 773–794). Such reforms have been opposed by various developing country governments, who see them as a means by which expert voices from the north will continue to dictate global economic policy to the south. Developing countries are weary of international aid charities that have absorbed most of the neoliberal assumptions of World Bank economics, and certainly do not want to be lectured to by large Western environmental NGOs, like the Sierra Club, which many critics feel promotes conservation over people's development. Developing countries fear that such (mainly Western) organizations would, if given the chance, use their financial muscle to enter into every dispute involving Southern challenges to Northern environment-linked trade restrictions, food-safety regulations, and so forth. *Amicus curiae* has been seen by its opponents as part and parcel of the strategy to bring labour and environmental standards in through the WTO's back door (as there have been difficulties getting them agreed, as we will see in the 'New standards' section below).

One widely circulated reform proposal is to negotiate an amendment to Article 13 of the DSU (or to support an Interpretive Declaration) that would formally entitle Panels to accept legal submissions (and other forms of information) from non-disputing parties (including NGOs). Two cases gave particular prominence to this reform proposal. The first was the 'shrimp–turtle' case, in which the Panel considered, in formulating its Report, submissions by non-governmental experts. The second case was the complaint by Canada against France, which had banned imports of chrysotile asbestos on health and safety grounds. The Appellate Body in the asbestos case initially invited concerned parties to submit *amicus curiae* briefs, but once submitted, it disallowed them (Marsden 2003).

Discussions with a wide range of developing country actors (including Southern NGO representatives as well as member-state delegations) revealed that such a proposal would face stiff resistance. Developing and LDC member states fear that Northern NGOs (many with more resources than small developing countries) will have undue influence over the dispute proceedings, and that this will work to their detriment.

New methods

The second element of the new agenda is seen in the worldwide activist community's attempts to obtain accountability through an expanded repertoire of methods. These actors have had to navigate the simultaneous processes of localization and globalization, the ceaseless reconfiguration of the scope of accountability relationships. Because scope so closely affects the choice of technique, the analysis of methods has been combined with the discussion of accountability jurisdictions.

In describing activities within the DSS the emphasis thus far has been on the existence of new kinds of relationships, in which actors play unaccustomed roles. But this second feature of the new accountability agenda is also present. The use of a novel set of tools is, in fact, at the heart of the DSS's approach. There is currently widespread acknowledgement that the existing sanctions-based approach to enforcement must be replaced with something fairer (The South Centre 1999). Shaffer is among those who believe that the US and the EU are focusing on procedural issues that 'fail to address the central challenge that developing countries face under the current WTO dispute settlement system: that of remedies' (1999: 5–6). This view is supported by formal submissions by a number of developing countries – for instance, proposals by Ecuador,[5] and by a group consisting of Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania, and Zimbabwe.[6]

Of the many proposals for fixing the problem of enforcement (or 'remedy') discussed at various times – both informally and in more official contexts by member states, multilateral agencies, and NGOs – there are three that share one crucial feature: they address the most commonly voiced concerns about proposed reforms to the DSM – the fear that they will lead to increased protectionism. Officials in the WTO secretariat, as well as developed-country member states, while acknowledging the shortcomings of the existing system, worry that greater leverage for developing countries would mean more retaliation, and therefore a *de facto* deliberalization of trade.[7] These three reform options seek specifically to prevent any net increase in retaliatory sanctions.

The first is to use enhanced (above-normal) trade access to rich-country markets as *itself* a penalty to be imposed by developing countries on rich countries when the latter's trade regimes are found by a panel ruling to be non-compliant with WTO treaty provisions, leading to nullification or impairment of benefit for the developing-country government. Rather than a developing member state obtaining (as a result of a Panel ruling) the right to withdraw trade access (that is, to abrogate the principle of non-discrimination), this reform would force the offending developed member state (whose trade measures were found by a Panel report to have violated treaty provisions) to *reduce* tariff barriers (to a level below what is already stipulated in existing reciprocal commitments) for imports from those member states that had initiated the complaint in question. Which sectors would receive these additional tariff reductions could be left to the Appellate Body, in consultation with the complaining member state, to decide. The additional relief would need to amount to more than the estimated loss arising from the original violation in order to create a positive incentive for compliance. There is also the possibility that access to these self-punitive reduced tariff barriers in the developed member state concerned could be made available to *all* developing member states, rather than only to those that had initiated the dispute.[8]

This solution, however, could well impose sufficiently intense free-rider problems to forestall collective action, and so would need to be carefully modelled.

The second reform proposal that uses a non-trade-sanctions approach recommends that developed-country member states that fail to comply with a Panel ruling be prohibited from initiating a new dispute against *any* member state (developed or developing). This proposal, it is felt (most notably by European country WTO delegates who have experienced first hand the difficulty of establishing an effective WTO Advisory Centre), would act as a serious disincentive to developed member states who might otherwise consider it acceptable to suffer the (not-very-serious) consequences of retaliatory trade sanctions by much smaller developing and LDC member states. Developed countries might conclude that the cost of non-compliance on any given issue was too severe if failing to abide by a Panel ruling meant that they lost their ability to compel compliance from other member states on issues of greater concern.[9]

In the third proposal to reform the enforcement methods used in the DSS, developed member states found by Panels to be in violation of their commitments (in cases brought by developing member states) would be liable, in some instances, to pay monetary damages rather than to suffer trade sanctions. The advantages of this approach, in addition to halting the spiral of protectionist retaliation, is to focus public opinion generally in the penalized developed member states on the costs of non-compliance (rather than relying on discontent among sectoral interests adversely affected by the retaliatory sanctions imposed).

Shaffer argues that 'remedies (which) rely on trade sanction to induce compliance instead of monetary damage awards' allow rich countries to take advantage of their market leverage. His proposal is to 'modify WTO remedies to provide that retrospective monetary damages be awarded when developing countries prevail against developed countries in WTO disputes, as well as (in certain cases) reasonable attorney fees' (Shaffer 1999: 4). He advocates doing this in a phased experimental fashion, so that it applies first to some agreements, and then others. An alternative version of this proposal is to have a portion of the monetary fine paid over to the Advisory Centre on WTO Law. Monetary compensation already features in other aspects of WTO rules (such as with respect to special safeguards), and is also a feature of other (non-WTO) trade treaties.

New standards

New standards of accountability are a central part of the new accountability agenda, but also the most difficult to pin down. New standards – what targets of accountability are to be held accountable *for* – are also closely related to the first two dimensions of the new agenda. Shifting standards, for instance, are a crucial part of what has propelled non-state actors into

unprecedented roles, while the constantly fluctuating scale of accountability jurisdictions also has an impact on the type of criteria that can be used effectively.

Standards debates have also been a source of much controversy in and around the WTO over the past decade – particularly the question of whether trade-access privileges should be conditional upon adherence to internationally agreed norms on the treatment of workers and the environment. Interestingly, it was not possible to reach agreement on these matters, meaning that the WTO's change-resistant properties meant that no action was taken. So there are limits to standard revisions.

Though these 'social-clause standards' were 'driven out of the WTO', as the battle-hardened veterans of these debates put it, a case can be made that other types of standards have been taking root with less fanfare. The most far-reaching is the emerging consensus that poverty reduction, in the form of 'sustainable development' – a term found in both the preamble of the WTO's founding document and in the subsequent Johannesburg summit of 2002 – which while not achieving much in concrete terms, did have the effect of placing further pressure on the WTO to be seen to be using the Special and Differential Treatment (SDT) provisions of the WTO negotiating instruments to support this common aim. Through the instrument of SDT, and in the name of promoting 'coherence' across all sites of North–South negotiation (whether in the World Bank, the IMF, or the WTO), a raft of reform proposals has been floated (Sampson 2001: 69–85). Shaffer's proposal for reforming the enforcement machinery, for instance, is built around the idea that it should be possible to make poverty reduction an explicit factor in deciding the distribution of rights and obligations among WTO member states in the use of the DSS.

Conclusion: towards a domestic/multilateral hybrid?

Thus far we have examined the DSS as a self-contained accountability institution charged with holding states accountable – to one another and to the institution itself – for their substantive treaty commitments and their obligations under procedural rules. This has involved an examination of the DSS's perceived failure to deliver accountability to poorer states, particularly on issues of 'remedy', because of a range of 'biases'. Most critics have stressed this interstate accountability relationship. Indeed, while DSS reform proposals, taken collectively, have embodied much of the new accountability agenda, interstate accountability has remained relatively distinct from what we might call domestic accountability.

In the WTO context, the domestic accountability deficit refers to the inability of ordinary citizens effectively to demand answers from their governments (let alone impose sanctions against them) for either government actions taken *within* the multilateral arena, or the content and sequencing of policy measures introduced (or not introduced) in order to

conform to the provisions of multilateral agreements. Member states are rarely held specifically accountable for their determinations on (a) whether to comply with specific WTO treaty commitments (or panel rulings, if it comes to that); (b) the time frame within which to do so; and (c) the policy levers to be employed. There is a substantial list of decisions that governments, North and South, must make in the course of the dispute-settlement processes: which cases to initiate, which to settle (and on what terms – agreeing to do *what* in order to avoid further proceedings), which actions to undertake when losing a case (in order to avoid retaliation), which forms of retaliation to take when winning a case, and so forth. This gives states far more discretionary power than is often recognized.

The demand that the WTO be made more accountable to ordinary people is often dismissed as an arrogation of power by NGOs, who are not infrequently lacking in accountability themselves. Another common rejoinder is that demands for greater 'access' and 'participation' fundamentally misunderstand the WTO's legal status as an intergovernmental institution, which implies that the relationship between citizens and the WTO must per force be mediated by the state. Thus, according to this logic, if member-state representatives are insufficiently attentive to the domestic distributional consequences of their DSS-related actions, then the appropriate course of action is to shore up domestic processes of accountability. Indeed, the general tendency in DSS reform proposals has been to focus on the interstate aspects of accountability (between rich and poor countries), while expecting the intrastate power inequalities to be addressed separately. This is not an unreasonable position. But there is also a sense in which the divide between the domestic (citizen–state) accountability relationship and the interstate relationship has already begun to evolve. As we saw earlier, there has been limited progress in expanding the role of non-governmental experts in the DSS process through the submission of amicus briefs.

WTO observers have started to acknowledge – at times in an oblique way – the importance of domestic-accountability issues. Charnovitz was one of the first to argue that the domestic component of accountability could be used to rectify the huge inequality in the distribution of the capacities necessary to permit member states to enforce DSS rulings in their favour. In a slight variation on this theme, Charnovitz (2001) argued that 'more can be done to use public opinion as a means to influence' those governments that fail to comply with judgments against them.

More far-reaching proposals envisage something approaching a hybrid form of accountability, in which the domestic relationships of accountability were more firmly linked to interstate aspects of accountability, and vice versa.[10] The range of accountability reforms to the interstate dispute procedure already outlined would need to be combined with measures to open up to domestic scrutiny the process by which these countries bring

complaints to the DSS. Complainants, for instance, could be required to conduct a publicly transparent domestic fact-finding and reporting process to determine which of the many potential cases is worth pursuing – based on an independent analysis of the economic costs of current non-compliance by the targeted trading partner. Such a process would place the governments of developed member states, in particular, under increased pressure (from domestic public opinion) to pursue only valid disputes, not those of concern to only very narrow economic constituencies.

Further domestic-accountability-related SDT provisions could be developed which would require developed country member states that win cases against developing countries or LDCs to conduct a public hearing that would consider the impacts of various proposed forms of retaliatory sanctions on poor people in the target country. The purpose would be to act as a spur to domestic public opinion in donor countries, which might in turn convince developed-country governments that it is self-defeating to promote poverty reduction through development programmes, while simultaneously disregarding the distributional impacts of trade-related measures, including those effected as part of the enforcement function of the WTO's interstate accountability institution.

One set of recommendations for institutional reform of the WTO referred specifically to the difference between internal democracy and external accountability (Action Aid *et al.* 2002). Differentiating between processes within the WTO and those that concern relations with groups outside of its framework is in fact an improvement on much of the insufficiently focussed writings on how the organization's seeming power can be checked. The recommendations for increasing external accountability acknowledged, above all, the current lack of clarity as to the rights and obligations of those who should be the key actors. What 'the general public' desperately need is 'information about . . . who is accountable to them for decisions taken at the WTO; and how they can influence these decisions' (Action Aid *et al.* 2002: 9).

In other words, even to the extent that it is necessary to focus more on domestic accountability relationships, the sheer scope of the WTO's influence on policy-making makes it increasingly *necessary* to operationalize these through multilateral rule-changes, resulting in institutional fusion of the two levels. This becomes *possible* because of shifts in the standards against which developed-country governments are being held accountable: initiatives are invariably 'development-led', stressing the need to fix institutions to prevent them working at cross-purposes with the donor community's Millennium Development Goals.

It in fact makes sense for the DSS to perform this role as a hybrid institution: by some accounts, it already is one. Keohane *et al.* (2000) admit that the WTO's DSS falls somewhere between the 'interstate' and 'transnational' types in their categorization of legal institutions. But as the

authors employed three variables, and the DSS scores mainly as an (old-style) interstate institution on two of them, it was only thanks to its enforcement features that the DSS could justly claim partial hybrid status.

Seeing the DSS as a hybrid institution makes further sense if we recognize the extent to which certain domestic actors have already inserted themselves into the processes of multilateral accountability. Shaffer (1999) has documented and analysed the role played by national business associations in supplying their governments with fully researched legal briefs against the states in which their competitors are based. While 'in formal terms', according to Keohane, 'states have the exclusive right to bring cases before (WTO) tribunals', in practical terms 'in the GATT/WTO proceedings the principal actors from civil society are firms or industry groups, which are typically wealthy enough to afford litigation . . .' (2002: 179). The result is that 'although states retain formal gatekeeping authority in the GATT/WTO system, they often have incentives to open the gates, letting actors in civil society set much of the agenda' (*ibid.*: 179–180). Linking DSS reforms to domestic processes strikes a balance between the need to respect the state as the critical site of politics and to use inter-state mechanisms to offset some of what is lost by virtue of the accountability-depleting qualities of multilevel governance.

Notes

1 'The WTO is facing a crisis of legitimacy' was the conclusion of a measured discussion paper produced by Oxfam UK, 'Institutional Reform of the WTO', March 2000. Available on line at: http://www.wtowatch.org/library/admin/uploadedfiles/Institutional_Reform_of_the_WTO.htm (accessed 10 December 2001).
2 'Globalisation: The Argument of Our Time', an OpenDemocracy.net debate between Paul Hirst and David Held, 2002. Available online at: http://www.opendemocracy.net/debates/article.jsp?id=6&debateId=28&articleId=637#one.
3 See 'WTO Secretariat's Chef De Cabinet Breaks the Rules', *Focus on the Global South*, 23 September 2002.
4 Formally known as the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding).
5 *Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO*, TN/DS/W/9 (8 July 2002).
6 *Negotiations on the Dispute Settlement Understanding*, TN/DS/W/19 (9 October 2002).
7 This was made clear in the author's interviews with senior officials in the WTO secretariat, and in the delegations of OECD and non-OECD member-states, Geneva, February 2001.
8 *Ibid.*
9 *Ibid.*
10 This form of accountability hybrid – incorporating the national and international levels – is conceptually distinct from another form identified by Goetz and Jenkins, which involves the blurring of the lines between horizontal and vertical forms of accountability. See Goetz and Jenkins 2005.

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14 Conclusion

Actors, institutions and democratic governance: comparing across levels

Arthur Benz and Yannis Papadopoulos

Introduction

By covering analyses of democratic governance from different sub-disciplines of political science, the intention of this volume was to extend the analytical perspectives that usually predominate in debates on this subject. A view that cuts across different levels of politics enables us to comprehend better the variations in the problems of, and prospects for, democratic legitimacy in different governance arrangements: 'There is much to be gained by developing the debate across the empirical and theoretical boundaries between those studying transnational developments, for example, European integration and transnational governance, and colleagues working on network governance at subnational and local levels' (Skelcher 2005: 106).

In the following sections, we draw some conclusions on conceptual and analytical issues that we regard as relevant for future research. We begin with some remarks on the normative concept of democratic legitimacy which provide a common ground for comparing national, European, and international governance, and proceed to point out how this concept can be applied in empirical research. Secondly we focus on actors in governance, assuming that governance includes new actors but does not extend participation of citizens in general. Therefore the justification of the inclusion and exclusion of actors as well as the issue of the accountability of these actors has gained the utmost importance in the governance debate.

Finally, we deal with the institutional framework which sets the rules for the interaction between representatives, from both governments and non-governmental organizations, and those represented in governance arrangements. These rules determine the selection of representatives, and create formal structures of communication and control, in which representatives can be effectively held accountable for their decisions. For that reason we believe that institutional structures of governance are decisive for democratic legitimacy. However, governance structures and institutions are not always congruent; they do not necessarily follow compatible

modes of policy-making. Hence it is important to know whether an existing institutional setting contributes to the linking of representatives with those whom they should represent, whether existing institutions have no impact on the way governance is working, or whether they have negative effects on it. By comparing governance at the national, European, and international level, we show that the effects of institutions on governance and consequently the problems of democracy differ across levels. We therefore maintain that the discussion and theory of democratic governance should be differentiated, and that a fine-grained approach can contribute to a more elaborate and adequate evaluation of the democratic legitimacy of policy-making in intricate governance arrangements.

Towards a common normative concept of democratic governance

A comparative view on democratic governance across different levels of politics requires a common normative concept of democratic legitimacy. Scholars working on governance often assume that the deep transformation of existing political systems requires a new notion of democracy either for analytical or for normative purposes. Concepts of deliberative, associative, or consociational democracy play an important role in debates on governance. The latter is deemed to emphasize horizontal instead of vertical relations, and it includes more participants on a functional basis than it does according to territorial criteria. Decisions should be based on consensus instead of majorities, and cooperation among relevant actors from the public and the private sector should prevail instead of party competition and antagonistic power structures (Gbikpi and Grote 2002; Kooiman 2002; Pierre and Peters 2000).

In fact governance implies, at least in theory, new ways for associations and private corporations to participate in policy-making. However, it regularly includes only particular groups of actors in elitist and frequently asymmetric relations. Furthermore, governance also implies competitive relations between actors. To put it differently: governance is not only about participation, consensus or functional reorganization of politics, but involves power. Ignoring its character as ‘politics’ means disregarding the problem of democracy (in particular, see Chapter 5 by van Gunsteren in this volume). For that reason a normative concept of democratic governance has to capture the relations between those holding power in governance arrangements and those remaining outside of them but being affected by the resultant decisions.

The authors contributing to this volume concur – across the different sub-disciplines – to a notion of democracy that takes the reality of power into account. Most of them explicitly refer to the concept of complex democracy that has been formulated by Fritz W. Scharpf (1970, 1999), among others (for example, Lijphart 1999; Putnam 1993). Distinguishing

between input and output forms of legitimacy, Scharpf emphasizes that those responsible for decisions on the output-side have to be accountable to citizens formulating the inputs of policy-making. Certainly, these criteria have no exclusive relevance for the governance debate as they claim general validity, irrespective of particular institutional settings or objectives of politics, thereby defining democratic legitimacy on an abstract level. Yet, they draw attention to exactly those problems that governance generates for a democratic political system: the input of citizens' interests is no longer guaranteed by elections, since non-elected actors enter the arenas of policy-making. In structures of governance where decisions are not made by majorities but emerge from bargaining and arguing, effective outputs are difficult to achieve. Among these problems, the thorniest issue concerns accountability in political processes that are mostly informal, not very transparent, often dominated by elites and experts, and provide the actors with opportunities to shift the blame to other decision-makers (see Chapter 2 by Pierre and Peters in this volume).

Input-legitimacy refers to how the interests of citizens are transferred into policy-making, which procedures are applied, which interests are included and excluded and how this selection is justified. Equality of potential access and fairness in the consideration of interests is a basic requirement of democratic legitimacy. Moreover, as Wolf suggested in Chapter 11 of this volume, representatives should be considered as intermediaries of interests, and it must be asked how they are formally (for instance, by election or delegation) and substantially (concerning their mandate) authorized to make decisions for citizens or for particular groups. As to the outputs of policy-making, they contribute to legitimacy if they find acceptance by citizens or by the affected groups, and particularly if governance networks are considered to be responses to the failures of traditional steering mechanisms, offering 'new and alternative ways of getting things done' (Benner *et al.* 2004: 192). Acceptance can relate to specific issues, or to the general effectiveness of governance (Easton 1965; Wolf, Chapter 11 in this volume). In addition, governance arrangements should be designed to deal with unexpected disturbances and to induce policy learning. In terms of output-legitimacy, governance should therefore provide for 'resilient regimes' (van Gunsteren, Chapter 5 in this volume).

While it could be argued that effective outputs can be produced by deliberation among experts or within narrow circles of actors, decision-makers must also be subject to control. Accountability allows those subject to decisions to react to the outputs of governance, and it compels the responsible decision-makers to anticipate these reactions. By linking the representatives to the represented, accountability becomes the central issue of democratic legitimacy from a normative point of view (Bovens 1998; Held and Koenig-Archibugi 2004). From an analytical point of view, several contributors to this volume (particularly Peters and Pierre

(Chapter 2) as well as Benz (Chapter 6)) regard it as the main problem in governance. Since governance regularly cuts across the boundaries of institutions or territories of governments, internal accountability has to be complemented by external accountability (see Risse, Chapter 10 in this volume). Decision-makers and those scrutinizing their decisions have to consider effects going beyond their jurisdiction if they seek democratic legitimacy. While internal accountability can – in principle – be made effective by institutionalized relationships between representatives and represented, external accountability requires the inclusion of actors standing for general interests or representing those outside the immediate political context of the government arrangement.

Further debate will show whether this framework for evaluating democratic legitimacy is accepted in different fields of research on governance. Yet it is noteworthy that it has been taken up by researchers working on different levels of political science. Hence it may provide a common ground for comparison across levels of policy-making.

The rise of new actors in governance

In the face of the democratic deficits of governmental institutions and, at the international level, of intergovernmental bodies, scholars often consider as a remedy the participation of non-state actors in governance arrangements. Such an arrangement not only responds to functional imperatives but is also regarded as an important source of democratic legitimacy. Sometimes non-state actors are considered to express stakeholders' interests better than governmental actors. According to this perspective, therefore, legitimacy should be ensured through a 'horizontal' dialogue between governments, policy-making bodies, civil-society organizations, and private actors, which supplements the classic 'vertical' accountability and remedies its weaknesses beyond the nation state.

Following the analyses presented in the sections above, two kinds of non-state actors will now be given particular consideration: experts, meaning actors who provide knowledge but do not bear the responsibility for decisions, and private actors who represent particular interests, such as NGOs and private firms. Accordingly, a distinction can be made analytically between expert-based and interest-based governance (see Smismans, Chapter 7 in this volume). As the analyses in this book reveal, the participation of these 'new' actors does not *per se* improve democracy, since their involvement can also contribute to the democratic deficit of governance arrangements.

Experts

In Chapter 4 Anne-France Taiclet finds that policy experts play an increasingly prominent role in French territorial development. Territorial

development is now a professionalized sector, as indicated by the existence of specialized journals, conferences, associations, mailing lists, and university degrees. Another example of the weight of professional legitimacy can be found in the European Commission's use of best-practice exchange as an instrument of coordination. Moreover, expert-based governance is mushrooming in the EU, as revealed in the case studies by Stijn Smismans (Chapter 7) and Christine Neuhold (Chapter 8). There are good reasons to assume that the same is true for international governance, too.

Experts deliver knowledge and information: therefore, their participation can be justified with regard to output legitimacy. As a rule, governance arrangements emerge when complex issues are at stake and politicians and bureaucrats simply are not able to cope with them. Furthermore, experts are often used to discharge politicians from the need to make decisions on highly disputed matters. They change policy-making processes from bargaining on divergent interests into deliberation on problem-solving (Joerges and Neyer 1997). Experts therefore function as an additional source of legitimacy for policy-making, based upon the assumption that scientific knowledge can help to distinguish between what is right or wrong. Finally, deliberation among experts can improve external accountability by introducing concerns and arguments that are generally acceptable even by those not represented in governance arrangements.

It goes without saying that these assumptions are disputable. Experts rarely come to an agreement on questions that concern political debates and policy-making. This is quite understandable since scientific issues (that is, those that can be decided by using approved methodologies and knowledge) and political issues (those that require decisions between competing interests) are normally entangled and can hardly be separated. According to Neuhold (Chapter 8), this is one of the main obstacles for improving democratic control of comitology committees in the EU. Moreover, experts often implicitly or explicitly represent particular interests. Expertise that is relevant for political processes is not only produced in universities and research institutions but also in associations. Finally, it should not be forgotten that science is not value-free but is based upon assumptions which include particular perceptions of social reality.

Although experts can claim to provide output-legitimacy as they improve knowledge of the causal mechanisms of problems, and thereby enhance the credibility of policy recipes, their participation may cause a problem of input-legitimacy if their proximity with particular groups is concealed. Moreover, even if this is made explicit, experts often are not accountable to a group or community because, in order to find acceptance, they have to claim independence. Therefore, the participation of experts contributes to democratic governance only if it is supplemented by structures or procedures guaranteeing input-legitimacy. It is thus the

relationship between experts and elected politicians or other representatives of societal interests that determines the democratic quality of governance. In this respect, the findings of Anne-France Taiclet (Chapter 4) on French regional policy are noteworthy. Here, politicians seem to be able to balance the rising power of experts. For European governance, Stijn Smismans (Chapter 8) emphasizes that democratic governance has to combine expert-based and interest-based forms. While the first type supports deliberative policy-making and may allow for the consideration of 'external' concerns by referring to general interests, interest-based governance implies bargaining, with the probability of stalemate, but includes actors that can be held (internally) accountable. Consequently, the rise of experts calls for a search for mixed modes of governance.

Private actors and 'civil society'

Governance is frequently identified with policy-making between public and private actors in cooperation. In order to conform to the standards of democratic legitimacy defined above, the 'privatization' of governance has to meet at least three conditions. Firstly, compared to the traditional 'iron triangles' or corporatist structures, *new* private actors of 'civil society' have to participate in governance, in other words those who represent general or underprivileged interests (such as environmental issues, civic rights, consumer protection, or interests of the unemployed, disabled or poor) that are usually ignored in established politics. Secondly, democracy requires a non-discriminatory balance of power between the different representatives of private interests. Thirdly, those actors who claim to represent particular private interests must be accepted by those they represent and must be accountable to them.

The trends toward the privatization of governance are more pronounced at the international level than at the national or sub-national level, as is supported by many of the contributions to this volume (see also Braithwaite and Drahos 2000; Brühl 2003; Cutler *et al.* 1999; Ronit and Schneider 2000). In the absence of a transnational governmental authority, private corporations or associations often come to rely on voluntary self-regulation when the market fails. In addition, when national governments negotiate on treaties or cooperate in international regimes or international organizations, they are increasingly controlled by international NGOs and have to cooperate with them. The number of these organizations has increased tremendously,[1] and today they are important actors in international governance (Josselin and Wallace 2001; Scholte 2002). As already noted in the introduction to the present volume, the increasing 'voice' of NGOs in international governance combined with the mobilization of social movements has induced several international organizations to inform and consult them.

At the European, the national, and sub-national levels of governance,

private actors are also important. In particular, European governance arrangements increasingly bring public and private actors together. While in the international field private actors pursue their interests more in the shadow of the competition between corporations or states, at the national level the 'shadow of hierarchy' of a sovereign government implies different conditions for their involvement in governance. Nevertheless, the criteria for assessing the legitimacy of their contribution apply to governance at all levels. The extensive debate on private actors' contribution to democracy in international governance is relevant for the governance debate in the European, national, and sub-national contexts, too.

This debate reveals that there is some reason to expect the inclusion of private actors to democratize governance. As Klaus-Dieter Wolf explains in Chapter 11, these actors can improve both input- and output-legitimacy, provided that specific conditions are met. In many cases their legitimacy is derived from rules set by governmental organizations, such as states and international organizations. This argument also applies to private actors at the national and regional level and in the EU, where they are subject to laws or generally accepted norms, and where their inclusion can be defined by democratic institutions (see Schmitter, Chapter 9). However, as shown by the case studies presented by Smismans (Chapter 7), Brühl (Chapter 12), and Jenkins (Chapter 13), the participation of private actors often generates a democratic deficit. This deficit can be caused by the structure of the governance regime which often includes only selected actors, but it can also be inherent in the organization of the new private actors.

The problem of selectivity is evident at the international level, where NGOs are criticized for conveying 'Northern' norms while local populations are absent from the stage.[2] In her chapter, Tanja Brühl maintains that private actors from the South have limited resources in terms of money and of the ability to articulate their interests in international negotiations, which is further diminished by language problems. Moreover, in Chapter 13 on the WTO, Rob Jenkins notes that reform proposals focus on involving non-governmental actors in the process by which Panels and the Appellate Body assess the claims made by disputing parties, only to add that such reforms have been opposed by the governments of various developing countries. The latter fear that (mainly Western) NGOs would, if given the chance, use their financial muscle to enter into every dispute involving Southern challenges to Northern environment-linked trade restrictions and food-safety regulations, among other issues. There are however, indications of change in a more pluralistic direction, since locally based NGOs in developing countries emerge and claim to represent local constituencies (Woods 2002: 28).

In any event, it is only under restrictive conditions that forms of (inter-organizational) horizontal accountability between decisional bodies and organizations representing social interests can compensate for the lack of

efficient mechanisms of 'vertical' accountability in international governance. Moreover, although civil-society actors may claim to represent general interests they are primarily accountable to their own organization. Besides, their members or those represented can only weakly control their actions. National associations as well as international NGOs are subject to elitism, and, in exchange for the attribution of 'formal partner' status, to domestication by institutions (Scholte 2002: 295–299). With the growth of governance, internal structures of representation in societal associations tend towards centralization. When these organizations become partners in negotiations and networks with governments and administrations, the relationship between their leaders and the represented members may turn into an oligarchic structure (Offe and Wiesenthal 1980). This development should be taken into consideration when seeking to assess the democratic legitimacy of 'civil society' involvement.

Democratic governance in different institutional settings

While many similar aspects can be found in the different discourses on democratic governance regarding the normative framework and actors' legitimacy, matters are more complicated when considering the institutional framework of governance. Governance itself may be regarded as an institutional setting. It 'concerns both the organization of collective decisions in a given institutional setting among actors with pre-established preferences and resources, and the shaping of constraints relevant for political action, in particular by building and shaping institutions' (Kohler-Koch 2003: 11). Apart from that, governance arrangements are usually linked to governmental, European, or international institutions which influence the way that they work. In that respect, comparison across levels is fruitful since it demonstrates the effects of different institutional settings on governance.

Institutions of democratic government and governance in the nation state

With regard to the national level, government has not become a marginalized structure, and in the past society was probably not more governable by authoritative regulation than it is today. Governance in the nation state serves as a corrective for deficits in the institutions of government. Due to the functional differentiation of modern society, the territorial organization of the state is complemented by sectoral networks, and in particular by policy areas (Mayntz 1993). Well-known examples are corporatist networks in economic policy, or extra-parliamentary councils and committees which are extensively used in Nordic Countries and in Switzerland. Recently the discussion on governance has shifted its focus to the regional arena. This is understandable as regions are the places where the interdependence of special policies and the need for coordination ('joined-up

management', 'management of interdependence') become apparent, and regional policies are mainly made in networks of public and private actors (Ansell 2000; Benz *et al.* 2000; Fürst 2003; Le Gales 2002).

Whatever their particular characteristics are, these patterns of governance emerge inside the institutional framework of the democratic nation state that has developed throughout a long history. Institutions of the democratic state can contribute to the democratization of governance: the state provides rules regulating who is authorized to participate in decisions, and it has established procedures for decision-making. Rules shape the modes of accountability of representatives and determine how they are controlled and by whom. However, the linkages between governance and institutions have different consequences as regards input-legitimacy, output-legitimacy, and accountability.

Concerning the inclusiveness of policy-making, the fact that participants from governments are bound to institutionalized rules of the democratic process can improve the input-legitimacy of governance. Whereas governance networks are often criticized for favouring powerful special-interest groups, elected members of governments cannot afford to cooperate with actors representing only an insignificant number of citizens. They have an interest to back less organized groups and those organizations pursuing general interests against the power of special-interest groups. Furthermore, accountability of policy-makers is better safeguarded if governance arrangements are linked to institutional rules of the democratic state, whereas divorcing governance from representative political institutions and party government can cause deficits in democratic legitimacy.

On the other hand, the effectiveness of policy-making may be negatively affected by the tight coupling of governance structures to formal democratic institutions. If actors cooperating in governance networks are firmly bound to rules of the democratic process, their ability to find agreements and innovative solutions will be constrained. Governments subject to the strict control of their parliament lose their autonomy, which is necessary for effective cooperation in networks. The competitive style of politics in the parliamentary arena and in public debates among political parties does not accord to the consensus-oriented style in policy networks or negotiations. Hence, the new modes of participation of 'stakeholders' may negatively interfere with the established cycle of representative democracy.

It follows from these observations that democratic legitimacy depends on how governance and the institutions of the democratic state are linked. In their contributions to this volume, B. Guy Peters and Jon Pierre (Chapter 2) as well as Herman van Gunsteren (Chapter 5) point out the negative effects of governance decoupled from democratic institutions. Katrin Auel (Chapter 3), on the other hand, reveals the problems that arise if government is too strong, while Anne-France Taiclet (Chapter 4) describes a more balanced situation in French regions.

B. Guy Peters and Jon Pierre, mainly in accordance with van Gunsteren, argue that some actors in governance can be held to account through the election process, but most of them cannot. The 'enabling state', for example, attempts to capitalize on resources controlled by a wide range of actors and to employ those resources in the pursuit of collective goals for society. However, if these actors turn out to perform inadequately, it is unclear who is to be held accountable for that policy failure. Moreover, in new public management, accountability becomes almost exclusively a performance-related issue having to do with the quality of public-service delivery, while a good deal of public participation is now being directed towards the administration, with a risk of bureaucratizing the practice of democracy. The other important sector of government activity, the exercise of political power, is ignored and the traditional notion of responsible party government is shifted into the background. Herman van Gunsteren (Chapter 5) views the trend towards governance as part of the effort to restore resilience, by which is meant the capacity to cope with surprises in such a way that core values of the public sector are preserved. However, the price for this improvement is that the reach of the erstwhile sovereign centres of political decision-making is limited. As a result, both in theory and in practice, the role of politics becomes smaller and smaller. The author notices that the rise of governance goes on a par with citizens withdrawing from politics and politicians misrepresenting it, mainly due to the role of the media.

Yet, as has just been noted, too narrow a linkage between governance and the institutions of the democratic state can produce problems. For this reason both must be brought into a balanced relation. Individual states differ in the degree this balance is realized, since the evolution of patterns of governance is path-dependent: they are shaped by the particular institutional framework of the state as well as by policy styles and existing policy networks. The two cases studies presented by Katrin Auel (Chapter 3) and Anne-France Taiclet (Chapter 4) illustrate this point.

Katrin Auel describes regional policy networks in Germany as a form of 'negotiated democracy', in which relevant social groups are directly involved in the process of developing programmes and projects. However, these networks emerged inside the framework of a strong regional 'government' within the *Länder,* where a more traditional notion of parliamentary decision-making prevails alongside an aversion to the involvement of interest groups and private actors. Both conceptions of democracy coexist in an uneasy coupling. Regional governance implying the involvement of new actors has been fostered at the regional level, whereas these actors are kept out of the *Länder's* policy-making with the argument that they lack formal institutional legitimacy. The predominating *Länder* governments in fact isolate themselves from regional networks and partnerships and resort to vertical modes of policy-making. There is no real shift to governance, and at the same time executive-dominated

structures of policy-making are not well linked to parliamentary deliberation and control either, not the least because of self-restraint by parliamentarians themselves. As a consequence, regional policy in Germany appears to be characterized by technocratic tendencies that distinguish it both from party government and from effective network governance.

The case analysed by Anne-France Taiclet reveals different problems. In territorial development policy, notwithstanding the aforementioned strong influence of experts, democratically elected representatives are not absent from governance networks. This fact may be surprising since regional governments are rather weak in comparison with Germany. However, the weakness of these democratic institutions induces elected politicians to increase their legitimacy (that is, their ability to gain support, especially in elections) by appropriating the positive outputs of governance networks. Given the strong role still occupied by the central state, no structural initiative can be carried out without its financial and technical support, and the elected officials representing various institutional levels (municipal, departmental, regional) must compete for the allocation of state resources. Hence the logic of political competition has a strong impact on governance, which is loosely linked to institutions of regional and state government. For that reason, the conflicts between governance structures and democratic institutions that were observed in the German case are not prevalent in French regional policy.

Governance and evolving democratic institutions in the EU

Being neither a state nor an international regime or institution, the EU has generated a particular form of governance beyond the nation state. Its structures resulted from an integration process which was driven by two logics: a functionalist logic, which led to structural differentiation of policies and to sector-specific institutional governance arrangements that include representatives of special interest groups and experts; and an intergovernmentalist logic, which created territorially based patterns of governance in which representatives from member states can negotiate. Both patterns are now embedded in the evolving institutional framework of the 'ever closer union'.

Governance in the EU – in the form of a diversity of networks (Kohler-Koch and Eising 1999), such as committees of experts, bipartite, or tripartite negotiations between the Commission and interest groups, and intergovernmental negotiations between the Commission and national and/or regional governments – suffers from several well-known democratic deficits. Policy-making in these structures can enjoy some output-legitimacy (Scharpf 1999), but it may be particularly open to powerful interests and does not guarantee the accountability of representatives. Interest-based governance has a bias in favour of well-organized

associations. Intergovernmental negotiations turn into sectoral policy networks in which experts from member-state governments pursue their policies without being subject to adequate parliamentary control. Furthermore, committees of experts tend to treat political issues as technical matters and to ignore the affected interests. In sum, as Peter Mair (2005: 17) puts it: 'We have a political system that is open to all sorts of actors and organisations [...] but that is more or less impermeable as far as voters are concerned.' Moreover, there is not only a European democratic deficit, but European integration has also led to a weakening of democracy at national level.

As the essays collected in the second part of this volume demonstrate, these democratic deficits within European governance cannot be solved by simply upgrading the democratic institutions. In his analysis of multilevel governance in the EU (Chapter 6), Arthur Benz stresses that the deficits of accountability in EU multilevel governance are mainly caused by the relations between democratic institutions, in particular the European Parliament (EP), the Council, and national parliaments. All of these institutions care for the consideration of interests and for the access of associations and well-organized private actors. However, as policies in these institutions are made according to different rules, the coordination of decisions is hampered by these various, divergent logics of interaction. It is for this reason that policy-making is shifted to informal negotiations and governance networks. The Commission, now accountable to the EP which can force it to resign with a vote of no-confidence, still has strong informal relations with national or sub-national governments, associations, and experts. In European legislation, the coordination between the EP and the Council is difficult due to the fact that majorities in both institutions are not formed according to the rules of party democracy and cannot be anticipated. Therefore, decisions are actually made by committees of the EP in informal coordination with the Council, which makes policy-making rather opaque. The members of the Council are individually accountable to their national parliaments, but if national parliaments use their formal powers, they threaten to undermine the effectiveness of European policy-making. Hence conflicts between government and national parliaments are usually kept secret and dealt with in informal consultations, which further undermine the transparency of the parliamentary process at the national level (Benz 2004).

This argument is supported by Christine Neuhold. In her analysis of the democratic legitimacy of comitology (Chapter 8), she not only describes the selectivity and opacity of committees but also provides insight into the efforts of the EP to control them more effectively. However, the different logics of operation make this difficult. Governance follows the logic of negotiation, aims for a consensus among actors, and is based on mutual trust or interdependence, whereas the EP expects to find majorities through a competitive process. Actors in committees can hardly

anticipate the will of the majority when they come to an agreement, and if they are made accountable to the EP, the effectiveness of governance may suffer from risk-avoiding behaviour, or from unexpected rejection of compromises by a parliamentary majority. Stijn Smismans (Chapter 7) explains from a different angle why a strengthening of democratic institutions does not *per se* solve the legitimacy deficits of European governance. As he shows in his case study on occupational health and safety policies, an extended participation of interest groups in governance arrangements does not eliminate the problems of biased inclusion of interests, effectiveness, and accountability. The author also points out the variations of governance arrangements and patterns of participation which are based on different normative reasons and follow different rules. Therefore, rather than hoping for a reform in the general institutional framework, he pleads for an intelligent combination of the different modes of governance. Hence, from both contributions it follows that alternative ways of linkage between institutions or between committees and democratic institutions must be devised in order to impede the emergence of isolated networks and to improve the legitimacy of European governance.

For this reason, the democratization of European governance should not be expected to ensue simply from the making of a constitution. It should not be denied that the Constitutional Treaty promises a further step towards a transparent and workable democratic polity, but it does not turn European governance into a European government based on a parliamentary or presidential democracy. In the foreseeable future, Europe will remain a particular kind of multilevel political system that combines different institutionalized and informal rule systems in a plurality of arenas (Jachtenfuchs and Kohler-Koch 2003; Kohler-Koch 2003; Marks *et al.* 1996). As a consequence, it is characteristic of EU democracy that governance has to overcome the problems of the compounded democracy created by the institutional framework of the EU (Héritier 1999). Therefore, as Philippe Schmitter argues in Chapter 9, it is the democratization of governance arrangements by themselves which is at stake. Whether his proposal for institutionalizing 'European Governance Arrangements' is thoroughly convincing will be subject to discussion. Nevertheless, Schmitter's differentiated proposal for rules that define functions, responsibilities, membership, boundaries, modes of decision-making, and so on has the undeniable merit of putting on the agenda the question of the democratization of EU governance through the transformation of procedures which are central to the EU system without being visible. His idea to create governance arrangements with a specific function, for a particular purpose, which are open to stakeholders who participate on an equal basis and decide by consensus, seems fully stimulating in that respect. Schmitter's argument for changing the rules of governance instead of linking them more closely to democratic institutions with often incompatible rules aims at inducing a dynamic process of

democratization at the point where institutional reforms come to their limits. Even if he leaves open the question of how governance can be linked to the established institutions of national governments and the EU, his line of reasoning avoids focusing debates upon oversimplified strategies of democratization that transfer elements of parliamentary, presidential, or direct democracy into the European context of a multilevel political system composed of multiple arenas.[3]

Governance without democratic institutions in international politics

Unlike in domestic environments and in the EU, governance at the international level does not emerge parallel to hierarchic subordination but replaces it ('governance without government': Rosenau and Czempiel 1992; or 'governance among governments': Wolf 2002: 37). Important authoritative decisions are produced by a complex 'polyarchy' of (sometimes overlapping) authority structures, 'an evolving global governance complex' (Held and McGrew 2002: 1) that encompasses states, international organizations, transnational networks, and various public and private agencies.[4] In the absence of a central institution above states to which national governments could transfer their power, internationally agreed rules are produced in a cooperative manner, through bargaining and deliberation. They are prepared by top-rank administrators, and officially negotiated by members of the executive branch. The interplay between these members of the elite with the overall public is weak. The 'chain' of delegation is long, the rules of a democratic process hardly exist, and control by affected groups is inadequate, so that a 'disjunction' occurs (Held 1996).

It would be an exaggeration to argue that the actors responsible for political regulation at the international level are not accountable at all. International governance often occurs 'in the shadow of global public authorities' (Held and McGrew 2002: 10), that is to say international organizations or regimes. However, this is no guarantee of democratic legitimacy. Rules are often produced by function-specific international institutional bodies (such as the WTO, the institutions of the Bretton Woods system, the ILO, the WHO, and so on) which are established on an intergovernmental basis. In the decision-making bodies of these organizations national governments are represented, but representation is flawed by inequalities (Etzioni-Halevy 2002: 206-207; Woods 2002: 30).[5] Hence there are drastic limits both with respect to the 'external' and to the 'internal' accountability of these organizations: numerous stakeholders are marginalized, and even states are not adequately represented (Nanz and Steffek 2004: 326). As a consequence, the outcomes attributed to regulations emanating from such bodies are viewed as negative by a considerable share of communities and groups. A negative spillover effect can thus be observed from a bias in terms of input to a deficit in terms of output-legitimacy.

All of this does not imply that governance without the framework of democratic institutions cannot be democratic at all. In any case, the problem of incompatible rule systems observed in nation states and in the EU does not apply in international governance. Nevertheless, the lack of adequate institutionalized boundaries and rules has negative consequences. With regard to input-legitimacy, there is no way to guarantee the open access of interests to policy-making, even if the growing influence of 'new' non-governmental actors is taken into consideration. Usually the participation of NGOs representing civil society is weakly institutionalized, and imbalances in the power structures are not corrected in a way that conforms to the norm of input legitimacy. In contrast to most NGOs, corporations, or associations of economic interests not only influence international governance directly but also have their interests considered by national governments, thereby allowing them to profit from a 'double voice' (Woods 2002: 27). As in national settings, weakly organized interests have fewer resources to express their views. However, unlike in national settings, this cannot be offset by 'voice' through electoral mechanisms. Effective output requires that any problems relating to the implementation of decisions and compliance with the rules be solved, as they cannot usually be enforced by an authority. Moreover, as Thomas Risse (Chapter 10) indicates, deliberation among actors in international governance may be counteracted by politics inside their communities or organizations, such as when protest movements compel them to adopt competitive strategies against their partners in international negotiations. Finally, Risse points to dilemmas with regard to accountability: without clear boundaries of jurisdiction, actors who accept external accountability, like NGOs, may suffer from deficits in internal accountability, whereas governments can, in principle, be held accountable by their constituencies but tend to ignore the external effects of their policies.

Klaus Dieter Wolf (Chapter 11) tries to clarify the conditions under which private actors and private governance without government can claim democratic legitimacy. Relying upon empirical evidence about different 'codes of conduct' replacing international regulation, he reveals the positive effect of such governance arrangements in terms of input and output legitimacy. Yet the effectiveness of these codes not only depends on the resources of private organizations and the functioning of market forces, but also on the willingness and ability of national governments to enforce these rules of behaviour against corporations within their jurisdiction. Moreover, dependence on the resources and on the professionalization of private groups who advocate public interests raises doubts about whether these modes of governance are fair and transparent. Private actors are only accountable to their own organization or to the market, and even NGOs are not always independent (Tarrow 2001). Finally, there is no guarantee that private governance avoids the negative externalities that affect other groups since actors are subject neither to internal nor to

external accountability. Wolf concludes that in order to become more democratic private international governance has to follow basic procedural and institutional requirements. Besides, it cannot replace the role of (democratic) national governments or international regimes but must be supported by them.

In the case of environmental policy, Tanja Brühl (Chapter 12) provides an example of the ambivalent character of privatized international governance. On the one hand, it is contributing to the establishment of several pillars of deliberative democracy beyond the state. Those who are affected by decisions have more opportunities to take part in decision-making today than they had in previous decades. Additionally, international governance has gained in transparency because non-state actors inform a wider public about political deliberations. As regards output-legitimacy, private actors provide resources such as expertise and help to implement the agreements. Nevertheless, whereas NGOs have taken part in international negotiations for a long time, the role of business actors is rather new, and this increases the North–South gap in terms of representation. Finally, as a result of the de-governmentalization of world politics, effective compliance mechanisms are absent. To avoid these negative effects, the author believes, in accordance with Wolf, that privatization needs to be regulated. As the only legitimate world organization, the United Nations should take over this task and should have the power to set guidelines for private regulations, check whether the existing regulations comply with these guidelines, and take measures to ensure that all relevant problems are dealt with.

Commercialization (reliance on market principles) is another problem. True, if economic competition does not end in pure anarchy but follows the rules of fairness, and if private corporations seek sustainable economic success instead of short-term profit, market mechanisms can be utilized by organized groups to commit private corporations and governments to standards of environmental protection, labour rights, and consumer protection. In the shadow of the market and of the costs of 'naming and shaming', private regulations can emerge that conform to the criteria of output legitimacy. However, as noted by Brühl and Wolf, this form of external accountability through the market suffers from some important weaknesses: there is a lack of congruence between those able to punish companies (consumers in wealthy countries) and those whose interests are supposed to be protected (workers and communities in poorer countries) (Koenig-Archibugi 2004: 256–257). Moreover, as Brühl in particular has pointed out, the rules of the market can undermine the autonomy of governance arrangements and may limit the range of feasible policies.

These suggestions indicate that, from a normative point of view, governance has to be embedded into institutions, to adopt Wolf's terminology. From an empirical point of view, as has already been mentioned, governance without government in the international arena is not unaffected by

existing institutions of international organizations or regimes and these institutions have an impact on how governance can be democratized. Yet, once again, the prospects of democratization by institutional reform should be analysed carefully, as in the case of the EU. Of course it is inconceivable, from the examples given, to reduce the inequalities of representation in international bodies through a system of 'one man, one vote'. Neither is the analogy with the rules for the democratization of national political systems, where the majoritarian model of democracy tends to be the norm, relevant here. Compliance with decisions taken through such a mode requires identification with a global community that does not exist (Keohane 2002: 339).

It should also be considered that the introduction of decision rules based on the principle of formal equality and majority can cause *de facto* inequality. The study by Rob Jenkins (Chapter 13) on the WTO is instructive in that respect, as it deals with an international organization in which the 'one state, one vote' principle applies. Nevertheless, no decisions are taken that would be contrary to the interests of the big industrial countries. Decisions are worked out in informal negotiations dominated by the states with large market shares, so that procedural fairness is circumvented and transparency reduced (Woods 1999: 46 and 52; Woods 2002: 31). In the WTO's Dispute Settlement System (DSS), Jenkins identifies legitimacy problems stemming from two types of failure: those caused by 'capture' and those caused by 'bias'. Capture is when corruption of one form or another has undermined the impartiality of decision-making within an accountability institution. Bias is when an accountability institution (a) has no remit for considering in its deliberations the effects of fundamental power inequalities, or (b) presents substantial access barriers to less powerful actors. Several rules governing the operation of the DSS adversely affect the interests of less developed and developing countries, making them unable either to obtain response or to impose sanctions against rich countries that fail to honour their treaty commitments. The only way for a member state to enforce a Panel decision that has found violation by another member state is to withdraw trade access. However, when a developing or a less developed member state has a small domestic market, it has little leverage to enforce compliance on the part of its richer trading partners.

To summarize: in contrast to the nation state, international governance networks develop without being integrated into the framework of democratic institutions. Only actors representing national governments can derive some source of legitimacy from the democratic nation state (where it exists), and their policy is at best weakly controlled by parliaments and citizens. The participation of private actors and NGOs reduces deficits in participation, but without effectively overcoming asymmetries. Moreover, these actors are not bound to democratic rules. Without these rules, they can contribute to the effectiveness of international governance, but only

imperfectly to accountability or to an unbiased intermediation of interests. International regimes, institutions such as international organizations, and the rules of competition in the market can be exploited by powerful actors and usually provide no basis for democratizing governance. More can be expected from improving the legitimacy of actors participating in governance arrangements – by increasing and formalizing both their internal and their external accountability – and the establishment of a regulative framework for democratic governance without government. Positive effects can also be expected from emerging parliamentary networks aiming to check the activities of international organizations such as the World Bank or the WTO (Slaughter 2004: 173), even if they have no official role and are not institutionalized.

Prospects for future research

Despite an ongoing debate about the democratic deficits of governance and the potentials for improving its democratic legitimacy, there is still need for further research. This volume should demonstrate that exchange among researchers focusing on different levels of governance is promising in that respect, as it helps to clarify concepts and to introduce new perspectives. By drawing conclusions from the foregoing essays we would like to emphasize three aspects:

1 The concept of a circular relationship between representatives and represented (input, output, and feedback via accountability) provides an adequate framework to define democratic legitimacy in governance research. This relationship is in general a necessary condition for the production of legitimate collectively binding decisions. Across levels of politics the length of the chain of delegation may vary, but policy-takers should be able to identify this chain and agree with its components. Decisions should be binding only to those who feel they have – in one way or another – authorized decision-makers to take them. Therefore the concept used in this volume can be applied in particular for analysing governance in a comparative view. This concept is both convincing from a normative point of view and provides a useful analytical tool for research on governance at all levels. Even if it needs further differentiation beyond what was proposed in this volume, it enables criteria to be derived for evaluating and coming to terms with democratic legitimacy.

2 As governance means policy-making between actors representing different public and non-public interests, their authorization, their contribution to legitimate policy-making and their accountability are crucial issues, in particular when it comes to the participation of private actors, of actors representing ‘civil society’, and of experts. The inclusion of such actors does not imply *per se* more democratic

legitimacy of governance. Experts, for example, do not enjoy democratic authorization but should draw some form of bottom-up authorization due to their scientific credentials. Legitimacy also depends on the pluralism of interest representation, and on the internal organization of non-public actors (the way in which the representatives are linked to the represented). It also depends on the specific issues that are at stake, for instance whether more technical issues are dealt with and appropriate expertise is required, or whether the decisions to be made concern the allocation of resources or values among identifiable groups in society.

3 Of particular importance for further research in governance and democracy are the institutional contexts. By this is meant both the institutional framework that defines the rules of governance, as well as the institutional bodies which are supplemented, but not made irrelevant, by governance. As 'neo-' or 'actor-centred' institutionalism convincingly demonstrates, actors' behaviour is constrained by institutions ('bounded rationality', or 'logic of appropriateness'), and this applies of course to actors' behaviour within governance networks too. Therefore, the way in which networks are embedded in formal (and for our case democratic) institutions does matter. The impact of different institutional frameworks can be very clearly revealed when governance is compared under different conditions. The comparison across levels is particularly instructive in this respect. At the national and sub-national level, we can learn how the linkage between institutions of democratic government and governance varies across countries or policy sectors and which consequences different types of linkages have for the intermediation of interests, for the accountability of decision-makers and for the effectiveness of policy-making. In the EU, this linkage is much looser and a much more complex and evolving relation can be observed between the institutionalization of a democratic polity and the evolution of territorial and function-specific governance arrangements. At the international level, we notice a combination of (very) indirect authorization of rulers with 'horizontal' interorganizational control by collective actors (NGOs), albeit not institutionalized and contingent on the distribution of power resources between them. Unlike governance networks at the national or sub-national level, international governance networks do not operate in the shadow of democracy, but in the shadow of the market and of international regimes and organizations, and we can study the impact of this – weaker and not democratic – institutional framework.

In order to make governance more democratic, we need a common ground for evaluating the meaning of democracy. Moreover, analysis and policies should not only focus on institutions, but also on actors and their interactions in practice. Concerning the institutional framework, it is not

only the existence of democratic institutions but also the kind of linkage between these institutions and governance that is crucial. Governance arrangements without linkages to democratic institutions (uncoupling) have their flaws, but the same applies to networks or committees tightly coupled to institutional rules of hierarchical structures of the state, to competitive party politics, or to unrestricted pluralism. Usually, a kind of loose coupling between democratic institutions and networks would be an adequate solution (Benz 1998).

Of course, further comparative research is necessary to confirm this hypothesis, and to define more precisely how loose coupling can be established in practical politics, what effects it has, and how such forms of coupling can be stabilized. However, we can envisage a decisional pattern characterized by a functional separation of power between policy formulation in networks, and veto power dedicated to institutions which are authorized and accountable to citizens. Formally authorized institutions should first have a constituent function by setting the procedural rules for fair participation and for accountability in governance. The same institutions should have the final say on outputs, by being an effective locus of final decisions (and this requires resources in terms of information, time, professionalism, organization) on proposals formulated by governance networks, which have for their part the advantage of pooling expertise and of facilitating acceptance by 'stakeholders'.[6] In national, regional as well as in international governance, citizens (by referendum), national parliaments, or elected governments should fulfil the constituent and veto functions, even though delegation to governments would play a stronger role at the supra- and international level. Actors in networks should then have to convince in communicative processes the legitimized veto players about their policy proposals, while veto players would be forced to effectively supervise participation and policy-making in governance. Such a pattern of decision-making can serve as a guideline to be approximated at each level, in order to increase the chances for improving the democratic legitimacy of governance.

Notes

1 While there were 176 international NGOs at the beginning of the twentieth century, by 1996 this figure had increased to 38,243 (Held and McGrew 2002: 7).
2 Of the 738 NGOs accredited to the Ministerial Conference of the WTO in Seattle, 87 per cent were based in industrialized countries (Woods 2002: 36).
3 For an attempt to discuss the introduction of direct democratic elements in EU policy-making which takes into account the federalist and consociational structure of the EU polity, see Papadopoulos (2005).
4 Whereas there were 37 intergovernmental organizations at the beginning of the twentieth century, by 1996 the number had increased to 1,830 – not to speak of treaties and multilateral regimes that also define governance rules, as well as regional organizations, be they political (EU) or only economic (such as NAFTA or MERCOSUR) (Held and McGrew 2002: 7).

5 One example, perhaps extreme but nevertheless instructive, is the IMF. Here, voting shares 'are in proportion to an outdated and imperfectly measured economic weight of a country', while 'for more than a century, in other democratic processes, wealth has not been a qualification for voting' (Stiglitz 2003: 120). As a result in the IMF 'the US and the EU member states, which between them account for approximately a tenth of the world population, together control more than half of the votes in the Fund's executive board. Moreover special majority requirements on certain policy matters increase further the influence of the big contributors' (Koenig-Archibugi 2002: 54). And 'at the lowest extreme, meanwhile, twenty-three states of francophone Africa together hold just over 1 percent of the vote' (Scholte 2002: 291).

6 We leave aside here the issue of the implementation of decisions, which can again be delegated to policy networks, but also requires oversight by formally authorized bodies. Other forms of loose coupling can be found in the linkages between 'governance councils', administrative agencies, parliaments, and the judiciary in the framework of 'democratic experimentalism' (Dorf and Sabel 1998; see also Eberlein and Kerwer 2004: 132–133 for an application to the 'open coordination method' in the EU).

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