



TRANSNATIONAL STANDARDS IN THE DOMESTIC LEGAL ORDER: AUTHORITY AND LEGITIMACY

Workshop

Friday 24 October 2014

De Bazel (Vijzelstraat 32, 1017 HL, Amsterdam)

THEME

The workshop explores the evolving interactions between transnational standards and the domestic legal order from the perspectives of **authority** and **legitimacy**. The theme is rephrased into three guiding questions:

1. How do domestic actors adopt standards developed by transnational standard-setting bodies? More specifically, which domestic actors, through what processes, and on what argumentative bases?
2. How can we theoretically understand the authority of transnational standards at the domestic level?
3. Is the domestic permeation of transnational standards normatively problematic, and if so, in what sense?

BACKGROUND

The decline of sovereign states in global governance was accompanied by the expansion of transnational standard-setting bodies, which are *not* part of treaty-based institutions. The International Organization for Standardization (ISO) develops industrial standards; the Basel Committee on Banking Supervision (BCBS) provides capital requirements; the International Accounting Standards Board (IASB) formulates accounting standards; the Forest Stewardship Council (FSC) establishes principles and criteria for forest products; and the International Commission on Radiological Protection (ICRP) recommends radiological protection standards. The standard-setting in these bodies is led not only by governmental regulators, but also by industry representatives and scientific experts.

These bodies' transnational standards permeate national standards, domestic statutes, administrative instruments, and judicial decisions. The **interactions between transnational standards and the domestic legal order** have significantly evolved, and reduced regulatory fragmentation across states without the rigidity of concluding any formal international treaties. Transnational standard-setting bodies actively promote, if not oblige, the domestic permeation of their standards in order to achieve regulatory convergence across states. National legislatures, ministries, judges, industries, and the general public may invoke transnational standards in statutes, administrative instruments, judicial decisions, and wider legal practices.

The evolving interactions between transnational standards and the domestic legal order give rise to the fundamental questions about **authority** and **legitimacy**. In this workshop, authority broadly concerns an entity's claims and others' deference to them. Legitimacy concerns a broad normative perspective to evaluate the authority of transnational standard-setting bodies and their standards.

Authority appears to be a multi-faceted notion when it is cast against transnational standards. On the one hand, the authority of standard-setting bodies seems to be strongly supported by the expertise of transnational bodies, the industry and scientific "consensus" they formulate at the transnational level, and pressure for regulatory harmonization across states. On the other hand, the authority of standard-setting bodies and their standards appears to be contextual, and constituted by domestic politics and legal contexts. The concept of authority has been traditionally associated with a sovereign state and its binding domestic laws and regulations.

The concept has also been employed in relation to international organizations, such as the UN, the World Bank, and the WHO, which are established by sovereign states. Yet many questions remain as to whether or how we can employ the notion of authority for transnational standards. What constitutes authority? How is the expertise of transnational standard-setting bodies relevant to their authority? How does the authority of transnational standards vary according to the domestic legal order in which the standards are applied? What conditions lead to the varied domestic amenability to transnational standards?

The authority of transnational standards further gives rise to a multi-faceted question of **legitimacy**. Despite the fact that transnational standards have an impact on domestic legal practices, transnational standard-setting processes and domestic legal processes appear to invite only restricted input from domestic constituencies. At the transnational level, standard-setting processes may not allow any formal governmental representation, as contrasted with the conclusion of treaties and the decision-making processes in international organizations. At the domestic level, transnational standards are not subject to parliamentary approval required for the conclusion of formal treaties. The executive organs may defer to transnational standards and avoid domestic deliberation. The technicality of industry or scientific standards makes it difficult for the wider public to review the governmental reliance on transnational standards. Overall, there is a strong indication that transnational standards may escape domestic scrutiny at multiple levels.

The limited domestic input may lead us to critically assess whether the domestic permeation of transnational standards normatively problematic, and if so, in what sense. On what basis have transnational standards, and standard-setting bodies, been challenged at the domestic level? Could the expansion of transnational standards undermine domestic democracy? What role do domestic courts play in reviewing and contesting the governmental use of transnational standards? Does national contestation have any feedback on the development of transnational standards?

Extensive studies have already been produced on the role of transnational standard-setting bodies. Much less recognized are **the interactions of transnational standards with the domestic legal order**. Given that the regulatory significance of transnational standards often depends on domestic acceptance, it is important to examine the queries of how the authority of transnational standards is constituted at the domestic level, and whether the authority is legitimate.

PROGRAMME

FRIDAY 24 OCTOBER 2014

- 09:00-09:30 Registration / Coffee and tea
- 09:30-09:45 Introduction from the organizers
Machiko Kanetake, University of Amsterdam

1. Scientific expertise, authority, and a *demos*

- Chair & discussant: Bas Schotel, University of Amsterdam
- 09:45-10:30 Scientific Expertise and Transnational Standards: Authority, Legitimacy, Validity
Jaye Ellis, McGill University
- 10:30-11:00 Claiming Authority on the Basis of Scientific Expertise
Vesco Paskalev, University of Hull
- 11:00-11:30 Break

2. Transnational standards in domestic deliberative processes

- Chair & discussant: Ronald Janse, University of Amsterdam
- 11:30-12:15 Transnational Forestry Standards as a Site of Jurispersuasion: The Transformation of the Canadian “Duty to Consult” Indigenous Peoples
Natalie Oman, University of Ontario
- 12:15-13:00 Epistocracy as Deliberative Diplomacy? The Authority and Legitimacy of the ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities in the Domestic Legal Orders
Ka Lok Yip, Graduate Institute of International & Development Studies
- 13:00-13:45 Lunch

3. Transnational standards in legislative and administrative practices

Chair & discussant: Catherine Brölmann, University of Amsterdam

13:45-14:30 Non-Binding Instruments and the Role of Legislatures in Democratic States
Cecily Rose, Leiden University

14:30-14:45 Break

4. Transnational standards in domestic courts

Chair & discussant: Geoffrey Gordon, VU University Amsterdam

14:45-15:30 Transnational Commercial Law Applied by National Judges: The Cases of Argentina, Brazil and Mexico
Cristián Gimenez Corte, Office of the Legal Affairs, UN

15:30-16:15 Transnational Science-Based Standards on Radiation: The Japanese Experience of Domestic Acceptance and Resistance
Machiko Kanetake, University of Amsterdam

16:15-16:30 Break

5. Concluding keynote address

16:30-17:30 Nico Krisch, Institut Barcelona d'Estudis Internacionals (IBEI)

17:30-17:45 Conclusion from the organizers
André Nollkaemper, University of Amsterdam

18:00 Drink (Café de Jaren, Nieuwe Doelenstraat 20 - 22)

SPEAKERS & CHAIRS

Catherine Brölmann is Associate Professor of law at the Amsterdam Center for International Law. In 2012 Brölmann was a visiting professor at the Institute of Advanced Studies of the University of Bologna, and a visiting scholar at the Humboldt Universität Berlin. She is also a member of the Advisory Committee for Public International Law of the Netherlands Government, a member of the Board of Directors of WaterLex in Geneva and an editor on the board of the *International Community Law Review* (Brill). Forthcoming work includes a Research Handbook on the Theory and Practice of International Lawmaking (ed with Y Radi), Elgar Publishers, 2015.

Cristián Giménez Corte is a national from Argentina, has worked as a trial lawyer and counsel in Argentina, taught Private International Law and General Theory of Law at the *Universidad Nacional del Litoral* and *Universidad Nacional de Rosario*, Argentina; and served in the legal offices of the United Nations Office at Vienna, and in the United Nations Headquarters, New York

Jaye Ellis is Associate Professor in the Faculty of Law and School of Environment, McGill University. She teaches public international law, international environmental law, and environmental epistemology and ethics. Current research projects focus on transnational law, constitutionalisation of international and transnational law, intersections between law and science, and rule of law in transnational and international spheres. She chairs the Coordinating Committee of the International Environmental Law Interest Group, European Society of International Law. Recent publications include “Liability for International Environmental Harm” in *Oxford Bibliographies – International Law* (October 2013); “Constitutionalisation of Nongovernmental Certification Programmes” (2013) 20(2) *Indiana Journal of Global Legal Studies* 1035-1059 (Symposium: Transnational Societal Constitutionalism. Guest editors: Gunther Teubner and Anna Beckers); “Shades of Grey: Soft Law and the Validity of Public International Law”, (2012) 25 (2) *Leiden Journal of International Law* 313-34; and “General Principles and Comparative Law” *European Journal of International Law* (2011) 22(4) 949-971.

Geoff Gordon is an assistant professor at the Vrije Universiteit Amsterdam and a director of the LLM program Law & Politics of International Security. He holds a PhD from the Vrije Universiteit and a JD from Columbia University. His teaching and research involve interdisciplinary and normative study of international and transnational law as carriers of ideas and possibilities for political community. Forthcoming work includes the monograph *Innate cosmopolitanism: The immanent collective in international law*.

Ronald Janse joined the University of Amsterdam Law School in September 2012. He was assistant professor (since 1998) and associate professor (since 2005) at the Law School of Utrecht University from 1998 to 2012. He was seconded part-time to the Hague Institute for the Internationalisation of Law from 2007 to early 2013, where he built and led the rule of law program and was senior justice sector advisor. He co-founded and is editor of the *Hague Journal on the Rule of Law* (Cambridge University Press). Recent publications include 'Entering the forbidden zone; the World Bank, the political prohibition clause, and criminal justice reform', in: *International Organizations Law Review*, 2013, 10 (1), pp. 81-116 and 'The turn to legal pluralism in rule of law promotion', in: *Erasmus Law Review*, 2013, (3/4), pp. 181-190. Forthcoming work includes '(Why) was the World Bank supposed to be an apolitical

organization? An interpretation of the original meaning of article 4 (10) of the Articles of Agreement of the IBRD, 1941-1948' and 'How deep is your love? The UNGA resolutions on the rule of law at the national and international levels, 2006-post-2015'.

Machiko Kanetake is a Postdoctoral Researcher and Lecturer at the Amsterdam Center for International Law. Machiko has also been appointed as a 2014-2015 Visiting Fellow at Harvard Law School's Human Rights Program. Machiko specialises in the interactions between national and international law, United Nations law and international organisations law. Her forthcoming books include: *The UN Security Council and Domestic Actors: Distance in International Law* (Routledge) and Machiko Kanetake and André Nollkaemper (eds.), *The Rule of Law at the National and International Levels: Contestations and Deference* (Oxford: Hart Publishing, 2015).

Nico Krisch is an ICREA Research Professor at the Institut Barcelona d'Estudis Internacionals (IBEI). Previously, he was a professor of international law at the Hertie School of Governance in Berlin, a senior lecturer at the Law Department of the London School of Economics, and a research fellow at Oxford's Merton College, at New York University School of Law and at the Max Planck Institute for International Law in Heidelberg. He has also been a visiting professor at Harvard Law School. He holds a PhD in law from the University of Heidelberg. His 2010 book, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP), was awarded the Certificate of Merit of the American Society of International Law. His most recent work focuses on the changing foundations of international law in a context in which its traditional pillars, especially the consent of states, are increasingly weakened. Nico Krisch is also a member of the Council of the International Society of Public Law.

André Nollkaemper is Professor of Public International Law at the Faculty of Law of the University of Amsterdam. He is also external Legal Advisor to the Minister of Foreign Affairs of the Netherlands, Member of the Permanent Court of Arbitration, President of the European Society of International Law and Member of the Royal Netherlands Academy of Arts and Sciences.

Natalie Oman (D.Jur. Osgoode Hall Law School; Ph.D. McGill University; M.A. McGill University) is Assistant Professor of Legal Studies at the University of Ontario. She is the author of the forthcoming book, *The Responsibility to Protect in International Law*, which examines the impact of the responsibility to protect principle on global governance. Dr. Oman has published articles in the areas of international law and human rights, philosophy of law, Indigenous rights, and ethics. Her recent projects include a monograph on the philosophical and legal foundations of the modern Indigenous treaty process in Canada.

Dr. Oman's current interests focus on reinterpreting the traditional sources of international law to ensure more effective participation in global governance by non-state entities and states of the global South. Dr. Oman is spending winter of 2015 as a visiting fellow with the "Sovereigns as Trustees of Humanity" GlobalTrust research project at Tel Aviv University to develop this theoretical dimension of a global rule of law.

Vesco Paskalev is lecturer in EU law at University of Hull, UK. Prior to this, he has been a researcher at EUDO Citizenship Observatory at the Robert Schuman Centre for Advanced Studies in Florence, Italy. He has obtained his first law degree from Sofia University and then an LLM in Comparative Constitutional Law from Central European University, Budapest. He has been visiting researcher at the Centre for Socio-Legal Studies, Oxford University (2003/4) and at London School of Economics (2010) and obtained his PhD from European University

Institute, Florence in 2013. His thesis studies the role of reason and scientific argumentation in risk regulation in the European Union and was awarded the European Law Faculties Association (ELFA) prize for a thesis on European Law.

Cecily Rose is an Assistant Professor at the Grotius Centre for International Legal Studies at Leiden University. Cecily previously worked as an Associate Legal Officer at the International Court of Justice in The Hague, and at the Special Court for Sierra Leone in Freetown, Sierra Leone. She also worked as an associate in the International Regulation and Compliance group of Steptoe & Johnson, LLP, in Washington, D.C. Cecily holds an LL.M. and Ph.D. from the University of Cambridge, a J.D. from Columbia Law School, and a B.A. (English) from Yale University.

Bas Schotel (Ph.D. law Vrije Universiteit Brussel; LL.M. Columbia University New York on a Fulbright grant) is assistant professor legal theory at the University of Amsterdam. Prior to becoming a fulltime academic in 2009, Bas worked as an attorney at law (Stibbe Simont Monahan & Duhot), strategy consultant (Booz Allen & Hamilton) and manager (Netherlands Authority for the Financial Markets). He published on the legal and ethical foundations of European migration policy. His current research looks into the mechanics of legal protection. He recently proposed a way of understanding law, i.e. “juridical law”, which can account for law’s protective function to be distinguished from other practices, e.g. science, governance, regulation, politics (see “Legislation, Empirical Research and Juridical law”, *The Theory and Practice of Legislation* (2013), vol. 1, no. 3, 501-532).

Ka Lok Yip holds a Bachelor of Laws (LLB) from King’s College London with first class honours and a Bachelor of Civil Law (BCL) from the University of Oxford with distinction. She is currently a PhD candidate at the Graduate Institute of International and Development Studies in international law, with a minor in international relations and political science. She is a solicitor admitted to practice in England and Wales and Hong Kong. Prior to undertaking her PhD research, she was a project finance lawyer at Linklaters LLP. While undertaking her PhD research, she has interned for the Senior Legal Policy Advisor to the United Nations High Commissioner for Human Rights and at the Office of the Legal Counsel at the United Nations.

PRACTICAL INFORMATION

Venue

[De Bazel](#) – Koningszaal (the King's Chamber)
Vijzelstraat 32
1017 HL Amsterdam

Arrival at Schiphol Airport

From Schiphol airport, trains leave every few minutes to Amsterdam Central Station – consult the [railway journey planner](#). The journey takes about 20 minutes. Tickets are sold in the airport's central hall, either at the counter of the NS (Dutch Railways) or at vending machines - see the final page for instructions on the use of the machines.

Please note that e-tickets can only be bought by holders of a Dutch bank account.

Public transport within Amsterdam

Disposable chipcards valid for 1 hour (EUR 2.80), 24 hours (EUR 7.50) or 48 hours (EUR 12.00) after check-in are sold

- at (few) GVB vending machines in Central Station (look for the blue GVB logo)
- at the GVB Tickets & Info office in front of Central Station or
- at ticket machines in the metro stations.

The 1-hour card can also be bought on board of trams and busses (not in the Metro).

Directions to the venue

From Central Station, take tram 16 or 24 (on your left when you leave central station) and stop at Keizersgracht (Vijzelstraat). Turn back a few steps to the entrance of the building. The tram ride takes approx. 10 minutes.

Contact

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Buying single-use chipcards for use in trains

Single-use chipcards for immediate use between Schiphol and Amsterdam can be used to or from any train station in Amsterdam – but not on Amsterdam trams, busses or the metro. Tickets can be bought at the NS Tickets & Service counter in Schiphol airport or Amsterdam Central station or from an NS ticket machine (with a blue sign and white NS logo on top).



Ticket machine with NS logo

How to buy a single-use chipcard at the ticket machine?

- Change the language to English from the bottom left corner of the screen
- Then press “Buy single ticket or OV-chipcard”
- Select “Single ticket”
- Press “Single ticket” and follow the instructions on the screen
- You can choose to pay with a VISA, MasterCard, Maestro and V Pay card or cash (coins only)
- Pick up your single-use chipcard from the box below the left bottom corner of the screen
- On your ticket you can see whether you need to check-in and check-out
- Check in at the check-in points
- Do not forget to check out when you get off the train



Check-in point