'Says who?' liquid authority and interpretive control in transnational regulatory regimes

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The article explores the notion of liquid authority by examining the ways in which the central organizations in three transnational regulatory-governance regimes do or do not attempt to establish interpretive control over the norms that they issue: the International Accounting Standards Board, the International Organisation of Standardisation, and the Forest Stewardship Council. The need to 'solidify' their authority ranges across all of their regulatory functions; this article focusses on just one of those functions: interpretation. In focussing on how these regulators seek to exercise interpretive control, the article seeks to show how liquid authority can crystallize. Further, the article develops the notion of liquid authority by arguing that the establishment, exercise, and continual maintenance of authority in transnational regulatory regimes, which are characterized by liquid authority as they lack a formal, legal base, are fundamentally linked to the issue of legitimacy. It argues in turn that legitimacy, and thus authority, is endogenously produced, a fact which exogenous, normative assessments of legitimacy can overlook. The article argues that regulators play an active role in their own legitimation – in creating, exercising, and maintaining their legitimacy, and in turn their authority, and that their success or otherwise in doing so is linked in part to their functional effectiveness, but that transnational regulators face a legitimacy paradox: they depend in part on such effectiveness for their legitimacy. The article supplements the 'anatomical' analysis of liquid authority with an understanding of the physiology of legitimation.

Keywords: transnational regulation; authority; legitimacy
rule interpretation; transnational standard setters

The dynamics of transnational regulatory regimes are only just now starting to be understood, though concerns about their accountability and legitimacy have been expressed for some time. Puzzlement is also expressed

as to how such regimes are sustained, and from where they derive their authority: why do certain actors treat their norms as independent reasons for action in the absence of any legal requirement to do so? As Nico Krisch argues in the introduction to this special issue, traditional, 'solid' notions of authority that attach to the nation state or formally constituted international organizations are challenged when confronted with the realities of transnational, non-state regulatory systems, requiring a more 'liquid' conceptualization of authority and understanding of its sources and modes of operation (Krisch 2017).

This article explores the anatomy of liquid authority in transnational regimes by focussing on a core function in any regulatory regime, namely, how interpretive control over the norms (rules, standards, principles) that are written is established and exercised. It further analyses how that particular exercise of liquid authority is linked to the need for the regime to constantly re-establish and renew its authority in the absence of a formal legal framework, and how that authority is fundamentally linked to strategies of legitimation (the gaining, developing, enhancing, or repairing of legitimacy).

In the concept of liquid authority, the core conception of authority, as seminally articulated by Raz, as non-coercive, content-independent reasons for action, is retained (Raz 1979). The differentiation of liquid authority from formal legal authority lies in the different sources of authority, which are not grounded in law but in social relations. In finding the source of authority in social relations and a voluntary acceptance of deference, the analysis of liquid authority draws attention to the necessarily fluid, dynamic, and ultimately contested bases on which authority is founded when detached from the stabilizing structures of the state, hence the metaphor of liquidity to describe it. As is well recognized in the literature, authority in the transnational context is informal, based on social and political acceptance not formal legal rules; it is ideational, based on ideas of what is the appropriate thing to do (though often articulated in technocratic terms and based on epistemic claims to expert knowledge); it is necessarily exercised through non-legal or 'soft' law norms and 'enforced' through social or community practices. Whilst authority can be based on a cognitive acceptance that a particular actor or group of actors are those who are most appropriate to govern, very often it is contested (Krisch 2017, for review).

Authority which is not founded in law cannot be exercised through legal rules, unsurprisingly, and so attention in the literature then frequently turns to the relative functional efficacy of 'hard' and 'soft' law, particularly with respect to their enforceability, or to whether non-legal regulatory regimes are 'legitimate' in accordance with an exogenously produced normative criteria.

This article also focusses on the functioning of 'soft' law regimes, but on a relatively under-explored aspect of those regimes, namely, whether and how they seek to maintain interpretive control over the norms they issue. As such, it is focussed on a particular form of the exercise of 'liquid' authority in the performance of one particular regulatory function, that of interpretation.

Moreover, the article develops the notion of liquid authority by arguing that the establishment, exercise, and continual maintenance of authority in transnational regulatory regimes are fundamentally linked to the issue of legitimacy. It argues that legitimacy, and thus authority, is endogenously produced, a fact which exogenous, normative assessments of legitimacy can overlook. Furthermore, it argues that regulators play an active role in their own legitimation – in creating, exercising, and maintaining their legitimacy, and in turn their authority, and that their success or otherwise in doing so is linked in part to their functional effectiveness. As such, the article argues that the anatomy of liquid authority can usefully be supplemented by an understanding of the physiology of legitimation.

The article is divided into three sections. The first section sets out the context, explaining the links between authority and legitimacy in the transnational context. It then focusses on the exercise of a particular regulatory function, establishing a common interpretation of the rules that the regime, or a particular actor within it, issues, which is paralleled in state-based regulatory regimes. In a sense, what those who operate on the basis of liquid authority are trying to do in establishing interpretive control, is to 'solidify' their authority – reduce the endless fluidity by making concrete the interpretation and application of their rules. Exercising interpretive control is thus an instantiation of the exercise of authority in one important functional area of operation. Moreover, it is an exercise of authority that state-based regulators take for granted as their authority to exercise interpretive control is set out in their legal mandates, or it is vested in courts. For transnational regulators, there may be a set of documents constituting them as organisations but their authority is not necessarily based in law. So transnational regulators have to work to build their authority, and hence their ability to exercise interpretive control. Two things are of interest here: the extent to which transnational regulators do in fact seek to exercise interpretive control over the written norms (principles, rules, standards, and so forth) they issue, and how they build their authority to enable them to do so. Drawing on literature on legitimacy in the transnational regulatory context and on theories of rules and interpretation, the analysis of the three regimes considered here suggests that the extent to which a rule-issuer may seek to exercise interpretive control over its own rules in the absence of a formal legal basis for authority is based on two

inter-related functional needs: to maintain the operation of the regulatory regime, and to build and maintain its legitimacy and thus its authority with respect to those legitimacy communities it views as most important to the regime's survival.

As Nico Krisch makes clear, liquid authority is a relative notion, and there is a spectrum of solidity-liquidity. Some transnational regimes may exhibit more liquidity than others, as institutional structures stabilize and authority crystallizes and solidifies. The second section explores this dynamic by examining the ways in which actors in three transnational regulatory regimes do or do not attempt to exercise interpretive authority and control over the norms that they issue, and how these practices change over time: the International Accounting Standards Board (IASB), the International Organisation of Standardisation (ISO), and the Forest Stewardship Council (FSC).

The third section analyses some of the possible reasons for the manner in which each regime has sought to perform the particular function of maintaining interpretive control through the exercise of interpretive authority, and what this contributes to an understanding of the nature of authority and legitimacy in transnational regulatory regimes. The article develops the notion of liquid authority by arguing that how 'liquid' authority functions in the transnational context is fundamentally linked to the need, in the absence of state-based legal authority, to constantly create authority through establishing the legitimacy of the actor purporting to exercise that authority. In addition, it argues that functionality, legitimation, and authority are fundamentally intertwined. Finally, it reveals the ultimate vulnerability of actors who rely on direct social acceptance rather than the mediating institutions of state constitutions for their right to govern.

Setting the context

This article adopts a regulatory functionalist approach, focussing on how regulators exercise their functions, and argues that their ability and capacity to function is rooted in practice in legitimation. Legitimation is the process by which regulatory actors gain the authority to perform their functions. Regulatory functions comprise four main tasks: agenda setting and goal determination, the creation of (written or unwritten) norms or rules, monitoring, and changing behaviour to align with the norm. In state-based, non-stated based, and hybrid regimes these tasks are often dispersed amongst a number of different actors in a decentred or polycentric set of relationships which may be managed or orchestrated in various ways

(Black 2001; Black 2002; Abbott and Snidal 2010). Moreover, within any issue area there may be several regulatory regimes, systems, or networks, both state and non-state, public and private, which can interact in different ways. Alternatively there may be multiple regulators in a particular domain, again both state and non-state, who may compete, cooperate, or simply ignore one another (Eberlein *et al*. 2014). In such situations, regulators have to compete for 'regulatory share' using a range of strategies, including legitimation (Black 2009).

This article focusses on one core element of any regulatory regime: written norms. In all types of regulatory systems, written norms (rules, standards, principles, and so forth) are a core regulatory technology. Written norms are expressions of an understanding or set of understandings of the social/physical environment which can also be constitutive of that environment and which can be used to alter or otherwise affect it, but whose very formulation, in linguistic structure, legal status, or substantive content, can affect the performance of those norms in different ways (Schauer 1991; Black 1997; Braithwaite 2002).

Polycentric regimes and rule complexes

Polycentric regulatory governance regimes or systems, both state, non-state, and hybrid, are frequently characterized by dense rule-complexes. In the transnational context, rules may emanate principally from a focal (but not necessarily legal) source and cascade through the regulatory regime via national and regional legal systems, in which public and private norms may intermingle and interact (Black 2002, Bartley 2011). As with legal rules, transnational rules may be accompanied by quasi-legal or non-legal guidance from state and non-state regulators, and a host of local interpretations and codes such as those of certification bodies or the compliance manuals of individual firms (themselves often written by third parties such as management consultants and legal advisors).

At each point of transposition, as rules emanating from one source are transposed into other norms and implemented and enforced in numerous fora, the rule may be changed, altered in its text and/or meaning, and indeed the number of points of transposition may have been so great or so dispersed in time and/or space that those transposing, using and interpreting it may not be aware of its original source. The HACCP (hazard and critical control point) principles of the Codex Alimentarius, for example, are transposed into EU directives, member state laws, regulatory guidance and food retailers' compliance manuals, and implemented and enforced through the medium of market-based mechanism such as supply chain

contracts and/or state-based institutions such as regulatory agencies and courts.

Rules may also be networked through cross-referencing, which can create (or express) inter-dependencies and can be potentially reinforcing through conditionality: 'if you comply with X rule from Y organisation, then you comply with our requirements or get Z benefit within our part of the regime'. As rules cascade through a regulatory regime, as rule complexes or 'ensembles' are built (Perez 2011), the life of rules becomes one of multiple conversations, interpretations, transpositions, and applications. Regulatory-governance regimes of all types are thus characterized by multiple regulatory conversations (Black 1997, 1998) occurring simultaneously and over time and across multiple locations and between all involved in interpreting and applying norms, including third-party advisors. Through this dense network of conversations such regimes are constituted and continually reproduced.

Those who write the rules can attempt to control the interpretations that those rules are given in their application, and thus set the boundaries of such conversations, through rule design. Variations in rule design comes from the differential use of the dimensions of rules, notably their linguistic structure (if they use precise or general terms, if they are simple or complex), their character (if they are permissive or mandatory in nature), and their clarity (the extent to which they use language which is commonly understood in the rule community (Diver 1983, Baldwin 1991, Black 1997). However, as we know, a rule writer can never completely control the interpretation and application of rules due to the inherent imprecision of language, the inevitable lack of foresight of rule-writers, and the multiple sites in which rules are interpreted and applied.

Rule-based systems therefore often have individuals or organizations whose role it is to interpret the rules in cases of doubt or contestation in order to stabilize interpretations, either generally or in particular instances. It should be noted, however, that interpretation is distinct from dispute resolution and indeed from enforcement – the question being asked here is not: 'who can impose (market, social, legal) sanctions on another?' or 'how should we resolve this dispute?' It is instead, 'how, if at all, are interpretations stabilized through the exercise of interpretive control, and/or interpretive authority within the regulatory regime?' In a state-based context the answer is usually provided in the legal mandate of the regulator and the wider constitutional settlement: a regulatory agency may be given the power to enforce its own norms, or this may be given to another state-based body such as a court or tribunal, or there is some other legally mandated arrangement which may or may not involve non-public bodies. In the context of a transnational regulatory regime where there is no 'solid' basis

for the exercise of interpretive control, the fundamental question is 'on the basis of what authority does this organization exercise this function?'. In the case of the function of interpretation, when exercised in the context of liquid authority, the challenge for the regulator is to answer the question, 'says who?' The exercise of interpretive authority and control in trans national regulatory regimes is a little explored aspect of their operations. However, exploring how regulators build the authority to exercise interpretive control in a context when authority is founded in social relations which are not formalized in a legal, constitutional settlement, provides an excellent window on the question of how regulatory regimes founded on 'liquid' authority seek to stabilize their institutional positions, and illustrates in turn how the exercise of their authority, including their interpretive authority, is dependent on legitimation.

Authority and legitimacy in transnational polycentric regimes

As Nico Krisch explains in the introduction, authority in the transnational context still infers that the utterances of an organization or group provide independent reasons for action for a group of other actors. However, very broadly, once the authority of an actor is not based in law, but in some other reason for social acceptance, that authority becomes increasingly 'liquid' and potentially contested. As such, the sources of liquid authority resonate strongly with sociological understandings of legitimacy. Legitimacy in a regulatory and governance context means that the actor has social credibility and acceptability such that it is perceived as having a right to govern both by those it seeks to govern and those on behalf it purports to govern (Weber 1948, 213; Suchman 1995; Scott 2001; Beetham 1991). In sociological versions of institutional theory, there are three sets of reasons for social acceptance, or legitimacy. Legitimacy may be pragmatically based: the person or social group perceives that the organization will pursue their interests directly or indirectly. It can be morally or normatively based: the person or social group perceives the goals and/or procedures of the organization to be normatively appropriate. Finally, legitimacy can be cognitively based: the organization is accepted as necessary or inevitable (Zucker 1987; Suchman 1995). Sociological writings on transnational regulation have described regimes as 'legitimate' where legitimacy is based on self-interested acceptance, at least in the early phases of a transnational regime (Bernstein and Cashore 2007). However, in most writings in law, political science, and political theory, legitimacy has narrower con notations, and is associated with a normative acceptance (e.g. Hurd 1999), perhaps even a cognitive acceptance, of the right to govern. It is this sense in which it is used here.

One of the implications of being accepted as having a right to govern is that it is accepted that actor is afforded authority to provide content-independent reasons for action. Legitimacy and authority are thus fundamentally inter-linked. Moreover, drawing on sociological institutionalism, authority and legitimacy are relational, situational, and endogenously produced. As such, the legitimacy of any one actor can differ significantly across time and space, and between actors, systems, and contexts (Zucker 1987; Suchman 1995). If we are trying to establish the legitimacy of an actor or system in practice, the relevant criteria are not those which an external observer (including a commentating academic) would see to be normatively valid or valuable. Rather, the relevant criteria are those being used by those who are interacting with the actor in order for them to accept its right to govern, and thereby its authority. Legitimacy lies in the eye of the beholder, in the values, interests and expectations and cognitive frames of the different 'legitimacy com munities' who are perceiving or assessing the regulatory actor, system, or regime. Regulators, of any type, are thus likely to be subject to multiple legitimacy claims (demands) which differ between themselves quite substantially, and which indeed may be irreconcileable (Black 2008).

How does this excursus into relational legitimacy relate to liquid authority? Quite simply because authority is rooted in legitimacy. Legiti-macy in a regulatory and governance context means an acceptance of having the right to govern both by those the regulator seeks to govern and those on whose behalf it purports to govern, and thus to exercise authority. This applies equally to state-based and non-state-based regulatory regimes. However, as the literature on transnational regulation, and the notion of liquid authority, makes clear, transnational regulators face a particular challenge for they rely on direct social acceptance for their legitimacy rather than on the mediating institutions of state-based constitutional settlements (Black 2009). Each institution therefore needs to create its own legitimacy, constantly, in a never ending process of legitimation, and moreover, they need to do so in order to function. As legitimacy means acceptance of the right to govern, it is fundamentally rooted in social relations. Where these social relations have not been formalized into a legally binding constitu-tional settlement (or where there is such a settlement but it is not regarded as legitimate), then the relational base for legitimacy, and in turn authority, needs constantly to be maintained and renewed. The difficulty of the task is amplified in a context where the criteria for acceptance (legitimacy demands) are competing and changing, and/or the differential power rela-tions of the various groups making those demands are constantly shifting. Moreover, transnational regulators are often caught in a legitimacy paradox – they need legitimacy (in part) to function effectively and need to function effectively (in part) to gain legitimacy. Understanding the

fundamental dependence of liquid authority on a constantly shifting base of social acceptance (legitimacy), focusses attention on how regulatory actors will actively seek to gain legitimacy and thereby authority in a context where this is not conferred on them by a (accepted) constitutional settlement. In both state and non-state contexts, regulators, like states or indeed any organization, can manage their legitimacy, and thus authority, in a host of ways (Meyer and Rowan 1977; Suchman 1995; Cashore 2002; Bernstein and Cashore 2007; Black 2008, 2009). Ole Jacob Sending's paper in this symposium calls for attention to these processes of creation as regards the recognition that underlies authority. Understanding the dynamics of legitimation is critical to understanding the dynamics, or physiology, and not just the anatomy of authority in any context. However, the need to understand the dynamics of legitimation has a particular functional urgency in the context of liquid authority as legitimacy cannot be assumed, and without legitimacy the regulatory regime cannot function. Moreover, as noted above, regulators, particularly transnational regulators are often competing for 'regulatory share', which in turn depends on who accepts their right to govern. But whilst regulatory actors can compete for legitimacy, whether they are accepted, and by whom, depends on whether their legitimacy communities will endow them with the legitimacy and authority they seek (Black 2009).

Examining the exercise of interpretive authority in three transnational regulatory regimes

So, starting with the notion of liquid authority, we have now discussed how authority and legitimacy are inextricably linked, and how legitimacy is rooted in social relations. This is so in any context. However, in a 'liquid' context, characterized by the absence of an accepted constitutional settlement, authority and legitimacy can be contested and the social relations on which they are based can be constantly shifting. Now we need to loop back to the issue of interpretation and the exercise of interpretive control, and explore whether and how, in a 'liquid' context, an organization (or individual) seeks to exercise interpretive control within a regulatory regime.

  As noted above, in any regulatory regime there is a *prima facie* functional reason to have a clearly identified component which exercises ultimate interpretive control, which is to ensure the coherent and consistent operation of the regime. In order for that control to be recognized as authoritative, that is, for people to consider the utterances of that component of the regime as independent reasons for action, it has to be legitimate. In a 'liquid' context, that authority and legitimacy has to be constantly built and renewed. So there is a continually shifting, iterative dynamic between

the functional performance of one element of a regulatory regime (interpretation) and the attempts by the regime to establish and stabilize its authority and legitimacy in a changing context. So in this endlessly changing context, do regulatory regimes (and particular components within them) seek to exercise interpretive control, and if so, how? This is a deliberately 'sharp' question to pose in what is an apparently endlessly fluid set of regulatory processes where, as Nico Krisch argues in the introduction, Westphalian state-based notions of authority or legitimacy seem out of place. It is also an empirical question. In exploring that question the article adopts an inductive approach, analyzing three contrasting case studies in order to explore the relationship of liquid authority and legitimacy in the performance of the same function, interpretation.

These regulatory regimes are deliberately selected as they exhibit differences in two pertinent characteristics: their institutional position within the trans national context in which they operate and the types of rules that they issue (on case study selection see Gerring 2007; Seawright and Gerring 2008). Their institutional position is defined here in terms of the degree to which they are 'monopoly' rule providers or are competing with other regulators over the same domain or issue area (see Büthe and Mattli 2011), and the degree to which their authority and legitimacy is contested. The types of rules they use are relevant to the regulatory function under consideration, that of interpretation. As discussed above, rules are an important technology of regulation, and rule type can be a deliberate policy choice, not least because it can affect the mode of their interpretation and operation (Black 1998).

IASB

The IASB is the standard setting board of the International Financial Reporting Standards (IFRS) Foundation. It is a non-state body, founded in 1973 by a group of auditors and professional bodies (Camfferman and Zeff 2007).[1] Initially, its focus was on developing common ideas and objectives for financial reporting standards (Camfferman and Zeff 2007; Bhimani 2008). By the end of the 1990s it was being urged by professional bodies in some of the countries with significant financial centres, such as the United Kingdom, and by the global committee of securities regulators to become more proactive in harmonizing standards around the world (Büthe and

[1] The initial members were Australia, Canada, France, Germany, Japan, Mexico, the Netherlands, United Kingdom, Ireland, and the United States in 1975 Belgium, India, Israel, New Zealand, Pakistan, and Zimbabwe joined as associate members and in 1981, the World Bank, the United Nations, the Organization for Economic Co-operation and Development (OECD), amongst others, formed its consultative group. IOSCO joined the group in 1987; and the EU Commission and the US FASB joined as observers in 1990.

Mattli 2011). The IASB responded by producing the IFRSs and in a conscious legitimation move, deliberately restructured its organization and governance on the lines of the US Financial Accounting Standards Board (Bhimani 2008). Since 2001, almost 120 countries have required or permitted the use of its rules. The main outlier has been the United States, though work has been underway for some time to gain substantive convergence between the US GAAP and the IFRS standards.

Despite its global significance, the IASB is still an associational body which lacks any political or state foundations. It is dependent on governments to recognize its rules as legally valid, and thus the IASB's authority to be the global accounting regulator. As such it has to continually assert and maintain its legitimacy and authority. To those ends, not only has it emphasized its technical expertise, but it has relied increasingly on procedural transparency and on its governance structure to build its legitimacy and thus authority with those who rely on the regime and recognize its authority, but are not direct participants in it.

The key objective of the IASB is to develop common accounting rules with the ultimate goal of ensuring that the accounts of any listed company in any jurisdiction are comparable. The IASB therefore has a clear institutional interest in exercising interpretive control to protect the integrity of its system of accounting standards: the goal of comparability will not be attained if its standards are being interpreted and applied very differently around the world.

As noted above, rule design is one strategy that rule-writers can use to try to control interpretation. The IFRS are principle-based standards, which by their nature allow for greater interpretive choice by those implementing them. The key method that the IASB uses to exercise interpretive authority and control is therefore not through rule type, but through a largely reactive process of giving rulings on the correct interpretations of its standards. The interpretations process is highly structured and deliberately restricted – the IASB is concerned that over-use of its interpretations process would undermine the principles-based nature of its regulatory system and result in it developing into a rules-based regulator 'through the back door' (Alali and Cao 2010). In 2002, it created an interpretations committee, now known as the IFRS Interpretations Committee (IFRS IC) to interpret the application of its accounting and reporting standards and provide 'timely guidance' on financial reporting issues. In providing interpretations, the Committee is to have regard to the need to develop international convergence.[2] It does not

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[2] The procedures are set out at http://www.ifrs.org/How-we-develop-Interpretations/Pages/How-do-we-maintain-IFRS.aspx. Note that procedures relating to all regulators analyzed here are accurate as in December 2015.

respond to requests for interpretations on individual cases; instead it will only respond to requests which meet certain criteria. The Committee's composition and procedures have become increasingly transparent as the IASB itself has successively changed its constitution and become more open in its procedures as part of a wider strategy of legitimation.

Nonetheless, the IASB is still vulnerable despite, and indeed because of, its growing dominance. As the influence of the IASB has grown, as its authority has stabilized, so have there been increasing legitimacy demands on it to become more transparent and accountable. Moreover, in the wake of the financial crisis, both the countries using its standards and the global committees for banking supervision have sought to exercise greater political control over the decisions of the IASB (G20 2008) and the IASB has constantly had to fight for its institutional position by emphasizing its functional, epistemic, and performance legitimacy claims as an authoritative, independent, technocratic body (Perry and Nölke 2006; Street 2006; Bhimani 2008; Nobes 2008; Sacho and Oberholster 2008; Bengtsson 2011; Burland and Colasse 2011).

The IASB thus illustrates the constant need that transnational regulators have to reaffirm and reassert their authority and legitimacy in the face of contestation. The IASB has a strong functional imperative to maintain interpretive control, which is to create comparability between corporate financial statements and thus the integrity of the accounting regime as a whole. In turn, its legitimacy and authority are dependent on its ability to maintain that interpretive control. In making its legitimacy claim, the IASB relies on its position as the author and issuer of the standards it is interpreting, the highly structured and consultative procedures for giving interpretations, the expertise and impartiality of the decision makers and on the consensus basis of its decision making, relying on constitutional, internally democratic, and epistemic legitimacy claims to create and maintain its legitimacy and thus its authority in this liquid context (see Black 2008). Furthermore, the ways in which it exercises the function of interpretive control and asserts its authority are both dependent on and contribute to its wider need for and strategies of legitimation, and thus the creation, maintenance, and enhancement of its institutional position in a dynamic context in which it occupies a dominant position, but in which its role is nonetheless contested.

ISO

ISO has a longer history than the IASB and its position as the dominant, global technical standard setter is largely uncontested. Although the dominance of its standards in individual countries varies (Büthe and Mattli 2011), ISO standards are on the whole widely adopted and referenced by

international organizations, regional bodies such as the EU and national governments in their own legislation and other legal provisions (ISO 2007). From the size of paper to the size of freight containers, it sets technical standards for thousands of products. In its 9000 and 14000 series, it also sets standards for quality management processes and practices. The vast majority of its standards are certifiable, including the ISO 9000 and 14000 series, although it has also recently developed two further sets of standards which are not certifiable: on risk management (ISO 31000, in 2009) and social responsibility (ISO 26000, in 2010).

However, for the most part, ISO does not seek to exert interpretive control directly over any of its standards or become involved in the certification process in any way, nor does it become involved in disputes between firms and certifiers as to whether or not certification should have been given. Instead, ISO uses the dual structure of accreditation and certification to ensure 'correct' implementation of its standards, operating through a 'house like Jack built' system of conformity assessment: firms are certified by an accredited certifier; the certifier is accredited by an accreditor, and accreditors are accredited by ISO (ISO undated). ISO focusses its attention on accreditation of the accreditors, which is ensured through a system of ISO inspections, sampling, supplier certification, and through peer assessment (for which there is also a standard: ISO/IEC 17040:2005.)

Rule type plays a key role in this strategy. The significant majority of ISO's standards are product standards which are highly specific and require little interpretation in their application. ISO can therefore have reasonable confidence that multiple interpretations will not arise in the certification process so there is only a low risk that variation in certification practices will undermine the integrity of the ISO system. For this reason, the ISO 31000 and ISO 26000 series are deliberately not certifiable as the standards are more open, and thus susceptible to a significant variation in implementation. By rendering them non-certifiable, ISO can tolerate variation in interpretation as it will not impact on the integrity of the certification system more widely.

There are two notable exceptions where ISO issues interpretations: the ISO 9000 series, which apply to management systems generally and the ISO 17000 series, which apply to ISO accreditation bodies. The main reason for ISO's selective exercise of interpretive authority lies in the potential for variation in application of these standards to undermine trust in the certification process, thus damaging both the functionality and the legitimacy of the ISO system as a whole.

The ISO 9000 standards are written in quite general terms, which means that there is scope for interpretation and thus variation. This can pose problems of inconsistency, and in 2004 ISO agreed to provide

interpretations for the ISO 9001:2000 standard in response to members' demands in order to prevent 'ambiguous and vague' interpretations being given by certification bodies, and to develop a database of interpretations (ISO 2004). Member bodies or liaison organizations can send requests for interpretation to the ISO Technical Committee 176, which is the 'owner' of the standards within ISO (ISO 2008). Interpretations then fed into a revised version of the ISO 9001:2000 standard in 2008, which drew on members' feedback and extensive user surveys (ISO 2008). The standard was further revised in 2015.

The same reason, to maintain the integrity and thus legitimacy of the ISO system as a whole, motivates ISO's exercise of interpretive control and authority over the ISO 17000 standards. The ISO system relies critically on a widespread acceptance not only of the standards but of the worldwide certification processes, and is undermined if the widespread view is that certifiers in country X, for example, are corrupt, incompetent, or simply feeble. There is an underlying 'stick' at work too: ISO standards are approved under the WTO's Technical Barriers to Trade (TBT) Agreement as not creating unnecessary barriers to trade. ISO, and as ISO stresses, ISO members, therefore have a strong interest in ensuring that inadequate or corrupt conformity assessment procedures do not undermine this position (ISO undated; Cau and Prakash 2011). Accreditors are important actors in this assurance process for ISO relies on them to act as guardians of the certification process, and to ensure mutual trust and recognition between certification bodies around the world.

The critical part of ISO's institutional infrastructure for interpretation of the ISO 17000 accreditation standards and maintenance of the accreditation system is the ISO Conformity Assessment Committee (CASCO). CASCO's role is to develop policy and publish standards related to conformity assessment, and it aims to promote the international harmonization of conformity assessment activities. Through consensus-driven procedures (all decisions have to be approved by two-thirds of members) it provides non-binding interpretations (which since 2013 have been termed 'clarifications') of the ISO 17000 standards for assessing the conformity of products, processes, or management systems to ISO standards, thereby facilitating consistent interpretations and practices, and through that the mutual recognition of conformity assessment results. The consensus procedures are intended to ensure that the interpretation is *de facto* accepted and adopted by members of the ISO community, but the clarification does not become binding until formally adopted and incorporated into a standard.[3]

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[3] http://www.iso.org/iso/home/about/conformity-assessment/conformity-assessment_resources. htm (accessed 4 January 2016).

Thus for the most part, ISO is highly strategic in its use of its authority to exercise interpretive control, targeting it at what it considers to be the most critical point of intervention in the ISO regime in order to preserve its integrity, namely the accreditation process. Its role in interpreting ISO 9000 standards has a slightly different rationale, and is based instead on a response to a demand from members arising in part from the more open-ended structure of the ISO 9000 standards. However, in both instances the exercise of interpretive control is intimately linked to the need to preserve the integrity and therefore legitimacy and authority of the system as a whole.

FSC

Established in 1993, the FSC aims to ensure that forests are managed in a manner which is environmentally appropriate, socially beneficial, and economically viable (FSC 2012). Although probably the leading non-state transnational standard setters for sustainable forestry, the FSC competes with other transnational standard setters in setting sustainable forest standards (Marx and Cuypers 2010, FSC 2011)[4] and with national and regional governmental provisions on forestry and logging (Haufler, 2003; Gulbrandsen 2004). However, in an example of regulatory hybridization, its standards have been incorporated into the regulation of national forests in some countries, for example the United Kingdom.

The FSC system comprises four elements: regulative rules setting out principles of sustainable forestry management, a system of certification of compliance, chain of custody certification, and labelling. Certification is performed by accredited certification bodies, who are accredited by the FSC's own central accreditation body, Accreditation Services International (ASI). Certified products are allowed to use the trademarked FSC label. The FSC relies principally on market forces to generate uptake of its certification scheme, and most forests that are covered by FSC certification are either in developed countries and/or are those with export markets to those countries (Cashore 2002; Cashore *et al.* 2004; Pattberg 2005; Marx and Cuypers 2010).

The multiple sites in which its standards are being implemented necessarily poses challenges for the FSC in ensuring consistency in their interpretation and application. Consistency of interpretation is linked fundamentally to the integrity of the FSC label, and in turn the legitimacy

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[4] Its principal competitor is PEFC (Programme for Endorsement of Forest Certification), established in 1993 as Forest Europe and adopted by the UN Food and Agricultural Committee. It claims to certify over two-thirds of the world's forests (http://www.pefc.co.uk), whereas the FSC certifies about 20% worldwide; however the overall figures mask considerable differences in distribution: the FSC certifies over 40% of certified forests in the United States and Europe, but only 6% in South America; 5% in Africa, 3% in Asia and 1.5% in Oceania: FSC (2011).

and thus survival of the regime. This is particularly relevant for, as noted, the FSC is operating in a context in which it is competing for 'regulatory share' with a number of other national and transnational organizations. One of its key claims to legitimacy is that it is a rigorous standard which is superior to its competitors, and one with which compliance is ensured through a robust certification process (FSC undated; Kooster 2010).

The FSC operates a complex federal structure and has an elaborate system of rules constituting and regulating its own governance which has developed and intensified over time, partly in response to internal demands and partly to external pressures. The standards making process is carefully designed to demonstrate compliance with the applicable requirements of the ISO Code of Good Practice for Standardisation (ISO 1994), and the WTO TBT Agreement (WTO 1994).

All FSC standards, including its core Principles and Criteria for Forest Stewardship are developed by the Policy and Standards Unit in the FSC International Centre and approved by the FSC Board. Central to the FSC governance model is multi-stakeholder decision making (Auld and Bull 2003), and Principles and Criteria are closely fought over internally. Guidance documents are developed in response to questions submitted to FSC by other FSC Units and/or by certification bodies or FSC National Initiatives. Interpretations on FSC standards are given centrally by the Policy and Standards Unit, which may decide to develop a guidance document or an Advice Note in response to enquiries from FSC members, certification bodies and/or FSC national initiatives.

The FSC has also adopted a deliberate policy of rule design as a regulatory technique to manage rule interpretations given the challenges of scale and variety it faces, and its need to manage the competing demands of consistency and the need for application and interpretation to respond to local contexts. It has a four-tier rule structure comprising principles, which define the overall goal; criteria, which set out 'how to comply' or the means of judging whether or not there has been compliance; indicators, which are measurable states which are used to assess whether the principle or criterion is being complied with, and verifiers, which set out the means to ensure that the indicator is being realized. The composite is referred to as an FSC standard. The structure of the standards closely imitates the engineering-type standards of ISO in order to try to leave as little interpretive discretion as possible. Evaluative words such as 'appropriate' are banned in an organizational exercise in self-censorship. The aim is to produce standards which can be audited in a consistent manner, providing replicable results across all locations (FSC 2009).

However, the FSC allows local adaptation through the adoption of different indicators and verifiers at the regional, national, or sub-national level.

It is has also spent several years developing generic indicators to accompany its Principles and Criteria to give greater guidance to those at the local level (FSC 2010).[5] Stakeholder engagement is also required in the elaboration of local indicators. However, as noted above, no standard is ever completely unambiguous. Rules and standards always and everywhere have to be translated: interpreted and applied to particular states of affairs. Differences are bound to arise, therefore, in the way that different certification bodies (or different individuals within them) interpret and apply those standards (Counsell and Loraas 2002; Eden 2008; Maletz and Tysiachniouk 2009).

As the FSC system has grown, its processes for ensuring control over the interpretation of the Principles and Criteria and the development of local indicators have increased in density over time. They have also become centralized within the organizational structure. In the FSC's early days, ASI had responsibility to monitor local adaptations. In the early days of the FSC, its certification process was strongly criticized as ineffective in a high-profile study by an influential NGO (Counsell and Loraas 2002). Although the criticism was countered by the FSC (FSC 2003) it recognized that the rapid uptake of FSC principles had outstripped the development of an infrastructure to support the certification process, either through training or through the consistent provision of interpretations and guidance (FSC 2006). It thus began to increase its attempts to control the certification process, including a requirement on ASI to gain ISO accreditation (ASI 2008). In 2008 the interpretative function was centralized, and the FSC Policy and Standards Unit was placed in the centre of the local standards development process. There is now a clear hierarchical framework, at least formally, under which local standard bodies develop local indicators in accordance FSC required procedures, which include a requirement for piloting those indicators, 'forest testing', and those standards are then approved by the FSC Policy and Standards Unit.[6] Nonetheless, the FSC remains critically dependent on the regulatory capacity of organizations at the national level to draft standards, to establish and then consult with the local groups as demanded by the FSC process requirements, and indeed to stimulate local demand for FSC certification at all.

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[5] The process ran from 2006–2009, during which time the FSC reviewed over 10,000 indicators, including those used in regional/local Forest Stewardship Standards and ultimately identified 345 'best bet' generic indicators to be used, though note that these are being revised in line with revisions to the Principles and Criteria.

[6] FSC, Structure and Content of National Forest Stewardship Standards FSC-STD-60-002 (FSC 2009); FSC, Process Requirements for the Development and Maintenance of Forest Stewardship Standards (FSC 2009).

Despite the very different institutional structure and operational context of the FSC regime, there are a number of parallels with the IASB and ISO in the way in which the FSC seeks to exercise interpretive control. There is a highly structured process for applying for and issuing interpretations, only a limited range of people or organizations can request interpretations (more restricted than the IASB), and interpretations are based strongly in consensus. In exercising its interpretive authority the FSC emphasizes its role as the guardian of the FSC standards and its independent expertise, and thus epistemic authority, in issuing interpretations. Again, interpretive control is seen as critical to maintaining the integrity and thus legitimacy of the regime as a whole, but the FSC faces much greater competition in maintaining or enhancing its regulatory share (by getting organizations to accept its standards) than either ISO or IASB, making it more vulnerable to weaknesses in the certification process. It therefore seeks to manage its competing logics (Baldwin and Black 2008; Auld, Rencken and Cashore 2015) of consistency and control, with a commitment to local empowerment in a federated structure. However there is an inevitable, and potentially irreconcileable tension between local empowerment and the exercise of central control, not only because of their competing logics, but because the exercise of each is critical to the FSC's legitimation, but for different reasons. Local empowerment is central to the FSC's internal legitimation by its members, but the functional problems of scale and variety in the sites of interpretation requires the FSC to exert central control throughout the interpretive chain in order to maintain the integrity, reputation and thus legitimacy and authority of the FSC regime as a whole.

Observations and conclusions: 'liquid' authority, rules, and the exercise of interpretive control

This article has focussed on a little explored aspect of transnational regulatory governance regimes, which is how they exercise the function of interpretive control over the norms they issue. Interpretation is a core element of the use of rules as a regulatory technology, and thus a critical element to the functioning of a regulatory regime. However, it has argued that in order to exercise this critical function of interpretive control in a context in which its authority is 'liquid', a regulatory regime has to build its legitimacy. In so doing, it is seeking to 'solidify' or crystallize its authority in a particular way at a particular time, but in contexts in which authority may be more or less fluid, legitimacy more or less contested, and thus the task of crystallization correspondingly easier or more complex.

As discussed above, the notion of liquid authority retains the core concept of authority as a content-independent reason for action, but the

'anatomical' analysis offered by Krisch (2017) focusses attention on structures: how authority is constituted, how it is exercised, and the degree to which it is contested in transnational contexts. In focussing on a particular function which is common to state-based and transnational regulators, the interpretation of rules, the article draws attention to the different operational dynamics of transnational regulatory regimes, as opposed to those operating within the context of an accepted constitutional settlement and legal order (note that there can be non-state-based regimes which are regarded by some as more legitimate than the state-based regimes, but that is not the focus of this paper). Regulatory regimes which operate on the basis of 'liquid' authority constantly need to earn their authority through establishing their legitimacy, rather than being able to rely on the mediating institutions of state constitutions to give them their right to govern. The three case studies illustrate how, in different ways and to different degrees, transnational regulators are vulnerable to shifts in their acceptance from often changing constellations of actors on whom they are relying for their legitimacy, their authority, and, in turn, their ability to function, and how this affects their exercise of interpretive control.

Each of the regimes considered here seek to exercise differing degrees of interpretive control over their standards, and have very different techniques and institutional arrangements for doing so. These arrangements have evolved over time in response to both the functional need to ensure consistency of interpretations in order to attain the overall goals of the regime, such as comparability and inter-operability in the case of ISO and IASB, and/or to ensure the integrity of the system as a whole, as in the case of the certification and labelling regimes of ISO and FSC. Their strategies for exercising interpretive control are similar in some regards, but differ in others. In their similarities, each has clearly structured sets of procedures for providing interpretations, and interpretations are based on consensus. Procedures for requesting interpretations are also closely prescribed. Each seeks to legitimate its authority as interpreter through its position as author of the standards, its epistemic authority, that is, its independent expertise, and the consensus-based nature of its interpretation process. ISO is distinct from IASB and FSC in that, for the most part, ISO is a standard setter that does not seek to exert interpretive authority directly over the vast majority of its standards when they are implemented by firms or others. Scale alone would make this almost impossible, given the high number of ISO standards in existence. Instead, it is highly strategic in its use of its interpretive authority, targeting it at what it considers to be the most critical point of intervention in the ISO regime in order to preserve its integrity, namely the accreditation process. The FSC also has issues of scale to deal with, but it has the additional challenge of facing much greater competition from other

regulators in maintaining or enhancing its regulatory share than either ISO or IASB, making it more vulnerable to weaknesses in the certification process. In addition, it has to manage the competing logics of interpretive consistency and control with a commitment to local empowerment in a federated structure, which it does in part through a system of differentiated rule types.

It is always dangerous to generalize from case studies, but some preliminary observations can be made. First, there is a complex inter-dependency between legitimacy of the regime as a whole and its functional effectiveness. The function of providing interpretations of rules that apply across the regime is at once an exercise of authority which relies on legitimacy, and is used to constitute that legitimacy by preserving the integrity of the regime through establishing consistency of meaning and application of the rules. Moreover, the manner in which interpretive control is exercised is used to bolster legitimacy claims rooted in constitutionality, internally participative democracy, expertise and technocratic functionality. In turn, that legitimacy grounds the authority of the regime in the absence of the state. However, liquidity is a differentiated state: some regimes are operating in contexts in which they are more accepted than others, associated in part to the length of time in which they have been in existence and the extent to which their position is contested. ISO is the longest established of the three and is widely accepted as a global technical standard setter, enjoying a quasi-monopoly position in many areas in which it operates as well as the acceptance of many countries' governments. The IASB also has widespread acceptance and now faces only one major competitor – the United States – but it had to fight for its institutional position as it grew and in the face of challenges in the immediate wake of the financial crisis. The FSC, in contrast, operates in a context in which it has to compete constantly for regulatory share and is in a continual process of renewing and maintaining its legitimacy and authority in the face of competing legitimacy demands. Thus the authority of each varies in the degree of its 'liquidity' in practice. This in turn seems to have some relation to whether and how they seek to exercise interpretive control over their norms. It is possible to hypothesize, at least, that there is a relationship between the two.

Second, the analysis illustrates the dynamics of a small but significant part of the dense network of regulatory conversations through which such regimes are continually reproduced. It shows that the functional need for a centralized exercise of interpretive control is met by all regimes, but is put under constant pressure as the regimes develop over time. The regimes considered here have responded to the pressures of changes in scale, scope, and operational contexts by increasing the density of their institutional structures, introducing central organizational bodies and increasingly

formalized processes for providing interpretations. It is notable that rule type is not consistently used as a device to promote consistency of inter- pretations, and thus to limit the need for the exercise of interpretive control. Moreover, issuing interpretations is a highly strategic function in each case, performed by a central component of the regime acting in accordance with quite formalized procedures which restrict access to those seeking inter- pretations, and which can become increasingly dense as the functional demands for interpretive consistency increase. As we have seen with ISO, ultimately the demands of scale are such that rule makers strategically target the exercise of the interpretive function to points which they consider most critical to the effective operation of the regime as a whole.

Third, as the regimes or systems grow in scale and scope, and as their institutional position becomes more dominant, greater demands on their legitimacy are made by more legitimacy communities in proportion to the regime's growing influence and claims to authority, to which they have to respond. However, the maintenance of legitimacy and authority is a parti- cular challenge where legitimacy demands compete. For example, the 'logic' of the regime (and on which it may also base its legitimacy) may be one which encourages widespread ownership of the rules through a federated structure, such as the FSC, and in which central control over interpretations may be resisted internally by members. However, these internal legitima- tion demands contrast with those being made by external legitimacy com- munities, who see consistency as central to the system's functional integrity and thus legitimacy and authority. This contestation renders the exercise of interpretive control more complex in a context where authority is relatively liquid, as the functional need for interpretive control can be in tension with the need to respect the role of others to issue their own, localized inter- pretations. These competing demands between central control and local autonomy are common in any federated structure, but for those operating in a 'liquid' context, there is no recognized arbiter to resolve them in the form of a constitutional agreement enforced by a court. Instead they have to be resolved by the regime itself, and how it does so will in turn affect the legitimacy it receives from different legitimacy communities, and ultimately its ability to function.

So the notion of 'liquidity' draws attention to the fluidity of the legitimacy context in which transnational regulators can operate, and in turn their authority. However, as this analysis suggests, some contexts can be more fluid than others. Regulators operating in such contexts can adopt various strategies to 'solidify' their position by gaining legitimacy from different legitimacy communities. Legitimacy in turn affects their ability to exercise authority, and their ability to function. The article has focussed only on one regulatory function, that of interpretation. The analysis suggests that the

exercise of interpretive control is intimately linked to the regulator's efforts to create, develop, maintain, and even repair its legitimacy in a context where that legitimacy and associated authority is endogenous, relational, and contested: it is 'liquid'. In so doing, it illustrates how regulatory actors can develop their institutional structures and processes and deploy different legitimation strategies as they seek to maintain their institutional position over time. It highlights the fluid and dynamic nature of regulatory regimes, the developing 'crystallization' of institutional structures and processes as a regime seeks to meet the challenges of its expanding scale and scope, and the internal and external functional and legitimation pressures it faces. Such an exploration also enables us to identify points of concentration and fragmentation within regimes based in liquid authority, and to see where and how authority may be 'solidified'. It thus enables us to see where and how legitimacy and authority may crystallize, but to recognize that whilst hardened they may remain brittle and vulnerable to challenge.

Acknowledgements

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