



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

09:00-09:20 Registration / Coffee and tea

09:20-09:30 Introduction from the organizers
Machiko Kanetake, University of Amsterdam

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

Chair & discussant: Bas Schotel, University of Amsterdam

09:30-10:50 Scientific Expertise and Transnational Standards: Authority, Legitimacy, Validity,
Jaye Ellis, McGill University

Claiming Authority on the Basis of Scientific Expertise
Vesco Paskalev, University of Hull

10:50-11:10 Break

2. Transnational standards in domestic deliberative processes

Chair & discussant: Ronald Janse, University of Amsterdam

11:10-12:30 Transnational Forestry Standards as a Site of Jurispersuasion: The Transformation of the Canadian “Duty to Consult” Indigenous Peoples
Natalie Oman, University of Ontario

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

12:30-13:20 Lunch

3. Transnational standards in legislative and administrative practices

Chair & discussant: Catherine Brölmann, University of Amsterdam

13:20-14:40 Non-Binding Instruments and the Role of Legislatures in Democratic States
Cecily Rose, Leiden University

Will TTIP create a New Transnational Administrative Architecture? The Politics of Regulatory Cooperation and the Divergence in Administrative Cultures
Fernanda G Nicola, American University, Washington College of Law

14:40-15:00 Break

4. Transnational standards in domestic courts

Chair & discussant: Geoffrey Gordon, VU University Amsterdam

15:00-16:20 Transnational Commercial Law Applied by National Judges: The Cases of Argentina, Brazil and Mexico
Cristián Gimenez Corte, Office of the Legal Affairs, UN

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

16:20-16:30 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 (outside the venue)