WHEN IS NON-STATE GLOBAL GOVERNANCE REALLY GOVERNANCE?

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Meaningful non-state global governance exists but is less prevalent and harder to achieve than the broader scholarship on global governance suggests. The argument proceeds in three parts. First, I put forward and defend the claim that meaningful global governance must be authoritative and rest on political legitimacy. Second, borrowing from Adler and Bernstein (2005), I introduce a framework of “good” governance to provide a foundation for assessing the empirical and normative quality of governance. Third, I apply that framework to attempts by non-state actors and institutions to socially and environmentally regulate the global marketplace. It shows that only a small subset of such efforts—usually in the form of producer certification and product labeling systems that include third-party auditing—qualify as meaningful governance.

I. INTRODUCTION

Looking back, the concept of global governance seems an unlikely candidate to have survived into the twenty-first century. The more recent attention given to non-state global governance might seem even more curious. The terms are hopelessly vague; those who see legitimate political order stemming only from sovereignty and constitutions bristle against them,¹ and what may look like governance beyond the state is much more often regional or sectoral than global. Moreover, despite protestations from its defenders that governance is not the same as government, its purposely close lexical connection to government invokes constant comparisons to the state and state authority, to which it is found wanting.

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In addition to its wooliness, critics point to its normative shallowness, stemming from its liberal origins. Thus, although some cosmopolitan thinkers might embrace the global governance concept as the terrain in which they see a demand and the possibility for global democracy and transnational citizenship, critics worry the resultant preoccupation with procedural legitimacy has sidelined more fundamental and longstanding substantive concerns of global justice, such as distributive justice, autonomy, or equality. Such demands challenge the legitimacy of a global order that entrenches unequal distributional consequences and power relations. Critical scholarship thus attacks the new focus on global governance for obfuscating a history of domination by Western states and powerful economic classes, acting at times through international institutions to further legitimize their interests. It thereby challenges an underlying assumption of much global governance literature that procedural and substantive legitimacy will automatically be mutually reinforcing.

Despite these lines of attack, the terms global governance and non-state global governance continue to resonate among practitioners involved in international or global issues. Similarly, the academic literature on “global governance” shows little signs of abatement. There is a even a journal by that name, which focuses mainly on the U.N. system but also explores the vast array of institutions, networks, and actors, both public and private, that make up an increasingly dense, complex, and crowded institutional environment beyond the state. There is simply no other encompassing concept on the horizon to replace global governance as a category to capture the full range of norm-promoting, regulatory, administrative, and adjudicative activity that cannot be located in the traditional governance mechanisms of single sovereign states. Even more broadly, the shift to focus on “governance” as a noun—and not simply as a verb referring to processes—in studies of political authority and regulation recognizes what Louis Pauly and Edgar Grande have usefully described as “Complex Sovereignty.” In sum, global governance resonates with our shared experience of complex hierarchies and

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2 See, e.g., Craig N. Murphy, Global Governance: Poorly Done and Poorly Understood, 76 INT’L AFF. 789 passim (2000).
3 GLOBAL GOVERNANCE AND PUBLIC ACCOUNTABILITY passim (David Held & Mathias Koenig-Archibugi eds., 2005).
4 See Murphy, supra note 2, at 789.
5 Id. at 791.
7 GLOBAL GOVERNANCE: A REVIEW OF MULTILATERALISM AND INTERNATIONAL ORGANIZATIONS is published four times a year by Lynne Rienner Publishers.
8 On this distinction, see Matthew J. Hoffmann & Alice D. Ba, Introduction: Coherence and Contestation, in CONTENDING PERSPECTIVES ON GLOBAL GOVERNANCE: COHERENCE, CONTESTATION AND WORLD ORDER 1, 8–10 (Alice D. Ba & Matthew J. Hoffmann eds., 2005).
overlapping authorities in an increasingly globalized era, even if the state and “government” are still alive and well.

This Article, in line with the topic of this Symposium, critically examines the hardest case of global governance—“non-state” global governance—to evaluate whether it lives up to its name in a meaningful way. It argues that it can and does, but in a much more limited number of cases than the broad literature on non-state global governance suggests.

The argument proceeds in three parts. First, I critically examine the concept of global governance to make the claim that meaningful governance must be authoritative and rest on a notion of political legitimacy. Second, borrowing from my work with Emanuel Adler, I introduce a framework to understand “good” governance. It suggests that governance worth its name ought also to have normative content to separate it from simple coercion or domination. Third, I apply this framework to one particular realm of non-state governance: attempts to socially and environmentally regulate the global marketplace. I make the case that only a small subset of such efforts—what have been variously labeled “transnational regulatory systems,” “non-state market driven” (NSMD) governance systems, and “civil regulations”—qualify as non-state global governance. I conclude with some possible objections and limits to my argument.

II. GLOBAL GOVERNANCE—FROM WOOLINESS TO CONCEPTUAL PRECISION

Rosenau and Czempiel’s landmark volume on Governance Without Government: Order and Change in World Politics performed both a huge service and an unfortunate disservice to those trying to understand political authority beyond the state. On the plus side, it provided a vocabulary to speak about the fracturing of political authority, perhaps not wholly new but at least more visible, under conditions of increasing globalization. By focusing on governance rather than government, it obviated the need to invoke metaphors of world government or

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10 See infra Part II.
12 See infra Part III.
13 See infra Parts IV–V.
17 See infra Part VI.
rest analyses of new spaces of authority on a strong version of the decline of sovereignty hypotheses. In sum, it became possible to speak of political authority absent centralized control of well-defined territorial spaces. New (or newly visible) sites of authority, under this lens, could co-exist and possibly interact with sovereign states, whether or not sovereignty was itself undergoing a transformation.

This analytic move, however, came at a cost. It allowed a minimalist understanding of political authority that has led many scholars to see governance nearly everywhere there appeared to be “purposeful order” or attempts to regulate human interaction for the common good. Global governance could be located, then, in or through an enormous range of mechanisms and means to regulate, manage, promote, or control transnational activities: formal international organizations like the United Nations and its various agencies issue specific “international regimes” (a precursor concept to global governance also famously described as “woolly”); hybrid institutions such as private-public partnerships or other institutional configurations of private and public actors; and wholly private- or non-state-led forms that operate relatively autonomously from states. One recent overview of contemporary thinking on global governance includes even looser attempts to create order, such as harmonization of national laws and “global policy issue networks.” Although there is nothing inherently objectionable about grouping together such a broad range of mechanisms, what precisely makes them governance as opposed to coordinated activities across borders can be easily lost given the range of mechanisms and scope of activities included. It begs the question, How far can the concept of global governance bend before its link to any meaningful concept of governance breaks?

To answer this question requires moving beyond definitions to the core features of governance. Rosenau provides a useful baseline. He argues that, stripped of its dependency on centralized state power, governance consists of two elements. First, it is the purposeful steering of actors towards collective or shared

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20 The consensus definition of regimes in the international relations literature is implicit or explicit “principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area.” Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 Int’l Org. 185, 185 (1982). Literature on “private” regimes is also growing. See *Private Authority and International Affairs* (A. Claire Cutler, Virginia Hauser & Tony Porter eds., 1999); *The Emergence of Private Authority in Global Governance* (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002).
22 Benedict, supra note 19, at 6235.
24 See id. at 14.
goals or values. Second, it is authoritative in the sense of consisting of “systems of rule.” I argue that scholarship on global governance too often errs on the side of the former at the expense of the latter. As a result, one could find support in the literature to count virtually any attempt at steering as global governance with little attention to whether it also embodies a meaningful level of political authority. The opposite problem, however, should also be avoided. It would set the bar too high to suggest that political authority must always require a monopoly on authority, universal or general-purpose jurisdiction within a defined territory, or the equivalent of state sovereignty. Thus, global governance worth its name ought to more resemble government than most writings acknowledge, but not be so narrow a category as to dismiss the meaningful political authorities that exist in transnational and global spaces. Fortunately, most definitions of political authority provide room for this middle ground.

Political authority—or in the words of Max Weber, “domination”—is present when there is a good “probability that a command with a given specific content will be obeyed by a given group of persons.” Authority relationships are those in which an actor or institution makes a claim to have a right to govern. In practical terms, then, the term governance should be limited to institutions that perform some kind of regulatory function (creating, implementing, or adjudicating rules or normative standards) or where their decisions create an obligation to obey.

Political authority requires political legitimacy to link power to authority. Following from this understanding, political “legitimacy can be defined as the acceptance and justification of shared rule by a community.” Legitimate political authority—as opposed to an empty claim to authority where the “right” to rule is not recognized—concerns situations in which a community is subject to decisions by an authority that claims to have a right to be obeyed, and actors intersubjectively hold the belief that the claim is justified and appropriate. Authority relationships empower actors and institutions that participate in them and that construct governing institutions through their interactions. They authorize

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25 See id.
26 See id. at 14–15, 18–20. Although Rosenau clearly argues against the requirement of hierarchical forms of authority, he speaks of “systems of rule” and locations of authority as sites of governance. See id. On this reading, some form of authority or “rule” is part of the baseline of “governance,” even if authority is disaggregated. See id. at 18–20.
30 The term “community,” rather than public, avoids a necessary association with the state, but still denotes “publicness” in the sense that its members collectively empower political authority.
particular individuals or institutions to make or interpret rules. Political legitimacy concerns relationships in which commands ought to be obeyed. It reflects the “worthiness of a political order to be recognized” or a “more general support for a regime [or governance institution], which makes subjects willing to substitute the regime’s decisions for their own evaluation of a situation.” This idea of substitution is especially important because it directs attention to the difference between voluntary and authoritative institutions. If actors—be they states, firms, or civil society organizations—evaluate, with each decision or policy of an institution, whether to maintain or withdraw support, governance or political authority in any meaningful sense of the word is absent. Political legitimacy concerns institutionalized authority (whether concentrated or diffused) with power resources to exercise rule, as well as shared norms among the community that recognize it and grant it legitimacy. Such norms provide justifications and a shared understanding of what an acceptable or appropriate governing institution or political order should look like and the bounds of what it can and should do.

Notably, nothing in the above discussion makes a necessary or constitutive relationship between political authority and the state or political authority and a monopoly on legitimate coercive power. Weber was clear that the location of a monopoly on legitimate force (i.e., the right to rule) in the modern state is a historical construction. The insight has two important implications for clearing up misunderstandings about political authority that may arise from the current literature on legitimacy in global governance.

First, legitimacy in global governance should not be understood only in contrast to coercion. Perhaps owing to the conceptual break of recognizing that governance can occur in the absence of hierarchy or coercive forms of state power, global governance literature has emphasized the importance of legitimacy as the main source of compliance in global governance. For example, in Thomas Franck’s seminal work on the “power of legitimacy,” he identifies how rules exert a “pull towards compliance” not because of power or interest, but “because those addressed [normatively] believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.” Ian Hurd similarly contrasts coercive power and legitimate commands (that compel obedience in themselves) as sources of compliance.

Theorists of global governance are understandably drawn to this analytic distinction. Even if legitimacy frequently reflects the interests of powerful actors, it
always means that the leader, rule, or institution in question has authority recognized by the relevant audience independent of brute force. Whereas new sites of authority may sometimes be backed by the coercive powers of leading states, the de-coupling of coercive force and legitimate rule is arguably a striking feature of contemporary global governance. According to Rosenau, “the essence of [new sites of authority] is that they derive their legitimacy from the voluntary and conditional participation of individuals who can revoke their consent at any time.”

However, we move too far from a meaningful definition of political authority if actors can revoke consent at a whim with little sense of obligation. Whereas Rosenau convincingly finds little indication that coercive power is moving beyond the state in any systematic fashion, and thus the importance of legitimacy is elevated, new authorities resting wholly on moral legitimacy are rare and unlikely to create broader order. The problem of politics is that compliance, even when it is the “right” thing to do, is never absolute.

Broader order relies minimally on the possibility of enforcement, although enforcement must be legitimated for governance to be sustainable. To take the analogy of social contract theory, contracts may be rational and entered into voluntarily, but they grant authority to enforce the contract for governance to be achieved. Thus global governance worth its name cannot simply be a realm of voluntary action. What makes current global governance talk something more than idealist musings is the increasing enforceability of rules and acceptance of their broader reach. The distinction between legitimacy and power can also mask power relationships inherent in the exercise of political authority. Uncovering forms and relations of power becomes an important subject of inquiry. For example, power may be indirect in the form of institutional power and law or the empowering of particular actors such as technical experts or private authorities, or it could be direct but diffuse, reflecting the structural power of leading states or classes but without the need for their direct intervention.

Thus, whether from a positive or critical perspective, governance as political authority must be understood to combine legitimacy and power.

The second implication of recognizing the contingent relationship between political authority and the state is that governance need not be monopolistic, territorially based or universal.

Global governance is rarely monopolistic and frequently interacts with other rules, whether international or transnational, in the form of overlapping, nested, or intersecting regimes. It also may interact with domestic rules because many institutions of global governance explicitly link to national laws, regulations, or standards. Nonetheless, it is still possible for non-monopolistic forms of authority

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39 On forms of power in global governance, see POWER IN GLOBAL GOVERNANCE (Michael Barnett & Raymond Duvall eds., 2005).
40 See infra Part V.B.
to be authoritative for those who “sign on” or consent. The test is whether a sense of obligation and recognition of the authority follows that consent or whether it may be easily or arbitrarily withdrawn.

Global governance need not be territorially based because it may apply to actors who may or may not be located in contiguous geographic spaces. For example, it might apply to a transnational marketplace sector or to a profession, such as accountants in the case of the International Accounting Standards Board (IASB) or the forest sector in the case of the Forest Stewardship Council (FSC). This does not mean all global governance is non-territorial. In many cases, national decisions to adopt transnational or international standards or rules of a global institution may in practice mean much global governance is located in multiple territorial spaces, which may even be concentrated geographically. It would also be an unfairly high bar to demand that global governance necessarily have global reach. In this sense, “global” is probably a misnomer. Many examples of governance beyond the state are regional or concentrated in pockets. Nonetheless, as long as within those pockets its political authority is recognized, an institution or mechanism still counts as global (in the sense of transcending the state) governance.

Finally, global governance is never characterized by universal or general-purpose jurisdiction like states, owing to formal anarchy (the absence of world government) in the international system. Still, the scope of governance varies considerably across institutions of global governance. Some are quite narrow and issue specific, while others (the U.N. Security Council, for example) have a broader, albeit still limited, scope.

Owing to its fractured and at times decentralized nature, the problem of political community is perhaps the trickiest element of global governance to pin down: to which community does authority apply, and from which community or communities is it generated? This question cannot be easily answered a priori. An appropriate research strategy, then, is to identify political communities wherever they form, whether in professional or technical networks; the relevant production chains of producers, as well as the consumers, communities, and interested civil society actors in the case of social regulation of the marketplace; or the traditionally demarcated “international society” of diplomats and state officials. Determining what then is required to establish political authority will depend, in part, on what bases legitimacy within those communities rests.41

The foregoing discussion suggests that political authority is possible beyond the state, but it is much rarer and harder to achieve than a casual reading of the global governance suggests.

41 Elsewhere I explore the bases of political legitimacy in different forms of global governance, but that question is beyond the scope of this Article. See Steven Bernstein, Legitimacy in Interstate and Non-state Global Governance, Rev. Int’l Pol. Econ. (forthcoming 2010).
III. RAISING THE BAR: “GOOD” GLOBAL GOVERNANCE

While the discussion above already sets the bar sufficiently high to be considered governance, political authority at the global level does not exist in a vacuum. Just as within state governance, a complete picture of global governance requires attention to not only the power to command, but also normative expectations and justifications for shared rule. It could be argued, then, that global governance worthy of the name must also be “good” governance. In this section, I draw on my previous work with Emanuel Adler, where we identify the conditions or building blocks of “good” global governance. These building blocks will serve as a template by which to evaluate non-state social and environmental global governance and its adequacy or inadequacy given legitimate demands being made upon it in this period of globalization. The building blocks of global governance include both material and ideational conditions that explain and enable the global governance we get, as well as normative requirements for governance, which define whether it is “good” or “moral.”

According to Adler and Bernstein, global governance rests, on one hand, on material capability and knowledge, and, on the other hand, on legitimacy and fairness (Table 1). Governance, in this view, is the sum of collective understandings and discourse about material capabilities, knowledge (normative, ideological, technical, and scientific), legitimacy (the acceptance and justification of the right to rule by relevant communities), and fairness (which in our account may include notions of mutual respect, equal treatment, representation (who gets to participate and how), and responsibility (the obligations to broader society of participants in any governance system), as well as distributive justice.

Plotting these four constitutive elements of “good” governance in a 2x2 table, the results are the requirements of global governance; that is, “what material capabilities or science alone cannot explain, what, by themselves, legitimacy and fairness do not produce, and what in their absence leaves no order of things.” The interaction of these constitutive elements produces a descriptive taxonomy of the four building blocks of global governance: authority, epistemic validity, a conception of good practices, and the institution of rationality or practical reason.

42 Adler & Bernstein, supra note 11, at 305–07.
43 Id. at 300–08.
44 For a defense of why representation and responsibility are included under the rubric of fairness, see id. at 300. We place these values together in an attempt to capture a bundle of concepts associated with the principled demands communities make on those empowered to make and implement decisions on their behalf.
45 Id. at 300–01.
46 This table is a descriptive taxonomy, not an explanation for global governance.
Authority, per the discussion above, is constituted by power, legitimacy, and political community. In the context of “good” governance, legitimacy demands “good” reasons, or justifications, for recognizing an authority. What counts as good reasons under conditions of globalization depends on the historically contingent values, goals, and practices of the relevant society or communities, because legitimacy, at its most basic level, depends on acceptance of rule or rules as appropriate by a community with shared values, norms, and beliefs. Different audiences of state, civil society, or marketplace actors may share different criteria or weightings of “input” (procedural), “output” (performance, efficiency), or more traditional notions of substantive (values of justice and fairness) legitimacy. Under globalization, there is no presumption that international authority emanates solely from states; thus, the argument that different configurations of actors make up the community in which authority operates is important. Legitimacy dynamics under such conditions are not fixed, but vary accordingly.

B. Epistemic Validity

Epistemic validity refers to “legitimate” knowledge—i.e., knowledge that is regarded as valid by a collectivity of subjects. It can mean widely accepted norms, consensual scientific knowledge, ideological beliefs deeply accepted by the collective, and so on. As used here, epistemic validity is rooted in a pragmatist philosophical perspective according to which validity rests on deliberation, judgment, and experience of communities that engage in rational persuasion. A useful way to think about epistemic validity is Habermas’s argument that valid knowledge claims are based on comprehensibility, truthfulness, and rightness, which are arrived at pragmatically by communities of the like-minded. Habermas, however, refers to such validity claims as being part of an “ideal-speech

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47 Id. at 301.
48 See infra Part II.
50 The input/output distinction comes from Fritz W. Scharpf, Economic Integration, Democracy and the Welfare State, 4 J. EUR. PUB. POL’Y 18, 19 (1997), but it tends to ignore other substantive values that may produce legitimacy.
51 Bernstein, supra note 41.
situation” to which democratic societies must aspire if discussion, debate, and social communication in the public sphere are to lead to social progress. Applying this idea to international politics, Thomas Risse points to the requirement of a “mutually accepted external authority to validate empirical or normative assertions” for negotiations or deliberations to approach a situation where rational persuasion can occur, and thus where outcomes will be perceived as legitimate by participants. In global politics, such external sources of authority may include previously negotiated treaties or scientific findings.

Epistemic validity can sometimes play a very direct role as a source of power in global governance. Under globalization, the combination of a lack of formal political processes beyond interstate bargaining and the highly technical nature of problems that demand international governance can lead to authority by default appearing to move to technical experts or private authorities as demands for global governance increase. For example, dispute resolution panels in trade agreements may rely on trade lawyers and economists rather than judges to interpret rules. Similarly, experts may develop standards in technical areas, which then may become authoritative either directly or indirectly through recognition of those standards by other institutions. For example, the Sanitary and Phytosanitary Measures (SPS) Agreement explicitly identifies three “recognized” international standard-setting bodies: the FAO-WHO Codex Alimentarius Commission for food safety; the International Office for Epizotics for animal health; and the FAO’s Secretariat of the International Plant Protection Convention for plant health.

Experts may also gain authority through specialized cause-effect knowledge where their prescriptions gain legitimacy as focal points for cooperation or the bases of new rules. Such “epistemic communities” have been influential in the development of a variety of international institutions and agreements.

However, when functional authority is granted to experts, purposely or by effect, it can be a source of legitimacy problems absent agreement on good practices or practical reason. This problem can be especially acute when governments simply leave technical decisions on complex issues to the private

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53 HABERMAS, supra note 31, at 178–79.
55 Id.
56 This demand stems primarily from a desire to maintain free global markets, which economic actors view as threatened in the absence of regulation beyond the state. At the same time, mainly non-economic actors are increasing demands for social regulation in areas such as the environment, labour and human rights, and the global economy more generally.
57 Coleman & Porter, supra note 38, at 380–82.
sector to design their own rules, especially if those rules are seen to have broader effects on public policy. Governance may thus be achieved, but without the required moral basis for sustaining authority, especially if it is removed from the state or from some other mechanism of direct accountability to affected parties. Expertise also can be a source of epistemic power, which can advantage some while disempowering others, thus leading to demands for increased accountability and democracy.

C. Good Practices

Grouped in this category is the bundle of notions associated with fairness and procedural legitimacy. At issue here is not only the differing views around the world regarding what stands as good governance, but also the limits in applying domestic governance procedures, such as democratic accountability and transparency, to the global level.

Mainstream international relations literature, nonetheless, largely defines good practices in global governance institutions in terms of democratic procedures and notions such as accountability, responsibility, transparency, and representation. The mostly normative scholarship on these concepts reflects the rich debate around precisely how these values might be achieved and their limits in a context beyond the state. It includes disagreements over issues such as deliberation versus representation; who has the right or ability to represent interests and values in global governance institutions (state officials, individuals directly, NGOs that claim to speak for particular group values or interests, firms or business associations, etc.?); whether there ought to be direct participation or representation; what form accountability should take; and so forth. To adjudicate those disagreements is beyond the scope here. My argument is only that virtually all normative theories of global governance agree that “good” global governance must rest on these values, even while they may disagree on how they ought to be operationalized.

Being constituted by both legitimacy and fairness, the actual institutional practices to promote “good governance” highlight the need to pay attention to both procedural and distributional/empowering implications. Disagreements over what counts as “good” often revolve around claims that one or the other is unduly neglected. For example, the emphasis on the rule of law and anti-corruption by the World Bank is understood primarily in the context of protecting private property

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61 See, e.g., Buchanan & Keohane, supra note 60, at 426–29 (discussing accountability and transparency as “virtues” necessary to create legitimate global governance).

62 Id.
rights and the sanctity of contracts. However, the Bank also supports democratic and administrative reforms, including greater participation and transparency in governance. Attempts to reconcile those values have led to criticisms by some civil society groups and communities in states subject to World Bank or IMF authority of the specific meaning of good practices. These disagreements also reflect shifts in the communities from which international financial institutions now seek legitimacy. As a result, the old legitimating practices driven by expert-based consensus over sound financial or development policies no longer suffice.

D. Practical Reason

Closely related to the issue of good practices is practical reason, which, like epistemic validity, relies on a pragmatist reading of rationality that is sensitive to contingent historical and cultural contexts. Practical reason builds on the notion that reasons derive from interpretive and dialogical processes (e.g., legal processes) in which intersubjectively validated knowledge and normative understandings of fairness play a major role. Practical reason, for example, concerns the epistemic requirements for democratic practice, which, according to Habermas, requires “discursive validation” and must therefore rest on “good arguments” made under “ideal speech” conditions where validity claims can be assessed. Under such conditions, free and equal autonomous actors can challenge validity claims, seek a reasoned communicative consensus about their understandings of the situation and justifications for norms guiding their action, and are open to being persuaded. Governance is viewed as a truth-seeking process, and institutions should be designed to approximate such conditions. The link between epistemic validity and practical rationality is obvious in this regard, as the former is not possible without agreement on the latter. Like Habermas, international relations scholars who apply this understanding of practical reason point out that conditions for ideal-speech are counterfactually valid but insist that approximations of such a situation can obtain. Whether one accepts this version of deliberative theory, it serves a purpose here in laying out one idealized version of practical reason against which current practices can be assessed.

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64 Id. at 10.
65 Id. at 1.
67 HABERMAS, supra note 52, passim; HABERMAS, supra note 31, at 178–79.
68 E.g., Thomas Risse, “Let’s Argue!”: Communications in World Politics, 54 INT’L ORG. 1 passim (2000); Risse, supra note 54, passim.
IV. THE LIMITED CASE FOR NON-STATE GLOBAL SOCIAL AND ENVIRONMENTAL GOVERNANCE

Institutions and mechanisms identified as non-state global governance come in a variety of forms (including private regimes, self-regulation, standardization bodies that may or may not include a mix of private and public actors, and private-public partnerships that blur the lines between private and public authority) and address a wide variety of issues (including bond rating, accounting, product standards, labor standards, and environmental regulation). Here, in an attempt to provide a focused illustration of the theoretical arguments above, I exclusively examine attempts to establish non-state social and environmental global governance. There has been an explosion of such efforts, primarily designed to regulate firms directly in the marketplace. However, in some cases these institutions also seek to promote standards, norms, or processes that states might adopt in their regulations or laws. The choice of realm of governance is somewhat arbitrary (I might have focused on non-state economic governance) but is meant to illustrate my central claim that, following on the above criteria of what counts as global governance, only a small fraction of non-state global governance institutions fit this category.

Out of the vast array of non-state or private attempts to socially and environmentally regulate the global marketplace—usually classified broadly under the rubric of “corporate social responsibility” (CSR)—a small subset has arisen in the last twenty-some years that can be rightfully labeled non-state global governance. These mechanisms—usually in the form of producer certification and product-labeling systems that include third-party auditing—are remarkable for their similarity to state-based regulatory and legal systems.69 They aim to be authoritative in the sense of creating rules with a sufficient “pull toward compliance”70 to create an obligation to comply on the part of firms who sign on. Institutionally they are notable for establishing their own governing systems, largely independent of state governments, with regulatory capacity to back up those obligations with enforceable rules.71

Scholars in law, political science, and business have variously labeled them “transnational regulatory systems,”72 “non-state market driven” (NSMD) governance systems,73 and “civil regulation.”74 Here, I use the NSMD governance label. Although slightly awkward, it has significant uptake in the scholarly literature, and studies of NSMD governance systems have generated the most

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69 Meidinger, supra note 14, at 121.
70 FRANCK, supra note 35, at 24.
71 Cashore, supra note 15, passim.
72 Meidinger, supra note 14, at 121.
74 Vogel, supra note 16, at 262.
detailed and distinct categorization of these mechanisms. Moreover, the goal for many NSMD governance systems is not simply to create niche markets that apply their standards, but also to promote their standards as appropriate and legitimate across an entire market sector.

NSMD systems can be formally defined as “deliberative and adaptive governance institutions designed to embed social and environmental norms in the global marketplace that derive authority directly from interested audiences, including those they seek to regulate, not from sovereign states.” These systems use global supply chains to recognize, track, and label products and services from environmentally and socially responsible businesses and have third-party auditing processes in place to ensure compliance. Their governing arrangements usually include stakeholders as well as representation from the targeted firms, owners, service providers, or producers. NSMD systems’ goals to transform markets, to establish authority independently of sovereign states, and to develop dynamic and adaptive governance mechanisms differentiate NSMD systems from most traditional eco-labeling initiatives.

The most relevant examples of NSMD systems are members of the International Social and Environmental Accreditation and Labelling (ISEAL) Alliance, an umbrella organization created to develop agreement on “best practices” for its members and to gain credibility and legitimacy for its members’ standards. Its members include the Fairtrade Labelling Organizations International (FLO), a group that aims to improve conditions for workers and poor or marginalized producers in developing countries through certifying commodities including coffee, cocoa, and sugar; the Forest Stewardship Council (FSC), which aims to combat global forest deterioration; the International Federation of Organic Agriculture Movements (IFOAM), which certifies organic food; the Marine Aquarium Council (MAC), which targets the hobby aquarium trade to promote sustainable management of marine ecosystems and fisheries; the Marine Stewardship Council (MSC), which combats fisheries depletion; the Rainforest

76 Id.
77 Id.
Alliance, which has developed certification systems for a wide variety of agricultural products from tropical countries to promote sustainable agriculture and biodiversity,84 and Social Accountability International (SAI), which aims to improve workers' rights and community development through certification programs for a wide range of manufactured products.85

Below, I briefly discuss the core features of these systems to differentiate them from other CSR initiatives. In so doing, I also show how—at least by design, if not always fully in practice—they reflect the core elements of “good” global governance.

V. HOW IS NSMD GOVERNANCE DIFFERENT, AND WHY DOES IT COUNT AS GLOBAL GOVERNANCE?

Drawing on Cashore,86 Cashore et al.,87 and Bernstein and Cashore,88 I outline five characteristics of an ideal NSMD system that make such systems good candidates to be considered non-state global governance. While other forms of CSR may share some of these characteristics, it is the combination that sets these governance systems apart.

A. Absence of State Authority

First, NSMD systems do not derive policy-making ability from states’ sovereign authority. As elaborated in Cashore’s earlier work,89 this feature does not mean that states are unimportant: some state agencies have provided financial support for particular NSMD systems,90 and domestic and international regulatory environments potentially affect their activities. Moreover, many systems explicitly include adherence to existing national laws and regulations as part of their

86 Cashore, supra note 15, at 503–04.
87 CASHORE ET AL., supra note 73, at 17, 20–30.
88 Bernstein & Cashore, supra note 75, at 349–50.
standard,\textsuperscript{91} though also frequently include additional elements. However, even in cases where governments supported their formation or facilitated the implementation of their standards,\textsuperscript{92} or where the systems interact with state regulators, government procurement policies, or international organizations interested in their standards, NSMD systems do not derive governing authority from states, nor are they accountable to them. Thus, while no global governance system may be completely autonomous from interaction with states, this characteristic firmly establishes these mechanisms in the non-state or private realm.

NSMD governance systems, therefore, can be distinguished from public-private partnerships, which still ultimately rest on state authority, and even private authorities whose competencies and powers are delegated by states. By the same logic, they differ from more traditional standard-setting bodies that derive their authority from governments or intergovernmental organizations, such as Codex Alimentarius (established by the Food and Agricultural Organization and World Health Organization), or from national standard-setting bodies, such as the International Organization for Standardization (ISO).\textsuperscript{93}

B. Institutionalized, Adaptive, and Dynamic Governance

NSMD institutions constitute governing arenas in which actors purposely steer themselves toward collective goals and values and in which adaptation, inclusion, and learning occur over time and across a wide range of stakeholders. Dynamic governance differentiates NSMD systems from most traditional ecolabeling initiatives (e.g., Nordic Swan), which generally identify a static measure of environmental quality a firm must adopt to receive a label.\textsuperscript{94} NSMD system managers justify this design feature on the grounds that it makes NSMD systems more democratic, open, and transparent than many of the business-dominated public policy networks they seek to bypass, as well as most corporate self-regulation and many social responsibility initiatives.

These features can be understood as efforts to achieve the elements of good practices and practical reason. Indeed, ISEAL’s mission is in part to promote “good practices” to ensure its members move beyond the minimum demanded to

\begin{itemize}
\item \textsuperscript{92} Id. at 52.
\item \textsuperscript{93} ISO is a network of national standards institutes that is the world’s largest developer and publisher of international standards. See ISO, About ISO, http://www.iso.org/iso/about.htm (last visited Mar. 1, 2010).
\item \textsuperscript{94} See, e.g., Nordic Ecolabel, About the Nordic Ecolabel http://www.svanen.nu/Default.aspx?tabName=aboutus&menuitemID=7069 (last visited Mar. 1, 2010) (explaining that the Nordic Swan is a label indicating compliance with a voluntary environmental, quality, and health requirements licensing system with the goal of creating a sustainable society).
\end{itemize}
be recognized as international standards. For example, ISEAL’s flagship document, the Code of Good Practices for Setting Social and Environmental Standards, encourages members to incorporate many aspects of the Technical Barriers to Trade (TBT) agreement’s Annexes 3 and Second Triennial Review Annex 4, as well as ISO/IEC Guide 59: Code of Good Practice for Standardization. The code also goes beyond these documents with additional criteria aimed specifically at social and environmental standard setting. Some of these criteria are technical, illustrating the importance of being able to engage in processes of epistemic validity in regard to providing, for example, knowledge on its standards, fulfilling technical requirements, and engaging with technical arguments over trade rules. Others aim to augment the provisions in TBT Annex 3 and Second Triennial Review Annex 4 for the participation of developing countries. For example, the code explicitly requires multi-stakeholder consultations, and section 7.2 requires that all interested parties “be provided with meaningful opportunities to contribute to the elaboration of a standard.” Section 7.4 also requires that ISEAL members give special consideration to disadvantaged groups, such as developing country stakeholders and small and medium-size enterprises, and seek a balance of stakeholder interests among sectors, geography, and gender. Specific recommendations include funding to participate in meetings, measures to improve technical cooperation and capacity building, and mechanisms that facilitate the spread of information. Strategies through which NSMD systems comply with the provisions of the code are frequently re-evaluated because meaningful multi-stakeholder participation is among the most difficult requirements to fulfill.

The code and its requirements also are clearly part of a legitimation strategy. The requirements tap into expectations within the international trading system, evolving international norms on democracy, as well as evolving international environmental and social norms from which the basic purposes of NSMD systems are constituted. A power dynamic also is at play because NSMD systems at once

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96 ISEAL CODE, supra note 78.
97 ISO/IEC, ISO/IEC GUIDE 59: 1994 CODE OF GOOD PRACTICE FOR STANDARDIZATION (1994). This is a code of good practices for consensus-based governmental and non-governmental standardization bodies. It covers procedures for development of standards, facilitation of international trade, stakeholder participation, transparency, and coordination.
98 See, e.g., id. § 6.1.
99 See id. § 7.4.
100 Id. § 7.2.
101 Id. § 7.4.
tap into norms that encourage market mechanisms and promote liberalized trade, while also trying to navigate concerns of environmental and social groups about the power of the marketplace or marketplace actors to shape governance in ways that may be difficult to reconcile with some environmental or social goals.

C. Authority Arises out of Market-Based and Market-Civil Society Interactions

Authority granted to NSMD systems emanates from the market’s supply chain in interaction with civil society. These interactions occur both globally and locally, especially because particular governance systems frequently have regional standard-setting processes in addition to the general standard.\footnote{See Cashore, supra note 15, at 507.} Moreover, these systems depend upon and encourage community participation in decision making and the development of standards in locations where certification is taking place.\footnote{See id. at 506–09.}

These communities of relevant actors—along the supply chain and within civil society—must grant legitimacy for the ongoing authority of the governing institution. Producers and consumers from extraction to retailers to end-users (in the case of commodities such as forest or agricultural products) or from service providers to consumers (in the case of services such as tourism) make individual choices about whether to require that products or services are certified for compliance to an NSMD system. Thus, the relevant political community will vary across governance systems. In the case of forestry, membership will include forest landowners and forest management companies, producers of forest products and purchasers of those products further down the supply chain, retailers and consumers, as well as members of communities where certification occurs. In the case of tourism, relevant audiences might include tour operators, travel service providers, hotel and resort owners, as well as the workforce in the local communities that are the destinations of travelers and travelers themselves. In the case of fair trade coffee, relevant audiences include coffee brokers, communities who subscribe to fair trade, coffee retailers and individual coffee consumers. The market supply chain is also a source of power, a point elaborated below in the discussion of enforcement (the fifth feature of NSMD governance systems).

The support of both market actors and civil society (including local communities) is essential for ongoing political legitimacy. Institutional design is crucial for ensuring processes of practical reason can occur. This is absolutely essential because market and civil society actors may come to the enterprise of governing with very different community norms and different understandings not only of what the institution ought to be doing, but also of what legitimacy requires. For example, whereas businesses may be focused on output legitimacy and will evaluate these systems based on whether they produce some kind of economic benefit, social and environmental groups who created the systems must perceive them as legitimate arenas of authority with which to address globally important problems, and they may highly value input legitimacy. Learning, dialogical, and
deliberative processes are essential for good governance, and many NSMD systems, as well as ISEAL, promote or engage with them.106

D. Transformative Goals

NSMD systems aim to reconfigure markets. They aim not only to create standards for products and services, but also to regulate processes of production, environmental and social impacts, and working conditions. They attempt to ameliorate global problems that, in their absence, firms have little incentive to address. This feature distinguishes NSMD systems from new arenas of private authority designed to standardize business practices, such as accounting, or to improve market coordination. In those cases, economic incentives for profit-maximizing firms to comply inherently exist—even if the resolution to the coordination problem that created a need for governance has distributional consequences (i.e., creates winners and losers). This feature points back to the importance of “good” practices and practical reasons highlighted above, but also to the importance of how material power and legitimacy combine to enable enforcement.

E. Enforcement Mechanisms and Mandatory Requirements

NSMD systems possess mechanisms to verify compliance and to create consequences for non-compliance. This feature means that, in effect, they develop mandatory standards for those who sign onto the system. The most common compliance mechanism is a third-party audit in which auditors “certify” firm or producer compliance with the rules or identify improvements required for a successful audit.107 If thought of as “civil” regulation, NSMD systems blur the boundaries between voluntary standards and mandatory regulation, “public” and “private,” and “hard” and “soft” law.108 Citing a growing body of international relations scholarship on “private” authority, Vogel notes that these sharp dichotomies may be better viewed as ends on a continuum or else they risk obscuring changing relations of power and authority in international relations and global governance.109

108 Vogel, supra note 16, at 265.
109 Id.
Guidelines for Multinational Enterprises (revised in 2000)) are usually voluntary and often discretionary, even for those who sign onto them. For instance, the industrial association dominated Ethical Trading Initiative does not rely on independent third-party certification that its members are following practices. Likewise, Responsible Care does not require that members participate in the program, views its political community as limited to the industry, and, until 2005, did not require third-party auditing. The move to a new auditing regime nonetheless illustrates that there can be evolution of non-state institutions that might bring them closer to fulfilling the core elements of good governance. To be clear, what defines NSMD governance is not NGO, rather than business sponsorship—business-dominated initiatives may evolve into NSMD systems—but rather between systems that do or do not have the five characteristics.

VI. CONCLUSIONS AND RESPONSES TO CRITICS

This Article’s goals have been quite modest: to make the case that non-state global governance can exist, but that it should be confined to a narrow band of cases that exhibit meaningful political authority. It has meant to respond both to skeptics who argue governance worth its name cannot exist absent state authority, and to those who see governing authority anywhere and everywhere, emptying the term of analytic utility. The former group does not deny attempts to generate authority internationally, but views such attempts as always rooted in the collective agreement or consent of states, as delegated by states, or as operating at the pleasure of states. To that group, I have tried to argue that non-state governing authority can be generated, rooted in political communities that may transcend states by interacting in the spaces of global society and markets. In particular, I have shown that political authority can exist absent a monopoly on authority, universal or general-purpose jurisdiction within a defined territory, or the equivalent of state sovereignty. To those who see governance as ubiquitous, I have argued that it should be understood as political authority, not simply any kind of authority, power, or coordinated activity. In so doing, I set the bar very high of what counts as political authority, laying particular emphasis on its connection to legitimacy and political community. Moreover, I made the perhaps even more controversial case that governance worth its name includes—or at least should

111 Third-party audits are now required for many of its regional sub-groups around the world (e.g., The American Chemical Council and similar bodies in India, South Africa, and Brazil), although others have not yet fully implemented an auditing system. See RESPONSIBLE CARE, STATUS REPORT 2008, 13 (2009), http://www.responsiblecare.org/filebank/Status%20Report%2001_05.pdf.
112 See supra Part II.
113 See supra Part II.
114 See supra Part II.
include—a normative dimension: it should be “good.”  

Although this position has roots in the classic Weberian formulation that the right to rule is based in “legitimate” authority, drawing on my work with Emanuel Adler I have tried to further specify the conditions of “good governance” and argue that they apply equally to state, interstate, and non-state forms of governance.

While, no doubt, there are many possible objections to the above arguments, I conclude by identifying just two that also point the way toward broader implications and future research that might build on this study.

First, it might be objected that, in practice, the authority relationship between non-state and state-based governance is much more symbiotic than I suggest, even in cases where decision-making authority seems quite autonomous from governments. Although I have made the case for the independent basis of authority of NSMD governance systems—which I will not repeat here—there is some evidence that a number of non-state governing institutions in the social and environmental area are arising that increasingly blur these boundaries.

One can observe two pressures that may make a more symbiotic relationship the norm. One pressure stems from existing international law or guidelines, such as those found in the TBT annexes and reviews cited above or ISO guidelines, that state that international standards must be open to input from all interested states. Although states have so far largely stayed out of direct input into NSMD systems, the more they strive to become international standards, as opposed to standards for niche markets, the more one might expect states to become involved in the creation and support of their rules. Still, one might want to ask even under those circumstances whether states are a party like other parts of the broader political community (rooted in global supply chains and affected communities), or have become a required basis of authority. A second pressure stems from the proliferation of such systems in response to policy or program goals of international institutions, or to international agreements where standards are needed to aid implementation or compliance. For example, one can observe the World Bank working closely with some non-state standard setters in the area of forest certification to promote sustainable forestry practices. The Bank, in this case, is working with the World Wildlife Fund to create guidelines for NSMD

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115 See supra Part III.
116 See supra Part III.
117 See supra Part III.
118 See supra Part V.A.
119 See supra Part V.B.
120 See supra Part V.B.
systems and support for the adoption of such standards. Another example is the Gold Standard certification scheme for carbon offsets, which was designed in the context of the Clean Development Mechanism of the Kyoto Protocol—a mechanism established through interstate agreement. That case suggests an even more explicit symbiotic relationship, where the standard could become authoritative in terms of what counts as legitimate emission reductions that can be counted by the mechanism. Such a shift, nonetheless, arguably signals more complexity in global authority relationships, not a diminution of non-state authority.

Taking such an objection to its logical extreme, it may also be that at some deeper level, global society and markets only exist by virtue of a secure and regulated social structure rooted in state authority. However, that argument takes us into ontological issues of whether states themselves rest on an underlying normative structure. Even granting that states provide stability and security to any global interaction, if there are cases where authority arises through the interaction of groups or processes largely independent of the purposeful steering of states, one could still speak of non-state global governance in a meaningful way.

A second objection is that non-state governance systems in the marketplace reflect market forces and/or the power of dominant economic classes, and thus do not reflect autonomous political authorities. However, the same objection could, and has been, leveled at states. Ongoing debates in political science concern precisely the relative autonomy of states vis-à-vis markets and economic interests. That interaction, and the appropriate balance between state and market, is one important battleground of state legitimacy and, by extension, the debate over changing configurations of political authority. This is not to dismiss the objection, because the political legitimacy of states is also threatened when it is seen as relinquishing its authority or autonomy to markets to too great a degree. Similarly, it is an empirical question of to what degree non-state governance systems can maintain their relative autonomy from market power and interests, and whether they can maintain authority if the balance tips too far in the direction of markets. The focus on “good” governance suggests that governance that does not reflect sufficient autonomy from market power or special interests (as opposed to some way of achieving the general interest or “will,” or an overlapping consensus of its political community, to use the formulations of prominent political philosophers) will be unsustainable.

In sum, the bar should be set high in evaluating non-state activities and institutions as truly governance so as not to delude ourselves into seeing authority where it does not exist. Nonetheless, it is equally important to recognize that such governing authority can and does exist. We should not dismiss it by objections,

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122 See WORLD BANK, supra note 121; WWF/WWF BANK GLOBAL FOREST ALLIANCE; supra note 121.
124 Id.
which, if applied to states, would suggest they also do not count as governing institutions or locations of political authority. In recognizing that non-state governance can exist, this Article also suggests the need to continue to ask difficult questions about non-state governance systems, including their prospects and limits for addressing global problems, their legitimacy, and their implications for understanding the changing configurations of political authority.