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at the University of Duisburg-Essen (UDE)

## Transnational Governance: Achievements and Limits

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Manuscript Version: Authors Accepted Manuscript

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Authors accepted manuscript of an article that has been published in a revised form in European Journal of Sociology / Archives Européennes De Sociologie. Quack, S. (2019). Transnational Governance: Achievements and Limits - Tim Bartley, Rules without Rights. Land, Labor, and Private Authority in the Global Economy (Oxford, University Press, 2018) - Veerle Heyvaert, Transnational Environmental Regulation and Governance. Purpose, Strategies and Principles (Cambridge University Press, 2019). European Journal of Sociology / Archives Européennes De Sociologie, 60(3), 429-436. doi: 10.1017/S0003975619000250

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**Suggested Citation:** Quack, Sigrid (2019). Transnational Governance: Achievements and Limits - Tim Bartley, Rules without Rights. Land, Labor, and Private Authority in the Global Economy (Oxford, University Press, 2018) - Veerle Heyvaert, Transnational Environmental Regulation and Governance. Purpose, Strategies and Principles (Cambridge University Press, 2019). European Journal of Sociology / Archives Européennes De Sociologie, 60(3), 429-436. <https://nbn-resolving.org/urn:nbn:de:hbz:465-20230522-162552-9> (Authors Accepted Manuscript)

Research for this publication was done at the Käte Hamburger Kolleg/Centre for Global Cooperation Research at the University of Duisburg-Essen, Germany, sponsored by the Federal Ministry of Education and Research (grant number 01UK1810).

## Transnational Governance: Achievements and Limits

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Bartley, Tim *Rules without Rights. Land, Labor, and Private Authority in the Global Economy* (Oxford University Press, 2018)

Heyvaert, Veerle *Transnational Environmental Regulation and Governance. Purpose, Strategies and Principles* (Cambridge University Press, 2019)

Since the 1990s, there has been a proliferation of initiatives of transborder governance and regulation that seek to tame economic globalization, and in particular to limit its harmful environmental and social consequences across the globe. More than three decades after the establishment and spread of many transnational governance initiatives, it seems timely to take stock of their achievements. The two books reviewed here tackle the question of how effective transnational governance is and what the possible alternatives are. They do so from partly complementary and partly opposing perspectives. While the two studies do not reference each other, reading them together and critically against each other points towards important future avenues for research and theorizing.

*Rules without Rights* is a deeply researched and comprehensive study of compliance with certification and auditing schemes in global supply chains in the forest and garment industries. Written by Tim Bartley, one of the leading scholars in the field, it builds on extensive field research undertaken over the last fifteen years. Rich in illustrative material, the book takes the reader to far-distant places such as garment factories and forest concessions in Indonesia and China to explore to what extent voluntary standards are enforced and complied with on the ground. The results of the enquiry, to say this straight away, are sobering: Focusing on enabling rights of local communities and workers in conflicts over land tenure and collective labor rights in Indonesia and China, Bartley finds little evidence that voluntary certification and auditing programs have brought improvements. That is not to say that these forms of private transnational governance have not contributed to increased sustainability and better health and safety conditions in supplier firms, as documented in the book's informative and detailed chapters on the implementation of these programs in the forest and garment sectors in Indonesia and China<sup>1</sup>. Overall, the balance is also more positive in forestry than in labor governance for reasons explained subsequently.

Bartley reaches these conclusions on the basis of a longitudinal comparison of the establishment and implementation of two specific transnational certification programs, the Forest Stewardship Council (FSC) in forests and SA8000 in labor, and those of their transnational and national competitors over the period from the 1990s to the early 2010s, in two major supplier countries

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<sup>1</sup> For labor, see also Locke, R. M. (2013). *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*. Cambridge: Cambridge University Press.



from the Global South. Indonesia and China are salient countries to compare. In addition to hosting significant shares of global production in the sectors under study, they also allow consideration of the impact of a democratizing as compared to a continuously authoritarian political regime on the implementation of private standards. According to Bartley, the comparison between more open political spaces in Indonesia and more closed political spaces in China produces some counterintuitive outcomes. In the former case, possibilities for contentious politics render negotiations about the implementation of transnational private governance more complicated but may ultimately lead to more substantive behavioral change. On the contrary, implementation of managerial processes appears easier but allows for more decoupling and window dressing in the latter case.

What then are the reasons for the observed limits of transnational private regulation in producing better environmental and working conditions in global supply chains? The theoretical framework developed in the book takes a critical stance towards models of private regulation that rely on the “hope of transcendence” (p. 5), address exclusively global companies and their suppliers and neglect or sidestep national regulators. All too often, according to Bartley, these models assume that places of production are “empty spaces” to be filled by global norms while in fact they are already “crowded” with domestic regulation (p. 38).

To counter this myth, Bartley focusses on the influences of the domestic regulation context, which he argues significantly shapes the outcomes of transnational private governance. Bartley’s detailed studies show that understandings and practices of auditing and compliance tend to be more demanding in locations with an active and autonomous civil society and in countries with strong regulatory authorities. Somehow less convincingly, Bartley also maintains that domestic governance will typically prevail in cases where it clashes with transnational standards. Illustrative cases cited are conflicts over indigenous peoples’ rights to land and workers’ collective rights to form independent unions. Yet, Bartley may be overgeneralizing from his cases here because other studies provide evidence for more complex interactions between certification and public regulation, in some cases resulting in an adaptation of national regulation to transnational standards<sup>2</sup>. In addition, the composition and constitution of transnational fields and the content of rules also shape the implementation and compliance of cross-border rules. Under this heading, the author refers, among others, to elements such as the mobility and visibility of production, and the relative influence of non-industry groups in multi-stakeholder initiatives. Here, Bartley’s book stands out for its still rare but urgently needed comparative approach to long-term developments in different industry sectors. It is based on a research program that has been underway for more than 10 years, and provides one of the few existing syntheses of the factors that yield an overall more positive assessment of the outcomes of transnational private governance in forestry than in the garment industry.

*Rules without Rights* ends with a plea for a more “place conscious” transnational governance that should re-center the state (p. 259). This is a puzzling demand giving that one of the factors that triggered private transnational regulation was the realization that many producing countries lack the capacity or are not willing to implement existing environmental, labor or land tenure laws, not to speak of those countries where the law is weak or absent. A second reading reveals

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<sup>2</sup> For FSC standards, see Meidinger, E., 2007, Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems. In Brüttsch, C., & Lehmkuhl, D. (Eds.), *Law and Legalization in Transnational Relations* (London: Routledge), pp. 133-155. The public endorsement of private standards is also to be found in financial regulation. See Botzem, S., 2012, *The Politics of Accounting Regulation: Organizing Transnational Standard Setting in Financial Reporting* (Cheltenham: Edward Elgar Publishing).

that Bartley has something more complex in mind than just stronger enforcement of national law. The prototype presented is the emerging transnational timber legality regime. Both the US and Europe have passed laws that prohibit the import of illegal harvested wood and impose penalties on the seller of the final consumer product. At the same time, they provide capacity building and require the involvement of civil society in local oversight in the exporting countries. While a transnational labor legality regime is far away on the horizon, Bartley nevertheless sees emerging demands for the greater legal accountability of lead firms with respect to their supply chains. To a large extent, his vision of a transnational labor legality regime builds on the extra-territorial enforcement of national labor laws through penalties and deterrence issued by the governments of the countries in which the lead firms of global production chains are headquartered.

While *Rules without Rights* covers its topic with impressive breadth and depth, it also leaves a number of questions unanswered. For instance, Bartley largely focusses on private certification and auditing while leaving the existing plethora of other forms of transnational rule-making, and particularly those involving public regulators, aside. Similarly, after his convincing analysis of the failure of private certification to transcend state regulation, Bartley does not analyze in depth the various processes through which private and public forms of regulation interact. By mostly opposing transnational to national regulation, he sidesteps a discussion of recent literature on more complex interactions between transnational certification and national regulation. Other studies have shown how transnational private rules have become adopted, incorporated or indirectly annexed by international and national public authorities<sup>3</sup>, and private and public rules might mutually influence each other through recursive interactions<sup>4</sup>. Furthermore, underlying Bartley's argument about the failure of private certification and auditing are strong assumptions that legally binding rules, claims for entitlements and threats of penalties are the most effective means of achieving compliance. But is that necessarily always the case? What, for example, about the need for building the capabilities of companies and regulatory authorities to implement regulation? Given the ongoing lively debate in sociological, socio-legal and legal research and the inconclusive empirical findings on the complex relationships between rights, rules, enforcement and compliance in transnational settings<sup>5</sup> these assumptions would have deserved a more explicit discussion in the book. Finally, a more explicit consideration of these points might have helped to provide a better specification of the argument's scope conditions. As it stands in the book, it is not clear how far the conclusions from certification and auditing can be generalized to other forms of transnational governance. Despite these concerns, *Rules without Rights*, is an important contribution to a comparative sociology of implementation and compliance of transnational

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<sup>3</sup> Eberlein, B., Abbott, K. W., Black, J., Meidinger, E., & Wood, S., 2014, Transnational Business Governance Interactions: Conceptualization and Framework for Analysis. *Regulation & Governance*, 8(1), 1-21. Green, J. F., & Auld, G. (2017). Unbundling the Regime Complex: the Effects of Private Authority. *Transnational Environmental Law*, 6(2), 259-284. Zajak, S., 2017, *Transnational Activism, Global Labor Governance, and China* (Basingstoke, Palgrave Macmillan).

<sup>4</sup> Halliday, T. C., & Shaffer, G. (Eds.), 2015, *Transnational Legal Orders* (Cambridge, Cambridge University Press. Malets, O., & Quack, S., 2017, Varieties of Recursivity in Transnational Governance. *Global Policy*, 8(3), 333-342.

<sup>5</sup> For example, Parker, C., & Nielsen, V. L. (Eds.), 2011, *Explaining compliance: Business responses to regulation* (Cheltenham, Edward Elgar), identify fourteen factors that influence compliance, the majority of which are not directly linked to coercion or deterrence. For economic and social factors fostering compliance, see also Djelic, M. L., & Quack, S., 2018, Globalization and Business Regulation. *Annual Review of Sociology* 44:123-43.

regulation on the ground that will hopefully encourage more research on these topics in the future.

The second book reviewed in this essay, *Transnational Environmental Regulation and Governance* is at once narrower (in its methodological approach and its sectoral concentration on environmental governance) and broader (in encompassing different forms of transnational governance) than the previously discussed book. Written by Veerle Heyvaert, a prominent legal scholar specializing in transnational law and regulation, this monograph is also highly relevant to sociologists as it presents a panoramic view on the emerging transnational regulatory landscape in the environmental field. The field is broad, ranging from climate change governance to the forest certification studied by Bartley. Looking at the field in its breath, as Heyvaert does, has the merit of showing countervailing trends. While in forestry private transnational governance was initiated to fill a perceived gap in public regulation, many other subfields of environmental governance have been dominated for long by intergovernmental bodies and international treaties with private regulation only recently entering the scene. Predominantly based on an analysis of documents and literature, Heyvaert's book provides an original mapping of the contemporary variety of transnational regulatory activity that encompasses private and public regulatory actors and their addressees, distinguishing them according to the intentions of the regulation.

Accordingly, transnational environmental regulation (TER), understood as regulation produced in a cross-border context with the involvement of non-state actors, encompasses five different categories: (a) Collective action TER addresses environmental problems that cannot be solved at the national level; it is typically developed by public actors, in conjunction with private and civil society actors, and is directed towards public addressees. These need not necessarily be states, as the example of transnational municipal and world city networks for climate policy demonstrates. (b) Trade facilitation TER seeks to regulate both market and environmental conditions at the same time. It is also predominantly developed through intergovernmental negotiation and takes the form of international agreements. In contrast, (c) substitute TER seeks to fill a regulatory gap through standard-setting, third-party audits and certification. In this category, private and public regulators are active in addressing mostly private, but sometimes also public audiences. Forest certification and auditing, as studied by Bartley, fall into this category. (d) Risk management TER, in contrast is mostly fostered by private regulators and directed towards private addressees to deal with environmental, reputational and legal risks. (e) A last category entitled enhancement TER covers regulation that seeks to link different existing public and private regulations or various stakeholder groups to generate mutual support and improve convergence. Transnational city networks are an example of such a hybrid form of governance. One might have concerns that distilling the intentions of regulation exclusively from a documentary analysis provides a full picture of purposes and to what extent overlapping goals can be easily disentangled from each other, concerns that the author discusses in her book. The merit of the classification lies in providing a comprehensive picture of public, private and hybrid forms of transnational governance that includes but is not limited to private-to-private regulation. In this way, *Transnational Environmental Regulation and Governance* allows us to position the certification and auditing studied in *Rules without Rights* within a broader ecology of transboundary regulation. In turn, that provides a grid for discussing the generalizability of the latter's finding to other forms of transnational governance.

Dissatisfied with all too schematic assessments of command-and-control and alternative approaches of regulation, Heyvaert then develops an activity-based model of transnational

environmental governance that seeks a more nuanced assessment of its effectiveness. Transnational regulation is analyzed according to five recursive stages of activity: goal setting, normalization, engagement, learning and response. Applied to five case studies, each representing one of the previously categorized types of TER in the field of climate change (the Paris Agreement, the EU Fuel Quality Directive, the Carbon Neutral Protocol, the Compact of Mayors and the Regional Greenhouse Gas Initiatives) this activity-based analysis points to dense interdependencies and interactions between private and public forms of transnational regulation. According to Heyvaert's analysis, TER is the "product of different organisations interlinking, relying on each other's work and integrating each other's strategies towards the pursuit of shared regulatory goals." (p. 161) Different regulatory schemes are, for example, laterally networked through "standardization by reference", as is the case when the compact of mayors mandates or recognizes the validity of norms developed in other forums, or, to use an illustration from the labour field studied by Bartley, private certification bodies draw on core standards of the International Labor Organization. Heyvaert's findings also point towards multiple ways in which transboundary regulation interacts with national law. The recursive nature of standardization and certification, according to the author, requires for example that rules are not only implemented locally but also further developed through learning and response from local actors. While *Transnational Environmental Regulation and Governance* provides a valuable overview of the possible types of regulatory interaction, its approach also leaves open a number of questions. The advantages of the chosen phases of the regulatory process of other models are not well explained and their distinctiveness from each other is questionable. To the extent that the book also claims to be based on a review of empirical studies, one would have wished for greater contextualization of the regulatory interactions in the national or world regional context – of the kind provided by Bartley's book. To be fair, *Transnational Environmental Regulation and Governance* does not claim to provide such an in-depth grounding. Nevertheless, one would still have wanted to learn more about whether certain forms of interaction between private and public rules are more likely to improve the effectiveness of regulation under specific economic, social and political conditions.

In the last section of her book, Heyvaert discusses the normative implications of her findings. She argues that the activity-based analysis calls into question the assumptions underlying enforceability, compliance and deterrence, as traditionally understood in the national context. Accordingly, while transnational regulatory authorities can rarely make use of coercive instruments, they have a wide range of engagement mechanisms, learning technologies and response options available. Among the schemes studied, no clear-cut pattern arises since not all public schemes work through coercion and threat of penalties and not all private schemes rely exclusively on voluntary adoption. *Transnational Environmental Regulation and Governance*, hence, suggests that engagement, capacity-building and learning might be equally important as other means of enforcement. While the book warns that one should not "automatically equate the absence or scarcity of deterrence mechanisms characteristic of TER with lack of enforcement or, relatedly, regulatory ineffectiveness" (p. 126), it also acknowledges that many of the prevailing managerial, procedural and principle-based approaches have a "propensity towards permissive or even lowest common denominator environmental regulation" (p. 21). *Transnational Environmental Regulation and Governance's* encompassing approach, hence, carries with it some ambiguity and inconclusiveness. While readers are introduced to a variety of different enforcement mechanisms, they are left without clear conclusions as to which are more likely to work in what contexts and situations. Instead, the book closes with a call for a

more differentiated empirical analysis of how various categories of addressees respond to the variety of available enforcement techniques.

While the two books reviewed in this essay mirror each other in many ways, they also take a different stance on the variety of governance, enforcement and compliance mechanisms as well as their effectiveness, representing different streams of theorizing as well as empirical slices of the overall phenomena. Whereas the in-depth case studies of *Rules without Rights* highlight the limits of the implementation of one of these models when applied to specific country contexts, the sampling from a broad range of regulatory modes enables *Transnational Environmental Regulation and Governance* to generate a broader classification of the forms of regulation, their enforcement mechanisms and potential effectiveness. Ideally, one would wish a theory of transnational governance to combine the best of both approaches. In awaiting such a theory, readers will find both books enriching, providing important building blocks for future research.