

## The Crystallization of Regulatory Norms

DONAL CASEY\* AND COLIN SCOTT\*

*This article investigates the processes through which regulatory norms generally, and in the context of transnational private regulation (TPR) in particular, become effective. We argue that institutionalization – the embedding of norms within some wider structures which impact upon their distribution, enforcement, and mode of transmission – is generally central to the processes through which regulatory norms are crystallized. We note that, within processes of crystallization of TPR norms, the potential for managing legitimacy has been exploited through the institutionalization of policies, structures, and processes which are responsive to the beliefs, expectations or interests of the relevant legitimacy communities. However, we suggest that the focus of such legitimating strategies on the making of rules and standards exposes weaknesses and limits to the potential of such legitimation attaching to actions which implement such norms through monitoring and enforcement, particularly where such processes are embedded within supply-chain contracts.*

### INTRODUCTION

A central problem of regulatory governance is seeking to understand the conditions under which regulatory rules are followed. Within regulatory research, this is often expressed in terms of the problem of compliance. Furthermore, there has been growing interest in the role played by a wide variety of norms in steering regulatory regimes. Whilst these issues are of importance for regulatory regimes generally, they take on particular

\* *UCD School of Law, University College Dublin, Belfield, Dublin 4, Ireland*  
*donal.casey@ucdconnect.ie colin.scott@ucd.ie*

Earlier versions of this paper were presented at the ECPR Joint Sessions, Lisbon, 2009 and at the first annual conference of the Hiil-funded project on Transnational Private Regulatory Regimes. We thank the following for comments on earlier drafts: Joel Anderson, Daniel Friedrich, Robert Goodin, Tony Prosser, Linda Senden, Nicholas Southwood, Kai Spiekermann, and Andrew Woods.

significance in regimes which are one step removed from national legislative systems, as with those which are substantially supranational or substantially non-state or private in origins. Regimes which combine both these elements, being both transnational and non-governmental, are the core set of transnational private regulatory (TPR) regimes. TPR regimes, accordingly, present a particularly acute challenge.<sup>1</sup> A central problem of such regimes is to understand the conditions under which the variety of norms secure conformity, and to distinguish these circumstances from those where, although a variety of governing norms are available, none consistently steer behaviour.

We argue in this paper that a central aspect of regulatory compliance is the institutionalization and embedding of norms within some wider set of structures. Classically the crystallization of norms occurs within the processes for legislating or rule making, such that the regulatory rules are recognized as valid legal rules requiring obedience to them. The challenge to state sovereignty associated with increasing emphasis on supranational and non-state governance of economic and social life requires a degree of rethinking of how norms become effective. A wide array of rules within TPR regimes do not have an authoritative legal source and are crystallized within other institutional structures, such as those of social groups or markets. From this starting point, the focus of this paper is on setting out the variety of norms which shape behaviour within regulatory regimes generally, and TPR regimes in particular, and seeking some understanding of the conditions under which norms ‘crystallize’, to take on de jure or de facto binding properties.

Crystallization is the process through which fluids are solidified, starting from a nucleus and then growing in a fashion which assumes a regular pattern in a very marked contrast to the boundaries of the fluid from which it emerged. A process of crystallization thus gives shape to what was previously shapeless, defining and giving significance to elements of the structure. Drawing on this process, our particular understanding of the crystallization of norms suggests a process by which norms take on regulative effects.

Whilst the article contributes to the widespread challenge to the centrality of official or formal law in contemporary regulatory governance, it suggests that there is significance in the institutionalization of rule-making processes external to the state, long held to be a central property of official law.<sup>2</sup> We argue that institutionalization, by which we mean the embedding of norms within some wider structures which impact upon their distribution, enforcement, and mode of transmission generally is central to the effects of regulatory norms (that is, norms which have been set with the intention of

1 J. Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2 *Regulation and Governance* 137–64, at 144.

2 B. Tamanaha, ‘Law and Society’, St. John’s Legal Studies Research Paper no. 09-0167 (2009).

producing particular effects) and that this is of equal importance to the crystallization of other kinds of norms than law. This paper starts with the case for a broad analysis of norms within regulatory settings and the assortment of mechanisms through which such norms are promulgated. We follow this with a discussion of the problem of crystallization of norms – what are the processes through which norms are linked to the modification of an actor’s behaviour? From this analysis we examine the issues of legitimacy and legitimation in the context of the crystallization of norms in TPR regimes. Here, we address how we conceptualize legitimacy and the role legitimacy plays in the processes of crystallization.

## A SPAGHETTI BOWL OF NORMS

We are concerned in this article substantially with norms which have regulatory intentions or effects on social and economic behaviour. Thus, we are not concerned with norms governing such matters as identity, values or common sense in themselves. The norms which steer behaviour take a variety of forms and originate from a multitude of sources. Such norms have been subject to numerous taxonomies and analytical schema. Regulatory norms comprise prescriptions of behaviour, to which sanctions of one kind or another are attached for breach.<sup>3</sup> In the paper, ‘A Typology of Norms’, Morris establishes a classification which attends to the ‘salience of norms’ rather than ‘content criteria’.<sup>4</sup> Morris’s typology, we argue, is fundamentally concerned with regulatory norms and is suggestive of a series of continua which address the *distribution* of a norm (extent of knowledge, acceptance, and application), its *enforcement* (rewards and punishments, enforcing agency, extent of enforcement, source of authority, degree of internalization), mode of *transmission* (socialization process and degree of reinforcement by subjects), and *conformity* to the norm (amount of conformity and deviance by objects and kind of deviance).<sup>5</sup>

Morris’s typology is valuable in explicating the parameters of norms with regulatory intentions or effects. However, it says little about the context in which norms are likely to be: more or less widely known; more or less widely accepted; more or less conformed to, and so on. These are key issues at the heart of the problem of crystallization. Within this spaghetti bowl, the norms which govern a particular social actor’s conduct will depend upon a number of relational factors. A social actor’s participation within a specific jurisdiction, agreement, community, and/or market setting will dictate which norms may be applicable to their conduct. Following a well-established

3 R.T. Morris, ‘A Typology of Norms’ (1956) 21 *Am. Sociological Rev.* 610–13, at 610.

4 *id.*, p. 612.

5 *id.*

three-way analysis of social ordering generally – hierarchy, market, and social ordering – we can think of three main categories of norms, namely, legal, social, and market.<sup>6</sup>

Legal norms in regulatory governance settings classically originate from the decisions of legislatures (or ministries and agencies under delegated legislative powers) to prescribe or prohibit certain conduct, to attach sanctions for breach and, sometimes, to establish machinery for detecting deviations from the norm which has been set (for example, an agency with duties to monitor behaviour and powers to investigate, delegation to a non-state body such as a professional organization, and sometimes incentives to,<sup>7</sup> or requirements on third parties to enforce).<sup>8</sup> It is clearly a prerequisite to the operation of such regimes that there is a commitment amongst the targeted community to the law-making process. The absence of such commitment is a key factor in explaining the limited reach of law in international regimes.<sup>9</sup> The limits of public international law are demonstrated by long-standing frustrations over the effects and effectiveness of norms on human rights which have the status of public international law but which are routinely breached by many, if not all, signatory states.<sup>10</sup>

TPR regimes have emerged which are also underpinned by law. However, these regulatory regimes' reliance on law tends to derive from the contractual relationships between the actors involved rather than from public law instruments. Such regulatory regimes include those based on individualized contractual relations (as when standards are included in supply-chain contracts which also outline modes of monitoring, such as third-party certification,<sup>11</sup> and mechanisms for dealing with non-compliance) and on associational contractual relations (as when members of an association agree to be bound by the association's code).<sup>12</sup>

In many situations legal rules are not the predominant steering mechanisms which guide a social actor's behaviour. Rather, social norms which emanate from communities govern much human behaviour. Regimes based on social norms emerge in the community at large and, in particular,

6 R.E. Goodin, 'Democratic Accountability: The Distinctiveness of the Third Sector' (2003) 44 *European Archives of Sociology* 359.

7 J. Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (2008) ch. 3.

8 J.A. Gilboy, 'Compelled Third-Party Participation in the Regulatory Process: Legal Duties, Culture, and Non-Compliance' 20 *Law and Policy* 135–55.

9 K.W. Abbott and D. Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421–56, at 422.

10 G. Teeple, 'Honoured in the Breach: Human Rights as Principles of a Past Age' (2007) 1 *Studies in Social Justice* 136–45.

11 M. Blair, C.A. Williams, and L.W. Lin, 'The New Role for Assured Services in Global Commerce' (2007) 33 *J. of Corporate Law* 325–60.

12 C. Scott, 'Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance' (2002) 29 *J. of Law and Society* 56–76.

communities such as those based around professions. A core feature of social norms is their *normativity*. By this, we mean that social norms are prescriptions or proscriptions embedded in a society or community of what *ought* to be done (or not done).<sup>13</sup> Despite this, what *ought* to be done is not necessarily what is *actually* done. As such, the existence of a social norm, in and of itself, does not say anything about the regulatory effects of such norms. While there may be a social norm in many societies which may take the form of ‘you ought not to litter’ or ‘in restaurants, you ought not to talk on your mobile phone’, we still see litter on the streets and people talking on their phones in restaurants. However, failure to follow social norms can elicit responses that may involve signs of disapproval, ostracization, and other measures. Breaches of social norms may be characterized as anti-social (as opposed to illegal) behaviour.

The effectiveness of social norms is a central theme of Lisa Bernstein’s study of the evolution and application of non-legal norms in the New York diamond trade.<sup>14</sup> The system of regulation which she describes originated within a relatively homogeneous group of diamond traders capable of enforcing their own social norms. Enforcement depended both on agreements by dealers on joining the club to submit all disputes to the club’s arbitration process, and the reputational effects associated with conduct breaching the norms. Thus, there was a strongly institutionalized system for enforcement of norms in a very tight-knit, though gradually fragmenting group of traders. Whilst Bernstein claims that the bonds of this community are one of the central characteristics underlying its effectiveness, institutionalization of social norms may occur in more fragmented settings. Indeed, Bernstein highlights how technology has been used to bolster the effectiveness of the social norms upon the industry in the face of the global fragmentation.<sup>15</sup> In the context of TPR regimes more generally, a highly diffused picture of regulatory capacity has emerged with non-governmental organizations (NGOs), businesses, and associations of businesses having varying degrees of involvement in hundreds and perhaps thousands of different regimes, some exhibiting a degree of overlap and even competition for adherents. Other things being equal, those regimes which exhibit a degree of tightness in their social organization (for example, because they are oriented around a particular profession or specialized market) are likely have greater capacity for implementing social norms distinct from the legal obligations of participants.

13 J. Woodward, ‘Why Do People Cooperate as Much as They Do’ in *Philosophy of the Social Sciences: Philosophical Theory and Scientific Practice*, ed. C. Mantzavinos (2009).

14 L. Bernstein, ‘Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry’ (1992) 21 *J. of Legal Studies* 115–57.

15 *id.*

Norms which emerge from within markets are classically set through the interaction of many buyers and sellers, and most centrally relate to the price/quality ratio of goods and services. Other matters too may be the subject of market norms, such as dispute resolution procedures. In some instances, what we might think of as pure market processes for establishing and enforcing norms proves inadequate. For the millions of people who buy and sell regularly on eBay, there are risks involved which relate to non-delivery, poor quality, non-payment, and so on. eBay has developed clear norms and a mechanism under which buyers rate sellers. This information underpins an enforcement mechanism where sellers with few or poor ratings may need to sell at a lower price (if they can sell at all) than would be the case if they had better ratings.<sup>16</sup> This simple enforcement mechanism incentivizes compliance and permits sellers who build up strong ratings to sell successfully.

Processes of technical standardization have emerged also as mechanisms for addressing weaknesses in the coordinating capacity of markets, and as alternative mechanism for setting norms for market actors, with the standard-setting process involving key industry actors, through decisions on adoption or not of norms which occur in market settings.<sup>17</sup> In the case of technical standardization, the process for the making of norms is more of a social than a market process, involving deliberation by groups of key industry actors. Nevertheless, the success or failure of a technical standard is largely determined by its take-up within a particular market through, for instance, its adoption both in production processes and in the specification within supply contracts. In addition to technical standards, other kinds of norms are also incorporated within contracts. Such norms include those that require suppliers to comply with ethical rules governing employment of workers.<sup>18</sup>

It is clear that the range of norms which are *available* to govern an actor's conduct does not automatically answer the question of which norms *actually* govern that actor's behaviour. Whilst a wide variety of norms may exist within fluid governance settings, only a proportion may crystallize into a system in which expectations are set by the norms. Indeed, empirical research has shown that, in particular contexts, both contractual and regulatory, while legal rules may be applicable to a specific action of a certain social actor or actors, for instance, through contractual agreement or legislation, these legal rules are not relied upon to steer their conduct.<sup>19</sup>

16 D. Lucking-Reiley, D. Bryan, N. Prasad, and D. Reeves, 'Pennies from eBay: The Determinants of Price in Online Auctions' (2007) 55 *J. of Industrial Economics* 223–33.

17 K.T. Hallström, *Organizing International Standardization: ISO and IASC in Quest of Authority* (2004).

18 C. McCrudden, 'Using Public Procurement to Achieve Social Outcomes' (2004) 28 *Natural Resources Forum* 257–67.

19 P. Grabosky and J. Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986); S. Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *Am. Sociological Rev.* 55–67.

Furthermore, although a legal rule may have been promulgated by a legislator, it may not have crystallized to guide social actors' behaviour. In such cases, social norms may guide the specific conduct of the actor. The implication of this observation is that the mere categorization of norms according to their source is not sufficient to identify their actual effects. We argue that what is important when evaluating norms is not their source. Rather, the crux lies in whether such norms have crystallized so as to govern behaviour. In other words, whether what ought to be done, is in fact done.

## THE DYNAMICS OF CRYSTALLIZATION

A wide variety of norms are available for the governance of social and economic behaviour in national and transnational settings. We suggest that the processes of crystallization are central to shaping the effects of norms on behaviour. The central problem associated with crystallization is to understand the factors which result in conformity, more or less, with a norm. There is no single answer to the question of how various norms crystallize and produce binding effects upon those actors to whom they are addressed. Rather, norms may crystallize through a variety of mechanisms. Some clues are to be found in analyses which set down parameters relating to both the nature and extent of institutionalization of regulatory norms. These parameters are indicative not of a sharp distinction between norms which are crystallized and those which are not. Rather, they highlight a number of continua within which any particular norm may be located. These factors can be broadly understood as relating to the extent to which a norm has been distributed, the degree of enforcement of the norm, and its mode of transmission. From such a perspective, conformity is the dependent variable which may be explained by reference to distribution, enforcement and/or mode of transmission.

Analysis of the distribution of a norm relates to the extent to which it is known, accepted, and applied. Knowledge of a norm is frequently not only a product of its promulgation. Training and education for those involved in applying the norm and sometimes information campaigns and notices may also play a key role in building such knowledge. By contrast, it may be argued that social norms by their very nature imply that what ought to be done is known by the community in which norms operate. Acceptance of a norm may involve consideration of both the process through which it emerges, its content, and its likely effects. Crystallization of norms is therefore heavily reliant upon the instruments which can transmit information that educates actors about not only the substantive content of rules, but also the objectives which underlie norms and methods by which norms can be complied with. In respect of application, the classical conception of law was that of universal applicability. A widespread observation associated with the emergence of both welfare and regulatory states

has been the application of more materialized or highly specified rules to sub-sections of society.<sup>20</sup>

Analysis of the enforcement of a norm is concerned with the rewards and punishment associated with following the norm, the mechanisms and extent of enforcement, the source of authority, and the degree of internalization. A classical regulatory regime involves the oversight of compliance with regulatory rules by a unit within a ministry or a specialized agency, with powers to gather information and to apply sanctions. A considerable volume of empirical evidence in the United States, the United Kingdom, and Australia suggests that enforcement processes frequently do not involve the stringent application of regulatory rules.<sup>21</sup> Instead, a wide range of approaches, often involving education and advice to those found in breach, are utilized ahead of more stringent actions – warnings, civil or criminal penalties, and license revocations. In their classic model of responsive regulation Ayres and Braithwaite array these potential responses in an enforcement pyramid, combining the empirical evidence of the practice of escalating sanctions with the game-theory arguments as to how and when such escalation should occur.<sup>22</sup> The application of the enforcement pyramid is intended to ensure that regulatees who are fundamentally oriented towards legal compliance receive appropriate advice to enable them to meet this objective. On the other hand, the credible threat of escalation encourages the ‘amoral calculators’ (who only comply when this is consistent with financial incentives) to comply at the lowest level of the pyramid, because non-compliance would be more costly. Thus, even within classical regulatory regimes, rewards and punishment may occur within the framework of the legislative regime, but not be determined by it. Thus, crystallization does not occur at the legislative moment, but rather in the practices of the overseeing agency and its relations with those whom it oversees.

Within TPR regimes operated under individuated or collective contracts, the authority for oversight and enforcement derives not from legislation but from contract and is frequently linked to market incentives for compliance (or not). Such regimes often involve the crystallization of social norms within particular professional or commercial groupings (as with many professional and standards bodies, or in the case of the New York diamond industry, discussed above). In such regimes, the norms are thus reflected in contractual arrangements and reinforced through participation in markets.

Social norms may be crystallized to the extent that they trump legal norms. An intriguing example is presented by Robert Ellickson’s famous study of neighbour disputes in Shasta County. Ellickson was interested in

20 G. Teubner, ‘Juridification: Concepts, Aspects, Limits, Solutions’ in *A Reader on Regulation*, eds. R. Baldwin, C. Scott, and C. Hood (1998).

21 Grabosky and Braithwaite, op. cit., n. 19; R. Cranston, *Regulating Business: Law and Consumer Agencies* (1979).

22 I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).



testing the Coase theorem, which was based around an example of neighbour disputes, and observed the norms surrounding the consequences when cattle broke out of their ranches causing damage to the land of other farmers. Within Shasta county, two different legal regimes were operating – one of strict liability caused by stray cattle and the other denying liability. Even those ranchers aware of this distinction were found to operate their practices and dispute resolution on the basis that it is wrong to let cattle stray.<sup>23</sup> Within this meta-norm exist subsidiary social norms requiring notification to ranchers when their cattle stray and a quick response and apology from the offending cattle-owner. Minor harm is lumped rather than pursued and stray cattle are boarded without charge, often for many weeks, until a convenient time for their return is agreed.<sup>24</sup> Where the social norms are persistently breached there is the potential for an escalating set of sanctions against the deviant, starting with social sanctions (such as negative gossip) and which may eventually reach a formal legal claim.<sup>25</sup> Within TPR regimes, similarly, it is likely that social norms frequently underpin the reasonable operation of a regime by the parties with a degree of reinforcement through market sanctions and/or the possibility of resort to legal sanctions for significant or harmful deviation from such norms.

Whilst the institutionalization associated with legal, social, and market norms are quite varied when considering the distribution and enforcement of norms, it may be quite similar when considering modes of transmission. Socialization is the process through which we learn about norms which apply to our conduct. Flowing from this, reinforcement may be conceived of as the process by which others enhance the impact of such socialization processes. Socialization affects how we act, not only in respect of social norms, but also legal and market norms. Such processes involve those with whom we are in direct contact – in family, education and peer-group settings. In addition, a central role in this process may also be played by the mass media. Governments are particularly cognisant of this dimension of making norms effective. For example, substantial criminal penalties for driving with blood-alcohol above minimum levels are backed up with advertising campaigns that go beyond informing drivers of the penalties and seek to affect both socialization processes and the reinforcement of messages surrounding the social unacceptability of drink-driving. The introduction of a levy on plastic bags supplied in retail premises in Ireland created a modest financial incentive to reuse plastic bags rather than dispose of them after a single use.<sup>26</sup> The effects of this widely accepted levy have, arguably, been magnified by the

23 R.C. Ellickson, 'Of Coase and Cattle: Dispute Resolution Amongst Neighbours in Shasta County' (1986) 38 *Stanford Law Rev.* 623–87, at 673.

24 *id.*, p. 674.

25 *id.*, p. 677.

26 F. Convery, S. McDonnell, and S. Ferreira, 'The Most Popular Tax in Europe? Lessons from the Irish Plastic Bag Levy' (2007) 38 *Environmental and Resource Economics* 1–11.

emergence of social norms which reject the taking of plastic bags, even where the taker complies with the requirement to pay a levy.

To take a further example, a central mechanism of contemporary regulatory governance is supply-chain contracts which specify standards or norms with which the contractor must comply. Such contracts are frequently used to import norms developed in other contexts which are less than fully institutionalized. Whilst supply-chain contracts are one individuated mechanism for institutionalizing standards, an alternative and more general mechanism is the specification of compliance with technical standards in legislative instruments making particular standards mandatory as a condition of market participation or, alternatively, incentivizing take-up of such standards by providing that compliance with a technical standard will be deemed to comply with some broader legal principles, such as product safety

The take-up of standards in supply-chain contracts is not restricted to technical standards, as traditionally conceived, and extends also to broader non-state governance regimes, such as those applying to issues of environmental protection and fair trade. In the case of the standards set by the Forest Stewardship Council, these were adopted by major retailers in their supply-chain contracts because of market pressures to show strong environmental performance – a process described as Non-State Market-Driven Governance.<sup>27</sup> The incorporation of standards into supply-chain contracts is transparent to the parties and has been subject to well developed mechanisms of monitoring and enforcement (for example, through third-party certification).<sup>28</sup> Accordingly, there is frequently a high degree of institutionalization.

Knowledge and acceptance of a norm is part of the process of entering into a contract. While entering into a contract (and indeed the terms) are classically treated as voluntary matters by the parties, the voluntary character has long been questioned.<sup>29</sup> It is possible to imagine circumstances where a contractor enters into the contract without being fully accepting of the detailed terms. Furthermore, the authority for enforcing supply-chain contracts is the contract itself, which will frequently provide terms relating to monitoring and sanctions for breach, and additionally create the potential for not renewing a contract where compliance has not been satisfactory. Empirical research in the United States and the United Kingdom automotive industries has found that contracting parties frequently do not rely on the law

27 B. Cashore, 'Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority' (2002) 15 *Governance: An International J. of Policy, Administration and Institutions* 503–29.

28 Blair et al., op. cit., n. 11.

29 A. Stinchcombe, 'Contracts as Hierarchical Documents' in *Organizational Theory and Project Management*, eds. A. Stinchcombe and C. Heimer (1985); R.L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Pol. Sci. Q.* 470–8.

or lawyers in resolving disputes over breaches – widely understood as the product of their relationship being institutionalized socially and economically, as much as legally.<sup>30</sup> So, within such contractual settings, we should not assume that the contract is the instrument of institutionalization which it appears to be.

With supply-chain processes the dimension of socialization and reinforcement occurs largely through market processes – the acceptable modes of negotiating and treating contractual obligations (whether they are treated in formal or informal terms). Just as the Shasta County ranchers largely resolve cattle trespass disputes informally, so with business-people operating in this manner, there is frequently the potential to pursue formal sanctions, held in reserve, for anti-social actors who do not follow the applicable social norms in their relationships. Pressures to ensure strict compliance may be external. For example specification of ethical norms relating to fair trade or labour rights within supply-chain contracts may form part of the expectations of consumers associated with products.<sup>31</sup> More generally, Gunningham et al. have extended the idea of companies being governed by an implicit ‘social licence to operate’ as underpinning the legitimate operation of companies, beyond the extractive industries from which the idea emerged.<sup>32</sup>

## THE LEGITIMATION OF NORMS

In this section we argue that processes of legitimation are fundamental to the crystallization of regulatory norms. A number of questions assist in illuminating the significance of legitimacy and the legitimation of regulatory norms in the context of crystallization. First, what do we mean when we assert that a regulatory norm is legitimate? Secondly, what is the importance of legitimacy and what role does legitimacy play in the crystallization of regulatory norms? Thirdly, what are the possible reasons which underlie the legitimacy of regulatory norms and regulatory regimes? Finally, how can regulatory regimes seek to achieve the legitimation of the norms which they produce? This section will address each of these questions.

30 Macaulay, *op. cit.*, n. 19; H. Beale and T. Dugdale, ‘Contracts Between Businessmen’ (1974) 2 *Brit. J. of Law and Society* 45–60. Macaulay’s empirical research highlighted that contract law is often times ignored in favour of non-legal norms in business transaction, By contrast, Beale and Dugdale buttressed this observation by identifying that, in many cases, businessmen expressly agreed upon primary obligations only, while issues related to the business relationship were left to be regulated by tacit non-legal norms.

31 D.A. Kysar, ‘Preferences for Processes’ (2004) 118 *Harvard Law Rev.* 526–642.

32 N. Gunningham, R. Kagan, and D. Thornton, ‘Social License and Environmental Protection: Why Businesses Go Beyond Compliance’ (2004) 29 *Law and Social Inquiry* 307–41.

The legitimacy of regulatory norms may be addressed from a normative and a sociological perspective. In normative terms, legitimacy speaks of the acceptability of regulatory norms, and whether or not such norms can be justified by reference to certain predetermined ‘standards and criteria of legitimacy’.<sup>33</sup> One can identify four broad criteria which are frequently prescribed to evaluate the legitimacy of regulatory norms and regimes: constitutional; democratic; functional and performance-based; and values- and objectives-based.<sup>34</sup> Constitutional evaluations of regulatory norms and regimes emphasize issues such as fair procedures, due process, consistency, coherence, proportionality, and the existence of ‘oversight from constitutionally established bodies such as national courts, legislatures or executives or international organisations’.<sup>35</sup> Where such norms and regimes are assessed by reference to democratic standards, the extent and effectiveness of participation, transparency, accountability, and deliberation in the norm-formation process are given prominence.<sup>36</sup> Normative evaluations, which stress the values and objectives of regulatory norms, focus on the underlying ends which the norms and the regulatory regime seek to achieve, for example, fair trade, good agricultural practices, market efficiencies, and sustainable development.<sup>37</sup> Finally, functional and performance-based appraisals point to issues such as the degree of expert involvement in the production of regulatory norms, and the effectiveness and efficiency of such norms in achieving the objectives which they pursue.<sup>38</sup>

By contrast to these normative and essentially prescriptive approaches to legitimacy, the sociological perspective embraces the view that ‘[l]egitimacy is a quality that society ascribes to an actor’s identity, interests, or practices, or to an institution’s norms, rules or principles’.<sup>39</sup> Hence, legitimacy is conceived of as an objective constituent that may or may not be present in a particular regulatory norm or regime. In line with our thinking in relation to the crystallization of regulatory norms, we conceptualize legitimacy as an empirical phenomenon rather than a normative abstraction. Drawing on

33 J. Steffek, ‘The Legitimation of International Governance: A Discourse Approach’ (2003) 9 *European J. of International Relations* 249–75, at 253.

34 J. Black and D. Rouch, ‘The Development of the Global Markets as Rule Makers: Engagement and Legitimacy’ (2008) 2 *Law and Financial Markets Rev.* 218–33.

35 *id.*, p. 225.

36 M. Zürn, ‘Democratic Governance Beyond the Nation State: The EU and Other International Institutions’ (2006) 6 *European J. of International Relations* 183–221; T. Risse, ‘Transnational Governance and Legitimacy’, and K.D. Wolf, ‘Private Actors and the Legitimacy of Governance Beyond the State’, both in *Governance and Democracy: Comparing National, European and International Experiences*, eds. A. Benz and Y. Papadopoulos (2006) 179–99, 200–27; F.W. Scharpf, *Interdependence and Democratic Legitimation* (1998).

37 Black and Rouch, *op. cit.*, n. 34.

38 N. Brunsson and B. Jacobsson, *A World of Standards* (2000).

39 C. Reus-Smith, ‘International Crises of Legitimacy’ (2007) 44 *International Politics* 157–74, at 159.

Suchman's schema, we argue that a regulatory norm is legitimate where there is a 'generalised perception or assumption' that the norm is 'desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions'.<sup>40</sup> Thus, for a regulatory norm to be legitimate, it must be accepted by those to whom it is addressed. The underlying rationales for acceptance and, therefore, the legitimation of a regulatory norm lie in the existence of congruence between the norm and actors' 'beliefs or expectations or ... interests'.<sup>41</sup> To some extent socially accepted norms overlap with social norms. Nevertheless, it is perfectly possible for norms generated other than through social processes to be accepted too, and it is the variety of mechanisms through which acceptance of norms generally occurs which are of interest here.

What is the importance of legitimacy and what role does legitimacy play in the crystallization of regulatory norms? The answers to these questions lie in the way in which actors react to regulatory norms which they perceive as legitimate. Here, 'the central empirical premise of legitimacy is well supported – legitimacy is an effective influence strategy'.<sup>42</sup> This empirical premise rests on a number of observations which are fundamentally important to the crystallization of regulatory norms. First, legitimacy creates a sense of obligation, upon those that confer a regulatory norm with legitimacy, to act in accordance with the particular norm. While a sense of obligation does not necessarily lead to compliance, it does increase the likelihood that a regulatory norm will be obeyed. As such, the legitimation of a regulatory norm may obviate the need for extensive and inefficient monitoring and enforcement mechanisms within a regulatory regime. Secondly, a regulatory regime which has been legitimated will be able not just to foster passive support for its norms but will also be able to garner active support from those actors which it seeks to steer through its norms.<sup>43</sup> This is of particular importance in relation to regulatory norms which seek to steer behaviour as active support is a 'critical element in motivating behavioural responses'.<sup>44</sup> While individuals may agree to be bound by a contract, it does not necessarily follow that their actions will change in line with contractual obligations. Where active support is granted to the regulatory norms contained within contracts, however, active compliance with contractual obligations in the absence of coercion can be enhanced.

40 M. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 *Academy of Management Rev.* 571–610, at 574.

41 Black, op. cit., n. 1, p. 144.

42 T.R. Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (2006) 57 *Annual Rev. of Psychology* 375–400, at 392.

43 Reus-Smith, op. cit., n. 39, p. 163; Suchman, op. cit., n. 40, p. 575; R. Hülse, 'Even Clubs Can't do without Legitimacy: Why the Anti-Money Laundering Blacklist was Suspended' (2008) 2 *Regulation and Governance* 459–79.

44 Black, op. cit., n. 1, p. 148.

Thirdly, by providing a ‘reservoir of support’,<sup>45</sup> legitimacy can lead to the stability and persistence of regulatory norms even when they attempt to shape behaviour in ways which are immediately undesirable.<sup>46</sup> This aspect of legitimacy, therefore, enhances the persistence of regulatory norms in situations where they no longer serve the immediate interests of their intended audience. Tyler concludes that legitimacy is central to:

whether or not authorities in organised groups are effective in shaping the voluntary behaviour of group members. Such voluntary behaviour is, in turn, central to the effectiveness of authorities because, although authorities typically have some ability to reward rule following and punish rule breaking, leadership based on reward, coercion, or both is difficult and often ineffective.<sup>47</sup>

As such, legitimacy is of crucial importance to the processes of the crystallization as it can create a sense of obligation and bolsters active support for regulatory norms while aiding the persistence and stability of such norms.

As noted above, legitimacy as we conceive it refers to a quality which is attributed to a regulatory norm or regime where there is congruence between the norms or regime and actors’ ‘beliefs or expectations or ... interests’.<sup>48</sup> This conjunction may exist at a normative, pragmatic and/or cognitive level.<sup>49</sup> Legitimacy may be provided because aspects of the regulatory norm relating to how it was created, and/or its substantive content, are aligned with the particular normative evaluative criteria of those actors to whom the norm are addressed. Therefore, our conceptualization of legitimacy is not insulated from normative concerns such as those rooted in constitutional, democratic, performance- or value-based evaluative criteria. Nevertheless, such evaluations are empirically grounded in the specific normative concerns of the actors whose behaviour the regulatory norm seeks to shape. A 2007 survey carried out by ISEAL, an alliance of social and environmental TPRs, spotlighted the important role which such normative evaluations play in the legitimation of standard-setting organizations, including TPRs.<sup>50</sup> The survey results showed that inclusiveness, participation, fair representation, and independence of auditing all played a crucial role in the assessment of the credibility of standards which, in turn, feeds into the legitimacy of TPRs. Indeed, the Marine Stewardship Council, established by the World Wildlife Fund and Unilever in 1996, was initially criticized due to perceived industry

45 M. Weatherford, ‘Measuring Political Legitimacy’ (1992) 86 *Am. Pol. Sci. Rev.* 149–66.

46 Suchman, *op. cit.*, n. 40, pp. 574–5; Tyler, *op. cit.*, n. 42, p. 381.

47 T. Tyler, ‘The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities’ (1997) 1 *Personality and Social Psychology Rev.* 323–45, at 335.

48 Black, *op. cit.*, n. 1, p. 144.

49 Suchman, *op. cit.*, n. 40.

50 S. Bernstein, ‘Legitimacy in Intergovernmental and Non-State Global Governance’ (2011) 18 *Rev. of International Political Economy* (forthcoming).

capture and lack of transparency and participation in its standard-setting procedures. In light of these criticisms, the MSC became a fully independent non-profit organization in 1998, and undertook a comprehensive governance reform to enhance participation, representation, and transparency.<sup>51</sup>

One of the most striking examples of TPR over the past two decades has been the emergence of TPR in the policy area of forestry. Within this policy area, the Forest Stewardship Council (FSC), on which the MSC is based, has been the most active of the TPRs in the institutionalization of processes which attempt to increase its legitimacy, and in turn, crystallize the norms relating to responsible forest management. The FSC was created in 1993 by a number of environmental NGOs, some members of the timber industry, and the World Wildlife Fund (WWF), and was formally recognized as a non-profit organization in 1995.<sup>52</sup> In order to address the normative concerns of many of its stakeholders, the FSC has institutionalized an elaborate governance structures which is based upon 'participation', 'democracy', and 'equality'.<sup>53</sup> The FSC has established a tripartite governance structure composed of social, environmental, and economic chambers which have equal voting rights. Within each chamber, there are both north and south sub-chambers with equal voting rights attached to each section irrespective of the number of members. In order for any decision to be made, there is a requirement that two-thirds vote, which necessitates agreement not only between social, environmental, and economic interests, but also between north and south interests. This situation can be contrasted with that of GLOBALGAP, a TPR in the sphere of food safety and quality. While GLOBALGAP has initiated processes to enhance participation in its standard setting, such as notice-and-comment procedures, the Board of GLOBALGAP is still composed of retailer and producer representatives. While GLOBALGAP recognized the need to open up its standard-setting procedure, these actors felt that ultimate control of the organization should remain in the hands of the retailers and producers.<sup>54</sup> Similar arrangements can also be found in industry-led forest certification schemes.<sup>55</sup>

51 L.H. Gulbrandsen, *Transnational Environmental Governance: The Emergence and Effects of the Certification of Forests and Fisheries* (2010).

52 L.H. Gulbrandsen, 'Organizing Accountability in Transnational Standards Organizations: The Forest Stewardship Council as a Good Governance Model' in *Organizing Transnational Accountability: Mobilization, Tools, Challenges*, eds. M. Boström and C. Garsten (2008).

53 E. Meidinger, 'The Administrative Law of Global Private-Public Regulation: The Case of Forestry' (2006) 17 *European J. of International Law* 47–87; E. Meidinger, 'Competitive Supragovernmental Regulation: How Could it be Democratic' (2008) 8 *Chicago J. of International Law* 513–34.

54 Interview with GLOBALGAP representative (26 March 2010).

55 B. Cashore, G. Auld, and D. Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority* (2004); L.H. Gulbrandsen, 'Accountability Arrangements in Non-State Standards Organizations: Instrumental Design and Imitation' (2008) 15 *Organization* 563–83.

In her study of the international standardization organization, the ISO, Tamm Hallström suggests that traditionally, given the industry focus of the ISO, and its core business of setting technical standards, its legitimacy was generally assessed along two lines.<sup>56</sup> First, legitimacy was assessed by the extent to which there was expertise in the standard-setting process, a normatively based evaluation. Secondly, however, the legitimacy of ISO standards were assessed by the degree to which the ISO standards allowed for the rationalization of standards in a particular area, and the associated benefits which flow from such a rationalization. Legitimacy evaluations based upon the ability of TPRs such as ISO to rationalize existing standards highlight the fact that pragmatic or instrumental evaluations may also play an important role in the legitimation of regulatory norms.<sup>57</sup> Pragmatic or instrumental evaluations rest upon whether or not a regulatory norm serves, or is perceived to be a response to, the needs and interests of its intended audience. Cashore, Auld, and Newsom suggested that the key factors which led businesses to support the FSC were based on pragmatic evaluations related to the possibility of either increased market access or the protection of market share, and not through normative evaluations relating to participation, transparency, and so on.<sup>58</sup> In order to manage such evaluations, it has engaged in campaigns which seek to damage the brands of those which do not support the FSC. Pragmatic legitimacy is, in many respects, similar to Scharpf's output dimension of his theory of democracy and legitimate democratic rule.<sup>59</sup> The substantive output aspect of the concept requires authority to be effective in solving the audiences' problems and meeting their needs. Finally, the legitimacy attributed to a regulatory norm may be cognitively based. Cognitive legitimacy may be granted, for example, where a regulatory norm pursues an objective which is socially understood and taken for granted as desirable, proper or appropriate.

Stemming from this discussion is the observation that the legitimation of a regulatory norm may be rooted in one rationale or a number of different ones which may be normatively, pragmatically, and/or cognitively based. In order for legitimacy to be granted to regulatory norms, those regulatory regimes which produce norms must be cognisant of and, responsive to the legitimacy demands of those actors whose behaviour their norms seek to shape. Indeed, regulatory regimes must 'focus on those being led' and '[w]idespread legitimacy will exist only when the perspectives of everyday members are enshrined in institutions and in the actions of authorities'.<sup>60</sup> The extent to

56 K. Tamm Hallström, 'ISO Expands its Business into Social Responsibility' in *Organizing Transnational Accountability: Mobilization, Tools, Challenges*, eds. M. Boström and C. Garsten (2008).

57 Black, *op. cit.*, n. 1; Cashore, *op. cit.*, n. 27; Tyler, *op. cit.*, n. 42; Cashore et al., *op. cit.*, n. 55.

58 Cashore et al., *id.*

59 Scharpf, *op. cit.*, n. 36; Bernstein, *op. cit.*, n. 50.

60 Tyler, *op. cit.*, n. 42, p. 392.



which the multitude of normative evaluations and the degree to which instrumental or cognitive rationales underlie the granting of legitimacy will depend not only on the particular regulatory regime in question, but also may vary between the different actors which are subject to the regulatory norms. For example, effective participation in the standard-setting process and the ability of a technical standard to facilitate market access may be crucial to whether or not suppliers grant legitimacy to the technical standard institutionalized within a supply-chain contract. Nevertheless, in order for purchasers to grant such a standard of legitimacy and to incorporate such a standard within their supply-chain contracts, they may need to be convinced that the standard not only enhances efficiency, but also achieves the objective it pursues, such as the guarantee of product safety. Consequently, a number of different legitimacy demands may be made by those actors to whom regulatory norms are addressed.

As noted above, traditionally the legitimacy of ISO standards was assessed by reference to the degree of expertise and the extent to which ISO standards rationalized technical standards. However, Tamm Hallström offers an example which highlights how a TPR can find itself in a legitimacy dilemma.<sup>61</sup> As the ISO expanded its scope from technical standards and began to develop a social responsibility standard, ISO 26000, expertise and rationalization were insufficient in and of themselves to legitimate the new standard. The ISO recognized that, given the potential users of such a standard, it had to adapt its standard-setting procedure to open it up to wider stakeholders such as NGOs and consumer groups. In order to do this, the ISO set up six specific stakeholder categories and created new procedural rules so that all stakeholder views were represented. By doing so, however, it was faced with new types of stakeholders who had different legitimacy demands from those previously dealt with. In particular, a legitimacy dilemma was created when the NGO and consumer stakeholder groups demanded that the standard-setting process be more transparent and opened to the media. However, the demand for increased transparency was successfully contested by the industry stakeholder groups. The significant point is that legitimacy demands are not homogenous. While there may be congruence, and indeed a certain degree of compatibility between legitimacy demands, it is equally likely these demands will lead to contestation. Such an environment may lead to a 'legitimacy dilemma' for a regulatory regime:

[W]hat they need to do to be accepted by one part of their environment is contrary to how they need to respond to another . . . It is simply not possible to have complete legitimacy from all aspects of its environment.<sup>62</sup>

61 Tamm Hallström, *op. cit.*, n. 56.

62 J. Black, 'Contesting Accountability and Legitimacy in Non-State Regulatory Regimes', *Basel Institute of Governance Conference Paper (2007) 7, 8*, at: <<http://www.baselgovernance.org/fileadmin/docs/pdfs/Nonstate/Paper-Black.pdf>>.

Here, regulatory regimes such as standards-setting organizations must make an active choice as to what legitimacy demands they respond to positively, for instance, by introducing greater participation and transparency in the standard-setting process, and which legitimacy demands they choose to dismiss.

The tensions which may emerge in active strategies to manage legitimacy in a transnational private regulatory regime are highlighted by the dependence on others for implementation which characterizes many regimes where the 'peak organization' within the regime is concerned chiefly with the setting of standards. It is not untypical in such regimes that responsibility for monitoring and enforcement is either explicitly or implicitly passed on to others. In some instances, there are private or self-regulatory organizations which may actively manage their legitimacy, but which may also be subject to a degree of steering by the peak organization. A good example of this phenomenon is presented by the variety of self-regulatory organizations for advertising in Europe which have tended to align themselves with the International Chamber of Commerce norms on advertising self-regulation in respect of substantive principles, and with Best Practice Recommendations in respect of regulatory procedures promulgated by the European Advertising Standards Alliance.<sup>63</sup>

Just as common are the regimes where implementation of TPR norms is achieved through their incorporation into supply-chain contracts where a purchaser requires adoption of the applicable standards and engages in monitoring and enforcement either directly or through contracting third-party assurance organizations.<sup>64</sup> Third-party organizations may bring in the norms of their profession, for example, where accounting firms provide assurance services. However, it is clear that bilateral contractual relations within supply-chain contracts present significant problems for the management of legitimacy in terms both of substantive norms and processes, and identifying the level at which such issues are managed.

A documented example of the use of inter-firm contracting to legitimate the governance of a project is presented by the case of the construction of Terminal 5 of Heathrow Airport. Deakin and Koukiadaki have described how the client, airport owner BAA plc, put in place a sophisticated framework for contracting which contained substantive innovations, such as risk pooling between sub-contractors and client, performance monitoring, and also learning mechanisms which provided for 'effective diffusion of information, the use of frameworks, benchmarks and measurement and the operation of integrated teams working'.<sup>65</sup> This contract-based mechanism of

63 European Advertising Standards Alliance (EASA), *Blue Book 6: Advertising Self-Regulation in Europe and Beyond* (2010).

64 Blair et al., op. cit., n. 11, pp. 325–60.

65 S. Deakin and A. Koukiadaki, 'Reflexive Approaches to Corporate Governance: The Case of Heathrow Terminal 5' in *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*, eds. O.D. Schutter and J. Lenoble (2010) 108.

governance is said to have allowed the parties to develop a mutual framework of understanding and for adjustment of strategies to address shortcomings. In other words, the construction contracts were transformed, to some extent, from an instrument of hierarchy to an instrument of mutual learning.<sup>66</sup>

The centrality of supply-chain contracts to TPR regimes present significant challenges for legitimating strategies. On a worst-case scenario, they are likely to be experienced coercively by suppliers, resulting in adverse consequences for commitment to the regime. Regimes involving multiple actors, such as where third-party assurance organizations are brought in, increase complexity but also diffuse the responsibility for legitimation. Indeed, the choice of third parties may be part of a legitimation strategy not only vis-à-vis suppliers, but also in respect of ultimate consumers seeking assurance that products are compliant with codes in the manner claimed. To the extent that issues of consumer confidence are significant, there may be strong incentives to manage legitimacy in such a manner. This is a field for further research within particular TPR regimes.

## CONCLUSION

The past two decades have witnessed a proliferation of TPR in many significant policy areas. While it is now clear that TPR abounds in global regulatory space, many of the important dynamics of TPR are yet to be sketched out. In this paper, we have addressed one critical dynamic – the process of crystallization of TPR norms. Broadly speaking, crystallization of TPR norms suggests a process by which these norms take on regulative effects and steer behaviour. Our main argument can be broken down into two related parts. Firstly, we argue that the institutionalization of TPR norms – the embedding of norms within some wider structures which impact upon their distribution, enforcement, and mode of transmission – is important in the process of crystallization. Whilst structures which relate to the distribution, enforcement, and mode of transmission of TPR norms are significant, the second aspect of our argument draws attention the critical role played by the institutionalization of the policies, structures, and processes which seek to enhance the legitimacy of TPRs. Here, we perceive legitimacy as a quality which may be attributed to a norm or regulatory regime where there is a perceived congruence between these aspects of a TPR and actors' 'beliefs or expectations or ... interests'.<sup>67</sup> TPR regimes must both recognize and be responsive the expectations of their legitimacy

66 See, also, O. Perez, 'Using Private-Public Linkages to Regulate Environmental Conflicts: The Case of International Construction Contracts' (2002) 29 *J. of Law and Society* 77–110.

67 Black, *op. cit.*, n. 1, p. 144.

communities. The importance of legitimacy from the perspective of the crystallization of TPR norms lies in the observations that, where a TPR is perceived as legitimate, a sense of obligation and active support may naturally flow. The potential for managing the legitimacy of a TPR regime has been exploited by such regimes through the institutionalization of policies, structures, and processes which are responsive to the beliefs, expectations or interests of their legitimacy communities and can augment the structures which address the distribution, enforcement, and mode of transmission of norms in crystallizing TPR norms. However, the dependence of many TPR regimes on supply-chain contracts for monitoring and enforcement creates a further significant challenge, beyond the reasonably well developed arrangements for the setting of standards, which has yet to be fully documented and addressed.