Institutional Alliances and Derivative Legitimacy

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INSTITUTIONAL ALLIANCES
AND DERIVATIVE LEGITIMACY

Claire R. Kelly*

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International organizations (IOs) form law-making alliances to achieve instrumental goals and enhance the legitimacy of their work product. For example, the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank joined forces to promote a legislative guide for modernizing national bankruptcy statutes. The World Trade Organization (WTO) has incorporated the standards set by the Codex Alimentarius Commission (for food safety), the International Office of Epizootics (for animal health), and the International Plant Protection Convention (for plant health) into its Agreement on Sanitary and Phytosanitary Measures (SPS). The World Bank has incorporated into its Loan Guidelines the United Nations Convention on Biological Diversity, the 1972 Convention Concerning the Protection of World Cultural and Natural Heritage, and the Food and Agricultural Organization (FAO) Guidelines for Packaging and Storage of Pesticides. The legitimacy claims of these alliances and the norms that they generate are derivative; they flow from the legitimacy claims made by the constituent organizations of the alliance and from the act of allying. I believe that the best method to assess the legitimacy of the resulting norms is to examine whether the alliance employs good procedures.

Legitimacy claims are increasingly important to IOs because they permit the IOs to: (i) answer concerns regarding accountability and inclusiveness that arise as democratic norms spread among the constituencies that IOs affect; and (ii) secure compliance with the norms that they generate. IOs address difficult problems and often compete with each other to address these problems. These IOs face criticisms


that they are unrepresentative or nondemocratic at a time when democratic values are on the rise. Thus, it is not surprising that they increasingly employ the tools of linkage and accommodation and turn to other IOs to form alliances in which they collaborate, share resources, or broker consensus. These alliances bring within their ambit more experts, more nuanced problem-solving techniques, more resources, and establish a new basis for law-making legitimacy, i.e., derivative legitimacy.

These alliances thus force us to consider what framework works best to assess derivative legitimacy. IOs seeking to promulgate or propagate legal norms have always faced legitimacy questions: By what authority do they purport to act? To whom are they accountable? What power do they have to enforce their commands? Why should anybody listen? These questions challenge an IO to justify its structure and conduct. One could characterize these questions as directed toward an IO’s primary legitimacy claims. These questions are more complex when addressed to alliances that claim legitimacy from a combination of sources and thus challenge derivative legitimacy claims.

To answer these questions we must first define what we mean by legitimacy. IO legitimacy claims are complex and distinct from inquiries involving domestic entities. As Ian Hurd explains, legitimacy of IOs should be understood from a relational perspective. Legitimacy results when one party—in relation to another—perceives that other party as legitimate.


6. Id. at 16 (calling for a new system to assess global governance).


12. Hurd, Legitimacy, supra note 11, at 38 (noting that “[p]erceptions of legitimacy create the authoritative instructions”).
perception is subjective, but it responds to a legitimacy claim that can be assessed using objective criteria. To help concretize and systematize this relational analysis of legitimacy, it is helpful to divide legitimacy claims into two broad categories: input legitimacy and output legitimacy. Output legitimacy focuses on the ends of decision-making and asks whether the resulting laws or proposed laws are effective under a particular normative standard. Input legitimacy focuses on the means of lawmaking and asks whether the resulting laws come from democratic, representative, or procedurally fair processes. It is difficult for IOs to satisfy both output criteria and input criteria at the same time. This Article considers whether derivative legitimacy is best assessed using an input metric, an output metric, or some combination of the two.

Part I describes global lawmaking and the legitimacy challenge. It provides a typology of IOs that develop norms: (i) regulatory bodies, (ii) governmental norm-creating forums, and (iii) private norm-creating forums. It explains that legitimacy is a subjective belief, but it provides objective paradigms for assessing legitimacy claims. It demonstrates how pursuing legitimacy according to one set of criteria can sacrifice legitimacy claims under another. It also examines the competition among IOs, the push for democratic norms, and the resulting need for stronger legitimacy claims.

Part II explains linkage and accommodation and gives specific examples of where these phenomena work to garner more legitimacy for specific organizations and the soft and hard law that they develop. Linkage and accommodation techniques result in at least four types of alliances: partnering, coordination, endorsements, and resource-sharing arrangements. Each of these alliances enables claims of derivative legitimacy.

Part III outlines some of the positive and negative consequences of derivative legitimacy, including stronger legitimacy claims, marginalization of interests, entrenchment, new regime and forum shifting

14. Keohane & Nye, supra note 5, at 12–16. This normative standard is typically set by the organization itself. An alternative approach would be to assess the normative legitimacy more generally and to question why it is that a global governance institution has the right to rule. Output legitimacy, or effectiveness, would be only one part of that inquiry and would involve a moral assessment of the institution. See Allen Buchanan & Robert O. Keohane, The Legitimacy of Global Governance Institutions, 20 ETHICS & INT'L AFF. 405, 412 (2006).
17. For a definition of soft law and hard law, see Kenneth W. Abbott & Duncan Snidal, Hard and Soft Law in International Governance, 54 INT'L ORG. 421, 421–22 (2000). Abbott and Snidal define hard law as precise, legally binding obligations that delegate authority for interpreting and implementing the law, while defining soft law as somewhat weakened in its obligations, precision, or delegation. Id.
opportunities, and unique opportunities for abuse that these alliances create.

Finally, Part IV argues that a derivative legitimacy analysis must focus on the relationship among the constituent IOs, and that the best paradigm to do so is a process-based paradigm. We should consider whether these alliances have sufficient procedures to secure transparency, participation, and fairness. Although the particular processes will depend on the type of alliance, some standard procedural devices, such as notice, transparency mechanisms, power-sharing devices, rules requiring explanation, and rules against corruption, will be important to promote stronger legitimacy claims and mitigate the negative consequences of these alliances.

I. THE LEGITIMACY CHALLENGE FOR INTERNATIONAL ORGANIZATIONS

A. International Organizations as Institutions for Global Lawmaking

The institutions of global governance form a complex and overlapping web of problem-solving entities that touch on almost every aspect of life. In this Article, I use the term international organization (IO) broadly to refer to intergovernmental organizations (IGOs) (as embodied in some institutions, such as the WTO or UNCITRAL) and private international governance institutions (such as the International Chamber of Commerce (ICC)). I divide the relevant IOs by how they generate legal norms: (i) regulatory bodies, (ii) quasi-governmental norm-generating forums, and (iii) private norm-generating forums.

Regulatory Bodies. Regulatory bodies are institutions established by States that have the power to generate norms and rules to which States have ex ante committed. These IOs derive their authority from the membership of sovereign States. States are drawn to regulatory IOs;
IOs have efficiencies that make membership appealing. Additionally, both developing and developed nations see membership in regulatory bodies as enhancing their standing in the community of nations. Membership in some organizations, such as the WTO, has become a must, given the economic benefits that accrue to members.

Quasi Governmental Norm-Creating Forums. Other IOs generate norms to which States will agree ex post. For example, UNCITRAL is an arm of the United Nations, from which it derives its authority. UNCITRAL’s work product includes conventions, model laws, and legislative guides. Likewise, the International Institute for the Unification of Private Law (UNIDROIT) is a law-making forum in which Member States that have acceded to the UNIDROIT statute work on harmonizing substantive private law issues. It focuses on technical (and less political) issues. Its work product includes conventions, principles, uniform laws, and guides. There are other governmental law-generating forums that address other issue areas.

24. Developing nations may seek membership in IOs in order to affect domestic policies. Edward D. Mansfield & Jon C. Pevehouse, Democratization and International Organizations, 60 INT’L ORG. 137, 138–39 (2006). For example, IO membership helps leaders to sustain domestic democratic reforms. Id. at 161. Mansfield and Pevehouse note that democratizing countries may find that membership in IOs can positively or negatively affect their reputation and the credibility of their leaders, depending on their actions within the organization. Id. at 141, 144, 161; see also Robert Howse, The Legitimacy of the World Trade Organization, in The Legitimacy of International Organizations, supra note 10, at 355, 356 (discussing how “[s]overeigns use international organizations as a means of legitimizing their own power,” but questioning who, in turn, legitimizes the IO).
29. Structure, Legislative Policy, and Working Methods of UNIDROIT, http://www.unidroit.org/english/presentation/main.htm (last visited Aug. 22, 2008) (noting that “UNIDROIT’s independent status amongst intergovernmental Organisations has enabled it to pursue working methods which have made it a particularly suitable forum for tackling more technical and correspondingly less political issues”).
30. Id.
Private Norm-Creating Forums. International, private norm-creating forums work in much the same way as private legislatures in the domestic setting; they generate rules or standards that parties choose to adopt if those parties think that the rules or standards will be useful. For example, the ICC sets standards that will facilitate business, should businesses choose to adopt them. Among its most notable successes are the Uniform Customs and Practice for Documentary Credits (UCP 500 and UCP 600), which banks routinely adopt to govern their letters of credit, and ICC INCOTERMS, which parties frequently adopt as a matter of course when engaging in the sale of goods.

Regulatory IOs and, to a lesser degree, governmental and private norm-creating forums, compete with each other for members, jurisdiction, and relevancy. Although one could contend that an IO has no independent persona beyond its constituents, one can see examples of IOs reaching beyond the original mandates established by their constituents to: (i) expand their jurisdiction, (ii) change their agendas in response to changed circumstances, and (iii) remain relevant. For example, the General Agreement on Tariffs and Trade/WTO expanded its role from a body primarily aimed at tariff reduction and enforcing rules of nondiscrimination to a body that, in some instances, promoted substantive

35. Heifer, Understanding Change, supra note 4, at 693.
harmonization. In a related vein, Laurence Helfer has explored the International Labor Organization’s (ILO) ongoing evolution over its ninety-year history, including the competition it faced from other institutions, such as the United Nations Economic and Social Council (ECOSOC). Whether these changes are the result of an institutional persona, or merely the result of nation-state desires, as IOs change they often compete with other IOs for jurisdiction over important issues. IOs pursue legitimacy because it helps them to compete, change, and remain relevant.

B. The Legitimacy Problem

To evaluate an IO’s legitimacy claims, we must define legitimacy. As Hurd explains, legitimacy is “an actor’s normative belief that a rule or institution ought to be obeyed.” It is intersubjective. IOs have legitimacy when other actors believe they do. As a result, one cannot truly hope to assess an IO’s legitimacy. Rather, at best, one can hope only to assess an IO’s legitimacy claim to ascertain whether States will likely perceive the IO and its work product as legitimate.

38. See Helfer, *Understanding Change*, supra note 4, at 693.
40. Hurd, *Legitimacy*, supra note 11, at 35–36 (noting that “[t]he power of social institutions in a society is largely a function of the legitimacy of those institutions”).
41. *Hurd, After Anarchy*, supra note 11, at 7. Alternatively, one could question the normative prescription more generally. See Buchanan & Keohane, *supra* note 14, at 412. Buchanan and Keohane reject the three traditional standards to judge the normative question, i.e., state consent, consent by democratic States, and global democracy, in favor of a more complex inquiry that mixes consent, justice democracy, morality, fairness, and procedure. *Id.* at 417–18.
42. *Hurd, After Anarchy*, supra note 11, at 7–8. Naturally, when one considers the relational quality of legitimacy, one must identify the parties. Whose subjective belief matters—States, citizens, or other IOs? *Id.* at 9.
43. *Id.* at 7 (describing legitimacy as a subjective quality “defined by the actor’s perception of the institution”).
44. *Id.* at 8 (characterizing legitimacy as a “difficult concept to study . . . [which] is not readily accessible to outside observers”).
45. *Id.* at 31 (noting that since legitimacy is not accessible by outside observers, it can only be measured “through an assessment of whether the audience in question acknowledges it”).
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IOs' legitimacy claims can be assessed by reference to their institutional functioning or to institutional accomplishments. This distinction has been drawn by Fritz Scharpf, and later by Robert Keohane and Joseph Nye. They describe these lenses as input and output legitimacy, or input and output criteria. Input legitimacy captures those legitimacy claims that focus on the means by which constituents participate in IOs, e.g., representation, inclusiveness, or process. Output legitimacy represents those paradigms that focus on substantive outcomes, e.g., trade liberalization or fairness, and whether goals set by the IOs themselves are reached, i.e., the efficacy of the IO. Not surprisingly, IOs seek both input and output legitimacy, even though the


48. Esty, supra note 46, at 1517.
pursuit of legitimacy through one set of criteria may undermine or forfeit legitimacy through another.9

1. Input Legitimacy

Representation. IOs enhance their legitimacy claims by developing norms in a representative manner. For example, the ILO is a representative body that has evolved over time. Its members include States that send delegates representing different constituencies, including worker and employer delegates. Where IOs work in a representative or democratic fashion, their norms reflect the will of the entities on whose behalf they act; they represent and are accountable to their constituents.51

Whether an IO is truly accountable depends on its relationship with its constituents. That relationship can be strained by a variety of factors. The constituents can be numerous, with diverse and sometimes conflicting interests. Even the interests of discrete groups will change over time. It is not always clear that the groups representing various interests are themselves governed by democratic norms. Both States and IOs

49. Block-Lieb & Halliday, Legitimation, supra note 1, at 45–46; Keohane & Nye, supra note 5, at 8 (quoting Harlan Cleveland as asking, “How do you get everyone into the action, and still get action?”).


51. ILO Constitution, supra note 50, arts. 1–3, 7.

52. Esty, supra note 46, at 1507 (discussing accountability). Esty explains that “democratic legitimacy depends on decision-makers being seen as acting on behalf of a community.” Id. at 1504.

53. Id. at 1505 (“The legitimacy of decisionmaking becomes more strained as the sense of community thins and the distance between those exercising authority and the public grows.”); see also Paul B. Stephen, The New International Law—Legitimacy, Accountability, Authority and Freedom in the New Global Order, 70 U. Colo. L. Rev. 1555, 1578 (1999).

54. Junne, supra note 10, at 192 (discussing global society).


56. Keohane & Nye, supra note 5, at 14. On the state level, many countries operate under dictatorial regimes and still participate in IOs—from King Abdullah bin Abdul Aziz Al Saud’s Saudi Arabia (a Member State of the United Nations, the IMF, the World Bank, and the Organization of Petroleum Exporting Countries) to Hu Jintao’s China (a permanent member of the U.N. Security Council and member of the Asia-Pacific Economic Cooperation, Shanghai Cooperation Organization, and the WTO). On the organizational level, see Michael T. Hayes, The New Group Universe, in INTEREST GROUP POLITICS 142 (Allan J. Cigler & Burdett Loomis eds.,
may be undemocratic or unrepresentative. And as IOs achieve greater integration, more questions concerning their law-making legitimacy arise.

Inclusion. Scholars have documented the organizational structure of UNCITRAL as an inclusive body. UNCITRAL employs working groups in specific issue areas. UNCITRAL seeks representativeness by constituting these groups with a broad base, including: official state delegations from a worldwide geographic and economic cross section equaling sixty States, observer States (all States are invited), and other IOs.

Inclusion as the basis for a legitimacy claim is a close cousin to representation, but there are some differences between the two. Inclusion, like representation, provides accountability. However, inclusion involves participation of non-electoral bodies. One might want to include the views of experts or of civil society, for example. Thus, IOs garner legitimacy through tactics of inclusion targeting States, citizens, NGOs, and other IOs.

Broad-based state membership does not necessarily equate with input legitimacy from either a representation or inclusion perspective. The WTO has near universal membership, and yet has been characterized under the "club model," in which only a limited number of States enjoy meaningful representation with respect to agenda setting. As discussed

1986) (stating that "[a]t a minimum, the policy views of group leaders often will diverge from those of their members"); see also Terry M. Moe, Toward a Broader View of Interest Groups, 43 J. Pol. 531 (1981); Paul A. Sabatier, Interest Group Membership and Organization: Multiple Theories, in The Politics of Interests 106 (Mark P. Petracca ed., 1992) (citing Terry M. Moe, The Organization of Interests (1980)).

57. See Junne, supra note 10, at 192–93 (discussing the United Nations and observing that even where an IO provides for one State, one vote, powerful nations can exert themselves over weaker States).

58. Eric Stein, International Integration and Democracy: No Love at First Sight, 95 Am. J. Int’l L. 489, 530 (2001) (confirming the “correlation between the level of integration (normative-institutional and empirical-social), on the one hand, and the intensity of the discourse on the democracy legitimacy deficit, on the other”).

59. Block-Lieb & Halliday, Legitimation, supra note 1, at 14, 72 (discussing inclusiveness).

60. UNCITRAL Guide, supra note 27, at 29–47.

61. Id. at 2–4.


63. Id. at 14 (discussing participation of non-governmental organizations (NGOs), professional, and transnational networks, as well as markets).

64. Id. at 13.

65. See James Thou Gathii, The High Stakes of WTO Reform, 104 Mich. L. Rev. 1361, 1362 (2006) (citing Keohane & Nye, supra note 5). The club model refers to institutions in which outsiders—those not involved with the issue area or the public generally—are not included in the work of the institution. Thus, for example, only trade ministers may do the work of the WTO. A club can have limited and restricted membership or be open to all. See
more fully below, Keohane and Nye's club model describes institutions that exclude outsiders—outsiders being those deemed "not concerned" with the particular issue area, e.g., only trade ministers are included in the "trade" club. But, the club model has also come to refer to institutions run by a small, discrete, homogenous group, typically from wealthy governments that limit transparency and participation.

Process. IO norms, rules, and standards can claim legitimacy because they result from fair procedures, deliberations, or discourse. Process imposes transparency, participation, and dialogue on institutions. Some process tools focus on the discourse among decision-makers or stakeholders as promoting fair and effective conduct. Among the process tools that promote legitimacy are rules for sound rulemaking, transparency rules, public participation mechanisms, controls against corruption, and power-sharing devices.

IOs strengthen legitimacy claims by adopting good procedures. Some call for IOs to adopt better procedures generally. Recent scholarship, in particular the Global Administrative Law Project, has examined the use of various "administrative law" mechanisms in global lawmaking. Few IOs adopt all of the available processes, but many IOs adopt some. The International Civil Aviation Organization's procedures for developing Standards and Recommended Practices involve a process that could be characterized as a type of notice and comment rulemaking. Recently, the World Bank sought comments on its anticorruption initiative, Strengthening Bank Group Engagement on Governance and

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generally Keohane & Nye, supra note 5, at 2 (explaining how governance regimes "operated as clubs of negotiators").
66. Id. at 4.
68. Esty, supra note 46, at 1520–21.
69. Id. at 1527–30.
70. Id. at 1530–34; Stephen, supra note 53, at 1580.
71. Esty, supra note 46, at 1530–34; Stephen, supra note 53, at 1580.
73. Id. at 1534–37.
74. Stewart, supra note 7, at 64 (discussing accountability of IOs).
Anticorruption. The International Atomic Energy Agency generally holds open meetings and allows other international organizations observer status. Likewise, the International Hydrographic Organization, which develops standards for navigational products, opens its proceedings to other IOs or national agencies, and has procedures for submitting issues to the general body.

Input legitimacy, whether it takes the form of representation, inclusion, or process, has its deficiencies. Representation does not necessarily equate to democracy. Although democracy is not an essential requirement of input legitimacy, commentators sometimes focus on democratic deficits among IOs. Unfortunately, the democratic paradigm simply does not translate to the international setting. Even where one requires only some form of representation or inclusion, as opposed to democratic representation, representative institutions do not necessarily represent all interests equally. Interests change, and some constituents have more voice than others. Purportedly democratic or representative IOs are subject to capture by special interests.

80. Esty, supra note 46, at 1532 (“In the supranational governance context, the ability to participate in a meaningful way in policymaking is not evenly distributed across countries or even across interests within nations.”).
83. See supra note 54 and accompanying text.
84. See supra notes 56–57 and accompanying text.
85. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, supra note 3, at 245–46 (comparing international lawmaking to national administrative law systems); Krisch & Kingsbury, supra note 76, at 4 (discussing capture).
Institutions that claim only to be inclusive are subject to the criticism that inclusion does not equal representation. 86 Also, institutions that do seek legitimacy through representation or inclusion may find it difficult to get things done. 87 For example, law-generating forums that seek consensus on model instruments may find those instruments unadopted. 88 Thus, representation or inclusion can undermine effectiveness. 89

Process can undermine effectiveness as well. Some processes impose difficult political costs on States. 90 Transparency, for example, may generally be a healthy attribute for an IO, but it may also cause domestic repercussions for Member States of that organization. 91 Moreover, while one can hope that procedurally fair institutions will, as a result of these attributes, generate useful and fair norms, none of these attributes assures a substantively fair or just law or any law at all. 92 Additionally, process can slow progress. 93 For example, notice and comment rulemaking ideally leads to dialogue that leads to better rules, 94 but it also takes time and has costs. 95 There are numerous examples of rulemaking in the United States that have spanned years and sometimes decades. 96 Process can be

86. Stewart, supra note 7, at 71 (discussing substantive criticisms of the international regulatory process as “dominated by well-organized economic interests and powerful countries”).
87. Keohane & Nye, supra note 5, at 8.
88. See infra notes 185–187 and accompanying text.
89. Keohane & Nye, supra note 5, at 17 (using the WTO to illustrate that increased participation “by groups threatened by losses” relating to certain negotiations may “foster deadlock”).
90. Krisch & Kingsbury, supra note 76, at 8.
91. Id.
92. See Zaring, supra note 31, at 580 (referring specifically to the Basel Committee, “it is difficult to draw normatively rich conclusions about the substantive outcomes of procedurally legitimate decisions”).
93. Stewart, supra note 7, at 81 (discussing the rationale of the parity minus approach, “excessive legalization and procedural formality will compromise confidentiality in international negotiations and otherwise impair the ability of the executive to conclude and promptly implement international agreements”).
abused. Special interests can delay and obfuscate by using process. Analytical requirements and review of rulemaking can lead to ossification.

2. Output Legitimacy

Alternatively, IOs can claim legitimacy to develop norms based on their accomplishments. Results-based, or output, legitimacy focuses on good outcomes. Assessing what is a "good" outcome requires a normative position and might include determining whether a law, standard, or rule is fair, just, well ordered, universally accepted, or supportive of a particular goal, e.g., trade liberalization. In short, output legitimacy questions whether the IO is effective at generating useful norms and having them implemented. While compliance is not the sole basis for output criteria, assessing output criteria can be a bit circular because legitimacy aids compliance. Parties are more likely to comply with norms they perceive as legitimate. Thus, the perception of legitimacy leads to greater compliance (effectiveness), and in turn stronger legitimacy claims. Effectiveness also involves developing useful norms in the first place. Effective norm development can result from IOs' expertise or a limited constituency with convergent interests and/or limited focus and mandate. Effective norm development may also be fostered by inclusion, process, deliberation, and discourse, or any of the attributes that


98. Michael E. Levine & Jennifer L. Forrence, Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis, 6 J.L. ECON. & ORG. 167, 169–70 (1990) (explaining capture theory as viewing politicians and bureaucrats as susceptible to incentives offered by individual interests or firms). In one example, the cigarette industry was able to insinuate its representatives into the WHO process for its Framework Convention on Tobacco, leading to claims that the process had been abused. See infra note 227 and accompanying text.


100. Esty, supra note 46, at 1517 (discussing the nature of results-based legitimacy as being focused on generating social welfare gains). One can also claim legitimacy stemming from one's work product as effective, neutral, or expert (e.g., output legitimacy, neutral, or communal legitimacy). See Alvarez, International Organizations: Then and Now, supra note 46, at 332 (discussing legitimacy and customary international law).


103. See, e.g., Jean-Marc Coicaud, Conclusion: International Organizations, the Evolution of International Politics and Legitimacy, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS, supra note 10, at 521 (discussing limited mandate, focus, and values).
constitute the input paradigms. But the focus here is distinct—the focus is on the ends and not the means.

Assessing the ends necessarily requires a normative judgment about what is and is not desirable. An even distribution of trade benefits, for example, may not be an appropriate end, if the normative goal is to maximize the returns from trade overall without regard to how those returns are distributed. If fairness is a goal, then trade liberalization may be sacrificed. As discussed more fully below, almost any legitimacy claim based on outcome can be challenged by challenging its normative premise. Not surprisingly, given the importance of the normative prescription, it is easier to come to a normative conclusion if the group reaching that conclusion is an exclusive club organization, rather than a representative or inclusive one. As Keohane and Nye explain, club organizations are "dominated by states . . . [and] . . . largely invisible to their various publics. They operate[] as clubs of negotiators, often technically trained, bargaining with one another within specific issue areas." Clubs support legitimacy claims for themselves and for their norms through their effectiveness. The WTO, the International Monetary Fund (IMF), the World Bank, the Organization for Economic Co-operation and Development (OECD), and the Basel Banking Committee have all been characterized as "clubs." These organizations have a normative agenda that is agreed to by the parties involved, and they remain effective by exploiting their expertise, limiting access, limiting transparency, and minimizing the diversity of interests represented.

Although IOs that claim output legitimacy justify themselves by their accomplishments, their accomplishments may be well served by means that also serve input legitimacy. An expert organization can seek broader representation in order to enhance its expertise. "The OECD is, primarily, an exclusive club whose members produce two-thirds of the world's goods and services . . . [and] provides a private setting for

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104. Keohane, Contingent Legitimacy, supra note 102, at 5 (noting that output legitimacy depends on input legitimacy).
106. Sungjoon Cho, Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma, 5 Chi. J. INT'L L. 625, 645–47 (2005) (noting that under the theory of comparative advantage, more developed countries have an easier task of complying with trade standards than do lesser developed countries and that there is a need to link free trade with social regulation).
107. See infra note 117 and accompanying text.
109. Id.
110. Id. at 4–5.
111. See Esty, supra note 46, at 1552 (discussing increased legitimacy of the WHO by incorporating outside experts and input from external sources regarding its Tobacco Treaty).
wealthy industrialized governments to share experiences, identify issues of common concern, and coordinate domestic and international policies. The OECD relies on its expertise to achieve desired outcomes and, as a general rule, does not engage civil society. But, as James Salzman explains, in the OECD’s Mutual Acceptance of Data (MAD) program, “member countries and non-member countries agree[d] to accept non-clinical data from one another.” Data tests were developed with the aid of a host of non-state experts, NGOs, and other members of civil society. Salzman explains that efforts to incorporate the knowledge of non-club experts made the MAD program exceptionally successful and legitimate.

Output legitimacy has its deficiencies. First, the normative goal that defines effectiveness is assumed. A challenge to that normative agenda is a challenge to legitimacy. Second, it is not necessarily inclusive or representative (let alone democratic). Evaluating the effectiveness of organizations comprised of members with convergent views seems to diminish the role of participation in the evaluative process. Effective organizations may also believe that too much process impedes efficient

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114. Id. at 200.

115. Id. at 202.

116. Id. at 202–03. Nevertheless, the OECD’s outreach efforts met failure in another case. Commentators cite the lack of developing country participation as one factor in the failure of the Multilateral Agreement on Investment. Esty, supra note 46, at 1549; Salzman, supra note 112, at 197.

117. See Daniel Bodansky, The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?, 93 Am. J. Int’l L. 596, 597 (1999). Bodansky notes that the expert model of legitimacy rests on some assumptions: “first, the decisions in question have better and worse answers; second, certain people possess special knowledge (expertise) about what those answers are; and third, we (the non-experts) can identify the people with this special knowledge.” Id. at 620.

118. Michael Barnett & Martha Finnemore, Rules for the World: International Organizations in Global Politics 172 (2005). IOs pursuing liberal ideals are at times “unabashedly undemocratic.” Id. Barnett and Finnemore state, “Harmonizing the substantively liberal goals of these organizations with procedures that, if not democratic, at least provide some accountability and representation will be an ongoing task that is essential to the long term legitimacy of global governance.” Id.

119. Cf. Stewart, supra note 7, at 70 (noting criticisms of club organizations such as the WTO and the IMF that claim these organizations impose “measures generated by secret processes without opportunity for participation and review by affected domestic interests”).
functioning, and, therefore, might sacrifice process as well.\textsuperscript{120} Finally, the output legitimacy model can also lead to false legitimacy claims.\textsuperscript{121} Perceived expertise can supply an undeserved veneer of output legitimacy. For example, the IMF relies on output legitimacy, and, in some cases, that model supports the organization’s legitimacy claims, even when the IMF is not actually effective. Michael Barnett and Martha Finnemore have explained how IMF failures at economic stabilization for borrower countries led to the expansion of IMF activities and authority over those economies.\textsuperscript{122} They explain, “[T]he logic of Fund models suggests that program failures often result from omitting parts of the economy from the stabilization program, thereby justifying more expansive conditionality in the future.”\textsuperscript{123} They suggest, however, that such expansion raises normative questions.\textsuperscript{124} More specifically, “as analytic frameworks draw them into spheres of economic and social life increasingly distant from their core macroeconomic competencies, the Fund’s staff’s authority as experts diminishes and the possibility for poor policy rises.”\textsuperscript{125}

3. Challenges to Secure Input and Output Legitimacy

IOs face a number of challenges when trying to make strong legitimacy claims. First, IOs confront an input/output paradox:\textsuperscript{126} securing one form of legitimacy criteria sometimes comes at the cost of other criteria. As discussed above, one potential weakness of each approach is that it sacrifices the other.\textsuperscript{127} Secondly, despite the tensions between output and input legitimacy, there are a variety of pressures on IOs that make it important for them to secure both input and output criteria. Globalization demands effective institutions that can address complex problems.\textsuperscript{128} IOs compete with each other to solve these problems, in part by claiming to be more legitimate.\textsuperscript{129} In addition, the ascendancy of democratic norms

\textsuperscript{120} However, as Robert Keohane explains, process actually is necessary for output legitimacy. See generally Keohane, Contingent Legitimacy, supra note 102.
\textsuperscript{121} See infra notes 301–308 and accompanying text.
\textsuperscript{122} Barnett & Finnemore, supra note 118, at 71.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 72.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 168–69; Block-Lieb & Halliday, Legitimation, supra note 1, at 2 (“The paradox is straight-forward: international organizations must be legitimate to be effective; but effectiveness is subverted by the very process of legitimation.”); Hurd, Legitimacy, supra note 11, at 35; Keohane & Nye, supra note 5, at 12 (discussing the paradox of democracy in the international setting).
\textsuperscript{127} See supra notes 81–98, 117–125 and accompanying text.
\textsuperscript{129} IOs compete with each other by trying to obtain greater compliance. Compliance is secured in part by securing greater legitimacy. See Franck, supra note 8, at 24.
pressures IOs to seek input legitimacy. Finally, legitimacy is necessary for compliance; thus, to be effective, IOs must be perceived as legitimate.

Although IOs may try to achieve both input and output legitimacy, it is not difficult to understand how one basis of legitimacy claims might come at the cost of the other. Output legitimacy may suffer when IOs attempt to improve input legitimacy; consensus in developing law becomes more difficult to achieve as the number of decision-makers increases. Ultimately, one can be left with a decision that is so vague, aspirational, or littered with exceptions that it is of very limited applicability. Likewise, process and procedures slow down lawmaking, resulting in less responsive, more costly laws. Conversely, output legitimacy may come at the cost of input legitimacy. The hesitancy to reach out more broadly may stem from the idea that representation or process may undermine norm-generating effectiveness. It is more difficult to reach consensus where greater interests are represented.

Nevertheless, globalization requires IOs to craft international solutions to complex problems. Businesspeople throughout the world must engage in commerce, even though different and sometimes conflicting domestic legal regimes govern their transactions. The social, environmental, developmental, and human costs of globalization need to be addressed, given that countries embrace vastly different values and approaches. Whether it is establishing a harmonized securitization

130. Keohane, Contingent Legitimacy, supra note 102, at 11; Raustiala & Victor, supra note 128, at 277–78 (discussing the alternative to a single regime governing a particular topic—a “regime complex,” comprised of several interconnected elemental regimes).
131. Hurd, After Anarchy, supra note 11, at 35 (noting that legitimacy, coercion, and self-interest are modes of securing compliance); see also Franck, supra note 8, at 24.
133. Krisch & Kingsbury, supra note 76, at 4.
134. See Block-Lieb & Halliday, Legitimation, supra note 1, at 45–46 (noting the danger of “bland generalities”).
135. Id. at 2.
136. Id. at 15–16 (discussing “tension between legitimation and effective rulemaking,” resulting from increased representation).
137. Id. at 45–46.
139. Raustiala & Victor, supra note 128, at 295 (discussing elemental regimes in regime complexes).
system or coordinating the use of pesticides in agricultural products, globalization challenges IOs to come up with solutions in spite of different backgrounds, approaches, and values.\footnote{141}

IOs compete with other IOs to address these problems.\footnote{142} For example, both WIPO and the WTO regulate intellectual property.\footnote{143} The Cartagena Protocol to the Convention on Biological Diversity and the SPS both, to some extent, affect standards relating to genetically modified organisms.\footnote{144} Several IOs have grappled with issues of international investments.\footnote{145} The World Bank and the OECD have addressed corruption.\footnote{146} UNCTIRAL and the World Bank have tackled international

\footnote{141. Cf. Raustiala & Victor, supra note 128, at 295 (noting that rules from one regime or forum may challenge rules from another).}

\footnote{142. Coicaud, supra note 103, at 522; cf. Jeffrey Wah-Teck Chan, Principal Senior State Counsel, Sing., Allocation of Work Among Formulating Agencies, Address at Model Law for Global Commerce: Congress to Celebrate the Fortieth Annual Session of UNCTIRAL, para. 17 (July 9, 2007), available at http://www.uncitral.org/pdf/english/congress/Chan.pdf (discussing contributing factors to coordination problems and explaining that institutions evolve and develop a life of their own); Alvarez, International Organizations: Then and Now, supra note 46, at 328 (discussing the problems at the “joints [of] regime complexes”); see also Helfer, Mediating, supra note 39, at 134–35 (explaining how competition affects IO behavior). Kal Raustiala and David G. Victor refer to “elemental regimes”—individual regimes that overlap with other regimes in terms of “scope, subject and time”—as forming what they refer to as “regime complexes.” They encourage analyzing these complexes systematically across various fields. Raustiala & Victor, supra note 128, at 279.}


insolvency. The ILO has competed with UNESCO. Where one IO fails to take up the law-making mantle, there are other organizations ready to use their cloak of authority and expand their mandate. Sometimes these regimes have reached beyond what their framers intended. Naturally, as IOs approach conflict, one may begin again to question which IO may legitimately act, and which norms should prevail in the case of a conflict. As a result, IOs try to offer some comparative advantage over other alternatives. That advantage may come in the form of a stronger legitimacy claim, whether based on input criteria, output criteria, or, ideally, both.

Effective IOs, which generate useful norms and secure compliance with those norms, will be seen as more legitimate than those that do not. But effectiveness is also linked to input criteria. The rise of democratic norms worldwide suggests that democratic values influence societal perceptions concerning the duty to obey norms. Keohane makes the point that the ascendancy of democracy in the twenty-first century requires that multilateral institutions respond to civil society and the larger interests they represent in order to be effective.
longer rely on a statist construction of legitimacy in order to secure their normative goals. \textsuperscript{157} Thus, despite the input/output paradox, IOs must secure both input and output legitimacy.

One can predict that as globalization continues, democracy ascends, and IO competition persists, IOs will increase their efforts to secure input and output legitimacy in order to address global challenges. \textsuperscript{158} One way they do so is by forming alliances in which they share resources and develop norms with other IOs. These alliances are made possible by linkage and accommodation, mechanisms that have both positive and negative consequences.

II. INSTITUTIONAL ALLIANCES

IOs use linkage and accommodation to form alliances from which they derive legitimacy. Linkage and accommodation allow IOs to partner, coordinate, endorse, and share expertise in order to answer the challenges of globalization and improve their legitimacy claims. The legitimacy gained from these alliances is derivative, as each IO imbues the alliance, and to some extent the other IO, with its input and/or output criteria. And the very act of allying can strengthen claims of input legitimacy through inclusion. The act of allying may also lead to better norm generation and compliance. These benefits are neither certain nor costless. Whether the alliance should be credited with derivative legitimacy depends on relationships between the IOs and how each IO functions within the alliance.

A. Linkage and Accommodation as Institutional Alliances

Linkage and accommodation describe instances in which regimes or forums incorporate, either explicitly or implicitly, the rules, decisions, or norms of another regime or forum. Linkage involves the influence of one IO's norms, decisions, or rules on another IO in an affirmative way. \textsuperscript{159} Others have already set forth the different linkage types and rationales in great detail. \textsuperscript{160} For example, an IO might affirmatively consider the ex-

\textsuperscript{157} Keohane, Contingent Legitimacy, supra note 102, at 3–6. Keohane specifically suggests that an organization should meet the standards of “inclusiveness, decisiveness and epistemic reliability.” Id. at 15.

\textsuperscript{158} See id. (discussing the institutional prerequisites to legitimacy); see also Block-Lieb & Halliday, Legitimation, supra note 1, at 6 (discussing the “crippling dissensus in global bodies”).


\textsuperscript{160} Id. at 16–24.
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pertise of another IO and reference that expertise in making a decision. Accommodation is similar to linkage in that it occurs when one regime implicitly acknowledges the norms, rules, or decisions of another; it allows regimes to avoid conflicts. It may take the form of a clear demarcation of boundaries, so that one IO does not contradict another, or it may involve an effort to avoid future conflicts through the use of savings clauses. Thus, for example, where the drafters of the Cartagena Protocol crafted a precautionary principle akin to that of the WTO's SPS Agreement, those drafters accommodated the WTO. The Protocol does not invoke the SPS Agreement, but it parrots the language used there, implicitly accommodating the values in that agreement.

Linkage and accommodation can operate in tandem, allies regimes or forums and providing new strategic opportunities for regimes and the constituencies that they affect. Others have already detailed some examples of connections in the intellectual property field, including those between the WTO and the World Intellectual Property Organization (WIPO). José Alvarez has documented linkage involving the World Bank setting norms by cross-referencing other arrangements and regimes. Alvarez details the “technocratic regulation” of the World Bank Guidelines:

The Guidelines even incorporate by reference some of the UN’s products, such as the [U.N.] Convention on Biological Diversity, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, the FAO Guidelines for Packaging and Storage of Pesticides, and programmatic instruments

161. For example, the WTO’s SPS Agreement cross-references the Codex. See infra notes 259–264 and accompanying text.
163. See, e.g., id. at 120 (discussing the Cartagena Protocol’s accommodation of the SPS Agreement).
164. Raustiala & Victor, supra note 128, at 297, 301 (citing boundary setting and savings clauses as examples of conflict-avoiding measures).
165. Kelly, Power, Linkage and Accommodation, supra note 162, at 120.
166. Id. at 114–16.
167. See, e.g., Marney L. Cheek, The Limits of Informal Regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Regime, 33 GEO. WASH. INT’L L. REV. 277 (2001); Helfer, Mediating, supra note 39, at 132–33 (discussing, inter alia, applications for observer status at the WTO and WIPO, the formal 1995 agreement between WIPO and the WTO to share information, “provide technical and legal assistance to developing countries that are members only of the other organization,” and “delegate[] to WIPO certain administrative functions”); Leebron, supra note 159, at 19–20 (discussing regime borrowing between the WTO and WIPO).
generated from UN policy conferences such as Agenda 21 of the 1995 Global Program of Action for the Protection of the Marine Environment from Land-based Activities. By requiring that the Bank, and, to the extent the terms are incorporated in its loans, its borrowers, comply with such instruments, the Bank strengthens compliance with both soft and hard law produced by it and other IOs. The World Bank Guidelines, no less than some treaties, are a mechanism to "harden" a dense network of otherwise "soft law" norms or treaties whose terms are vague or that have drawn few parties.  

Cross-references as a means of linkage are ubiquitous. But, they are only one type of relationship among IOs. The depth and scope of the various types of relationships depend in part on the reason for each particular alliance and the particular linkage or accommodation employed to support that alliance.  

The reasons for alliances can be complex. IOs may ally because of normative, strategic, or sanctioning reasons. Linkage or accommodation may occur as a reaction to IO power, for strategic reasons, or as a reaction to IO linkage. Neither linkage nor accommodation is intrinsically bad or good. They are tools. Arguably, linkage is explicit while accommodation is implicit, and thus accommodation may more easily obfuscate debate, but it is not necessary that it does so. Finally, the quest for legitimacy may also explain linkage and accommodation, as these tools allow IOs to borrow or derive legitimacy from other IOs.  

B. A Typology of Linkage and Accommodation  

Alliances among organizations occur as a result of linkage and accommodation, creating derivative legitimacy for the alliance and its resulting norms. These alliances may improve the resulting law, making it more representative, inclusive, procedurally fair, or effective. Alternatively, these alliances may simply lead to the perception of more representation, inclusion, process, or effectiveness. As legitimacy is a subjective belief, it is not possible to objectively assess the validity of that belief. However, one can assess an organization's or law's claim to legitimacy using objective criteria. Thus, an objective framework can be used to assess legitimacy claims that result in subjective perceptions of

169. *Id.* (citations omitted).
170. *Id.*
173. *Id.* at 116–17.
legitimacy. In order to choose a framework, I create a typology of alliances so as to examine each type and pinpoint any problems it might raise for a legitimacy analysis. On a continuum from greater to lesser integration, the types are as follows: partnering, coordination, endorsements, and resource sharing.

1. Partnering

Sometimes organizations form partnerships. The IOs form a partnership alliance in order to work together on a law-making project. Partnering can be a deep or shallow commitment. Partnerships can involve both linkage and accommodation. The alliance will link the IOs together in their approach and will accommodate each IO’s values where possible. Partnership implies that the partners have worked through a problem together, using process and dialogue as part of a joint effort. Partnership also suggests that the partners have considered each other’s views, although the partners may—or may not—exclude the views of others. Partnerships may or may not be effective.

Norms developed in partnerships derive legitimacy in several ways. A partnership alliance may lead to more effective norm generation, or it may be more inclusive. The partnership may claim the legitimacy of its constituent IOs so that others will perceive its norms as more legitimate. Two examples of partnerships are described below.

**UNCITRAL and the World Bank.** UNCITRAL is a governmental norm-generating forum. It develops law in various forms (conventions, model laws, legislative guides) that States choose whether to adopt. States are involved in the drafting of UNCITRAL products but do not commit *ex ante* to adopt the products. The perceived legitimacy of these products affects whether States ultimately adopt them.

UNCITRAL’s claims to legitimacy stem from both input and output legitimacy criteria. Established by the General Assembly to harmonize and unify the law of international trade, UNCITRAL members are representative of the world’s geographic and economic groups. In its legislative activities it relies on a framework of inclusiveness.

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174. For another example of a partnership not listed here, see the description of the relationship between the WTO and WIPO in Helfer, *Mediating, supra* note 39, at 132–33.
175. UNCITRAL GUIDE, *supra* note 27, at 1–2, 13.
176. *Id.* at 1, 4–5.
178. UNCITRAL GUIDE, *supra* note 27, at 1, 2–3.
operates through several working groups composed of experts in the relevant substantive fields and delegates from the Member States. Other organizations partner with UNCITRAL, committing to the substantive project.\textsuperscript{180}

Both UNCITRAL and its commentators have touted the forum’s effectiveness and its alliances with other organizations.\textsuperscript{181} As a norm-generating forum, UNCITRAL’s effectiveness and the effectiveness of the partnerships it forms can be assessed based on whether States actually adopt its norms, standards, or rules. For example, a number of UNCITRAL’s products have enjoyed considerable success. The United Nations Convention on the Carriage of Goods by Sea (1978) has thirty-two signatories,\textsuperscript{182} and the United Nations Convention on Contracts for the International Sale of Goods (1980) has seventy signatories.\textsuperscript{183} The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) has been a tremendous success, with 142 signatories.\textsuperscript{184}

Other projects, while highly regarded, have been less successful. Those that have failed to enter into force or gain widespread acceptance include the United Nations Convention on International Bills of Exchange and International Promissory Notes (1988), which has five States parties (short of the ten States parties required for entry into force);\textsuperscript{185} and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991), which requires five signatories but has only four.\textsuperscript{186} UNCITRAL’s model laws have also enjoyed mixed results.\textsuperscript{187}

\textsuperscript{180} UNCITRAL GUIDE, supra note 27, at 10, para. 24.

\textsuperscript{181} Id. at 10 (discussing UNCITRAL’s coordinating role); Block-Lieb & Halliday, Legitimation, supra note 1, at 14–15 (discussing UNCITRAL’s technical and representative expertise).


\textsuperscript{183} Id.


\textsuperscript{185} Status of Conventions and Model Law, supra note 182, para. 4.

\textsuperscript{186} Id.

\textsuperscript{187} See id. paras. 5–14.
Although each UNCITRAL project is unique, in its *Legislative Guide on Insolvency* (*Guide*), UNCITRAL worked with many States and international actors as partners. The *Guide*, for example, draws on earlier World Bank works to set key objectives. In turn, the World Bank has derived legitimacy from UNCITRAL by accommodating the *Guide* and linking its *Principles for Effective Insolvency and Creditor Rights Systems* (*Principles*) to UNCITRAL. To promote the *Principles*, the World Bank partnered with UNCITRAL and the organizations participating in the *Guide* to ensure consistency between the *Principles* and the *Guide*.

*The United Nations Forum on Forests and the Collaborative Partnership on Forests.* The Collaborative Partnership on Forests (CPF), a unique network of fourteen IOs, was established on the recommendation of the U.N. ECOSOC. The partnership is part of the Food and Agriculture Organization (FAO) in the United Nations and provides expertise to the U.N. Forum on Forests (UNFF). It also works to support and implement specific proposals for action established by the Intergovernmental Panel on Forests (IPF) and the Intergovernmental Forum on Forests (IFF).

The success of the CPF hinges on the success of the UNFF. Although the IPF and IFF were somewhat successful, both initiatives occurred prior to the establishment of the CPF. Indeed, the CPF formed in response to IPF and IFF proposals to develop a legal framework on forests. Its efforts have been less than successful, and despite the size and seeming inclusiveness of this partnership, it faces serious criticism.
Some claim that the CPF “has done little to advance implementation of international commitments on forests at the local and national levels.”94 Debate continues concerning the adoption of a convention on forests and has delayed the project until at least 2016.95 Critics also complain of a lack of transparency at the UNFF and of a process that prevents meaningful participation by all interested parties.96 Others complain of an absence of real dialogue or debate at the sessions in that it consists merely of delegates repeating what they have been instructed to say by their respective governments.97 Some question whether the UNFF can have any possible impact on forests.98

One NGO, Forests and the European Union Resource Network (FERN),99 reported on the failings of the UNFF, noting that the process could not even be evaluated due to insufficient data resulting from UNFF’s failures over the years.200 The report points out that “although an evaluation questionnaire was sent out, . . . only the EU and fourteen other countries (including two EU countries) sent their response back to the UNFF secretariat, thereby ruling out any meaningful evaluation.”201 FERN believes that UNFF has grossly failed in its objectives of monitoring and reporting. According to the report, only eight of the 191 countries (about four percent of the membership) had reported to the secretariat on progress made on forest management.202 There was also a

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94. Forest Peoples Programme, supra note 193.
96. See FERN, FERN Special Report: Live or Let Die? An Evaluation of the Fifth Session of the United Nations Forum on Forests 1 (July 2005) (prepared by Leontien Krul), available at http://www.fern.org/media/documents/document_1582_1583.pdf [hereinafter FERN Special Report]. The FERN report criticizes the participatory process at UNFF. FERN places particular blame for the failure at UNFF 5 on countries from the South, naming Cuba and Venezuela as the countries that have blocked meaningful integration of the topics discussed in Multi-Stakeholder Dialogue into the main sessions of UNFF. Id. at 2 (stating also that “[t]he Major Groups [other than States] could not speak during any text negotiations but only at the plenary—and then only after all Member States had spoken”). In other words, besides not having a direct say in the negotiations of texts, Major Groups would speak after most delegates had already left the room. The FERN report concludes that the UNFF is instead being used by some countries as a shield against revealing the lack of progress made on promoting SFM. Id.
98. UNFF—Did Anyone Notice?, supra note 195.
200. FERN Special Report, supra note 196, at 1.
201. Id.
202. Id. at 2.
noticeable lack of response from heavily forested countries in the South. Of the eight States that responded, six were European.\textsuperscript{203}

Recently, the UNFF has made some progress by adopting a \textit{Non-legally Binding Instrument on All Types of Forests}.\textsuperscript{204} The instrument sets forth principles to which States commit themselves to promote sustainable forest management.\textsuperscript{205} Nevertheless, critics complain that the instrument is weak,\textsuperscript{206} ignores the views and values of indigenous peoples, and lacks means of implementation and funding.\textsuperscript{207}

2. Coordination

Coordination involves a consideration of what the other IO has done, or can do, to generate or promote its norms. Thus, IOs with vastly different agendas might coordinate by making accommodations for each other. The alliance would recognize that each IO has an agenda or set of values and try to coordinate activities so that one does not interfere with the other. In this way, the alliance derives input legitimacy from each IO and will likely avoid conflicts and be more effective. Alternatively, where the IOs have similar values or agendas, the alliance might coordinate to take advantage of efficiencies, synergies, and leverage that come from working together. In such cases, the alliance becomes more effective while making each of the IOs more effective, garnering derivative legitimacy for itself, and strengthening the legitimacy claims of the constituent IOs.

\textit{The WHO and the WTO}. The World Health Organization (WHO) is the U.N. organization addressing issues relating to global public health. It sets standards and norms, conducts research, and provides technical assistance to States. There are 193 Member States that have accepted the WHO Constitution.\textsuperscript{208} The WHO's Health Assembly is comprised of all

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item See Andrei Laletin et al., UNFF Adopts \ldots the Status Quo, \textit{Forest Cover} (Global Forest Coalition, Amsterdam, Neth.), June 2007, at 8–9, available at http://www.wrm.org.uy/GFC/cover/ForestCover22.pdf.
\item Constitution of the World Health Organization, July 22, 1946, 62 Stat. 6349, 14 U.N.T.S. 185, as amended and reprinted in \textit{Basic Documents} 1 (47th ed. 2007) [hereinafter WHO Constitution]. The Health Assembly was established to carry out the work of the WHO. \textit{Id.} art. 9. It meets annually and its functions include, \textit{inter alia}, formulating WHO policies, establishing committees, identifying health issues of which the Executive Board and Director-General may inform Member States, and considering recommendations made by other U.N. organs that have any "bearing on health." \textit{Id.} art. 18. The Health Assembly is also authorized
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member nations and its Executive Board is constitutionally required to be geographically representative.\textsuperscript{209} WHO staff are experts who assist member nations in their negotiations of conventions. The WHO is empowered to "act as the directing and co-ordinating authority on international health work."\textsuperscript{210} It performs a wide variety of informational, research, supportive, and standard-setting activity.\textsuperscript{211} Among its standard-setting powers, the WHO has the power to issue binding regulations, although it does not often exercise that power.\textsuperscript{212} Daniel Esty explains that this hesitancy reflects staff concerns about "the legitimacy of an aggressive global governance role for the WHO."\textsuperscript{213}

One recent WHO coordination effort revealed an attempt by the WHO to improve its legitimacy claims. The WHO "recognized the need to expand the legitimacy of [its] governance activities" when it sought to regulate tobacco.\textsuperscript{214} As Esty explains, the WHO's efforts to conclude the Framework Convention on Tobacco Control (FCTC)\textsuperscript{215} demonstrated an instance in which the WHO relied in part on process legitimacy and in particular on "good governance and the deployment of the tools of administrative law."\textsuperscript{216} The organization did this by engaging the public and other institutions to partner in its work.\textsuperscript{217} Its efforts included reaching out to the WTO and the World Bank.\textsuperscript{218} While it may go too far to categorize the WHO's engagement as accommodation, it does open the door to allow for accommodation of the norms, values, and rules from these

\textsuperscript{209} "to adopt conventions or agreements with respect to any matter within the competence of the Organization." \textit{Id.} art. 19.

\textsuperscript{210} \textit{Id.} art. 24.

\textsuperscript{211} \textit{Id.} art. 2(a).


\textsuperscript{213} WHO Constitution, \textit{supra} note 208, art. 21; \textit{see also} Esty, \textit{supra} note 46, at 1550–51 (noting that the WHO typically uses non-binding resolutions).

\textsuperscript{214} Esty, \textit{supra} note 46, at 1551.

\textsuperscript{215} \textit{Id.} at 1552.


\textsuperscript{217} Esty, \textit{supra} note 46, at 1552.

\textsuperscript{218} Id. Esty stated that

[a}s they moved to legislate limits on tobacco globally, the WHO staff developed draft provisions, posted these on the WHO website, held public hearings, convened open dialogues with NGOs and private sector representatives, accepted policy papers and other inputs from external sources, and encouraged debate by posting these materials on the Internet.

\textit{Id.}

\textsuperscript{218} Esty noted that this type of dialogue was atypical for the WHO, which seems to rely more on expertise and less on process and the use of administrative law tools to promote its legitimacy. \textit{Id.} at 1552–53 (explaining the WHO's focus on a culture of expertise at the expense of the "global public health policymaking process").
other IOs. In fact, a 2002 joint report took note of the various trade rules and specific trade cases in which restrictions on tobacco could or did cause a conflict with WTO rules.\textsuperscript{219} The report endorsed efforts to reduce smoking worldwide so long as those efforts did not conflict with trade rules.\textsuperscript{220}

Subsequently, the report noted that the WHO’s then current draft of the FCTC proposed that restrictions on tobacco “shall not constitute a means of arbitrary or unjustifiable discrimination on international trade.”\textsuperscript{221} The articulated standard accommodated WTO norms, which call for measures not imposing “arbitrary or unjustifiable discrimination” on trade.\textsuperscript{222} This language, however, did not make it into the Convention.\textsuperscript{223} The report identified WTO agreements that could be implicated by measures to reduce tobacco usage, including the Technical Barriers to Trade Agreement, the Agreement on Agriculture, and the Agreement on Trade Related Aspects of Intellectual Property.\textsuperscript{224} Nevertheless, as Joost Pauwelyn explains, attempts to situate the WTO Agreements as inherently superior to the FCTC were eventually thwarted when language acknowledging the obligations under prior treaties was deleted in favor of relying on the general rules of treaty interpretation found in the Vienna Convention on the Law of Treaties.\textsuperscript{225}

Indeed, the WHO faced criticism for procedures that allowed special interests, including the cigarette companies, to influence the FCTC.\textsuperscript{226} An expert report on the influence of tobacco companies revealed that the industry used other U.N. organizations, as well as state delegates, to influence the WHO process more generally.\textsuperscript{227}

\textsuperscript{220.} Id. (“[R]educing tariffs and eliminating non-tariff barriers to trade [] does not prevent governments applying non-discriminatory internal taxes and certain other measures which they may consider appropriate to safeguard public health.”).
\textsuperscript{221.} Id. ¶ 138.
\textsuperscript{224.} Joint Study, supra note 219, at 75–76.
\textsuperscript{225.} Pauwelyn, WTO Compassion, supra note 223, at 1201–02.
\textsuperscript{226.} Esty, supra note 46, at 1552–53.
The World Bank and the WTO. The World Bank is not a law-generating institution, but, as a proponent of certain rules and practices, it plays a critical role in promoting international legal and non-legal norms. In 1996, the World Bank and the WTO entered into an agreement to "consult and exchange views on all matters of common interest,"\(^\text{228}\) allow each organization to observe each other’s meetings,\(^\text{229}\) and allow access to the other’s research and databases.\(^\text{230}\) The World Bank has a series of programs that accommodate and support WTO norms. A number of these programs involve partnerships with the WTO relating to agriculture, including *Trade Liberalization, Rural Poverty, and the Environment; Agriculture and the New Trade Agenda in the WTO Negotiations; Standards and Trade Development Facility; and Integrated Framework for Trade Related Technical Assistance.*\(^\text{231}\) These projects accommodate trade liberalization norms and increase the World Bank’s relevance to developing countries seeking to operate more effectively within the WTO framework.

One manifestation of the coordination between the WTO and the Bank is the *Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries (Integrated Framework).*\(^\text{232}\) The *Integrated Framework* brings together a number of agencies (United Nations Conference on Trade and Development (UNCTAD), the WTO, the World Bank, the IMF, and the United Nations Development Program (UNDP)) in order to help developing countries with economic growth. It was introduced by the WTO Singapore Ministerial Conference in 1996. The *Integrated Framework* involves a diagnostic process whereby a team of experts evaluates a country’s economic competitiveness.\(^\text{233}\) They then develop an action plan that “spells out a set of policy recommendations..."\(^\text{234}\)


\(^{229}\) Id. ¶ 4(a).


\(^{232}\) Id.

\(^{233}\) Id. at http://www.integratedframework.org/diagphase.htm (last visited Aug. 21, 2008) [hereinafter *Integrated Framework: Implementation: Diagnostic Phase*].
and priority technical assistance needs." Thus, for example, the action plan for Ethiopia focused primarily on moving forward with WTO succession. The action matrix for Tanzania suggests broadening the tax base so as to reduce import tariffs. Despite its laudable goals, some have characterized the Integrated Framework as a failure.

**The ILO and the Bretton Woods Institutions.** The ILO has pursued an ongoing campaign to work with the Bretton Woods Institutions in order to integrate its “decent work agenda” into the activities of these institutions. It sought and achieved entrance as an observer institution in the governance structure of the Bretton Woods Institutions and has sought a “progressive movement towards greater policy integration.” The ILO has also sought to infuse its policies concerning core labor standards on a state level by its coordination with these institutions. One can see the potential for the ILO to harden soft law if, for example, the World Bank or the IMF were to incorporate ILO standards into their work with specific countries.

The ILO claims that this incorporation is actually happening and that there is a “policy convergence” between the ILO and the Bretton Woods Institutions. In particular, the ILO has noted that through its participation and dialogue with the IMF and the World Bank, these institutions have incorporated ILO comments in their final work products. These comments further ILO legal norms articulated in its

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234. Id. at http://www.integratedframework.org/ifcountries.htm (last visited Aug. 21, 2008).
238. The Bretton Woods Institutions are the IMF and the World Bank and were established in 1944 to promote “a postwar economic order based on notions of consensual decision-making and cooperation in the realm of trade and economic relations.” What are the Bretton Woods Institutions? (Bretton Woods Project), http://www.brettonwoodsproject.org/item.shtml?x=320747 (last visited Oct. 15, 2008). Additionally, the General Agreement on Tariffs and Trade, which eventually became the WTO, grew out of the failed attempt at Bretton Woods to establish the International Trade Organization. Id.
240. Id.
241. Id.
242. Id.
243. Id. para. 5. The Report notes that
conventions and declarations, such as the Declaration of Fundamental Principles and Rights at Work, and reflect an ongoing dialogue. As a result of this dialogue, these Bretton Woods Institutions have linked themselves to the ILO principles and norms.

The ILO has been less successful in linking itself to the WTO, or even getting it to accommodate ILO legal norms. The WTO resisted ILO linkage in both the Singapore Declaration and the Doha Declaration. This attempted linkage illustrates an attempt to regime shift—to move the implementation of labor norms to a new forum in order to promote compliance. One can see why the ILO might want to link with other institutions. If the ILO can coordinate with them, it may be able to promote compliance with its norms through those institutions.

3. Endorsements

Endorsements involve IOs touting each other’s work products as worthwhile. Where the endorsed product is soft law, it can be hardened into binding law through an endorsement by particular IOs. The en-

[1]The IMF’s twice-yearly World Economic Outlook (WEO) is a significant component of the IMFC’s agenda, and since 1995 the ILO has had the opportunity to provide its views to the IMF secretariat on the draft reports. From the outset, the impact of ILO inputs was generally perceived to have been less than anticipated. Nevertheless, some welcome changes were noted in the draft of the April WEO, including acknowledgement of the need to promote domestic ownership of the reform agenda through the closer involvement of unions, employers’ organizations and other representatives of civil society in its design.

Id. The Report continues,

Also welcome was the more cautious stance taken on capital account liberalization, with poor and some middle-income countries being advised to delay this until they are better able to cope with the greater risk involved. The statements at the IMFC provide an opportunity to reinforce the ILO’s main messages, and it is interesting to note that the ILO’s comments on the April 2000 draft WEO had a more substantive impact on the final document than in the past.

Id.


248. ILO, ILO Relations with Bretton Woods Institutions, supra note 239, at 3.
endorsed IO (and its norms) derives legitimacy from the endorsement, but so does the endorsing IO. The endorsing IO proclaims its legitimacy to endorse. The resulting alliance has derivative legitimacy cumulated from each of the IOs.

**UNCITRAL and Private Norm-Generating Forums.** UNCITRAL has linked itself to private norm-generating forums by endorsing their products. It has "endorsed" the work of the Institute of International Banking Law and Practice, which promulgated the International Standby Practices (ISP98) as well as the ICC's Uniform Customs and Practices for Documentary Credits (UCP 500). In its endorsements, UNCITRAL bestows legitimacy on both institutions, while at the same time enhancing its own legitimacy as the arbiter of sound commercial practices for international trade. The ICC has also entered the endorsement game by adopting ISP98 and endorsing the UNCITRAL Convention on Independent Guarantees and Stand-by Letters of Credit.


252. Alvarez, International Organizations as Law-Makers, supra note 3, at 220. Alvarez also gives the example of the Convention on the Law of the Sea (UNCLOS), which incorporates by reference "generally accepted" international "rules, standards, regulations, procedures and/or practices" ... effectively transform[ing] a number of [International Maritime Organization] IMO's codes, guidelines, regulations, and recommendations ... into binding norms, even for States that may not have approved of these standards within the context of the IMO but have been parties to the Law of the Sea Convention.
rural poverty by promoting sound agricultural policies in investment.\textsuperscript{253} In this project, the Bank endorses the FAO's Code of Conduct as part of a plan to pursue investments in agriculture.\textsuperscript{254} Here, the Bank affirmatively links its efforts to conform national policy to these standards, transforming these soft law rules into hard law obligations.

Alvarez explains the codification of the soft law of the FAO (as well as other institutions) into hard law through the World Bank Guidelines, which Bank staff use when assessing various projects and drafting loan agreements.\textsuperscript{255} He argues, "The World Bank Guidelines, no less than some treaties, are a mechanism to 'harden' a dense network of otherwise 'soft law' norms or treaties whose terms are vague or that have drawn few parties."\textsuperscript{256} As Alvarez explains, the Bank's legitimacy claim with respect to these guidelines rests more on process values than representative values, as the Guidelines are not adopted through a political process, but are often administratively adopted with comment from various interested parties.\textsuperscript{257} But, when these Guidelines are adopted within a particular loan agreement, they become binding, at the very least as a matter of contract law.\textsuperscript{258}

The WTO and Various Standard-Setting Organizations. Similar to the World Bank's cross-referencing of the FAO, the WTO's SPS Agreement cross-references and validates several standards set by IOs. WTO Members who enact SPS measures that are based on the Codex Alimentarius Commission, the International Office of Epizootics, and the International Plant Protection Convention fall into a safe harbor within the SPS.\textsuperscript{259} WTO law thus links itself to these standards and accommodates the values that they reflect.\textsuperscript{260}

The WTO endorsements have transformed soft law into hard law. The WTO invocation of the Codex Alimentarius, for example, has taken a voluntary code concerning food safety and made it the safe

\textsuperscript{253} Id. at 220.
\textsuperscript{256} Alvarez, International Organizations as Law-Makers, supra note 3, at 236–37.
\textsuperscript{257} Id. at 237.
\textsuperscript{258} Id. at 236.
\textsuperscript{259} Id.
\textsuperscript{260} SPS Agreement, supra note 2, art. 3.4.
\textsuperscript{261} The Codex Alimentarius Commission is a subsidiary organization of the WHO and the FAO. Codex Alimentarius, http://www.codexalimentarius.net (last visited Sept. 11, 2008).
harbor provision under the SPS Agreement. By doing so, the WTO has all but assured that countries will conform to that standard. This has put new pressures on the Codex. One commentator has questioned whether the input criteria that supported the Codex as a voluntary code can support the Codex’s new stature:

Inequities between the various participants are perhaps the most important failing. In order for there to be true deliberation, equality between participants is essential. There are a number of important disparities between the parties in the Codex process. First, developing countries are less able to participate in Codex deliberations due to a lack of resources. In addition, states have more power than non-state actors, limiting the ability of interests that are not effectively represented by states to be heard. Finally, within the non-state groups present at the Codex, there is a bias towards industry groups, with many fewer active consumer group participants.

Differences in participation rates between developed and developing countries also lead to inequities in input. Nevertheless, the Codex has been hardened into a standard that will apply to all WTO member countries alike.

4. Resource Sharing

Resource sharing includes sharing data and personnel. It may or may not lead to global lawmaking. Nonetheless, the very act of working together signals that each IO (and its norms) has legitimacy. In this regard it is an implicit co-endorsement that allows the IOs—and the norms that they generate—to claim greater legitimacy.

The OECD and the WHO. The OECD both develops norms and promotes the legal norms developed by other organizations. Not surprisingly, the OECD works with development banks such as the Asian Development Bank, the World Bank, and the Inter-American

262. Id. at 781 (discussing the pressure for legitimacy of the Codex, given its new position in the international legal framework).
263. Id. at 783.
264. Id. (citing BRUCE TRAILL ET AL., REPORT OF THE EVALUATION OF THE CODEX ALIMENTARIUS AND OTHER FAO AND WHO FOOD STANDARDS WORK (2002)).
266. See OECD Convention on Combating Bribery, supra note 146.
Development Bank, but in 2005, it prioritized its relationship with the WHO. The WHO/OECD alliance involves sharing data on health statistics, mortality rates, and diseases in OECD member countries, systemic terminology in health care and biotechnology, food safety, and chemicals management. OECD information and links are provided on the WHO Health Evidence Network webpage, "which gives rapid access to reliable health information and evidence."

The WHO and the WTO. In 2002, the WHO and the WTO published a joint study, The WTO Agreements & Public Health. The report does more than share information. It details a list of linkages between the activities, concerns, and norms of both regimes and identifies areas in which the IOs can share input and achieve coordination. This example shows that resource sharing can be part of a more in-depth alliance, such as coordination or partnership.

III. DERIVATIVE LEGITIMACY AND ITS BENEFITS AND COSTS

Achieving greater legitimacy through alliances, whether through partnership, coordination, endorsement, or simple information and resource sharing, is both desirable and problematic. Although alliances may create more legitimate laws, they may also lead to false legitimacy claims. And, they may marginalize those who do not participate in the alliances and can result in entrenchment. These alliances also offer new regime and forum shifting strategies, which are factors to consider when evaluating these norms. Finally, alliances may provide new opportunities for abuse or manipulation. In this part, I detail these consequences. In Part IV, I suggest that good procedures will promote more legitimate norms and mitigate negative consequences.

A. Legitimate Institutions and Norms

Properly managed, linkage and accommodation can enhance the legitimacy of IOs, alliances, and global lawmaker. Alliances among IOs can enable resulting norms to claim both output and input legitimacy criteria, even though either organization might lack one or the

268. Id.
271. Id. at 57–137.
272. See supra notes 208–213 and accompanying text.
other. Alliances formed through linkage and accommodation might also enable output and input legitimacy claims that might otherwise not be possible because one or both of the IOs has reached beyond its original mandate. The very act of allying strengthens claims based on inclusion and makes it more likely that the IOs will be effective.

Linkage and accommodation may enable an alliance to claim legitimacy criteria lacking in one of the members of the alliance. For example, an IO partnership between a club model IO and a representative one might be able to claim input legitimacy. Representation by proxy provides at least some input legitimacy. And, the very act of partnership promotes inclusion. Likewise, if output legitimacy requires effective functioning based on some normative yardstick, then it can be helpful to broker consensus or ally with an already functioning effective institution. The World Bank/UNCITRAL partnership on insolvency serves as an example. UNCITRAL can make strong representation and inclusion claims. And, although it develops some remarkably successful instruments, others are less than successful. The World Bank, however, although operating as a club, has a great deal of success in effectively implementing norms. Thus, the World Bank/UNCITRAL partnership on insolvency can claim input legitimacy and output legitimacy.

Linkage and accommodation strengthen legitimacy claims strained by IO evolution. Joost Pauwelyn notes that the WTO, for example, now lacks both input and output legitimacy because its effectiveness in trade liberalization has waned, and, although nominally representative, it operates more as a club. Linkage and accommodation could help it be more effective. They could also improve its inclusiveness. Thus, even though the WTO has stalled in efforts to generate greater trade liberalization, it has had some success in its alliance with the World

274. Keohane, Contingent Legitimacy, supra note 102, at 13 (discussing criteria for comparative legitimacy and stating that “multilateralism per se . . . confers legitimacy” because it is more inclusive).
275. Leebron, supra note 159, at 11–16 (discussing strategic linkage).
276. See supra notes 175–190 and accompanying text.
277. See supra notes 178–179 and accompanying text.
278. See supra notes 185–187 and accompanying text.
Bank to embed its liberal trade values within developing countries.\textsuperscript{281} The WTO endorsement of soft law standards, such as the Codex, has furthered WTO harmonization efforts.\textsuperscript{282} Whether such success is desirable, it nevertheless gives the WTO a stronger claim to output legitimacy. Coordination efforts could provide the WTO with an opportunity to strengthen input legitimacy, in particular, through inclusiveness and process. For example, although the WTO has allowed a number of organizations to be observers,\textsuperscript{283} and it has coordinated with others,\textsuperscript{284} it has resisted partnerships that might result in stronger process or inclusion claims, such as a more in-depth alliance with the ILO.\textsuperscript{285}

Law-making alliances may also enhance legitimacy by the very process of allying, creating more innovation and more responsive approaches to difficult problems. Bringing together different constituencies to work together in a new setting may generate new thoughts, new perspectives, and more effective functioning. For example, UNCITRAL's \textit{Legislative Guide on Insolvency} drew a panoply of experts from different arenas to work on a difficult problem.\textsuperscript{286} It may also reveal the benefits of participation, access, transparency, and generally the payoffs from typical administrative law tools. Such benefits may spur more inclusion. As a result, participation may beget still more participation.\textsuperscript{287}

The process of allying can also result in more holistic and efficient efforts. Norm-generating alliances reduce duplication and avoid unnecc-
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necessary inconsistencies.\textsuperscript{288} For example, in the area of international trade law, there are a number of agencies working on related—even the same—issues.\textsuperscript{289} Informal collaboration is sometimes imperfect.\textsuperscript{290} Alliances can improve cooperation and increase efficiencies.\textsuperscript{291} The \textit{Integrated Framework} serves as an example of a multi-layered approach to a complicated problem that provides a number of efficiencies.\textsuperscript{292}

Despite the efficiencies that alliances create, linkage and accommodation have their costs. In some instances, alliances undermine legitimacy. Alliances can be used to solidify positions and to deflect calls for greater transparency. For example, as discussed above, the coordination efforts between the WTO and the World Bank have resulted in an \textit{Integrated Framework} involving not only these organizations but also UNCTAD, the IMF, and the UNDP.\textsuperscript{293} The goal of the \textit{Integrated Framework} is to help developing countries with economic growth. A team of experts evaluates a country's economic competitiveness and develops an action plan.\textsuperscript{294} The \textit{Integrated Framework} is a sensible, holistic approach to development, and it would seem that the norms that result from \textit{Integrated Framework} recommendations and action plans would be entitled to a significant amount of legitimacy. But not all voices are represented in the \textit{Integrated Framework}. The \textit{Integrated Framework} lacks a systemic labor or environmental partner.\textsuperscript{295} Although the ILO participates in individual projects, it is not a partner to the \textit{Integrated Framework} in the same way as the IMF or the WTO.\textsuperscript{296} The ILO has been vigilant in trying to be part of the policy discussions that underlie the \textit{Integrated Framework}.\textsuperscript{297} Omitting labor concerns or norms from an action plan for development marginalizes those norms and can also undermine effectiveness.\textsuperscript{298}

\textsuperscript{288} Raustiala & Victor, \textit{supra} note 128, at 300–01 (discussing the push for consistencies among elemental regimes).

\textsuperscript{289} Wah-Teck Chan, \textit{supra} note 142, para. 15.

\textsuperscript{290} \textit{Id.}

\textsuperscript{291} \textit{Id.} para. 16.

\textsuperscript{292} See \textit{supra} notes 232–236 and accompanying text. Whether this effort has been successful is a matter of debate. See McGill, \textit{supra} note 237, at 399.


\textsuperscript{294} \textit{Integrated Framework: Implementation: Diagnostic Phase, supra} note 233.

\textsuperscript{295} See Prowse, \textit{supra} note 293 at 83, 85.

\textsuperscript{296} \textit{Integrated Framework: Implementation: Diagnostic Phase, supra} note 233.


\textsuperscript{298} The failure to include a broader array of voices actually harmed the initial efforts of the \textit{Integrated Framework}. Susan Prowse reports that the \textit{Integrated Framework} failed at the country level, at least initially, because there was no country ownership beyond the trade ministries. See Prowse, \textit{supra} note 293, at 83, 85.
Ultimately, IOs' alliances addressing difficult problems may lead to more effective norms. By forming alliances, IOs collect more input, more information, and more expertise to solve difficult problems. They also garner a greater number of constituents invested in the final product such that compliance becomes more likely, and, thus, the IO may be more effective. Ultimately, the legitimacy of these alliances will depend on whether they are seen as effective and perceived as inclusive and process oriented.

B. False Legitimacy Claims

While on the whole international norm-generating alliances are positive developments, one of their great dangers is that they cloak themselves, or their constituent IOs, with undeserved derivative legitimacy. Not every alliance that makes a claim to greater legitimacy will be entitled to it. The alliance may be one of name only, lacking substance. In other words, States or civil society might perceive the alliance or the constituents as having a greater claim to input or output legitimacy than can be objectively justified.

False legitimacy claims may arise because the alliance uses the act of allying to mask its deficiencies. The CPF is a good example of an alliance that seems to claim more legitimacy than it should. Although it is billed as an inclusive and representative organization, there have been challenges to its representativeness. Some claim that it has ghettoized indigenous peoples and civil society. One can also question whether it is in fact effective. Only recently has the UNFF, which the CPF supports, been able to move forward by producing a nonbinding instrument. And, some have claimed that this instrument is not much of a step forward.

Similarly, the coordination between the WTO and the WHO with respect to the Framework Convention on Tobacco masks the normative

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299. Block-Lieb & Halliday, Legitimation, supra note 1, at 13–14 (discussing expert authority and, in particular, UNCITRAL's incorporation of experts and other organizations in formulating the Legislative Guide).
300. Hurd, After Anarchy, supra note 11, at 12 (noting that legitimacy promotes compliance); Helfer, Mediating, supra note 39, at 136 (noting that review by many organizations could produce better outcomes because it provides an opportunity for multiple responses to policies, thus preventing any particular "organization from prematurely locking in an equilibrium that is sub-optimal or biased toward particular interest groups").
303. See UNFF Fails Indigenous Peoples Again, supra note 207.
304. See supra notes 200–203 and accompanying text.
305. U.N. Forum on Forests, supra note 204.
306. See supra notes 199–207 and accompanying text.
conflict between the two IOs. In one way, the coordination that the WHO invited with the WTO was essential. An FCTC that challenged the foundational trading rules and the WTO would be seriously handicapped. On the other hand, the Joint Report issued by the WHO and the WTO does not seem to resolve any of the potential normative conflicts between the organizations. Any claim by either institution that it is more legitimate as a result of the coordination does not seem warranted.

False legitimacy claims are the most pernicious problem for derivative legitimacy because they obscure the underlying failures of the alliance and its members. False legitimacy claims mask failure, thus not only failing to correct an IO's deficiency (the lack of input criteria for example), but also obscuring that failure, rendering it less likely to be addressed in the future.

C. Marginalization

Alliances marginalize those not included in the alliance. Elsewhere I have raised the possibility that accommodation, although desirable in some respects, might obscure real debate over substantive normative differences. As Barnett and Finnemore point out, "IOs promote a particular, mostly liberal, moral vision in world politics, and determining this moral vision is itself an act of power in the most fundamental sense." These alliances may strengthen the resulting IOs and their influence on States. Now, perhaps that is the point. But, views that are external to these IOs may not find a forum.

UNCITRAL, for example, was established in part to provide a forum for developing countries to participate in the harmonization of international trade law. But as UNCITRAL forms alliances with other organizations, those organizations obtain influence in UNCITRAL's


308. Pauwelyn, WTO Compassion, supra note 223, at 1201-02 (discussing the negotiations between the WHO and the WTO). Alternatively, false legitimacy claims may stem from a nominal integration of one of the IOs rather than a substantive one.

309. Raustiala and Victor note how in regime complexes, negotiators will attempt to avoid conflicts by "demarcating clear boundaries" and negotiating "savings clauses." Raustiala & Victor, supra note 128, at 297.

310. See Kelly, Power, Linkage and Accommodation, supra note 162, at 113-27 (discussing potential conflict between the Cartagena Protocol and the SPS); accord Cho, supra note 106, at 639 (discussing the tension between trade and social regulation).

311. Barnett & Finnemore, supra note 118, at 165 (discussing Sen's criticisms that institutionalizing may silence most of the world's population).

312. Wah-Teck Chan, supra note 142, para. 7.
norm-setting agenda and process. Such influence is not an evil in itself—it is exactly what is desired by the alliance. That influence raises the question of whether other voices—voices that may otherwise be un- or underrepresented—are marginalized by the alliance. The failure of the Integrated Framework to include labor interests in a meaningful way exemplifies the problem of marginalization.

Linkage and accommodation can also blunt the force of counter-regime norms that regime and forum shifting promotes. Others have written about regime shifting strategies and their potential for generating counter-regime norms. Linkage and accommodation dilute norms and undermine the creation of counter-regime norms. David Leebron, for example, has discussed how linkages between regimes may dilute the normative framework of the regimes, and the danger that one regime’s policies will overshadow another’s. As discussed below, the CPF is an interesting example of forum shifting that has pushed non-state actors out of forest negotiations, even though it was those same actors whose call for action created the CPF in the first place.

The dilution of counter-regime norms is compounded by the strengthening of alliance-supported norms. The convergence of multiple IOs in the same issue area strengthens the power of the norms that result. Michael Barr and Geoffrey Miller document what they call “nested regimes” in assessing the legitimacy of the Basel Banking Committee:

The process of accession to the WTO financial services agreement and concomitant efforts to ensure liberalization under the agreement, resolution of currency and debt crises, IMF and World Bank policy prescriptions and lending conditions, all interact with Basel adoption in the developing world. The Basel standards, while voluntary in principle, are effectively embedded in a range of other policies and market practices that make adoption in some form or another difficult to resist for developing countries.

314. Developing countries may feel market pressures to adopt a standard that they had little say in developing. See Barr & Miller, supra note 9, at 17 (discussing market pressure to adopt Basel Banking Committee guidelines).
315. See supra Part II.B.
317. Kelly, Power, Linkage and Accommodation, supra note 162, at 127–28 (concluding on the necessity of evaluating accommodation models because of their propensity to produce undesirable effects).
318. Leebron, supra note 159, at 25 (giving an example of the possibility of including labor rights within the trade regime).
319. Id. at 25–26. Leebron also suggests that “linkage will sometimes create an additional source of regime instability [because] . . . it may be that no regime can be stronger or more stable than the least stable of those regimes.” Id. at 26.
320. See infra notes 322–346 and accompanying text.
nations. Because these other policy and market regimes give added force to the Basel Committee’s hortatory pronouncements, the extent and nature of global administrative law mechanisms designed to enhance the legitimacy and accountability of the Basel Committee’s processes need to take account of these extra-Basel inputs. 321

Thus, alliances that promote efficiencies and increase leverage are more likely to succeed in implementing their norms. They are also more likely to succeed in marginalizing views that are inconsistent with those norms. 322

Finally, marginalization results from unification and harmonization. Some voices get pushed out. 323 Brokeder consensus may involve replacing accountability with efficiency or expertise. 324 For example, one commentator has suggested that although the Codex is relatively good about participation from non-state interests, the interest of consumer groups “to be effectively heard in consultations with national delegations to the Codex may be impaired by a lack of domestic political influence.” 325 Business groups have much greater access. 326 Such disparate treatment may be unavoidable. Nevertheless, the WTO/SPS endorsement of the Codex and the resulting conversion of the Codex from soft to hard law magnifies the importance of that marginalization. 327 Arguably, such marginalization is an unavoidable by-product of harmonization. That is the whole point of harmonization, i.e., pushing out the non-conforming. But, marginalization is a cost to be considered, and it is more likely to result from alliances that involve club-like IOs and lack procedural mechanisms to include non-members in the law-making process.

D. Entrenchment

Related to the problem of marginalization is the problem of entrenchment. Entrenchment results in frozen rules that are unresponsive to changed circumstances or norms. 328 Alliances bring more parties together in support of a particular norm. As more invest in that norm or rule, it

321. Barr & Miller, supra note 9, at 41.
322. Id. at 20 (discussing “lock-in” created by harmonization).
324. Id.
325. Livermore, supra note 261, at 785.
326. Id.
327. See id. at 781–83.
may become more difficult to have that norm or rule change or evolve.\textsuperscript{329} States reconstruct their interests through participation in these IOs and the alliances that they form.\textsuperscript{330} Once actors invest in IOs, there is always a danger that the law will become unresponsive and immutable\textsuperscript{331} and, ultimately, less effective.\textsuperscript{332}

One can see the relationship between marginalization and entrenchment by again turning to the Codex. The SPS/WTO endorsement of the Codex causes national regulators to hold more closely to their pre-established domestic preferences in Codex negotiations, fearing that whichever standard is adopted will become the \textit{de facto} world standard by virtue of the WTO/SPS endorsement.\textsuperscript{333} As Michael Livermore points out, such reticence cuts off serious deliberation and debate.\textsuperscript{334}

As discussed above, alliances solidify positions and render law-making institutions less open to new voices, new ideas, and new norms. IOs and alliances, or networks of IOs, are just as susceptible to entrenchment as national agencies or legislatures.\textsuperscript{335} While coordination between the World Bank and the WTO may produce efficiencies, it also entrenches the liberal trade values that those institutions espouse.\textsuperscript{336} Entrenchment, like marginalization, may be unavoidable. But, unlike marginalization, it really is not the point of harmonization, and therefore is all the more problematic.

\textbf{E. Regime and Forum Shifting Strategies}

Regime and forum shifting involves "an attempt to alter the \textit{status quo ante} by moving treaty negotiations, law-making initiatives, or standard-setting activities from one international venue to another."\textsuperscript{337} Regime and forum shifting, in my view, are neither good nor bad; they

\begin{itemize}
  \item \textsuperscript{329} For a discussion of harmonization and public choice critics of the Basel process, see Barr & Miller, \textit{supra} note 9, at 20.
  \item \textsuperscript{330} See Alvarez, \textit{International Organizations: Then and Now}, \textit{supra} note 46, at 338.
  \item \textsuperscript{331} Raustiala & Victor, \textit{supra} note 128, at 296 (noting path dependence in regime complexes at the meso scale).
  \item \textsuperscript{332} \textit{Cf}. Barr & Miller, \textit{supra} note 9, at 26.
  \item \textsuperscript{333} Livermore, \textit{supra} note 261, at 786.
  \item \textsuperscript{334} \textit{Id.} at 786–87.
  \item \textsuperscript{335} Kenneth Anderson, \textit{Squaring The Circle? Reconciling Sovereignty and Global Governance through Global Government Networks: A New World Order}, 118 \textit{Harv. L. Rev.} 1255, 1276 (2005) (reviewing \textit{Anne-Marie Slaughter, A New World Order} (2004)) ("National governments, international agencies, and large corporations are all subject to bureaucratic ossification . . . ").
  \item \textsuperscript{336} Pablo Zapatero, \textit{Searching for Coherence in Global Economic Policymaking}, 24 \textit{Penn. St. Int'l L. Rev.} 595, 622–24 (2006) (discussing how the partnering of the WTO, the IMF, and the World Bank has furthered their goal of trade liberalization, but at the same time has discriminated against the economic policies of other institutions that "inevitably produce a particularly restricted phenomenon of path dependence in their activities").
  \item \textsuperscript{337} Helfer, \textit{Regime Shifting}, \textit{supra} note 247, at 53.
\end{itemize}
are strategies that can be put to different purposes. Actors engage in regime or forum shifting as a strategy to affect IO agendas and functioning. They also tend to forum shop to best suit their own interests when initiating a change in the rules. Alliances formed through linkage and accommodation in order to facilitate lawmaking open new pathways to regime shifting.

These new alliances provide a new forum to which to shift. It might be a new venue in which to promote counter-regime norms. So, for example, it may be possible for labor rights advocates to insinuate themselves into World Bank agendas on development with the World Bank alliances. However, alliances may also operate to thwart regime or forum shifting attempts. Because these alliances broker consensus, they may force participants to compromise and close out dissent. Likewise, where the WHO accommodates trade concerns, those who would want to use trade devices to promote health concerns are shut out.

One can imagine the situation in which alliances are formed in order to displace the jurisdiction of other law-creating IOs. The CPF provides an interesting example of forum shifting and partnerships. It was after the Rio Earth Summit in 1992 that civil society and indigenous peoples petitioned the U.N. Commission on Sustainable Development (CSD) to take up forest issues that went unimplemented after Rio. The result, as discussed above, was the IPF and then the IFF, both of which begat the IAF and the resulting UNFF and the CPF. Some claim that the CPF and the UNFF have ghettoized civil society and indigenous peoples and relegated their views as far inferior to States' positions on forests. State control of the UNFF process has muted the concerns of non-state stakeholders in this new forum, even though it was these stakeholders that instigated the creation of the forum in the first place.
F. The Potential for Abuse

Alliances offer creative parties an opportunity to abuse the process that creates the alliances. Abuses may come in the form of manipulation or capture, placing one stakeholder’s agenda, or the agenda of a set of stakeholders, over another’s. Capture also can lead to other problems already discussed, including marginalization, entrenchment, and false claims of legitimacy.

Much as a national administrative agency is subject to capture, the alliances themselves can become tools that the alliance members utilize in order to obtain their policy objectives. The WHO process of inclusion and coordination reveals a compelling example. The tobacco industry took advantage of the WHO philosophy of inclusion to undermine its efforts to curb tobacco use. In addition to lobbying and public relations efforts to discredit the WHO and change its agenda, the tobacco industry cultivated relationships with WHO staff and employees, sometimes offering them future employment. The industry also tried to use its financial and political power to influence WHO budgets. The WHO report documenting this abuse deals with tobacco industry actions directed at the WHO generally. But, one can see how these tactics could easily be applied to an alliance. Alliances provide multiple points of entry for those wishing to capture an agenda.

Alliances that involve club organizations may be more subject to capture. Club-like organizations can be nontransparent, and, thus, more

348. See Levine & Forrence, supra note 98, at 169.
349. Allyn Lise Taylor, Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health, 18 Am. J. Int’l & Med. 301, 339 (1992) (noting that “[public international] organizations are also subject to significant external influence from individuals, nations, non-governmental organizations, and other international organizations”); see also Raustiala & Victor, supra note 128, at 301–02 (noting the potential for abuse). Raustiala and Victor state,

While efforts at achieving consistency drive much of the action within a regime complex, the PGR case illustrates that States may also attempt to create what we term strategic inconsistency. Cognizant that the growing legalization of world politics means that legal conflicts focus efforts at solutions, States at times attempt to force change by explicitly crafting rules in one elemental regime that are incompatible with those of another.

Id.

351. Id. at 32.
352. Id. at 37.
353. Id.
354. Helfer, Regime Shifting, supra note 247, at 8–9 (explaining that linkages create a need for international bodies to manage complex policy issues, which leads to regime shifting and creates considerable room for groups of States and NGOs to maneuver so as to maximize their own interests).
subject to efforts to capture. 355 Barr and Miller give the Basel Committee as an example of a club organization that is particularly vulnerable to capture. 356 Where alliances exercise leverage to secure implementation, the problem of capture and "regulatory imperialism" is particularly acute. Thus, for example, the coordination between the WTO and the World Bank leaves little room for non-liberal trade norms. Wealthy countries develop the trading rules, and wealthy countries can impose them through the World Bank. 358 Regardless of whether they are good rules, developing countries may have little choice but to accept them. 359 Weaker groups, as opposed to States, might be pushed aside as well. Business groups, for example, may have more access than consumer groups to alliances and international organizations. 360 Alliances compound the access problem because they reduce transparency and increase the power of the underlying organizations.

IV. Evaluating Derivative Legitimacy Claims Through Input (Process) Criteria

Where an alliance maintains good procedures, it will be more likely that its derivative legitimacy claims will be objectively warranted. 361 Derivative legitimacy results from the relationship between the IOs. That relationship may or may not foster more legitimacy. The relationship may cause the alliance to have mixed, contentious, or simply blurred objectives, making effectiveness an illusive measure. Or, the alliance may compound the problems of representation and inclusion. Process addresses these issues by promoting accountability and transparency. 362 Good process ensures that the relationship is meaningful, open, and fruitful. 363 Although process does not solve all problems (and indeed it

355. See, e.g., Barr & Miller, supra note 9, at 19 (discussing the Basel Committee).
356. Id. at 19–20 (noting criticisms of the Basel Committee).
357. Id. at 20 (stating that "[m]ost powerful economic nations meet to develop rules that will affect a broad range of countries excluded from the process of developing the rules").
358. See supra notes 228–235 and accompanying text.
359. See Barr & Miller, supra note 9, at 20.
360. Stewart, supra note 7, at 87.
361. The process criteria discussed here can be situated in the larger global administrative law project. See, e.g., id. at 74–75.
362. Esty, supra note 46, at 1522 (discussing how process can give structure to policymaking, further accountability, and encourage dialogue, thereby enhancing legitimacy and effectiveness).
363. Id. at 1521 (noting that "[a] thoughtfully structured rulemaking process will clarify underlying issues, bring facts to bear, promote careful analysis of policy options, and engage interested parties in a political dialogue").
creates some), it best supports strong legitimacy claims for law-making alliances. Moreover, process is better suited than other metrics because it can alleviate some of the particular dangers raised in these alliances.

A. How Good Procedures Strengthen Derivative Legitimacy Claims

Even if one might have adopted a particular output or input framework for assessing the legitimacy claims of IOs, it is not clear that such a framework would necessarily be suitable to objectively assess derivative legitimacy claims spawned by these alliances. A derivative legitimacy claim should be assessed by examining the relationship of the members because it is from that relationship that legitimacy derives. When examining that relationship, we should assess whether it employs good procedures in order to evaluate whether its legitimacy claims are objectively justified. Process promotes the substantive exchange of ideas, facilitates accountability and transparency, ameliorates negative externalities of alliances, and can be tailored for each particular alliance.

A process analysis best suits derivation legitimacy claims because it reveals the workings of the relationship. We can see the exchange of views and whether inclusion is undercut by the exclusion of others or whether it was designed to shift debate to an ineffective path. Process can reveal whether the relationship entrenches the parties and creates path-dependence, resulting in less effectiveness. The ideal procedure needed will depend on the alliance, but a suitable derivative legitimacy framework uses procedure to ensure an open and effective relationship between the IOs. More specifically, when thinking about the most suitable derivative legitimacy framework, we should consider the typology of alliances and the potential relational queries that each raises.

1. Partnering

Where partnering means a real dialogue concerning various alternatives and the norms that they represent, crediting the resulting norms with the other IOs' input legitimacy seems genuine. In such cases, it seems more likely that the dialogue will lead to the most effective alternatives available. The partnership between UNCITRAL and the World Bank in drafting the Guide seemed to involve a real airing of views and an attempt to represent a wide variety of interests.365

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364. See Stewart, supra note 7, at 68 (explaining how transparency can increase costs and impede successful negotiations).

365. See supra notes 175–193 and accompanying text. Nevertheless, even this partnership can be criticized because it resulted in a hybrid document, which some might claim avoided the truly difficult questions.
However, it may be that “partnerships” are merely nominal entities. One could question, for example, the work of the Collaborative Partnership on Forests. Although, this alliance claims to be a partnership and claims input legitimacy in terms of inclusion and representation, arguably it is not really inclusive or representative; its legitimacy claims are false. One can distinguish such false claims from deserved claims by examining whether the alliance employs good procedures. For example, where alliances have procedures to allow transparency, interested parties can see if the partnership is working. A meaningful exchange of ideas through notice and comment or other participatory mechanisms should result in more effective rules. Power-sharing procedures minimize manipulation and capture opportunities.

Additionally, nominal partnerships have serious costs. They actually undermine legitimacy claims because they push out marginal voices or entrench the status quo. Worse, partnerships may enable interested parties to shift debate of the normative issues to a forum or a regime in which outcomes can be manipulated. Participation and transparency mechanisms reduce the likelihood of manipulation by eliciting debate and increasing accountability. Rules for explanation should minimize opportunities for abuse as well.

2. Coordination

Coordination suggests three possible scenarios, each aided by good procedures. First, institutions may coordinate their law-making activities so that different experts work on separate segments of a problem. UNCITRAL, for example, holds itself out as the coordinating IO in the area of international trade law. Here, coordinating substantive work reduces duplication and leads to greater effectiveness. One would want to be certain that the alliance chose the best means of dividing work to promote effectiveness. Participatory mechanisms will generate more alternatives and debate concerning the appropriate division of labor. Although each organization might be an expert in the area, and thus might have its own ideas about how to divide work, the fact that they are

366. See supra notes 191–207 and accompanying text.
367. See supra note 94.
368. See supra notes 344–346 and accompanying text.
369. Barr & Miller, supra note 9, at 28–29; Keohane & Nye, supra note 5, at 12.
372. Barr & Miller, supra note 9, at 26–27.
working together suggests that none of the organizations is suited to do the job alone. Therefore, it is more likely that their efforts will be effective if they have power-sharing procedures.

Second, the coordination effort might be an attempt to try to work together in overlapping areas of expertise. So, where the ILO attempts to coordinate its labor reform efforts with the Bretton Woods Institutions' efforts on economic development, one can see an opportunity for greater inclusion. One would want to ensure that the inclusive opportunities were real, through transparency and participatory mechanisms.

Third, coordination might result in a shared understanding that the resulting law will not conflict with the values or already established laws of either of the IOs. This "hands off" coordination is troubling, as it suggests that parties represented by counter-regime norms are cut out of the process of norm development. If, for example, the WHO had carved out language in its FCTC to appease the WTO agreements, those who see trade measures as an acceptable tool to combat the spread of tobacco use would be shut out of a forum (the WHO). Transparency is particularly important here as it reveals the normative compromise to those that would wish to challenge it and enables accountability. Participation mechanisms would be important as well because they would provide some outlet for those values pushed out by accommodation.

Some coordination efforts will be difficult to evaluate. The WTO and the World Bank support each other's values of liberal trade in support of economic development. In one sense, this alliance produces efficiencies. Working together, these organizations achieve leverage in their liberal trade agenda. Pablo Zapotero observes:

The modern institutional architecture of global governance is comprised of a group of coexisting and interrelated international regimes, such as international institutions and treaties with a degree of institutionalization. These regimes consolidate horizontal

373. Block-Lieb & Halliday, Incrementalisms, supra note 371, at 900–02 (explaining that various incrementalisms are necessary to facilitate global consensus, which could suggest that within a given area of global lawmaking there exists an inherent division of labor and that some organizations are better suited to certain functions).
374. See supra notes 239-244 and accompanying text.
375. See supra notes 241–244 and accompanying text.
376. Kelly, Power, Linkage and Accommodation, supra note 162, at 123 (stating that implicit deference is especially troublesome because it "masks... normative differences and allows norms to evolve in a skewed fashion").
377. See supra note 221 and accompanying text.
378. Barr & Miller, supra note 9, at 31.
379. Zapatero, supra note 336, at 596–97 (discussing synergies among rules and policies of the WTO, the IMF, and the World Bank with regards to trade liberalization for purposes of international growth and development).
380. Id.
networks of inter-institutional relations on diverse stages of development. The mechanism of coordination between the International Monetary Fund . . . , the World Bank, and the World Trade Organization . . . stands out among them. This three-sided model of coordination promotes the convergence of agendas and activities in the areas of trade integration, development, and macroeconomic stability.\textsuperscript{381}

Thus, coordination may help to promote the trading rules even in the face of opposition to those rules.\textsuperscript{382} At the same time, this mutually reinforcing coordination empowers the constituent IOs and the norms they develop without necessarily including more views.\textsuperscript{383} However, such coordination may lead to greater effectiveness and thus warrant more legitimacy from an output legitimacy perspective. Input credentials would benefit from process and the inclusive mechanisms that process generates.

3. Endorsements

An endorsement typically involves one institution promoting the rules or standards of an expert institution. Endorsements bestow legitimacy on both the endorsing and the endorsed institution. The endorsing institution claims the authority to pronounce another IO's norms, rules, or standards as useful, and the endorsed IO enjoys validation of its work product. So, both UNCITRAL and the ICC benefit from UNCITRAL's endorsement of the UCP 500.\textsuperscript{384} UNCITRAL tells the world that the ICC has a great product, while at the same time proclaiming itself as the arbiter of great products.\textsuperscript{385} In one sense, endorsements seem ideal. One can imagine a representative institution seeking the endorsement of an expert technical law-creating body.

However, endorsements may lead to false legitimacy where the rules or standards of one institution are codified without any real consideration of whether they are consistent with the interests of those represented by the endorsing institution.\textsuperscript{386} Here, an endorsement would seem more legitimate if it resulted from a meaningful examination of the norms, laws, or standards endorsed. Process helps ensure that the examination is meaningful. For example, as Alvarez explains, when the World Bank

\textsuperscript{381} Id. at 595.
\textsuperscript{382} See, e.g., Kelly, Power, Linkage and Accommodation, supra note 162, at 121.
\textsuperscript{383} Id.
\textsuperscript{384} See, e.g., Kelly, Power, Linkage and Accommodation, supra note 162, at 121.
\textsuperscript{385} Id. at 595.
\textsuperscript{386} See, e.g., Kelly, Power, Linkage and Accommodation, supra note 162, at 121.
Guidelines codified the FAO standards, the Bank relied on process, using participatory mechanisms to garner legitimacy.  

4. Resource Sharing

Information and resource sharing is helpful but should not be touted beyond its true worth. Sharing information allows for more effective norms. The more an institution knows, the better that it can address a problem. And, to be sure, information sharing can be a way of making an IO more inclusive and more effective. But, information alone does not assure that interests are represented or that values are considered. Likewise, access to information does not guarantee positive outcomes. So, while information sharing is to be applauded, alliances that proclaim legitimacy based on information sharing should face meaningful examination. For example, the ILO and the WTO have recently concluded an important report, *Trade and Employment: Challenges for Policy Research*, which compiles a host of information on the economic links between labor and trade and is certain to be very useful to policymakers. But, it does not integrate the ILO into the *Integrated Framework* as the ILO might like.  

B. Process as Compared to Other Metrics

Process criteria are a superior metric to other legitimacy criteria for assessing derivative legitimacy claims. Any output metric used to test these alliances necessarily involves a normative assumption, an inescapable assumption for output criteria. True, output criteria are always subject to criticism for their normative assumptions. But, this criticism takes on special salience where alliances are involved. Linkage and accommodation mask normative struggles, obscuring output criteria's normative assumptions. Take, for example, the derivative legitimacy of the UNCITRAL/World Bank collaboration on the *Legislative Guide*. On the one hand, the *Guide* represents a stunning accomplishment. It employs new technologies to address a difficult challenge to harmonization of fundamental differences in domestic insolvency laws. Yet, one could complain that by brushing over the hard questions with these technolo-

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389. *See supra* note 297 and accompanying text.


392. *Id.* at 4–5.
gies, the drafters have avoided the real conflicts. Thus, the Guide’s effectiveness depends on its goals. If one concludes that UNCITRAL’s mandate is to harmonize, then the Guide did not achieve that goal. If one believes that the UNCITRAL partnership with the World Bank was meant to modernize insolvency law so that it may ultimately at some later point lead to harmonization, then perhaps the Guide is effective. Thus, we see that where alliances leave open questions concerning goals, any output metric will be inadequate because of subjective disagreements over what is effective.

Still, one could accept the normative assumption, despite the danger of ignoring difficult normative questions, and ask whether the alliance is effective in terms of fulfilling the mandate it sets for itself. However, given the particular problems raised by alliances discussed above, I submit that using output criteria to judge these derivative legitimacy claims is a second-best solution. The proliferation of these alliances and the power that they have to affect every part of our lives demands more rigorous review than assessing whether the alliance has achieved a self-defined and somewhat self-serving objective.

Likewise, representation criteria falter because of the lack of international demos. Again, this is not a new criticism, but it is magnified by alliances. It is difficult enough to apply a representation framework to IOs; the failure of the democratic analogy is compounded where IOs team up to create law. For example, although most States are WTO members, the WTO is not considered a truly representative organization. It really falls into the club model. The Codex also lacks equitable representation among States. Although it is a U.N. agency (located within the FAO), different countries have different abilities to participate in developing the norms established there. Thus, although

395. See, e.g., Block-Lieb & Halliday, Harmonization and Modernization, supra note 393, at 512.
396. Keohane & Nye, supra note 5, at 11 (describing the lack of a political community).
397. See, e.g., Barr & Miller, supra note 9, at 26 (noting the high cost of public participation in international lawmaking).
398. Keohane & Nye, supra note 5, at 20 (explaining that while WTO delegates claim accountability, their negotiations are often shrouded in secrecy, leaving outsiders with the feeling that they are not adequately represented).
399. Id. at 7-8 (describing the WTO as a “club of trade ministers” and its negotiations as “clublike”).
400. Livermore, supra note 261, at 783 (citing Traill et al., supra note 264).
401. Id.
both the WTO and the Codex “represent” the interest of a majority of States, it would be difficult to say whether the WTO endorsement of the Codex was entitled to a claim of input legitimacy based on representation.\footnote{See Levit, \textit{supra} note 67, at 200-01 (discussing the accountability “mismatch”).}

Inclusion as a paradigm is helpful but incomplete. Inclusion criteria promote dialogue, transparency, and more representative norms. But, inclusion, like representation, does not necessarily promote effective norms. In my view, process facilitates inclusion and serves additional purposes that promote fairness, order, predictability, transparency, and accountability. Process can at least tell us if the alliances allow for representative values. But, it can also elicit debate, lead to more effective results, and contribute to accountability.\footnote{Barr & Miller, \textit{supra} note 9, at 28-29.}

Process is also a superior metric because it can be tailored. The particular procedures needed to objectively assess derivative legitimacy claims will depend on the organizations and issues involved.\footnote{Id. at 17.} For example, where a partnership such as the WTO and the World Bank forms, the concerns relate more to marginalization and entrenchment rather than to false legitimacy claims.\footnote{See \textit{supra} notes 321, 335-338 and accompanying text.} Thus, transparency and participatory process mechanisms are more important. Likewise, alliances that claim to be partnerships should have procedures in place that enable power sharing and should be transparent so that interested parties can see the true nature of the partnership. While endorsements may involve one body adopting the work product of a more expert body, any lack of public participation in the operations of the latter should be countered by participatory mechanisms and transparency. The procedures best suited for coordination alliances will depend on the particular method of coordination. For example, an alliance that divides work will need different procedures than one that accommodates values by avoiding conflicts. I will not attempt to prescribe procedures for every type of alliance here; I will just argue that procedural choices will need to be tailored.

\textbf{C. How Good Procedures Mitigate Problems Caused by Law-Making Alliances}

I submit that the best means to assess the derivative legitimacy claims of these alliances is to examine whether the alliances employ procedural devices to increase participation, dialogue, transparency, accountability, and integrity. These procedures promote more legitimate norms, but they also mitigate the particular problems that law-making

\footnotesize{402. See Levit, \textit{supra} note 67, at 200-01 (discussing the accountability “mismatch”).  
403. Barr & Miller, \textit{supra} note 9, at 28-29.  
404. Id. at 17.  
405. See \textit{supra} notes 321, 335-338 and accompanying text.}
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alliances cause, including false legitimacy claims, marginalization, entrenchment, harmful regime and forum shifting opportunities, and abuse. False legitimacy claims proffer shared information, partnership, or coordination as grounds for greater legitimacy, but examination of the actual alliance fails to reveal any positive benefit from the proffered relationship. The CPF could be accused of this. Transparency mechanisms allow interested parties to see the false claim objectively and not credit the claim. Participation avenues will also be helpful, as they can be useful in holding ineffective alliances accountable. Alliances that marginalize or push out other voices that might offer real criticism or prodding can be held accountable if there are procedures to allow such criticism and participation.

Process also thwarts false legitimacy claims because it promotes effectiveness more generally. Notice and comment procedures not only allow stakeholders an expressive outlet, they promote debate that fosters more effective rules. In fact, process criteria such as notice and comment provisions, power-sharing devices, transparency, controls against corruption, and explanatory requirements all elicit debate and hopefully, but not necessarily, better rules. Through transparency, interested parties can see what is being done and at least try to intervene should they find it objectionable or irrational. Power-sharing devices force those in power to share their ideas in order to persuade each other. Debate leads to better solutions. For example, the partnership between the World Bank and UNCITRAL on the Guide allowed UNCITRAL to develop new technologies in its law harmonization and modernization efforts. Arguably, the project would not have been successful without these technologies. Also, rules generated with adequate process will be more

406. See supra notes 199–203 and accompanying text.
408. See Barr & Miller, supra note 9, at 24 (noting that transparency provides for accountability).
409. Esty, supra note 46, at 1520 (discussing deliberative legitimacy and asserting that it “promote[s] rationality and improve[s] outcomes”).
410. See Block-Lieb & Halliday, Legitimation, supra note 1, at 5 (explaining new technologies and rule-types).
411. See id. at 5–6 (suggesting that the new technologies and rule-types facilitated the success of the Guide).
likely to secure compliance—because of their input legitimacy credentials—and, thus, be more effective.412

Arguably, process and inclusion can frustrate efforts to generate useful norms in the first place.413 Club organizations work, in part, because through exclusion and secrecy they reach decisions and take action.414 However, I do not believe that this argument defeats a push for more procedures in law-making alliances because these alliances by their very existence suggest that the IOs need to reach out to other IOs in order to be effective. They have already sacrificed some exclusivity and secrecy, and if we wish to credit them with derivative legitimacy, we should be able to see that they are actually entitled to it.

Process also alleviates negative consequences caused by alliances. As discussed above, harmonization and convergence necessarily lead to some marginalization,415 but process can at least minimize the marginalization that results from excluding others from the debate.416 Voices that lose the debate will, of course, be marginalized, but participatory procedures, power-sharing, transparency, and explanation enable those voices to at least be heard once.

The debate and dialogue facilitated by process wards off entrenchment. Decision-makers may become entrenched and path-dependent, choosing only to perpetuate the status quo.417 Procedural safeguards and their resultant transparency and dialogue allow interested parties to examine the causes, and to combat the effects, of entrenchment.418

Process has its problems. Although I argue that process can alleviate entrenchment, process can, admittedly, create entrenchment through ossification. Procedural rules can frustrate attempts at reform and make the law less responsive.419 Process can also be biased in favor of well-organized and well-funded stakeholders.420 But, I am not suggesting that we adopt process for process' sake. The process needed must be tailored to each alliance.421 Sometimes transparency will be more important than notice and comment procedures. Moreover, ossification results from de-

412. Michael Asimow, Public Participation in the Adoption of Interpretive Rules and Policy Statements, 75 Mich. L. Rev. 520, 573–75 (1977) (noting that "[t]he public may be more likely to accept and less likely to sabotage a rule if it has been allowed to participate in its formulation").
413. Stewart, supra note 7, at 68 (explaining, for example, how transparency can increase costs and impede successful negotiations).
414. Levit, supra note 67, at 194 (discussing decision-making in small groups).
415. See supra note 323 and accompanying text.
416. See Stewart, supra note 7, at 87.
417. See Zaring, supra note 31, at 578–79.
418. See Stewart, supra note 7, at 83–84.
419. See supra notes 97–99 and accompanying text.
420. Barr & Miller, supra note 9, at 26.
421. See supra notes 404–405 and accompanying text.
manding analytical review, rather than particularly procedural devices that ensure transparency and notice. While I would argue that good process requires that decision-makers give reasons, the international setting lacks the type of analytical review present in national administrative schemes in which ossification occurs.

Nevertheless, some baseline explanatory requirement spurs dialogue and debate and combats path-dependence. It is not a rational explanation to say that something has always been done one way and thus must continue in the same way. Moreover, process begets process. Imbuing an organization with a culture of process, openness, and dialogue is perhaps the most important guard against entrenchment.

Procedures that provide for transparency and combat corruption also serve to minimize capture opportunities. Various IO alliances consolidate power and raise concerns regarding the abuse of that power. Efforts at both regime shifting and forum shifting respond, in part, to perceived power balances. Transparency and anti-corruption procedures reveal the workings of alliances and minimize incentive to succumb to capture. Admittedly, process can be abused. It can be used to delay and derail. The choice to employ procedures involves a cost-benefit analysis. Process may slow down international law-making alliances, but the benefits are that they develop more legitimate norms.

CONCLUSION

Law-making alliances among IOs are ubiquitous, useful, and unique. While we should embrace those that can lead to more legitimate norms, we need to rethink how we make such an assessment. Although legitimacy will always be a subjective conclusion, claims to legitimacy can be objectively assessed. IO law-making alliances require a new framework:

422. See, e.g., Barr & Miller, supra note 9, at 28–29 (explaining that public participation improves rationality).
423. See, e.g., id. at 17 (citing the Basel Committee process as an example of process begetting process).
424. Stewart, supra note 7, at 70 (discussing process-based criticism of international regulation).
426. Helfer, Regime Shifting, supra note 247, at 6–7 (noting that some actors attempt to regime shift in order to enhance their own power).
427. Stewart, supra note 7, at 71–72 (explaining that the creation of transnational administrative law promotes transparency and accountability through compliance with due process standards, thereby countering the injustices of regulatory decision-making that can disadvantage affected, yet politically weak, parties).
428. See, e.g., id. at 68.
429. Id. at 81.
a process-based framework that examines the very relationship between the organizations and inquires as to whether it indeed leads to more inclusiveness, more efficiency, or both. Good procedures help to ensure that the relationship between the IOs promotes legitimate functioning and results. These alliances also impose costs. The costs include those costs associated with an IO, but there are also unique costs as well. These unique costs and concerns can be mitigated through process.