

Experimentalism in Transnational Governance: Emergent Pathways and Diffusion Mechanisms

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Introduction

This paper explores the emergence and diffusion of experimentalism in transnational governance. We define experimentalism as a governance architecture in which: (1) framework goals and metrics for assessing their achievement are provisionally established by some combination of “central” and “local” units, together with relevant outside stakeholders; (2) local units are given broad discretion to pursue these ends in their own way; (3) but as a condition of this autonomy, these local units must report regularly on their performance and participate in a peer review in which their results are compared with those employing alternative means to the same general ends; and (4) the goals, metrics, and decision-making procedures themselves are periodically revised in response to the results of the review process.

Such governance architectures have three salient virtues. First, they accommodate diversity in adapting general goals to varied local contexts, rather than imposing one-size-fits all solutions. Second, they provide a mechanism for coordinated learning from local experimentation through disciplined comparison of different approaches to advancing broad common goals. Third, both the goals themselves and the means for achieving them are explicitly conceived as provisional and subject to revision in the light of experience, so that problems identified in one phase of implementation can be corrected in the next iteration. For each of these reasons, such experimentalist governance architectures have emerged as a widespread response to turbulent, polyarchic environments, where strategic uncertainty means that effective solutions to problems can only be defined in the course of pursuing them, while a multi-polar distribution of power means that no single actor can impose her own preferred solution without taking into account the views of others.

Experimentalist governance architectures of this type have become pervasively institutionalized across the European Union, covering a broad array of policy domains from regulation of energy, telecommunications, financial services, and competition through food and drug safety, data privacy, and environmental protection, to justice and internal security, anti-discrimination, and fundamental rights. They take a variety of organizational forms, including networked agencies, councils of national regulators, open methods of coordination, and operational cooperation among front-line officials, often in combination with one another (Sabel and Zeitlin 2008, 2010). But experimentalist governance architectures with similar properties can also be widely found in the United States and other developed democracies, both in the regulation of public health and safety risks, such as nuclear power, food processing, and environmental pollution, and in the reform of public services like education and child welfare (Sabel and Simon 2004, forthcoming a and b).

Experimentalist governance appears particularly well-suited to transnational domains, where there is no overarching sovereign with authority to set common goals even in theory, and where the diversity of local conditions and practices makes adoption and enforcement of uniform fixed rules even less feasible than in domestic settings. Although experimentalism conforms neither to traditional canons of input nor output legitimacy, the greater policy space it offers to nations and regions in pursuing broadly shared goals makes it arguably not only more effective but also more legitimate than competing forms of transnational governance. Yet the very polyarchy and diversity that make experimentalist governance attractive under such conditions can also make it difficult to get a transnational regime off the ground. Thus, too many participants with sharply different perspectives may make it hard to reach an initial agreement on common framework goals. Conversely, a single powerful player may be able to veto other proposed solutions even if he cannot impose his own.

Despite these coordination problems, familiar to international relations scholars, recent research suggests that transnational experimentalist regimes appear nonetheless to be emerging across a number of major issue-areas, such as disability rights, data privacy, food safety, and environmental sustainability of forests, fisheries, and other primary commodities. To guide exploration of the processes through which this may be occurring, we sketch out in this paper seven pathways for the emergence and diffusion of transnational experimentalist regimes. There is no reason to believe that the underlying mechanisms exhaust the full range of possibilities, nor are they mutually exclusive, since they can often be found in combination with one another in specific empirical cases. Whether these pathways originate with public or private actors, or at the national or the international level, they converge on a multi-level, multi-actor governance architecture which in practice should efface the relevance of these distinctions and thus the relevance of particular starting points and paths of development. We say “should” because a number of these transnational regimes are nascent and it is unclear how well they will actually function.

1) Multilateral regime generation

The first and (so far) rarest such pathway is the de novo creation of a global experimentalist regime through the established multilateral procedures for negotiating international agreements, such as the UN convention system, as a result of reflexive learning by state and non-state actors from the failures of more conventional approaches. The clearest example of this to date is the 2008 UN Convention on the Rights of Disabled Persons (CPRD). Traditional regimes of this kind contain catalogues of specific obligations for states and sporadic international monitoring, understood as an analogue and (ideally) precursor to judicial enforcement. The CPRD, as de Búrca (2010) documents, arose out of a sustained debate among participating governments and NGOs about the deficiencies of such international human rights treaties. It departs from the model of formalist law strictly enforced by a court by incorporating many experimentalist features, including broad, open-ended goals such as “reasonable accommodation” for the disabled; participation of national NGOs and human rights institutions in implementation monitoring; and annual review of its operations on the basis of comparative national data by an inclusive conference of stakeholders.

2) Private coordination in response to multilateral impasse and public inaction

A second pathway involves the creation of private experimentalist regimes in response to impasses in multilateral negotiations and inaction by public authorities, followed by its diffusion

vertically along supply chains and horizontally across industry associations. Notable examples include the creation of the Forest Stewardship Council (FSC) in the early 1990s to develop private standards for sustainable forestry and certify their implementation in response to the failure of previous efforts to tackle the problems of global forest deterioration through the negotiation of an international convention and unilateral fixing of environmental standards for imported timber products by northern governments. (Note, however, that many of these “private” standard-setting and certification regimes, including both the FSC and its main rival, the Program for the Endorsement of Forest Certification Schemes (PEFC), have been extensively supported by national governments through public procurement policies, state forestry agencies, and direct subventions.)

A regional example is the California Leafy Greens Products Handler Marketing Agreement (LGMA) as a regional example, which has acquired national and international status through recognition by US courts, foreign governments, and the Federal Food Safety Modernization Act of 2010 (Sabel and Simon forthcoming b). Other similar private standard-setting bodies, such as GlobalGAP, have developed over the past two decades to assist participating firms and their suppliers in meeting increasingly stringent public health and safety standards for imported food (a combination of pathways 2 and 3).

3) Unilateral agenda setting subject to multilateral deliberative constraints

A third pathway towards a transnational experimentalist regime involves unilateral regulatory agenda setting subject to deliberative constraints imposed by multilateral institutions, such as the WTO. Thus a large jurisdiction like the EU or the US may unilaterally seek to extend its internal regulations for protection of public health and safety and the environment to transnational supply chains as a condition of market access. World Trade Organization (WTO) rules permit member states to restrict imports in order to protect public health and the environment. But they also require states wishing to restrict imports on these grounds to ensure that their proposed measures are non-discriminatory and proportional to the intended goals, take account of relevant international standards, and consult with their trading partners to minimize the impact on affected third parties. These disciplines, when they permit such extensions at all, can thus provide a potential mechanism for transforming unilateral regulatory initiatives by developed countries like the EU into a joint governance system with stakeholders from the developing world, if not a fully multilateral experimentalist regime.

Examples include the Dolphin Conservation Program of the Inter-American Tropical Tuna Commission, which developed in response to the GATT judgment against the US Marine Mammal Conservation Act (Parker 1999), and the EU Forest Law Enforcement Governance and Trade (FLEGT) initiative, which has been explicitly designed from the outset to be both experimentalist and WTO-compatible (Zeitlin 2011).

4) Cross-sectoral diffusion through replication and adaptation

A fourth pathway works through replication and adaptation of organizational models across sectors. We see this in the field of private transnational regulation, in the case of the rapid diffusion of multi-stakeholder roundtables for sustainability standard-setting and certification of primary commodities, which have spread from forestry (FSC) and fisheries (MSC) to palm oil, soy, cotton, sugarcane, biofuel, cocoa, aquaculture, and beef, as a result of initiatives by two key participants, the World Wildlife Fund (WWF) and Unilever (Brassett et al. 2010; Nikoloyuk

2009). In the field of public transnational regulation, we see a similar dynamic within the EU, in terms of the diffusion of experimentalist organizational models such as councils of regulars, networked agencies, and open methods of coordination from one policy domain to another (Sabel and Zeitlin 2008, 2010). Unsurprisingly, such cross-sectoral transfers are not always equally successful (compare, for example, the sustainable palm oil and responsible soy roundtables), and often involve adaptations and modifications of the original design, which can become the basis for new organizational models in their own right.

5) Cross-national convergence through mutual influence

Where multilateral treaty obligations do not impose deliberative constraints on unilateral regulation, but there is international pressure for coordination of separate national regimes and domestic pressure for rapid rule updating in the face of uncertainty, convergence towards an experimentalist regime can emerge out of mutual influence, transmitted through thin international links like the operation of multinational corporations within each other's territory. As separate jurisdictions converge on similar solutions in practice, this in turn can lead to elaboration of an explicit transnational regime.

A good example is data privacy, where domestic regulation was explicitly exempted from multilateral deliberative disciplines under the GATS agreement, and the EU has unilaterally required foreign firms to comply with its internal rules as a condition of market access. While many countries have revised their national data privacy legislation to meet the EU's adequacy standards, the US instead negotiated a Safe Harbor Agreement, whereby American firms doing business in Europe agreed to follow a version of EU privacy rules under the supervision of the Federal Trade Commission (FTC) (Newman 2008, 2009). Spurred by the FTC's expansive interpretation of its ensuing mandate to become an 'activist regulator advancing an evolving consumer-oriented understanding of privacy', as well as by state-level data privacy breach notification laws, large US corporations have developed experimentalist approaches to the integration of broad, revisable privacy objectives into enterprise-wide risk governance systems, which have in turn fed back into current debates about the revision of the EU's own data privacy legislation (Bamberger and Mulligan forthcoming a and b; Robinson et al. 2009; European Commission 2010). Such convergence on the ground could lead to the development of a more explicitly joined-up regime, especially in the context of ongoing EU-US negotiations over privacy protection in transatlantic transfers of personal data between businesses and public authorities in counter-terrorism policies.

6) Joining up regime complexes through benchmarking and public comparison

A sixth pathway to the development of transnational experimentalist regimes works through benchmarking and public comparison of competing components of regime complexes. In private regulation, for example, both the governance arrangements and the substantive standards of the FSC and its business-led rivals operating under the umbrella of the PEFC have converged as a result of a process of public comparison and benchmarking, conducted by retailers, government procurement agencies, and industry associations, which pushed the industry schemes to raise their standards and the FSC to make certification less costly and more practically feasible, even if they remain some distance apart on key issues (Overdevest 2010; Zeitlin 2011). In food safety, similarly, a Global Food Safety Initiative has been established to benchmark private standards against one another, and seven major global food retailers have now agreed to accept four of these standards and their constituent HACCP systems as mutually equivalent based on

this benchmarking exercise. In public food safety, as in a number of other policy domains, regional and national authorities in the EU, the US, and elsewhere, benchmark their domestic regulatory systems against one another for equivalence as a condition for permitting expedited imports into each other's markets, thereby generating a de facto joined up transnational regime which may eventually become so de jure (Henson and Humphrey 2009; Zeitlin 2011).

7) Cooperative decentralization of international regulatory standards

A final pathway towards the emergence of a transnational experimentalist regime runs through what Helleiner and Pagliari (2011) have called “cooperative decentralization” of international regulatory standards. The starting point is a consolidating international regime, consisting for example of universally applicable standards. The regime comes under strain because differences in national and regional circumstance make a uniform response to long-term changes or sudden shocks intolerably burdensome. Rather than seeking agreement on closely harmonized standards, which under these heterogeneous circumstances would often lead to “sham compliance”, international bodies such as the Financial Stability Board (FSB) can focus instead on “the development and promotion of broad principles-based regulatory standards.” This allows for a substantial margin of policy autonomy to accommodate regional or national divergence, coupled with “activities such as information-sharing, research collaboration, early warning systems, and capacity building.” Compliance with these broad regulatory standards would be secured through a combination of regular peer reviews, periodic assessments by international organizations such as the IMF and World Bank, and restriction of market access for non-conforming jurisdictions, as is already envisaged by the FSB (cf. also Helleiner 2010).

How Experimentalist Regimes can Increase National “Policy Space” in a Global Economy

These mechanisms suggest that the scope for reconciling the regulation of open international markets with national policy autonomy could be expanded by extending the range of permissible grounds for restriction of imports under WTO rules from the protection of public health and the environment to other legitimate objectives like the promotion of innovation and economic development, as advocated by Dani Rodrik (2011) in his recent book. But as in the case of public health and the environment, such derogations from WTO rules would need to be subject to strict review procedures in order to ensure that the proposed measures are non-discriminatory and proportional to the intended goals, take account of relevant international standards, and consult with their trading partners to minimize the impact on affected third parties.

A regional precedent for such a procedure already exists in the form of the EU state aid regime, where national industrial policies may be permitted within the internal market provided that they fulfill “clearly defined objectives of common [European] interest” and do not distort intra-community competition and trade to an extent contrary to the common interest”. National state aid measures are scrutinized for conformity with these principles by the Commission, following revisable guidelines agreed with the Member States that are effectively binding on both sides, subject to review by the European Courts. Increasingly, these guidelines redirect national state aid programs away from subsidies to individual firms and sectors towards broader “horizontal” objectives such as promoting investment in innovation and R&D, enhancing environmental protection, and supporting the development of disadvantaged regions. Increasingly, too, approvable state aid measures must not only identify a “clear objective of common interest”, but also be more efficient than alternative instruments in meeting their goals”, and enable

beneficiaries to carry out activities which would not have taken place otherwise (Blauberger 2009; Sabel and Zeitlin 2008: 299-300).

Conclusion

Taken together, the mechanisms analyzed in this paper demonstrate that there are many possible pathways to the emergence and diffusion of transnational experimentalist regimes, whose success does not depend on a narrow set of favorable background or scope conditions. Under conditions of strategic uncertainty, such regimes have a number of salient advantages over conventional forms of hierarchical governance, most notably their capacity to accommodate diversity, promote recursive learning, and regularly revise their goals and procedures in response to implementation experience. These features are especially desirable in transnational settings, and provide a workable architecture for reconciling cooperative regulation of open international markets with increased space for national and regional policy alternatives.

References

- Bamberger, K.A., and Mulligan, D.K. (forthcoming a): ‘Privacy on the Books and on the Ground’, *Stanford Law Review*.
- Bamberger, K.A., and Mulligan, D.K. (forthcoming b): ‘Catalyzing Privacy: New Governance, Information Practices, and the Business Organization’. *Law and Policy*.
- Blauberger, M. (2009): ‘Of “Good” and “Bad” Subsidies: European State Aid Control through Soft and Hard Law’ *West European Politics* 32(4): 719-37.
- Brassett, J., Richardson, B., and Smith, W. (2010): ‘Experimentalist Governance, Deliberation and Democracy: A Case Study of Primary Commodity Roundtables’, *CSGR Working Paper 270/10*, Centre for the Study of Globalisation and Regionalisation, University of Warwick, UK.
- de Búrca, G. (2010): “The EU in the Negotiation of the UN Disability Convention”, *European Law Review* 35(2); accessed through SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1525611.
- European Commission (2010): *A Comprehensive Approach on Personal Data Protection in the European Union*, COM(2010) 609 final, Brussels 4.11.2010.
- Helleiner, E. (2010): ‘What Role for the New Financial Stability Board? The Politics of International Standards after the Crisis’, *Global Policy* 1(3): 282-90.
- Helleiner, E., and Pagliari, S. (2011): ‘The End of an Era in International Financial Regulation? A Post-Crisis Research Agenda’, *International Organization* 65: 169-200.
- Henson, S. and Humphrey, J. (2009) *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, paper prepared for FAO/WHO, Rome, Codex Alimentarius Commission, accessed at <http://www.ids.ac.uk/index.cfm?objectid=7D8A984D-B119-7A24-4E28D9545EAA3B56>.
- Newman, A. (2008), *Protectors of Privacy: Regulating Personal Data in the Global Economy*, Ithaca, NY: Cornell University Press.

- Newman, A. (2009), 'EU Experimentalism in the Global Governance of Data Privacy', unpublished paper prepared for the project on "Extending Experimentalist Governance: From the EU to the World?", University of Wisconsin-Madison, October 23-4.
- Nikolyuk, J., (2009), 'Sustainability Partnerships in Agro-Commodity Chains: A Model of Partnership Development in the Tea, Palm Oil and Soy Sectors', Utrecht-Nijmegen Programme on Partnerships (UNPOP), Copernicus Institute for Sustainable Development and Innovation, Utrecht, NL.
- Overdeest, C. (2010): 'Comparing Forest Certification Schemes: The Case of Ratcheting Standards in the Forest Sector', *Socio-Economic Review*, **8**, 47-76.
- Parker, R.W. (1999): 'The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict', *Georgetown International Law Review* 12: 1-122.
- Robinson, N., Graux, H., Botterman, M., and Valeri, L. (2009), *Review of the European Data Protection Directive*, report by RAND Europe to the UK Information Commissioner's Office, London.
- Rodrik, D. (2011): *The Globalization Paradox: Democracy and the Future of the World Economy*, New York: Norton.
- Sabel, C. F. and Simon, W. H. (2004): 'Destabilization Rights: How Public Law Litigation Succeeds', *Harvard Law Review*, **117**, 1015-1101.
- Sabel, C. F. and Simon, W. H. (forthcoming b): 'Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering', unpublished paper, Columbia Law School, *Michigan Law Review*, available online at <http://www2.law.columbia.edu/sabel/papers.htm>.
- Sabel, C. F. and Simon, W. H. (forthcoming a): 'Minimalism and Experimentalism in American Public Law', forthcoming in *Georgetown Law Review*, available online at <http://www2.law.columbia.edu/sabel/papers.htm>.
- Sabel, C. F. and Zeitlin, J. (2008): 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union', *European Law Journal*, **14**, 278-80.
- Sabel, C. F. and Zeitlin, J. (eds) (2010): *Experimentalist Governance in the European Union: Towards a New Architecture*, Oxford, Oxford University Press.
- Zeitlin, J. (2011): 'Presidential Address: Pragmatic Transnationalism: Governing across Borders in the Global Economy', *Socio-Economic Review* 9: 1-20.