

Chapter IV

Contemporary Issues of Public Administration

Trans-regulatory networks and
public administration

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READING MATERIAL FOR CHAPTER N° 4

TRANS-REGULATORY NETWORKS AND PUBLIC ADMINISTRATION

Content

1. Changing the concept of global problem-solving: the rise of non-state actors as regulators.	1
2. Informal international law-making.....	2
3. Transnational/trans-governmental regulatory networks (TRNs)	3
3.1. Definition of the phenomenon.....	3
3.2. Characteristics of the phenomenon: sui generis	3
3.3. Informalities of TRNs	3
4. Administrative law of TRNs	6

1. Changing the concept of global problem-solving: the rise of non-state actors as regulators

Goods and functions that escape State control are regulated at supra-state/ global level by organs of the State other than the legislator.

States are not able to control the fishing of migratory fish species, just as they are powerless to unilaterally limit the use of greenhouse effect producing gases or to prevent the spread of financial crises. When their borders and functions overlap and conflict, States benefit by giving up their regulatory powers to other, global, public organisations that can effectively handle them. The emergence of several major cooperative initiatives among national regulators began engaging the attention of international law scholars in the 1990s when the first successes of the financial area were seen. However, it is not a new phenomenon. The 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, for example, mandated the creation of new national agencies to coordinate international efforts at drug control and communications were to be carried out directly between these agencies rather than through normal diplomatic channels. The 1936 Convention thus attempted to create a network for drug control. A network of American antitrust regulators and their allies in foreign countries developed after World War II formed, collectively, a principled transnational network geared toward restructuring various national economies.

The centrality of the State to the notion of public powers has become an optical illusion according to *Cassese*. States develop from and around a power centre. In contrast, global administrative organisations develop through mutual connections from peripheral points. Individual government agencies and actors have started to negotiate directly with their foreign counterparts and reach *informal understandings* relating to their areas of responsibility. Their expertise and insulation from domestic political pressures allow them to solve problems that traditional international organizations cannot adequately address. [Verdier (2009) p. 115]

The [Basel Committee on Banking Supervision](#) (BCBS) is the primary global standard-setter for the prudential regulation of banks and provides a forum for regular cooperation on banking supervisory matters. Its 45 members comprise central banks and bank supervisors from 28 jurisdictions (90% of the world's banking assets). Additionally, the Committee has nine observers including central banks, supervisory groups, international organisations and other

bodies (Bank for International Settlements and the Basel Consultative Group: European Banking Authority, European Commission and International Monetary Fund. The governance structure of the Basel Committee comprises a rotating chairmanship, standard-setting, and research-based groups, and the Secretariat, hosted by the BIS. The BCBS reports to the Group of Central Bank Governors and Heads of Supervision (GHOS) - its oversight body - and seeks its endorsement for major decisions.

2. Informal international law-making

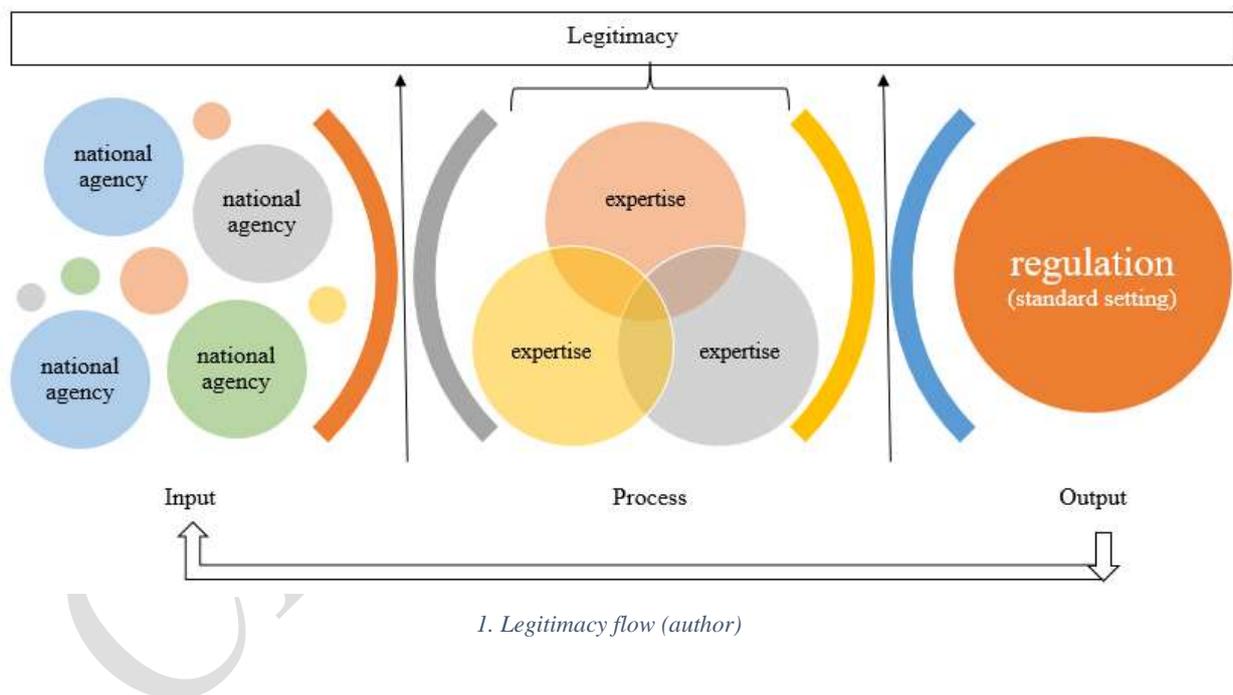
Informal international law-making (IN-LAW) is a broad phenomenon that is taking place in various forms and by different kinds of bodies that aims to produce a legal solution for global challenges. The informal character of this law-making process may be reflected at three levels:

(a) input informality: the actors are other than traditional diplomatic – State –actors.

In the international sphere, it is the executive of the State who is entitled to represent the State and assumes an obligation on behalf of it.

(b) process informality: it is a cross-border cooperation between public authorities, with or without the participation of private actors and/or international organisations in a forum other than a traditional international organization.

(c) output informality: the result of cooperation does not result in a formal treaty or traditional source of international law.



There are two basic types of informal international law-making in recent decades around the turning point between the 20th- 21st century:

(a) **International agencies/supranational authorities** which are international bodies that are based on a decision by an international organisation, so their legitimacy and competencies are based on the empowerment by their creators.

(b) **Harmonisation networks/trans-governmental networks/transnational networks/TRNs** which informal multilateral forums that bring together representatives from national regulatory agencies or departments to facilitate multilateral cooperation on issues of mutual interest within the authority of the participants. [Verdier (2009) p. 115.]

3. Transnational/trans-governmental regulatory networks (TRNs)

3.1. Definition of the phenomenon

There is neither one consistent title nor a global definition of TRNs in the literature. As these phenomena emerge upon necessity in practice, there is no uniform description that is valid for all of them. Usually, its major features are collected together.

TRNs effectively address global problems that individual governments cannot tackle alone. On the other hand, because TRNs are decentralized, dispersed, and involve domestically accountable participants, they do not pose the kinds of threats to democracy, freedom, or national sovereignty that make world government undesirable.

3.2. Characteristics of the phenomenon: *sui generis*

TRNs:

- **members** are not States, but national regulatory agencies, who are tied to national rules related to their activity. This means a system of separate regimes, which are connected into a network. Their membership may also be selective;
- have no centre; it does not develop according to a plan, but **spontaneously**, therefore they can exist without the drawbacks of formal institutions or government procedures;
- gather the necessary expertise for a successful resolution;
- have **no international legal personality** or status beyond that conferred on their organization under the national law of their host country;
- tend to **operate** by consensus without formal voting procedures: it is progressive, cooperative and non-hierarchical;
- are not **transparent**. Despite recent efforts at greater transparency, many of their important meetings and negotiations are **kept secret** until the resulting document is released;
- issue **guidelines** and other documents that do not create international legal obligations (soft law) and do not require the same domestic ratification procedures as treaties;
- do not formally monitor the implementation of their decisions or provide dispute solution procedures;
- are widely regarded as **successful**: Unlike formal international institutions that are often paralyzed by politics, TRNs have the advantages of speed, flexibility, and inclusiveness, and the capacity to dedicate sustained attention to complex regulatory problems.

3.3. Informalities of TRNs

(a) *input informality*: the standard setters are neither vested with legislative power, nor they are entitled to assume obligation for a State, although their product acts as a normative act in a non-conform way defined by the classical Westphalian regime. Authorities taking part in the network are formed and perform their powers within the limits of their domestic law and are accountable for their acts accordingly. However, the domestic legal and political mechanisms that normally hold national regulators accountable to their constituencies do not apply when regulators participate in TRNs.

BCBS members include organisations with direct banking supervisory authority and central banks. After consulting the Committee, the BCBS Chair may invite other organisations to become BCBS observers. BCBS membership and observer status will be reviewed periodically.

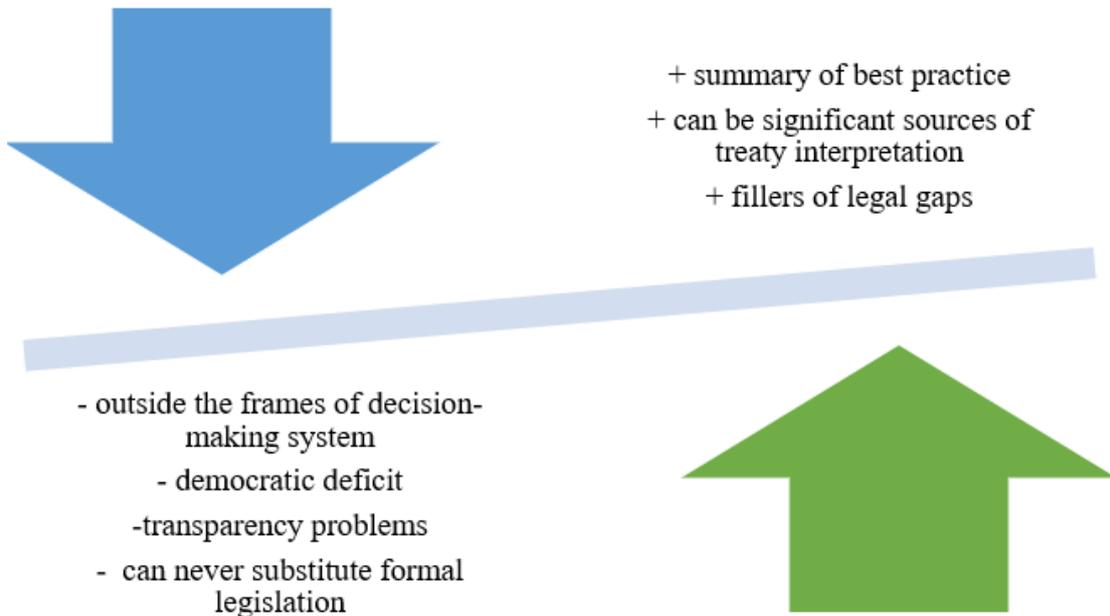
In accepting new members, due regard will be given to the importance of their national banking sectors to international financial stability.

(b) process informality: different authorities of different jurisdiction work together in a supra-state sphere and at that level often without detailed and previously settled scenario, accountability problems arise. understanding international regulatory cooperation in TRNs requires an examination of how domestic preferences shape the positions of national regulators on specific issues

Accountability has two sides; internal accountability refers to the decision-making processes within the organisation, including checks and balances and a clear division of roles and responsibilities. External accountability consists of the supervisors' obligation ability to explain to external stakeholders (including the government, parliament and the general public) the impact of their activities is a generic concept that may be interpreted in different ways. Accountability encompasses at least six important elements: (i) who is liable; (ii) to whom; (iii) what are they liable for; (iv) through what processes is accountability assured; (v) by what standards; and (vi) what are the potential effects when standards have been breached? Due to the high level of informality of the functioning of TRNs (i.e. there are no pre-defined rules for every aspect of functioning, preparation for decision -making, voting etc.), most of the questions remain without answer.

The Committee is the ultimate decision-making body of the BCBS. Decisions by the Committee are taken by consensus among its members. Committee decisions of public interest shall be communicated through the BCBS website. The Committee shall issue when appropriate, press statements to communicate its decisions. A simple [Charter](#) with the purpose and role, membership, oversight organisation, BCBS standards, guidelines and sound practices, consultation with non-member authorities, relationship with other international financial bodies and public consultation process is available on the website of the BCBS but no further information is available on the functioning of the network.

(c) output informality: The members (and often non-members') daily activity within their competencies is strongly influenced by the soft law standards. The influencing nature of the *soft law* creates roots in the economic or political interdependence of States while legitimacy and administrative control are missing from this system. So, domestic public administrative law, and, in fact, most elements of public law (constitutional elements the requirements of rule of law), seems to be put aside while foreign elements infiltrate into domestic public administration and their daily authority practice. Soft law has insufficiencies, however, several advantages, too, which may prove the success of TRNs. It shall be noted that legally binding force and legal effects are not the same. Even if there is no legally binding force, soft law can have legal effects in an unorthodox way (compared to the Westphalian model of international cooperation).



2. Pros and cons of TRNs (author)

The Basel Committee produces publications relating to capital adequacy (the best known of which is Basel III), accounting and auditing, banking problems, cross-border issues, core principles for effective banking supervision, credit risk and securitisation, market risk, the combating of money laundering and terrorist financing, operational risk, and transparency and disclosure. The BCBS sets standards for the prudential regulation and supervision of banks. The Basel Committee produces publications relating to capital adequacy (the best known of which is Basel III), accounting and auditing, banking problems, cross-border issues, core principles for effective banking supervision, credit risk and securitisation, market risk, the combating of money laundering and terrorist financing, operational risk, and transparency and disclosure.

The BCBS does not possess any formal supranational authority. Its decisions do not have legal force. Rather, the BCBS relies on its members' commitments. The BCBS expects full implementation of its standards by BCBS members and their internationally active banks. However, BCBS standards constitute minimum requirements and BCBS members may decide to go beyond them. The Committee expects standards to be incorporated into local legal frameworks through each jurisdiction's rule-making process within the pre-defined timeframe established by the Committee. If the deviation from literal transposition into local legal frameworks is unavoidable, members should seek the greatest possible equivalence of standards and their outcome.

The Basel Committee established a comprehensive [Regulatory Consistency Assessment Programme \(RCAP\)](#) in 2012 to monitor and assess the adoption and implementation of its standards while encouraging a predictable and transparent regulatory environment for internationally active banks. Besides, there is no tool for enforcement.

The spreading practise of such trans-regulatory networks and their growing importance reveals the necessity of the articulation of a **new legal order** and re-thinking of the current one. TRNs can produce effective cooperation just they do not fit in the existing legal order and the existing concepts that keep the legal order legitimate.

Beyond financial areas, there are significant transnational networks in the area of security and environmental protection.

In the global security area, the [International Organization of Securities Commissions \(IOSCO\)](#) is the primary forum for networking. It acts as a forum for securities cooperation and gives structure to the regulatory network. IOSCO comprises over 130 member commissions and meets regularly. IOSCO was founded in 1984 and has no state members. IOSCO provides an arena for discussion, policy coordination, and technical training for regulators in emerging markets. 85 per cent of the world's capital market is under IOSCO member supervision. Among IOSCO's main activities, the promulgation of core principles of securities regulation, the development of shared accounting standards, and the regulatory impact of the Internet can be emphasized. IOSCO members have negotiated over 500 non-legally binding Memoranda of Understandings (MOUs) amongst themselves.

In environmental issues, networks play a different role than in securities regulation. Because treaties remain the core approach to environmental rulemaking, the network of environmental regulators is primarily focused on enhancing the capacity of regulators to regulate. In other words, capacity building, rather than creating new agencies or embracing particular substantive rules, is the primary activity. The [International Network for Environmental Compliance and Enforcement \(INECE\)](#) for example was created in 1997 to signal the commitment to an ongoing network and set in place an ambitious two-year work program. While conferences are a central part of INECE, and permit regulators to meet, exchange ideas, and make connections, information technology is expanding its reach. It makes a connection with global environmental authorities, access training materials, help guide the Network's focus and be recognized as a leader in environmental compliance and enforcement. INECE raises awareness of the importance of environmental compliance and enforcement as the foundation for the rule of law, good governance and, ultimately, for sustainable development.

4. Administrative law of TRNs

In the case of a TRN, the preparatory and executive tasks are performed by state organs; bodies, each of them according to their domestic laws. Within the TRN, these different bodies act as regulatory bodies, contributing to the formulation of a commonly acceptable solution for a challenge that they seem to be able to fight against. Therefore, a significant part of the administrative law of a TRN is given by the domestic administrative law of the members. The rest is the feature of the collaboration phase of the members of the network but given the fact that it is an informal international law-making, no regularities can be shown. According to the current definitions and requirements, the administrative law (and the complete public law background) of such phenomenon can be described as illegal or in a smoother manner: it shows nonconformity with the classical rule of law based legal order.

Global administrative law is the closest notion to describe the TRN phenomenon.

- **Global**, as the expression stands to describe the complexity of the actors and the different levels they represent. It is not advisable to use the word 'international' as the etymological meaning of the word suggests State actors while in such kind of regulatory regime, the supranational level of cooperation is marked by non-State participant lacking the main features of the classical intergovernmental networks. This is the reason why the notion of *international financial regulation* is not able to describe the phenomenon as a legal framework beside the content of regulation is too strict to overlap the process of formulation, implementation, and execution of financial supervision regime in this multilevel structure.
- **Administrative**, as, strictly speaking, governmental functions are practised at the supranational level. It should not be called simply public law as it covers a wider scope than administrative law, it has constitutional law concerns but includes, inter alia, criminal law for example. The activity practised by trans-regulatory networks, in the view of the Westphalian model and the rule-of-law-based requirements of democratic functioning,

shows evidence for the shifting of governmental functions to a global level. Comity work, standard-setting and creating soft law can be understood as preparatory work for legislator as the acceptance, implementation, and evaluation of the achievements (soft law) depend on different actors of a lower level. Its later success depends on legislative organs and executive authorities that finally applies them, and in lack of legislative implementation, the system shows a movement from the continental to the common law practice. Within the EU, example for features of both can be observed.

- And finally, it is *law*, as the law determines all social interactions, the arising phenomenon shall fit in the existing order and its basic requirements. The law defines and limits power. All the elements of the practice of power shall be done under a normative framework and shall correspond to the basic requirements concerning legitimate functioning. Regarding the multilevel phenomenon of financial supervision, this law in an infant status as it has not yet adapted to the existing legal order. Certain aspects of the multilevel public administrative system of composite procedures have legal gaps; the guarantees that protect individuals against authority powers are under construction. It shall be accepted that notions used in nation-States cannot be equivalent to the global phenomenon, but a corresponding interpretation may be applied.

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SIGNIFICANT DEFINITIONS

Best practice	is a method or technique that has been generally accepted solution by various actors that fight the same challenges within their competences
Formality of law-making	is an expression for a system that is settled by normative rules for the procedure of law-making based on the constitutional law of the State and the administrative law that rules the activity and procedure of the representative of the State that is empowered to assume legal obligations on behalf of the State.
Harmonisation networks/trans-governmental networks/transnational networks/TRNs	address global problems that individual governments cannot tackle alone by authorities of States which perform their activities in a special area to decide upon a best practice that can be followed with success to respond to transboundary challenges
The informality of international law-making	is a broad phenomenon that is taking place in various forms and by different kinds of bodies that aims to produce a legal solution for global challenges
Input informality of law-making	means the circle of actors and their incapacity to assume obligations for the legal system
Legal effect	power to influence the rights and obligations without <i>de iure</i> legal obligation; a sort of <i>de facto</i> obligation.
Legal force	power of binding rules for the conduct of individuals which can be enforced by the State organs; powers and limitations that arise from legislation and interpretation of laws, and which impel or restrain individual or organizational activities. <i>De iure</i> and <i>de facto</i> legal obligation.
Legal order	is a collection of norms: the law of nation-states, supranational entities or international law which are produced based on common characteristics (p.ex. Westphalian model of international cooperation)
Output informality of law-making	means the result of informal international law-making which does not create a legal obligation for States and have no legal force
Process informality of law-making	the non-existent normative background of international cooperation phase among actors that are not empowered to assume obligation on behalf of the State

EXERCISES TO PRACTICE

1. Compare the formal and informal law-making according to the following features!

		Formal international law-making	Informal international law-making
Input	Actors		
	Nature of procedure		
Process	Actors		
	Nature of procedure		
Output	Result		
	Force		

2. Compare the trans-governmental regulatory networks to classical international cooperation!

	Classical international cooperation	Trans-governmental regulatory networks
Actors		
Institutionalisation of cooperation		
Political force v. expertise		
Legal personality		
Normative background of functioning		
Transparency of functioning		
Result of cooperation		
Success of cooperation		

TEST OF MULTIPLE CHOICES/QUIZ

1. Individual government agencies

- a) are empowered to act at an international stage to assume obligation on behalf of their State.
- b) are often empowered to participate in international cooperation but they are not vested with the power to assume obligation on the State.
- c) are not empowered to act at the international stage but they can assume obligation on behalf of their State.

2. Actors of global administrative sphere

- a) can neglect domestic political pressure which allows them to solve problems that traditional international organizations cannot adequately address.
- b) are governed by domestic political pressure which allows them to solve problems that traditional international organizations cannot adequately address.
- c) are governed by domestic political pressure which prevents them from solving problems that traditional international organizations cannot adequately address.

3. Informal international law-making

- a) lacks input, output and process formality.
- b) lacks input, output and process informality.
- c) is featured by input and output legitimacy.

4. The basic types of informal international law-making

- a) are TRNs and supranational authorities.
- b) are non-governmental organisations and governmental organisations.
- c) are TRNs and the informal group of States.

5. Trans-governmental regulatory networks

- a) regulate global challenges with the intention of legal effect on the legal system.
- b) regulate global challenges with legally binding tools.
- c) regulate global challenges by creating an obligation on the participants.

6. The guideline of an international organisation

- a) is a soft law international law instrument.
- b) is a hard law international law instrument.
- c) is not law at all.

7. Trans-national regulatory networks

- a) monitor the implementation of their decisions and provide dispute solution procedures.
- b) do not formally monitor the implementation of their decisions or provide dispute solution procedures.
- c) enforce the implementation of their decisions and provide dispute solution procedures.

8. TRNs are

- a) formal multilateral forums that bring together representatives from national regulatory agencies or departments to facilitate multilateral cooperation on issues of mutual interest within the authority of the participants.
- b) informal multilateral forums that bring together representatives from international organisations to facilitate multilateral cooperation on issues of mutual interest within the authority of the participants.
- c) informal multilateral forums that bring together representatives from national regulatory agencies or departments to facilitate multilateral cooperation on issues of mutual interest within the authority of the participants.

9. Input informality of TRNs means that

- a) the standard setters are vested with legislative power and are entitled to assume obligation for a State, although they issue acts as a normative act in a non-conform way defined by the classical Westphalian regime.
- b) the standard setters are neither vested with legislative power, nor they are entitled to assume obligation for a State, although they issue acts as a normative act in a non-conform way defined by the classical Westphalian regime.
- c) the standard setters are neither vested with legislative power, nor they are entitled to assume obligation for a State, although they issue acts as a normative act in a non-conform way defined by the global administrative regime.

10. The spreading practice of trans-regulatory networks and their growing importance

- a) leads to a new world order which is called supranational legal order.
- b) reveals the necessity of the re-thinking of the existing global administrative world order and requires the re-establishment of the Westphalian world order based on State dominance in international relations.
- c) reveals the necessity of the articulation of a new legal order and re-thinking of the current one.