

Let's Justify! How Regime Complexes Enhance the Normative Legitimacy of Global Governance

Theory Note

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Abstract

This theory note develops a theoretical approach that integrates the negative spillovers that international institutions often impose on each other into our thinking about their normative legitimacy. Our approach draws on the political philosophy of Rainer Forst which revolves around the right to justification. It suggests that regime complexes facilitate the break-up of institution-specific orders of justification by prompting invested actors to justify negative spillovers vis-à-vis each other. Thus, regime complexes enable more encompassing justifications of negative spillovers than stand-alone international institutions. Against this backdrop, we submit that the proliferation of regime complexes represents normative progress in global governance.

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Introduction

“We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, (...) we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all.” (World Trade Organization

2001, para. 4). This stipulation is the integral part of the “Declaration on the TRIPS Agreement and public health” (Doha Declaration), unanimously adopted by the members of the World Trade Organization (WTO) at their Ministerial Meeting on 14 November 2001.

The Doha Declaration responds to the negative spillovers that the WTO TRIPS Agreement, by increasing prizes of and reducing access to essential medicines in less affluent parts of the world, imposes on global health (Sun 2004, 125–27). It results from a fierce battle between the holders of intellectual property rights on pharmaceuticals in the “Global North” and the importers of those products in the “Global South” (Drezner 2007, chapter 7). Within this battle, a transnational alliance of developing countries and public health NGOs brought the World Health Organization (WHO) to monitor closely how exactly TRIPS affects public health (t’Hoen 2003). The knowledge thus created by the WHO increased the pressure on the WTO to justify its regulations of intellectual property rights against the backdrop of public health concerns (Helfer 2009, 41–42). The Doha Declaration responds to this justificatory pressure by linking one of the governance objectives of the WTO (protecting intellectual property rights) to the governance objective of the WHO (protecting public health). In doing so, it mitigates the negative spillovers that the WTO TRIPS Agreement imposes on public health.

The interaction between WTO and WHO exemplifies that international institutions often create effects outside their own governance domains (Johnson and Urpelainen 2012). This theory note establishes why these effects impact their normative legitimacy. More precisely, it argues that the normative legitimacy of *any* international institution depends *also* on how it deals with the negative spillovers it creates.

The note diverges in two important ways from the dominant approach to the normative legitimacy of international institutions: *First*, rather than treating international institutions as

stand-alone entities which address separate cooperation projects and operate in isolation from each other (Grant and Keohane 2005; Moravcsik 2004; Zürn 2004), it adopts the analytical perspective of the New Interdependence Approach (NIA), which conceives of international institutions as elements of larger institutional structures characterized by rule overlap (Farrell and Newman 2016, 716, 721–22). More precisely, it conceives of international institutions as embedded in regime complexes composed of international institutions that overlap in their memberships and regulatory competences without being coordinated by a hierarchical instance (Raustiala and Victor 2004). *Second*, rather than locating normative legitimacy in the ability of international institutions to realize clearly separable governance objectives (Keohane, Macedo, and Moravcsik 2009) or in the (democratic) quality of decision-making within single international institutions (Moravcsik 2004), the note conceives of normative legitimacy as residing in inter-institutional justificatory practices. By drawing on the *right to justification* (Forst 2011, 2015), it conceptualizes normative legitimacy as emerging from “the justification of actions to those whom they affect according to reasons they can accept” (Williams 2009, 43; see also Steffek 2003). In short, the note combines a new analytical perspective on international institutions as embedded in regime complexes with a new approach to normative legitimacy as residing in inter-institutional justificatory practices.

We reveal that, as stand-alone entities, international institutions can establish only partial orders of justification which revolve around their own governance objectives. Drawing on the NIA, we argue that any international institution is a key source of asymmetric power, because each international institution systematically privileges those collective actors and transnational alliances that pursue its own governance objective over collective actors and transnational alliances that pursue diverging governance objectives (Farrell and Newman 2016, 716). The WTO, for instance, systematically privileges those collective actors and transnational alliances

that exert justificatory pressure against the backdrop of its governance objective to liberalize trade over collective actors and transnational alliances that refer to diverging governance objectives, such as the protection of the environment and of labor rights (Steffek 2003, 268–70).

Regime complexes, in contrast, facilitate inter-institutional and therefore more encompassing orders of justification. The process that led to the Doha Declaration exemplifies how the embeddedness of international institutions in regime complexes enables affected collective actors and the transnational alliances they may form to create political pressure against the backdrop of diverging governance objectives enshrined in overlapping international institutions.¹ As elements of regime complexes, actors interacting within international institutions (e.g. the WTO) therefore face stronger political pressure to justify negative spillovers (e.g. on public health) than as if they would interact within stand-alone entities. In sum, regime complexes enable breaking open the partial orders of justification put in place by single international institutions. In that sense, they facilitate normative progress in global governance.²

This theory note expands existing research on regime complexes which is hitherto primarily driven by the question of whether and in how far regime complexes constitute barriers or opportunities for effective global governance (Faude and Gehring 2017; Orsini, Morin, and Young 2013). By implication, it almost completely neglects questions of normative legitimacy (Alter and Raustiala 2018). However, two starkly contrasting arguments stand out: On the one hand, Eyal Benvenisti and George Downs (2007, 595–96) argue that the institutional fragmentation of global governance “operates to sabotage the evolution of a more democratic and egalitarian international regulatory system” and, in the end, yields “a regulatory order that reflects

¹ This argument applies to regime complexes that are composed of international institutions from at least two different international regimes.

² This assessment is made “in light of the imperfect present set of institutions” which makes the evaluation of its normative legitimacy “a task for normative non-ideal theory” (Follesdal 2016, 308).

the interests of the powerful that they alone can alter.” On the other hand, Jonathan Kuyper argues that the democratization of global governance should occur at the level of regime complexes because they empower weaker actors and enhance the realization of three core values of democratization: “equal participation”, “accountability”, and “institutional revisability” (Kuyper 2014a).

Their starkly contrasting arguments notwithstanding, both contributions share the assumption that regime complexes clearly privilege specific groups of actors – either powerful states (Benvenisti and Downs) or weak states and non-state actors (Kuyper) – over others. We, by contrast, argue that regime complexes facilitate inter-institutional dynamics of justification which do not a priori benefit one clearly identifiable group of collective actors. Rather, they enable actors marginalized within the international institution producing negative spillovers to demand inter-institutional justifications.

The note proceeds as follows: *First*, we establish that normative legitimacy in global governance is created not only within but also across international institutions. *Second*, we develop a new analytical perspective on normative legitimacy in global governance which conceives of international institutions as embedded in regime complexes. *Third*, we introduce a new theoretical approach to normative legitimacy as residing in inter-institutional justificatory practices. It revolves around Rainer Forst’s ‘right to justification.’ *Fourth*, we argue that regime complexes put in place political opportunity structures which advance inter-institutional justifications and thereby facilitate normative progress in global governance. The conclusion charts the research agenda stemming from this theoretical intervention.

Why the Dominant Approach to the Normative Legitimacy of International Institutions is Incomplete

The case of public health-related intellectual property rights exemplifies that contemporary international institutions do not operate in isolation but create and are subject to positive and negative spillovers (Johnson and Urpelainen 2012). Positive spillovers emerge if one international institution supports a separately established international institution in achieving its governance objective (Johnson and Urpelainen 2012, 646). Several conventions adopted within the International Labor Organization (ILO), for example, reduce incentives for trafficking in persons and thus support the governance objective of the UN Trafficking Protocol. The latter, in turn, supports the governance objective of the ILO because preventing human trafficking reduces forced labor practices (Gómez-Mera 2016, 584). Negative spillovers, by contrast, arise if one international institution adversely affects or undermines the ability of another international institution to reach its governance objective (Johnson and Urpelainen 2012, 646). International institutions that facilitate transnational transport, such as the International Maritime Organization (IMO) and the International Civil Aviation Organization (ICAO), for example, undermine the governance objective of international institutions devoted to protecting the climate (Oberthür 2003). And the governance objective of the WTO to facilitate transboundary trade adversely affects the governance objective of the World Food Program to promote food security (Margulis 2018).

These examples are not anomalous but point to the ubiquity of functional spillovers in contemporary global governance (Alter and Raustiala 2018; Gehring and Faude 2013). Functional spillovers result from the distinct trajectory on which world politics became institutionalized after World War II. As envisioned by neofunctionalists, states gradually

promoted the institutionalization of world politics by establishing sector-specific international institutions whose design followed functional needs (Haas 1964, chapter 1). This dynamic was partly fueled by the fact that, due to functional spillovers, gains from institutionalizing cooperation in one issue-area (e.g. financial and monetary affairs) could only be reaped fully, if cooperation was also institutionalized in cognate issue-areas (e.g. trade). Put differently, it was partly driven by the desire to exploit *positive* spillovers (Haas 1958, chapter 8).

This neofunctionalist account neglects that cooperation in one issue-area may also undermine cooperation in a contagious issue-area, if divergent governance objectives cannot be reconciled. Thus, neofunctionalism does not capture the *negative* spillovers that were caused by the proliferation of international institutions (see Drezner 2013). Our approach, by contrast, is not only able to capture negative spillovers, but also to problematize them from the perspective of normative legitimacy.³

Their ubiquity in contemporary global governance notwithstanding, the dominant approach to the normative legitimacy of international institutions neglects both positive and negative spillovers. It adopts an institution-specific perspective which postulates that normative legitimacy is created exclusively *within* separately established international institutions that operate in isolation from each other (Grant and Keohane 2005; Moravcsik 2004; Zürn 2004). Grant and Keohane (2005, 35–37), to take a prominent example, identify seven discrete accountability mechanisms, but none of them takes functional spillovers and relations among international organizations into account. To be sure, their mechanism of “supervisory accountability” “refers to relations between organizations,” but the organizations that the authors have in mind to hold international organizations accountable are “states” and “institutions within states” (Grant and Keohane 2005,

³ Neofunctionalism does not in any way problematize the normative legitimacy of international institutions.

36). Moreover, whilst the mechanism of “peer accountability” “arises as the result of mutual evaluation of organizations by their counterparts”, these counterparts are thought to be NGOs (Grant and Keohane 2005, 37).

Within the dominant approach, two perspectives on the normative legitimacy of stand-alone international institutions can be distinguished. The premise of the *first* perspective is that “[t]he justification for having global governance institutions is primarily if not exclusively instrumental” (Buchanan and Keohane 2006, 422). It stipulates that international institutions derive their normative legitimacy primarily, if not exclusively, from their ability to realize the global public interest, that is, by helping states to realize governance objectives that they are not able to realize unilaterally, such as mitigating climate change or facilitating financial stability (Buchanan and Keohane 2006, 422; Zürn 2004, 262–66). This perspective adopts an *institution-specific* definition of the public interest (Keohane, Macedo, and Moravcsik 2009, 9–16). It implicitly assumes that the governance objectives pursued by international institutions are clearly separable and can be achieved without reflecting upon their interrelationships.

The *second* perspective approaches the normative legitimacy of international institutions by referring to a set of principles inherent in democratic theory, such as accountability and transparency (Dahl 1999; Moravcsik 2004; Zürn 2000). Scholars subscribing to this perspective share the assumption that international institutions derive their normative legitimacy from how they organize their collective decision-making. Grant and Keohane (2005, 35), for example, argue that the legitimacy of international organizations depends on “charters or articles of agreement that specify the procedures by which they have to act to make their rulings authoritative.” In general, this strand of literature analyzes in how far collective decision-making within stand-alone international institutions realizes democratic principles or can be expected to

do so in the future (Zürn 2000). Whilst the first perspective adopts an institution-specific definition of the *global public interest*, this perspective puts forward an institution-specific definition of *global democracy*. By implication, it neglects how functional spillovers affect the democratic quality of international institutions and, thus, their normative legitimacy. Moravcsik (2004: 338–48), to take a prominent example, develops a framework to analyze the democratic deficit in world politics that clearly applies to single international organizations. Consequently, he applies his framework to one international organization - the European Union (EU) - which he clearly conceives of as a stand-alone institution (Moravcsik 2004, 348–61). And Dahl, to take another example, offers “several reasons for believing that whatever kind of government may prevail *in* international organizations it will not be recognizably democratic in any sense” (Dahl 1999, 20; our emphasis). Lastly, the arguments put forward by Zürn apply to “both international institutions in general and the EU in particular” (Zürn 2000, 185–86).

The capacity of both perspectives to adequately assess the normative legitimacy of contemporary international institutions is incomplete. Both perspectives neglect that contemporary global governance is not merely the product of sector-specific international institutions but also emerges from their interactions (Weiss and Wilkinson 2014). The *first* perspective fails to reflect that, due to the ubiquity of functional spillovers, contemporary international institutions help collective actors to reach *interdependent* governance objectives that need to be balanced against each other (Fischer-Lescano and Teubner 2004). By implication, it fails to capture that what constitutes the global public interest is constantly contested not only *within* but also *across* separately established international institutions (cf. Grant and Keohane 2005, 38). In areas of overlap, the positions on how the global public interest ought to be defined differ among the proponents of diverging governance objectives. That is, collective actors disagree on how diverging governance objectives ought to be balanced. Among transnational human rights and environmentalist

activists, for example, it is a widespread criticism that international economic institutions subordinate environmental and consumer protection as well as human and labor rights to liberal economic goals (Bernstein 2005, 141). In short, no sector-specific international institution can unilaterally define *the* global public interest.

The *second* perspective fails to capture the relevance of negative spillovers from the perspective of democratic theory. Negative spillovers imply that collective decision-making within one international institution not only undermines the ability of another international institution to reach its governance objective, but also adversely affects collective actors and individuals. For example, the anti-terrorism policy of the United Nations Security Council not only undermined the governance objective of international human rights institutions, but - through its “targeted sanction list” - also violated the rights of individuals that human rights institutions seek to protect (Morse and Keohane 2014, 395–98). From the perspective of democratic theory those affected by the negative spillovers of international institutions should be part of the collective decision-making processes that produce them.

In sum, notwithstanding the fact that, in contemporary global governance, it is hard to think of an international institution that is *not* part of a regime complex, the dominant approach to their normative legitimacy conceives of international institutions as if they were stand-alone.

A New Analytical Perspective on Normative Legitimacy: International Institutions Embedded in Regime Complexes

Since functional spillovers are ubiquitous in contemporary global governance, we posit that our assessments of the normative legitimacy of international institutions should be sensitive to inter-institutional influences. We therefore develop a theoretical approach which enables IR scholars to

assess how negative spillovers affect the normative legitimacy of separately established but functionally overlapping international institutions. Adopting the NIA, we, *firstly*, conceive of international institutions as key sources of asymmetric power. That is, we hold that any international institution systematically privileges specific types of collective actors over others. *Secondly*, we conceive of international institutions as embedded in regime complexes, which feature rule overlap among separately established international institutions. We stipulate that every regime complex establishes a new political opportunity structure which facilitates countering the asymmetric power that individual institutions systematically grant specific types of collective actors (cf. Farrell and Newman 2016, 716).

Diverging governance objectives and asymmetric power

All international institutions are established to influence the behavior of relevant actors in order to achieve a particular governance objective such as international financial stability or the protection of human rights (Oberthür and Gehring 2006, 9). By implication, any international institution systematically privileges those collective actors that pursue its own governance objective over those who contest it by referring to diverging governance objectives pursued by overlapping international institutions. In that sense, international institutions are a source of asymmetric power (Farrell and Newman 2016, 716).

Within regime complexes composed of international institutions from at least two different international regimes, the ways in which institutions seek to influence the behavior of relevant actors diverge. As a consequence, clashes between collective actors pursuing diverging governance objectives emerge. By institutionalizing and channeling the fight for dominance between those actors, regime complexes create political opportunity structures which enable

balancing the asymmetric power relationships prevalent within single international institutions. Within the refugee regime complex, for example, collective actors operating within international institutions regulating global mobility (that is, refugees, labor migration, and travel) interact with collective actors operating within international institutions devoted to humanitarian assistance, international security, human rights and development (Betts 2009).

Rule overlap and decentralized political opportunity structures

Since rule overlap is their defining feature, regime complexes decentralize the political opportunity structures within which collective actors operate in contemporary global governance (cf. Farrell and Newman 2016, 722; Alter and Raustiala 2018, 331–33). The NIA, however, hitherto focuses primarily on “rule overlap between different national jurisdictions,” (Farrell and Newman 2016, 713) and on overlap “of domestic and global authorities” (Farrell and Newman 2016, 714). This note, by contrast, foregrounds rule overlap *among* global authorities. We hold that, if the NIA wants to deliver on its ambition to develop “the basis for a systemic account of world politics” (Farrell and Newman 2016, 716), it needs to take regime complexes, which have been described as the “signature feature of twenty-first century international cooperation” (Alter and Raustiala 2018, 345) more systematically into account.

A political opportunity structure is defined in social movement studies as “consistent – but not necessarily formal, permanent, or national – dimensions of the political environment which either encourage or discourage actors from using collective action” (Tarrow 1994). Any political opportunity structure is composed of formal institutions which serve as “discursive arenas” (Kriesi 2004). It determines how those that are dissatisfied with a given institutional status quo can collectively contest it. “Open structures” which are decentralized and enable easy access to

decision-making are distinguished from “closed structures” which are centralized and restrain access (Kriesi 2004, 69–70). The proliferation of regime complexes has decentralized the political opportunity structures in global governance which have traditionally revolved around single international institutions. It enables collective actors that are affected by the negative spillovers of an international institution to use a separately established international institution in order to contest these spillovers. Thus, the elemental institutions of regime complexes serve as discursive arenas that enable communicative processes geared toward diverging governance objectives. They provide sets of references “to which actors can relate in their communicative interactions” (Risse 2002, 607). Thus, regime complexes are contested sides of global governance (Muzaka 2011).

Substantive Linkage and Cooperation

The opportunity structures established by regime complexes enable collective actors to purposefully connect the interrelated governance objectives pursued within separately established international institutions (Gehring and Faude 2014). That is, collective actors may establish a substantive linkage among the diverging governance objectives of these institutions (cf. Haas 1980).⁴ As exemplified by the Doha Declaration, actors that establish a substantive linkage understand the governance objectives of separately established institutions as interlinked and reconceptualize them in a more encompassing way (cf. Haas 1980, 372; 374). In doing so, they use the political opportunity structures put in place by regime complexes not only to contest, but also to mitigate negative spillovers.

⁴ In its original meaning, the concept of substantive linkages refers to linking issues in one international regime (Haas 1980, 374).

A Forstian Approach to Normative Legitimacy in Global Governance

In order to grasp from a theoretical perspective how their embeddedness into regime complexes affects the normative legitimacy of international institutions, we draw on the political philosophy of Rainer Forst (2011; 2015). He holds that the term normative legitimacy does not contain any normative power on its own but is normatively dependent. That is, according to Forst (2015, 188–90), normative legitimacy depends on other, deeper, resources which vary in their idealistic grounding. Against this backdrop, he suggests that no person and no institution, but only a distinct type of social interaction is able to yield normative legitimacy via the production of normatively valid justifications (Forst 2011, 262). A Forstian approach therefore implies that the normative legitimacy of international institutions is created via a distinct type of social interaction within which institutionalized norms, rules and decisions are elaborated, justified, contested, and defended. The central question for this notion of normative legitimacy is *how* the normative orders established by international institutions are justified to the people living under them. That is, from a Forstian perspective, the normative orders established by international institutions are understood as orders of justification. As such, they pre-suppose *and* generate justifications. Thus, a Forstian approach conceives of justifications as enshrined in the collectively binding norms, rules and decisions adopted within international institutions (see also Steffek 2003).

In global governance, justifications may be constructed through various types of social interaction, from power-based bargaining to norm-guided interaction to truth-seeking arguing (Risse 2000). However, from a Forstian perspective, key is not which type of social interaction leads to a given justification. Rather, two criteria are applied to identify normatively valid justifications: reciprocity and generality. *Reciprocity* implies “that none of the parties concerned may claim certain rights or privileges they deny to others and that the relevance and force of the

claims at issue are not determined one-sidedly”. *Generality* requires that “those affected have an equal right to demand justifications” (Forst 2011, 258). Taken together, these two criteria constitute the right to justification which implies “a qualified veto right against any norms and practices that cannot be justified reciprocally and generally” (Forst 2011, 259).

Applied to global governance, the “right to justification” requires the normative orders established by sector-specific international institutions to be justified in two ways: *first*, vis-à-vis those that are subjected to them (institution-specific justification);⁵ *second*, vis-à-vis those that are affected by them and therefore ought to recognize them from outside (inter-institutional justification).

The criterion of *reciprocity* implies that, from a Forstian perspective on normative legitimacy, it is important whether the legitimate interests of those *not* represented in collective decision-making but affected by its negative spillovers are considered in the process. That is, the criterion of *reciprocity* asks any international institution to justify the negative spillovers it creates. Such justifications may be developed not only by truth-seeking or norm-guided interaction but also by way of power-based bargaining. However, we may expect their normative quality to vary across the three types of social interaction.

In sum, a Forstian approach implies that the normative orders established by international institutions can be conceived as arbitrary rule or domination, if they are not *reciprocally* and *generally* justified. This is the case, if exclusive institutional structures close the space for contestation. From this perspective, any absence of institutional structures that enable actors to call prevailing justifications into question *is* “political domination” because it prevents the construction of reciprocal and general justifications (Forst 2011, 249–50). A Forstian approach

⁵ On institution-specific justifications, see Steffek (2003).

therefore requires global governance to develop institutional structures which enable the proponents of diverging governance objectives enshrined in overlapping international institutions to put forward, contest and defend reciprocal and general justifications. Put differently, a Forstian approach requires global governance to facilitate the right to justification to be exercised across overlapping normative orders and, thus, beyond institution-specific justificatory narratives. By implication, it asks IR scholarship to integrate the questions of whether, how and to what degree global governance enables the contestation of institution-specific justificatory narratives when assessing its normative legitimacy (Forst 2015, chapters 1 and 2).

How Regime Complexes Enable Normative Progress in Global Governance

As long as international institutions operate separately, individual governance objectives define the normative orders around which “actors’ expectations converge in a[ny] given area of international relations” (Krasner 1982, 186). By implication, social interaction revolves exclusively around individual governance objectives. As a result, the normative orders established and reproduced by international institutions pre-suppose and generate justifications that are fundamentally biased towards their own governance objectives. In other words, international institutions establish institution-specific orders of justification within which institution-specific justificatory narratives constrain social interaction. Such justificatory narratives neglect that “beliefs of fact and causation”, “rights and obligations” as well as “specific prescriptions or proscriptions for action” diverge across regimes (Krasner 1982, 186).

As soon as international institutions become elements of regime complexes, the context “within which decisions are made and rules are adopted” gets enlarged (Helfer 2009, 39). Regime complexes establish governance arrangements which revolve around the diverging governance

objectives of their elemental institutions as normative reference points. They enable dispute and, possibly, reflection about prevailing standards of justification. In other words, inherent in regime complexes is an interplay of the diverging justificatory narratives constructed within their elemental institutions.

By enabling actors that pursue different governance objectives to exchange justifications, regime complexes facilitate the balancing of the asymmetric power that individual institutions systematically grant specific types of collective actors (cf. Farrell and Newman 2016, 716). On the one hand, dominant actors within each elemental institution face inter-institutional pressure to justify their actions *also* with reference to the governance objectives of other elemental institutions. On the other hand, dissatisfied actors (in particular those affected by negative spillovers) gain the opportunity to call institution-specific justificatory narratives into question by demanding reciprocal (inter-institutional) justifications of negative spillovers.⁶ In short, due to rule overlap, regime complexes weaken the capacity of dominant actors to constrain discursive spaces and empower actors that are affected by negative spillovers. From a Forstian perspective, they establish political opportunity structures that facilitate reciprocal (inter-institutional) justifications.

Actors that are affected by the negative spillovers emanating from various development projects funded by the World Bank, for example, may draw on international human rights treaties to demand a justification for these spillovers (Heupel 2017). And environmentalists affected by WTO regulations, to take another example, may resort to international environmental institutions

⁶ Given that we conceive of international institutions as sites of asymmetric power, we expect these actors to be marginalized in the institution that creates negative spillovers.

in order to ask the WTO to justify the negative spillovers it exerts on the protection of the environment (Gehring 2011).

Reciprocal justifications are produced, if prevailing institution-specific justificatory narratives are not only called into question within inter-institutional dynamics but gradually replaced by “reflexive justifications.” Such a dynamic implies, *first*, that institution-specific justifications of norms, rules and decisions are challenged and overcome and, *second*, that justifications are being acknowledged inter-institutionally (reciprocally) (Forst 2015, chapter 8). This dynamic amounts to the construction of a substantive linkage between the governance objectives pursued by the elemental institutions of regime complexes. From a Forstian perspective, a substantive linkage institutionalizes an inter-institutional (reciprocal) justification. It comes into being through a collectively binding norm, rule or decision that interrelates the governance objectives pursued by these institutions. If a substantive linkage is in place, the “relevance and force of the claims at issue are not determined one-sidedly” (Forst 2011, 258) but by taking diverging governance objectives into account within collective decision-making. The Doha Declaration, for example, constructs a substantive linkage between WTO and WHO by interrelating the protection of intellectual property rights to the protection of public health. In doing so, it mitigates the negative spillovers that the WTO imposes on the WHO. Another substantive linkage has been constructed between the governance objective of the World Food Program (WFP) to enhance food security and the governance objective of the WTO to facilitate transboundary trade. The construction of this linkage responds to concerns within the WFP and other UN agencies that the trade liberalization facilitated by the WTO compromises food security (Margulis 2013, 61). To intervene in the trade negotiations, the WFP placed an advertisement in the Financial Times on the first day of the 2005 WTO Ministerial in Hong Kong. The advertisement bluntly raised concerns that WTO trade regulations could have devastating effects on food security (Margulis

2018, 16). By problematizing negative spillovers, it put pressure on the WTO to justify its trade regulations against the backdrop of food security. After a harsh political battle, it was decided ten years later, at the 2015 Nairobi Ministerial, that, in cases of emergency, establishing food security trumps facilitating international trade (Ministerial Decision on Export Competition, WT/MIN(15)/45, No. 22–32). More precisely, the Ministerial Decision stipulates that humanitarian agencies, and not the WTO, are the legitimate institutions to decide what constitutes a legitimate food aid emergency (Margulis 2018, 17).

It is important to emphasize that justifications can feature varying degrees of reciprocity. If an elemental institution of a regime complex, for example, unequivocally subordinates the governance objective of an overlapping institution to its own governance objective and thus marginalizes its rival, the level of reciprocity is low. By contrast, if diverging governance objectives are inter-related in a fine-grained and equitable way, for example by defining under which circumstances which governance objective is to be given priority, the level of reciprocity is high. Thus, we do not conceive of justifications in binary terms. That is, we do not conceive of them as being either one-sided or reciprocal. Rather, we submit that justifications can assume varying degrees of reciprocity. Importantly, however, our Forstian approach suggests that also a low level of reciprocity constitutes (small) normative progress compared to the completely one-sided (that is, institution-specific) orders of justification constructed within international institutions. Thus, even turf battles between elemental institutions of regime complexes enhance reciprocity as long as they do not reject diverging governance objective(s) altogether. Normative progress is completely absent only if the elemental institutions of regime complexes justify their norms, rules and decisions as if they were stand-alone institutions.

A Forstian approach suggests that regime complexes increase the ability of their elemental institutions to critically revise how they achieve their governance objectives (Buchanan and Keohane 2006, 427). To the degree that “checks and balances are mechanisms designed to prevent action that oversteps legitimate boundaries by requiring the cooperation of actors with different institutional interests” (Grant and Keohane 2005, 30), regime complexes put in place a rudimentary system of informal checks and balances among separately established, but functionally overlapping international institutions. They effectuate that the legitimate boundaries of institutionalized political action in global governance are defined not only within single institutions, but also inter-institutionally.

In sum, our Forstian approach to normative legitimacy implies, *first*, that international institutions tend to produce normative orders that neglect negative spillovers and, by implication, the legitimate interests of those not represented in their collective decision-making. As a result, they violate Forst’s criterion of *reciprocity*. It implies, *second*, that, as elements of regime complexes, international institutions induce social interaction that tends to take negative spillovers into account, although in different ways and, thus, with varying degrees of normative legitimacy. In short, regime complexes put in place the opportunity structures that enable collective actors to develop inter-institutional justifications. In doing so, they enable normative progress in global governance. It is, however, an empirical question how considerable this progress is (see Conclusion).

Where to Look for Inter-institutional Justifications?

Inter-institutional justifications are developed in two types of institutional bodies. *First*, established decision-making bodies of international institutions may put forward inter-

institutional justifications by taking the governance objectives of other elemental institutions into account when adopting their decisions. The dispute settlement body of the GATT/WTO system, for example, has in various decisions dealt with the contentious question of environmentally motivated trade restrictions (Gehring 2011). These decisions determine the scope of those GATT/WTO rules that allow restricting international trade for environmental purposes. Initially, the dispute settlement body rejected “environmentally motivated trade restrictions that were in conflict with the GATT non-discrimination obligations” (Gehring 2011, 234). More precisely, it argued that “market access for goods could become subject to an increasing number of conflicting policy requirements for the same product and this would rapidly lead to the end of the WTO multilateral trading system” (World Trade Organization 1998, para. 7.45).

In the “shrimp/turtle case”, however, the WTO Appellate Body significantly changed the GATT/WTO jurisprudence on environmentally motivated trade restrictions. It did so by arguing that “the world trade system is directed at ensuring that the interests of the importing state to enact meaningful environmental protection measures are weighed against the interests of the exporting states to accede to the import market.” Against this backdrop, it “developed a number of criteria to which trade restricting domestic measures must conform in order to be compatible with GATT rules” (Gehring 2011, 245). In doing so, the WTO Appellate Body established a substantive linkage between the governance objective of the WTO and the governance objectives of various international environmental institutions. Thereby, it has reduced negative spillovers and increased reciprocity in the regime complex of trade and the environment.

In a similar vein, the World Bank has been dealing for decades with the question of how the projects it funds affect individual rights enshrined in international human rights treaties (Krisch, Corradini, and Reimers 2020). Its initial approach to human rights drew on the “political

prohibition” rule in the Articles of Agreement which provides that “the Bank and its officers shall not interfere in the political affairs of any member.” Over time, however, the World Bank has started to problematize the negative spillovers its projects exert on human rights. Not only was the World Bank Inspection Panel established in 1993 and the Environmental and Social Framework (ESF) launched in 2018 but also World Bank lawyers have increasingly relied on international human rights institutions in their legal interpretations (Krisch, Corradini, and Reimers 2020). In stark contrast to the initial approach, one General Counsel even argued that “the Articles of Agreement *permit*, and in some cases *require* the Bank to recognize the human rights dimensions of its development policies and activities” (Danino 2006). In sum, the World Bank has, over time, increased reciprocity by becoming more receptive of the norms and rules enshrined in international human rights treaties. In fact, it has established a substantive linkage between diverging governance objectives. By implication, it has reduced negative spillovers.

Second, inter-institutional justifications may emerge within inter-institutional bodies that are established with the explicit purpose of mediating inter-institutional tensions and conflicts. Within the regime complex for hazardous substances and activities, for example, the Inter-Organization for the Sound Management of Chemicals (IOMC) assumes such a role. The IOMC brings together representatives of various institutions which meet twice a year to coordinate their activities on chemicals management and recommend common policies for all elemental institutions (Dunoff 2012). In particular, they consider how the regulation of chemicals management affects the governance objectives pursued by the elemental institutions of the complex, be they food security, environmental protection, or industrial development. The various “joint working groups and expert groups” established by the IMO and the ILO are further examples of such inter-institutional bodies. Within the “Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and

Abandonment of Seafarers”, the “Joint IMO/ILO Ad Hoc Expert Working Group on the Fair Treatment of Seafarers in the Event of a Maritime Accident”, “the Joint ILO/IMO Working Group on Medical Examinations of Seafarers and Ships' Medicine Chests” and others, inter-institutional justifications that relate the social protection of seafarers (a governance objective pursued by the ILO) to the protection of the maritime environment (a governance objective pursued by the IMO) are put forward (Dunoff 2016, 69).

What About Democracy?

Their ability to facilitate the construction of inter-institutional justifications notwithstanding, all of the aforementioned institutional bodies are highly exclusive. Their composition of political, judicial, and technical experts is consequential for our Forstian approach to the normative legitimacy of international institutions. It implies that the *generality* of the justifications put forward in these bodies is highly restricted, no matter how *reciprocal* they are. As we lay out in Section 3, *generality* is the second criterion that Forst uses to identify normatively valid justifications. It captures the relationship between those adopting collectively binding decisions within international institutions and those affected by them. More precisely, *generality* requires that “those affected have an equal right to demand justifications” (Forst 2011, 258). By implication, it asks international institutions to open-up their exclusive institutional structures, including those that put forward inter-institutional justifications. In short, the criterion of *generality* calls for the institutionalization of democratic governance structures. To the degree that representatives of civil society and, indeed, citizens contribute to the construction of inter-institutional justifications, not only their *reciprocity* but also their *generality* is enhanced.

How does the absence of democratic governance structures affect our argument that regime complexes facilitate normative progress in global governance? Democracy can be defined as a

“system of governance which requires that individuals can participate as equals in the collective decision-making that affects their lives” (Kuyper 2014b, 180). Thus, global governance can be described as democratic if all those significantly affected by it enjoy “equal and maximal inclusion” in international institutions (Kuyper 2014a, 637). While we use the criterion of *reciprocity* to suggest that regime complexes enhance the normative legitimacy of global governance by facilitating inter-institutional justifications, we do *not* use the criterion of *generality* to suggest that regime complexes enhance the ability of citizens to demand justifications. Thus, our argument that regime complexes facilitate normative progress in global governance relies exclusively on their ability to facilitate inter-institutional justifications. However, our Forstian approach is not only able to make visible the normative progress that is achieved within exclusive institutional bodies by its criterion of *reciprocity*, but also to criticize the lack of democratic structures by its criterion of *generality*.

In fact, our Forstian approach is largely compatible with the “bottom-up” deliberative approach to global democratization developed by James Bohman (2010). Similar to us, Bohman (2010, 438) observes that existing institutions “often involve restrictions in the availability of relevant perspectives,” a fact that he (like us) traces back to a lacking diversity of actors. Analogous to this theory note, he argues that, to enable mutually checking procedures, decision-making power should be dispersed “across overlapping and differentiated institutions” (Bohman 2010, 441). In contrast to our emphasis on inter-institutional justifications (*reciprocity*), however, Bohman foregrounds the integration of civil society and the public sphere into collective decision-making (*generality*).

Our approach is distinct, however, from John Dryzek’s (2006) approach to democratizing global governance. Whereas Dryzek (2006, 158) emphasizes discourses within the general public that

lack a “formalized connection to binding collective decisions”, we focus on justifications put forward within formal international institutions. Nevertheless, Dryzek (2006, 18), like us, points to the importance of constellations in which different (hegemonic) discourses clash and emphasizes the democratic potential of engagement across multiple discourses.

In general, Bohman, Dryzek and other proponents of global deliberative democracy foreground discursive processes and good reasons without elaborating precisely on the institutional arrangements (whether they exist in the real world or not) that may enable those types of social interaction (Zürn 2016, 93). Our Forstian approach, in contrast, emphasizes the legitimacy-enhancing potential of an institutional arrangement – the regime complex – which not only exists in the real world, but is even increasingly prevalent in global governance.

Conclusion and Future Research

As the NIA suggests, political contestation takes place in *multiple* and *overlapping* venues (Farrell and Newman 2016, 724).⁷ To accommodate this phenomenon, we develop a new theoretical approach to the normative legitimacy of international institutions which conceives of them as embedded in regime complexes. In contrast to the dominant approach, we posit that the normative legitimacy of any international institution is affected by the effects it creates outside of its own governance domain.

Drawing on the political philosophy of Rainer Forst, our approach conceives of normative legitimacy as residing in inter-institutional justificatory practices as a distinct type of social interaction. Against this backdrop, we argue that regime complexes enhance the normative

⁷ However, the Farrell and Newman only very briefly touch upon the normative concerns raised by the NIA (Farrell and Newman 2016, 730).

legitimacy of global governance by increasing the ability of affected actors to contest the negative spillovers international institutions create in governance domains beyond their own. In doing so, they enable inter-institutional and, therefore, more encompassing forms of justification than individual international institutions. In other words, regime complexes enlarge the context within which international institutions are expected to justify their decisions compared to a counterfactual situation – commonly assumed by existing research – in which they operate in isolation.

They let institution-specific justificatory narratives compete against each other for the determination of the global public interest. Thus, their embeddedness in regime complexes affects how international institutions justify their norms, rules and decisions. It therefore makes a difference whether, for example, the WTO is a stand-alone institution or an elemental institution of the regime complex for public-health related intellectual property rights. Since inter-institutional justifications concern not merely technical difficulties or implementation problems but fundamental normative conflicts, they are inherently political in nature. Regime complexes accommodate a “plurality of regulatory perspectives” which enables actors to interrelate diverging governance objectives (Dunoff 2012, 139). As the various empirical examples sketched in the note illustrate, the process of interrelating diverging governance objectives includes hard-fought political battles. Our Forstian approach to the normative legitimacy of international institutions therefore incorporates conventional adversarial politics.

This theory note prepares the ground for a new research agenda on the normative legitimacy of international institutions as embedded in regime complexes. Since negative spillovers may be justified in different ways, the inter-institutional justifications put forward within regime complexes inevitably possess different degrees of normative legitimacy. We do not conceive of

justifications in binary terms, that is, as being either one-sided or reciprocal. Rather, we assume that they can possess varying degrees of reciprocity. Against this backdrop, the next step in advancing knowledge on how their embeddedness in regime complexes affects the normative legitimacy of international institutions is a comparative empirical analysis of the reciprocal qualities of various regime complexes. Such a study would, *firstly*, analyze inter-institutional justifications which can be demanded by collective actors via critical public statements, reports, or even by establishing competing rules. Such actions are observable implications of a situation in which justifications developed within international institutions are not acknowledged inter-institutionally. It would, *secondly*, analyze inter-institutional justifications which can be put forward within international institutions in order to nurture the belief in their legitimacy. In that case, inter-institutional justifications “are observable in official texts and public statements”, including “public justifications of institutional reforms, framing of IO policies, use of value-laden symbols, and other rhetorical measures” (Tallberg and Zürn 2019, 588).

To the degree that the inter-related governance objectives of overlapping international institutions are taken into account in decision-making processes, and justifications of collectively binding decisions are being acknowledged inter-institutionally, normative progress is observable. The comparative empirical analysis of inter-institutional justifications within various regime complexes will help to develop a more fine-grained understanding of reciprocity. More importantly, it will enable us to capture the varying normative qualities of the inter-institutional justifications put forward within and across elemental institutions of regime complexes. As a result, we may determine the empirical extent of normative progress in global governance.

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