

SYMPOSIUM ON INDUSTRY ASSOCIATIONS IN TRANSNATIONAL LEGAL ORDERING

THE INTERNAL CHALLENGES OF ASSOCIATIONAL GOVERNANCE

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This essay describes the normative dynamics *within* industry associations that affect their contributions to private transnational legal ordering. It asserts that even the most powerful associations possess characteristics that undermine their autonomy to rulemake for their industries, and so, their ability to govern. Examining the relationships between associations and their members helps us [identify the forces](#) that impede the effectiveness of associational governance, an important source of transnational private regulation.¹

Effectiveness can be assessed in various ways, but the most relevant for our purpose is an association's capacity to [direct](#), or at least influence, the behavior of its member firms.² The insight is that to be effective, associations must navigate the challenges stemming from two special characteristics of associational governance. The first pertains to membership, which is both voluntary and nonexclusive. The second pertains to the members themselves, who are independent, self-governing firms and economic rivals. Both of these characteristics have consequences for the effectiveness of associational governance because they corrode associations' autonomy as rulemakers.³

Voluntary and Nonexclusive Membership

Associations' autonomy to govern their members is curbed by two features of association membership. First, association membership is voluntary, so firms may choose whether they become and remain members. An association can wield authoritative power equivalent to that of a government organization. Yet, because U.S. associations are not publicly funded, their financial solvency depends on membership dues and their chances of survival

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¹ [THE CHALLENGE OF TRANSNATIONAL PRIVATE REGULATION: CONCEPTUAL AND CONSTITUTIONAL DEBATES](#) 3 (Colin Scott et al. eds., 2011) (“Transnational private regulation capture[s] the idea of governance regimes which take the form of ‘coalitions of non-state actors which codify, monitor, and in some cases certify firms’ compliance with labor, environmental, human rights, or other standards of accountability.”).

² Terence C. Halliday & Gregory Shaffer, [Transnational Legal Orders](#), *TRANSNATIONAL LEGAL ORDERS* 3, 48–49 (Terence C. Halliday & Gregory Shaffer eds., 2015).

³ The focus here is on associations from the United States because it is home to many of the world's largest companies and, by extension, the biggest, most resourced, and globally influential associations. U.S. associations are nonprofit, voluntary organizations that aggregate, represent, and promote the interests of their member firms—domestic and transnational corporations. Be it in the area of pharmaceuticals, toys, derivatives, organic cotton, beverages, telecommunications, or chocolate, most industries are governed by at least one association, and most businesses belong to at least one association. Michael L. Barnett, [One Voice, But Whose Voice? Exploring What Drives Trade Association Activity](#), 52 *BUS. & SOC'Y* 213, 213–214 (2013).

are impacted when nonmember businesses “free ride” by using their norms without paying for them.⁴ The voluntary membership feature aggravates the free-riding risk. In order to survive, associations must continually work to attract new and retain existing dues-paying members. In the case of a “leader-association” that is recognized as *the* rulemaker for the industry, member recruitment and retention is considerably easier. The [International Swaps and Derivatives Association](#) (ISDA) is a good example.⁵ ISDA developed the form contracts and standards that govern virtually every swap transaction. Companies that decline to employ the ISDA forms and standards operate at a disadvantage in the capital markets. However, most associations are not “leader-associations,” which means that they are under real pressure to attract and retain members.

A second feature that limits associations’ rulemaking autonomy and heightens their vulnerability is that membership is nonexclusive, meaning that a single firm can be a member of multiple associations. This has consequences. Absent a strong sense of institutional loyalty, a firm belonging to multiple associations is likely to shift its attention to focus on whichever association best advances its interests at any point in time. A firm’s engagement in its association(s)—gauged by time and resource commitments, and participation in association events and decisionmaking processes—can fluctuate significantly, even within the span of a few months. This can create instability within affected associations. Inconsistent or unpredictable member engagement can hamper an association’s resource mobilization efforts and the implementation of (especially longer-term) initiatives, which can in turn create obstacles for effective associational governance. Indeed, association professionals explain that one of the biggest challenges they face is keeping members engaged and invested in their associations’ work.⁶

Member engagement is also crucial for association-disseminated norms to “settle” across the membership and, by extension, the industry. As Shaffer and Halliday explain, “legal” norms developed by both state and nonstate actors—including industry associations—settle when their meaning becomes “stable within the minds and practices of the actors who implement and apply the norms, whether these actors are public officials or private professionals.”⁷ The less engaged association members are, the less likely they will be to internalize—let alone observe—association norms. Nonexclusivity can therefore challenge an association’s effectiveness in diffusing norms among its members.

A second consequence of nonexclusivity is that dissatisfied members can “defect” with relative ease. A defecting member can join another association or even establish its own competing association. For an association, defection can carry costs that far exceed lost member dues, especially if it reveals a loss of confidence in the institution. Some larger associations, especially [multisector associations](#) (e.g. the National Association of Manufacturers), can better tolerate defections and underengagement than can the (many) smaller or more specialized associations.⁸

Nonexclusivity therefore intensifies the competitive pressures already at work within the market for associations and further corrodes the ability of associations to act autonomously from their members. It is in part because firms can “association shop” that associations tend to exercise only limited enforcement power. When an association is faced with member noncompliance, the typical response is to try to persuade the wayward member to change its

⁴ Matthew Potoski & Aseem Prakash, [A Club Theory Approach to Voluntary Programs](#), in VOLUNTARY PROGRAMS: A CLUB THEORY PERSPECTIVE 15–40, 23 (Matthew Potoski & Aseem Prakash eds., 2009).

⁵ See [About ISDA](#), ISDA.org.

⁶ Association professionals highlighted this at a conference on [Industry Associations and Transnational Governance](#) organized by the Rutgers Law School Center for Corporate Law and Governance and ASIL’s International Organizations Interest Group on June 10, 2016.

⁷ Halliday & Shaffer, [supra note 2](#), at 36. The authors note that settled norms nonetheless evolve over time, as a function of contexts, including the relative legitimacy of the actors involved. *Id.* at 24–31, 46.

⁸ LYN SPILLMAN, [SOLIDARITY IN STRATEGY: MAKING BUSINESS MEANINGFUL IN AMERICAN TRADE ASSOCIATIONS](#) 88–89 (2012).

ways. Sanctions, which are largely limited to expulsion, are applied only as a [last resort](#) and only very rarely.⁹ As a recent example, the biotech association [BIO](#)¹⁰ recently [expelled](#) Turing Pharmaceuticals after it increased the price of the drug Daraprim by over 500 percent overnight. BIO explained that Turing and “its leadership do not reflect the commitment to innovation and values that are at the core of BIO’s reputation and mission. For that reason, BIO determined, after a review of Turing’s membership status, that the company did not meet our eligibility criteria, and we took action to rescind its membership and return its membership dues.”¹¹

Expulsion makes a strong statement. It occurs only rarely because it is off-putting both to existing and potential members and because its effects are likely to be minor in a competitive associations market where firms can simply find another association to join. However, as [Lisa Bernstein](#) explains in her seminal research on the diamond and cotton trades, if the expelling association is a leader-association, the stain on the expelled member’s reputation can shut it out of the industry altogether.¹²

This first special characteristic of voluntary and nonexclusive membership illustrates just how tethered associations are to their members; associations can only be as autonomous as their members allow. Leader-associations aside, these institutions cannot afford to advance agendas that go beyond, let alone conflict with, their members’ expectations. As with many private standard setters, the power dynamics that infuse the relationships between associations and their members are more horizontal than vertical—identifying the “[governor](#)” is not a straightforward task.¹³

Self-Governing and Rival Members

The second special characteristic of associational governance has to do with the members themselves. Industry association members are self-governing firms that do not depend on their associations for market access. This feature affords members significant discretion to decide how much rulemaking authority to confer on their associations. When a firm decides to join an association, to be bound by association rules and to allow the association to speak on its behalf, it effectively relinquishes some control over its regulatory future. Firms do not do this lightly—especially when they have to pay for it.

Firms [often resist](#) binding “command and control” regulation, favoring softer voluntary mechanisms.¹⁴ But resistance extends to the realm of soft law [as well](#).¹⁵ Even the [voluntary governance](#) regimes produced and

⁹ Virginia Haufler, [Globalization and Industry Self-Regulation](#), in GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION 226, 232 (Miles Kahler & David A. Lake eds., 2003)

¹⁰ See [About BIO](#), BIOTECHNOLOGY INNOVATION ORGANIZATION.

¹¹ John Carroll, [BIO boots Martin Shkreli’s Turing out after pricing controversy erupts](#), FIERCE BIOTECH (Sept. 23, 2015, 6:05 PM).

¹² Lisa Bernstein, [Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry](#), 21 J. LEGAL STUD. 48 (1992).

¹³ Kenneth Abbott & Duncan Snidal, [Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit](#), 42 VAND. J. INT’L L. 501, 512–519, 529–533 (2009).

¹⁴ Kenneth Abbott & Duncan Snidal, [Hard and Soft Law in International Governance](#), 54 INT’L ORG. 421, 548 (2000) (“Firms also prefer self-regulation for its business-friendly standards, low compliance costs, and limited intrusion by outsiders”); TIM BÜTHE & WALTER MATTLI, [THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY](#) 11 (2011) (“Firms and other private actors also often push for private governance, which they see as leading to more cost-effective rules more efficiently than government regulation.”).

¹⁵ *Id.*; Kishanthe Parella, [Treaty Penumbra](#), 38 U. PA. J. INT’L L. 275 (2017); Roya Ghafele & Angus Mercer, [Not Starting in Sixth Gear: An Assessment of the U.N. Global Compact’s Use of Soft Law as a Global Governance Structure for Corporate Social Responsibility](#), 17 U.C. DAVIS J. INT’L L. & POL’Y 41, 50 (2010) (explaining that “companies, like states, prefer their activities not to be subject to the decisions of an external force” and that soft norms should be hardened only gradually to avoid push-back).

administered by industry associations face resistance if they exceed members' preferences.¹⁶ Such resistance can result in conflict with and possible defection of members.

This points to a delegation problem: members assign associations only a certain degree of power to make, monitor, and enforce norms—going beyond that can compromise member autonomy and generate push-back.¹⁷ The problem is [compounded](#) by the fact that association members are typically economic rivals that compete with each other.¹⁸ Given that rival firms enter associations equipped with different resources, interests, and demands, it should not be taken for granted that they will collaborate with one another.

If firms are reluctant to relinquish rulemaking authority to an outside body such as an industry association, and if they are reluctant to collaborate with their rivals, why do they nevertheless do so? In this regard, associations face similar governance challenges as those faced by *public* rulemakers, in particular IGOs. Like associations, IGOs have to manage differing interests and persuade their member states to relinquish (some) regulatory control. This tends to be easier in times of crisis, when interests are more likely to converge. In ordinary times, however, the more “voice” and resource disparities that exist between members, and the less mutual dependency, the more difficult it becomes to foster collaboration.

Of course, IGO members are not self-governing firms but sovereign, self-governing states. Nevertheless, the collective action challenges facing both types of institutions are quite similar. The legal scholarship analyzing the drivers for interstate collaboration is rich and can inform the study of interfirm collaboration within associations. For example, [Rachel Brewster](#) analyzes nation states' compliance with international law in spite of the relative lack of enforcement or “commitment mechanisms”;¹⁹ she finds that the reputational costs attached to noncompliance are too limited and inconsistent to fully explain why states do—or don't—comply.²⁰

A similar puzzle exists in the association space—where accountability mechanisms are likewise only rarely set into motion. Sociologist [Lyn Spillman](#) and legal scholar [Lisa Bernstein](#) show that compliance with associational norms can be at least partially explained by the sense of solidarity and mutual trust that members experience when they associate.²¹ Solidarity taps the forces of camaraderie and shared identity.²² It offers a powerful explanation for compliance that complements that offered by nonpersonal rationalist or utilitarian perspectives.

Associations assemble communities of individuals representing their firms, just as IGOs assemble national representatives of countries. These individuals are likely to be repeat players who have much in common—even if they represent different interests and come equipped with different resources.²³ This creates openings for solidarity, which can be actualized through social events (e.g. annual golf tournaments, galas, beach trips) and awards

¹⁶ Abbott & Snidal, [supra note 14](#), at 3 (differentiating hard from soft law along three dimensions: whether the rule can be described as a binding “obligation,” whether it is “precise,” and the degree to which its interpretation, monitoring, and enforcement is “delegated” to an external body). Andrew Guzman & Timothy Meyer, [International Soft Law](#), 2 J. LEGAL ANALYSIS 171, 204 (2010) (analyzing delegation of rulemaking to a supranational entities—e.g. tribunals—by nation states).

¹⁷ Abbott & Snidal, [supra note 14](#), at 436–444 (explaining the “sovereignty costs” attached to delegating authority to a supranational body).

¹⁸ Barnett, [supra note 3](#), at 213–214.

¹⁹ Guzman & Meyer, [supra note 16](#), at 182–183.

²⁰ Rachel Brewster, [Unpacking the State's Reputation](#), HARV. J. INT'L L.J. 231, 231–232 (2009).

²¹ SPILLMAN, [supra note 8](#), at 11–12; Bernstein, [supra note 12](#), at 138–140 (discussing the importance of social bonds for individual, repeat playing diamond dealers); Lisa Bernstein, [Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions](#), 99 MICH. L. REV. 1724, 1750–52 (2001).

²² SPILLMAN, [supra note 8](#), at 168–180.

²³ Several association professionals who participated in the Industry Associations and Transnational Governance conference favored having member firms designate specific individuals to represent them at events, rather than sending someone different each time.

programs that celebrate member achievements. Solidarity building boosts member loyalty, stimulates industry pride, and cultivates a culture of mutual trust and collaboration.²⁴ Bernstein shows that the integrity of the structures for nurturing solidarity and trust greatly enhance the effectiveness of the “private legal systems” established by associations.²⁵

While IGOs and associations are alike in important ways, they are also different in important ways. What draws firms to associations is quite different from what draws states to IGOs. IGO (formal) mandates typically focus on making the world a better place, while association mandates typically focus on industry promotion and profitability. As a result, the governance challenges that associations face in dealing with their members’ expectations resemble the challenges faced by individual *firms* in meeting the expectations of their *shareholders*.

Just as corporate executives are often restricted in their ability to look beyond short-term profitability when making decisions, so too are associations restricted in their ability to consider issues that are not of immediate relevance to their members’ economic success. But associations can, indeed must, have a long-term view if they are to stay relevant; otherwise, their value added will diminish, as will their chances of survival. This generates additional pressures for associational governance, since long-term and short-term perspectives can come into conflict.

Spillman shows that, alongside profitability, solidarity is important for understanding the continuing proliferation of associations in America. Solidarity injects a much-needed sense of personality and meaning into an otherwise “anomic” market of self-interested transactions.²⁶ The better an association is at nurturing solidarity with and among its members, therefore, the more room it will have to “think” long-term.

This second special characteristic reveals that industry associations must contend with hybrid governance challenges—public and private, political and commercial—in order to survive and be effective. While various strategies can be employed to meet these challenges, nurturing solidarity may hold the most promise.

To close, the two special characteristics of associational governance—voluntary, nonexclusive membership, and self-governing rival members—combine to circumscribe associations’ rulemaking autonomy and, by extension, their effectiveness as governors. However, they also reveal an important—if often overlooked—conditional source of associations’ governance power, namely solidarity. The better associations are at fostering a sense of solidarity among their members, the more effective they are likely to be as governors. Solidarity, which varies across associations, helps explain and gauge the effectiveness of associational governance in transnational legal ordering.

²⁴ SPILLMAN, *supra* note 8, at 163–168, 352–354, and 360–370; Bernstein, *supra* note 21, at 1782.

²⁵ Bernstein, *supra* note 21, at 1726–1728 and 1745.

²⁶ SPILLMAN, *supra* note 8, at 5–8, 12.