INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW

International Law and Justice Working Papers

IILJ Working Paper 2009/2
Global Administrative Law Series

THE EXERCISE OF PUBLIC AUTHORITY THROUGH NATIONAL POLICY ASSESSMENT

ARMIN VON BOGDANDY
Director of the Max Planck Institute for
Comparative Public Law and International Law

MATTHIAS GOLDMANN
Research Fellow at the Max Planck Institute for
Comparative Public Law and International Law

Global Administrative Law Project Directors:
Benedict Kingsbury and Richard Stewart
Institute for International Law and Justice
New York University School of Law
40 Washington Square South, VH 314
New York, NY 10012
Website: www.iilj.org

ISSN: 1552-6275

New York University School of Law
New York, NY 10012
U.S.A.

Cite as:
IILJ Working Paper 2009/2
(Global Administrative Law Series)
Finalized 03/24/2009
(www.iilj.org)

The Exercise of International Public Authority through National Policy Assessment

The OECD's PISA Policy as a Paradigm for a New International Standard Instrument[*]

Armin von Bogdandy[†] *& Matthias Goldmann*[‡]

Abstract

The OECD Programme for International Student Assessment (PISA) is probably the most prominent signpost for the internationalization of educational policy. It consists in repeated performance assessments of secondary school students in a large number of countries. The ensuing reports and country rankings have become an important factor for educational policy-making in the developed world. PISA owes its impact to a mode of governance which we call "governance by information". Governance by information affects a given policy field by shaping the cognitive framework through the collection, processing and dissemination of information. International and supranational institutions more and more often take recourse to governance by information.

This article explores the repercussions of governance by information for international law. It rests on the conviction that public international law is essential for legitimizing authoritative international acts which determine policy in a given field. Based on an idea of international public authority that focuses on the social relevance of official acts and their impact on individual liberty, we argue that PISA is an instance of public authority.

As such, PISA needs to be endowed with a public law framework. We conceptualize PISA by choosing an instrumental approach and proposing a doctrinal standard instrument called "National Policy Assessment" that serves as a legal paradigm for governance by information of the type of PISA. We further propose elements of a legal regime of National Policy Assessment addressing i.a. issues of competence and procedure. The legal regime would ensure the legitimacy and effectiveness of National Policy Assessment. It may find a legal basis in international institutional law.

---

[*] Pre-print version, to appear in 5 International Organizations Law Review (2008).

[†] Prof. Dr. jur., Director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, President at the OECD Nuclear Energy Tribunal.

[‡] Doctoral candidate, Heidelberg University; Research Fellow, Max Planck Institute for Comparative Public Law and International Law.

The authors would like to thank Eyal Benvenisti, Sabino Cassese, Stephan Leibfried, Dirk Hanschel, Christoph Möllers, Christian Tietje, Christian Walter, as well as two anonymous reviewers for valuable information and comments on earlier versions, and Jenny Grote, Peter Macalister-Smith and Joseph Windsor for language review. Much information was retrieved through interviews with persons involved in PISA on the national and international levels. We are grateful to them for sharing their insights with us.

Abbreviations: ACER = Australian Council for Educational Research; BPC = Board of Participating Countries; CERI = OECD Centre for Educational Research and Innovation; ICCPR = International Covenant on Civil and Political Rights; IEA = International Association for the Evaluation of Educational Achievement; INES = International Indicators of Education Systems; OECD = Organization for Economic Co-operation and Development; PGB = PISA Governing Board; PISA = OECD Programme for International Student Assessment; TIMSS = Trends in International Mathematics and Science Study; UNESCO = United Nations Educational, Scientific and Cultural Organization; VCLT = Vienna Convention on the Law of Treaties.

Index

I.“Governance by Information” as a Research Object

A. Agenda

The OECD Programme for International Student Assessment (PISA) is probably the most prominent signpost for the internationalization of educational policy.[4] The PISA reports on the performance of secondary school students have become an important factor for educational policy-making in the developed world. In some states PISA has spurred more educational reforms than anything before it during the last decades.[5] Germany is a case in point. PISA not only opened the public’s eyes about the sometimes dramatic situation of school education in Germany. It prompted the federal government to set up an educational support programme with a budget of no less than 4 billion Euros.[6] On the level of the *Länder*, the hectic reactions that followed the release of the first results of PISA in December 2001[7] have given way to substantive reform projects.[8]

What is more, PISA succeeded in shifting approach and focus in a most sensitive area of domestic policy touching on social justice and the self-understanding of the citizenry: Because of PISA, policy-making in the field of school education changed from normative, input-oriented reasoning to comparative, empirical, output-oriented analysis.[9] Any reform of school education is now likely to be measured by its impact on PISA results – not only in Germany.[10] The international plane succeeded in establishing itself

---

[4] For more information see <www.pisa.oecd.org>.

[5] For an analysis of reactions in Germany and the United Kingdom see T. Weigel, *Die PISA-Studie im bildungspolitischen Diskurs. Eine Untersuchung der Reaktionen auf PISA in Deutschland und im Vereinigten Königreich*, diploma thesis, University of Trier (2004), <http://www.pisa.oecd.org/document/59/0,2340,en_32252351_32236159_34805499_1_1_1_1,00.html> (last visited 9 April 2008). See also D. Smolka, “PISA – Konsequenzen für Bildung und Schule”, Aus Politik und Zeitgeschichte 12 (2005), 21.

[6] See Verwaltungsvereinbarung Investitionsprogramm “Zukunft Bildung und Betreuung”, 29 April 2003, <http://www.bmbf.de/pub/20030512_verwaltungsvereinbarung_zukunft_bildung_und_betreuung.pdf> (last visited 28 July 2008).

[7] See e.g. the press release of the Kultusministerkonferenz (standing conference of the ministers of education of the states) of 6 December 2001, <www.kmk.org>.

[8] E.g. “Rahmenplanung für die Qualitätsentwicklung der Schulen im Land Bremen” (2006), which contains numerous references to PISA, < http://www.bildung.bremen.de/fastmedia/13/rahmenplanung.pdf> (last visited 28 July 2008); on the reform projects of the Land Baden-Württemberg see Reformprojekte in Baden-Württemberg, undated document, <http://www.km-bw.de/servlet/PB/-s/nbi9mb1bqwm151wlhin04968iu1bjg1lf/show/1101334/PISA-E_Reformvorhaben_Internet.pdf> (last visited 9 April 2008). Sometimes, however, administrations prefer to specifically prepare their students for PISA, e.g. Hessisches Kultusministerium, “Materialsammlung und Übungsaufgaben des Instituts für Qualitätsentwicklung”, press briefing, 17 August 2006, <http://www.kultusministerium.hessen.de > (last visited 28 July 2008).

[9] K. Martens, “How to Become and Influential Actor – the ‘Comparative Turn’ in OECD Education Policy”, in *id.,* A. Rusconi & K. Leuze (eds), *New Arenas of Education Governance* (2007) 40-56.

[10] Although the media reaction to PISA was by far strongest in Germany, PISA received considerable media coverage in other participating states. See OECD INES Network A, Review of Assessment Activities, issue 16, February/March 2004, 2-4. The impact of PISA on the expert level was considerable everywhere. On the influence of OECD educational policies in Australia see M. Henry, B. Lingard, F. Rizvi & S. Taylor, *The OECD, Globalisaton and Education Policy* (2001); in a Finnish context R. Rinne, J.

as indispensable in a field thus far essentially conceived as domestic. On another note, the success in the field of education helps the OECD to overcome the crisis which it experienced after the end of the Cold War, when its usefulness was cast into doubt.[11] Policies like PISA demonstrate that the OECD can actually provide governments with high-quality, immediately policy-relevant services and can thus be more than an expensive think-tank.[12]

PISA owes its impact on educational policy to a mode of governance which we call "governance by information". It describes the process which impacts on a given policy field by shaping the cognitive framework of policy-making through the collection, processing and dissemination of information in the respective area.[13] International and supranational institutions more and more often take recourse to governance by information. For example, the "open method of coordination" of the European Union comprises policy-making by the establishment of quantitative and qualitative indicators.[14] And it was the Intergovernmental Panel on Climate Change, awarded the Nobel Prize, whose policy-oriented reports about human-induced climate change succeeded in raising *global* awareness for the issue and significantly increased pressure on policy-makers, even though the facts on which the reports rely have been known for long.[15] Within the OECD, examples for governance by information abound. Many of its policies, like the OECD Jobs Strategy, or peer-review processes like the OECD Environmental Performance Review or the periodic OECD Economic Surveys, one of the

---

Kallo & S. Hokka, "Too Eager to Comply? OECD Education Policies and the Finnish Response", 3 *European Educational Research Journal* (2004) 454-85.

[11] Cf. OECD, A Strategy for Enlargement and Outreach. Report by the Chair of the Heads of Delegation Working Group on the Enlargement Strategy and Outreach, Ambassador Seiichiro Noboru, 13 May 2004, 7; OECD, The OECD – Challenges and Strategic Objectives: 1997. Note by the Secretary General, C(97)180, 10 September 1997.

[12] On these problems M. Marcussen, "The Organization for Economic Cooperation and Development as ideational artist and arbitrator. Reality or dream?", in B. Reinalda & B. Verbeek, *Decision Making Within International Organizations* (2004) 90-105, at 99-103.

[13] The terminology and definitions used for this and similar governance modes varies. E.g. "governance by persuasion" is used by N. Noaksson & K. Jacobsson, "The Production of Ideas and Expert Knowledge in the OECD", *Score Rapportserie* 2003:7 (<http://www.score.su.se/pdfs/2003-7.pdf>, last visited 28 July 2008), at 32-4; while D. Lehmkuhl's paper is entitled "Governance by Rating and Ranking", paper presented at the annual meeting of the International Studies Association, Honolulu (2005), on file with the authors. Martens *et al.* use the term "governance by opinion formation", see K. Martens, C. Balzer, R. Sackmann & A. Weymann, "Comparing Governance of International Organizations – The EU, the OECD and Educational Policy", University of Bremen *et al.*, TranState Working Paper No. 7 (2004). Elsewhere (*supra* note 9, at 41), Martens speaks of "governance by comparison". With respect to national law, M. Kloepfer uses the broader notion of "informational steering" (*informationelle Steuerung*), see *Staatliche Informationen als Lenkungsmittel* (1998) 14-17.

[14] Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000, <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm> (last visited 28 July 2008).

[15] See <http://www.ipcc.ch>. The drafting of the 2007 Fourth Assessment Reports received worldwide media attention (e.g. <http://news.bbc.co.uk/1/hi/sci/tech/6620909.stm>, last visited 25 July 2008), and experienced increasing politicization (<http://en.wikipedia.org/wiki/Criticism_of_IPCC_AR4>, last visited 9 April 2008).

flagships of the organization, chiefly rely on empirical data surveys and analyses and the exchange of information.[16]

This article explores the repercussions of governance by information for international law in an approach that stresses the publicness of public international law and the role of international institutional law in legally framing global governance.[17] Our interest is focused on five interlinked issues: First, what is the legal framework of PISA? Second, why should PISA be considered in a public law perspective? Third, how could the legal framework of PISA be conceptualized in a public law perspective? Fourth, how could the legal framework be improved in order to make the instrument more legitimate or provide better outcomes? Fifth, what are possible repercussions of the legal framework of PISA for comparable activities of other international institutions?

Thus far, these questions have been hardly explored, in spite of the enormous impact of PISA on national policy. We hypothesize that this is because the knowledge and experience of international lawyers relate mostly to international treaties and other binding legal instruments.[18] Governance by information, by contrast, determines society indirectly through instruments which establish or contribute to the cognitive setting within which policy-makers operate. But since no legal obligations are imposed upon states or individuals, it escapes the established perspective of international lawyers, just as many other instruments, actors and processes of global governance do.

For debating the five interlinked issues we first provide an overview of PISA and its legal framework (II.). Second, we explain why PISA should be considered an exercise of public authority and why it therefore needs a solid public law framework (III.). Third, we explore on a theoretical level how a legal framework could be established for new forms of public authority. In the tradition of German and Italian public law scholarship we suggest the doctrinal construction of "standard instruments" (*Handlungsformen*) (IV.). In the following part, we construct and propose a standard instrument called "National Policy Assessment" which is designed to grasp the thrust of PISA and similar policies in a legally significant manner (V.). Subsequently, the legal regime of National Policy Assessment is developed by identifying basic legal elements and principles within the legal framework of PISA which we deem instrumental for the legitimacy and effective functioning of this standard instrument, and critically assess these elements and principles. We then consider the repercussions of the legal regime thus established for other international institutions venturing in the area of education. The article concludes with the observation that this standard instrument, although modeled after PISA, could be exported to other issue areas, as it constitutes a valuable tool for holding national governments accountable (VI.).

[16] For further details on these instruments see below V.B.
[17] In detail A. von Bogdandy, P. Dann & M. Goldmann, "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities", 9 *German Law Journal* (2008) 1375-1400.
[18] M. Goldmann, "Der Widerspenstigen Zähmung, oder: Netzwerke dogmatisch gedacht", in S. Boysen *et al.* (eds.), *Netzwerke* (2007) 225-46, at 234-6.

B. The Agenda in the Context of Current Research

This study on PISA is part of a research programme on the challenges of the exercise of public authority by international institutions to the publicness of public international law.[19] It takes recourse to several strands of contemporary scholarship. First, our interest in governance by information is, as the word tells, informed by the research on global governance in political science. In fact, it deals with the repercussions of global governance for public law scholarship. Though somewhat opaque, the OECD's definition of global governance as "the process by which we collectively manage and govern resources, issues, conflicts and values in a world that is increasingly a 'global neighbourhood'",[20] points to two phenomena which are the points of departure for most of the rich literature on global governance.[21] The first is the growing importance of

[19] See 9 *German Law Journal* (2008), issue 11, with the following contributions: von Bogdandy, Dann & Goldmann, *supra* note 17; E. de Wet, "Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work"; A. Farahat, "Regulating Minority Issues through Standard-Setting and Mediation: the Case of the High Commissioner on National Minorities"; I. Feichtner, "The Administration of the Vocabulary of International Trade: The Adaptation of WTO Schedules to Changes in the Harmonized System"; C. Feinäugle, "The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?"; J. Friedrich, "Legal Challenges of "Voluntary" Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries"; C. Fuchs, "Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) - Conservation Efforts Undermine the Legality Principle"; K. Kaiser, "WIPO's International Registration of Trademarks: An International Administrative Act Subject to Examination by the Designated Contracting Parties"; P. Láncos, "Flexibility and Legitimacy - The Emissions Trading System under the Kyoto Protocol"; S. Less, "International Administration of Holocaust Compensation: The International Commission on Holocaust Era Insurance Claims"; R. Pereira, "Why Would International Administrative Activity Be Any Less Legitimate? – A Study of the Codex Alimentarius Commission"; B. Schöndorf-Haubold, "The Administration of Information in International Administrative Law - The Example of Interpol"; G. Schuler, "Effective Governance through Decentralized Soft Implementation: The OECD Guidelines for Multinational Enterprises"; M. Smrkolj, "International Institutions and Individualized Decision-Making: An Example of UNHCR's Refuge Status Determination"; J. Windsor, "The WTO Committee on Trade in Financial Services: The Exercise of Public Authority within an Informational Forum"; D. Zacharias, "The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution"; M. Goldmann, "Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority"; A. von Bogdandy, "General Principles of International Public Authority: Sketching a Research Field"; J. von Bernstorff, "Procedures of Decision-Making and the Role of Law in International Organizations"; A. von Bogdandy & P. Dann, "International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority"; E. de Wet, "Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review"; I. Venzke, "International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law"; R. Wolfrum, "Legitimacy of International Law and the Exercise of Administrative Functions: The Example of the International Seabed Authority, the International Maritime Organization (IMO) and International Fisheries Organizations".

[20] OECD, *Globalisation: What Challenges and Opportunities for Governments?* (1996). See also Commission on Global Governance, *Our Global Neighbourhood* (1995).

[21] We refer in this context to the chronologically first and probably dominant stream of global governance research. This comprises J.N. Rosenau, "Governance, Order, and Change in World Politics", in *id.* & E.-O. Czempiel (eds), *Governance without Government* (1992) 1-29, at 4; J. Kooiman, "Findings, Recommendations and Speculations", in *id.*, *Modern Governance* (1993) 249-62, at 253; R. Mayntz, "Governance Theory als fortentwickelte Steuerungstheorie?", in G.F. Schuppert (ed.), *Governance-Forschung*, 2nd edn (2006) 11-20; M. Zürn, "Global Governance", in *ibid.* 121-46, at 127-8; A. Benz,

decision-making on transnational levels ("global"). In this respect, global governance is a particular analytical perspective,[22] which contests certain standard assumptions of the realist (and certain institutionalist) paradigms in international relations, such as the focus on billiard ball-like states as the principal actors.[23] It seems evident that this analytical perspective has repercussions for public international law which is traditionally state-centered. These considerations lie at the heart of the proposed concept of international public authority (III.B.).

The second phenomenon which is crucial for global governance research is the observation that policies are often formulated and implemented in complex, decentralized or informal processes ("governance"). This puts the concept of global governance in opposition to standard rationalist accounts, which presume that actors' preferences are fixed and that their behavior can therefore only be influenced by instruments backed by sanctions which change an actor's expected outcome to an extent that makes him likely to comply. Instead, global governance research has an affinity to constructivist approaches which assume that actors' preferences change over time, in particular if they are exposed to new structures or ideas, for example through participation in international institutions.[24] Accordingly, international institutions do not only meet states' needs for coordination, but their activities might also affect states' preferences.[25] We draw on such constructivist insights when assessing whether and under what conditions governance by information can be considered a form of public authority (III.C.).

Further, the idea to construct a standard instrument for PISA and similar policies draws on four strands of legal research which deal with the effects of (global) governance on public law. First, the research on an emerging Global Administrative Law aims at a stocktaking of the legal forms in which global governance comes along and envisages the development of overarching – mainly procedural – legal principles and other legal tools in order to ensure the accountability of global governance institutions.[26] We consider

---

"Einleitung: Governance – Modebegriff oder nützliches sozialwissenschaftliches Konzept?" in *id.* (ed.), *Governance – Regieren in komplexen Regelsystemen* (2004) 11-28, at 13-4; In the meantime the concept has been adapted by different schools of thought, see M.J. Hoffmann & A.D. Ba (eds), *Contending Perspectives on Global Governance* (2005).

[22] This analytical perspective needs to be distinguished from the related, but distinctly normative concept of (good) governance, a collective term for values like democracy and the rule of law, cf. T. Weiss, "Governance, good governance and global governance: conceptual and actual challenges", 21 *Third World Quarterly* (2000) 795-814, at 801.

[23] K. Dingwerth & P. Pattberg, "Was ist Global Governance?", 34 *Leviathan* (2006) 377-99, at 381. Much of the global governance literature is a brainchild of liberal and cosmopolitan IR scholarship; cf. A. Hurrell, "Power, institutions, and the production of inequality", in M. Barnett & R. Duval (eds), *Power in Global Governance* (2005) 33-58. Not surprisingly, the concept has spurred criticism from historical materialist (H. Overbeck, "Global governance, class, hegemony", in A.D. Ba & M.J. Hoffmann, *Contending Perspectives on Global Governance* (2005) 39-56, especially at 53) and critical perspectives (M. Koskenniemi, "Global Governance and Public International Law", 37 *Kritische Justiz* (2004) 241-54).

[24] A.-M. Slaughter, "International Law and International Relations", 285 *Recueil des Cours* (2000) 21-235, at 43-51.

[25] M.J. Hoffmann, "What is global about global governance? – A constructivist account", in A.D. Ba & *id.* (eds), *Contending Perspectives on Global Governance* (2005) 110-28.

[26] B. Kingsbury, N. Krisch & R. Stewart, "The Emergence of Global Administrative Law", 68 *Law & Contemporary Problems* (2005) 15-61; see the further articles on Global Administrative Law in the same

National Policy Assessment, the standard instrument we propose, as a contribution to this toolbox. Second, concerning the development of general principles, our approach overlaps to a large extent with the research on constitutionalization in international law, which is more universal and normatively more demanding compared to Global Administrative Law.[27] Third, the proposed standard instrument, its legal regime and the general principles find their legal basis in the law of international institution.[28] Finally, we are guided by the German "New Administrative Law Scholarship" (*Neue Verwaltungsrechtswissenschaft*).[29] This research provides important insights into the role of information as an administrative instrument and resource. Several participants in this discourse have called for a better legal framing of the use of information by public authorities, both in a domestic and a European context.[30] This is also the intention of this article.

Many other remarkable scholarly endeavors are under way which also aim at developing legal approaches to global governance.[31] We rely on the mentioned streams of research for the mentioned reasons. In particular with Global Administrative Law and constitutionalist thought we share the conviction that the framing of national public policy through constitutional and administrative law should be taken as a paradigm and benchmark for the legal reconstruction of global governance.[32] This is probably what has

---

issue as well as the symposium in 17 *Eur. J. of Int'l L.* (2006), issue 1. The toolbox is suggested by D.C. Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law", 115 *Yale Law Journal* (2006) 1490-1562. Similar is the approach of J.E. Alvarez, *International Organizations as Law-makers* (2005), who stresses the importance of providing legal accounts of the instruments and procedures of international organizations.

[27] See e.g. S. Kadelbach & T. Kleinlein, "International Law – A Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles", 50 German Yearbook of International Law (2007) 303-48; A. Peters, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures", 19 Leiden Journal of International Law (2006) 579-610.

[28] See J. Klabbers, An Introduction to International Institutional Law (2002); H. Schermers & N. Blokker, International Institutional Law, 4th edn. (2003).

[29] For an overview see A. Voßkuhle, "Neue Verwaltungsrechtswissenschaft", in W. Hoffmann-Riem, E. Schmidt-Aßmann & A. Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, vol. 1 (2006) 1-61. For a shorter English version see A. Voßkuhle, "The reform approach in the German Science of Administrative Law: The 'Neue Verwaltungsrechtswissenschaft'", in M. Ruffert (ed.), *The Transformation of Administrative Law in Europe* (2007) 89-141. Seminal works include E. Schmidt-Aßmann, *Das Allgemeine Verwaltungsrecht als Ordnungsidee*, 2nd ed. (2004); G.F. Schuppert, *Verwaltungswissenschaft* (2000).

[30] R. Pitschas, "Allgemeines Verwaltungsrecht als Teil der öffentlichen Informationsordnung", in W. Hoffmann-Riem, E. Schmidt-Aßmann & G.F. Schuppert (eds), *Reform des Allgemeinen Verwaltungsrechts* (1993) 219-305; C. Bumke, "Publikumsinformation. Erscheinungsformen, Funktionen und verfassungsrechtlicher Rahmen einer Handlungsform des Gewährleistungsstaates", 37 *Die Verwaltung* (2004) 3-33; C. Gusy, "Die Informationsbeziehungen zwischen Staat und Bürger", in W. Hoffmann-Riem, E. Schmidt-Aßmann & A. Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, vol. 2 (2008) 221-304; from an Italian perspective see B.G. Mattarella, "Informazione e communicazione amministrativa", 55 *Rivista trimestrale di diritto pubblico* (2005) 1-21; on the European information order see A. von Bogdandy, "Links between National and Supra-national Institutions: A Legal View of a New Communicative Universe", in B. Kohler-Koch (ed.), *Linking EU and National Governance* (2003) 24-52; *id*., "Die Informationsbeziehungen im Europäischen Verwaltungsverbund", in W. Hoffmann-Riem, E. Schmidt-Aßmann & A. Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, vol. 2 (2008) 305-403.

[31] For an overview see von Bogdandy, Dann & Goldmann, *supra* note 17.

[32] In the Global Administrative Law discourse, this "bottom up" perspective is complemented by "top down" analyses of the impact of transnational institutions, instruments and procedures on domestic

stirred the recent interest of New Administrative Law Scholarship in issues of globalization.[33] This article tries to foster the exchange among all these discourses. In doing so, it takes recourse to the experience of German and Italian administrative law scholarship. Admittedly, this gives the article a continental bias. It should be emphasized, however, that this bias does not rest on a conviction that these two legal traditions are superior to others. Rather, we think that a plurality of perspectives should be applied[34] and consider our perspective as a contribution to this market of ideas about legal responses to global governance.

II. Operation and Legal Framework of the OECD Programme for International Student Assessment

This part describes the complex organization and operation of PISA and its legal framework by applying established legal categories. This reveals how difficult it is to fully grasp the phenomenon with traditional legal analysis and shows the need for advancing new doctrinal concepts such as the standard instrument which we subsequently propose.

PISA is a "decentralized project" of the OECD, in the frame of which the OECD has so far conducted three cycles of large scale assessments of 15-year-old students. The designation as a "decentralized project" basically refers to the fact that PISA has a separate budget. The first assessment cycle with a focus on students' reading literacy was carried out in 2000, the second cycle, focusing on mathematics literacy, in 2003. The last assessment cycle so far, which focused on science literacy, took place in 2006. It has been agreed to continue PISA with a new cycle in 2009.[35] Although run by the OECD, the PISA study has not been limited to OECD Member States. While two OECD members did not take part in the first assessment cycle,[36] four non-OECD states have participated in PISA from the beginning.[37] Eleven additional non-member states followed their example and carried out the first assessment cycle in 2001.[38] In the second

---

administrative law, see S. Cassese, "Global Standards for National Administrative Procedure", 68 *Law and Contemporary Problems* (2005) 109-126.

[33] E. Schmidt-Aßmann, "Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen", 45 *Der Staat* (2006) 315-38; M. Ruffert, *Die Globalisierung als Herausforderung an das Öffentliche Recht* (2004), 67-8.

[34] Thus far, mostly the US perspective seems to have been explored, cf. R.B. Stewart, "U.S. Administrative Law: A Model for Global Administrative Law?", 68 *Law and Contemporary Problems* (2005) 63-108; Esty, 'Good Governance', *supra* note 26. The potential of EU law is explored by M. Savino, "EU "Procedural" Supranationalism: On Models for Global Administrative Law", manuscript, on file with the authors.

[35] Similar large-scale assessments of adult competencies and the outcomes of higher education are currently being explored by the OECD, like the envisaged OECD Programme for the International Assessment of Adult Competencies (<http://www.oecd.org/document/35/0,3343,en_2649_39263238_40277475_1_1_1_1,00.html>, last visited 9 April 2008).

[36] Slovak Republic, Turkey.

[37] Brazil, Latvia, Liechtenstein and the Russian Federation.

[38] Albania, Argentina, Bulgaria, Chile, Hong Kong-China, Indonesia, Israel, FYR Macedonia, Peru, Romania, Thailand.

assessment cycle in 2003, eleven non-member states participated from the beginning.[39] Taken together, the three assessment cycles cover one-third of the world population, and the states involved produce almost nine-tenths of the world's GDP.[40]

Turning to legal analysis, a first issue that arises is that of competence. While the OECD has carried out activities in the field of education since the 1960s,[41] the OECD Convention does not explicitly stipulate a competence for the organization in the field of education. All it contains is a provision on the legal instruments available to the bodies of the organization,[42] whose fields of application are determined by reference to the aims of the organization.[43] As the aims are kept in very general terms, they do not provide much guidance for the determination of the competencies of the OECD. Nevertheless,, education assessments could be understood as falling under policies designed "to achieve the highest sustainable economic growth and employment and a rising standard of living" in Member States.[44] The correlation between education and employment as well as economic growth is undisputed. There is statistical evidence that individual employment chances are to a significant extent contingent upon the level of education.[45] Economic growth is also considerably dependent on the prevalence of a high level of education among the workforce.[46]

Procedure is another aspect by which to grasp a policy. From the initial idea to the revelation of the first assessment results, PISA has passed through several stages. For heuristic purposes, this process could be structured by distinguishing five stages: (1) the problem articulation stage, (2) the goal definition stage (i.e. the setting of the policy goals by the decision-makers), (3) the policy development stage (i.e. the drafting of the project framework), (4) the adoption stage, and (5) the implementation stage. Each stage involved or involves a different set of actors, procedures and instruments.[47]

---

[39] Brazil, Hong Kong-China, Indonesia, Latvia, Liechtenstein, Macao-China, Russian Federation, Serbia, Thailand, Tunisia, Uruguay.

[40] See OECD, Learning for Tomorrow's World. First Results from PISA 2003 (2004), 20.

[41] The Centre for Educational Research and Innovation, which carries out most of the OECD's educational projects (*infra* note 49), was set up in 1967. However, the first statistics on school attendance and public spending on education were published in 1961 according to I. Richter & H.-P. Füssel, "System-, Leistungs- und Politikvergleiche in der Bildungsforschung", 51 *Recht der Jugend und des Bildungswesens* (2003) 252-255, at 252. An independent Directorate of Education within the OECD Secretariat was created only in 2002.

[42] Art. 5, Convention on the Organisation for Economic Co-operation and Development, 14 December 1960, 888 *UNTS* 180-91, hereinafter OECD Convention.

[43] Art. 1, OECD Convention.

[44] Art. 1(a), OECD Convention.

[45] Cf. OECD, OECD Employment Outlook 2004 (2004), 306-309.

[46] See OECD, The New Economy: Beyond the Hype (2001); R.J. Barro, "Education and Economic Growth", in J.F. Helliwell (ed.), *The Contribution of Human and Social Capital to Sustained Economic Growth and Well-being*. International Symposium Report, OECD and Human Resources Development Canada (2001).

[47] Based on the taxonomy developed by R. Mayntz, "Die Implementation politischer Programme: Theoretische Überlegungen zu einem neuen Forschungsgebiet", 10 *Die Verwaltung* (1977) 51-66. This taxonomy differs from Mayntz insofar as it does not include the "impact stage" suggested by Mayntz, which is most amorphous in a legal perspective, and adds the adoption stage. The adoption stage is added on grounds of its significance for ensuring consent and support by various actors within a multilevel system of governance, not all of which have been involved in the process so far. The classical example for the adoption stage is the ratification process of an international treaty, which is drafted by, e.g., an ad hoc committee within an International Organization, and which, after endorsement by an intergovernmental

The *problem articulation stage* began in the late 1980s with the emergence of the idea for PISA. US President Reagan wanted to increase pressure on educational policy-makers, which is the responsibility of the state level, through international comparative assessments.[48] In 1988, the Governing Board of the OECD Centre for Educational Research and Innovation (CERI),[49] a subsidiary body of the OECD Council,[50] set up a research project called "Indicators of Education Systems" (INES),[51] charged with developing indicators on education. It was hoped that such indicators would facilitate the comparison of statistical data on education from OECD Member States. However, it became apparent that the available data on student achievements, usually census data received from the Member States, were insufficient. Only large-scale data collection and evaluation was believed to be able to fill this lacuna and produce statistical material which would enable the meaningful drawing of policy lessons.[52]

In the following sequence of events, the *goal definition stage* and the *policy development stage* were largely interrelated, forming one communicative process. With respect to policy development, the INES Network A, which was then a relatively remote subsidiary body of the OECD charged with the task of developing indicators on learning outcomes, shouldered the bulk of the work for developing a framework for a large-scale student assessment.[53] Over several years, it developed a so-called "data strategy", the blueprint of

---

conference or by the General Assembly of the respective International Organization, is opened for ratification, and finally enters into force after receiving the necessary number of ratifications. The content of the treaty can still be modified in this stage by the addition of reservations, and the factual impact of the treaty hinges on the number and significance of the ratifying states. Ratification is mostly the business of domestic parliaments, which often do not get involved before this stage.

[48] S. Leibfried & K. Martens, PISA – Internationalisierung von Bildungspolitik. Oder: Wie kommt die Landespolitik zur OECD?, 36 Leviathan (2008) 3-14, at 7-8.

[49] The current mandate of CERI is contained in the Resolution of the Council approved at its 1046th session, 14 December 2006, C/M(2006)20, item 265, and C(2006)173.

[50] We use the term "subsidiary body" for bodies formally established by statutory organs or other subsidiary bodies of the organization. For a critical discussion of the terminology see T. Bernárdez, "Subsidiary Organs", in R.-J. Dupuy (ed.), *Manuel sur les organisations internationales* (1988) 100-46, at 101 et seqq.

[51] INES was established as a joint project to be financed by both the OECD and the member states (CERI Governing Board, Summary Record of the 38th Session (held at Paris on 30-31 May 1988), CERI/CD/M(88)1, 25 October 1988, para. 13). Since 2000, the activities of INES have been coordinated by the INES Strategic Management Group, which was jointly established by the CERI Governing Board and the OECD Education Committee in order to achieve a more strategic and transparent management of INES (Decision of the Education Committee DEELSA/ED/M(2000)2, para. 18; decision of the CERI Governing Board CERI/CD/M(2000)2 para. 42). The Strategic Management Group is composed of four members of the CERI Governing Board and four of the OECD Education Committee, along with two additional members from the Employment, Labour and Social Affairs Committee. According to its mandate, the INES Strategic Management Group is principally charged with reviewing the management of INES and making recommendations to the Joint Session of the CERI Governing Board and Education Committee in respect of proposals submitted by INES Networks, as well as on the priorities for the work of INES. The activities of INES are carried out through these Networks.

[52] N. Bottani, "OECD International Education Indicators", 25 *International Journal of Educational Research* (1996) 279-88, at 287.

[53] The INES Networks were originally established by the CERI Governing Board on the proposal of the Secretariat (CERI Governing Board, Summary Record of the 38th Session (held at Paris on 30-31 May 1988), CERI/CD/M(88)1, 25 October 1988, para. 13). Today, the Networks have received greater formalization. The mandate of Network A, for example, has been approved by the CERI Governing Board,

the later PISA framework, the comprehensive "Strategy for Student Achievement Outcomes" (hereinafter "Strategy").[54] This policy development process was guided by the OECD Education Committee, the subsidiary body charged with setting policy priorities for the OECD's educational activities. In this manner, the goals of PISA were defined step by step. The Strategy suggested that a so-called literacy concept be pursued, which means that the data survey would assess students' mastery of processes, understanding of concepts, and ability to apply previously acquired knowledge, rather than the mere mastery of contents prescribed by school curricula. Further, the Strategy proposed to measure how such skills relate to important demographic, social and economic factors.

In spring 1997, PISA was adopted in several steps. The OECD Education Committee and the CERI Governing Board each endorsed the PISA strategy. Thereafter many member states exchanged notes with the OECD Secretariat confirming their readiness to participate in PISA. The legal nature of these note exchanges, a third issue of traditional legal analysis, is not obvious. Whether an exchange of notes has to be qualified as an international treaty depends on the intention of the parties.[55] The exchanges of notes officially sought "a political decision for participation in the project as well as a commitment to contribute financially to the project".[56] While the term "political" militates against the assumption of a legal obligation, the contrary is true for "financial commitment". It seems that the idea behind this two-staged adoption procedure was to give member states sufficient time to secure domestic support for the project which needed to be studied and accepted by all relevant stakeholders, in particular by those in countries where PISA meant a radical policy change, before the OECD would take a binding decision. The requirement of notification gave member states some control over the schedule. Whereas it would therefore be difficult to deduce from the note exchanges a legal obligation to participate in PISA, one could at least derive from them an obligation to continue participation in the last steps of the decision-making process leading to the establishment of PISA in good faith.[57]

After domestic support had been secured by the participating states, the OECD adopted the resolution establishing PISA, which is formally a binding "decision" under Art. 5(a) of the OECD Convention.[58] The binding effect does not only extend to the member states, but also to the OECD, which was enabled to set up a separate budget for PISA.[59]

---

the OECD Education Committee, the joint sesson of both mentioned bodies, and eventually by the OECD Council, see <http://webnet3.oecd.org/OECDgroups/> (last visited 28 July 2008).

[54] DEELSA/ED/CERI/CD(97)4, 28 March 1997.

[55] G. Dahm, J. Delbrück & R. Wolfrum, Völkerrecht, vol. I/3, 2nd ed. (2002), 542.

[56] OECD, A Strategy for Producing Student Achievement Indicators on a Regular Basis, Summary of Decisions Taken, Meeting in Budapest, Hungary, 7-8 May 1997, DEELSA/ED/CERI/ CD(97)7, 19 August 1997, para. 19.

[57] On the difficulties to distinguish between binding and non-binding instruments of international organizations see M. Goldmann, Inside Relative Normativity, *supra* note 19.

[58] OECD, Resolution of the Council C(97)176/FINAL, 26 September 1997. Although the instrument is entitled "resolution", the first paragraph of the preamble refers to Art. 5(a) of the OECD Convention, which enables the OECD to adopt binding "decisions". OECD practice uses both terms synonymously.

[59] OECD, Resolution of the Council C(97)176/FINAL, 26 September 1997, operative para. 4.

By way of reference, the resolution gave binding force to the procedures set out in the Strategy.[60]

This led to the *implementation stage*, consisting of three assessment cycles. The implementation is steered by the "Board of Participating Countries" (BPC), meanwhile renamed "PISA Governing Board" (PGB). It is a subsidiary body of the OECD Council,[61] composed of one national expert from each participating country,[62] and the OECD Secretariat serving as the Secretariat of the PGB. The mains tasks of the PGB consist in providing oversight over the project and making all decisions involving policy choices. Thus, the PGB determines the policy objectives for each cycle, selects the areas and subjects to be tested, sets the priorities for indicators, analysis and instrument development, and guides the preparation of the reports at the end of each assessment cycle.[63] Further decisions of the PGB of fundamental relevance include e.g. the determination of the level of reliability desired for the study,[64] the selection of the age group to be tested,[65] and the adoption of proficiency levels.[66]

At this point, a fourth issue of legal analysis can be discussed: the voting rules. Decisions of the PGB are binding on the participating states.[67] They require consensus, or, if brought to a vote, a two-thirds majority of the members of the board.[68] In practice, majority votes occur frequently, although only on issues of minor importance, sometimes outside sessions by e-mail.[69] Only rules and regulations concerning the operation of the PGB, changes to the formula of country appropriations to the budget, and changes to the project design, i.e. the strategy prepared by INES Network A, are excluded from majority vote.[70]

Each cycle starts with the issuance of an international tender for the international contractors to carry out the assessment on the technical level. The Australian Council for Educational Research (ACER) was chosen by the PGB as the main international

---

[60] The retrieved documents of the exchange of notes between the OECD and Germany explicitly endorse the Strategy. Further, para. 3 of the preamble of the Council resolution mentions countries which "have agreed to participate in a Programme for Producing Student Achievement Indicators on a Regular Basis". Obviously, the programme mentioned here is the one laid down in the Strategy. Likewise, the operational role of the Pisa Governing Board states that it should monitor a programme to be carried out as described in the Strategy.

[61] It finds its legal basis in the resolution setting up PISA, *supra* note 58.

[62] OECD Council, Operational Role of the Board of Participating Countries, C(97)176, 10 September 1997, appendix.

[63] DEELSA/ED/CERI/CD(97)4, 28 March 1997, para. 72.

[64] INES Network, Plenary Meeting of 28-30 October 1996, Meeting Record, 4.

[65] *Ibid.*

[66] Tenth Meeting of the BPC, Summary Meeting Record, DEELSA/PISA/BPC/M(2001)1, 18 May 2001, 8.

[67] The PGB derives this power from the OECD Council, cf. Art. 5(a), OECD Convention. The binding nature can be concluded *ex negativo*: Usually, OECD documents stipulate explicitly if a decision is not intended to be binding.

[68] OECD Council, Operational Role of the Board of Participating Countries, C(97)176, 10 September 1997, appendix, para. 8.

[69] The voting results are not tracked in the meeting records, though.

[70] OECD Council, Operational Role of the Board of Participating Countries, C(97)176, 10 September 1997, appendix, para. 11.

contractor for each cycle.[71] National contractors for carrying out the assessment in each state in collaboration with ACER are chosen by each participating state. In a next step, the assessment materials, i.e. the questionnaires for the students, are developed in a cooperative process involving the international contractors, the PGB as well as Functional Expert Groups.[72] Further, a Technical Advisory Group was established to enable an exchange of views on technical questions of implementation among the prime international contractor, the subcontractors and independent experts. On the basis of the questionnaires, a representative sample of students from each participating state is assessed. The international and national contractors are responsible for carrying out the surveys and the processing of the data.

Once the data is collected, the main contractor, as solicited by the Secretariat, provides drafts of the PISA reports which reveal the results, including country rankings. The PGB reviews the reports meticulously, sometimes requesting modifications, and eventually approves them by consensus. Thereafter, they are published by the OECD Secretariat. Further thematic reports by the OECD provide more in-depth analyses.[73] Any release of national data requires the approval of the national government.[74] Participating states are free to produce national reports once the first international report has been released.[75]

As this overview demonstrates, the PISA study is characterized by the interaction of a plethora of committees and actors on different levels, formal as well as informal ones, private as well as public ones, and a corresponding multitude of procedures, as well as a variety of more and less formal instruments. It thus displays the typical ingredients of global governance. From a legal point of view, it is remarkable that PISA, although apparently a simple data gathering exercise, has been given such a refined legal framework. Other OECD policies which also rely on information and communication like the Environmental Performance Review reveal a similar pattern of high-level resolutions, guidance documents and individual decisions which guide the programme.[76]

At this point, we close our sketch of the operation and the legal framework of PISA. It should have become evident that PISA operates on an elaborate legal basis which is certainly crucial for its functioning. At the same time, this legal analysis along established lines of international scholarship – competence, bindingness, procedure, rules

---

[71] See, e.g., Third Meeting of the BPC, Summary of Main Outcomes, DEELSA/PISA/BPC(98)8, 20-21 April 1998, 2.

[72] Functional Expert Groups on reading literacy, mathematics, sciences, as well as problem solving were established in order to link the policy objectives specified by the PGB with the necessary scientific expertise (DEELSA/ED/CERI/CD(97)4, 28 March 1997, para. 78 *et seq.*). Each member of the expert groups was appointed as a contact point for several countries in order to ensure adequate representation of national interests. The Strategy stipulates a procedure for the appointment of the members of the Functional Expert Groups. Accordingly, the experts were to be nominated by the prime international contractor and appointed by the OECD Secretariat after consultation with the PGB. In practice, this procedure was modified in that the OECD Secretariat and the PGB played the main roles in the appointment procedure, see Third Meeting of the BPC, *Summary of Main Outcomes*, DEELSA/PISA/BPC(98)8, 20-21 April 1998, 3.

[73] Cf. <http://www.oecd.org/dataoecd/32/46/36390013.pdf > (last visited 28 July 2008).

[74] DEELSA/ED/CERI/CD(97)4, 28 March 1997, para. 116.

[75] *Ibid.*

[76] E.g. Environmental Policy Committee, "OECD environmental performance reviews: second cycle work plan", ENV/EPOC(98)21, and the mandate of the Working Party on Environmental Performance, Environment Policy Committee, ENV/EPOC(2004)32, 10 November 2004.

of decision, – does not really grasp how PISA impacts on domestic policies, which – in the end – triggers legitimacy concerns and thus the interest of a public law scholar. We think that a better grasp is possible by framing it in a perspective of public law through a new standard instrument "National Policy Assessment".

III. The Need for a Public Legal Framework of PISA

This section argues that PISA (and the same applies to other transnational policies which rely on governance by information) should be understood and construed in a public law perspective, because PISA qualifies as an exercise of public authority. First, we substantiate the understanding of public law behind this argument (A.). Then we develop a concept of public authority that meets the challenges of global governance (B.). This concept will be applied to PISA as an instance of global governance by information (C.).

A. Framing Public Authority: The Function of Public Law

Public law, at least in liberal democracies, is inextricably linked with the enlightenment idea of liberty. The general function of public law is to square liberty with the need of any society for the exercise of public authority, i.e. the making of unilateral decisions taken in the name and interest of an overarching, general entity, and their enforcement. The legal framework of decision-making processes resulting in such unilateral action needs to ensure that they are considerate of liberty.[77] The public law of liberal democracies does so by guaranteeing appropriate institutional settings, fair procedures, substantive standards, judicial review and other forms of accountability.[78] In other words, public law is about providing legitimacy to public authority by ensuring that public authority respects liberty, and not only based on considerations of efficiency,[79] or on considerations which are not in the interest of the public. Further, the legal framing of authority allows legitimacy not only to exist, but also to be seen and to be understood to exist. In sum, a legal framework is an indispensable, though not a sufficient, element of legitimate authority.[80]

The legitimacy-inducing function of public law is not only a necessity for the domestic level or the authority of the European Union, but also for international organizations, transnational networks and other transnational institutional formations which play a decisive role in more and more issue areas. As a result, the legitimacy of these international institutions and their activities has become the object of numerous

[77] See, e.g., I. Kant, *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht* (1784).
[78] S. Cassese, "Lo spazio giuridico globale", 52 *Rivista trimestrale di diritto pubblico* (2002) 323-39.
[79] M. Seckelmann, "Keine Alternative zur Staatlichkeit - Zum Konzept der 'Global Governance'", 98 *Verwaltungsarchiv* (2007) 30-53, at 41-6.
[80] This is not necessarily a Weberian idea. Weber assumed that the mere existence, and not the specific contents of a legal framework for rational-bureaucratic decision-making lead to legitimacy through legality; cf. *Wirtschaft und Gesellschaft*, vol. 1 (2nd edn. 1925), 19 (§ 7). Applying this idea to global governance is J. Steffek, "The Legitimation of International Governance: A Discourse Approach", 9 *European Journal of International Relations* (2003) 249-75.

concerns.[81] Diverse as they are, international institutions tend to weaken input-oriented mechanisms of ensuring legitimacy. For example, the transnationalization of a policy area might set free the dynamics of a "two-level game" by enabling national executives to increase their power over an issue to the detriment of other national stakeholders whose possibility to influence or control transnational decision-making is usually more limited.[82] However, national governments might find themselves in the situation of the sorcerer's apprentice whenever international institutions develop their own dynamics and emancipate at least partially from their members and founding documents.[83] As a result, global governance disturbs domestic balances of power and dilutes domestic accountability mechanisms set up to respond to the idea of liberty. This even occurs in cases of consensual international decision-making, be it only for the power qua knowledge of transnational epistemic communities.[84] But not to participate in global regulatory efforts might entail serious economic and political risks. All these factors contribute to concerns about unaccountable international bureaucracies which are incompatible with the idea of liberty. At the same time, these concerns are a sign of the success of international institutions as efficient solvers of global problems which each state alone could not tackle. In this situation, it seems to be the most promising strategy to provide a necessary condition for the legitimate exercise of such international public authority by elaborating sufficiently complex public law frameworks.

B. Public Authority of International Institutions

Yet, even those who share this general outlook might doubt whether seemingly unintrusive activities of international institutions like the gathering and distribution of data should be considered in a public law perspective. One might ask to what extent is it really convincing to frame such indirect modes of governance in terms of public law which is essentially about power. If an activity of international institutions does not affect liberty or human rights significantly, it does not need to be conceptualized in a public law

[81] For overviews on the state of the discussion J.E. Alvarez, "International Organizations: Then and Now", 100 *Am. J. of Int'l L.* (2006) 324-47, at 339-46; D. Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?", 93 *Am. J. of Int'l L.* (1999) 596-624; M. Zürn, "Global Governance and Legitimacy Problems", 39 *Government and Opposition* (2004) 260-87; M. Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", 15 *Europ. J. of Int'l L.* (2004) 907-31, at 909-17; C. Möllers, *Gewaltengliederung* (2006) 233-51.

[82] R.D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games", 42 *International Organization* (1988) 427-60; E. Benvenisti, "Exit and Voice in the Age of Globalization", 98 *Michigan Law Review* (1999-2000) 167-213. On two-level games in the German Empire and in the European Union S. Oeter, "Federalism and Democracy", in A. von Bogdandy & J. Bast (eds), *Principles of European Constitutional Law* (2006) 53-93, at 77-82.

[83] There is abundant literature describing these dynamics. See from a legal perspective J. Klabbers, "The Changing Image of International Organizations", in J.-M. Coicaud & V. Heiskanen (eds), The Legitimacy of International Organizations (2001) 221-55; Alvarez, *supra* note 26; D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (2005); from the standpoint of liberal international relations theory A.-M. Slaughter, *A New World Order* (2004), more critical Venzke, *supra* note 19. For a proposal to curb the dynamics of such delegations by legal rules C.A. Bradley, "International Delegations, the Structural Constitution, and Non-Self-Execution", 55 *Stanford L. Rev.* (2002-2003) 1557-96.

[84] P.M. Haas, "Epistemic Communities and International Policy Coordination", 46 *International Organization* (1992) 1-35.

perspective.[85] It might not even be advisable to develop legal straightjackets for all activities, not least because this might only produce new informal modes of governance in order to avoid the constraints of the preceding formalization. Thus, the decisive issue is to determine a threshold and to set the conditions under which governance activities should be considered exercises of international public authority.

Today, no generally recognized concept exists for determining when the activities of international institutions amount to a form of public authority. This might be one reason why the publicness of public international law is little explored.[86] What is needed is a concept of public authority for identifying those activities within global governance whichneed to be conceptualized in a public law perspective according to the purpose of public law as set out above.

There are established concepts of public authority in national public law,[87] mostly based on classical sociological accounts of authority.[88] Accordingly, authority is usually connotated with the capacity to issue legal commands. For example, Max Weber defines "authority" (*Herrschaft*) as "the probability that one actor within a social relationship will be in a position to carry out his own will",[89] thereby distinguishing it from the amorphous concept of "power" (*Macht*). Ralf Dahrendorf relies even more on the capacity to issue orders or prohibitions.[90] Authority is thus primarily associated with the capacity to issue (legal or social) commands, which are obeyed for fear of sanctions. Under this premise, it is difficult to characterize governance by information as a form of public authority. Although the PISA reports contain information that might have normative *effects*, they can in no way be considered as orders to the participating states.

However, such a narrow definition of public authority appears outdated given the complexity of global governance. If the primordial function of public law is to protect liberty while allowing for collective action, it follows that any activity with a certain impact on liberty should come under the definition of public authority, and not only legal commands. This view has already been held with regard to concepts of state authority. Remarkably, one of the most eminent representatives of the "legal method" in public law,[91] *Georg Jellinek*, emphasizes the need to assess *any* exercise of public authority by legal standards.[92] The New Administrative Law Scholarship also rests on the assumption that the scope of public law is defined by the scope of state activity. Public authority is not confined to unilateral legal orders; all activities of state authorities need to be

[85] Schuppert, *supra* note 29, at 247.
[86] Cf. P. Kunig, "Völkerrecht als öffentliches Recht – Ein Glasperlenspiel", in A. Randelzhofer, R. Scholz & D. Wilke, Gedächtnisschrift für Eberhard Grabitz (1995) 325-46.
[87] For Germany, the concept of "state authority" finds its basis in Art. 20(2) Basic Law. On its interpretation by the Federal Constitutional Court see Case No. 2 BvR 134, 268/76, Decision of 15 February 1978, 47 *Entscheidungen des Bundesverfassungsgerichts (BVerfGE*) (1978) 253, at 273-6.
[88] R.A. Dahl, "The Concept of Power", 2 *Behavioral Science* (1957) 201-15, at 202.
[89] M. Weber, *supra* note 80, at 122.
[90] R. Dahrendorf, *Über den Ursprung der Ungleichheit unter den Menschen* (1961), 20.
[91] On the "legal method" see *infra*, IV.A.
[92] G. Jellinek, *Allgemeine Staatslehre*, 3rd edn, edited by W. Jellinek (1914), 387.

studied.[93] The idea behind this consideration is that acts other than binding legal ones can compromise the liberty of the addressee, for example, because they might build up communicative pressure which the addressee can only avoid at some cost, be it reputational, economic or other.[94] In addition to this rather rationalist explanation, constructivist approaches to international relations point out the significance of the communicative framework for the formation of identities and, eventually, actions.[95]

Moreover, a definition of public authority on the international level needs to take the particularities of the international level into account. The factors which make informal institutions as well as non-binding and non-legal international instruments an attractive policy option, especially the absence of a requirement to undergo parliamentary ratification, or the frequent lack of competence on the part of international institutions to adopt binding legal instruments, put additional strain on their input-legitimacy.[96] Therefore, not only binding legal instruments, but also non-binding and non-legal instruments which merely frame national decision-making processes indirectly should be considered as potential sources of public authority.

As a result, we define *authority* as the capacity based in law to *determine* others, to reduce their liberty. The determination can be a *legal* one. This is the case if an act modifies the legal situation of a legal subject without its consent. A determination can also occur through an act which merely *conditions* other legal subjects. This is the case either whenever that act builds up communicative pressure exceeding the threshold above which a legal subject concerned by the act cannot ignore it without serious consequences, or if the act carves out the cognitive environment of the issue concerned in a manner that marginalizes alternative perspectives. PISA might be an example for both.[97]

Once it is established that an activity qualifies as an exercise of authority, the question is whether it is to be considered as *public* authority. Leaving aside the numerous problems

---

[93] Schuppert, *supra* note 29, at 144-8; Schmidt-Aßmann, *Ordnungsidee*, *supra* note 29, at 348-9; further references in C. Franzius, "Modalitäten und Wirkungsfaktoren der Steuerung durch Recht", in W. Hoffmann-Riem, E. Schmidt-Aßmann & A. Voßkuhle, *Grundlagen des Verwaltungsrechts*, vol. 1 (2006) 177-237, at marginal note 1.

[94] See A. Guzman, *How International Law Works* (2008) 71-117; D. Shelton (ed.), *Commitment and Compliance. The Role of Non-binding Norms in the International Legal System* (2000); in the context of German administrative law Michael Fehling, "Informelles Verwaltungshandeln", in W. Hoffmann-Riem, E. Schmidt-Aßmann & A. Voßkuhle, *Grundlagen des Verwaltungsrechts*, vol. 2 (2008) 1341-1404, at marginal note 7.

[95] M. Barnett & R. Duval, "Power in global governance" in *iid.* (eds), *Power in Global Governance* (2005) 1-32. Barnett and Duval define power in very broad terms as "the production, in and through social relations, of effects that shape the capacities of actors to determine their own circumstances and fate" (*ibid.*, at 8). Their research on power applies *mutatis mutandi* to our concept of authority. On power by identity formation see T. Porter & M. Webb, "The Role of the OECD in the Orchestration of Global Knowledge Networks", Canadian Political Science Association Annual Meeting (2007), <http://www.cpsa-acsp.ca/papers-2007/Porter-Webb.pdf> (last visited 28 July 2008).

[96] Koskenniemi, *supra* note 23; E. Benvenisti, "'Coalitions of the Willing' and the Evolution of Informal International Law", in: C. Callies, G. Nolte & P.-T. Stoll (eds), *Coalitions of the Willin: Avantgarde or Threat?* (2006) 1-23; J. Klabbers, "Institutional Ambivalence by Design: Soft Organizations in International Law", 70 *Nordic Journal of International Law* (2001) 403-21.

[97] See *infra* III.C.

related to the distinction between private and public acts,[98] we consider as public and international any authority which is exercised on the basis of a formal or informal international act of public authorities, mostly states, to further a goal which they define, and are authorized to define, as a public interest.[99] The "publicness" of authority is therefore first and foremost determined by its legal basis. Hence, authority is public if the institution from which it emanates acts as an agent of political collectivities. Granted, this definition does not exhaust the meaning of "public". The concept carries much of what is expected from public institutions in a liberal democracy, such as a public ethos, transparency or accessibility for citizens. Today, public authority comes with duties and constraints. Although such expectations should not be simply transposed to international institutions, they formulate issues which need to be addressed by international institutions. Yet, for qualifying an exercise of authority as *public*, the legal basis of that authority provides the best, though not the only, criterion. This is the more evident the stronger the institutional links to states or to any public law actor are. For example, scientific research carried out without any specific involvement of public decision-makers could never be considered an instance of public authority, even though it might be sponsored by public funds.

C. Governance by Information as an Exercise of International Public Authority

This definition of the concept of public authority will now be applied to PISA as an example of global governance by information. First, the necessary link to a public and international act serving as a legal basis can be easily established: PISA is legally a programme of the OECD, an international organization, and it is financed and run by governments and the organization. Although it involves a significant number of independent experts, on the national level as well as in the Functional Expert Groups, the PISA reports are *adopted* by the PGB by government representatives and published as OECD documents; hence the attribution to public institutions. They are thus more *public* than mere scientific research or independent expertise.

More difficult to apply is the other aspect of the definition, which raises the question whether PISA can be considered as having a relevant impact on liberty. In order to assess this, it might be useful as a first step to distinguish governance by information as it is understood here[100] from other types of public policy based on information. First, public authorities can inform the public about their policies and activities, which might enhance understanding for them, and therefore compliance. This type of information policy is always accessorial to other competencies and carries little weight of its own.[101] Second,

[98] These problems are discussed in more detail in von Bogdandy, Dann & Goldmann, *supra* note 17.
[99] Note that this definition is not exhaustive. On the problems related to functionally equivalent private authority see von Bogdandy, Dann & Goldmann, *supra* note 17. Some put the task to discharge public duties at the heart of their approach, e.g. M. Ruffert, "Perspektiven des Internationalen Verwaltungsrechts", in C. Möllers, A. Voßkuhle & C. Walter (eds), *Internationales Verwaltungsrecht* (2007) 395-419, at 402.
[100] See *supra* text accompanying note 13.
[101] From the perspective of German public law: C. Gusy, *supra* note 30, at marginal notes 95-7.

public authorities may give informal advice, which will not always be legally relevant.[102] Third, they may give advice or issue warnings in order to raise awareness of certain dangerous practices or products. Unlike PISA, advice and warnings are not addressed to policy-makers and do not require their giving follow-up to them for being effective; nevertheless, these activities will mostly need legal framing.[103] PISA, however, can be characterized as a process in which an international forum, mostly based on empirical assessments and often steered by epistemic communities,[104] builds shared convictions on certain policies, develops best practices and discusses reform agendas.[105]

With these distinctions in mind, the central question can be approached: Can PISA be considered to exceed the threshold of relevance? Which features of PISA give rise to the expectation that it will have a level of impact on decision-making which qualifies it as an instance of international public authority? And which features speak against this conclusion?

Against the qualification as an instance of public authority speaks, first of all, the fact that PISA consists principally in an empirical assessment and that the PISA reports show much restraint in drawing recommendations from the results of the assessment – at least in comparison to the OECD Job Study, which contained ten general and many more precise, country-specific recommendations.[106] The impact of PISA on educational policy in the participating states is thus an indirect one, generating general awareness that something must be done rather than inducing specific reforms. The interpretation of its results is by no means a clear-cut affair.[107] A second and related counter-argument is the high scientific quality of the assessment. Much energy was invested in producing a culturally neutral design which gives preference to the measurement of general competencies instead of specific knowledge, which would have hardly done justice to the different curricula used in the participating states. Third, PISA has been successful not least because it addressed a sensitive issue area at the right time. Impact seems to depend

[102] W.R. Andersen, "Informal Agency Advice – Graphing the Critical Analysis", 54 *Administrative L. Rev.* (2002) 595-609.
[103] The effects of such warnings can be as detrimental for producers as direct prohibitions. For this reason, public law often specifies under which conditions warnings may be issued. On the situation in Germany see Federal Constitutional Court, Case 1 BvR 558, 1428/91 ("Glykol"), decision of 26 June 2002, 105 *BVerfGE* (2003) 252; comprehensive overview on the German literature on public warnings in Bumke, *supra* note 31, at footnote 5.
[104] Haas, *supra* note 84.
[105] Instructive J.M. Dostal, "Campaigning on expertise: how the OECD framed EU welfare and labour market policies – and why success could trigger failure", 11 *Journal of European Public Policy* (2004) 440-60, at 446-8.
[106] OECD, Jobs Study (1994).
[107] E.g. H. Rindermann, "Was messen internationale Schulleistungsstudien? Schulleistungen, Schülerfähigkeiten, kognitive Fähigkeiten, Wissen oder allgemeine Intelligenz?", 57 *Psychologische Rundschau* (2006) 69-86; which triggered responses by J. Baumert, M. Brunner, O. Lüdtke & U. Trautwein, "Was messen internationale Schulleistungsstudien? – Resultate kumulativer Wissenserwerbsprozesse", 58 *Psychologische Rundschau* (2007) 118-45; and M. Prenzel, O. Walter & A. Frey, "PISA misst Kompetenzen", 57 *Psychologische Rundschau* (2006) 128-136.

on coincidences such as timing and whether the issue area is suitable for attracting media attention and generating public debate.[108]

On the other hand, a number of factors speak in favour of the position that PISA has a relevant impact on liberty. First, the PISA study – and earlier international assessments like the TIMSS study by a private research organization[109] – seem to have had effects on national political agendas.[110] This effect was very much intended, as PISA was designed to be policy relevant.[111] Agenda setting is an important part of the political process, and it would be difficult to completely ignore its influence on subsequent processes, and thus, on the policies that are finally adopted.[112]

Second, although the PISA reports do not state best practices in educational policy, the results of the assessments produce a shared knowledge-base, which is an important precondition for their establishment.[113] And the accumulation of authoritative knowledge already frames educational policy for the simple fact that empirical assessments cannot be carried out without a shared understanding of basic concepts.[114] In the case at hand, educational performance can only be measured in relation to a certain understanding of "education".[115] Although this and other underlying concepts have certainly been developed with careful consideration and in good faith, it should not be overseen that they involve contingent decisions and might fall prey to particular ideologies.[116] While an assessment based on such concepts will provide useful insights for policy-makers, insights from alternative concepts are necessarily discarded.[117]

---

[108] C. Engel, "Integration durch Koordination und Benchmarking?", in H. Hill & R. Pitschas (eds), *Europäisches Verwaltungsverfahrensrecht* (2004) 408-43, at 431.

[109] See M. Goldmann, 'Holding Governments Accountable through Governance by Information', 58 *Rivista trimestrale di diritto pubblico* (2008), 41-69.

[110] See generally *supra* note 10; Martens, *supra* note 9; M. Lehtonen, "OECD Benchmarking in Enhancing Policy Convergence: Harmonisation, Imposition and Diffusion through the Environmental Performance Reviews?" Conference on International Organizations and Global Environmental Governance, Freie Universität Berlin (2005), http://web.fu-berlin.de/ffu/akumwelt/bc2005/papers.html (last visited 28 July 2007), at 15: Lehtonen argues that PISA is more successful than the OECD Environmental Performance Review, because the OECD has been an "early mover" in educational policy promoting policy innovation, while environmental standards had been agreed in different fora before the OECD started its activities.

[111] DEELSA/ED/CERI/CD(97)4, 28 March 1997, paras 13-25.

[112] Marcussen, *supra* note 12.

[113] Often, no clear distinction is being made between assessments and benchmarks. Cf. M. John-Koch, "Nicht-normative Steuerung durch Ziele und Vergleiche", in J. Oebbecke (ed.), *Nicht-normative Steuerung in dezentralen Systemen* (2005) 363-402, at 372.

[114] This recalls the concept of "framing" as used in behavioural economics. Accordingly, whether something is considered a loss or a benefit is not an ontological question, but depends on circumstantial factors which determine the assessment. See B. Nagel, *Recht und Gerechtigkeit im gesellschaftlichen Wandel* (2007), 128.

[115] On the definition of education in the OECD see Bottani, *supra* note 52, at 279-80.

[116] For an analysis of the predominantly neo-liberal concept of education within the OECD see Henry, Lingard, Rizvi & Taylor, *supra* note 10, at 61 *et seqq.*, 102-105, 175.

[117] Similarly, the formulation of best practices entails the risk of ignoring alternative practices, which might prove equally, or even more successful in certain contexts, see D. Lazer, "Global and Domestic Governance: Modes of Interdependence in Regulatory Policymaking", 12 *European Law Journal* (2006) 455-68, at 463-6.

Third, national policy-makers can hardly ignore the PISA results of their country. From the beginning, PISA was planned to comprise three cycles and has now been prolonged even further.[118] Each subsequent round of PISA holds policy-makers accountable for their reactions (or failure to react) to the results of the previous round. Therefore, assessments can be expected to be particularly relevant if they are repeated, and in particular if carried out by an institution with the reputation of the OECD.[119]

Fourth, although PISA did not affect the formal division of competence on the national level, it changed certain powers in favour of national executives.[120] This is all the more remarkable as education falls at least partly within the competence of sub-national entities in a number of participating states.[121] While the dynamics of such "two-level games" are characteristic of every transnational policy process,[122] it is remarkable that even informal, indirect governance mechanisms like PISA have repercussions for power balances.[123]

Finally, the comparative nature of the assessment gives PISA particular bite.[124] Although it might not have been the intention of the initiators of PISA, country rankings impact on patriotism, and politicians and the media know how to use the rallying potential of such impact. In times of global competition, national stakeholders can be presumed to have a strong interest in their country not lagging behind. Thus, governments will be inclined to avoid being "named and shamed" for less competitive policies, or to react to unfavourable results.

In conclusion, it seems that the impact of PISA on the self-determination of the citizenry, and thus on liberty, should not be underestimated, in particular because of the *cumulative* effects of two-level dynamics, the potential for benchmarking, and rankings. It should therefore be considered an exercise of public authority, even though it might not present the clearest case of such authority. Accordingly, a public law perspective appears appropriate.

IV. The Function of Standard Instruments in Perspective: Lessons from Past Experiences

This section explores on a theoretical level how PISA could be conceptually grasped in a public law perspective by identifying basic legal elements and principles. For that

[118] Longer Term Strategy of the Development of PISA, 20th meeting of the PISA Governing Board, 27 September 2005, EDU/PISA/GB(2005)21.
[119] On the importance of reputation for OECD effectiveness: J. Sharman, "Rationalist and Constructivist Perspectives on Reputation", 55 *Political Studies* (2007) 20-37.
[120] K. Martens & K.D. Wolf, "Paradoxien der Neuen Staatsräson. Die Internationalisierung der Bildungspolitik in der EU und der OECD", 13 *Zeitschrift für Internationale Beziehungen* (2006) 145-176.
[121] E.g. Belgium, Canada, Germany, Spain (shared responsibility of both the national government and the autonomous communities), Switzerland, the UK, and the United States.
[122] *Supra* note 82 and accompanying text.
[123] This is close to a constructivist understanding of power, cf. Barnett & Duval, *supra* note 95.
[124] Lehtonen, *supra* note 110, at 15; Martens, *supra* note 9.

purpose we propose the development of "standard instruments" in legal doctrine. The term "standard instrument" is a translation of the German term *Handlungsform*. It echoes the term "legal instruments", with the important difference that "standard instrument" is a broader category.[125] Being doctrinal constructs, standard instruments constitute the reference point for applying legal discipline to an exercise of public authority. They allow the identification of acts of a specific legal quality out of the multitude of acts emanating from public authorities, and they rationalize and standardize the legal regime of these acts.

Providing doctrinal constructs like standard instruments as resources of public authorities is a specific contribution of legal scholarship to public infrastructure.[126] Although this understanding of the function of public law is not entirely unknown in Anglo-American scholarship, it seems rooted in a typically continental understanding of law. A flashback to the history of standard instruments, the underlying methodology as well as the political and social context in which they emerged helps to explore whether they have a potential for conceptualizing instruments of international public authority such as PISA. This will be done at the example of German and Italian public law and legal scholarship.

A. The Legal Method and Standard Instruments in German and Italian Public Law: A Retrospective

The history of both German and Italian public law scholarship is marked by a turn to positivism and to the so-called "legal method" (*juristische Methode*, *metodo giuridico*) in the second half of the 19th century. Given the difficulties related to the notion of positivism and the significance of this trend in legal scholarship until today, it might better be called "doctrinal constructivism". This method eventually became dominant in both countries.[127] In both cases, this methodological development can be explained as both a reaction to perceived deficits in the legitimacy of the government of the day, which was characterized by an awkward mix of monarchical divine legitimacy and some constitutional powers exercised by limited parts of the population, and to the desire of public law scholarship to be accepted as an autonomous discipline. In the wake of this methodological innovation, standard instruments like the *Verwaltungsakt* and the *provvedimento amministrativo* began to emerge, which were seen as a tool to enhance both the effectiveness and the legitimacy of governmental and administrative action. It is true that the emergence of the "legal method" transformed public law scholarship in numerous European jurisdictions, with the notable exceptions of France and England.[128]

---

[125] *Infra* note 182 and accompanying text.

[126] G.F. Schuppert, "Governance im Spiegel der Wissenschaften" in *id.* (ed.), *Governance-Forschung* (2006) 371-469, at 386-92.

[127] On the parallel development M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 2 (1992) 318-9; and P. Schiera & R. Gherardi, "Von der Verfassung zur Verwaltung: bürgerliche Staatswissenschaft in Deutschland und Italien nach der nationalen Einigung", in E.V. Heyen (ed.), *Wissenschaft und Recht der Verwaltung seit dem Ancien Régime* (1984), 129- 46, at 140-4.

[128] A. von Bogdandy, "Wissenschaft vom Verfassungsrecht: Vergleich", in *id.*, P. Cruz Villalón, P. Huber (eds), *Handbuch Ius Publicum Europaeum*, vol. 2 (2008) 807-842, at marginal note 15 *et seqq*. On the developments in France and England *ibid.*, at marginal note 24-5.

However, the choice fell on Germany and Italy because the legal method was first elaborated in Germany, and because state and constitution in Italy faced similar challenges. Moreover, the example of Italy might protect our findings against an overdose of German bias.

1. Germany: Otto Mayer and the *Verwaltungsakt*

The emergence of the legal method and of the *Verwaltungsakt* in German public law scholarship occurred at a time when the legitimacy of the new unitary national state formed in 1871, but also that of the old territorial states, faced several challenges. First, there was the challenge of popular sovereignty. Although democratic aspirations had been articulated in the revolution of 1848 by different progressive circles,[129] and although all territorial states had adopted written constitutions by 1849, only little progress had been achieved in this direction. However, the constitutions did not allow popular sovereignty and democratic government to come forth in the same way as in the United States. The legislative assemblies featured few democratic elements, as they were usually composed of an aristocratic first chamber and a second chamber elected by the citizens often according to property qualifications,[130] and their impact was limited as the executive remained largely under the control of the monarchs.[131] The constitutions reflected an ambiguous tradeoff between the monarchic and the democratic principle.[132] Whereas the British understanding of the monarchy, according to which the true sovereign is not just the king but the "king in parliament", could easily integrate elements of democratic reform, the German post-Vienna concept of monarchic legitimacy did not allow for such development.[133]

Second, additional stress was created by the effects of industrialization, which had inflated public administration. In order to discharge of its tasks, public administration needed effective legal instruments. Consequently, the rise of the social state exposed the individual to administrative interference in thus unknown dimensions. This increased the need for a strong legitimatory basis of public authority, particularly in the eyes of the economically powerful, but politically weak group of citizens. Although they generally welcomed the infrastructural blessings of the modern state, something was needed to protect their personal and economic liberties and to counterbalance the growing impact of the state. An increase in democratic participation was politically unavailable. Constitutional rights alone could not provide much compensation, since it had become

[129] In detail W. J. Mommsen, "Das deutsche Kaiserreich als System umgangener Entscheidungen", in *id.*, *Der autoritäre Nationalstaat* (1990) 11-38, at 23-31.
[130] While the constitution of the German empire of 1871 recognized universal male suffrage. However, Bismarck's oppression of socialism (1878-90) undermined the democratic value of the elections, and property qualifications persisted in elections for the legislative assemblies of many territorial states, most notably in Prussia.
[131] Stolleis, *supra* note 127, 318-21; D. Willoweit, *Deutsche Verfassungsgeschichte* 5th ed. (2005) 282-3, 285-6, 312-4, 331-4.
[132] W.J. Mommsen, 'Die Verfassung des Deutschen Reiches von 1871 als dilatorischer Herrschaftskompromiß', in *id.*, *Der autoritäre Nationalstaat* (1990), 39-65.
[133] Willoweit, *supra* note 131, at 283-4.

clear that they mattered little as long as they were not implemented in administrative practice.[134] Something more was needed: the *Rechtsstaat* (rule of law).[135] This idea implied that public authorities had to adhere to a set of fundamental legal principles, which would frame state action and provide safeguards against arbitrary action. Accordingly, the executive would be bound to respect the law (*Gesetzesbindung*), and administrative intrusions into liberty and property rights would be subject to authorization by the law (*Gesetzesvorbehalt*) as well as to (internal) mechanisms of review, giving rise to government liability in case of violations.[136] The *Rechtsstaat* thus became a synonym for the limitation of public power and the antipode of the absolutistic *Machtstaat*.[137]

At the same time, there was a desire among scholars of public law to autonomize the discipline. They aimed at overcoming the hitherto dominant multidisciplinary syncretism in public law scholarship,[138] as well as its limitation to the exegesis of political acts which could be changed by the stroke of a pen.[139] The reason underlying this desire was not only the comet-like rise of the natural sciences, but also the strong position of the school of pandectism in private law, which had immunized private law against "intrusions" by the legislator by way of conceptual system-building. This provided the model for the introduction of the legal method in public law scholarship. Important impulses for this methodological change came from the writings of Gerber and Laband.[140] Familiar with the abstract, conceptual thinking of 19th century pandectism, they directed their efforts towards conceptual system-building in public law. Such conceptual system-building is the hallmark of the legal method. It is achieved by the construction of a consistent order of abstract legal concepts (*Begriffe*); which is why it may be called "doctrinal constructivism" (*Dogmatik*). These concepts explain in a principled manner the deeper structure of the existing positive law.[141] They are thus located on an intermediate level between the terms contained in legal texts and philosophical or purely theoretical constructions.[142] On this intermediate level, they are

[134] Willoweit, *supra* note 131, at 332.
[135] Stolleis, *supra* note 127, at 382.
[136] H. Schulze-Fielitz, 'Art. 20 (Rechtsstaat)', in H. Dreier, *Grundgesetz*, vol. 2, 2nd edition (2006), marginal notes 13, 46.
[137] T. Vesting, "Die Staatsrechtslehre und die Veränderung ihres Gegenstandes", 63 *Veröffentlichungen der Vereinigung Deutscher Staatrechtslehrer* (2004) 41-70, at 43-45.
[138] In constitutional law, prominent representatives of this method were R. von Mohl and O. von Gierke; in administrative law Lorenz von Stein, see his *Verwaltungslehre*, 7 vols, 1st edition (1865-68).
[139] von Bogdandy, *supra* note 128, at marginal notes 17-23.
[140] C.F. von Gerber, *Ueber oeffentliche Rechte* (1852); *id.*, *Grundzüge eines Systems des deutschen Staatrechts* (1865); P. Laband, *Das Staatsrecht des Deutschen Reiches*, 3 vol., 1st ed. (1876-80).
[141] Stolleis, *supra* note 127, at 330-48; a good illustration for the "legal method" provides Laband's distinction of formal and material laws, see W. Pauly, *Der Methodenwandel im deutschen Spätkonstitutionalismus* (1993) 177-86.
[142] For an insightful analysis into the nature of *Dogmatik* see N. Luhmann, *Rechtssystem und Rechtsdogmatik* (1974) 9-23. A rough translation of *Dogmatik* would be "doctrine". However, elements of *Dogmatik*, which are created by both scholarly analysis and jurisprudence, usually have considerable impact on decision-making and even on law-making: Christoph Möllers, 'Methoden', in W. Hoffmann-Riem, E. Schmidt-Aßmann & A. Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, vol. 1 (2006) 121-75, at marginal notes 35-37; Schmidt-Aßmann, *Ordnungsidee*, *supra* note 29, at 4-6. Note that system building is only one aspect of *Dogmatik*, ibid., at 3-4.

chiefly coined by legal scholarship. This gave nourishment to the hopes of these scholars to autonomize their discipline by adopting the legal method.

The idea of the Rechtsstaat served as the lynchpin of system-building in public law. The proponents of the legal method understood the idea of the *Rechtsstaat* only in a formal way, not in the sense of principles of material justice. In their eyes, it had nothing to do with the idea of popular sovereignty.[143] For this understanding of the *Rechtsstaat*, the challenge of the time regarding the field of administrative law consisted in the legal conceptualization of the relationship between the individual and the state. State action directed against individuals was no longer accepted as a mere fact, but its preconditions, effects and in particular the available remedies against it had to be determined by law. However, the actions carried out by the different branches of the administration can assume highly variable forms, ranging from factual acts like the maintenance of a street to the payment of social support, the forceful dissolution of an assembly or the issuance of a permit to open a business. Something was needed to determine which rules should apply to which action in a rational and efficient manner. As one of the first, *Laband* achieved a remarkable systematization by using the toolbox of the legal method: he developed the *Verfügung* (order) as a legal concept, an early standard instrument that could be used for administrative orders to individuals in any branch of the administration, and described its legal preconditions and the consequences of its illegality.[144]

Otto Mayer followed in these footsteps and provided perhaps the most consequent elaboration of a system of administrative law based on the legal method in the 19th century.[145] In his pathbreaking 1895 textbook,[146] *Mayer* developed a standard instrument for non-consensual legal acts in state-citizen relationships, which he called *Verwaltungsakt*, in analogy to the French *acte administratif* which had inspired his idea to establish an efficient doctrinal tool for administrative decision-making.[147] *Mayer* argued that there was need for a legal concept for administrative decisions which determine the rights and duties of individuals that would be comparable to that of judgments by courts. Like judgments, it would need to be obeyed unless repealed by an *actus contrarius* issued by an administrative authority or tribunal. By postulating the principle of the binding force of non-repealed acts, whether unlawful or not, *Mayer* had developed a standard instrument which would guarantee both the effectiveness of administrative action by avoiding situations of legal uncertainty, and individual rights

[143] In fact, the idea of the *Rechtsstaat* was introduced in Germany by R. von Mohl, *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaats*, 2 vol. (1832-33), for whom the *Rechtsstaat* still coincided much more with the idea of material justice. See Stolleis, *supra* note 127, at 258.
[144] Laband, *supra* note 140, vol. 2 (1878), 216-29. For similar efforts by other writers see Stolleis, *supra* note 127, at 394-403; M. Engert, *Die historische Entwicklung des Rechtsinstituts Verwaltungsakt* (2002), 117-22.
[145] He explicitly followed the approach of the legal method, see O. Mayer, *Deutsches Verwaltungsrecht*, vol. 1, 2nd ed. (1914), VIII.
[146] O. Mayer, *Deutsches Verwaltungsrecht*, vol. 1, 1st ed. (1895).
[147] Mayer, *supra* note 146, at 59. The notion *Verwaltungsakt* had been used before Mayer, but not in a consistent way. On the significance of the acte administratif as a tool for conveying statal power G. Bigot, "Les mythes fondateurs du droit administratif", 16 *Revue Française de Droit Administratif* (2000) 527-36.

protection by ensuring some procedural safeguards and quasi-judicial remedies for each act.[148]

Methodically, this construction is not without difficulty from a contemporary perspective. Neither was it exclusively deduced from the idea of the *Rechtsstaat*, nor produced inductively by abstraction from the positive law. Rather, it was an intuitive, doubtlessly contingent, dialectical construction, guided by both practice and principles: Once *Mayer* had set out the nature and effects of the *Verwaltungsakt* on a normative level, he discovered this standard instrument in a multitude of cases in administrative practice.[149] The *Verwaltungsakt* was designed as a "foil"[150] which would give structure to the amorphous mass of the positive law and, by virtue of its normative nature, allow for the critical assessment of administrative practice.

The main merit of this construction consisted in enabling the administration to fulfill its growing tasks in an efficient manner, while becoming more foreseeable and accountable to those affected by its actions. These factors are likely to foster legitimacy. Maybe this explains the success of *Mayer's* concept of the *Verwaltungsakt*, which became quickly accepted in doctrine and judicial practice after its first publication and was later codified – albeit only after several modifications of *Mayer's* original definition.[151] Today, the *Verwaltungsakt* is understood as the decision of a public authority in the field of public law concerning an individual case which prompts direct external legal effects.[152] It can be enforced immediately, except in case of grave vices.[153] Judicial review of the *Verwaltungsakt* is guaranteed,[154] and there are uniform rules for the administrative procedure preceding the issuance of a *Verwaltungsakt*, as well as for its repeal.[155]

2. Italy: Orlando, Giannini and the *provvedimento amministrativo*

The constitutional situation of the unitary Italian state, which had been formed by 1861, shared a number of characteristics with Germany of the time. The claim for national unity *and* democratic reforms had been clearly articulated during the *risorgimento*, but the outcome was not a democracy. The *Statuto Albertino*, the piemontese constitution of 1848 which should become the first national constitution, resembled in some respects the constitutional situation in Germany – even though its text had been modeled after the

[148] This particular merit of Mayer has been pointed out by Engert, *supra* note 144, at 125-6.
[149] Mayer, *supra* note 146, at 94-104; on his method R. Schmidt-De Caluwe, *Der Verwaltungsakt in der Lehre Otto Mayers* (1999), 206-10; C. Bumke, 'Die Entwicklung der verwaltungsrechtswissenschaftlichen Methodik in der Bundesrepublik Deutschland', in E. Schmidt-Aßmann & W. Hofmann-Riem (eds), *Methoden der Verwaltungsrechtswissenschaft* (2004) 73-130, at 86-89.
[150] Bumke, *supra* note 149, at 87.
[151] Mayer, *supra* note 146, at 95.
[152] Cf. sec. 35 Verwaltungsverfahrensgesetz (Administrative Procedures Act) of 1976. The translation of the terminology follows M.P. Singh, *German Administrative Law in Common Law Perspective*, 2nd edn (2001), 63 et seq.
[153] Sec. 43 (2) and 44 Verwaltungsverfahrensgesetz.
[154] Sec. 42 Verwaltungsgerichtsordnung (Administrative Court Procedures Code) of 1960.
[155] *I.a.* sec. 38, 39, 41 and 48-50 Verwaltungsverfahrensgesetz.

French constitution of 1814.[156] The representative assembly was elected according to property qualifications,[157] and the executive remained under the active control of the king.[158] Consequently, Italy had an essentially monarchic constitution with some democratic elements, being far less progressive than the Belgian constitution of 1831, which gave primacy to parliament over the executive.

The first wave of industrialization, which occurred towards the end of the century, and the infrastructural challenge created by it caused a growth of the administrative apparatus of the new state, whose organizational design roughly followed the French model.[159] At the same time, important administrative legislation was brought under way.[160] Like in Germany, the economically strong group of citizens was therefore concerned about the impact of the administration on their liberty.

Thus, the socio-political context in Italy resembled that in Germany at the time of the emergence of the legal method. Scholarly debate introduced the idea of the *stato di diritto* (rule of law). This brought Italian public law thinking was brought closer to the ideas of the contemporary German writers of the legal method,[161] replacing earlier French influence in doctrine.[162] While earlier publications in the field of administrative law after unification had mostly been amalgams of historical, political and philosophical content,[163] the adoption of the legal method established administrative law as a discipline of its own – quite like in Germany. Some writers had already provided the groundwork for the legal method[164] when *Silvio Spaventa* pleaded for the introduction of judicial review of administrative action and the idea of the *stato di diritto* in a famous speech at Bergamo in 1880.[165] But it was left to *Vittorio Emanuele Orlando* to construct in Italy a system of public law in the sense of the legal method. Like Gerber and Laband, he had started as a private lawyer, and in 1889 he issued a call for the study of public law with the systematic rigour of private law and for the development of principles "above" the law, i.e. for the development of a public law *Dogmatik*.[166] Implementing this agenda, he published landmark studies of constitutional and administrative law.[167]

---

[156] R. Martucci, *Storia costituzionale italiana* (2002) 36.
[157] Universal male suffrage was only achieved in 1913.
[158] E.g. the royal interventions in government activities described by P. Colombo, *Storia costituzionale della monarchia italiana* (2001) 74-88; cf. further R. Martucci, *supra* note 156, at 50-57.
[159] G. Melis, "La storia del diritto amministrativo", in S. Cassese (ed.), *Trattato di diritto amministrativo*, vol. 1, 2nd edn (2003) 95-171, at 98-101.
[160] *Ibid*.
[161] S. Cassese, *Cultura e politica del diritto amministrativo* (1971) 15-21.
[162] Nevertheless, the organization of the Italian administration in many respects bears the traits of the French model, see S. Cassese, "Toward a European Model of Public Administration", in D.S. Clark (ed.), *Comparative and Private International Law* (1990) 353-67, at 355-62.
[163] Melis, *supra* note 159, at 102.
[164] Among those were Gianquinto and Mantellini, cf. G. Rebuffa, *La formazione del diritto amministrativo in Italia* (1981) 100 et seq. and 128 et seq.
[165] S. Spaventa, "Giustizia nell'amministrazione", in S. Ricci (ed.), *La giustizia amministrativa* (1993) 41-75.
[166] V.E. Orlando, "I criteri tecnici per la ricostruzione giuridica del diritto pubblico", in *id.*, *Diritto pubblico generale* (1940) 3-22. See also Melis, *supra* note 159, at 110-1.
[167] V.E. Orlando, *Principii di diritto costituzionale*, 1st edn (1889) 23-24; *id.*, *Principii di diritto amministrativo*, 1st edition (1890). The challenge to spell out administrative law in terms of abstract legal

In his analysis of administrative law, *Orlando* went quite some way towards the development of standard instruments. The *provvedimento amministrativo* was not yet fully elaborated as a standard form for unilateral, legally binding administrative acts.[168] However, the subdivision of administrative acts into "judicial" (= preventive, interventionist) and "social" (= public service) ones[169] entailed a considerable rationalizing effect: Judicial remedies, which had been introduced in 1889, were only available against acts of the former category, and only they could be enforced without a previous court ruling.[170] This enabled the determination of the scope of judicial review of administrative acts, while providing the administration with efficient, directly enforceable instruments. Thus, legal doctrine reacted to the legitimacy concerns faced by the administration by developing the tools for putting the *stato di diritto* into administrative practice. This is very much on a par with *Mayer's* achievement.

Although *Orlando's* work had a high and immediate impact on academic writing, legal education and jurisprudence,[171] it still took some decades until *Giannini* finally gave the *provvedimento amministrativo* its shape as a precisely defined form of action in 1950.[172] Today, the *provvedimento* has still not been codified, but its preconditions and consequences have been spelled out in doctrine and jurisprudence. Accordingly, the *provvedimento amministrativo* is a unilateral, motivated declaration of the will (*volontà*) of a competent holder of administrative power producing defined legal effects (called *contenuto*), which can be enforced immediately, unless repealed. It is subject to judicial review. Only in case of grave defects is the *provvedimento* void from the beginning. The *provvedimento* must be preceded by an administrative procedure (*procedimento*) meeting certain standards.[173] The resemblance with the *Verwaltungsakt* is eye-catching.

3. The Potential of Doctrinal Constructivism for the Framing of Global Governance

The historic flashback has revealed that the rise of the legal method in the late 19th century, and with it the development of standard instruments in administrative law, took place against the background of a particular political and social situation which was characterized by constitutional arrangements that fell short of parliamentary democracy and gave a strong role to governments controlled by monarchs. The legitimacy of this hybrid structure was exposed to serious doubts. At the same time, the administrative

---

principles was considerable, as earlier scholarship had confined itself to commenting on administrative legislation and reglementations. See M. Fioravanti, *La scienza del diritto pubblico*, vol. 1 (2001), 147-8.

[168] The term *provvedimento* seems to be understood as a generic term comprising both the internal law of the administration and every law regulating its relationship with citizens, be it in the form of legislative acts, abstract police orders (*ordonnanze*) or individual orders (*ordini*). Cf. V.E. Orlando, *Principii di diritto amministrativo*, 2nd edition (1892), 232-4.

[169] Orlando, *supra* note 168, at 229-85.

[170] Orlando, *supra* note 168, at 233-6.

[171] Melis, *supra* note 159, at 117-8.

[172] M.S. Giannini, *Lezioni di diritto amministrativo*, vol. 1 (1950), 289 et seq.

[173] On the development and current theory of the *provvedimento amministrativo* see B.G. Mattarella, "Il provvedimento", in S. Cassese (ed.), *Trattato di diritto amministrativo*, vol. 1, 2nd ed. (2003) 797-1034.

apparatus had to master an ever increasing range of problems, which in turn caused the liberal bourgeois elite to demand respect for its liberty and property, and scholars of public law were in search of autonomy for their discipline. In this situation, the development of standard instruments for the administration enabled by the legal method was a win-win situation: the administration obtained effective instruments, the bourgeoisie some basic safeguards against arbitrary state action which are small measured by contemporary standards, but meant some progress in those days, and legal scholarship was established as an autonomous discipline. Legal scholarship constituted a communicative platform for critique and compromise, and its conceptual work fostered the perpetuation of such compromises and their implementation through the judiciary.

Our time and its challenges are profoundly different. Our concerns about the legitimacy of international public authority derive from comparisons with democratic state authority which is generally held to be legitimate. The governors of globalization, highly professional, cosmopolitan civil servants in the glass towers of governments or international institutions, have little in common with 19th century administrators of the emerging welfare state in their in bleak offices. And the contemporary global bourgeoisie, be it multinational enterprises, the media, or non-governmental interest groups, is much more pluralistic and pursues a much wider range of often diverging interests than 19th century bourgeoisie. Moreover, it should not be overseen that the legal method suffers from the epistemological and normative difficulties of conceptual system building: This sometimes rather intuitive process might have prompted pragmatic, efficient solutions which structured administrative activity while providing some basic guarantees for individual rights, but these solutions were neither logically necessary[174] nor always entirely uncontroversial. Not surprisingly, it did not take long for criticism to be raised against the legal method, which was accused of providing mere apology of existing power structures.[175] Indeed, most of the authors of the 19th century legal method were close to the establishment and had little interest in democratic reform.[176]

Nevertheless, the flashback reveals the quality of doctrinal constructivism which we believe to be unaffected by these objections. This is its communicative potential, i.e. its function as a tool for the conceptual rationalization of discourses about the effectiveness and legitimacy of state authority. This potential might be valuable for discourses on international public authority. The dialectical nature of doctrinal constructivism links the practice of international institutions with deductive reasoning guided by legal principles and considerations of legitimacy. This might lead to practically reasonable and normatively acceptable solutions, which are stabilized by legal conceptualization. Of

[174] While for Kant systemic thinking was a precondition of knowledge, see his *Kritik der reinen Vernunft* (1787), vol. 4 (1974 ed.), B 861, this epistemological holism has meanwhile come under great strain, as it is difficult to identify an overarching principle establishing the unity of the system that is not entirely contingent. See R. Christensen & A. Fischer-Lescano, "Die Einheit der Rechtsordnung. Zur Funktionsweise der holistischen Semantik", *Zeitschrift für Rechtsphilosophie* (2007) 8-14.
[175] W. Wilhelm, *Zur juristischen Methodenlehre im 19. Jahrhundert* (1958), 159; S. Mastellone, *Storia ideologica d'Europa da Stuart Mill a Lenin* (1982), at 158. Well-known is the turn against the legal method by R. von Ihering, *Der Kampf ums Recht* (1872).
[176] Cassese, *supra* note 161, at 17.

course, this requires awareness of the contingency of conceptual proposals.[177] This awareness is not possible on the basis of the disciplinary isolationism of the 19th century legal method, but requires a multi-perspective view of the social context of the doctrinal construction under way. The normative starting point of this "enlightened" version of the legal method would not be the concept of the *Rechtsstaat* formally understood, but respect for liberty and individual rights. If one assumes that constitutional principles are emerging in international law, these principles will probably be among them.[178] A further normative premise is our conviction that there is a need for effective instruments of public authority on the international level.

Another difference between our vision of doctrinal constructivism and its 19th century predecessor that must be addressed concerns the institutional context. Doctrinal constructivism historically relied on domestic courts as implementers of its doctrinal concepts. By contrast, the competence of international courts and tribunals only allows for sporadic intervention, and international institutions alone will hardly develop solutions that satisfy all views. Therefore, domestic courts, but also domestic parliaments and governments, will have to participate in the formation of acceptable doctrinal concepts.

B. The Value of Standard Instruments for the Legal Framing of Global Governance

The flashback allows the identification of two characteristics of standard instruments that are valuable for the legal conceptualization of the instruments of international public authority on the basis of an "enlightened" version of doctrinal constructivism.

1. Identification of Legally Relevant Acts

The first strength of standard instruments is that they can serve as a "magnifying glass" for identifying those acts which out of the "flooding mass of administrative activity", as it was called by *Otto Mayer*, through which public authority is exercised in a comparable way.[179] For example, the *Verwaltungsakt* singles out from this "flooding mass" those acts which constitute formally similar intrusions into liberty and property rights.

On the international level, the triad of sources of international law as stipulated in Art. 38 of the Statute of the ICJ traditionally fulfilled the function of identifying all legally relevant acts. However, as the preceding sections should have demonstrated, global governance is characterized by a countless number of communications and actions, binding and non-binding ones, normative and non-normative ones, emanating every day from more or less formalized institutional settings which cannot be grasped by the

[177] See also A. Paulus, "International Law After Postmodernism: Towards Renewal or Decline of International Law?", 14 *Leiden Journal of International Law* (2001) 727-755.
[178] *Supra* note 27.
[179] Mayer, *supra* note 145, at 95.

sources triad.[180] Some have suggested that the sources triad should be expanded.[181] However, this strategy would be unhelpful in our case, since PISA cannot be characterized as a *legal* instrument.

In contrast to the sources triad, the concept of standard instrument might be a more flexible doctrinal matrix for the legal framing of various types of authoritative acts that escape the sources triad. Standard instruments do not need to be of a binding legal nature. Rather, according to the prevailing view in German doctrine, legal instruments (*Rechtsformen*), i.e. instruments from which rights or obligations are derived, are only one group of standard instruments.[182] Other standard instruments do not produce rights or obligations: For example, in German administrative law, a standard instrument has been developed for governmental warnings, which do not produce direct legal effects.[183] Case law demonstrates that this non-legal standard instrument is by no means insignificant for legal practice.[184] Likewise, the instruments[185] enumerated in Art. 249 EC Treaty are not limited to instruments producing rights or obligations, but also comprise recommendations and opinions.[186] Further, the doctrinal concept of a standard instrument does not necessarily need to be part of the positive law of the legal order concerned. Rather, as with any doctrinal concept, standard instruments can be a practice-guided internal theory about the structure of the law.

The development of standard instruments for the exercise of international public authority could lead to gains in efficiency for international institutions, and to greater legal certainty for all those affected by it. Once the doctrinal concept of a standard instrument is accepted one can avoid intricate and time-consuming considerations of each individual instrument like those above concerning PISA.[187] Rather, the application of established definitions of standard instruments facilitates the identification of the legally relevant issues.

---

[180] Goldmann, *supra* note 18.

[181] G.J.H. van Hoof, *Rethinking the Sources of International Law* (1983); E. Riedel, "Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?", 2 *Europ. J. of Int'l L.* (1991) 58-84 (suggesting "standards" as a new category of international law); J. Brunnée, "Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements," in R. Wolfrum & V. Röben (eds), Developments of International Law in Treaty Making (2005) 101-126; J. Klabbers, "Constitutionalism and the Making of International Law. Fuller's Procedural Natural Law", 5 No Foundations. Journal of Extreme Legal Positivism (2008) 84-112.

[182] E. Schmidt-Aßmann, "Die Lehre von den Rechtsformen des Verwaltungshandelns", 104 *Deutsches Verwaltungsblatt* (1989) 533-541, at 541; W. Pauly, "Grundlagen einer Handlungsformenlehre", in K. Becker-Schwarze et al. (eds), *Wandel der Handlungsformen im Öffentlichen Recht* (1991) 25-45, at 32-34.

[183] Bumke, *supra* note 31.

[184] Federal Administrative Court (*Bundesverwaltungsgericht*), Case No. 3 C 34/84 ("Transparenzliste"), judgment of 18 April 1985, 71 *Entscheidungen des Bundesverwaltungsgerichts* (1986) 183; Case No. 7 C 20/04 (anti-Scientology declarations), judgment of 15 December 2005, 121 *Deutsches Verwaltungsblatt* (2006) 387; Federal Constitutional Court, *supra* note 103.

[185] In German: *Handlungsformen*, i.e. standard instruments.

[186] On the terminology in the context of European law: J. Bast, "Legal Instruments", in A. von Bogdandy & J. Bast (eds), *Principles of European Constitutional Law* (2006) 373-418, at 373-4; A. von Bogdandy, J. Bast & F. Arndt, "Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis", 23 *Yearbook of European Law* (2004) 91-136.

[187] *Supra*, III.C.

2. Standard Instruments as a Repository of a Legal Regime

The second strength of standard instruments consists in providing a generalized legal regime which is the repository of legal rules, insights and experiences (*Speicherfunktion*).[188] Once an act has been identified as falling under the definition of a certain standard instrument, the standard instrument functions like a prism and makes an entire repository of norms applicable to the activity under consideration. This repository accumulates past experiences and may relate to all legal aspects of the activity, comprising the procedure, the rights and duties of the actors involved, the legal effects of the instruments as well as remedies.[189] The repository makes it easier to legally frame and limit authoritative acts in a manner that respects liberty, while constraining them only to the extent necessary or reasonable. A general legal regime for each standard instrument has a rationalizing effect: It is not necessary to enter in each case into cumbersome considerations about legitimacy, justice, fairness, accountability, or the applicability of higher-ranking norms such as ius cogens etc. in order to argue that certain rules *should be* applicable to the activity in question. Rather, the presumption is that the legal repository attached to a standard instrument *is* applicable once an activity has been qualified as a specific standard instrument.[190] Standard instruments thus help to find similar, adequate solutions to similar problems in a great number of cases.

As this shows, the legal repository of standard instruments is not merely a description of the legal framework produced by practice, but has a normative character and may not be dispensed with lightly. In national law, the normative character of the legal regime of standard instruments usually finds its legal basis in constitutional principles, above all in the rule of law.[191] On the international level, this is where the mentioned normative premises come into play.[192]

Standard instruments thus oscillate between a mere abstraction of the positive law (which risks being apologetic) and an idealistic proposition of normativity (which risks to be utopian). This oscillation, theoretically assailable as it may be, is perhaps the key to the success of the legal method, and to the potential of its enlightened version of doctrinal constructivism: Both have the ability on the one hand to create a stencil for the analysis of practice which is located at some distance from the positive law and thus autonomizes law from politics, while on the other hand the concepts developed by the legal method are still grounded in positive law, which increases the chance that any critical impetus the concepts may have will be accepted by practice. Thus, doctrinal constructivism is the precondition for both a positive law that is politically contestable, and for the partial immunization of the law against legislative or administrative *fiat*. Not by coincidence, the

---

[188] Schmidt-Aßmann, *Ordnungsidee*, *supra* note 29, at 298.

[189] None of these aspects needs to be part of the legal regime; and each of these aspects may also be a constitutive element of the definition of the standard instrument. See on this in the context of European law J. Bast, *Grundbegriffe der Handlungsformen der EU* (2006), 6-21.

[190] Schmidt-Aßmann, *Ordnungsidee*, *supra* note 29, at 298; W. Krebs, "Die Juristische Methode im Verwaltungsrecht", in E. Schmidt-Aßmann & W. Hoffmann-Riem (eds), *Methoden der Verwaltungsrechtswissenschaft* (2004) 209-221, at 217 et seq.

[191] Krebs, *supra* note 190, at 219.

[192] *Supra* IV.A.3.

Rechtsstaat became the antipode of the absolutistic notion of (uncontrolled) sovereignty.[193]

V. The Proof of the Pudding: National Policy Assessment as a Standard Instrument

A. Method

Having expounded the potential of standard instruments *in abstracto*, we will now demonstrate it *in concreto*. We will develop the standard instrument "National Policy Assessment" (NPA) on the basis of the legal framework of the OECD PISA reports. Although the OECD Convention lists three standard instruments (decision, recommendation, and conventions),[194] this does not preclude the development of further standard instruments by practice and doctrine.[195] Such a development requires a rather long process involving policy-makers on all levels, scholars, the public, and not least the courts. It is dialectical in nature, consisting of continuous cross-fertilizations between legal norms and legitimacy concerns, practice and theory. Therefore, the following can only provide a starting point, a suggestion for the establishment of National Policy Assessment as a standard instrument.

We will proceed in two steps.[196] In a first step, the definition of "National Policy Assessment" will be developed. This requires selecting those elements which we deem most characteristic for the specific kind of public authority that emanates from instruments like PISA, in particular if compared to other instruments.[197]

In the second step, the legal regime of the standard instrument needs to be determined. This means to select those elements which are considered essential for its legitimacy and efficiency. Elements which seem dispensable, or too context-specific, are to be discarded in order to achieve a sufficient level of abstraction for applying NPAs to other issue areas. With regard to the OECD in particular, preserving enough flexibility seems crucial for the success of NPA as a standard instrument. The trademark of the OECD is its informality and flexibility. In other words, the official "OECD method", to draw a parallel with the EU, is that there is no method.[198] If the development of standard instruments is to be successful, it must not deprive policy-makers of an effective instrument due to an overflow of formality. Nevertheless, not every OECD policy

[193] Vesting, *supra* note 137, at 43-7.
[194] Article 5, OECD Convention.
[195] In the context of the European Union e.g. J. Bast, *Grundbegriffe der Handlungsformen der EU* (2006); F. v. Alemann, *Die Handlungsform der interinstitutionellen Vereinbarung* (2006).
[196] On the two-step method see Schmidt-Aßmann, *Ordnungsidee*, *supra* note 29, at 298-9.
[197] For this purpose, it might also be useful to take recourse to existing standard instruments by way of analogy, see Goldmann, *supra* note 18, at 240.
[198] See OECD, Resolution of the Council on a New Governance Structure for the Organisation, C(2006)78/FINAL, 24 May 2006, 17. Similarly, J. Salzman concludes that the OECD has no meaningful administrative law thus far, see his "Decentralized Administrative Law in the Organization for Economic Cooperation and Development", 68 *Law and Contemporary Problems* (2005) 189-224.

reinvents the wheel. Some instruments function in similar manners, sharing elements of their procedural and institutional frameworks.[199]

As has been said, the development of standard instruments comprises value-based, contingent decisions. Our reasoning thus will not lead to any "objective" or "imperative" results. Nevertheless, we understand our procedure as scientific as we lay open our premises as well as our procedure and present our outcome as a doctrinal proposition.[200] Arguments will oscillate between concerns about ensuring a sufficient level of input-legitimacy and concerns about maintaining a sufficient level of efficiency and flexibility (which might in turn add output-legitimacy to the instrument).

B. First Step: Defining "National Policy Assessment"

In this part, we propose a definition of the standard instrument "National Policy Assessment" (NPA). This standard instrument should be defined in such a way as to cover a wide specter of authoritative instruments which rely on governance by information. Therefore, we will take other examples of governance by information into account when elaborating the definition. Among those are the OECD peer-review mechanisms mentioned above,[201] which analyze and assess member states policies, like the Economic Surveys,[202] Environmental Performance Reviews,[203] as well as the OECD Jobs Strategy.[204] These instruments comprise to varying extents empirical data surveys, rely to different degrees on predefined legal standards or best practices, and only partially contain explicit policy recommendations. With PISA, the empirical part prevails, while explicit policy recommendations are virtually absent. As discussed above, these instruments are not defined in the institutional law of the OECD.[205] We hold that the defining elements should be those criteria which are constitutive for these instruments being exercises of public authority and which determine the specific function of NPAs with respect to other standard instruments.[206]

---

[199] On Guidelines see Goldmann, *supra* note 18.

[200] On the epistemology of legal scholarship U. Neumann, "Wissenschaftstheorie der Rechtswissenschaft", in A. Kaufmann *et al.* (eds), *Einführung in die Rechtsphilosophie und Rechtstheorie der Gegenwart*, 7th ed. (2004) 385-400, at 396-400.

[201] *Supra* I.A. See also F. Pagani, "Peer Review: A Tool for Co-operation and Change", OECD Document SG/LEG(2002)1, 11 September 2002.

[202] <http://www.oecd.org/department/0,3355,en_2649_34111_1_1_1_1_1,00.html> (last visited 25 October 2008).

[203] See M. Lehtonen, "Deliberative democracy, participation, and OECD peer reviews of environmental policies", 27 *American Journal of Evaluation* (2006) 185-200.

[204] See <http://www.oecd.org/document/1/0,3343,en_2649_201185_38939649_1_1_1_1,00.html> (last visited 9 April 2008). The 1994 OECD Jobs Study, which contained a number of policy recommendations, led to the OECD Jobs Strategy, which comprises individual country reviews in which the implementation of the recommendations is examined, among other things. Cf. Noaksson & Jacobsson, *supra* note 13.

[205] See Art. 5(a) and (b), OECD Convention, which only mentions decisons and recommendations.

[206] For a distinction of several governance instruments which operate through the dissemination of information see *supra* III.C.

A first criterion is that NPAs produce informational documents on the outcomes of domestic policies. Although any information might have normative effects, their normativity is not integrated in the text by means of deontic operators ("shall", "may" etc.). NPAs may be supplemented by explicit recommendations drawn from the results of the data survey (as in the case of the economic surveys). But these recommendations always hinge on the preceding data survey or analysis. In no case these recommendations amount to binding prescriptions. This distinguishes them not only from binding legal instruments, but also from deontic instruments which are not preceded by an extensive data survey or assessment, such as Guidelines.[207]

A second constitutive element is the existence of an assessment with a claim to objectivity based on *empirical data*. Only information based on such data can yield communicative power, hence amounts to an exercise of public authority.

Third, there needs to be an *enforcement mechanism* which gives "bite" to the assessment, i.e. some element that equips the assessment with communicative power that future domestic policy can only ignore at some cost. One element of such a mechanism is *iterativity*. Repeated assessments establish a timeline within which national policy-makers are expected to improve their country's performance. A further element is the formulation of expectations to national policy makers. This can be achieved directly by including *specific policy recommendations*, or indirectly by *country rankings* as in the case of PISA. One might consider the ranking as a functional equivalent to a deontic operator as it implies for those not on top of the ranking that they should follow the example of those arriving first. Moreover, an additional element that creates constraint is *public availability* of the information.

Fourth, an NPA needs to be *attributable to an international institution* in order to be an exercise of public authority.[208] In general, assessments by private institutions do not qualify as NPAs as they are protected by civil liberties such as the freedom of information, of speech, and academic freedom.

Finally, NPAs need to refer to the *policy of another public entity*. Purely internal assessments might also raise legal issues. However, if the policy to be assessed falls into the competence of another public entity, the legal issues that need to be addressed are fundamentally different.

Thus, NPAs can be defined as the *revelation of empirical information* with a *claim to objectivity* by *international institutions* which concern the *policy of another public entity* and are coupled with an *enforcement mechanism* for future domestic policy, in particular *iterativity, publicness, country rankings* or *specific policy recommendations*.

[207] Goldmann, *supra* note 18.
[208] On our concept of international institution see von Bogdandy, Dann & Goldmann, *supra* note 17.

C. Second Step: The Legal Regime of NPAs

The second step consists in the construction of a set of legal requirements deemed decisive for the legitimacy and efficiency of NPAs (hereinafter "legal regime"). We will also explore how to elevate the legal regime from a purely descriptive level to the level of legal force. In order not to provide mere apology of existing practice, the legal regime then undergoes some normative critique. Finally, the repercussions of the legal regime of NPAs thus established on other international regimes will be explored.

1. Defining the Legal Regime of NPAs

The legal "repository" of NPAs will be conceptualized on the basis of the actual legal framework of PISA, but with the mentioned other mechanisms falling under the definition of NPA in mind. It needs to be sorted out which substantive and procedural elements of this framework are indispensable for the legitimacy and efficiency of PISA.

a. Mandate

One striking feature of PISA's legal framework is that the policy is based on a clear legal mandate. PISA rests on decisions by OECD organs which lay down the essentials of the programme. PISA is not a largely autonomous policy developed by an international bureaucracy on vague competencies, but has been specifically mandated by the main political decision-making body of the organization. This is not necessarily required under the established doctrine of international organizations, especially since PISA does not amount to the enactment of a binding legal instrument.[209]

In light of the fact that NPAs in general and PISA in particular are exercises of public authority and, as a consequence, its need of legitimacy, we conceive a mandate as legally required. The need of a legal basis is one of the most fundamental means by which public law provides legitimacy.[210] A mandate can result from the founding treaty, if that lays down such a policy with sufficient determinacy. Mostly, however, it will require subsequent legal acts, as in the case of PISA. A general, unspecific competence as for example Articles 1 and 5 OECD Convention would not support an NPA as an autonomous project of the secretariat of an international organization.

Additionally, the two-staged process in which the mandate of PISA was adopted, composed of a binding OECD decision preceded by exchanges of notes, has had the function of making PISA both more legitimate, as prior consultations of domestic stakeholders might reduce the effects of two-level games on national power balances, and potentially more effective, as prior domestic consultations are likely to enhance the impact of PISA. This two-staged process might even be considered an adequate remedy

[209] In detail J. Klabbers, *An Introduction to International Institutional Law* (2002) 60 et seqq.
[210] For a comparative study A. von Bogdandy, *Gubernative Rechtsetzung* (2000) 166 et seqq.

for the lack of parliamentary ratification of the resolution establishing PISA. It should therefore be taken as an essential element of the legal framework of NPAs.

b. Respect of Scientific Standards and Representative Expertise

PISA is an exercise of public authority not least because of its claim to rest on scientific data collection and elaboration. Being an essential element of the legitimacy and efficacy of NPAs,[211] the respect of pertinent scientific standards should form part of the legal regime of this standard instrument.

In many instances, there will not be sufficient scientific expertise in the bureaucratic apparatus to conduct the assessment. Hence the involvement of experts in the field, for example as participants in the functional expert groups.[212] It is remarkable that these experts were selected not only on the basis of their academic qualifications, but also of their national origin. In fact, the Strategy encourages a balanced country representation in the expert groups and envisages that states not represented in a particular expert group charge another expert with their representation.[213]

Thus, the drafters of PISA recognized that scientific expertise is not always culturally neutral, but that expertise is often influenced by the experiences made by an expert in his or her country of origin or residence. Accordingly, it appears necessary to ensure a geographically balanced selection of experts in order to avoid national or regional biases. Given the importance of a sound scientific design of the study for its credibility, geographic representativity of experts should be considered part of the legal regime of NPAs.

c. Access to the Assessment Data

The PISA results are published in a main report revealing the general results, and several additional thematic reports providing in-depth analysis of specific issues. Unlike most of the OECD's statistical data and country-specific analyses,[214] they can be downloaded for free from the PISA website. This underlines not only the public authority aspect of PISA, but it provides for the interested public a way to check and contest the assessment which – as set out – might become an important domestic policy instrument. Access to the assessment data therefore spurs accountability within international institutions; this is an important element of its legitimacy. For these reasons, access to the assessment data to an extent that allows meaningful checks should be part of the legal regime of NPAs.

[211] On problems resulting from giving preference to political rather than scientific considerations see M. Prenzel, J. Baumert & E. Klieme, "Falscher Verdacht", *Die Zeit*, no. 23 (2008), 73-4.
[212] *Supra* II.
[213] DEELSA/ED/CERI/CD(97)7, 19 August 1997, para. 80.
[214] E.g. Environmental Performance Reviews, Economic Surveys.

d. National Ownership

There are several indications that national ownership is a principle that plays an important role in the legal framework of PISA. One of them is the restraint in the reports in drawing recommendations from the empirical results; another is the careful drafting by the PGB of the communications strategy for the release of the results; and a third indication is the fact that each country is in charge of releasing national data. These examples indicate that the participating states should have the study in their hands to the extent possible.

Among the reasons behind this principle of national ownership might be the political intricacy of internationalizing an issue which deeply affects national self-understanding, the lack of a prior common understanding of best practices, the intention to make PISA more effective by ensuring the acceptance of the testing framework,[215] or the specific explosive potential of educational issues. At least the first three reasons constitute a sound normative basis for including national ownership as an overarching principle in the legal regime of National Policy Assessments. Yet, the criterion of national ownership does not exclude an assessment against the will of the state. The defense of other important international principles, such as human rights or international peace, might justify an NPA without consent.

e. Institutional Autonomy in Policy Development

OECD institutions enjoyed considerable autonomy in elaborating PISA. Certainly, in accordance with the principle of national ownership, the major decisions are to be taken by consensus in bodies representing the Member States. Yet, the legal framework and the practice of the PGB are also characterized by majority decisions. The Secretariat or any member may bring an issue to a vote, for which a two-thirds majority suffices. Moreover, the elaboration of PISA was to a considerable extent in the hands of experts which form a professional and epistemic community, which also furthers autonomy. This kind of autonomy appears to be an essential element of efficient and effective global governance mechanisms; total control by all members would paralyze them. However, it should not necessarily be conceived of as a requirement for the legality of an NPA, as the granting of autonomy for the purpose of efficiency bears the risk of unaccountable bureaucracies. Any autonomy that is not the result of a balancing of the principle of national ownership and the requirement of respect for scientific standards and representative expertise needs to be critically observed.

[215] In this sense A.P. Jakobi & K. Martens, "Diffusion durch internationale Organisationen: Die Bildungspolitik der OECD", in K. Holzinger, H. Jörgens, & C. Knill (eds), *Transfer, Diffusion und Konvergenz von Politiken* (2007) 247-270.

2. Constructing the Bindingness of the Legal Regime

In the preceding part, we have presented the elements of the legal regime of NPAs as legal requirements. Their description alone does not accord them legal status. In a domestic context, the normative force of the legal regime can be based on the rule of law and other constitutional principles. It is doubtful whether such principles exist on the international level. Nevertheless, we see several possible avenues for attributing legal status to the above-mentioned requirements a) to d), which will have the consequence that a policy which qualifies as an NPA but which does not respect these requirements is to be considered illegal under international law.

First, if a standard instrument is developed within a single institutional framework, in particular one international organization, the statute of this organization might provide a legal basis for it.[216] The legal regime of a standard instrument can be understood as a concretization of principles of the founding treaty, carved out by institutional practice. One might even consider institutional practice, normally only understood as a means of statutory interpretation,[217] as a source of law proper, namely of customary institutional law through which the organization binds itself. This approach is but an aspect of a strategy of internal constitutionalization in international institutions. The advantage of this approach is that it enables the accommodation of the specific logic and traditions of the institution concerned. Yet it is difficult to base a general legal regime on it which has significance for other international institutions.

In order to apply the legal regime of a standard instrument developed under one treaty to other institutions, one could hold that the standard instrument has crystallized into customary international law. But time is certainly not ripe for this with respect to NPAs. A more promising legal basis is to see the foundation of the normative quality of the legal regime in human rights, which are intrinsic to the idea of liberty. Instead of an entire cluster of human rights,[218] the following focuses on the human right to take part in the conduct of public affairs as set out in Art. 25(a) ICCPR. Certainly, this right is first and foremost addressed to states. But the more public authority is vested in international institutions, the stronger are the grounds to see them as addressees of this right, too. Additionally, states are obliged to provide for mechanisms to uphold this right against international holders of public authority.[219] Thus, once a legal regime is established for a standard instrument, which is generally deemed to ensure its effectiveness and legitimacy, the regime sets a standard which can be considered as a concretization of the right to take part in the conduct of public affairs, and which can therefore be invoked against other organizations which do not meet the same standard. Admittedly, the text of Art. 25(a) ICCPR may appear as a fragile basis for such a doctrinal construction as the

[216] See A. von Bogdandy, General Principles of International Public Authority, *supra* note 19.
[217] Alvarez, *supra* note 26, at 87-92; P. Cahier, "L'ordre juridique interne des organisations internationales", in R.-J. Dupuy (ed.), *Manuel sur les organisations internationales* (1988) 235-257, at 247, 253-4; J. Klabbers, "The Changing Image of International Organizations", in J.-M. Coicaud & V. Heiskanen (eds), *The Legitimacy of International Organizations* (2001) 221-55, at 234.
[218] Cf. J. von Bernstorff, *supra* note 19.
[219] E.g. European Court of Human Rights, *Matthews v. UK*, Judgment of 18 February 1999 [GC], Appl. 24833/94, ECHR 1999-I; A. von Bogdandy, "General Principles", *supra* note 19.

NPAs. However, this provision should be taken as one prominent expression of a general principle of public law, which is the need to ensure that public authority is legitimate.[220] The provision is therefore backed by huge normative support.

Summing up, we hold the internal constitutionalization of international institutions and the invocation of human rights, in particular Article 25(a) ICCPR to be the most promising strategies for attributing legal status to the legal regime of standard instruments. Once more, this is not an imperative conclusion. But we see enough legal ground to make this proposition. Certainly, there are few mechanisms to transform this proposition into applied law, as did the German or Italian administrative tribunals with the requirements of the *Verwaltungsakt* or the *provvedimento*. However, there are some international mechanisms. Moreover, domestic courts are becoming more demanding with the exercise of public authority by international institutions, and doctrinal constructions, once they are well established, can influence negotiations within international organizations about new programmes or the modification of existing ones. In any case, distilling a standard instrument out of the amorphous practice of global governance provides a solid ground for critique.

3. Normative Critique of the Legal Regime of NPAs

The legal regime established for NPAs is open to normative criticism concerning both the elements included in it as well as the elements believed to be missing. Such criticism can be based on different normative standpoints. First of all, legal norms of a higher hierarchical standing can be employed, like human rights or *ius cogens*. Second, comparisons with other national or transnational standard instruments might provide innovative insights. Third, rational choice considerations, and fourth, arguments derived from external perspectives on the law like political theory may be invoked. Of course, insights from comparative law, economics and political theory only provide a basis for *suggestions* as to how to improve the legal framework of NPAs, which are not to be followed as a matter of law.

Although this is not the main thrust of our article, one aspect will be pointed out here. Drawing on political theory, we question whether the legal regime of NPAs features enough sensitivity for the competencies of sub-state entities in the issue area under scrutiny. This aspect is relevant in the overall perspective of the article, as the federal set-up of a country is an important element for putting the idea of liberty into practice.

As mentioned above, the two-staged adoption process of PISA provided states with the opportunity to involve sub-state entities in the national decision-making process. However, sub-state entities were not represented on the PGB. While this is fully in line with established principles of international law, according to which the internal structure

[220] On the emergence of an international principle of legitimacy see N. Petersen, *Demokratie als teleologisches Prinzip. Zur Legitimität von Staatsgewalt im Völkerrecht* (2009).

of a state plays no role on the level of international law,[221] it is questionable whether it is still convincing from the viewpoint of the normative premises of this article.

Germany reacted to this issue with a preventive strategy. As the federal government has very few competencies in the field of eductation, it was agreed that one of the German delegates in the PGB should be a representative of the *Länder*, who needs to reach agreement with the representative from the federal government.[222] Theoretically, the representative of the *Länder* is to coordinate his position with his peers from the other *Länder*. If this model passes long-term practice test, it could find recognition in the internal law of the OECD. This would prevent frictions in input-legitimacy if international institutions venture into issue areas that fall into the competence of sub-state entities.

4. Horizontal Effects of NPAs

Finally, it ought to be explored whether the establishment of NPA as a standard instrument represented by PISA has *legal* repercussions for the activities of other international institutions in the issue area concerned. In fact, the OECD is by far not the only international organization with an interest in education. Rather, transnational governance in the field of education is characterized by highly overlapping mandates and competencies, which mostly do not extend to hard law-making. For example, the European Union, although it has no competence to enact harmonizing measures concerning education,[223] has thematized educational issues for decades,[224] establishing *inter alia* an information network on education.[225] UNESCO carries out diverse activities in the field, covering everything from primary to higher education, with a focus on development assistance concerning education. But UNESCO also functions as an information hub on education. For example, the UNESCO Institute for Statistics (UIS) provides data on education for all activities of the organization and its member states. Together with the OECD, it carries out the World Indicators Project, a student assessment in 19 middle-income countries, funded by the World Bank. On the regional level, European Ministers of Education have spurred the so-called Bologna Process for higher

[221] Cf. Art. 27, VCLT.
[222] Vereinbarung zwischen Bund und Ländern über die wesentlichen Elemente einer Beteiligung, 18 December 1997, on file with the authors. After the 2006 reform of German federalism, the participation of state representatives stands now on a much more solid constitutional basis: The new Art. 91b (2) of the Basic Law provides that the Federal Government and the *Länder* may cooperate on the basis of special agreements in matters concerning international education assessments, including reporting and recommendations related thereto.
[223] Cf. Art. 149(4), EC.
[224] E.g. Council and the Ministers of Education meeting within the Council, Resolution including a Programme of Action on Education, 9 February 1976, Official Journal C 38 of 19 February 1976; see further A. Augenti and L. Amatucci, *Le organizzazioni internazionali e le politiche educative* (1998), 125-188.
[225] Council and Ministers for Education, meeting within the Council, Resolution concerning the EURYDICE Education Information Network in the European Community, 6 December 1990, Official Journal C 329 of 31 December 1990.

education.[226] And the Council of Europe serves as a platform for the development of best practices concerning the contents of education.[227] Moreover, the International Association for the Evaluation of Educational Achievement has carried out numerous empirical student assessments, long before the OECD jumped on the bandwagon.[228]

This clutter of actors, competencies and programs recalls the debate about the fragmentation of international law. The usual phenomenon associated with this debate is the collisions of legal norms. In the case of governance by information, normative collisions are not possible for lack of legal norms. However, what might occur are "collisions of information"; i.e. situations in which information produced within one governance mechanism might compromise the functioning of another governance mechanism. This does not refer to the utterance of contradictory information, but to contradictions in the treatment of information.

One example might illustrate the risk of "collisions of information": In 2006, the UN Special Rapporteur on the Right to Education, *Vernor Munoz*, visited five countries in order to investigate the status of the realization of the right to education, pursuant to a mandate from the UN Commission on Human Rights.[229] Among these countries was Germany, where his visit and his recommendations triggered a considerable media echo – an unsurprising fact given the continuing ripples of the German "PISA shock". In his assessment of Germany, the Special Rapporteur relied much on the findings of PISA.[230] His recommendation that the three-tiered structure of the German educational system (separating pupils at the age of 10 and sending them to three different types of schools for low, medium and high performers) should be reconsidered[231] led to certain controversies with German policy-makers.[232] Mr. *Munoz* invoked some of the findings of PISA on social inequality in order to corroborate his view.[233] However, a careful reading of Mr. *Munoz'* report reveals that he pointed out that the PISA results, while yielding a significant correlation among pupils' social background and their likeliness to attend a certain type of secondary school, did *not* put the blame for these social inequalities on the three-tiered school system,[234] and that he based his recommendation mainly on the insights he had gained himself during his visit to Germany.[235]

---

[226] Cf. the Bologna Declaration, <http://www.bologna-berlin2003.de/pdf/bologna_declaration.pdf> (last visited 28 July 2008).
[227] Cf. <http://www.coe.int/T/DG4/HigherEducation/Resources/Recommendations_EN.asp#TopOfPage> (last visited 28 July 2008).
[228] On the activities of the IEA cf. Goldmann, *supra* note 109.
[229] For the mandate of the Special Rapporteur see Resolution 1998/33 of the UN Commission on Human Rights, Doc. E/CN.4/RES/1998/33 of 17 April 1998 (several renewals).
[230] United Nations General Assembly, Report of the Special Rapporteur on the right to education by Vernor Muñoz, Addendum, Mission to Germany, A/HRC/4/29/Add.3, 9 March 2007, http://daccessdds.un.org/doc/UNDOC/GEN/G07/117/59/PDF/G0711759.pdf?OpenElement (last visited 12 August 2007).
[231] *Ibid*., para. 59.
[232] Der Spiegel, 21 March 2007, http://www.spiegel.de/schulspiegel/0,1518,472906,00.html.
[233] *Supra* note 230, at para. 59.
[234] *Ibid*.
[235] *Supra* note 230, at para. 60.

What is the lesson from this example? Had Mr. *Munoz* explicitly drawn conclusions from PISA which were not authorized by the PISA reports, his recommendations would have collided with the national ownership principle enshrined in the legal framework of PISA. One might speculate whether Mr. *Munoz* refrained from doing so because he was convinced that it would be empirically wrong, or because he wanted to pay respect to the idea of ownership which is so prominent in PISA. Whatever his reasons might have been, it is submitted here that he *should* have done just as he did for *legal reasons*, i.e. to pay due respect to the principle of national ownership in the legal framework of PISA and in order not to interpret the results in a way that was not authorized by the PGB. The legal basis for this argument might be found in an overarching principle of mutual respect and cooperation applicable to international legal regimes venturing in the same or in overlapping issue areas. Along the lines suggested by *Ruffert*, this principle might be considered to be of constitutional significance for the present international legal order.[236]

VI. Conclusion: NPAs and the Accountability of Governments

Our analysis has provided a theoretical frame for the legal analysis of governance mechanisms operating through assessments of national policies. The example of PISA demonstrates that these instruments may have a quite elaborate legal framework, which adds to the legitimacy, efficiency and effectiveness of the public authority exercised through them. Standard instruments are a useful doctrinal category for abstracting basic legal elements and principles from their legal framework. This abstraction enables criticism from various normative bases. Moreover, the establishment of standard instruments gives policy-makers in international institutions a resource for transposing this type of governance to other issue areas. Once such a legal regime is considered legitimate and efficient on the abstract level, it can be applied to multiple cases, providing a rationalizing effect by ensuring legitimacy and efficiency in a great number of individual cases.

On a different note, it should be called into mind again that NPAs are a valuable tool for holding national governments accountable for their performance. As performance has an impact on the legitimacy of public authority, it might be considered *de lege ferenda* to establish more and more duties for national governments to expose themselves to such accountability mechanisms. As states are less and less able to meet the needs of a globalized world, and as their citizens and economies must compete on worldwide markets, the legitimacy of the state-based structure of the international legal order might fade if states do not continue to perform on a high level. Thus far, undergoing regular transnational policy assessments might only be a moral or at best a political duty. However, as globalization proceeds, it might harden into a legal one, just as there is a duty today to enable participation in the conduct of public affairs.

[236] M. Ruffert, "Zuständigkeitsgrenzen internationaler Organisationen im institutionellen Rahmen der internationalen Gemeinschaft", 38 *Archiv des Völkerrechts* (2000) 129-68, at 160-3.