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--Kenneth W. Abbott, David Levi-Faur and Duncan Snidal, editors

Introducing Regulatory Intermediaries,

Kenneth W. Abbott, David Levi-Faur and Duncan Snidal

Regulation is frequently viewed as a two-party relationship between a regulator (R) and the targets of its regulation (T). This volume conceives of regulation as a three-party system, in which diverse intermediaries (I) provide assistance to regulators and/or targets, drawing on their own capabilities, authority and legitimacy. Our framework paper for the volume, *Theorizing regulatory intermediaries: The RIT model*, sets out a general theoretical model for analyzing the roles and implications of regulatory intermediaries in diverse settings.

Examples of this three-party “RIT model” of regulation abound. The US Food and Drug Administration supplements its own inspectors by engaging private auditors to monitor food imports, and empowers other private bodies to accredit auditors (Lytton 2017). Private transnational regulatory schemes such as the Marine Stewardship Council (MSC) and Fairtrade International (FLO) also rely on independent auditors and accreditors (Auld and Renckens 2017; Loconto 2017). Some recent international human rights treaties require ratifying states to establish independent domestic bodies to promote treaty implementation (Pegram 2017). And the International Criminal Court enlists non-governmental organizations (NGOs) to advocate for support and cooperation from national governments (De Silva 2017).

As these examples suggest, the RIT model is not limited to the activities of regulatory agencies, or even of the state. Rather, it characterizes all forms of regulation:

public, private and hybrid; national, international and transnational; formal and informal. In this sense it is consistent with a broad “regulatory governance” approach. Our goal in this volume is to uncover common insights about the impacts of intermediaries to expand our understanding of all areas of regulation.

Regulatory intermediaries range from profit-making firms such as inspection companies and credit ratings agencies, to NGOs such as human rights advocacy groups, to transgovernmental networks of regulatory agencies. Intermediaries often enter the regulatory system through formal engagement, as by contract or delegated authority, or through orchestration, with a regulator or target encouraging a third party to intervene in desired ways and providing support to facilitate its activities. In other cases, the intermediary relationship is only tacit: for example, a regulator may adopt a rule expecting that its beneficiaries or other interested parties will play this role by observing and publicizing target non-compliance.

Intermediaries play diverse roles in regulation throughout the policy cycle. This volume focuses on the “downstream” stages of the regulatory process after a rule has been adopted. Intermediaries play important roles in the implementation of rules: interpreting and elaborating them for specific circumstances; “translating” them into practical forms useful to targets; providing assistance to targets; and evaluating alternative modes of implementation. Intermediaries often monitor compliance, especially where they possess greater expertise, operational capacity or access to targets than regulators themselves. “Meta-intermediaries” accredit and supervise monitors to ensure their trustworthiness. Intermediaries help create dialogue and trust between regulators and targets, and communities of practice and compliance among targets. They even enforce rules, as by disclosing non-compliance to generate public pressure, or by withdrawing valuable certifications.

Because of their central position between regulators and targets, intermediaries provide valuable feedback to regulators. They pass on the views and experiences of targets, and also draw on their own experiences to advise regulators of rule ambiguities, problems of implementation, and potentially more efficient approaches. In many cases, regulators and targets alike come to depend heavily on the services intermediaries provide.

Many of the papers in this volume introduce variations and extensions to the basic RIT model. For example, regulation often operates through chains of actors and mechanisms, with multiple regulators and/or intermediaries operating “in series.” In complex regimes, multiple regulatory systems, each with its own chain of RIT relationships, may also operate “in parallel.” Particular actors can occupy influential focal positions in complex regimes by operating across systems, e.g., by providing auditing services for both public and private regulation.

In addition, the beneficiaries of regulation figure in regulatory systems in diverse ways. They advocate for rules that will benefit them. Once rules are adopted, they may operate as an external constituency, evaluating the rules and their implementation and enforcement, and proposing improvements. They, or groups that claim to represent them, may play various intermediary roles, e.g., as monitors and sources of feedback. And they may overlap with or even constitute the regulator (or sometimes the targets).

Building on the understanding of intermediaries reflected in the RIT model and its extensions, this volume also problematizes their role. Even when other regulatory actors have engaged them, intermediaries must be understood as pursuing their own private interests. These include both institutional interests, such as compensation and organizational influence, and substantive interests in the area of regulation. Institutional

and substantive interests may lead particular intermediaries to ally with the regulator, with the targets or with other regulatory actors, and to attempt to shape the content of regulation, as well as its implementation, to their own benefit. The activities of intermediaries must therefore be analyzed in terms of legitimacy, democracy and distributive impact, as well as efficiency. Conflicts of interest and issues of accountability, transparency and fairness are central to evaluating their participation in regulation.

Incorporating intermediaries into the conceptualization of regulation not only reveals new issues, but also brings a fresh perspective to bear on longstanding issues. An important example is regulatory capture, the domination of one regulatory actor by another. A three-party regulatory system provides both new opportunities for capture and new barriers to capture. Targets may seek the engagement of intermediaries, not to advance sound regulation, but to facilitate capture. Capture is facilitated where the target need capture only the regulator *or* the intermediary, whichever is easier; but it becomes more difficult where the target must capture both the regulator *and* the intermediary, and where regulator and intermediaries can monitor one another for indications of capture. In addition, the intermediary itself may seek to capture the regulator, to ensure its influence in the regulatory system, to expand its role or to advance its substantive goals. Finally, capture of the intermediary by the regulator may also become an issue, especially where intermediary independence is crucial for regulatory outcomes. Many of these forms of capture have previously been conceptually indistinct and therefore marginalized in the regulatory governance literature.

To pursue common questions raised by the RIT framework, this volume of the Annals includes thirteen empirical papers written by experts in diverse areas of

domestic, international and transnational regulation. These include food safety, finance, international criminal law, labor rights, human rights, fisheries, buildings and urban planning, medicines and other therapeutic products, fair trade and sustainable agriculture. While most of the papers explore the utility of the RIT framework for understanding particular areas of regulation and regulatory actors, several papers extend the framework (e.g., by incorporating the roles of regulatory beneficiaries or of networks in the regulatory process), and others critique it. Through this combination of a spare analytical model, substantive case studies and theoretical extensions, the volume opens up a broad new approach to the study of regulation.

Mathias Koenig-Archibugi and Kate Macdonald's paper, *The role of beneficiaries in transnational regulatory processes*, extends the RIT model by focusing on a fourth category of regulatory actor: the intended beneficiaries of regulation. They identify three potential relationships between beneficiaries and other regulatory actors: separation (no connection between beneficiaries and RIT actors); identity (beneficiaries constitute RIT actors); or representation (representatives of beneficiaries constitute RIT actors). They examine how these relationships play out in several transnational schemes for the regulation of labor conditions, and offer conjectures as to the effects of different relationships on regulatory impact and democratic legitimacy. They conclude that relationships of beneficiary participation and representation can have significant welfare and legitimacy implications.

Tetty Havinga and Paul Verbruggen's paper, *Understanding complex governance relationships in food safety regulation: The RIT model as theoretical lens*, highlights the complex relationships among actors in public, private and hybrid regulatory regimes, using food safety regulation as an illustration. They then extend the basic RIT model to more closely fit the reality of modern hybrid governance relationships.

While they accept that the RIT model facilitates the disaggregation of complex regimes into regulatory “chains” and other tractable analytical units, they contend that (i) regulatory intermediaries can be related in more complex ways; (ii) intermediaries can mediate between multiple regulators and targets; and (iii) intermediaries can be “chameleonic,” also operating as regulators or targets, and so can “change color” (function) depending on the relationship studied.

Timothy D. Lytton's paper, *The taming of the stew: Regulatory intermediaries in food safety governance*, examines how regulators employ additional intermediaries to address agency problems arising between them and their initial intermediaries, and how they attempt to avoid replicating the same problems in the new relationships. His analysis reveals that intermediaries are sometimes relied upon to make rules, blurring the distinction between regulators and intermediaries. Lytton suggests that, in complex governance networks, it is misleading to attribute the origin of rules to a single authoritative “rule-maker.” Rules instead emerge out of network interactions. He argues that, by using the term “regulator” rather than “rule-maker” and redefining what a “regulator” does, the RIT model can avoid mischaracterizing the nature of rulemaking in complex regulatory systems while maintaining its analytical power.

Graeme Auld and Stefan Renckens' paper, *Rule-making feedbacks through intermediation and evaluation in transnational private governance*, explores two types of feedback mechanism within the operations of the Marine Stewardship Council (MSC), a transnational private certification program. *Intermediation feedback* derives from the informational advantage acquired by intermediaries – such as auditors of compliance with voluntary standards like those of MSC – as they translate rules into practical forms applicable to specific targets. Intermediaries communicate this knowledge to the regulator to strategically inform rule-reformulation; the regulator also

has direct access to this information if intermediaries are subject to transparency obligations. *Evaluation feedback* involves external audiences – actors outside the RIT process with an interest in evaluating and influencing regulation. Transparency about RIT relationships should strengthen this mode of feedback.

Allison Marie Loconto's *Models of assurance: Diversity and standardization of modes of intermediation* explores different modes of assuring compliance with regulatory standards, and the effects of those modes on the legitimacy of regulatory governance. She focuses on voluntary transnational regulation of sustainable agriculture, where a network of standards development organizations, certification bodies and accreditation bodies has emerged. First-party (self-declaration) and second-party (declaration by contractual partner or standard-setter) modes of assurance are long-standing. But third-party assurance (declaration by an independent actor, often an accredited certifier) has become dominant in this field. Debates over the legitimacy of these models, which combine different forms of assurance, focus on their ability to enforce compliance in trustworthy fashion. The separation of attestation and determination is key to ensuring that models of assurance can achieve impartiality and transparency.

Andreas Kruck's paper, *Asymmetry in empowering and dis-empowering private intermediaries*, focuses on credit rating agencies (CRAs) as private regulatory intermediaries. CRAs are powerful actors in global financial markets. Even after the global financial crisis, which spurred wide allegations that CRAs lacked reliability and integrity, a few private rating firms continue to determine costs of borrowing and access to capital for public and private borrowers. Regulatory reliance on private credit ratings *empowered* CRAs by delegating regulatory authority to them, and public endorsement bolsters CRAs' sources of power and profits. When regulators have subsequently

sought to *dis-empower* dysfunctional CRAs, they have had limited success. This reflects a path-dependent power shift, enhanced by regulators' (and targets') lengthy reliance on the intermediaries. This shift operates via both material and ideational mechanisms, i.e., by increasing the regulator's resource dependency and by normalizing reliance on intermediaries.

Martino Maggetti, Christian Ewert and Philipp Trein's paper, *Not quite the same: Regulatory intermediaries in the governance of pharmaceuticals and medical devices*, compares the role of regulatory intermediaries in two countries (Australia and Switzerland) and two industries (pharmaceuticals and medical devices). Regulating both types of therapeutic product is a complex and salient policy problem. Substantial scientific knowledge is required, and intermediaries may provide it efficiently; but intermediaries are prone to capture, especially by powerful regulated industries. The ways in which intermediaries are created, selected and activated, the authors argue, depend on the capture potential of the target and the organizational capacity of the regulator. As their four case studies show, where the regulated industry is powerful, the regulator will seek to keep intermediaries "under its shadow" to protect against capture. To do so, however, the regulator must be well resourced or strongly supported by its political principal. Where the regulated industry has limited capture potential, in contrast, the regulator can rely on "fully externalized" intermediaries, which may be more effective.

Nicole De Silva's paper, *Intermediary Complexity in Regulatory Governance: The International Criminal Court's Use of NGOs in Regulating International Crimes*, considers the conditions under which regulatory intermediaries engage sub-intermediaries to increase their capacity and influence. She examines how the International Criminal Court (ICC) – the key intermediary in the regulatory regime for

international crimes – has engaged NGOs as intermediaries, drawing on their advocacy, expertise, and operational capabilities. De Silva develops several theoretical conjectures as to when regulatory intermediaries will orchestrate or delegate to sub-intermediaries, and how their approaches may change over time. She tests these conjectures using the ICC's relations with NGOs. This analysis elucidates how regulatory intermediaries can compensate for weak support from regulators and address elusive targets by using secondary intermediaries.

Axel Marx and Jan Wouters' paper, *Rule intermediaries in global labor governance*, considers how the rules set out in the International Labour Organization's (ILO) Declaration on Fundamental Principles and Rights at Work are implemented among employers. The ILO itself operates an implementation system. But other international and transnational governance schemes also integrate the rules in the Declaration into their own standards, and adopt their own implementation mechanisms. The authors compare two such non-delegated intermediaries: the OECD, with its Guidelines for Multinational Enterprises, and the private, transnational Fair Wear Foundation (FWF). These actors follow very different approaches. The OECD involves few additional intermediaries, and these are largely passive, rarely interacting with targets. The FWF, in contrast, involves many additional intermediaries that actively engage with targets. The authors argue that the FWF's regulatory approach, while far narrower in coverage, is more effective than the OECD.

Jeroen van der Heijden's paper, *Brighter and darker sides of intermediation*, considers the expanding and increasingly diverse roles of intermediaries in the regulation of buildings and urban planning. Van der Heijden addresses two puzzles in this shift: why the targets of regulation engage regulatory intermediaries, and why the roles of regulatory intermediaries have expanded. He argues that the growth of

intermediation has been driven by three broad trends: a turn towards regulatory governance, the privatization of regulation, and the professionalization of regulation. But (potential) intermediaries have also utilized these trends strategically in their own self-interest, so that regulators and targets alike are now dependent on them. Van der Heijden explores the “dark side” of intermediation, considering risks such as regulator dependence, conflicts of interest and regulatory capture.

Tom Pegram's paper, *Regulatory stewardship and intermediation: Comparative lessons from human rights governance*, explores the risk that intermediaries will provide new channels for capture. To mitigate this risk, he proposes a novel form of regulatory management: regulatory stewardship, in which intermediaries monitor and support one another to increase regime effectiveness. Pegram explores the implications of regulatory stewardship for two innovative human rights treaties: the Optional Protocol to the Convention against Torture (OPCAT) and the Convention on the Rights of Persons with Disabilities (CRPD), both of which formalize, to varying degrees, relations between international and national intermediaries. He identifies three factors central to effective regulatory stewardship: the task environment (especially the extent of target resistance to implementation); the enabling quality of the rule frameworks in which intermediaries operate; and the approaches adopted by intermediaries in practice.

Jacint Jordana's paper, *Transgovernmental networks as regulatory intermediaries: horizontal collaboration and the realities of soft power*, applies the RIT framework to analyze the role of transgovernmental networks that facilitate interactions among global (GRs) and local (domestic) regulators (LRs), enhancing their ability to regulate targets. Jordana focuses on banking regulation, comparing three regional transgovernmental networks that intermediate between GRs such as the Basel Committee on Banking Supervision and national regulatory agencies. The main advantage of networks, he

argues, is their ability to provide “collaborative intermediation,” which does not compromise sovereignty. GRs view networks as pathways to disseminate and implement their soft law standards, while LR see them of sources of information and assistance. Through overlapping memberships, moreover, networks provide LR some modest influence on GRs. However, the structure and governance of network intermediaries strongly influences their effectiveness.

Jean-Pierre Galland’s paper, *Big third-party certifiers and the construction of transnational regulation*, examines the role of standards, certification and accreditation in international trade. The period since the 1980s has been characterized by the proliferation of international and transnational standards, and by the “certification revolution,” which has made rule implementation through third-party certification and the accreditation of certifiers by independent bodies the dominant form. Third-party certifiers (TPC’s) compete for clients, which generally pay them for their services. Accreditation is therefore mandated to ensure consistency in certification and prevent a “race to the bottom” in audit quality. Galland uses the RIT model to explore how a few TPC’s have exploited their central position between multiple regulators and targets to enter additional sectors, expand globally, and become preferred advisers to regulators. These “big TPCs” exercise their influence to promote regulations that suit their own organizations and modes of working.

In the final paper in the volume, *Conclusion: Enriching the RIT model*, we summarize the lessons of the empirical papers and highlight some of the most important cross-cutting issues they raise, including the diverse roles and pathologies of regulatory intermediaries, the normative implications of regulatory intermediation, and the implications of complex governance arrangements for the RIT model.

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