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## Introduction to Symposium on Industry Associations in Transnational Legal Ordering

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## INTRODUCTION TO SYMPOSIUM ON INDUSTRY ASSOCIATIONS IN TRANSNATIONAL LEGAL ORDERING

*Gregory Shaffer\** and *Melissa J. Durkee*<sup>†</sup>

Economic and cultural globalization creates increasing opportunities for lawmaking beyond the state. Businesses have engaged entrepreneurially to capture these opportunities and today play a major role in transnational lawmaking through industry associations. This symposium addresses the roles and mechanisms through which industry associations act as lawmakers as part of transnational legal processes, potentially giving rise to [transnational legal orders](#).<sup>1</sup>

Industry associations, also known as trade groups or sectoral associations, are organizations established and funded by businesses, which exist to promote the interests of their members. These private groups represent a wide variety of business sectors, from tobacco to pharmaceuticals to toys.<sup>2</sup> They are a familiar presence at national and local legislatures as they lobby to ease or harmonize regulatory burdens; they also have long been standard setters, responsible for the synchronisation of technologies and rules, whether related to train tracks, electrical sockets, cell phones, bank cards, or so many other essential things.

As globalization blurs borders and business increasingly operates across them, industry associations transpose their activities to the global level. Industry associations are expanding their reach, organizing transnationally, pursuing new sites of influence at the international level, and seeking harmonization across borders. These developments are keenly relevant to international law, as these private sector activities affect the content of legal norms, both public and private. This symposium interrogates these processes and their implications.

The first two contributions consider mechanisms of industry association lawmaking and influence. [Joshua Karton](#) focuses on transnational private law.<sup>3</sup> He explores how the development of norms by industry associations has made transnational contract law increasingly sector-specific. [Melissa J. Durkee](#) shifts to the international stage, examining sites of industry association lobbying at international lawmaking bodies.<sup>4</sup> Next, [Ayelet Berman](#) explores the practical implications of private sector lawmaking and influence, lauding the value of industry expertise while flagging concerns about capture of public officials.<sup>5</sup> The final two contributions consider factors that shape and restrain industry association activity. [Sarah Dadush](#) considers the distinctive inter-

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<sup>1</sup> [TRANSNATIONAL LEGAL ORDERS](#) (Terence C. Halliday & Gregory Shaffer eds., 2015).

<sup>2</sup> Sarah Dadush, [The Internal Challenges of Associational Governance](#), 111 AJIL UNBOUND 125 (2017).

<sup>3</sup> Joshua Karton, [The Rise of Sectorally Differentiated Contract Law](#), 111 AJIL UNBOUND 106 (2017).

<sup>4</sup> Melissa J. Durkee, [Industry Lobbying and "Interest Blind" Access Norms at International Organizations](#), 111 AJIL UNBOUND 119 (2017).

<sup>5</sup> Ayelet Berman, [Industry, Regulatory Capture and Transnational Standard Setting](#), 111 AJIL UNBOUND 112 (2017).

nal governance features of industry associations that facilitate and restrain the capacities of those groups,<sup>6</sup> while [Kishnathi Parella](#) addresses external factors that can coax those associations toward more socially productive activities.<sup>7</sup>

The symposium begins with Karton's *The Rise of Sectorally Differentiated Contract Law*. Karton observes that contract law historically was differentiated both territorially (involving different states) and functionally (involving different types of transactions). Today, however, contract law is increasingly differentiated by product type, with norms applying transnationally and across functional categories. Industry associations create differentiated legal rules for the industry through three mechanisms grounded in contractual governance: new sources of substantive law, new uses of choice of law clauses, and choice of forums with sector-specific expertise. All three mechanisms promote the development of sectorally differentiated contract law. Karton concludes that these trends reflect an epistemic shift "away from broad-based legal expertise and toward technical or business expertise."<sup>8</sup> While such a shift can be efficiency-enhancing, it also raises distributive concerns.

In *Industry Lobbying and "Interest Blind" Access Norms at International Organizations*, Durkee finds that international organizations' rules for participation by nonstate actors tend to be "interest blind" as to whether the actor is profit-oriented. This approach dates back to the League of Nations, which made no distinction between for-profit and public interest associations. The context of international lawmaking, however, has radically changed since the era of the League. International organizations have expanded in number and scope, and industry associations that interact with them have evolved in parallel. Durkee observes that industry group activism, both overt and covert, can shape the quality of information received by international organizations and the quality of deliberation within them. She concludes by evaluating recent calls for reform of the "interest blind" approach, as within the World Health Organization following a number of scandals.

In *Industry, Regulatory Capture, and Transnational Standard Setting*, Berman addresses implications of the fact that industry now plays a major role in transnational standard setting. Industry offers valuable expertise but its increased engagement also raises risks of capture: It can shape the information that regulators receive, resulting in information capture, and it is better organized than public interest stakeholders to participate in technical standard setting, resulting in representational capture. As a result, there is a greater risk that standards will more likely reflect industry preferences than the global public interest; that well-organized producers will obtain advantages in the market against their competitors, such as small- and medium-sized enterprises; and that standards will reflect concerns in major developed country markets, not the public interest in developing countries where the context radically differs.

Industry associations nonetheless face internal governance challenges that can inhibit their ability to shape transnational regulation, as Dadush asserts in *The Internal Challenges of Associational Governance*. Dadush examines distinctive features of industry associations that can affect their effectiveness. For example, because industry associations depend on member dues and membership is voluntary, members face collective action problems; nonmembers can free-ride on the legal norms that industry associations produce, affecting individual companies' willingness to contribute to the association. Moreover, because membership is nonexclusive, individual companies can shift loyalties among associations, creating instability within them. And since member firms often compete with each other, they can be wary of delegating rulemaking power to industry associations, as the outcome may not address their particular regulatory preferences. As a result, industry associations' power in transnational lawmaking depends on developing solidarity and trust among association members.

<sup>6</sup> Dadush, *supra* note 2.

<sup>7</sup> Kishnathi Parella, *The Information Regulation of Business Actors*, 111 AJIL UNBOUND 130 (2017).

<sup>8</sup> Karton, *supra* note 3.

In the concluding essay, *The Information Regulation of Business Actors*, Parella examines how external transnational processes can shape industry associations' behavior. She argues that industry associations can be primed to take greater account of public interests in transnational lawmaking, pivot in their relationship with international organizations, and change their identities through engaging in these processes. Even when industry initially opposes or successfully blocks international norm-making initiatives, it can be transformed through its engagement with these norm-making processes. Parella's examples include the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises, which business successfully blocked, and the Ruggie Framework and the UN Guiding Principles on Business and Human Rights, which are formally nonbinding. Over time, Parella contends, these transnational legal processes can change business practices on the ground.

Business has globalized while international law has lagged in addressing many issues pertaining to transnational business operations. Industry associations organize to shape law to govern transnational activities, working both inside and outside of public international law and international organizations. Lawmakers and legal scholars should attend to the roles these associations play in such transnational legal ordering. This symposium helps chart the ways.