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Beyond public and private**

Discussion Paper

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Abstract

**BUSINESS AUTHORITY IN GLOBAL GOVERNANCE:
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by Janne Mende¹

This paper discusses the concept of authority in global governance by unpacking the components that characterize its various notions. These components are the triadic relationship between power, legitimacy, and the reference to public interests, and how they are embedded in the constellation between public and private. After clarifying each of these components, the article applies them to business enterprises – key actors in global governance –, focusing on the issue area of business and human rights. The paper shows that business authority does not neatly fit into the public-private distinction that is pervasive in conceptions of global governance and the international human rights regime. Instead, businesses have public and private, as well as hybrid, roles in global governance. Business authority then forms a peculiar third, next to public authority and private authority. Accordingly, the paper suggests extending the two-pole constellation of public and private into a three-pole constellation, with business building a peculiar third position between and beyond the public and the private. This approach allows furthering the understanding of business authority in global governance in particular and the concept of authority in global governance more generally.

Keywords: Authority, power, legitimacy, global governance, human rights, business enterprises, public interests

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Zusammenfassung

Unternehmensautorität in der Global Governance: Jenseits von Öffentlich und Privat

von Janne Mende²

Den pluralen Perspektiven auf Autorität in der Global Governance sind vier Elemente gemeinsam. Autorität lässt sich demnach bestimmen als ein triadisches Verhältnis zwischen Macht, Legitimität und dem Bezug auf öffentliche Interessen. Diese Triade ist eingebettet in eine vermittelte Konstellation von Öffentlichkeit und Privatheit. Nach einer konzeptuellen Klärung dieser vier Elemente von Autorität diskutiert das Paper Unternehmen als zentrale Governance-Akteure im Themenbereich Wirtschaft und Menschenrechte. Deutlich wird, dass die Autorität von Unternehmen sich nicht in die Unterscheidung von öffentlich und privat einordnen lässt, die gleichwohl für die Governance-Forschung und für das internationale Menschenrechtsregime prägend ist. Vielmehr haben Unternehmen sowohl öffentliche als auch private und darüber hinaus auch hybride Governance-Rollen inne. Ausgehend von den Konzepten privater Autorität und öffentlicher Autorität schlägt das Paper daher vor, Unternehmens-Autorität als eine dritte Form zu verstehen, die gleichzeitig zwischen und jenseits von Öffentlichkeit und Privatheit situiert ist. Diese Perspektive trägt zu einem erweiterten Verständnis von Unternehmens-Autorität in der Global Governance bei und erlaubt sowohl konzeptuelle als auch normative Anknüpfungspunkte.

Stichworte: Autorität, Macht, Legitimität, Global Governance, Menschenrechte, Unternehmen, öffentliche Interessen

² Dieses Paper wurde in Kollquien der Abteilung Global Governance am WZB Berlin, dem Max-Planck-Institut für Ausländisches Öffentliches recht und Völkerrecht, der School of Global Studies an der Universität Gothenburg und dem Politikwissenschaftlichen Kolloquium an der Technischen Universität Darmstadt präsentiert. Die Autorin dankt den Teilnehmenden für ihre exzellenten Kommentare. Dieses Paper basiert auf Forschung, die von der Deutschen Forschungsgemeinschaft (DFG) gefördert wird, Projektnummer 398306144.

1. Introduction

Since global governance began to transform the world order in the late 20th century, International Relations (IR) research has sought to define the authority of global governance actors. The two are even being equated: “Global governance’ refers to the *exercise of authority* across national borders as well as consented norms and rules beyond the nation state” (Zürn 2018: 3f., emphasis added).¹ At the same time, the multiplication of global governance actors challenges capturing the forms and scope of their authority. Accordingly, there is a widespread push to scrutinize the authority of companies as key actors in global governance (Cutler 2018; Bell 2013; Ougaard/Leander 2010; Wettstein 2009; Fuchs/Lederer 2007).

The exercise of authority in global governance refers to the ability to govern and rule oneself and others, and to take part in developing, interpreting and implementing norms and laws. Understanding authority in global governance is complicated by the peculiar constellation of public and private roles on the global level. It challenges IR studies to “push the study of global governance beyond the notion of ‘add actors and processes into the international organization mix and stir’” (Weiss/Wilkinson 2014: 213, also cf. Enroth 2013). Global governance entails the inclusion of private and transnational actors in the domain of governing, which extends the classic notion in international law and international cooperation that depicts state actors as the only governing (and therefore public) actors. This challenges classic (i.e., pre-global governance, Westphalian) theories of public authority; these theories cannot simply be transferred from the state to the global level. Rather, the interactions between public and private dimensions have a profound influence on authority in global governance. Accordingly, scholars disagree about whether to conceptualize authority in global governance as public or private (Zürn 2018).

Against this background, this article discusses authority in global governance by unpacking the components that characterize its various notions. These components are the triadic relationship between power, legitimacy, and the reference to public interests, and how they are embedded in the public-private constellation. This ap-

proach is not designed to gloss over the differences in notions of authority. Rather, it proposes that even in otherwise differing accounts of authority, these four components are pivotal to understanding and explaining it.

These components are most visible in institutionalized forms of participation in regulation. However, they can be less visible, as global governance also includes informal and soft mechanisms of participation. The paper thus emanates from global governance definitions that include both formal *and* informal mechanisms of both state *and* non-state actors (Ruggie 2004: 519).

Applying these components to business enterprises as one of the most important non-state actors in global governance, and analyzing their role in the issue area of human rights, the article suggests that the two-pole constellation of public and private does not sufficiently capture the authority of companies in global governance. Rather, businesses have public and private, as well as hybrid roles. Business authority then forms a peculiar third, next to public authority and private authority. Accordingly, the article suggests extending the two-pole constellation of public and private into a three-pole constellation, with business building a peculiar third position between and beyond the public and the private.

The article has therefore two aims. First, it contributes to the study of authority in global governance more generally. Second, it investigates the peculiar role of companies in global governance. The discussion proceeds as follows. Section 1 conceptualizes authority in global governance as a triad of power, legitimacy and reference to public interests, and how they are embedded in the public-private constellation. Section 2 applies this frame to businesses as one of the major actors in global governance. Section 3 scrutinizes the triadic relations of business authority by focusing on the field of business and human rights. Section 4 proposes situating business authority between and beyond the public and the private, building a peculiar third. The final section discusses the empirical and normative conclusions that can be drawn from the concept of business authority in global governance.

ⁱ Also cf. Lake 2010: 590: “governance is the *exercise of authority* by an actor over some limited community” (emphasis added).

2. Authority in Global Governance

This section demonstrates that differing definitions of authority overlap, in that they consist of three interconnected components: power, legitimacy, and the reference to public interests, which are embedded in a fourth one: the public-private constellation of global governance.ⁱⁱ Research on each concept is abundant, and this section does not aim at providing conclusive definitions of each. Rather, this section focuses on sketching out a triadic framework which shows that the three components are closely interlinked. Each affects the other, in either an enhancing or restricting way. At the same time, each component contains parts that go beyond authority.

2.1 Power

Power is the first major component of authority; it is central to all definitions of authority, including disagreements about whether power *equals* authority. While power is a much discussed and pluralistically defined concept, Lukes' famous three faces of power serve as a major reference point for different approaches in global governance research.

The first face represents the power to push through one's interests in decision-making processes and to influence their output.ⁱⁱⁱ This aspect is also called *instrumental power* (Fuchs 2004: 136), as it is often based on material resources, but also on enforcement instruments such as weapons (Barnett/Finnemore 2005: 176).

The second face is the power to set agendas, frame knowledge, define problems and their solutions, and thereby influence the input side of policy. A has power in this sense if she can create or reinforce practices or norms that frame a political agenda, thereby hindering B from formulating her own interests and norms (Lukes 2005: 20 based on Bachrach/Baratz 1970). This *agenda-setting power* includes institutional pow-

ⁱⁱ For the following argument, other differences in concepts of authority can be disregarded. This includes the question of whether authority only exists in hierarchical relationships (Zürn 2018). Or cf. Bartelson 2010: 219 assuming and Barnett/Finnemore 2005: 170 doubting a strong relationship between legitimacy and compliance. The following argument also neglects the differentiation between normative and empirical or sociological sources for legitimacy, and considers them as interwoven instead (Thornhill 2011; Staden 2016). On the general importance of power and legitimacy for authority, cf. Friedman 1990: 56. For a concise overview of the differing approaches to authority, cf. Peters/Schaffer 2013.

ers (Barnett/Finnemore 2005: 177) and “power structures underlying behavioral options” (Lukes 2005: 20ff., also cf. Fuchs 2004: 137; Strange 2009).

The third face of power captures the ability to form and shape (the perception of) ideas, interests and wishes, even before they (do not) become a part of a political agenda, by way of socialization, internalization, habitualization and incorporation (Lukes 2005: 139ff.). This *discursive power* lies at the heart of constructivist approaches in IR and global governance research (Carstensen/Schmidt 2015). It is exercised through norms, rules, standards, identities, and political, cultural, religious, social, and discursive practices and institutions. Discursive power includes the ability to frame the perception of ideas and interests, including their claim to contribute to public interests (Barnett/Finnemore 2005: 180). It “does not simply pursue interests but creates them” (Fuchs 2004: 138). Compliance then becomes habitual (Hurd 1999: 388).^{iv}

Examining the three faces of power facilitates a clearer understanding of authority: “Authority involves more than the ability to get people to do what they otherwise would not; authority often consists of telling people what is the right thing to do. There is a persuasive and normative element in authority that is tightly linked to its legitimacy” (Barnett/Finnemore 2005: 170). Hence, the discursive face of power is inextricably linked to legitimacy, and thereby contributes to an actor’s authority.^v However, authority cannot simply be equated with discursive power, because the reference to public interests may be interlinked with the other faces of power as well. Material power can provide an indispensable prerequisite for the ability to contribute to public interests, and the sheer extent of material power can explain why an actor is compelled to contribute to public interests, and thereby to legitimate their power in the first place.

ⁱⁱⁱ “A has power over B to the extent that he can get B to do something that B would not otherwise do.” (Lukes 2005: 16, based on Dahl 1957)

^{iv} Other approaches add a fourth face of power, capturing Foucault’s understanding of power as productive and producing (Digesser 1992). While Lukes rejects such an extension of power definitions in order to delineate power as domination from simply any form of socialization (Lukes 2005: 88ff.), other approaches tend to conflate the third and fourth face, as for both the mechanisms of socialization and internalization are pivotal.

^v Accordingly, both Fuchs and Lukes tie this face to the legitimacy of power (Fuchs 2004: 138; Lukes 2005: 112f.).

2.2 Legitimacy

The second major component of authority is legitimacy. With regard to legitimacy, definitions of authority in global governance can be bundled into two major strands. The first strand suggests that authority equals legitimate power, i.e. power endowed with legitimacy. “What differentiates authority from power is the legitimacy of claims of authority. That is, there are both rights claimed by some superior authority and obligations recognized as legitimate on the part of subordinates or subjects to that authority” (Hall/Biersteker 2002: 4, also Venzke 2013; Lake 2010; Ruggie 1982; Onuf/Klink 1989; Milner 1991; Hurd 1999, going back to Weber 1979: 33ff.). According to Hurd, “the phrase *legitimate authority* is, strictly speaking, redundant” (Hurd 1999: 400). An actor’s power to rule and to set norms is legitimated by her recognition by the ruled: “An actor may be powerful regardless of what others think, but she is only authoritative if others recognize her as such. Other levers of power may be seized or taken, but authority must be conferred” (Barnett/Finnemore 2005: 170).

Definitions of authority of the second strand, in contrast, emphasize a difference between authority and legitimacy: “authority is to be distinguished from legitimacy: authority implies a rebuttable claim to legitimacy” (Bogdandy et al. 2017: 140, referring to Raz 1988). This notion suggests that one major reason for the rise of populism and the retreat of multilateralism is the lack of legitimacy of the – still relevant – (Hooghe et al. 2017; Zürn 2018) authority of international institutions: “international institutions exercise authority but cannot build on sufficient stocks of legitimacy” (Zürn et al. 2012: 70). For Zürn et al., authority is based on recognition as a first layer, which may or may not lead to legitimacy as a second layer (ibid.: 83).

Both strands thus envision strong, but differing relationships between power and legitimacy. A way to reconcile the two is to see legitimacy as one component of authority, standing in a causal relation to its other components. Both strands capture the relocation of power from states to other actors in global governance as neither a forceful acquisition nor as a simple principal-agent model. Rather, authority in global governance is an exercise of power that ideally is – or strives to be – based on legitimacy. Zürn, a major contributor to the second strand, emphasizes the relevance of legitimacy for authority without equating the two: “Inter- and transnational authori-

ties require legitimation” – at least in the long run (Zürn 2018: 9 and 62ff., similarly Buchanan/Keohane 2006: 407). On the basis of this requirement, the contestation of authorities is possible. “Without legitimacy, authority is likely undermined or must depend on coercion, secrecy, and trickery to obtain sway – and governance is often less effective as a result” (Tallberg et al. 2018: 3).

Therefore, the main difference between the two strands relates to the point at which an authority ceases to be acknowledged as an authority – i.e., once it loses (or does not acquire) its legitimacy. Yet, both strands view legitimacy as a causal component of authority. Authority may rise or fall as legitimacy increases or decreases, but this trajectory depends on other factors as well. Accordingly, both strands conceptualize authority as legitimate “in the context of a given stock of normative beliefs in a community” (Zürn et al. 2012: 83). Similarly, Barnett and Finnemore emphasize that the “exercise of authority in reasonable and normatively acceptable ways bolsters its legitimacy” (Barnett/Finnemore 2005: 170).

At this point, concepts of legitimacy from the again abundant literature align. Legitimacy cannot be understood on its own; it always refers to the legitimacy of something or someone, hence its close relationship with power. “Legitimacy, as I use it here, refers to the normative belief by an actor that a rule or institution ought to be obeyed. It is a subjective quality, relational between actor and institution, and defined by the actor’s *perception* of the institution” (Hurd 1999: 381, emphasis in original). The different concepts of legitimacy share the element of recognition by subordinates (also cf. the definitions in Beetham 2013: 11ff.; Raz 1988; Zürn et al. 2012: 83; Bodansky 2013), yet differ with regard to the weight and scope of recognition, or which elements need to accompany recognition in order to qualify as legitimate, such as endorsement, confidence or trust (Tallberg et al. 2018).

Legitimacy thus depends on shared beliefs (Zürn et al. 2012: 83), on the “minimal moral acceptability” of an actor or institution (Buchanan/Keohane 2006: 219), on the justifiability of established rules that legitimate power with the reference to shared beliefs (Beetham 2013: 11ff.), or on other forms of justification (Simmons 1999). This article suggests capturing these different approaches as the third component of authority: the reference to public interests.

2.3 Reference to public interests

The political and social norms of those who are subject to authority influence what they consider to be legitimate (Bartelson 2010: 219; Reus-Smit 2007; Smith 2013). They all share an element of public interests (Reus-Smit 2001; Ruggie 2004; Abrahamson/Williams 2014). “Reduced to its essence, then, the core demand of authority is to make the institutionalization of power in the best interests of the governed population.” (Koppell 2007: 194) Hence, it is pivotal for an authority to refer to public interests in order to legitimate its power.

According to the Westphalian notion of state authority, the state (as the public actor) is endowed with legitimacy and thus authority based on its contribution to public interests, which are (ideally) determined via democratic mechanisms (Best/Gheciu 2014; Münkler/Fischer 1999; Schuppert/Neidhardt 2002). In global governance, democratic mechanisms are supplemented by other sources of legitimacy, such as moral standing or technical expertise (Hall/Biersteker 2002; Cutler et al. 1999). This is because the reference to public interests is pivotal to the very definition of global governance (Zürn 2013: 408; Börzel 2008: 122; Ruggie 2004: 500). Global governance rests on the assumption that public interests can no longer be fulfilled only at the domestic level; cooperation and regulation beyond the state are thus necessary to pursue public interests globally (Habermas 1998; Scharpf 1998; Zürn 2018: 4).

This article therefore defines the third component of authority as the reference to public interests. Public interests can hardly be predefined, as they are a matter of deliberation and controversy (Scharpf 2004; Zürn 2013). By definition, their forms and scope must remain open. Yet it is possible to identify three major points of reference.

First, with various degrees of emphasis in different political systems and ideas (especially with regard to the paradigm of privatization), public goods such as infrastructure, water, electricity, hospitals and education serve as important public interests (Münkler/Fischer 1999).

The second point of reference relates to the principles documented in the United Nations Charter as the founding document of a new phase of global cooperation: international peace and security.

A third point that has become a major dimension of public interests in recent decades is the human rights regime. Even though empirically, human rights are not fulfilled everywhere, and conceptually, they are a matter of dispute, the international human rights regime builds a normative framework that is rarely explicitly contested (Mende 2019; Kumm 2013; Sikkink 2017). States' legitimacy – and even sovereignty – has become connected to the frame of human rights (Donnelly 2013).

In the twenty-first century, there is not a single state left in the international system that has not ratified at least one international human rights treaty [...]. Moreover, there is universal agreement that fundamental human rights constitute *ius cogens*, i.e. that part of international law to which states commit irrespective of whether or not they are party to individual treaties. (Risse/Ropp 2013: 9)

These three points of reference provide a frame for public interests, including shared norms and beliefs, which remain open to deliberation and contingency.

The reference to public interests should be differentiated from both the empirical fulfillment of public interests and from the recognition that public interests are being fulfilled; the latter instead denotes legitimacy. In the triadic framework, the reference to public interests refers to the *claim* (also cf. (Reus-Smit 2007: 159; Clark 2007) by a given authority that it contributes to public interests, which is supposed to legitimize its power. This includes a “communicative act. The exercise of authority in particular comes with a *claim* to be rightful and to be obeyed” (Zürn 2018: 4, emphasis added).

The reference to public interests is a necessary condition for legitimization for the purposes of exercising authority, not least because authority may restrict its subjects. “In a nutshell, the exercise of international public authority is the adoption of an act that affects the freedom of others in pursuance of a common interest” (Bogdandy et al. 2017: 117, similar Venzke 2013). At the same time, the reference to public interests limits authority. This is necessary in democratically informed concerns about power, and in terms of the empirical legitimacy of power (Bogdandy et al. 2017: 123f.). The recognition of power via its reference to public interests can be withdrawn (Avant/Haufler 2014: 48). Thus, authority can be contested and disputed (Zürn 2018).

2.4 The public-private constellation

Concepts of authority in global governance do not only consider the power of states, but also focus on international institutions (international public authority, cf. Bog-

dandy et al. 2017) and the power of non-state actors. While some authors consider the latter as private authority (Biersteker/Hall 2002; Cutler et al. 1999), others insist they hold public authority (Zürn 2018). Furthermore, concepts of liquid authority emphasize the less formalized, and more dynamic and pluralistic, forms of global authority (Krisch 2017). The public-private constellation is therefore pivotal to understanding authority in global governance. Strikingly, concepts of authority in global governance do not simply substitute public with private (Best/Gheciu 2014: 33), or domestic with international (Bogdandy et al. 2017: 134). Rather, authority establishes a link between these spheres. Therefore, this article denotes the public-private constellation as the fourth component in which authority is embedded.

In Westphalian concepts of public authority, the two “significant elements are the public nature of authority and its identity as a social construction” (Cutler 1999: 62, also cf. Friedman 1990; Lincoln 1994). Cutler emphasizes that “the ‘publicness’ of authority is constituted by a distinction between private and public activities” (Cutler 1999: 63). This division is based on the notion of an apolitical private sphere, in which economic and market activities are conducted, and a public sphere in which legitimate state power is exercised (*ibid.*: 64).

This dichotomy between public and private spheres is being challenged in the global governance literature:^{vi} The strong interaction between public and private in global governance research appears in the shadow of hierarchy (Héritier 2002; Börzel 2008; Graz/Nölke 2008a: 13), the participation of private actors are taking part in public mechanisms, regulating themselves and others (Peters et al. 2009), the mutual influence between state and non-state actors (Wolf 2012: 197f.; Ruggie 2004), a public expression of the social relationship between the ruler and the ruled (Hall/Biersteker 2002: 5), in deliberative procedures (Best/Gheciu 2014) or through commonly shared social norms (Hurd 1999). The “rise of private authority is not simply an external force that constraints the state. It is partly endogenous to the state” (Sassen 2006: 223, also Cutler et al. 1999: 16 ff.). Hence, the constitutive connection to the public sphere asso-

^{vi} To be sure, this model of a dichotomy between public and private has been criticized before, especially in feminist approaches to (international) political theory and international law. Cf. Okin 1991; Chinkin 1999; Pateman 1983, also Mill 2001.

ciates the authority of private actors (directly or indirectly) with formal or institutional ties.

[T]here are good reasons to doubt that rules established between private actors can live on their own, whether factually or normatively speaking. The claim for the desirability of a 'public' dimension expresses the awareness and conviction that social interactions are, and should be, regulated by rules that emerge from discourses about common interests. (Bogdandy et al. 2017: 121)

Similarly, the concept of private authority captures non-state actors' ability to assume regulatory functions in the public (Cutler et al. 1999a; Hall/Biersteker 2002; Hansen/Salskov-Iversen 2008). It combines two ostensibly contradictory dimensions by applying public authority to private actors – thereby revealing a genuine association between the private and the public. Even approaches that reject the notion of private authority acknowledge these elements: global governance contains private actors referring to public authority. The notion of global governance then “refers to public authority, independent of the question whether it is carried out by state or non-state actors. It involves an element of ‘publicness’” (Zürn 2018: 4).

Against this background, this article argues that the public-private constellation in global governance does not simply lead to a blurring, fluidity or dissolution of the two, as it is sometimes suggested (Stewart 2018: 246; Ciepley 2013: 141; Solomon 2010). Rather, the article suggests understanding the relationship between public and private as internally and externally mediated: each constitutes the other; each is shaped by the other; and neither would exist without the other. Public and private are externally mediated in that each sphere's inclusion is the other sphere's exclusion, and vice versa. They are internally mediated in the sense that each sphere (re)produces and (in)forms the scope, logics and content of the other sphere, by means of regulation, deregulation or non-intervention. Rather than considering one sphere as residual of the other (Biersteker/Hall 2002: 203), each sphere has specific functions for (and effects on) the other. The mutual constitution takes place in such a pervasive way that each builds a constitutive part of the other (cf. Figure 1). At the same time, the two remain distinct: they do not dissolve into each other, but retain their own logics, even though their (internal) content and (external) boundaries may change (Mende 2020).



Figure 1: The public-private constellation

Notions and definitions of what is considered public or private vary considerably. However, their mutually constitutive constellation remains. In the context of global governance (fueled by international law), state actors are seen as public actors, and non-state actors as private actors (Büthe/Mattli 2017; Schirm 2004; Peters et al. 2009).

2.5 Interim conclusion: Authority in global governance

In sum, the triad between power, legitimacy and the reference to public interests and their mutual influence and interdependence, embedded within the public-private constellation, constitutes authority in global governance (cf. Table 1).

While an actor holding institutionalized functions in global governance provides the most visible case for its authority, this paper does not confine authority to institutionalization. Rather, it includes both soft and hard forms of authority in global governance, varying with the degree of institutionalization and the scope of competences.

Authority	Power	1) Instrumental power 2) Agenda-setting power 3) Discursive power
	Legitimacy	Recognition Relational Based on perception Shared beliefs, norms, justifications
	Reference to public interests	Points of reference: a) Public goods b) International peace and security c) Human rights Not fulfillment or recognition of fulfillment, but claim by authority
	Public-private constellation	External mediation (one's inclusion = the other's exclusion) Internal mediation (mutual constitution, each inherent in the other) Independent from the other, not blurred

Table 1: The four components of authority in global governance

Since the three components shape each other causally, changes in one can explain changes in the other. At the same time, each component may entail dimensions and effects that go beyond the triad of authority (e.g., illegitimate power). Other than in the mutually constitutive *mediation* between public and private, the components in the *triad* do not cease to exist without the others. They may spring from other causal mechanisms, and yield other external effects.

While the four components do not address all possible definitions and controversies associated with the notion of authority in global governance, they provide a common framework of analysis that can help accentuate different approaches to authority, which place different degrees of emphasis on each component. This framework thus aims to provide a common basis for further research and debate.

3. Business Companies as Global Governance Actors

The remainder of this article applies the triadic framework of authority in global governance and its embedding in the public-private constellation to the empirical case of business enterprises, which are one of the most important actors in global governance (Börzel/Deitelhoff 2018; Büthe/Mattli 2017; Mikler 2013; Backer 2011; Avant et al. 2010; Haufler 2001). The paper addresses all business enterprises without equating them. It thus follows international documents such as the UNGPs and the OECD Guidelines, given the complexity of transnational companies, and the relevance of small and medium-sized companies. In a first step, this section addresses the power, legitimacy and reference to public interests of companies in global governance. The subsequent sections scrutinize the components' triadic relationships, studying the case of business and human rights, and how they are embedded within the public-private constellation.

Business power in global governance appears with all three faces of power. A company's instrumental power is closely tied to its size, resources, networks and wealth (Fuchs 2013: 82ff., also Epstein 1973, 1974; Bennie et al. 2016). It manifests in the ability to directly influence others' behavior and the output side of politics, most prominently via lobbying.

The second face, companies' agenda-setting power to influence policy input, and to set and interpret norms and rules, is particularly connected to global governance. It

comes into play in companies' participation in international organizations, public-private partnerships, multi-stakeholder initiatives and roundtables, and in the development of norms and codes of conduct with which companies can regulate their own and other companies' behavior (Peters et al. 2009).

Third, companies exercise discursive power. They influence ideas, norms and identities via their products, their advertisement, and the ways they engage in society, such as in education and social institutions (Fuchs 2004: 138ff.). Even before the rise of global governance, economist Bowen, the "Father of Corporate Social Responsibility" (Carroll 1999: 270), describes the extent to which business activities shape lives and society (Bowen 2013 [1953]: 8ff.). He argues that companies' behavior contributes to the individual standard of living, economic stability and economic progress, but also to societal order, national security, justice and freedom: "it comprises so large an element of human time, of human interrelationship, and of personality expression. It is not only a means to human life and human ends but a large part of human life, and an end in itself" (ibid.: 11). This extensive corporate influence can take several forms, and can either strengthen or inhibit^{vii} social and public issues. Companies' discursive power is mirrored, for example, in the paradigm of nudging – the assumption that companies should use their ability to shape behavior to do 'good' (Thaler/Sunstein 2008; Mende 2016). Campaigns such as the United Nations Global Compact or the Unstereotype Alliance demonstrate a high awareness of such power. The latter platform, launched in 2018 by transnational companies and convened by UN Women, "seeks to eradicate harmful gender-based stereotypes" in advertisement.^{viii} Ultimately, while companies may strive for discursive power on top of their usual activities (e.g. by advertising positions in public debate, Fuchs 2013: 85), it is also deeply integrated into their core business activities.

Discursive and agenda-setting powers depend heavily on immaterial factors and a company's reputation, such as its moral standing or the quality of its expertise. They are thus most closely connected to a company's legitimacy. Nevertheless, they are also related to instrumental power, which for some companies, especially transnational

^{vii} Just cf. Adam Smith's famous notion of a "conspiracy against the public", when "people of the same trade" assemble (Smith 2007 [1776]: 105).

enterprises, surpasses that of (certain) states (Mikler 2013: 4). While size and resources may not directly translate into power (Fuchs 2013: 87), “a firm’s ability to become politically active [...] also increases with its size” (Bernhagen/Mitchell 2010: 1177). Public visibility of a company’s material power goes hand in hand with demands to legitimize that power by contributing to public interests, which serves as the basis of the long tradition of corporate philanthropy.

Hence, all three faces of business power take effect in global governance. This is due to the extent of corporate power, and to the realm in which this power is exercised. All three faces of power are increasingly exercised in the realm of politics: Companies take on political activities and perform political power (Fuchs 2013: 87; Bernhagen/Mitchell 2010: 1177; Voss 2013: 29; Wettstein 2009; Pies 2011; Scherer/Palazzo 2007; Kolleck 2013). This includes companies’ abilities to regulate others and themselves (Crane et al. 2008; Peters et al. 2009; Cutler 2018; Green 2014). Some elements of these powers result from states’ delegation or deregulation mechanisms, while others develop in governance gaps. Both are based on some kind of legitimacy.

According to Bowen, long before the establishment of the neoliberal paradigm, “business, like government, is basically ‘of the people, by the people, and for the people.’ Such power [...] is given because the ‘people’ believe this decentralization to be desirable” (Bowen 2013 [1953]: 5f.). This (admittedly very far-reaching) legitimacy is mirrored in less far-reaching but similar mechanisms in global governance. Here, companies’ legitimacy is based on the belief in their expertise (Cutler et al. 1999), the quality and output of their products or services (Brühl/Rittberger 2001), or their social behavior such as with codes of conduct, social engagement, and dialogue with social and political partners (Voss 2013: 30). Furthermore, their governance legitimacy does not necessarily involve a direct relation with the thereby affected. It may also rest upon their recognition of other global governance actors, demonstrated, e.g., in fora of cooperation and public-private partnerships. Additionally, apathy (Hall/Biersteker 2002: 5), silent approval (Wettstein 2009: 210), and the absence of contestation may contribute to companies’ de facto legitimacy.

viii <http://www.unstereotypealliance.org>. Last access: April 2020.

These mechanisms of legitimacy are closely tied to the third component of authority: the reference to public interests.

How is that possible? Why do we allow actors with such predominance [...] in the supposedly democratic political game? The answer to this question points to the normative embedding of the depicted developments in power. The dominance of neoliberal norms in the past decades, with the associated focus on growth and efficiency, has meant that business has come to be seen as the primary expert, able to deliver in the “public interest.” (Fuchs 2013: 87)

Business activities coincide with the three points of reference for public interests discussed above. First, companies provide or are deeply involved in the provision of public goods such as water, electricity, infrastructure, health, education or housing, or the funding of research at public universities (Best/Gheciu 2014: 18f.; Bernhagen/Mitchell 2010; Graz/Nölke 2008b; Moon/Knudsen 2018). This involvement has risen tremendously in recent decades with the political course of privatization. At the same time, privatization does not simply detach these issue areas from the realm of public interests.

Second, companies are involved in matters of conflict, peace and security, which were seen to be the prerogative of states in the Westphalian world order. Companies are engaged in these matters through the privatization of security and armies (Gal-Or 2014; Deitelhoff/Wolf 2010). This involvement has a long history, for example with the “diversion of productive resources from civilian to military purposes” (Bowen 2013 [1953]: 11), medieval merchant associations (Cutler 2003), and the rights of colonial companies such as the British East India Company to conduct war and make peace in India (Avant/Haufler 2014).

Third, human rights have become a major subject of business activities, and of societal expectations towards companies. Since the 1990s, when civil society organizations drew considerable attention to companies’ involvement or complicity in human rights violations, the human rights regime has begun to take business actors into account (Cragg 2012; Deva/Bilchitz 2013; Addo 1999). Pivotal instruments such as the UN Global Compact, the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights (UNGPs) address businesses’ responsibility to

respect human rights on the global level.^{ix} While discussions of business and human rights are marked by fierce debate,^x they unanimously contribute to an extension of business responsibilities with regard to human rights as a part of public interests, on the one hand, and to societal expectations towards companies to assume such responsibilities, on the other.

4. Business Authority and Human Rights

How, then, do businesses' power, legitimacy and reference to public interests contribute to and explain their authority in global governance? Analyzing the relationship between the three components helps answer this question. This section focuses on business responsibilities for human rights as an example of the reference to public interests, because the issue area of business and human rights is an illustrative case for business authority in global governance: "human rights apply wherever governance occurs" (Goodhart 2006: 37). The triadic relationship between power, legitimacy and reference to human rights in business authority is double-edged: each component rebounds on the other.

First, power and human rights influence each other. The absence of states that are able (or willing) to act, and the existence of companies with a greater capacity to act than states, has created expectations for firms to become responsible actors for human rights. This transcends the classic state-centered human rights regime (Andreopoulos et al. 2006; Clapham 2006). It is mirrored in the discussion, whether a company's power might provide one criterion for a leverage-based human rights responsibility (Wood 2012), or whether this inappropriately assumes that 'can implies ought' (HRC 2008: 19f.), as Ruggie, author of the UNGPs, notes. The UNGPs do address at least a soft form of leverage-based responsibility (Wood 2012), requiring companies to "prevent or mitigate adverse human rights impacts that are directly linked to their opera-

^{ix} They are accompanied by non-binding (and a few binding) national mechanisms, such as National Action Plans or the French Corporate Duty of Vigilance Law.

^x Major disagreements relate to how companies can be addressed in international law, whether regulation of companies should be binding or non-binding, direct or indirect, and how to navigate business responsibilities between the private responsibility to respect human rights, on the one hand, and public state duties to protect and fulfill human rights, on the other (Kamminga/Zia-Zarifi 2000; Schutter 2006; Noortmann et al. 2015; Kobrin 2009).

tions, products or services by their business relationships, even if they have not contributed to those impacts” (UN 2011: §13).

In any case, the adoption of human rights responsibilities increases companies’ agenda-setting and discursive powers, because they can get involved in the development, interpretation and implementation of human rights (norms). This assessment does not even have to engage with the controversial juridical question of whether companies should become legal subjects of international law (cf. Nowak/Januszewski 2015: 118f.). The mutually reinforcing relationship between power and human rights also transcends the controversy between soft law and hard law, i.e., companies’ binding and non-binding responsibilities. It applies to both. At the same time, power and the reference to human rights can limit each other. The prosecution and sanctioning of human rights violations and related behavior of enterprises (or the threat thereof) can inhibit their power. Vice versa, a limited power of companies can restrain their abilities to contribute to human rights.

Second, the relationship between human rights and legitimacy demonstrates that business legitimacy in global governance is a double-edged sword. On the one hand, referring to human rights helps companies legitimize their (other) activities, which motivates them to develop codes of conduct, self-commitments, roundtables, philanthropic engagement and corporate social responsibility (CSR) measures. They provide companies with a “social license to operate” (Ruggie/Sherman 2017: 294). On the other hand, increasing civil society attention to business conduct with regard to human rights compels companies to legitimize their activities. Brand-sensitive or otherwise publicly visible companies can no longer ignore or remain silent about proximate human rights violations. They have to take action to avoid damaging their reputation and legitimacy, and in turn their authority. The relationship between human rights and legitimacy thus represents both an opportunity and pressure with regard to companies’ authority in global governance; it provides both access and restriction.

Third, the relationship between power and legitimacy applies to companies as actors in global governance more generally. The power of companies endows them with the ability to gain (and also explains their) access to legitimacy, especially via participation in global governance fora. Vice versa, if a company manages to strengthen its legitimacy, for instance by providing expertise or by plausibly referring to human

rights, it consolidates its position of power in global governance, and thus its authority. This point also demonstrates that the triad does not only consist of the two-pole relations between its components. Rather, the triadic components of authority are very closely related. If a company is compelled to legitimize its activities by committing to human rights, this gives other actors an instrument to challenge the company's power. As an activist from the International Labor Rights Fund's campaign against Nike explains: "hypocrites are far more interesting than mere wrongdoers, and it's been much easier to sensitize press and public to Nike's failure to implement its own code of conduct than to its failure to comply with Indonesian labor laws" (Bama Athreya cited in Rowe 2005: 123f., also cf. Risse et al. 2013, 1999).

In sum, the relationship between power, legitimacy and the reference to public interests constitutes business authority in global governance. However, the components do not rely exclusively on their interaction, but entail dimensions and effects that go beyond the triad, or even counter mechanisms (cf. Figure 2). Other mechanisms also enable and restrict companies' power, such as competition and economic pressure, political and legal restrictions, protectionism, the extent and complexity of global markets and global supply and value chains (cf. Crane et al. 2008: 46). Social businesses provide another example. Their orientation towards the common good does not endow them with more power than purely profit-oriented multinational enterprises. Furthermore, some companies are capable of pursuing their activities and powers without legitimacy – especially those companies that are less visible to the public, or those activities that take place in the folds and gaps of global governance and in the lowest tiers of supply chains. In contrast, the more a company acts as an authority *in* global governance, the greater its need of legitimacy, and hence its reference to public interests. The triad thus allows analyzing the gaps and challenges that business authority may pose in – and through – global governance.

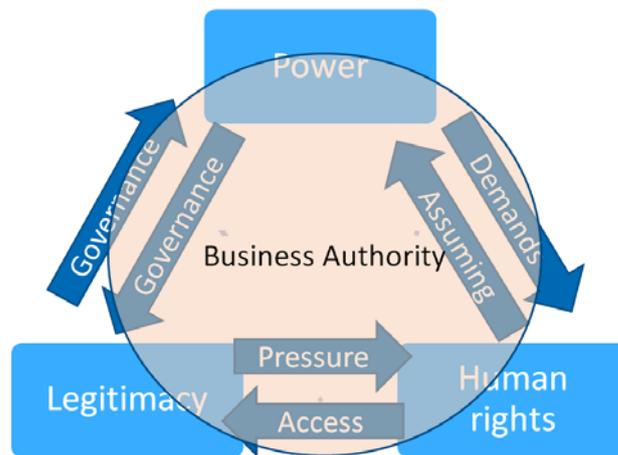


Figure 2: The triad of business authority

5. Business Authority between and beyond Public and Private

There is a widespread criticism in global governance research (and in human rights activism) that companies' authority is not adequately captured in legal, political or conceptual terms. "While thus provided with a form of political authority and legitimacy as a political actor in the wider sense, the neoliberal frame has also meant that global companies have not come to be seen as political actors in the narrow sense" (Fuchs 2013: 87, also Cutler 2018: 62; Wettstein 2009). This article argues that one of the reasons for this blank space lies in the way that business authority escapes the two-pole constellation between public and private that is pervasive in both the international human rights regime and global governance. The blank space even applies to the model of mutual constitution between public and private as introduced above. Nevertheless, this model still plays an important role in understanding the peculiar position of companies. This article argues that business enterprises as global governance actors transcend the classification of public and private roles. They extend the two-pole constellation with a third pole, which has a mutually constitutive relationship with the other poles as well. Business authority, then, differs from public as well as from private authority. It is a peculiar third type.

This hybrid character of company roles that escapes both public and private designations is evident in all three components of authority. With regard to *power*, companies' activities and agency, the extent and the effects of their powers transcend their own realm to such an extent that they outgrow the role of mere private actors.

The power to regulate themselves and others, and to develop and interpret norms and rules (i.e. their agenda-setting and discursive powers) transcends any definition of the private. However, companies are not officially entitled to govern others. In this regard, they are not public actors. Then again, *de jure*, every company (or their legal representatives) is subject to a state's jurisdiction and to civil law, just as any private actor. *De facto*, however, companies largely yield their powers on a global level, which is much more difficult to regulate than national jurisdictions. It requires international law and global forms of cooperation and governance. What is more, while international law does not perceive companies as subjects of international law, it acknowledges them as actors in international law (Wouters/Chané 2015). Multilateral agreements and arbitration mechanisms already treat companies as (global) subjects, thereby contributing to their power (Steininger 2018) and dragging them out of the private sphere.

The power of companies is one of the main motivations to demand their *legitimacy*. Purely private actors do not have to legitimize their private activities in the public; companies do. At the same time, the demand for legitimacy also provides them with access to public legitimacy, thereby further dragging them out of the private realm. Yet, neither empirical developments nor normative demands tend to equate companies' legitimacy with that of states. Hence, the double-edged legitimacy situates companies beyond both the public and private.

The third component of business authority, the *reference to public interests*, further differentiates companies from both public and private authority. For states and international organizations, the reference to public interests (even if it is disputed or underdeveloped) builds the very foundation of their authority. Business actors, by contrast, are perceived to legitimately follow their private interests – just as any other private actor. However, their contribution to public interests is perceived as something that can or should be reconciled (or even equated) with their private interests (cf. Kurucz et al. 2008; Clarke 2017). In all of these perspectives (if they do not challenge the capitalistic order as a whole), private business interests remain valid, but the search for ways to reconcile them with public interests transcends the private.

At this point, it could be argued that the mixture of private and public interests still qualifies business authority as private, since the concept of private authority in

global governance already captures both public and private dimensions, as shown above. However, companies also have roles that cannot be defined as either public or private in the first place. These hybrid elements include the extent and quality of business power, their double-edged legitimacy, and their involvement in public interests.

The fact that what appear to be private actors (NGOs, civil society, firms) are increasingly engaged in public practices (such as processes of public deliberation and the pursuit of public purposes) is too easily viewed as simply another example of the rise of private authority – missing the crucial ways in which these practices are redefining those actors as public because of what they do, not where they are situated. (Best/Gheciu 2014: 17)

At the same time, this article argues, it is pivotal to differentiate between business authority and public authority. States, as public actors, are legal subjects of international law, which are capable of making and implementing law, restricting liberty and executing force. They are public actors because they are endowed with judicative, legislative and executive powers in order to safeguard public interests. “We define as public those goods, actors, or processes that are recognized by the community in which they are carried out as being of common concern” (ibid.: 32, also Abrahamson/Williams 2014; Reus-Smit 2001). For this reason, states are (or should be) democratically legitimized.^{xi} Companies are not public actors according to this definition. Yet, they are so deeply involved in public affairs and public interests that they are not fully private actors either.

To summarize, enterprises have both private roles (their self-interest, their assignment to a state’s jurisdiction and to civil law) and public roles (their participation in global governance, in (self-) regulation and in the provision of public goods). They also have hybrid roles that cannot be described as public or private in the first place (the extensive effects of their actions on others, the access to and the demand for public legitimacy).

Therefore, this article argues, business authority creates a peculiar third between and beyond the public and the private.^{xii} It is entangled with both (between), but also

^{xi} Even though not all states accomplish that ideal, it creates a major normative yardstick for states, in contrast to dictatorships and totalitarianism.

^{xii} For discussions that address the hybrid roles of companies, cf. the concepts of political corporate social responsibility (Scherer et al. 2016; Scherer/Palazzo 2007), global corporate social responsibil-

escapes them in important regards (beyond). Business authority clearly differs from public authority. Compared to the concept of private authority in global governance, the notion of business authority as a peculiar third provides a more nuanced way to deal with the (limits of) the public-private constellation (cf. Table 2).

	Power	Legitimacy	Reference to public interests
Public authority	Public	Public	Public
Private authority	Private Public	Private Public	Private Public
Business authority	Private Public Hybrid	Private Public Hybrid	Private Public Hybrid

Table 2: Business authority as a peculiar third

The concept of business authority as a peculiar third is based on perceiving companies as a third type of actor, a third pole in the constellation of public and private. This argument extends the two-pole mediation between public and private into a relationship between three intermediated poles that mutually constitute each other. The private (e.g. the family, gender identities) is shaped and formed by both the public (e.g. state regulation of marriage and child care) and the business pole (e.g. wage politics, advertisement, gender-aware recruitment strategies), and vice versa.^{xiii} At the same time, the poles do not dissolve or blur into each other (Figure 3). Rather, they remain distinct, with distinct features, roles, and contributions to authority in global governance.

ity (Stohl et al. 2007), democratic corporate social responsibility (Levy/Kaplan 2008: 439ff.), extended corporate citizenship (Crane et al. 2008), corporations as next to governments (Wettstein 2009; Ciepley 2013), private government (Anderson 2017), companies as social actors (Brühl/Hofferberth 2013) and the political power and authority of companies (Fuchs 2013: 87; Atal 2019).

^{xiii} For a detailed delineation of an intermediated, mutually constitutive three-pole relationship between public, private and business, cf. Mende 2020.

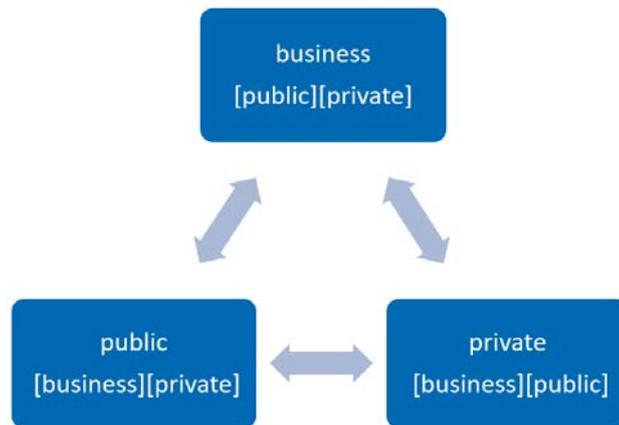


Figure 3: Three-pole mediation between business, public and private

6. Conceptual and Normative Conclusions

This article analyzes authority in global governance by scrutinizing the triadic components of power, legitimacy and reference to public interests, and how they are embedded in the constellation between public and private. It develops a theoretical framework, which it then applies to companies as major actors in global governance, focusing on the case of business and human rights. Finally, it suggests perceiving business authority as a peculiar third between and beyond the public and private.

The triadic concept of business authority is both conceptually and normatively relevant. *Conceptually*, it reveals the interconnections of power with legitimacy and the reference to public interests that establish business authority in global governance, and it captures the empirical powers of companies that partly transcend national and intergovernmental legislation.^{xiv} It thus provides a basis to investigate the questions that arise from such authority.

Developing business authority as a peculiar third also allows to go one step further and scrutinize the authority of other non-state actors in global governance in order to analyze how they transcend the public-private constellation (such as non-governmental organizations and civil society associations).^{xv}

^{xiv} This point cannot be overstated: The paper does not normatively demand the peculiar form of business authority; rather, it conceptualizes its empirical existence.

^{xv} Cf. for example research on global civil society Brysk 2005; Ruggie 2004; Steffek et al. 2008.

Furthermore, the triadic concept demonstrates the ambivalence of business responsibilities for human rights (or other public interests). On the one hand, given the extent of business power, such responsibilities seem to be uncircumventable. On the other hand, they affect companies' power and legitimacy, including in disputable ways. More concretely, the triad facilitates discussion of the dangers (1) that business responsibilities will undermine states' responsibilities for human rights (Wettstein 2009: 243; Rosemann 2005, but see Nowak/Januszewski 2015), (2) of institutionalizing too much trust in companies to contribute to public interests whilst pursuing their own (Stewart 2018), and (3) of endowing companies with too much power (Bishop 2012). The triad also allows to take into account how companies strengthen their agency and power by acting as subjects of human rights: "international law has further cemented economic structures by lending the authority of the human rights discourse to the rather mundane goal of maximizing corporate profits" (Steining-er/Bernstorff 2018: 14).

Normatively, the triad can help balance the three components of business authority. A company's power can provide a viable yardstick when deciding how to develop business responsibilities for human rights. The scope, form and extent of business responsibilities could be closely related to their power.^{xvi} This yardstick could be further differentiated with regard to the instrumental, agenda-setting and discursive aspects of business power, and how each is connected to legitimating mechanisms. Vice versa, the regulation of business power, e.g., granting them access to global governance fora, could be tied much more closely to a company's human rights performance. This yardstick could also be used to regulate business power in other areas.

Ultimately, the peculiar role of business authority between and beyond public and private can provide new mechanisms of global governance that are not restricted by the dichotomous choice to perceive companies as either public or private. Companies are both, and they are neither. Accordingly, this suggests a way around the notorious discussion in the issue area of business and human rights of whether to endow enterprises only with private responsibilities or to burden them with state duties. Rather, treating enterprises as a peculiar third pole allows to develop appropriate forms of

business responsibilities for human rights, which will require extending the public-private distinction in human rights law. Ultimately, approaches that take companies' empirically peculiar authority into account can build a conceptual basis for normatively delineating their roles, rights and duties in global governance.

^{xvi} Similarly, the question of states' extraterritorial human rights obligations is tied to "the state's exercise of power and control, whether directly or indirectly" (Augenstein 2016: 686).

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Matthew D. Stephen

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