

# The legitimacy of transnational NGOs: lessons from the experience of Transparency International in Germany and France

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**Abstract.** This article develops theoretical insights concerning the legitimacy of non-profit Transnational Non-Governmental Organisations (TNGOs) in global governance. The research compares the advocacy initiatives of Transparency International (TI), the leading TNGO in the international regime of anti-corruption, in Germany and France during the 1990s. The main argument is that the legitimacy of TNGOs is a relational concept: it is granted or denied in a relationship between at least two parties, in which actor attributes play a role but are not decisive. Only such a relational conception can explain why a given TNGO is granted legitimacy in one context and denied it in another. In addition, legitimacy matters. Although insufficient on its own, legitimacy is a necessary condition for effective advocacy, which TNGOs can generate endogenously. To the extent that the legitimacy of TNGOs depends on their acceptance by dominant groups and powerful decision-makers, therefore, 'legitimate' TNGOs may function to sustain rather than challenge the structures of power which condition global outcomes in ways that are often contrary to the goals of equality, fairness, and justice. Thus to assess the impact of TNGOs in global governance, one must examine *which* TNGOs have been granted (or denied) legitimacy and influence, and *why*.

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## I. Introduction

Transnational non-state actors (TNAs) of various kinds – non-governmental organisations (NGOs), advocacy networks, epistemic communities, social movements, transnational corporations, transnational organised crime groups, terrorist organisations, and others – are central to the processes and outcomes of contemporary global governance.<sup>1</sup> Non-profit transnational NGOs (TNGOs) in particular have been shown both to complement and challenge the authority of the international state system,

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<sup>1</sup> Peter Willetts, *Non-governmental Organizations in World Politics: The Construction of Global Governance*, Global Institutions Series (New York: Routledge, 2011); Thomas Risse, 'Transnational Actors and World Politics', in Walter Carlsnaes, Thomas Risse, and Beth Simmons (eds), *Handbook of International Relations* (London: Sage, 2002), pp. 255–74.

and both to contest and increase the legitimacy of various international institutions. Across a broad range of issues, it is widely acknowledged, these actors ‘can have a substantial impact on state policies, on the creation of international norms, and on the diffusion of these norms into domestic practice’.<sup>2</sup> The state is clearly no longer the sole actor of consequence in International Relations (IR) – if indeed it ever was.

Less clear is why and under what conditions a *specific* TNGO is more or less likely to affect global political processes and outcomes.<sup>3</sup> Generally, hypotheses explaining the effects of TNGOs take into account the following factors: prevailing *international conditions* (great power politics and the material structure of the international system; international institutions and the social structure of the international system; the particular phases in the international policy cycle – whether agenda-setting, norm creation, treaty creation, or treaty implementation); prevailing *domestic conditions* (such as political opportunity structures and norm resonance); *complex patterns of domestic/international interaction* (such as boomerang effects and spiral models); the *characteristics* of the particular TNGO (material and ideational resources) and of its targets (such as vulnerability to transnational pressures); and the *strategies* used by particular TNGOs (such as communicative processes including shaming and arguing).<sup>4</sup> One characteristic of TNGOs is often identified in the literature as explaining variation in their effects, yet remains remarkably underexplored: their legitimacy.

What is meant by the concept of legitimacy as it applies to TNGOs? What are the conditions under which specific TNGOs may be accepted as legitimate in their spheres of activity? How does this legitimacy impact the capacity of a particular TNGO to influence processes and outcomes in global governance? These questions are important if we are to understand the impact of TNGO activities across a wide range of issues in global affairs, and thereby come to a fuller appreciation of the conditions of global governance generally. On a practical level, those directly involved with TNGOs may wish to understand better the legitimacy dynamics that might enhance or constrain the effectiveness of their advocacy efforts. Despite the scope and importance of such questions, it seems that studies that might help develop mid-range theoretical insights about TNGO legitimacy in global governance attract less attention in the literature than they warrant.

This article contributes to such mid-range theoretical development by drawing on research gathered in a comparative study of the TNGO Transparency International (TI) in Germany and in France during the period leading up to and immediately following the signing of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The research shows that TI’s advocacy had a significant impact on state compliance with the Convention in Germany. In France, however, despite vastly similar national and corporate interests concerning transnational bribery, TI’s advocacy did not have a significant impact on compliance. This article explains the difference in TI’s respective impact on anti-bribery compliance in Germany and France as a consequence of differences in TI’s *legitimacy* in the two countries.

<sup>2</sup> Risse, ‘Transnational Actors and World Politics’, pp. 263–4.

<sup>3</sup> ‘TNGO’ is used here as an umbrella term, capturing a range of organisational approaches, where ‘transnational’ describes organisations that operate in and across a number of different countries. While TNGOs perform a range of functions in global governance, the focus here is on norm entrepreneurial and policy advocacy functions. This follows Vivien Collingwood, ‘Non-Governmental Organisations, Power and Legitimacy in International Society’, *Review of International Studies*, 32:3 (1 July 2006), pp. 439–54, doi:10.2307/40072197, p. 441.

<sup>4</sup> Risse, ‘Transnational Actors and World Politics’ provides a though overview of these factors.

Transnational bribery directly implicates the material and strategic trade interests of states and firms. Therefore, its control poses a significant challenge to norm-driven policy advocacy and presents an instructive policy context in which to assess the capacity of TNGO advocacy to influence state policy. The OECD anti-bribery convention requires states to criminalise transnational business bribery – the practice of sending corrupt payments from one national jurisdiction into another to secure influence in the recipient jurisdiction – and forms the centerpiece of an increasingly robust international regime of anti-corruption. In both Germany and France, countries that permitted the tax-deductibility of foreign bribes (and that strongly resisted international efforts to control this practice up until 1997), compliance with the OECD Convention required a significant shift in policy. In both states, TI was the leading non-state norm entrepreneur and policy advocate addressing international anti-corruption and, throughout the late 1990s, pressured both states to criminalise foreign bribes, eliminate their tax-deductibility, and comply with the Convention.

The comparison of TI's experience in Germany and France offers the opportunity both to assess the impact of TNGO advocacy in each case and to provide more general insight into the causal relationship between a TNGO's legitimacy and its impact. The research design includes variation on both the independent variable (TNGO legitimacy) and the dependent variable (TNGO influence on the policy process), while controlling for the TNGO characteristics often associated with legitimacy. In Germany, TI started out as a marginal, if not vilified, group. Nevertheless, over several years in the mid-1990s TI managed to establish itself as a legitimate NGO advocating for anti-corruption policies, and especially for the criminalisation of transnational bribery. Due in large part to the elite personal relationships of TI's leaders and its deliberately non-confrontational strategies, the German business and policy elites who were the target of its anti-bribery advocacy came to accept this TNGO as highly legitimate. Despite significant early resistance to the criminalisation of transnational bribery in Germany, TI was able to exploit this legitimacy and effectively pressure German business and political elites to change their positions and swiftly comply with the OECD anti-bribery Convention – a significant policy shift – despite important and countervailing material interests. TI's influence on the policy process was instrumental in this case.

In France, by contrast, the *very same* elite relationships and non-confrontational strategies, which conferred legitimacy in Germany, worked *against* TI and its ability to influence French policy on foreign bribes. TI failed to achieve legitimacy among key business and political elites in France, and its policy advocacy in favour of the OECD Convention was ineffectual. To the extent that France ultimately did comply with the criminalisation of bribery in international business mandated by the OECD Convention (later than Germany, more reluctantly, and to a lesser degree), it did so due to forces other than advocacy by TI.

These findings suggest three arguments about the legitimacy of non-profit TNGOs in global governance, generally. *First*, the legitimacy of TNGOs is most appropriately conceived as a relational, sociological, and empirical question rather than a quality inherent in an organisation or its characteristics. In other words, the acceptance of a particular TNGO as a legitimate actor in policy advocacy depends on the values held by those conferring that legitimacy. Thus, to assess and understand TNGO legitimacy in practice requires attention to the values, identities, and interests on both sides of the relationship: the TNGO advocate and its target audience. Crucially, the

very same ‘source’ of TNGO legitimacy in the eyes of one audience can be viewed with suspicion and as non-legitimate by another. *Second*, on a practical level, legitimacy matters. The presence or absence of legitimacy has important effects on the outcome of policy advocacy by TNGOs. Although insufficient on its own, legitimacy is a necessary condition for effective advocacy. *Third*, the legitimacy of TNGOs should be understood as a strategic resource, an asset to be generated and cultivated endogenously. Where TNGOs successfully generate and cultivate legitimacy, the probability of their success in leading change is greatly increased. Where they fail to do so, the effectiveness of their advocacy will be limited.

The next section discusses the legitimacy of TNGOs in global governance and introduces the study’s relational concept of legitimacy. Section three provides a brief overview of Transparency International and its activities in the international regime of anti-corruption during the 1990s and the early years of the twenty-first century. Sections four and five examine TI’s *legitimacy* and *influence* in Germany and France, respectively, during that same period. Section six concludes with some observations regarding the relevance of the article’s findings for theories of global governance, as well as directions for further research.

The chief conclusion of the article is that the increased participation of ‘legitimate’ TNGOs in processes of global governance does not in itself constitute a source of political legitimacy beyond the state. To the extent that the legitimacy of TNGOs depends on their acceptance by dominant groups and powerful decision makers, ‘legitimate’ TNGOs may in fact function to sustain rather than challenge structures of power (including those related to economic policies, social class, and gender) which condition global outcomes in ways that are often contrary to the goals of equality, fairness, justice, and legitimacy. In order to assess the impact of TNGO participation on global governance, one must examine *which* TNGOs have been granted legitimacy and influence, in *which* global policy processes, and *why*.

## II. The legitimacy of TNGOs in global governance

*Legitimacy* is the rightness or appropriateness of a referent, according to a defined standard or criterion. Thus the notion of something or someone being legitimate reflects a stamp of approval associated with being right, appropriate, empowered, or agreed upon according to some set of rules. It is a ‘generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs and definitions’.<sup>5</sup> In the realm of politics, the concept of legitimacy is usually associated with the justification of the exercise of power and authority by and within political institutions, which under certain circumstances also creates a moral obligation to obey legitimate rule.<sup>6</sup> For Allen Buchanan, ‘an entity has political legitimacy if and only if it is morally justified

<sup>5</sup> Mark C. Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’, *The Academy of Management Review*, 20:3 (1995), p. 574. Quoted in Deborah D. Avant, Martha Finnemore, and Susan K. Sell (eds), *Who Governs the Globe?*, Cambridge Studies in International Relations (Cambridge: Cambridge University Press, 2010), p. 360.

<sup>6</sup> Fabienne Peter, ‘Political Legitimacy’, in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2010), available at: {<http://plato.stanford.edu/archives/sum2010/entries/legitimacy/>} accessed 28 January 2013}.

in wielding political power, where to wield political power is to attempt to exercise a monopoly, within a jurisdiction, in the making, application, and enforcement of laws'.<sup>7</sup> In a *normative* conception of political legitimacy, such moral justification originates in standards drawn from liberal-democratic principles: for instance, respect for the rule of law, the protection of human rights, and/or the achievement of justice.<sup>8</sup> When a political actor, a set of rules, or an international institution reflects or embodies such standards, it can be said to be legitimate.

A *sociological* conception of legitimacy, on the other hand, considers the legitimacy of actors, rules, institutions, behaviours, or outcomes to be a matter of empirical fact rather than of normative judgment. According to this view, one can observe legitimacy in the extent to which a set of rules or an institution is *accepted* as such. As Robert Keohane has put it, '[i]n the sociological sense, legitimacy is a matter of fact. An institution is legitimate when it is accepted as appropriate, and worthy of being obeyed, by relevant audiences'.<sup>9</sup> In Scholte's succinct definition, 'legitimacy is a relationship between the governed and their governors'.<sup>10</sup> Collingwood notes that the concept is 'multi-leveled, simultaneously implying both agreement with the rules (whatever these may be) and – following Weber's understanding of the concept – the perception that the behaviour in question is legitimate'.<sup>11</sup> To some degree then, like beauty, legitimacy is in the eye of the beholder; it depends on perception and relationship.

In the Westphalian system of international politics, the legitimate holders of power and authority have traditionally been states.<sup>12</sup> In the contemporary era of global governance, however, states increasingly 'pool or delegate authority, or allow regulatory authority to shift to private or networked' sources of governance.<sup>13</sup> Accordingly, scholars of global governance are increasingly concerned with identifying the sources of political legitimacy beyond the state, both normative and sociological. Research on legitimacy asks such questions as: What are the normative, sociological, and political bases of 'legitimate' global governance?<sup>14</sup> Which actors should exercise power at the global level, and what rules should guide their action?<sup>15</sup> How might the effectiveness of crucial 'transplanetary regimes' for governing finance, migration, disease control, disarmament, and ecological integrity be improved by increasing their legitimate bases of authority beyond the state?<sup>16</sup> What are the 'legitimacy criteria'

<sup>7</sup> Allen Buchanan, 'Political Legitimacy and Democracy', *Ethics*, 112:4 (2002), p. 689.

<sup>8</sup> Buchanan, 'Political', p. 709.

<sup>9</sup> Robert O. Keohane, 'The Contingent Legitimacy of Multilateralism', GARNET Working Paper (September 2006), available at: {[http://www.garnet-eu.org/fileadmin/documents/working\\_papers/0906.pdf](http://www.garnet-eu.org/fileadmin/documents/working_papers/0906.pdf)} accessed 11 July 2013, p. 2.

<sup>10</sup> Jan A. Scholte, 'Towards Greater Legitimacy in Global Governance', *Review of International Political Economy*, 18:1 (2011), p. 111.

<sup>11</sup> Vivien Collingwood, 'Non-governmental Organizations, Power, and Legitimacy in International Society', *Review of International Studies*, 32:3 (2006), p. 444.

<sup>12</sup> Vivien Collingwood, 'State of the Art: Addressing the INGO "Legitimacy Deficit"', *Political Studies Review*, 3:2 (2005), p. 178; Mlada Bukovansky, *Legitimacy and Power Politics: The American and French Revolutions in International Political Culture* (Princeton: Princeton University Press, 2002); Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990).

<sup>13</sup> Steven Bernstein, 'Legitimacy in Intergovernmental and Non-state Global Governance', *Review of International Political Economy*, 18:1 (2011), p. 18.

<sup>14</sup> Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions', *Ethics & International Affairs*, 20:4 (2006), pp. 405–37; Robert O. Keohane, 'Global Governance and Legitimacy', *Review of International Political Economy*, 18:1 (2011), pp. 99–109.

<sup>15</sup> Ian Clark, 'Legitimacy in a Global Order', *Review of International Studies*, 29 (Special Issue 2003), pp. 75–96.

<sup>16</sup> Scholte, 'Towards Greater Legitimacy', pp. 110–20.

for evaluating the institutional processes of global governance?<sup>17</sup> More critically, what are the various processes of *legitimation* at work in global governance?<sup>18</sup> These are deep, complicated, and important questions, and legitimacy remains a central concern in ongoing debates about reforming global governance for greater effectiveness, accountability, and justice.<sup>19</sup>

As a variety of non-state actors expand the range and functions of global governance, *legitimacy* becomes an appropriate conceptual concern for considering the actions and influence of TNGOs. Although these actors do not exercise political rule *per se*, they do exercise significant influence in various aspects of global governance, and are precipitating a shift in the locus authority from states to non-state actors.<sup>20</sup> Through transnational policy advocacy and activism, formal and informal participation in intergovernmental institutions, and in processes of policy implementation, TNGOs and other non-state actors perform various authoritative and semi-authoritative functions: setting agendas, producing knowledge, building networks and coalitions, developing and implementing policy solutions, creating new norms and standards, and recommending policy change.<sup>21</sup> Alongside other non-state actors, TNGOs are forming new international regulatory arrangements in which they are active in the creation and enforcement of regulations.<sup>22</sup> Hall and Biersteker have noted that non-state actors of various kinds

often convey and/or appear to have been accorded some form of legitimate authority. That is, they perform the role of authorship over some important issue or domain. They claim to be, perform as, and are recognized as legitimate by some larger public (that often includes states themselves) as authors of policies, of practices, of rules, and of norms . . . In short, they do many of the things traditionally, and exclusively, associated with the state. They act simultaneously both in the domestic and in the international arenas. What is most significant, however, is that they appear to have been accorded a form of legitimate authority. . . . The state is no longer the sole, or in some instances even the principal, source of authority, in either the domestic arena or the international system.<sup>23</sup>

As Price observes, the point is not that these actors represent a challenge to the authority of the state, international institutions, or even the prevailing system of global governance. Rather, the point is that we cannot understand some key outcomes in world politics without taking account of TNGOs, which acquire their

<sup>17</sup> Daniel Mügge, 'Limits of Legitimacy and the Primacy of Politics in Financial Governance', *Review of International Political Economy*, 18:1 (2011), pp. 52–74.

<sup>18</sup> James Brassett and Eleni Tsingou, 'The Politics of legitimate Global Governance', *Review of International Political Economy*, 18:1 (2011), p. 10.

<sup>19</sup> Brassett and Tsingou, 'The Politics of Legitimate Global Governance'.

<sup>20</sup> Richard M. Price, 'Transnational Civil Society and Advocacy in World Politics', *World Politics*, 55:4 (11 December 2003), pp. 579–606; Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge University Press, 2002); Ann M. Florini, *The Third Force: The Rise of Transnational Civil Society* (Carnegie Endowment, 2000); Jessica T. Mathews, 'Power Shift', *Foreign Affairs* (1 January 1997), available at: {<http://www.foreignaffairs.com/articles/52644/jessica-t-mathews/power-shift>}.

<sup>21</sup> Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002), p. 4.

<sup>22</sup> Ronnie D. Lipschutz and Cathleen Fogel, "'Regulation for the Rest of Us?'" Global Civil Society and the Privatization of Transnational Regulation', in Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance*, Cambridge Studies in International Relations (New York: Cambridge University Press, 2002), pp. 115–40.

<sup>23</sup> Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002), pp. 4–5.

influence by virtue of their legitimacy.<sup>24</sup> Even though these actors cannot demand obedience, and although they do not claim any right to govern, through *legitimacy* they assert a right to be *heard*, if not heeded. For TNGOs, legitimacy does not necessarily *increase the scope* of their authority; rather, it *justifies the scope of authority they already claim*.<sup>25</sup>

Amidst the upswell in TNGO activity at the UN and in world politics generally during the 1990s, early research on the legitimacy of NGOs tended to tie legitimacy to a set of normative criteria drawn from democratic theory. NGOs and a robust global civil society were seen by some as part of the solution to the growing 'legitimacy gap' in global governance.<sup>26</sup> Later studies identified legitimacy problems associated with integrating TNGOs into the structures of global governance. As these organisations typically originated from the richer, Western countries of the northern hemisphere, sceptics argued they would likely further tip the balance of interests against those of the southern hemisphere and contribute to the fragmentation, privatisation, and further delegitimisation of an already unjust global order.<sup>27</sup> In addition, to those who privileged a state-centric conception of world order, the advocacy and governance activities of TNGOs *per se* lacked the legitimacy of state-based international politics.

Notwithstanding these debates, much early IR scholarship on international development NGOs explicitly tied the legitimacy of TNGOs to normative considerations. Hugo Slim, for instance, identified conformity to shared norms as being a primary source of TNGO legitimacy in world politics. NGOs, according to Slim, derive their ethical and moral legitimacy 'simply from claiming their legality within international law and by their being law-abiding' and from the moral substance of their mission, if based on the values of 'human equality, dignity, impartiality, justice, freedom and personal and collective responsibility'.<sup>28</sup> Put simply, in the normative sense, 'NGOs and their networks are legitimized by the validity of their ideas, by the values they promote, and by the issues they care about.'<sup>29</sup>

Aside from these purely normative standards, additional sources of TNGO legitimacy posited in the literature include both tangible and intangible forms. Tangible sources of legitimacy include direct support from people (membership, financial support, consent, intellectual agreement), expert knowledge, important organisational and interpersonal relationships ('what an organization knows and whom it knows'), and mission effectiveness ('good performance'). Partnership with or support from

<sup>24</sup> Richard M. Price, 'Transnational Civil Society and Advocacy in World Politics', *World Politics*, 55:4 (11 December 2003), pp. 579–606.

<sup>25</sup> Bernstein, 'Legitimacy', p. 21.

<sup>26</sup> Sebastian Haunss, 'Challenging Legitimacy: Repertoires of Contention, Political Claims-Making, and Collective Action Frames', in Achim Hurrelmann, Steffen Schneider, and Jens Steffek (eds), *Legitimacy in an Age of Global Politics*, (New York: Palgrave Macmillan, 2007), pp. 160–1.

<sup>27</sup> Sebastian Haunss, 'Challenging Legitimacy: Repertoires of Contention, Political Claims-Making, and Collective Action Frames', in Achim Hurrelmann, Steffen Schneider, and Jens Steffek, *Legitimacy in an Age of Global Politics* (New York: Palgrave MacMillan, 2007), p. 161.

<sup>28</sup> Hugo Slim, 'By What Authority? The Legitimacy and Accountability of Non-Governmental Organisations', International Council on Human Rights Policy International meeting on Global Trends and Human Rights – 'Before and After September 11', Geneva (10–12 January 2002), pp. 6–7.

<sup>29</sup> Miklos Marschall, 'Legitimacy and Effectiveness: Civil Society Organizations', *Transparency International* (1 November 2002).

powerful actors, sources of financial support, internal democracy, operational transparency, and constituent accountability are additional tangible factors identified in the literature as sources of TNGO legitimacy. Crucially, the strategic orientation of a TNGO might also be an important source of legitimacy.<sup>30</sup> On the other hand, intangible sources of legitimacy identified in the literature can be somewhat more difficult to generate, including such qualities as credibility, reputation, trust, and integrity. In contrast to the tangible sources of legitimacy, these ‘thrive on perception to function more like belief than fact. They can rely on image rather than reality and may not require any empirical experience to influence people one way or the other.’<sup>31</sup>

Fewer scholars have examined the sources of a particular TNGO’s legitimacy or the processes through which a specific TNGO seeks to generate and maintain legitimacy. Oliver Walton has sketched a theoretical framework for understanding how domestic, national-level NGOs generate and maintain legitimacy. The process can be exceedingly complex, organisationally specific, and may involve different *kinds* of legitimacy: normative, cognitive, regulatory, and pragmatic.<sup>32</sup> According to Walton, the process of legitimation is interactive and dynamic, depending not just on the work and characteristics of NGOs, but also on the ‘approaches, interests, and perceptions of the stakeholders’, perceptions that are subject to variation over time and across stakeholders. Put differently, a TNGO’s target audience (rather than the TNGO itself or the issue it addresses) determines which types of legitimacy are required, and which characteristics secure such legitimacy.

Walton’s formulation in the domestic context is a useful signpost for the examination of NGO legitimacy in the transnational realm. Attention to such relational aspects of legitimacy is precisely what most of the literature on TNGOs lacks. The concept of the legitimacy of a political order (be it national, international, or global) often references the requirements of political authority and political obligation within that order, including acceptance, obedience, and compliance.<sup>33</sup> By contrast, the legitimacy of a TNGO generates pressure for other actors to consider the interest of that group, as opposed to perpetuating a relationship of obligation.<sup>34</sup> Compliance with

<sup>30</sup> Vivien Collingwood, for instance, has noted the different paths TNGOs follow as they try to exercise influence at the international level. Some TNGOs seek to engage cooperatively with governments and corporations, working within the system to influence policy. In contrast, the ‘rejectionist’ approach favoured by other NGOs maintains that a radically different set of policies than those available in the current neoliberal global order is needed to address problems of social justice, environmental degradation, poverty, or conflict. Collingwood, ‘Non-Governmental Organisations’, p. 442.

<sup>31</sup> Slim, ‘By What Authority?’, p. 9. For Slim, these sources of an NGO’s legitimacy are ‘intricately connected to specific mechanisms of accountability’, consisting primarily of a process including provisions for reporting, involving, and responding. Accountability therefore is a crucial aspect of legitimacy.

<sup>32</sup> Oliver Walton, ‘Conflict, Peacebuilding and NGO Legitimacy: National NGOs in Sri Lanka’, *Conflict Security and Development*, 8:2 (April 2008), p. 138, citing Sarah Lister, ‘NGO Legitimacy Technical Issue or Social Construct?’, *Critique of Anthropology*, 23:2 (1 June 2003), pp. 175–92. *Normative legitimacy* refers to a basis of acceptable and desirable norms, standards, and values. *Cognitive legitimacy* is ‘based on goals and activities that fit with broader social understandings of what is appropriate, proper, and desirable’. *Regulatory legitimacy* is achieved through abiding by laws and regulations. *Pragmatic legitimacy* is acquired by conforming to demands for services, partnership, or by receiving private funding.

<sup>33</sup> George Klosko, ‘Legitimacy, Authority, and Political Obligation’, in Achim Hurrelmann, Steffen Schneider, and Jens Steffek (eds), *Legitimacy in an Age of Global Politics* (New York: Palgrave MacMillan, 2007), pp. 57–74.

<sup>34</sup> Marianne Beisheim, ‘NGOs Und Die (politische) Frage Nach Ihrer Legitimation. Das Beispiel Klimapolitik’, in Achim Brunngraber and Heike Walk (eds), *NGOs Im Prozess Der Globalisierung. Machtige Zwerge – Umstrittene Riesen* (Bonn: Bundeszentrale für Politische Bildung, 2005), cited in Haunss, ‘Challenging Legitimacy: Repertoires of Contention, Political Claims-Making, and Collective Action Frames’, p. 161. Beisheim’s argument is that as long as TNGOs are not able to make collectively binding decisions, these actors do not need to legitimate their actions *vis-à-vis* society.

the policy advocacy demands of TNGOs is voluntary, resulting from persuasion and other instrumental and norm-driven dynamics rather than political coercion. Yet, to be an effective persuader one must be *accepted* as a legitimate participant in the debate. Within this conception, TNGO legitimacy must be conferred and cannot be commandeered.

Accordingly, this article argues that a TNGO's 'sources of legitimacy' are best understood as variables that are affected by the audiences conferring (or failing to confer) that legitimacy. The very same 'source of legitimacy' – for example, support from powerful actors, membership in elite social networks, or strategic orientation – can be viewed with approbation by one audience and with suspicion by another. The legitimacy of a TNGO cannot be assessed without examining both sides of the relationship: the TNGO itself and the audience that grants it the legitimacy it requires.

### *Legitimacy of TNGOs as a relational concept*

In this study, legitimacy is defined as a relational concept. It is granted or denied in a relationship between at least two parties, in which actor attributes play a role but are not decisive. Thus, rather than attempting to catalogue the purported *a priori* bases of legitimacy, the present discussion is explicitly empirical, not normative: it does not propose what standards *should* count as required criteria for legitimate participation in processes of global governance; rather, it seeks to describe what *does* count in a TNGO's pursuit of legitimacy. Only such a relational conception can explain why a given TNGO is granted legitimacy in one context and denied it in another.<sup>35</sup>

A key methodological question arises from this empirical conception: How do we know legitimacy when we see it? In order to avoid circularity, the definition and measurement of legitimacy must be distinct from indicators of effectiveness. As a baseline, public statements and media reports can shed light on the opinions and attitudes of target audiences concerning the legitimacy of a TNGO. Favourable reportage in the news media, supportive statements by public officials, and a willingness for target audiences to be associated with the TNGO indicate that the audiences have conferred some measure of legitimacy. On the other hand, negative news stories and derisive or dismissive attitudes expressed publicly by key audience members are indicators that the TNGO lacks legitimacy in the eyes of these audiences. Less publicly, personal interviews can reveal private attitudes concerning the legitimacy of a TNGO. Financial support from target audiences is another indicator that these audiences consider the TNGO to be legitimate. Not least, the very act of 'taking the meeting' with a TNGO indicates that the target audience has conferred legitimacy to that group. Just as, for instance, opponents of negotiating with terrorists argue that doing so gives legitimacy to terrorist groups and methods, so the very decision to 'take the meeting' with a TNGO indicates an acknowledgement of that TNGO's legitimacy.<sup>36</sup>

Drawing on evidence from public statements by government and business officials, newspaper reports, self-assessments by TI leaders, and interviews with TI leaders and government officials, the case studies that follow examine the levels of legitimacy that

<sup>35</sup> Thanks to an anonymous reviewer for suggesting this clear statement.

<sup>36</sup> Peter R. Neumann, 'Negotiating with Terrorists', *Foreign Affairs*, 86:1 (2007), pp. 128–39.

Transparency International received from its target audiences in Germany and France, respectively. Before turning to the case studies the next section provides an overview of Transparency International and its activities during the emergence of the international regime of anti-corruption in the 1990s.

### **III. Transparency International and the international regime of anti-corruption**

In the late 1990s, corruption became a major international policy problem to be tackled for the first time in international law. The end of the Cold War, the liberalisation of the global economy and the advance of globalisation, the spread of liberal democratic principles, and the emergence of game-changing corruption scandals among business and political elites in Western Europe brought about a shift in global norms concerning corruption. Prior to this time, the prevailing attitude had been that corruption was a problem to be tolerated in developing countries in exchange for global political stability, or even that corruption might be beneficial to development and modernisation.<sup>37</sup> By contrast, during this period corruption was redefined as a ‘cancer’ to be eradicated from the global economy, wherein no country was immune from its scourge.

Alongside this shift in norms (and a concurrent trend toward legalisation in world politics), states, international organisations, and non-state actors produced a raft of international legal agreements, recommendations, and policy statements on combating global corruption. Following the typical lifecycle of norm emergence identified by Finnemore and Sikkink, an international regime surrounding a new norm of anti-corruption emerged.<sup>38</sup> The basis of the norm was that corruption was both wrong and harmful to economic development and political and economic liberalisation. In this sense, the anti-corruption norm was perfectly compatible with those of neoliberal globalisation.

The legal centerpiece of this new regime was the 1997 OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions. Together with soft law recommendations, this legally binding ‘hard law’ international treaty obligated its signatories to criminalise the bribery of foreign public officials, end the tax-deductibility of those bribes, and establish meaningful monitoring and enforcement mechanisms to ensure compliance. For decades previous to this Convention, bribery in international business had been widely supported among OECD states as a strategic trade policy, particularly for industries with important impact on a state’s foreign policy goals, global influence, or GDP – such as the arms industry, natural resource extraction, and construction.<sup>39</sup> Signing the OECD Convention, not to mention complying with its obligations, required a significant shift in policy in at least two major OECD states: Germany and France. Up until

<sup>37</sup> Samuel P. Huntington, *Political Order in Changing Societies* (Yale University Press, 1968); J. S. Nye, ‘Corruption and Political Development: A Cost-Benefit Analysis’, *The American Political Science Review*, 61:2 (1 June 1967), pp. 417–27, doi:10.2307/1953254.

<sup>38</sup> Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’, *International Organization* 52:4 (1998), pp. 887–917; Jennifer L. McCoy and Heather Heckel, ‘The Emergence of a Global Anti-corruption Norm’, *International Politics*, 38:1 (2001), pp. 65–90.

<sup>39</sup> Transparency International, ‘Bribe Payers Index: Overview’, *Transparency International – The Global Coalition Against Corruption* (2013), available at: {<http://www.transparency.org/research/bpi/overview>}.

this point, both these states had permitted the tax-deductibility of foreign bribes; consequently, complying with the Convention required significant policy and legislative change for both countries.

Emerging during this period as the leading non-state advocate for the criminalisation of transnational bribery, Transparency International was a significant actor in the new regime. Founded in Berlin by former World Bank executives of German nationality, TI quickly established itself as a persuasive transnational norm entrepreneur and policy advocate, and a major voice concerning international policy change on transnational bribery. TI influenced the World Bank to recognise corruption as 'the single greatest obstacle to economic and social development'.<sup>40</sup> Its annual Corruption Perceptions Index became a key tool for raising awareness about global corruption, and it developed widely respected tools for businesses and organisations seeking to control bribery and corruption in their operations. Today, TI is arguably the most prominent TNGO devoted to combating corruption in the global economy.

Logistically, TI functions as a transnational advocacy network.<sup>41</sup> In addition to a secretariat in Berlin which helped to coordinate its international anti-corruption efforts, in its early years TI's organisation consisted of approximately 85 independent national chapters, each one locally established, independent, and responsible for determining national programs of action to suit state-specific circumstances.<sup>42</sup> Within OECD states, TI operated through elite networks to persuade important decision-makers in implementing anti-corruption policy, employing a variety of strategies including communicative strategies such as reasoned discourse and reframing, as well as harnessing its moral authority and exploiting the vulnerabilities of political elites for whom it might be important to avoid association with charges of 'corruption'.<sup>43</sup> In the late 1990s, TI was most effective in those cases where it was able to call on states and business leaders to justify policies that were not in compliance with the state's avowed anti-corruption norms. Where TI was perceived by government officials and business leaders as a legitimate actor with moral authority, it was able to advocate successfully for adherence to emergent international anti-corruption norms and to promote state compliance with the OECD Convention.

However, the legitimacy of TI as a policy advocate on anti-corruption was not consistent among its various target audiences. As revealed in media reports, public statements by public officials and business leaders, and interviews with public officials and TI's leaders, TI was accepted as highly legitimate in Germany but was rejected as non-legitimate in France. In addition, press reports, interviews, self-assessments, and other evidence reveal that TI played a direct role in the policy process leading to anti-bribery compliance in Germany, but played no similar role in France. In the

<sup>40</sup> The World Bank, 'Anticorruption Home Page', *The World Bank Group* (2001), available at: {<http://www1.worldbank.org/publicsector/anticorrupt/index.cfm>} accessed 26 June 2001. Also cited in The World Bank, 'Empowering the Poor to Fight Corruption', *PovertyNet* (2011), available at: {<http://go.worldbank.org/APAR27YJ50>} accessed 16 July 2013.

<sup>41</sup> Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (New York: Cornell University Press, 1998).

<sup>42</sup> Transparency International, 'Our Chapters', *Transparency International – The Global Coalition Against Corruption* (2013), available at: {[http://www.transparency.org/whoweare/organisation/our\\_chapters](http://www.transparency.org/whoweare/organisation/our_chapters)} accessed 16 July 2013.

<sup>43</sup> Risse, 'Transnational Actors and World Politics', discusses such strategies, pp. 267–8. For a current statement of TI's principal anti-corruption strategies and activities, see Transparency International, 'What We Do', *Transparency International – The Global Coalition Against Corruption* (2013), available at: {<http://www.transparency.org/whatwedo>} accessed 16 July 2013.

absence of legitimacy among its target audiences in France, TI wielded little if any influence on France's compliance policies with respect to the OECD Convention.

#### **IV. Transparency International in Germany**

At the outset of its activities in Germany in the early 1990s, TI was not automatically accepted as a legitimate organisation. However, over time it was able to develop a high level of legitimacy among major business leaders and government policymakers, its key target audiences. It did so by virtue of its elite social network connections and its commitment to a non-confrontational strategy for advocating anti-corruption. TI received favourable press coverage in the media in Germany, policymakers recognised and solicited its expertise on anti-corruption policy, and business leaders and policy elites accepted it as an important advocate on issues related to anti-corruption in development assistance, international business practices, and domestic politics in Germany. As a result of this legitimacy, TI was able to play a key role in shifting dominant attitudes in Germany concerning transnational bribery and in this way it prepared the ground for business and government support for the OECD Convention. In the case of legislation to end the tax-deductibility of foreign bribes, moreover, TI played an absolutely direct role.

##### *Legitimacy: from resistance to acceptance*

In 1993, a small group of German academics and former executives of the World Bank established TI's national German chapter (TI-Germany) in Munich and the international secretariat of the transnational TI organisation (TI-S) in Berlin. Both groups were devoted to fighting corruption internationally, and their advocacy activities emphasised the harmful effects of corruption in the developing world; the activities of TI-Germany also raised awareness about corruption in Germany itself. From 1995 to 1998, both branches shifted their efforts to concerted lobbying for the adoption in Germany of the anti-corruption initiatives then underway at the OECD, aimed at curbing the supply-side of transnational bribery. TI-Germany lobbied businesses and the government to control the widespread German practice of *schmiergeld* – paying 'lubricant money' to smooth the way in international business transactions. The prevailing assumption among business and government in Germany at the time was that 'without this "lubricant" no business can take place' and therefore transnational bribes were acceptable – and also tax-deductible – business expenses.<sup>44</sup>

At the outset business and government opposed changes in German policy and resisted TI's anti-corruption advocacy. According to TI's managing director at that time, Hansjorg Elshorst, there was 'clearly a strong opposition of European business against TI because they felt that corruption is a nice way of being the most successful, of having a comparative advantage with the United States, where that was forbidden'.<sup>45</sup> TI, moreover, 'evoked much resentment in the Bonn bureaucracy due

<sup>44</sup> Barbara Crutchfield George, Kathleen A. Lacey, and Jutta Birmele, 'The 1998 OECD Convention: An Impetus for Worldwide Change', *American Business Law Journal*, 37:3 (2000), p. 513.

<sup>45</sup> Hansjoerg Elshorst, Managing Director, Transparency International, Interview, Berlin (2 July 2001).

to its public criticism of German policies like those permitting the tax-deductibility of bribes paid abroad'.<sup>46</sup> According to TI's Chairman Peter Eigen, the group's members were 'received as real trouble makers and enemies' by Germany's representatives at the OECD, and by members of the German business community who supported bribery as 'something which one had to do if one wanted to do business internationally'.<sup>47</sup>

When TI-Germany attained official non-profit status in 1996, German-based multinational corporations began endorsing TI through corporate memberships and financial support, and adopting its anti-corruption strategies. By 2001, TI-Germany's most significant financial supporters were Germany's largest and most prestigious firms, including ABB, BASF, DaimlerChrysler, Deutsche Lufthansa, Robert Bosch, and Siemens. Business leaders and government officials attended private meetings with TI's German leaders, and in 1997, the CEOs of 25 of Germany's major multinationals endorsed TI's anti-corruption efforts in an open letter to the OECD. When they began the legislative process to criminalise foreign bribery in compliance with new OECD norms, German government officials granted TI a direct role in drafting the actual legislation. This pattern of support and collaboration suggests that business and government in Germany accepted TI as a highly legitimate advocate for anti-corruption.

Significantly, the shift from early resistance to full acceptance suggests that, far from being automatically accepted, TI was able to *construct* this legitimacy. It did so through two key means: elite social networks and a non-confrontational strategy.

### *Elite social networks*

TI's presence in Germany, and indeed its organisational development and rise from a small operation to a prominent international TNGO, benefited from the activities and personal connections of at least three key German individuals: Peter Eigen, Hansjoerg Elshorst, and Michael Wiehen. Eigen is known as the founder of TI. After 25 years with the World Bank, including two years in Kenya as director of operations for East Africa, Eigen left the Bank in 1993 in frustration over its failure to address the problem of corruption in international development.<sup>48</sup> With support from Elshorst, former head of the German Agency for Technical Cooperation (GTZ), and Wiehen, another former World Bank executive, Eigen first established TI's presence in Germany in a one-room Berlin office, with no outside financial support.<sup>49</sup> Thus TI's early leaders, working on a volunteer basis and committed to the cause of anti-corruption reform, began building a dynamic TNGO that by 2001 would have total revenues of over DM 10 million (US \$4.5 million) from more than

<sup>46</sup> Arnold J. Heidenheimer and Holger Moroff, 'Controlling Business Payoffs to Foreign Officials: The 1998 OECD Anti-Bribery Convention', in Heidenheimer *et al.*, (eds), *Political Corruption: Concepts & Contexts* (3rd, edn, New Brunswick: Transaction Publishers, 2002), p. 950.

<sup>47</sup> Peter Eigen, Founder and Chairman, Transparency International, Interview, Berlin (3 September 2001).

<sup>48</sup> Raymond Bonner, 'The Worldly Business of Bribes: Quiet Battle is Joined', *New York Times* (8 July 1999).

<sup>49</sup> Transparency International, 'History', *Transparency International – The Global Coalition Against Corruption* (2002), available at: {[http://www.transparency.org/about\\_ti/history.html](http://www.transparency.org/about_ti/history.html)} accessed 23 April 2002.

three dozen state-agency donors, private foundations, private businesses, and a network of national chapters in 85 countries.<sup>50</sup> As one observer noted about TI, ‘the beginning of the new organization can be characterized as an affair centred around and carried by a few personalities’.<sup>51</sup> In large part due to these personalities and their influential connections, TI – both the German national chapter and the international movement headquartered in Berlin – enjoyed a high level of legitimacy among and access to Germany’s business and political elite.

As former director of the GTZ, Elshorst used his contacts there to keep TI afloat in the early years. Noting that TI was not always the popular, publicly lauded organisation it would become, Elshorst said: ‘In the phase before the OECD Convention, they wanted to kill TI. I protected TI via my old job in the aid system by keeping them alive financially and politically.’<sup>52</sup> Equally important during this early period was TI’s ability to attract an elite transnational network of experts to its leadership ranks, including such prominent world personalities as Luis Moreno Ocampo, Olusegun Obasanjo, and Oscar Arias Sánchez.<sup>53</sup>

TI-Germany also managed over the span of a few years to develop from a small group led by academics on a volunteer basis to a high-profile national non-profit group with corporate support from over 25 ‘world class’ German corporations.<sup>54</sup> Close observers have attributed much of this development to the personal skills and contacts of Wiehen. Eigen noted, for instance, that (especially in contrast to the national chapter in France) TI-Germany ‘was particularly strong under the leadership of Mike Wiehen and quite a number of companies’. Another TI colleague commented, ‘it took a while, but . . . after Michael became chairman of TI-Deutschland, he began to . . . establish very good contacts with German industry’.<sup>55</sup>

‘For all its cosmopolitan ambitions’, noted the *Economist* in 1998, ‘the governing elite of German business is still made up almost entirely of men in their 50s and 60s . . .’.<sup>56</sup> This homogeneity of the German business and political elite had helped to maintain the taboo surrounding the topic of corruption in Germany long after the United States first introduced its anti-corruption stance on the international agenda, in the late 1970s. This homogeneity also helps to explain the success of TI’s anti-corruption interventions in the mid-1990s: the leaders of TI in Germany were

<sup>50</sup> ‘Transparency International 2001 Audited Financials’, 31 December 2001, available at: {[http://www.transparency.org/files/content/ouraccountability/TIS\\_2001AuditedFinancials.pdf](http://www.transparency.org/files/content/ouraccountability/TIS_2001AuditedFinancials.pdf)}, accessed 16 July 2013. On TI’s origins and early successes, see also Frederick Galtung and Jeremy Pope, ‘The Global Coalition against Corruption: Evaluating Transparency International’, in Andreas Schedler, Larry Diamond, and Marc F. Plattner (eds), *The Self-Restraining State* (London: Lynne Rienner, 1999), pp. 257–82.

<sup>51</sup> Werner Van Ham, *Transparency International (TI) – The International TNGO Against Corruption: Strategic Positions Achieved and Challenges (A Case Study)*, Dissertation, Anglia Polytechnic University: Masters of Business Administration, 1998.

<sup>52</sup> Elshorst, Interview

<sup>53</sup> During his term as Chair of TI’s advisory council, Obasanjo was elected President of Nigeria; Ocampo is a renowned independent human rights lawyer and anti-corruption activist, based in Argentina, who in 2003 became the first Chief Prosecutor of the International Criminal Court at The Hague; Sánchez, former President of Costa Rica, won the Nobel Peace Prize in 1987.

<sup>54</sup> Michael Wiehen, Chairman: Transparency International – Germany, Interview, Berlin (17 July 2001). For a critical account of the relationship between TI-Germany and its corporate supporters, see Claudia Eltermann, ‘Feigenblatt der Großindustrie’ (A fig leaf for big business), *Der Spiegel* (4 November 2003).

<sup>55</sup> Eltermann, ‘Feigenblatt der Großindustrie’.

<sup>56</sup> ‘Deutschland uber alles?’, *Economist* (4 July 1998), p. 59.

essentially part of the same elite circles. Explaining the difference in TI's perceived legitimacy and effectiveness in Germany as opposed to France, Eigen noted:

we are closer to the [establishment] ... I have a lot of personal contacts to big business, you know, I know these people ... the head of Siemens is a relative of mine. Mike Wiehen, when he goes, enters a room with some big shots, you know, they respect him, because he has worked as a director of the World Bank, he knows how to deal with powerful business people.<sup>57</sup>

### *Non-confrontational strategy*

In addition to its access to elite social networks, TI owes much of its legitimacy in Germany to its allegiance to non-confrontational, 'consensus-building' strategies for promoting anti-corruption among its target audiences in business and government. From the outset TI eschewed scandal, public muckraking, or the 'outing' of particular firms engaged in corrupt practices. Instead, the strategic approach was to raise awareness about the harmful effects of corruption, to develop and disseminate practical anti-corruption tools for business and government, and to build collaborative anti-corruption coalitions between business, government, and civil society. TI-S also supported the work of TI's national chapters around the world by facilitating exchanges of information throughout its international network, coordinating activities on a variety of international and national anti-corruption initiatives, and promoting the cause of international anti-corruption on the global governance agenda.

Among TI's flagship activities that initially accorded it an international profile were its annual Corruption Perceptions Index and related Bribe Payers' Index; Global Corruption Report publication; annual general meeting and biannual International Anti-Corruption Conference; annual integrity awards; and its flagship programme for transparency in international procurement practices, the Integrity Pact. The group produced a comprehensive anti-corruption 'source book' and specialised anti-corruption 'tool-kits' to support the work of anti-corruption activists in a variety of contexts and translated these materials into several languages, including Albanian, Portuguese, Romanian, Serbian, Spanish, and French.<sup>58</sup> They also disseminated research on corruption through independent and joint publications, and through web-based 'corruption on-line research information services', which compiled and published a list of 'daily corruption news' items from a variety of international news sources. Notably, TI generated no such news on its own. Explicitly eschewing the investigation of alleged corruption or any attempt to 'name and shame' corrupt actors, TI's non-confrontational 'inside-the-tent' approach to international anti-corruption lent it credibility among multinational corporations, governments, private foundations, and other like-minded public interest groups. This non-confrontational strategy was key during the latter half of the 1990s, when TI shifted its focus to the promotion of the anti-bribery initiatives promulgated by the OECD.<sup>59</sup> In Germany TI worked

<sup>57</sup> Eigen, Interview.

<sup>58</sup> For a critical review of TI's anti-corruption activities, and its Source Book in particular, see Barry Hindess, 'International Anticorruption as a Program of Normalisation', Paper presented at the Annual Meeting of the International Studies Association, Montreal (2004).

<sup>59</sup> Although TI-S did not devote significant material resources to the OECD anti-corruption programme, several TI leaders pursued a very active OECD-focused campaign on a volunteer basis. TI's 'point men' on this portfolio were Michael Wiehen of TI-Germany, Peter Rooke of TI-Australia, and Fritz Heimann of TI-USA.

especially hard to persuade business and policymakers that German businesses and citizens ought not to export corrupt business practices to foreign countries. Wiehen described TI-Germany's activities on behalf of the OECD anti-corruption programme, noting 'we perform a function to start the debate, to keep the debate going, and to make sure that from time to time the public is informed about the issue.'<sup>60</sup> Thus, on the OECD Convention in particular, TI's main strategy was simply to articulate the norm of anti-corruption in a variety of elite fora, including private meetings with business leaders and government officials, semi-public conferences, government agencies, as well as in public media.

### *Influence on the policy process*

Perhaps the most important venue for this norm articulation was a series of private 'closed-door' meetings with top executives of major German multinational corporations that took place in Berlin in the mid-1990s, meetings which proved key to TI's success in shifting attitudes in Germany on transnational bribery.<sup>61</sup> Through the course of these meetings, several of which were chaired by the much respected former German President Richard Weizsacker, Eigen personally made the case to leading German multinationals that they ought to curb bribery in their international business activities. Eigen argued that bribery in international business transactions was simply unnecessary; moreover, he claimed that it was possible to eradicate it and effectively solve the competitive dilemma that induced companies to employ such practices. He argued that German companies should take a leadership role in promoting efforts to curb bribery in international business. They were to do this in two steps: first, by adopting TI's 'Integrity Pact' model, whereby businesses would agree to reject foreign bribery in competitive contracts; and, second, by pushing the German government to take an active position at the OECD by getting competitor states to adopt functionally equivalent anti-bribery policies.

The normative arguments presented by Eigen in these meetings proved successful in shifting the dominant attitudes of several of Germany's top chief executives with respect to foreign bribery and corruption. In 1996, some of the largest German companies adopted TI's Integrity Pact. They then began to lobby the government to adopt firm anti-bribery rules through the OECD. In May 1997 the leaders of some of Germany's most prominent multinational corporations sent an open letter to the OECD Economic Ministers, calling on all European governments to criminalise international corruption and to end the tax deductibility of bribes paid to officials abroad. Noting widespread scandals relating to bribery 'all over Europe', the business leaders confirmed their support for TI and endorsed political and legislative actions against transnational bribery. The letter demanded that European Union countries agree on 'united action to prohibit bribery beyond the EU's borders' and 'eliminate tax deductibility of foreign bribes'. It concluded,

<sup>60</sup> Wiehen, Interview. See also report in 'UNTERNEHMEN Schmierer und Schmierer Lassen', *Handelsblatt* (17 July 2001).

<sup>61</sup> Hugh Williamson, 'A Battler Against Bribery – Interview with Peter Eigen', *Financial Times* (13 October 2003).

As businessmen, we call on the EU states to eliminate the scourge of bribery from international as well as domestic transactions. This means implementation without delay of the OECD Recommendations. Effective monitoring mechanisms should be put in place to ensure that these essential measures are effectively enforced.<sup>62</sup>

Almost immediately following publication of this letter, OECD states began the negotiations for the Convention on combating bribery of foreign public officials in international business transactions.

When Germany adopted the OECD Convention, ratified the treaty, and implemented the criminalisation of foreign bribes, there was already general support among German multinationals for this change in policy. German companies, prompted by the norm articulation of TI, played a key role in initiating this change. Eigen's description of the course of these events is worth quoting at length:

Now TI managed to change this, managed to really change this consensus. And we mainly worked with big business in Germany. We had confidential meetings with leaders of German large companies ... three leaders in four years. Some of them were chaired by Richard Weizsacker, the former President, therefore we were able to attract some really high level policy makers in these meetings. And we gradually led to a recognition by these people that what they were doing was corruption. And more importantly, that this type of corruption was extremely destructive in the economies in which they operated, and that it was very risky to them – at the time, some German companies had been caught [bribing] in Singapore, and places like this – and that, in our opinion, it was possible to stop bribing without losing business. And this squaring the peg was something which we managed to convey to them ...

... and at that time we made the leaders of these companies sign an open letter to their ministers who were in charge of the OECD negotiations. And that open letter has been signed by around 20 people, including Siemens – this was the chairman of the board of Siemens – including Daimler-Chrysler, including Lufthansa, including Bosch, including Deutsche Telecomm, and including also a few American companies.

This is an open letter which has been signed by the business community and sent to the various ministers, in which they basically urged the ministers to sign the Convention. And that must have been in 1997 ... And from then on, the companies helped us to push the Convention. Partly, it was the assumption that it will probably not succeed to get a Convention. But each of the countries wanted to be seen to push it, and probably most of them were surprised that the Convention was actually signed in December 1997. And I was surprised. I have never seen a Convention signed so quickly.<sup>63</sup>

When it came to ending the tax-deductibility of foreign bribes, TI's influence on the policy process was even more direct and immediate. TI's German leaders had close contacts within the Social Democratic Party (SPD), which was the leading opposition party in Germany until it formed a coalition government with the Greens under the leadership of Gerhard Schroeder in 1998. Under TI's influence, the party first took up the issue of tax deductions for bribes as the opposition, and TI subsequently 'reminded' the new SPD government in 1998 that ending tax deductibility still remained to be done.<sup>64</sup> Subsequently, TI-Germany played a direct role in

<sup>62</sup> Transparency International, Press Release: 'Business Leaders call on OECD Ministers to "Act against International Corruption"', Berlin/Paris (21 May 1997). The signatory business leaders included chairmen, chief executives, and board members of the following German companies: Robert Bosch GmbH, Siemens AG, Haas Consult, Asea Brown Boveri AG, Daimler Benz AG, Hartmann & Braun, Krone AG, and Metallgesellschaft AG.

<sup>63</sup> Eigen, Interview.

<sup>64</sup> Eigen, Interview.

drafting the legislation. The Chairman of TI-Germany, Wiehen, saw the draft law before it was passed by Parliament. In Bonn, Wiehen met with a government representative and took the opportunity to explain why in TI's view the law was inadequate. The representative indicated that if Wiehen could draft proposed changes within 48 hours, there was a chance these changes could be incorporated into the government's legislation. According to Wiehen, 'We got her a draft in 47 hours and she changed the law. And what we proposed became law in Germany.'<sup>65</sup> In this case, due to its elite contacts in government, TI-Germany had a direct impact on German policy.

In sum, TI in Germany played a key role in changing business attitudes and government policy towards foreign bribery. Considering the social and political barriers to discussing corruption in German business circles in the early 1990s, this was not an easy feat. In 1997 Eigen noted that 'just five years ago you couldn't even get German companies to admit they gave bribes in the developing world... The subject was taboo to the same extent that the practice was widespread.'<sup>66</sup> The change in attitude in Germany about international corruption is especially noteworthy, considering that German businesses, in contrast to American, British, and even French business cultures, have tended to retain 'bad habits' largely eradicated from most international business, such as corruption in purchasing, territorial and strictly formal hierarchies, and relative homogeneity among the governing business elite.<sup>67</sup>

Because of their membership in elite social networks and their commitment to a non-confrontational strategy, TI's German leaders were able to get the conversation started in Germany about curbing the supply-side of transnational bribery; ultimately, the tide in Germany changed. Michael Wiehen of TI-Germany noted:

the OECD Convention wasn't exactly invented by us. But we took it as a godsend that somebody had thought of drafting it and we put all our weight behind getting the Convention passed. Without us in the critical summer of '97, without our pressure through business, the Convention would not have passed.<sup>68</sup>

TI in Germany *led* business. Despite having originated independently of major national companies – indeed, despite receiving substantial opposition from them – and in the face of a strong taboo against broaching the topic of corruption, TI eventually changed the dominant attitudes about corruption among Germany's leading corporations. Subsequently, the German government responded to business demands for international, 'united action' against bribery in international business. TI's role in this shift was critical.

TI was able to play such a vital role because its target audiences in business and government conferred sufficient legitimacy on the group to grant it access and opportunity to persuade. TI's leaders in Germany were able meet with business and government elites to present their anti-corruption arguments. As students of administrative behaviour have noted, 'administrators manifest a markedly more moral attitude in those cases in which they have to explain and defend their decisions in person – to someone sitting just across a desk from them, rather than to someone reading their

<sup>65</sup> Wiehen, Interview.

<sup>66</sup> Peter Eigen, quoted in Neil Jr King, 'Coming Clean: EU Firms Await Pact on Banning Bribery with Mixed Feelings; As OECD Prepares Treaty, Members Fear Losses and Lax Enforcement; World Bank, IMF Join In', *Wall Street Journal (Europe)* (23 September 1997).

<sup>67</sup> 'Deutschland uber alles?' *Economist* (1998).

<sup>68</sup> Wiehen, Interview.

bureaucratise thousands of miles away'.<sup>69</sup> The legitimacy afforded to TI by its target audience, along with the personal access granted through that legitimacy, proved invaluable to its success.

## V. Transparency International in France

In stark contrast to the case of TI in Germany, in France both the transnational TI organisation and the national chapter (TI-France) lacked legitimacy and played no role in the formulation of French policy on foreign bribery and the OECD Convention. TI's target audiences in France – business leaders and government policy-makers – objected to its participation in the international processes surrounding the OECD Convention, did not include TI leaders in meetings on the matter, did not openly associate themselves with TI's anti-corruption campaigns, and did not open themselves to the possibility of its persuasion. TI's evident lack of legitimacy kept it largely on the sidelines of French policymaking on international corruption issues, both during the period of the anti-bribery Convention's negotiation and conclusion (roughly 1996–7) and throughout a drawn-out period of controversy during which France delayed its ratification and compliance with the Convention's requirements (1997–2001). According to key French officials at the time, TI lacked public visibility in France and had no significant influence on business or government attitudes in France.<sup>70</sup> To the extent that TI figured anywhere in French public life during this time it was in disparaging portrayals of the organisation in French newspapers, which explicitly asserted the non-legitimacy of this TNGO in France.

### *Non-legitimacy: criticism and rejection*

TI's non-legitimacy in France was most clearly evident in criticism published in influential media outlets. Both the widely read satirical weekly publication *Le Canard enchaîné* and the intellectual monthly *Le Monde diplomatique* published damaging salvos in what Eigen described as a 'vicious campaign' against TI.<sup>71</sup> The pointed thrust of this 'campaign' was to accuse TI of direct links with the CIA. *Le Canard enchaîné* first made this allegation in the context of scathing criticism of TI in the fall of 1999. Calling TI's anti-corruption work 'laughable', the article personally

<sup>69</sup> Robert E. Goodin, *Motivating Political Morality* (Cambridge, MA: Blackwell, 1992), p. 130.

<sup>70</sup> Confidential Interview, Official of the French Ministry of Finance and Economics (Direction du Trésor), Paris (21 September 2001); Confidential Interview, Official of the French Ministry of Foreign Affairs (Sous-direction des Affaires financières internationales), Paris (24 September 2001).

<sup>71</sup> Eigen, Interview. Though satirical, *Le Canard enchaîné* has a longstanding pedigree and a respected place in the French media. It currently prints roughly 700,000 copies per week and has been called 'the only French paper that politicians in Paris truly fear'. Britta Samberg, 'French weekly *Le Canard Enchaîné* ruffles feathers in Paris', *Spiegel online international* (9 March 2011), available at: {<http://www.spiegel.de/international/europe/0,1518,749665,00.html>}. *Le Monde diplomatique* has been a key tool in the anti-globalisation movement in France. Its director-general, Bernard Cassen, was the leader of ATTAC, an anti-globalisation group with broad public support in France and Europe. In the late 1990s, the paper had a circulation of roughly 300,000 and an estimated readership of 900,000 in France alone, where 130 members of Parliament were members of ATTAC. See Philip H. Gordon and Sophie Meunier, *The French Challenge: Adapting to Globalization* (Washington, DC: Brookings Institution Press, 2001), p. 85.

attacked the President of TI-France, Daniel Dommel, as having been ‘close to the American right’ during the Cold War and a CIA operative (‘maintes fois accusé d’être un faux nez de la CIA’), suggesting that TI itself was a creation of the World Bank and under the influence of ‘certains intérêts américains (en abrégé, CIA)’.<sup>72</sup> Subsequent articles in *Le Monde diplomatique* cited *Le Canard enchaîné* and reiterated its description – this time as a matter of record – of TI as an outpost of the CIA in France and a lackey of major US corporations.<sup>73</sup> Despite efforts by TI leaders in Paris and Berlin to clarify through correspondence the record on TI’s origins, purposes, and methods, rumours about TI as a creation of American interests persisted in the French media at least into the summer of 2001 – in *Le Monde diplomatique* in particular.<sup>74</sup>

Aside from attacks in the press, there were other indications of TI’s lack of legitimacy in France. TI-France leaders acknowledged that, in contrast to the situation in Germany, where TI enjoyed a respectful relationship with business leaders, in France TI was ‘not as strong’.<sup>75</sup> French business leaders did not trust TI and did not welcome its advocacy on matters related to transnational bribery. When the powerful French employers’ group MEDEF and French government officials met to discuss France’s position on the OECD anti-bribery Convention, at least one official from TI-France was physically prevented from entering the room, apparently because he was suspected of being a spy for the United States.<sup>76</sup>

French government officials also thought that, in its anti-corruption efforts, TI represented the interests and arguments of the US government and American multinational corporations. Those directly involved acknowledged ‘tense relations’ between TI and the government on the matter of the Convention.<sup>77</sup> Throughout the entire policy process related to the OECD Convention, TI – both the international organisation headed in Berlin and the French national chapter headed in Paris – was coolly received in French government circles. To wit, when in Paris in the summer of 2001 to promote the launch of TI’s 2001 Corruption Perceptions Index, Eigen experienced ‘the most unpleasant meeting’ of his trip when he met with France’s ‘roving ambassador’ in charge of corruption, Pierre Charasse. One active member of TI-France described this official in particular as openly ‘hostile’ to TI. Furthermore, a French government official said, opinion in government circles about the French officials of TI-France in particular is ‘not high’.<sup>78</sup>

TI’s lack of legitimacy in France remained puzzling to TI’s leaders in Berlin, who noted that the chapter there had ‘some very respectable people ... in [its] advisory council, and in [its] board’.<sup>79</sup> Indeed, TI-France shared the same elite social networks

<sup>72</sup> Louis-Marie Horeau, ‘Les Chiffres de la Corruption Mondiale sont Impayables’, *Le Canard enchaîné* (2 November 1999).

<sup>73</sup> Christian De Brie, ‘Etats, mafias et transnationales’, *Le Monde diplomatique* (April 2000), p. 4; Pierre Abramovici, ‘Une ONG Contestée’, *Le Monde diplomatique*, p. 23.

<sup>74</sup> Transparency International, *Internal Communication* (11 April 2000); Bernard Cassen, ‘Arrières pensées dans la lutte anticorruption’, *Le Monde diplomatique* (May 2001) and ‘Limites de la Transparence’, *Le Monde diplomatique* (July 2001), p. 15; Daniel Dommel, ‘Lutte Anticorruption’, *Le Monde diplomatique* (July 2001).

<sup>75</sup> Member, Transparency International – Interview, Paris (22 September 2001).

<sup>76</sup> *Ibid.*

<sup>77</sup> Official, French Ministry of Finance and Economics, Interview.

<sup>78</sup> Eigen, Interview; author’s confidential interview with a member of TI-France, Paris (19 September 2001); Official, French Ministry of Justice, Interview, Paris (24 September 2001).

<sup>79</sup> Eigen, Interview.

as TI's other national and transnational branches, and used the same non-confrontational strategies. Yet in France, in contrast to the case in Germany, these elite networks and strategies actually contributed to TI's *non*-legitimacy and *hampered* its advocacy efforts among French intellectuals, business leaders, and government officials.

### *Elite social networks*

In addition to sharing the same elite social network as TI's transnational organisation, the local membership of the French national chapter of TI included several prominent public figures with elite credentials who were active in influential social networks. The founding president of TI-France, Michel Bon, for instance, was the former CEO of France's major retail chain *Carrefour* and was the managing director of the ANPE, the French employment office, when he became chairman of the fledgling group in October 1994.<sup>80</sup> Bon resigned his position at TI-France in 1997 to become the Chairman and CEO of the newly privatised France Telecom. His successor, Daniel Dommel, was a former high-ranking bureaucrat, holding the title of *Inspecteur Général des Finances Honoraire*, and part of the 'aristocratie française ... très haut niveau'.<sup>81</sup> Moreover, Dommel, Bon, and other TI-France officials were members of the prestigious and exclusive French political club *La Fondation Saint-Simon*, an elite policy think tank comprised of the French 'cultural nobility' – intellectuals, journalists, elite civil servants, and captains of industry – on the (anti-communist) 'new left' of the political spectrum.<sup>82</sup>

However, rather than conferring legitimacy on TI, these elites were not respected by TI's target audiences in France as legitimate discussants on French policies of anti-corruption. To the contrary, their close ties to the transnational organisation of TI (and to the same elites that conferred legitimacy in Germany) were used as fuel in personal attacks against them. Moreover, despite such ostensibly close links with the governing class in France, TI-France had very little public visibility and did not noticeably benefit from its potential access to the elite echelons of government. TI-France did not figure strongly in the media's coverage of debates on corruption in France. With the exception of one brief quote from the president of TI-France, the national chapter did not appear in news reports about international corruption or about France's position on TI's Corruption Perceptions Index and Bribe Payers Index, during the period 1996–2001.

This lack of public visibility was the topic of some concern within TI as early as 1997.<sup>83</sup> TI founder Eigen characterised TI-France as confronting 'strong resistance' from intellectuals, government, and businesses, a resistance 'which has partly to do with the fact that they feel we are too close to the Americans'. In particular,

<sup>80</sup> TI Newsletter (June 1995).

<sup>81</sup> Confidential interview, Paris (22 September 2001).

<sup>82</sup> Vincent Laurent, 'Enquête Sur La Fondation Saint-Simon: Les Architectes Du Social-libéralisme', *Le Monde Diplomatique* (1 September 1998), pp. 26–7.

<sup>83</sup> Transparency International, internal memorandum (21 May 1997).

They fear that we are more or less a secret brigade for corporate America. And they fear that there is a lot of support to us from USAID, from companies in the US, [and] that we are simply doing the dirty business of the Americans. So whenever something comes up, say a big scandal of the Americans' use of secret intelligence [like] Echelon [or] the CIA and so on, then immediately they throw us mentally into the same bag. And it has been very difficult for us to overcome.<sup>84</sup>

### *Non-confrontational strategy*

TI also lacked legitimacy in French business and government circles partly because these target audiences did not accept its key strategies for raising awareness about international anti-corruption, nor its central 'coalition-building' approach to advancing anticorruption strategies in partnership with business and government. In interviews, French officials noted the government's position that the OECD Convention and its related processes (such as processes for monitoring compliance) were strictly state-based initiatives. One official explained, 'the basic position of the government is to distinguish between the two: the OECD, and TI'.<sup>85</sup> In the specific context of the OECD Convention and France's anti-bribery policy, TI was not a welcome partner. Furthermore, there were reports of 'strong resistance from the French side' to suggestions that 'organizations like TI' might be involved in additional state-led anti-corruption initiatives, for instance at the United Nations.<sup>86</sup> TI's Berlin leadership considered reports like these in 2001 as being 'a further confirmation that the French have launched a concerted action against TI'.<sup>87</sup> Eigen commented: 'they use every excuse to attack us, to badmouth us . . . and therefore there is still a tremendous battle in France'.<sup>88</sup>

French government officials also took particular exception to TI's main method of raising public awareness about corruption: the annual Corruption Perceptions Index and the Bribe Payers' Index. Echoing similar criticisms raised by *Le Canard enchaîné*, government officials greeted France's regularly poor ratings on TI's corruption indices with a heavy dose of scepticism about the validity of the methods and conclusion of these surveys. In the words of one official, 'On pense que cette méthode de publicité n'est pas la bonne'.<sup>89</sup> In business circles, moreover, TI's coalition-building, non-confrontational strategy for raising anti-corruption awareness was interpreted as insufficiently critical of the United States and others for their perceived weak enforcement of their own anti-bribery rules.

In sum, TI's elite social networks and its non-confrontational strategy could not confer the slightest legitimacy for TI in France, nor overcome French opposition to international anti-bribery rules. Crucially, TI's values were directly opposite those of

<sup>84</sup> Eigen, Interview.

<sup>85</sup> Official, French Ministry of Finance and Economics, Interview, Paris (21 September 2001).

<sup>86</sup> Eigen, Interview.

<sup>87</sup> Transparency International, *International Communication* (15 June 2001). The reports are also consistent with Gordon and Meunier's observation that 'NGOs had never been very prominent in statist France'. Gordon and Meunier, *The French Challenge*, p. 96. This is rapidly changing. See also John T. S. Keeler and Peter Hall, 'Interest Representation and the Politics of Protest', in Alain Guyomarch, Howard Machin, Peter A. Hall, and Jack Hayward (eds), *Developments in French Politics*, 2 (Hounds-mills, Basingstoke, Hampshire: Palgrave, 2001), pp. 50–67.

<sup>88</sup> Eigen, Interview.

<sup>89</sup> Author's interview with an official of the Ministry of Foreign Affairs, Paris (24 September 2001).

its target audiences in business and government – and the values of these actors rather than the properties of TI proved determinant of non-legitimacy. In France TI's elite networks and non-confrontational strategies created the sense of non-legitimacy, a different outcome than what TI experienced in Germany with the *same* elite networks and strategies.

### *Influence on the policy process*

This lack of legitimacy significantly constrained TI's ability to influence anti-bribery policy in France. Specifically, TI-France had no discernible influence on the *policy context* in which legislators framed their deliberations over the Convention. In Germany, TI had persuaded business leaders to support anti-bribery policies by framing the issue of transnational bribery in the contexts of international development and the 'enlightened self-interest' of Germany's major companies, frames that promoted compliance with the Convention. In France, where it lacked legitimacy, TI was not able to shape the debate about anti-bribery policy in similar terms. Instead, in France an alternative policy frame held sway, one that promoted a hesitant approach to compliance: that of strategic trade. In this frame, and in response to the concerns of leading French export firms, government officials questioned the impact of anti-bribery rules on exporters' competitiveness in international markets. Rather than international development or any other policy area, the Rapporteur of the National Assembly's foreign affairs committee noted, 'it is in fact [trade] competition that was the essential engine of state action' on bribery in international business.<sup>90</sup>

The strategic trade policy frame supported arguments for a cautious, if not openly reluctant, approach to compliance with the OECD Convention. During a Senate debate on France's implementing bill, for instance, one senator explicitly argued that since the Convention's policy context was above all that of international competition for export markets, and since France was the fourth largest exporter in the world, compliance was not a 'neutral' policy.<sup>91</sup> Legislators cautioned that if France implemented the Convention more strictly than its trade competitors, French exporters would lose foreign contracts to competitors whose home countries did not enforce their own anti-foreign bribery laws.<sup>92</sup> Thus, rather than emphasising the importance of compliance with their international legal obligations under the OECD Convention, French legislators debating the Convention's implementation were primarily concerned with ensuring the equal application and enforcement of the

<sup>90</sup> Assemblée Nationale de France, *Rapport fait au nom de la commission des affaires étrangères sur le projet de loi, adopté par le Sénat, autorisant la ratification de la convention sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales ...* Rapport No. 1574 par M. Pierre Brana, Député (France: Assemblée Nationale, 12 May 1999), available at: {<http://www.assemblee-nationale.fr/11/rapports/r1574.asp>}. The original quotation in French reads: '... c'est en fait la concurrence qui a été le moteur essentiel de l'action des Etats'.

<sup>91</sup> Sénat de France, *Projet de loi modifiant le code pénal et le code de procédure pénale et relatif à la lutte contre la corruption, présenté au nom de M. Lionel Jospin Premier ministre par Mme Elisabeth Guigou garde des Sceaux, ministre de la Justice.*, Rapport No. 179. Session ordinaire de 1998–1999, Annexe au procès-verbal de la séance du 28 janvier 1999, {<http://www.senat.fr/leg/pj198-179.html>}.

<sup>92</sup> Sénat de France, *Lutte contre la corruption: Discussion d'un projet de loi*, Séance du 10 novembre 1999 (France: SÉNAT, 10 November 1999), available at: {<http://www.senat.fr/seances/s199911/s19991110/sc19991110011.html>}.

Convention by the major OECD states. Concerned that the United States in particular did not adequately enforce its own anti-bribery laws, and with explicit reference to the competitive position of French exporters, senators thus advocated ‘a realistic approach’ to French compliance to ensure that ‘the pure and simple removal of this device [that is, the payment of foreign bribes in international contract procurement] does not penalize French companies in light of international competition’.<sup>93</sup> This position reflected and responded to concerns expressed by French exporters themselves.<sup>94</sup> As the business-oriented newspaper *Les Echos* reported, French industrialists maintained that the OECD Convention was conceived as being a ‘veritable machine of commercial warfare’.<sup>95</sup>

Once the French parliament began the legislative work to implement the Convention the government included a *non-retroactivity* clause in the implementing bill. This clause explicitly exempted from the purview of the proposed legislation foreign bribes that would be paid out in relation to contracts concluded prior to the effective date of the new legislation – even when these bribes would be disbursed after the legislation’s entry into force.<sup>96</sup> According to news reports at the time, the purpose of the clause was to ‘reassure companies that feared they would not be able to fulfill terms of previously concluded contracts’.<sup>97</sup> The clause became the focus of successive rounds of parliamentary debate as legislators shuttled the bill between the Senate and the National Assembly.<sup>98</sup> It also prompted international allegations that France was deliberately attempting to scuttle the Convention.<sup>99</sup>

In Germany, where business leaders had already been persuaded by TI to curb transnational bribery, the process of implementing the OECD Convention was quick

<sup>93</sup> Ibid.; Assemblée Nationale de France, *Rapport fait au nom de la Commission des lois constitutionnelles, de la Législation et de l’Administration générale de la République sur le projet de loi, adopté par le Sénat, modifiant le code pénal et le code de procédure pénale et relatif à la lutte contre la corruption, par M. Jacky Darne, Député.*, Rapport No. 2001 (France: Assemblée Nationale, 13 December 1999), available at: {<http://www.assemblee-nationale.fr/11/rapports/r2001.asp>}.

<sup>94</sup> Jean-Claude Sandrier, Christian Martin, and Alain Veyret, *Rapport D’information No 2334. Déposé En Application de L’article 145 Du Règlement Par La Commission de La Défense Nationale et Des Forces Armées Sur Le Contrôle Des Exportations D’armement.*, Rapport No. 2334 (France: Assemblée Nationale, Onzième législature, 25 April 2000), p. 75.

<sup>95</sup> Jean-Pierre Neu, ‘Les Industriels de L’armement Montent Au Créneau Contre La Future Loi Anti-corruption’, *Les Echos* (10 February 1999), p. 13.

<sup>96</sup> The specific clause reads: ‘Les articles [concernant la transposition de la convention de l’OCDE] ne s’applique pas aux faits commis à l’occasion de contrats signés antérieurement à l’entrée en vigueur sur le territoire de la République de la convention visée par ces articles’. Sénat de France, *Rapport Fait Au Nom de La Commission Des Lois Constitutionnelles, de Législation, Du Suffrage Universel, Du Règlement et D’administration Générale (1) Sur Le Projet de Loi Modifiant Le Code Pénal et Le Code de Procédure Pénale et Relatif à La Lutte Contre La Corruption, Par M. José Balareello Sénateur.*, Rapport No. 42 SÉNAT SESSION ORDINAIRE DE 1999–2000 Annexe au procès-verbal de la séance du 3 novembre 1999 (France: Sénat, 3 November 1999), available at: {<http://www.senat.fr/rap/199-042/199-0420.html>}.

<sup>97</sup> Virginie Malingre, ‘Les députés souhaitent de renforcer le contrôle sur les contrats à l’étranger’, *Le Monde* (11 December 1999).

<sup>98</sup> Virginie Malingre, ‘Polémique Sur L’application En France de La Convention de l’OCDE Contre La Corruption’, *Le Monde* (5 December 1999); Virginie Malingre, ‘Polémique autour du projet de loi sur la corruption’, *Le Monde* (15 December 1999).

<sup>99</sup> Virginie Malingre, ‘L’Assemblée nationale amende le projet de Mme Guigou’, *Le Monde* (16 December 1999); Madeleine K. Albright, ‘Address to the World Economic Forum’ Davos, Switzerland (30 January 2000), available at: {<http://www3.itu.int/MISSIONS/US/DAVOS/albright3.html>}; Laurent Mauduit, ‘Pots-de-vin et Contrats D’exportations: Enquête Sur Une Système Opaque’, *Le Monde* (16 December 1999), Paris edition; ‘Les députés retirent une disposition contestée du projet sur la corruption’, *Le Monde* (2 March 2000); Patrick Jarreau, ‘La loi française sanctionne désormais la corruption pratiquée à l’étranger’, *Le Monde* (8 August 2000).

and non-controversial; in France, debate over the non-retroactivity clause caused a relatively long delay in the implementation of anti-foreign bribery legislation. Lacking legitimacy as a credible policy advocate on transnational bribery and excluded from consultation with major exporters and policymakers, TI was absent from these debates. In this context, the strategic trade policy frame held sway, causing controversy and delay in compliance.

Germany and other leading OECD states ratified and implemented the Convention within twelve months of signing, whereas France took almost three years to do so. Interference from MEDEF and from representatives of the state's defence industry exporters was largely responsible for this delay, and for triggering questions about the extent to which the country's implementing legislation would effect satisfactory compliance with the Convention. According to Hansjoerg Elshorst of TI in Berlin, when French compliance was stalled during the legislative process, 'there were rumours . . . that the French arms industry had interfered into the process'.<sup>100</sup> The French publication *L'Express* reported in 1999 that the government developed its proposed implementing bill in secret negotiations with MEDEF.<sup>101</sup> In addition, the Chair of the OECD Working Group, Mark Pieth, described the situation as follows:

France had a long fight internally, especially, again, the defence industry fought back and said the US are just making a big show, they don't have many cases and they are [continuing to bribe] off-shore. That was what the French defence industry was saying, and therefore they were not convinced that they needed to [go along with the Convention]. And then, as a second line of defence they said well if we do [comply] we need to preserve our ongoing contracts, including the bribe contracts. So they wanted a clause of non-retroactivity, allowing them to continue to bribe on old concluding contracts.<sup>102</sup>

Business groups in France did not support the Convention and TI was not able to persuade them otherwise. On the contrary, during legislative proceedings to implement the Convention in French law, firms demanded that the government include the non-retroactivity clause in its proposed legislation. The government's assent to these demands precipitated a contentious debate, delayed France's compliance, and raised doubts within the OECD as to the ultimate capacity of France's implementing legislation to comply with the Convention.<sup>103</sup>

Ultimately, the non-retroactivity clause in France's anti-bribery implementing legislation did not stand and France eventually *did* comply with its obligations under the Convention to criminalise foreign bribes and end their tax-deductibility. Widespread international criticism, US diplomatic pressure, and pressure from its OECD partners contributed to France's removal of the controversial clause. Advocacy by TI did not feature in this shift. Whereas in Germany TI *led* business and government, in France TI lacked legitimacy and was a non-factor. The fact that France ultimately did comply due to international pressure leads to the reasonable counterfactual probability that if TI *had* enjoyed greater legitimacy and, by extension, been granted direct access to relevant business leaders and policymakers, it likely would have had an influence similar to that which it had in Germany.

<sup>100</sup> Interview with Hansjoerg Elshorst, Berlin (July 2001).

<sup>101</sup> Vincent Nouzille, 'Contrats: Comment Faire Sans Pots-de-vin . . . L'express', *L'Express* (February 1999); Martine Orange, 'Les entreprises craignent les effets pervers de la convention de l'OCDE', *Le Monde* (16 February 1999).

<sup>102</sup> Interview with Mark Pieth, by telephone (10 June 2002).

<sup>103</sup> OECD Working Group report on French compliance.

*Alternative explanations*

The foregoing analysis of TI's experience in France has argued that TI did not influence French compliance with the OECD, and that, in the absence of TI's advocacy for compliance, strategic trade arguments against full compliance with the Convention held sway. Why was TI influential in Germany, where firms and the government *also* initially opposed anti-bribery rules, but not in France? The explanation is that a high degree of *legitimacy* in Germany accounts for TI's influence in this case. In contrast, TI lacked legitimacy in France and was unable to influence the policy process. The argument is that TI's legitimacy – conceived as a relational variable – varied across these cases, and that legitimacy is a necessary condition for TNGO influence.

What other reasons might explain TI's lack of influence in the French case? One alternative explanation has to do with differences in the structure of domestic politics in France and Germany. Perhaps in France, generally, NGOs and civil society organisations are less likely to influence state-driven policy processes than in Germany. As scholars have noted, a state's domestic structure can create more or less opportunity for the persuasion, learning, and socialisation strategies that non-state policy advocates employ.<sup>104</sup> Thus, differences in political structures between the two cases might explain the discrepancy in terms of TI's respective impact.<sup>105</sup> However, the literature on civil society in France and the experience of influential, broad-based civil society groups such as Attac suggest that there is no *necessary* opposition to civil society engagement in France.<sup>106</sup> Indeed, the period when TI-France was attempting to influence the policy process was in general a period of increased openness to civil society on the part of the French government.<sup>107</sup> As Sarah Waters notes, moreover, the political success of Attac in France can be linked to the place of intellectual elites within it, who hold positions of power and influence within political, university, and media circles.<sup>108</sup> Given its elite social networks and non-confrontational strategies, why was TI not able to be similarly influential? The answer lies with the particular relationship between this organisation and its specific target audiences in business and government, and not the domestic structure of the French state.

A second alternative explanation for the variation in TI's influence in Germany and France might be differences in the domestic 'saliency', 'resonance', or 'fit' of the international norm of anti-corruption in each case.<sup>109</sup> According to this explanation,

<sup>104</sup> Jeffrey T. Checkel, 'Norms, Institutions, and National Identity in Contemporary Europe', *International Studies Quarterly*, 43:1 (1 March 1999), pp. 83–114, doi:10.2307/2600966.

<sup>105</sup> A. Cortell and J. Davis, 'How Do International Institutions Matter? The Domestic Impact of International Rules and Norms', *International Studies Quarterly*, 40 (1996), pp. 451–78; Herbert P. Kitschelt, 'Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies', *British Journal of Political Science*, 16:1 (1 January 1986), pp. 57–85, doi:10.2307/193981.

<sup>106</sup> Joanna Drugan, Jim House, and Sarah Waters, 'New voices in French politics', *Modern and Contemporary France*, 12:1 (2004), pp. 3–74; Daniel Stockemer, 'The Successful Creation of Attac France: The Role of Structure and Agency', *French Politics*, 9:2 (2011), pp. 120–38; Sarah Waters, 'Mobilising Against Globalisation: Attac and the French Intellectuals', *West European Politics*, 27:5 (2004), pp. 854–74.

<sup>107</sup> Robert Elgie, 'The Changing French Political System', *West European Politics*, 22:4 (1999), pp. 1–19; Vivien A. Schmidt, 'The Changing Dynamics of State-Society Relations in the Fifth Republic', *West European Politics*, 22:4 (1999), pp. 141–65.

<sup>108</sup> Waters, 'Mobilising against globalisation'.

<sup>109</sup> Ellen Gutterman, 'Easier Done Than Said: Transnational Bribery, Norm Resonance, and the Origins of the U.S. Foreign Corrupt Practices Act', *Foreign Policy Analysis* (Forthcoming). Cortell and Davis, 'How Do International Institutions Matter?'

business leaders and policymakers in Germany might simply have been more predisposed to accept TI's anti-bribery advocacy than their counterparts in France due to the 'cultural match' of the proposed policy to existing policies in Germany.<sup>110</sup> However, the norm of anti-corruption and the specific anti-bribery policies promoted by TI had *low salience in both* Germany and France prior to TI's advocacy. No prohibition on foreign bribes existed in either state, and both states permitted foreign bribes as tax-deductible business expenses. Both initially opposed multilateral efforts to curb this practice, and both ultimately agreed to a binding multilateral initiative to do so. The OECD Convention itself was no less suited to French global policy interests than it was to Germany's. In fact, the Convention can be read as being perfectly in line with the elements of France's approach to 'managing' globalisation at the time. This approach entailed emphasising international institutional arrangements to realise the benefits of globalisation while regulating its harmful effects; asserting independence from US global hegemony and binding the US to multilateral commitments to constrain its power; and enhancing France's prestige as a global leader in institutional fora.<sup>111</sup> Nevertheless, having committed to the OECD Convention, France responded to its obligations quite differently than Germany. The comparison of these cases demonstrates that the cause of this difference lies with the legitimacy and consequent influence enjoyed by TI in Germany but not in France.

## VI. Conclusion

The legitimacy of TNGOs is best conceived in relational and sociological terms. A specific TNGO's legitimacy depends neither solely on its own qualities and characteristics, nor on its manifestation of the tangible and intangible 'sources' of legitimacy often identified in the literature. Rather, whether or not a specific TNGO will be accepted as a legitimate advocate on any policy depends on the relationship of that TNGO with relevant target audiences. The acceptance of a TNGO by its audience is as much a function of the audience's values as the TNGO's. Furthermore, this relational legitimacy matters. Legitimacy – conceived as being a relational phenomenon – is a necessary condition for the effectiveness of TNGO advocacy and norm entrepreneurship.

These conclusions carry important implications for the strategies of TNGOS seeking to influence the policies of states and other actors in global governance. TNGOs and policy advocates deficient in legitimacy need to recognise this liability and work strategically to acquire and build legitimacy by appealing to the specific criteria valued by particular audiences. In addition to its relational and sociological status, legitimacy therefore is also an endogenous variable that actors can strategically manufacture and generate through their own activities.

This conception of TNGO legitimacy sheds important new light on questions concerning the legitimacy of TNGOs in global governance generally. Can TNGOs, when accepted as legitimate by the targets of their advocacy, constitute a source of political legitimacy beyond the state? Can 'legitimate' TNGOs help respond to a

<sup>110</sup> Checkel, 'Norms, Institutions, and National Identity in Contemporary Europe'.

<sup>111</sup> Gordon and Meunier, *The French Challenge: Adopting to Globalization*; Guyomarch *et al.*, *Developments in French Politics 2*.

growing 'legitimacy gap' and increase the legitimacy of global governance and its outcomes, generally?<sup>112</sup> Are 'legitimate' TNGOs capable of reforming the institutions of global governance in the direction of greater equality, fairness, and justice? Such questions 'involve judgments and choices, struggles and negotiations about what NGOs do and who has what rights to influence organizational decisions' in global governance, and they are important considerations in wider debates about legitimate global governance.<sup>113</sup>

Rather than providing a panacea for the dilemmas of global governance, this study's conception of TNGO legitimacy entails a cautious appraisal on these points. To the extent that the legitimacy of TNGOs depends on their acceptance by dominant groups and by powerful decision-makers, it is important to recognise that 'legitimate' TNGOs may in fact function to sustain rather than challenge structures of power (including those related to economic policies, social class, and gender) which condition global outcomes in ways that are often contrary to the goals of equality, fairness, and justice. Since legitimacy is not a property of actors and institutions themselves, but rather an instrumental and strategic resource that is constructed in relation to an audience, a risk to 'legitimate global governance' lies in the fact that TNGOs must situationally appeal to the norms and values of the audience they are addressing in order to acquire legitimacy. These audiences are often those already in power. Thus the increased participation of 'legitimate' TNGOs in the processes of global governance does not in itself necessarily indicate any measure of increased legitimacy, accountability, or representativeness of political authority beyond the state generally. In order to assess the impact of TNGO participation on legitimate global governance, one must examine *which* TNGOs have been granted legitimacy and influence in global policy processes, and *why*.

Further research on the legitimacy of TNGOs should therefore focus on the communities and audiences that grant their legitimacy in global governance. Critical work on legitimate global governance, in addition to examining the strategies of legitimation employed by various global governance actors, should also consider the role of target audiences as active participants in processes of legitimation and delegitimation. Scholars of legitimacy in global governance are beginning to pursue research that includes the audiences that grant legitimacy.<sup>114</sup> Much room remains for further conceptual and empirical exploration in this vein.

<sup>112</sup> Jan A. Scholte, 'Towards Greater Legitimacy in Global Governance', *Review of International Political Economy*, 18:1 (2011), pp. 110–20.

<sup>113</sup> M. Edwards, 'Legitimacy and Values in NGOs and International Organizations: Some Sceptical Thoughts', in D. Lewis (ed.), *International Perspectives on Voluntary Action: Reshaping the Third Sector* (London: Earthscan, 1999), p. 260.

<sup>114</sup> Jonathan Symons, 'The Legitimation of International Organisations: Examining the Identity of the Communities That Grant Legitimacy', *Review of International Studies*, 37:5 (2011), pp. 2557–83; Bernstein, 'Legitimacy'.