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978-1-107-07478-1 - The Role of 'Experts' in International and European Decision-Making Processes: Advisors, Decision Makers or Irrelevant Actors?

Edited by Monika Ambrus, Karin Arts, Ellen Hey and Helena Raulus

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## 1

## The role of experts in international and European decision-making processes: setting the scene

MONIKA AMBRUS, KARIN ARTS, ELLEN HEY  
AND HELENA RAULUS

Analyses of the significance of knowledge in present-day society,<sup>1</sup> also referred to as knowledge society, fuelled our curiosity about the role that experts play in international and European decision-making processes. This interest prompted us to ask the question reflected in the title of this book: are experts in these decision-making processes advisors, decision makers or irrelevant actors? A literature survey illustrated that, while analysis of knowledge utilization is – and has been – readily available in the social sciences,<sup>2</sup> there is only scant analysis of *how* experts relate to decision-making processes at the international and European levels.<sup>3</sup> This realization in turn prompted us to bring together a group of, yes, ‘experts’ to discuss the above-mentioned

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<sup>1</sup> We include only a few examples: U. Beck, *Risk Society, Towards a New Modernity* (London: Sage, 1992); N. Caplan, ‘The Two-Communities Theory and Knowledge Utilization’, *Public Administration Review*, 39 (1979), 459–70; P.M. Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’, *International Organization*, 46 (1992), 1–37; N. Stehr, *Knowledge Societies* (London: Sage, 1994); R. Grundmann and N. Stehr, *Experts: The Knowledge and Power of Expertise* (London: Routledge, 2001).

<sup>2</sup> See references in note 1 and Schrefler, Chapter 4, this volume.

<sup>3</sup> Some fairly recent examples include: L. Botcheva, ‘Expertise and International Governance: Eastern Europe and the Adoption of European Union Environmental Legislation’, *Global Governance*, 7 (2001), 197–224, which addresses concerns about

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question at a two-day seminar held in June 2011, which is at the origin of this book.

From the outset, one could ask why the contributors to this book qualify as 'experts'. Is it because as an individual, each is 'a person who has [or is deemed or claimed to have] extensive skill or knowledge in a particular field'?<sup>4</sup> Or is it because they belong to expert communities that share a common knowledge base, accepted methods for presenting their findings and certain values? As illustrated below and in the chapters of this book, both the individual and collective elements are relevant for identifying who might qualify as an expert. Honesty about where we and the authors come from also requires us to unveil that most of the contributors to this project participate in various international or European decision-making processes as experts, thereby bringing hands-on experience of what it means to be an expert to the book. Are we being self-referential in that we are studying ourselves in our roles as experts? To some degree, this might be the case.

To sum up, for the purposes of the project we initially adopted the above-cited plain-language definition of the term 'expert',<sup>5</sup> thereby referring to the individual dimension of what it means to be an expert. However, as noted above, there is also a collective dimension to being an expert.<sup>6</sup> Moreover, who qualifies as an expert may be the result of a

the sources of credibility and policy influence of expert information in environmental governance; G.J. Brandsma, 'Backstage Europe: Comitology, Accountability and Democracy in the European Union', unpublished PhD thesis, Utrecht University (2010), available at: <http://igitur-archive.library.uu.nl/dissertations/2010-0204-200144/brandsma.pdf>, which focuses on the particular institutional setting of the EU; K. Conca, *Governing Water: Contentious Transnational Politics and Global Institution Building* (Cambridge, MA: MIT Press, 2006), which maps the processes of institution-building in water governance, including the role of networking among experts and professionals; C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press, 2011), which deals with the role of expert witnesses and advisors in international legal proceedings; A. Gornitzka and U. Sverdrup, 'Access of Experts: Information and EU Decision-Making', *West European Politics*, 34 (2011), 48–70, which examines patterns of participation in the expert group system of the European Commission; and M. Halme-Tuomisaari, *Human Rights in Action: Learning Expert Knowledge* (Leiden: Martinus Nijhoff, 2010), which explores the activities of a network of Nordic human rights experts.

<sup>4</sup> Adjusted version of a definition of the term 'expert' provided in *Collins Concise Dictionary*, [www.collinsdictionary.com/dictionary/english/expert](http://www.collinsdictionary.com/dictionary/english/expert).

<sup>5</sup> See note 4. <sup>6</sup> See Haas, Chapter 2 and Werner, Chapter 3, both this volume.

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political process, which in turn may predetermine the nature of the outcome of the expert process.<sup>7</sup>

In terms of policy areas, we chose to focus on the role of experts in decision-making processes regarding environment, trade (with a focus on trade and health-related risks), human rights and migration, and financial regulation, the latter particularly from the perspective of the European Union (EU). In addition, in relation to the EU we also included chapters on expert involvement in European Commission processes and national administrations, and on the so-called agencification process, because we suggest that these processes epitomize the involvement of experts in decision making and aptly illustrate legitimacy problems that expert involvement may lead to. We chose the above-mentioned policy areas on the basis of our experience that the involvement of experts in these areas is contested, both in theory and in practice. This book thus does not present a comprehensive overview of all policy areas in which experts are involved in international or European decision-making processes, an impossible endeavour by any account.

In terms of the status of the decisions resulting from the decision-making processes in which experts participate, we chose to focus on those processes that result in decisions that impact the lives of individuals and groups in society, regardless of whether those decisions are legally binding. Think of United Nations (UN) human rights special mandate-holders whose work does not generally lead to binding decisions in international law, but whose decisions may have consequences for individuals, vulnerable and other groups or governments.<sup>8</sup> Furthermore, in some cases the fact that there is no binding decision to contest may be part of the problem.<sup>9</sup> Moreover, in most international environmental regimes, expert input is linked to decisions taken by the conference of the parties, which are not legally binding.<sup>10</sup> Yet, we suggest that expert involvement in international environmental regimes illustrates some traits that also feature in expert involvement in decision-making processes that may result in binding decisions, such as in the World Trade Organization (WTO) and the EU.<sup>11</sup>

<sup>7</sup> See Herwig, Chapter 10 and Knio, Chapter 16, both this volume.

<sup>8</sup> See Subedi, Chapter 12, this volume.

<sup>9</sup> See Scholten and Terlouw, Chapter 14, this volume. <sup>10</sup> See Part II, this volume.

<sup>11</sup> See Parts III and V, this volume.

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The methodological approach adopted in this book is eclectic in that we asked the authors to reflect on the role of experts on the basis of their own methodological preferences. We chose this approach above all because we were curious about the insights that the various narratives would generate.<sup>12</sup> The result is a multifaceted 'picture' of experts and their involvement in international and European decision-making processes. The chapters in this book illustrate that a variety of methodologies, ranging from classical legal and policy analyses to critical Foucauldian analyses, are relevant for understanding how experts relate to these decision-making processes. Does such an eclectic approach lead to contradictions? Yes. However, we submit that it first and foremost results in a wealth of insights, both substantively and methodologically. This wealth is illustrated by, for example, the treatment of the notion of epistemic community developed by Haas on the basis of constructivist political science theories<sup>13</sup> and further explored in several chapters.<sup>14</sup> Many of the chapters themselves add further methodological insights on how experts might be studied. These chapters engage with knowledge utilization literature,<sup>15</sup> Aristotelian virtue ethics,<sup>16</sup> institutional learning theory,<sup>17</sup> the notion of semi-autonomous fields,<sup>18</sup> the French *Régulation* School<sup>19</sup> and perspectives from public management.<sup>20</sup>

In this introductory chapter we discuss the following themes. First, we consider the rationales for involving experts in international and European decision-making processes and the legitimacy problems that ensue.<sup>21</sup> Second, we highlight the individual and collective aspects of involving experts in decision making. Third, we discuss the political dimensions of involving experts in decision making. Fourth, we briefly address the question that inspired this book. Lastly, we provide a short overview of the structure of the book.

<sup>12</sup> L. Lixinski, 'Narratives of the International Legal Order and Why they Matter', *Erasmus Law Review*, 6 (2013), 2–5.

<sup>13</sup> Haas, Chapter 2, this volume.

<sup>14</sup> See Werner, Chapter 3, this volume. Werner explores the relevance of the concept of epistemic communities for international lawyers as experts.

<sup>15</sup> Schrefler, Chapter 4, this volume. <sup>16</sup> Klabbers, Chapter 5, this volume.

<sup>17</sup> Siebenhüner, Chapter 7, this volume.

<sup>18</sup> Scholten and Terlouw, Chapter 14, this volume. <sup>19</sup> Knio, Chapter 16, this volume.

<sup>20</sup> Schout and Sleifer, Chapter 17, this volume.

<sup>21</sup> For the sake of brevity from hereon in, reference is to 'decision-making processes', omitting the clarification 'international and European', unless the qualification is conceptually necessary.

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Prior to engaging with the above-mentioned themes, we thank the authors involved in the project for sharing their thoughts with us and, in particular, their intellectual curiosity about the role of experts in decision-making processes, as well as for their commitment to the project.

### 1.1 Rationales for involving experts and ensuing legitimacy problems

Experts are called upon to provide input into ever more complex decision-making processes. They are involved in policy making, law-making, and implementation and enforcement efforts. Two reasons for involving experts in decision-making processes at the international and European levels appear prominently in the literature; both concern the legitimacy of governance.<sup>22</sup>

First, it is suggested that involving experts in decision making enhances the quality, and thus the legitimacy, of the decisions taken by providing scientific – presumably neutral – solutions to technical problems. Traditionally, this reason for involving experts in decision making is particularly prominent in those areas where expertise in the natural sciences plays an important role, such as in decision making regarding environmental issues or health risks.<sup>23</sup> Increasingly, input from other disciplines, such as law, economics and other social sciences, is also qualified as expert involvement. For instance, in 2012 Piccone referred to the independent experts that carry out the Special Procedures for Human Rights in the UN as ‘the bricks and mortar that have helped keep this house standing’ and as ‘dedicated experts [who] . . . carry out the unheralded legwork that the system has come to depend on for credible reporting and advice’.<sup>24</sup> Relying on expertise then is regarded as bringing credibility to and depoliticizing the decision-making process. However, as Beck has shown, expertise, including expertise in the natural sciences, can become

<sup>22</sup> D. Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’, *American Journal of International Law*, 93 (1999), 596–624.

<sup>23</sup> See Haas, ‘Introduction: Epistemic Communities’; Haas, Chapter 2, this volume.

<sup>24</sup> T. Piccone, *Catalysts for Change: How the UN’s Independent Experts Promote Human Rights* (Washington DC: Brookings Institution Press, 2012), at 4.

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contested.<sup>25</sup> This observation is aptly illustrated by the predicament in which the Intergovernmental Panel on Climate Change (IPCC) and its expert members were involved in 2010.<sup>26</sup>

Second, including experts in decision-making processes has been justified because it is thought to enhance the legitimacy of these processes themselves by increasing transparency as well as providing for more inclusive decision making through the participation of experts. Nanz and Steffek, for instance, suggest that 'legitimation can be generated by means of deliberation between a variety of social actors (e.g., government officials from different national communities, scientific experts, NGOs, etc.).'<sup>27</sup> Accordingly: 'Well-informed and consensus-seeking discussion in expert committees that are embedded in international decision-making procedures has been suggested as an effective remedy to the legitimation problems of international governance.'<sup>28</sup> Buchanan and Keohane also point out that 'legitimacy [in international decision-making processes] depends crucially upon the activities of external epistemic actors in what might be called the transnational civil society channel of accountability'.<sup>29</sup>

The above-mentioned arguments entail that experts and their expertise are resorted to for enhancing both input and output legitimacy of decision-making processes. Input legitimacy refers to the claim that expert involvement (input) in decision-making processes is likely to engender debate and broader participation, which in turn generate decisions that, as such, are more likely to be regarded as legitimate.<sup>30</sup> Output legitimacy refers to the claim that expert involvement in decision making generates better-quality decisions and that it is the content of those decisions (output) that generates legitimacy. Input and output legitimacy may also inter-relate in the sense that if the legitimacy of the decision-making process (input legitimacy) is contested, its outcome (output legitimacy) may be more easily challenged as well. Consequently, the relationship between input and

<sup>25</sup> See below, notes 70 and 71. <sup>26</sup> See Siebenhüner, Chapter 7, this volume.

<sup>27</sup> P. Nanz and J. Steffek, 'Global Governance, Participation and the Public Sphere', *Government and Opposition*, 39 (2004), 314–35, at 315.

<sup>28</sup> *Ibid.*, 320.

<sup>29</sup> A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions' in R. Wolfrum and V. Röben (eds.), *Legitimacy in International Law* (Berlin: Springer, 2008), 25–62, at 59.

<sup>30</sup> On input and output legitimacy, see F. W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999).

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output legitimacy is a reoccurring theme in the chapters of this book, with most contributors pointing to the need for enhanced input legitimacy in order to generate output that better meets standards of justice and generates compliance pull, that is, incentives that foster compliance.

A good example of the tense relationship between expert involvement in decision making and legitimacy can be derived from the experiences of the EU. It has been argued that the EU has no great legitimacy problem because it takes decisions in policy areas where there is 'low electoral salience'.<sup>31</sup> In this view, the EU attains legitimacy by adopting better decisions, that is, by concentrating on the objective outcome of the decision-making processes (output legitimacy). The EU decision-making processes, accordingly, should be perceived as regulatory processes, where parliamentary involvement could be seen as interfering with or undermining legitimacy.<sup>32</sup> Increased expert involvement in the EU, also by adding new layers of experts through the agencification process, fits within this view. However, it is precisely these developments that have given rise to challenges regarding the accountability of the regulatory decision-making processes, both from democratic<sup>33</sup> and judicial perspectives.<sup>34</sup> Consequently, it must be recognized that expert involvement can provide only a limited answer to the legitimization of decision making.<sup>35</sup>

As a result of these legitimacy concerns, demands regarding the accountability of expert involvement arise as well. These concerns relate especially to the selection of experts and the openness of expert

<sup>31</sup> A. Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union', *Journal of Common Market Studies*, 40 (2002), 603–24, in particular at 615–16. See also Schout and Sleifer, Chapter 17, this volume.

<sup>32</sup> A. Føllesdal and S. Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', *Journal of Common Market Studies*, 44 (2006), 533–62, in which the authors refer specifically to Moravcsik, 'In Defence of the "Democratic Deficit"' and G. Majone, 'Europe's Democratic Deficit: The Question of Standards', *European Law Journal*, 4 (1998), 5–28; G. Majone, 'The European Commission: The Limits of Centralization and the Perils of Parliamentarization', *Governance*, 15 (2002), 375–92.

<sup>33</sup> See references in note 32; and Y. Papadopoulos, 'Problems of Democratic Accountability in Network and Multilevel Governance', *European Law Journal*, 13 (2007), 469–86. See also Everson, Chapter 15, this volume.

<sup>34</sup> See Busuioic, Chapter 18, this volume.

<sup>35</sup> For instance, C. Scott, 'Governing without Law or Governing without Government? New-ish Governance and the Legitimacy of the EU', *European Law Journal*, 15 (2009), 160–73.



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communities and their views to public scrutiny and critique. Expert involvement is thereby becoming subject to similar expectations as the decision-making processes themselves, with questions being raised in relation to how to create forms of accountability to govern these expert processes. Various contributors to this book offer different ways out of this conundrum, including further regulation of expert involvement,<sup>36</sup> limiting the role of the experts,<sup>37</sup> enhancing civil society involvement<sup>38</sup> and returning to Aristotelian virtue ethics.<sup>39</sup>

## 1.2 Experts and expert communities

Given the characterization of contemporary society as an information or knowledge society, the widespread involvement of experts in international and European decision-making processes does not come as a surprise. However, this finding quickly leads to the realization that the answer to the question of who is an expert is not straightforward. The chapters in this book illustrate that, in order to unveil the role of experts in decision making, 'using the methods and approaches of the natural sciences' does not suffice as a selection criterion.<sup>40</sup> How then might experts and expertise be qualified? As the chapters in this book demonstrate, in some policy areas the regimes themselves provide some degree of clarification as to who might qualify as an expert, while in other cases experts seem to emerge by default.<sup>41</sup>

Terms for selecting experts and regulating their *modus operandi* are in place, in particular in international regimes regarding the environment,<sup>42</sup> trade and health-related risks,<sup>43</sup> and in the EU,<sup>44</sup> while contentious attempts to further formalize the selection and role of UN human rights special mandate-holders are ongoing.<sup>45</sup> Gruszczynski, in

<sup>36</sup> Schrefler, Chapter 4, Gupta, Chapter 8, Gruszczynski, Chapter 11, Herwig, Chapter 10, Subedi, Chapter 12, Schout and Sleifer, Chapter 17 and Busuioc, Chapter 18, all this volume.

<sup>37</sup> Everson, Chapter 15, this volume.

<sup>38</sup> Gupta, Chapter 8 and Siebenhüner, Chapter 7, both this volume.

<sup>39</sup> Klabbers, Chapter 5, this volume. <sup>40</sup> See also Grundmann and Stehr, *Experts*.

<sup>41</sup> Scholten and Terlouw, Chapter 14 and Handmaker and Mora, Chapter 13, both this volume.

<sup>42</sup> Andresen, Chapter 6 and Siebenhüner, Chapter 7, both this volume.

<sup>43</sup> Herwig, Chapter 10 and Gruszczynski, Chapter 11, both this volume.

<sup>44</sup> Schout and Sleifer, Chapter 17, Busuioc, Chapter 18 and Everson, Chapter 15, all this volume.

<sup>45</sup> Subedi, Chapter 12, this volume.



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illustrating the progressive formalization of expert involvement in WTO dispute settlement proceedings related to health risks, makes the point that 'the output of adjudication can only be as good as the underlying process'.<sup>46</sup>

At the same time, other contributors emphasize that the formalization of expert involvement often prioritizes certain expertise. For instance, Herwig submits that the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) fails to 'involve a sufficiently broad range of experts who could address all justice-related aspects in risk policy-making'.<sup>47</sup> Knio in turn shows that the appointment of a homogeneous group of experts, consisting of persons who are associated with the (financial) system that they are requested to review, will not necessarily yield significant and necessary inputs on how to change the system. Rather, their involvement is likely to result in certain, predictable approaches to the financial crises.<sup>48</sup>

Considerations similar to those that inform Herwig prompt Gupta to suggest that more structured, participatory and integrated assessments – or what she refers to as civic science, involving civil society members – may be required to increase the compliance pull of decisions in environmental decision making.<sup>49</sup> Siebenhüner similarly suggests that lay-learning should be integrated into the IPCC process. His chapter also illustrates how organizational learning has led to the further formalization of the working methods of the IPCC and improved the quality of its output.<sup>50</sup> Subedi's chapter, besides pointing to the advantages of attempts to further formalize and regulate the involvement of UN human rights special mandate-holders, also reveals an important disadvantage: further polarization of the decision-making process.<sup>51</sup>

However, requirements for expert involvement may also remain unspecified or informal. Handmaker and Mora, for example, in discussing the role of migration experts, point out that there seems to be an informal group of policy advisors and implementers who share common beliefs and as a result reproduce existing hierarchies, thereby 'out-lawing' so-called irregular migrants.<sup>52</sup> Similarly, Scholten and Terlouw illustrate that airline carriers can be characterized as a group

<sup>46</sup> Gruszczynski, Chapter 11, this volume, at 218.

<sup>47</sup> Herwig, Chapter 10, this volume, at 215. <sup>48</sup> Knio, Chapter 16, this volume.

<sup>49</sup> Gupta, Chapter 8, this volume. <sup>50</sup> Siebenhüner, Chapter 7, this volume.

<sup>51</sup> Subedi, Chapter 12, this volume. <sup>52</sup> Handmaker and Mora, Chapter 13, this volume.

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of migration experts in situations in which private actors are called upon to implement migration policies.<sup>53</sup>

The above-mentioned findings regarding experts lead us to the collective aspect of what it means to be an expert. This collective dimension prompted Oscar Schachter as early as 1977 to refer to international legal experts involved in decision making as 'a kind of invisible college dedicated to a common intellectual enterprise ... engaged in a continuous process of communication and elaboration'.<sup>54</sup> The invisibility of the college indirectly also points to a problem that today is associated with the involvement of expert communities in decision making: their lack of transparency. Thus, while on the one hand, it is argued that involving experts in decision making enhances transparency, especially in relation to public administration processes and consultations,<sup>55</sup> on the other hand, it is submitted in various chapters of this book that expert communities themselves may not be transparent.

In 1992 Peter Haas found that the manner in which experts in the natural sciences operate can be explained in terms similar to those used by Schachter for international lawyers. He coined the term 'epistemic communities'.<sup>56</sup> This conceptualization has been further developed by Haas since, in particular with respect to how natural science experts operate in environmental regimes. Haas characterizes epistemic communities as:

networks – often transnational – of knowledge-based experts with an authoritative claim to policy relevant knowledge within their domain of expertise. Their members share knowledge about the causation of ... phenomena ... and a common set of normative beliefs about what actions will benefit human welfare in such a domain. Members are experts with professional training who enjoy social authority based on their reputation for impartial expertise.<sup>57</sup>

Haas maintains that international lawyers do not form an epistemic community, even if they may be part of an epistemic community also involving natural scientists. This stance seems to be due to the

<sup>53</sup> Scholten and Terlouw, Chapter 14, this volume.

<sup>54</sup> O. Schachter, 'The Invisible College of International Lawyers', *Northwestern University Law Review*, 72 (1977), 217–26, at 217.

<sup>55</sup> See above, notes 27 *et seq.* <sup>56</sup> Haas, 'Introduction: Epistemic Communities'.

<sup>57</sup> P. M. Haas, 'Epistemic Communities' in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), 791–806, at 793.