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## IILJ International Legal Theory Colloquium Interpretation and Judgment in International Law

NYU Law School

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Pollack Colloquium Room, FH 9th Floor, 245 Sullivan St.  
Thursdays 4.00pm-5.50pm

*Provisional Semester Program - Attached Paper is shown in Bold*

- January 17 – Jeremy Waldron, NYU Law School  
Topic: *"Partly Laws Common To All Mankind": Foreign Law In American Courts*
- January 24 - Catharine MacKinnon, University of Michigan Law School  
Topic: *Women's Status, Men's States*
- January 31 - Beth Simmons, Harvard University Government Department  
Topic: *Explaining Variation in State Commitment to and Compliance with International Human Rights Treaties*
- February 7 - Richard Stewart, NYU Law School**  
**Topic: *Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance***
- February 14 - Joseph Weiler, NYU Law School  
Topic: *The Theory and Practice of Interpretation in International Law*
- February 21 - NO COLLOQUIUM
- February 28 - Derek Jinks, University of Texas Law School  
Topic: *Fragmentation of International Law concerning Individuals in Armed Conflict*
- March 6 - Robert Howse, University of Michigan Law School  
Topic: *Beyond Compliance: Rethinking Why International Law Really Matters*  
(paper co-authored with Ruti Teitel)
- March 13 - Martti Koskeniemi, University of Helsinki/NYU Law School  
Topic: *Natural Law between Moral History and Raison d'Etat: Understanding the Pre-History of International Law*

Note: March 14 and 15, the Program in the History and Theory of International Law convenes in the same room a conference on Roman Law and Imperialism in the Foundations of Modern International Law (all welcome – see [iilj.org](http://iilj.org))

- March 20 - NO COLLOQUIUM – Spring Break
- March 27 - Jose Alvarez, Columbia University Law School  
Topic: *Interpretive Problems in International Investment Law*
- April 3 - Ryan Goodman, Harvard Law School  
Topic: *Sociological Theory Insights into International Human Rights Law*
- April 10 - Sally Engle Merry, NYU Anthropology Dept & Law and Society Institute  
Topic: *Indicators in Global Governance*
- April 17 - Christopher McCrudden, Oxford University/U. of Michigan Law School  
Topic: *Human Dignity in Human Rights Interpretation*
- April 24 - Stephen Gardbaum, University of California at Los Angeles Law School  
Topic: *Is U.S. Constitutional Rights Jurisprudence Exceptional?*

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# Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance

Richard B. Stewart  
New York University<sup>1</sup>

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<sup>1</sup> [stewartr@juris.law.nyu.edu](mailto:stewartr@juris.law.nyu.edu). I am grateful to Euan MacDonald and Daniel Ricks for research assistance and helpful suggestions.

## I. INTRODUCTION

Accountability and participation have become rhetorical slogans in the globalization debates. All too often demands are made for greater accountability and participation by global regulatory bodies without serious analysis of precisely what accountability or participation consist of, how they can be achieved, or what their goals are. This article provides that analysis. It examines the frequent invocations of “accountability gaps” and “participation gaps” as diagnoses of the larger problem of disregard, which this article defines as the disregard by global decisional bodies of the interests of affected but marginalized states, groups, and diffuse economic, environmental and other societal interests. It further outlines a tripartite array of institutional tools—of which greater accountability and expanded participation are only elements—to redress this problem of disregard.

The article explains the concept of accountability, demonstrating that it is far more precise and limited in scope than the widespread accountability rhetoric in the globalization debates. Further, it shows that “accountability” does not exist in the abstract and is not an end in itself. The question is who is accountable to whom through what types of mechanisms. The number of accountability mechanisms is limited. Moreover, accountability mechanisms represent only one of three basic types of governance mechanisms used by global regulatory bodies to correct the problem of disregard. The other two types of mechanisms are, respectively, decision rules (the rules and procedures that govern decisionmaking by global authorities) and other responsiveness-promoting measures (a residual category of other measures and practices, including transparency, reason giving, and non-decisional participation—to promote greater responsiveness by global decisionmakers to disregarded interests). This article also unpacks the rhetoric of participation, showing that there are distinct forms of participation corresponding to the three categories of institutional mechanisms outlined above: participation in legal proceedings before global authorities as part of legal accountability; exercising a portion of a global body’s decision making authority pursuant to decision rules or electoral participation by electing decision-making representatives; and non-decisional participation, such as consultation or opportunity to submit views to decisionmakers, which falls in the residual category of other responsiveness-promoting mechanisms. Finally, the article applies this analysis to examine the potential application to global authorities of two sharply different approaches to regulatory governance: US interest representation administrative law and EU consensus-based deliberation by specialized regulatory bodies.

Part II of this article provides the basic conceptual framework for the articles by explaining the problem of disregard and the three basic categories of governance tools. It then uses this framework to examine the various forms of accountability and participation mechanisms in relation to other institutional tools for remedying important normative deficiencies in current global governance arrangements.

Part II.A examines the problem of disregard and the potential normative frameworks for guiding the choice of appropriate legal and institutional arrangements for promoting greater responsiveness to states, groups, and societal interests impacted by the decisions of global regulatory bodies. It notes a widely held view global regulatory authorities often disregard the interests of weak states and groups and of diffuse societal interests as result of specialist “tunnel vision,” insularity, domination by powerful states and organized economic interests, and other causes. As a result, the burdens and benefits of global regulatory cooperation are not equitably distributed. What then, are the potential remedies?

Some attribute the problems of global regulatory governance to the erosion, as a result of globalization, of traditional domestic and international mechanisms of regulatory accountability, including electorally-based political accountability and legal accountability. Globalization is said to have created an

“accountability crisis.”<sup>2</sup> But the discussion in Part II.A points out that the problem, as Robert Keohane has made clear, is often not that global authorities lack accountability. Rather, they are often all too accountable to the states and other entities that constitute and support them and to powerful economic actors, to the detriment others affected by their decisions. Strengthening certain existing domestic accountability mechanisms or creating new ones at either the domestic or global levels are possible solutions to this problem. But greater accountability is not the sole or only appropriate solution to the discontents of global governance. Mechanisms within the other two categories of governance can also be used to promote greater responsiveness by global authorities to the disregarded. Further, accountability mechanisms are limited in number and application. Even where such mechanisms could be deployed, are often difficult to establish, costly to use, or have other drawbacks. Similarly, expanded participation is not a cure-all for global governance failures. Participation in the form of adversary legal proceedings is often costly and burdensome. Extending decisional authority to representatives of general social and economic interests is often politically infeasible or operationally impracticable. Participation in the form of consultation or submission of views may be ineffective window-dressing.

In many cases, what is required for more equitable global governance is a combination of these three different types of mechanisms. The precise mix requires careful assessment of the particular regulatory objectives and institutions in question in relation to a number of potentially conflicting normative objectives. In addition to regulatory justice and distributional equity, such objectives may include administrative efficiency, regulatory efficacy, the need to assure continued support for global regimes by founder states or entities, limitation and contestation of power, and promotion of democratic values.

Part II.B analyzes accountability and the mechanisms for achieving it. Authors, politicians, and media commentators have haphazardly used the catch-word “accountability” as a remedial slogan. It argues that the concept of accountability must, in order to retain its analytic integrity and utility, be restricted to institutionalized mechanisms under which an identified account holder has the right to obtain an accounting from an identified accountant for his conduct, evaluate that conduct, and impose a sanction or obtain another appropriate remedy for deficient performance. It shows that only five mechanisms meet these essential structural requirements: electoral, hierarchical, supervisory, fiscal, and legal accountability. Such mechanisms are of two basic types. The first is where the account holder delegates or grants authority or resources to the accountant; it includes electoral, fiscal, hierarchical, and supervisory accountability mechanisms. The second is legal accountability, where the account holder seeks redress for infringement by the accountant of his legally protected interests. While participation rights may form a basis for some legal accountability mechanisms, such as the right to a hearing in legal proceedings before global authorities and reviewing courts or election of representatives to a global decision-making body, participation by itself cannot serve as an accountability mechanism. The discussion rejects suggestions that the concept of accountability should be defined more broadly to include market, peer, public reputational, general political, and social influences, or more narrowly to encompass only hierarchical relationship structures. It also shows that practices often invoked in the global accountability rhetoric, such as transparency, evaluative standards, and reason giving, are not necessary elements of many accountability mechanisms.

Part II.C turns to a consideration of the internal decision making processes of global regulatory bodies, which include a variety of institutional structures and voting and other decision rules. Providing states or groups or diffuse societal representatives of interests with the right to exercise a share of global bodies’ decisional authority—for example by granting them voting membership in a collegial authority that makes authoritative decisions for the body—is another subcategory of participation mechanisms. Where these representatives are elected, typically by groups or associations as in the case of the ILO, voting by

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<sup>2</sup> Bronwen Morgan, *Technocratic v. Convivial Accountability*, in Michael W. Dowdle, ed, *Public Accountability: Designs, Dilemmas and Experiences* 243, 245 (2006)

representatives is linked with accountability to the electors. The analysis explains that changes in the decision rules of global authorities to include or give greater decisional power to the disregarded interests are unlikely, due to the reluctance of the most powerful states or other actors who founded these bodies to share decisional authority, the practical difficulties in providing representation of diffuse societal interests, and the risk of impairing the organization's effectiveness in achieving its specialized objectives. This part also makes special note of the consensus-based deliberative process for regulatory decision making, as exemplified in an EU family of new governance practices. These include comitology and the New Approach to regulatory standard setting through industry standards bodies.<sup>3</sup> These practices are not accountability mechanisms and do not rely on other external techniques for promoting responsiveness. Rather they seek to incorporate relevant interests within a cooperative, dialogic decisional process. Invoking conceptions of reason-based public dialogue, some proponents of such processes view them as democracy-enhancing and a promising model for global regulatory governance.

External governance tools other than accountability mechanisms are examined in Part II.D. It shows that more open decisionmaking, public access to information, participation in the form of opportunity for consultation or submission of comments, and requirements that global decision makers give public reasons for their decisions are not by themselves accountability mechanisms (although they may promote the effective operation of such mechanisms where they exist). In contrast to accountability mechanisms, may be invoked as of right by specified account holders who can deploy specific sanctions or remedies for deficient performance, or the right of specified actors to exercise actual decisional power of an organization, these mechanisms and their operation are diffuse in their operation and availability and their influence on decisionmakers is "soft" in character; they may nonetheless have significant impact in making global regulatory bodies more responsive to the disregarded. On the other hand, such measures may have limited effect and largely serve to extend a trapping of legitimacy to bodies dominated by powerful states or well-organized economic interests. Much depends on the particular context.

Part III uses the analytic framework developed in Part II to consider the contrasting US and EU approaches to regulatory governance, which reflect important differences in legal and political culture.<sup>4</sup> Americans emphasize control of regulatory power through mechanisms of political and legal accountability that are pluralist, open, and competitive. Europeans tend to favor governance mechanisms that are more consensus-oriented, corporatist, and closed. To borrow the words of Robert Kagan in a related context, "Americans are from Mars and Europeans are from Venus."<sup>5</sup> The Part III discussion of US approaches to regulatory governance focuses on the US interest representation model of administrative law and its potential application to global regulatory authorities and the problem of the disregarded. The Aarhus Convention provides a potential template for such an external, legalized, accountability-based approach.<sup>6</sup> The discussion then turns to consideration of an internal approach based on changes in decisional rules, as exemplified by the EU model of consensus-based deliberation. The analysis considers the potential application to global decisionmaking of EU "deliberative supranationalism" as developed through the EU comitology method for adopting regulatory standards, and the problems in assuring representation of all relevant affected societal interests within the deliberative process.

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<sup>3</sup> See J. Scott and D. Trubek, *Mind the Gap: Law and New Approaches to Governance in the EU Union*, 8 *Eur. L. J.* 1 (2002) and other article in the same journal issue.

<sup>4</sup> See Robert A. Kagan, *American and EU Ways of Law: Six Entrenched Differences* (Paper prepared for First EU Socio-Legal Conference, Onati, Spain, 3 2005)

<sup>5</sup> Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* 3 (2005). The Robert Kagan who is the author of this book is different from the Robert A. Kagan cited in footnote 4.

<sup>6</sup> See Benjamin Dalle, *The Global Aspirations of the Aarhus Convention and the Case of the World Bank*, Paper prepared for Second Global Administrative Law Seminar, Viterbo, Italy, June 2006.

The analysis concludes that the both US administrative law approach and the EU comitology approach are in some respects well suited for the decentralized, heterarchical conditions of global regulatory governance and could in principle promote greater responsiveness to disregarded interests, but that each also has appreciable weaknesses. The analysis considers potential strategies for synthesizing the two different strategies, or alternatively for distributing their application using the one or the other for the different global regulatory bodies and issues for which it is best suited. Finally, Part III contrasts the US accountability-based approach and EU decisionmaking-based approaches with a third strategy of promoting transparency, non-legal, non-decisional participation, and reason-giving in global governance to indirectly promote greater responsiveness to the disregarded.

## **II. MEASURES FOR PROMOTING DISREGARDED SOCIETAL INTERESTS IN GLOBAL REGULATORY GOVERNANCE**

### **A. Introduction: Problem of Disregard, Accountability and Participation Gaps, and Three Types of Institutional Tools for More Responsive Global Regulatory Governance**

The approach in this article, and the companion Global Administrative Law Project at New York University, understands regulation broadly as encompassing the many different fields of economic and social regulation, measures to enhance security and development aid, regulation of the movement of persons, and securing human rights.<sup>7</sup> Global regulation is carried out by a wide variety of international, intergovernmental, governmental, and private and hybrid bodies. Increasingly, the functional demands of effective regulation have led the states or other entities that found these various bodies to establish and delegate authority to subsidiary decisionmaking institutions, often complex and administrative in character. The resulting global regulatory administrative space is sprawling and complexly differentiated. The problems of disregard associated with the decisions of these various bodies are similarly diverse.

It is widely asserted in many different quarters, often with good reason, that global regulatory bodies disregard or give inadequate consideration to developing country or small states to vulnerable groups such as indigenous peoples, or to diffuse societal interests and values impacted by their decisions.<sup>8</sup> As a result, these disregarded may suffer unjustified harms, or be denied a just share of the benefits of international economic and other forms of cooperation. Or, the rights of individuals or groups may be violated. As convenient shorthand, this paper refers collectively to these problems as the problem of disregard. The concept of disregard implicitly underlies much criticism of global governance, but it is rarely articulated and developed.

Disregard has a dual aspect. One is the substantive aspect—disadvantage, harm, injustice, or inequitable treatment. The other is the procedural and institutional aspect—failure by global regulatory authorities to take into account and give adequate weight in decisionmaking to those disadvantaged. Procedural regard is linked to substantive regard. A central purpose of procedural regard - for example, procedures allowing those affected to submit evidence, analysis and views to decisionmakers, and requiring decisionmakers to

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<sup>7</sup> See, e.g., Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (Summer/Autumn 2005).

<sup>8</sup> E.g., Petersmann, Chimni, Benvenisti and Downs, World Commission on the Social Dimension of Globalization, Ghandi, Pallis, Akech, Craik. [From Euan MacDonald memo.] The interests of ultimate concern here are not those of governments or international or intergovernmental organizations or global regulatory bodies. They are the interests of individuals, or groups of individuals. They may be represented by states, by group, or communal governance bodies, or by civil society organizations including business firms and non-profit NGOs. These societal interests may be variously characterized, for example, as domestic or international, Northern or Southern, economic or social and cultural, local or cosmopolitan, environmental or consumerist.

respond to these submissions in the process of giving explanations and reasons for their decisions - is to help ensure that the affected are fairly or appropriately treated in the decision made, in accordance with applicable decisional norms. Further, it may not be sufficient to satisfy procedural regard for the decisionmakers to permit submissions and respond to them in decisions, if the decision itself treats the affected with manifest injustice. We want to say that the decisionmakers have not really considered the interests of the affected, for if they had they would have made a different decision. This does not mean, however, that procedure collapses into substance. While the governing decisional norms may place constraints on decisional outcomes and the treatment of those affected, they are typically so numerous and general as to allow decisionmakers wide latitude in striking the balance among competing considerations, interests and values in given situations.

The exercise of such discretion, however, may be disciplined by a practice or requirement of giving public reasons for the choices made.<sup>9</sup> Such a practice may not only discipline particular decisions but also promotes a degree of consistency in successive decisions, limiting to some degree measures dictated by raw power or ad hoc bargains. And, a norm and practice of responsible decisionmaking justified ----- by publicly stated reasons may, like other rule-of-law structural norms and practices, indirectly serve to promote greater regard for those affected.<sup>10</sup>

An actor may be said to be responsive to the interests and values of others when she considers and takes into account those interests and values in making decisions. Greater responsiveness is the antidote to disregard. Like disregard, responsiveness has both a procedural and a substantive aspect, linked in the same ways as explained above in the discussion of disregard. In addressing the problems of disregard, the question is how best to make the various different types of global regulatory bodies more responsive to the disregarded, consistent with other important objectives. For example, there is the need to maintain beneficial cooperation by the states and other entities that found global bodies and provide them with authority and resources to address regulatory problems that can not be satisfactorily handled through decentralized domestic measures. One must also assure the effective and efficient discharge by global bodies of their specialized functions and responsibilities. These and other important objectives may conflict with steps to promote greater regard for what is often a wide range of disparate entities and societal interests affected by such bodies' decisions.

In the debates over global governance, much attention has been focused on gaps in the efficacy of domestic political and legal mechanisms of participation and accountability resulting from shifts of regulatory authority from domestic to global regulatory bodies.<sup>11</sup> As a result, it is argued, important societal interests are disregarded and unjustifiably harmed. For example, NGOs argue that regulatory decisions by the WTO, investment treaty arbitral tribunals, and other global bodies are undermining environmental, health, and safety protection laws and programs in the US.<sup>12</sup> The remedy often proposed is to fill the resulting accountability and participation gaps by reinvigorating domestic electoral and legal mechanisms of accountability and participation by, for example, refusing to recognize global regulatory norms in domestic legal systems or limiting the delegation of regulatory authority to global bodies.<sup>13</sup> But

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<sup>9</sup> See Richard B. Stewart, *The Reformation of American Administrative Law*, *Harv. L. Rev.* (1976)

<sup>10</sup> The relation between reason-giving and other rule-of-law practices and substantial justice is, of course, a difficult and contested issue in legal theory and in constitutional and administrative law. Further exploration of this issue is for another day.

<sup>11</sup> Broad definition of regulation.

<sup>12</sup> *E.g.*, Public Citizen, *Global Standard Setting in International Trade*, 1-3 (2004). Accessible at <http://www.citizen.org/trade/harmonization/harmonization/> [Cite Keohane, M & M]

<sup>13</sup> *E.g.*, *NRDC v. EPA*, 464 F.3d 1, 20-26 (D.C. Cir 2006). *See also* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 *COLUM. L. REV.* 1955 (1999); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 *MINN. L. REV.* 71 (2000); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55

it is not true that global regulatory bodies are not accountable. They are often subject to informal but powerful mechanisms of supervisory and fiscal accountability to the states and other founder entities that create, fund, and support these global institutions.<sup>14</sup> This situation has stimulated a second angle of attack, often voiced by developing countries and global NGO networks: that these bodies are dominated by the most powerful developed countries and multinational business and financial firms, to the detriment of developing countries, the poor, and environmental and social interests. Rather than relying on renewed domestic controls, here the remedy typically advocated is the creation, at the level of the global bodies that increasingly make regulatory law, of new mechanisms of participation and accountability to protect these disadvantaged interests.<sup>15</sup>

The invocation by critics of accountability and participation notions in order to diagnose and remedy problems of global regulatory governance tends to obscure the underlying problem of disregard and the full array of governance tools and options for addressing it. As Ruth Grant and Robert Keohane point out, accountability and participation mechanisms are only two of a number of different types of practices and institutional mechanisms for constraining, directing, and influencing the exercise of power.<sup>16</sup> In the global context, these mechanisms include force or its threat; negotiation and the threat of exit or “go it alone” power<sup>17</sup>; other forms of informal cooperation for mutual advantage through coordination or collaboration; institutionalized rules for collective decision making that specify the structure of decisional authority, the requirements for making authoritative decisions, and who plays what role in making them; a variety of accountability mechanisms; and other practices and incentive structures ranging from non-decisional participation and transparency to peer relations within epistemic communities to market competition. Legal norms, both substantive and procedural, and institutions should be added to this list. In addition to being only two of many approaches for disciplining power, accountability and participation themselves are complex phenomena that need to be carefully unpacked in order to serve as useful analytical and institutional tools. This article analyzes the array of institutional options for addressing the problem of disregard in terms of three basic categories: decision rules, accountability mechanisms, and other responsiveness-promoting measures.

First, decision rules define the entities or persons vested with authority to make decisions for an institution and the structures, voting rules or other arrangements for making such decisions. These rules, discussed further in Part II.C, may establish complex internal authority structures. Some of these structures may provide for several decisional bodies interlocking in a system of checks and balances “designed to prevent action that oversteps legitimate boundaries by requiring the cooperation of actors with different institutional interests to produce an authoritative decision.”<sup>18</sup> Because of functional demands for specialized knowledge and responsibility and for decisional efficiency, the decisional structures of many global regulatory bodies increasingly have an administrative character. The decisionmaking structure may also include external aspects, linking decisions of a given global regulatory entity to those other global entities, creating a global regime complex.<sup>19</sup> Accordingly, one potential means of promoting responsiveness by global regulatory bodies to the disregarded interests is to give them or

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STAN. L. REV. 1557 (2003); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004);

<sup>14</sup> Robert O. Keohane, *Accountability in World Politics*, SCANDINAVIAN POLITICAL STUDIES Vol. 29, No. 2 at 80-81 (2006). See also E. Benvenisti and G. Downs

<sup>15</sup> See Chimni

<sup>16</sup> Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 30 (2005).

<sup>17</sup> See K. Abbott and D. Snidal, *The Governance Triangle, Regulatory Standards, Institutions and the Shadow of the State* (2007)

<sup>18</sup> Grant & Keohane, *supra* note XX, at 30.

<sup>19</sup> For the concept of a global regime complex, see K. Raustiala & D. Victor, *The Regime Complex for Plant Genetic Resources*, 58 Int'l Org. 277 (2004).

their representatives a share of the decisional power within the organization, or to link the regulatory body's decisions to those of another body that is more responsive to such interests.

Second, accountability mechanisms are designed to protect organizational “outsiders” by influencing “inside” decision makers to give regard to their interests. As discussed in Part II.B, there are five types of accountability mechanisms: electoral, fiscal, hierarchical, supervisory, and legal. These several mechanisms are characterized by a common set of minimum requirements: specified account holders have the authority to hold specified power holders to give account for their conduct and impose sanctions or secure other remedies for deficient performance or unlawful conduct. The prospect of being required to make account and potentially incur discipline makes the decisionmakers responsive to the interests of the account holders. Thus, another type of remedy for the problem of disregard is to create or strengthen mechanisms such as elections or legal redress, that entitle representatives of such interests to hold organizational decision makers to account for their decisions.

Third, other responsiveness-promoting measures are institutional arrangements or practices that are neither decisional rules nor accountability mechanisms, but provide global bodies with various incentives to give more adequate consideration to disregarded interests. Like accountability mechanisms, they are external in character, but they fail to meet the minimum requirements of an accountability mechanisms because they do not involve a defined structural relation between power holders and those affected by its exercise, because these affected lack the authority to hold decisionmakers to give account, or because no sanctions or remedies are available to these affected. Examples of other responsiveness-promoting measures include requirements or practices under which regulatory bodies provide information about their activities or enable outsiders to participate in organizational decisions without exercising decisional authority (for example, by consultation practices or submitting comments on proposals); steps to mobilize peer reputation influences on decision makers; or establishing competition among different global regulatory bodies in the same field of regulation.

Participation procedures do not represent a fourth distinct category of governance mechanisms. Rather, quite different forms of participation that can only be properly understood by distributing them among the three fundamental categories of governance mechanisms set forth above. First, decisional rules may give identified persons the right to vote on or otherwise make authoritative decisions on behalf of a body, thereby conferring decisional participation rights... Second, participation may take the form of voting in elections of representatives, creating electoral accountability. Or, other types of participation rights may be an integral part of a legal accountability mechanism. These juridical participation rights may include for example the right to a hearing to present evidence and argument before a court or tribunal proceeding to hold a decisionmaker to account or, in some cases, the right to present evidence and argument in the first instance to an administrative body or other decisionmaker who is under a legal obligation to give them adequate consideration.<sup>20</sup> Third, selected persons or the public generally may be afforded the opportunity for consultation or comment regarding decisions by a body, these non-decisional participation practices that may promote greater responsiveness to the interests of those who avail themselves of such opportunities.

Decisional rules and accountability mechanisms tend to have a “hard” character, which assign defined roles to specified actors and have determinate consequences for institutional decisions or actors, while the availability of other responsiveness-promoting practices is more diffuse and their influence more indeterminate. In practice, many institutions include or operate in environments that include all three types of measures, arrayed in different configurations in different institutions.

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<sup>20</sup> This procedure is discussed further below.

The focus in much of the globalization debate on accountability or participation gaps and their remedies risks serious errors in diagnosis and prescription. The invocation of accountability or participation defines the problem of disregard in terms of particular types of procedural/institutional defects and prescribes that remedies of the same type should be adapted in order to cure these defects. This obscures the underlying substantive character of the problem of disregard and ignores the opportunities for using a broader array of procedural/institutional measures to address the particular problem of disregard choosing those that are most appropriate and effective in a given institutional setting.

Thus, much of the globalization literature decries the lack of accountability on the part of global authorities and in the same breath proposes that this gap be closed by new or strengthened accountability arrangements. These calls often fail to clarify the precise character of the accountability failures in question or the particular type of accountability mechanisms that should be adopted in response. As explained further below, there are only five types of regulatory accountability mechanisms. Further, these mechanisms can be invoked by the disregarded in only a limited range of institutional structures. Moreover, they are often costly to deploy and suffer from other drawbacks. Accordingly, none of the five accountability mechanisms may be feasible, appropriate, or effective for protecting the interests of the particular disadvantaged entities of interests of concern in the context of a specific global regulatory regime. More fundamentally the root problem is typically not the absence of accountability mechanisms but of substantive disregard – an exercise of power that unjustified harms or unjustly treats some of those affected. Institutional remedies other than accountability mechanisms may be far better suited for redressing this problem in a particular context. One option is to change the decisional rules of global regulatory bodies to make disregarded “outsiders” into “insiders” or to link the decisions of one body to another. Another is to promote other responsiveness-promoting practices, such as greater regime transparency, regulatory competition, peer evaluation, or non-decisional participation practices that are not accountability mechanisms but promote greater consideration of outside affected interests.

Depending on the situation, these different types of tools may function either as substitutes or complements. In many cases, some combination of these different types of measures will be superior to relying on one alone. The evaluation and choice among such alternatives must inevitably be context-specific. It is true that globalization has undermined the efficacy of established accountability mechanisms operating in the nation state context. But it does not follow that the application of accountability mechanisms to global decision is always the necessary or appropriate solution. Focusing simply on accountability threatens to misdiagnose the fundamental problem and prescribe the wrong remedies. It also leads governance reformers to stretch the concept of accountability to the point where it loses its integrity and utility.

Alternatively, critiques of regulatory globalization are often expressed in terms of participation. Thus, certain societal interests (“stakeholders”) are said to have been neglected because their representatives did not have an adequate opportunity to participate in decisions of global authorities that affect them in important ways.<sup>21</sup> The corresponding remedy sought is the creation or expansion of participation rights for these interests. This approach to diagnosis and prescription, however, suffers from the same basic failings as the single-minded focus on accountability.

First, general invocations of expanded participation ignore the fundamentally different forms of participation, set forth above. Specifying what type of participation is in issue is essential to sound analysis and prescription. Second, in many cases, it may be infeasible, impractical or unduly burdensome to extend “strong” forms of participation such as the right to make decisions, the right to elect representatives, or the right to an adversary legal hearing, to the wide range of those affected. Third, many forms of participation rights—for example in the form of opportunities for consultation or submission of

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<sup>21</sup> Chimni, *Co-operation and Resistance*.

comments—may in practice be dominated by well-organized economic interests or powerful states, or may be otherwise ineffective in promoting better treatment of the disadvantaged.<sup>22</sup> Fourth and most fundamental, the focus on participation gaps and remedies again obscures the underlying problem of substantive disregard. It also overlooks the potential for using other remedies, such as accountability mechanisms, external linkages to other global bodies, or a range of other responsiveness-promoting measures, that may be more effective in curing disregard.

The basic aim of this Part is to warn against overly simplistic recipes for global regulatory governance by focusing on the underlying problem of substantive disregard and exposing the full array of potential governance arrangements for addressing that problem. It also shows that each of the three basic types of mechanisms—decision rules, accountability mechanisms, and other responsiveness-promoting measures—includes a variety of options. All of these options must be considered and evaluated in the context of any given regulatory regime, its structure and purpose, and the specific problems of disregard at issue including the identity of the disregarded.

In carrying out this analysis, it is necessary to distinguish the various types of global regulatory bodies, the particular substantive problems that they address, and the functions that they serve. The many different global institutions that make, implement, or enforce regulatory norms can be grouped into five basic types: (1) formal treaty-based international or intergovernmental organizations (such as the WTO, the Security Council, the World Bank, the Climate Change regime, etc); (2) informal intergovernmental networks of domestic regulatory officials (such as the Basel Committee of national bank regulators); (3) domestic authorities implementing or subject to global regulatory law (distributed administration of global norms); (4) hybrid public-private regulatory bodies such as the Internet address protocol regulatory regime, which includes the Internet Corporation for Assigned Names and Numbers (ICANN) and WIPO; and (5) private bodies such as the International Standards Organization and the Forestry Stewardship Council.<sup>23</sup> In many fields, a variety of global bodies exercise regulatory authority over the same activities, creating global regime complexes. For example, ten different global bodies are involved in regulating the Internet infrastructure.<sup>24</sup> The structures and decisionmaking procedures of these different bodies vary greatly. But, to a significant and growing extent, the regulatory authority of these institutions is exercised by bodies, including councils, committees, boards, and dispute resolution bodies that are fundamentally administrative in character, operating below or to the side of general decisionmaking bodies comprised of representatives of the member entities establishing the institutions.<sup>25</sup> For this reason, techniques for disciplining regulatory administrative decisions derived from those in domestic systems of administrative law may be promising for application to global regulatory governance.<sup>26</sup>

In addition to addressing the important differences in the locations and structure of global regulatory bodies, analysis of global regulatory governance must also deal with the wide variations in the fields they regulate and the reasons that they were created to supplement domestic regulatory efforts in dealing with various aspects of globalization (“decentralization failures”). Some global regulatory regimes promote global market integration and address market failures through regulation of trade, investment, financial markets, money flows, competition, communications, transport, and consumer and environmental health and safety protection. Others address problems of international security or bodies that promote economic development, including the World Bank and the IMF, have myriads of regulatory functions. Still others promote protection of human rights, or regulate the international movement of persons. These

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<sup>22</sup> Chimni, *International Institutions Today*; Harlow [From Euan MacDonald memo]

<sup>23</sup> Kingsbury, *supra* note at 20.

<sup>24</sup> M. Lips & B.J. Koops, *Who Regulates and Manages the Internet Infrastructure? Democratic and Legal Risks in Shadow Global Governance*, 10 *Information Polity* 117 (2005)

<sup>25</sup> Kingsbury, *supra* note X.

<sup>26</sup> GAL project & framing paper

institutional and subject area variables have to be carefully considered in identifying and diagnosing potential problems of disregard and providing sound institutional remedies.

Evaluations and prescriptions for improvement of global regulation also require robust normative theory of global governance.<sup>27</sup> A central criterion is regulatory functionality: the performance of global regulatory bodies in providing regulatory benefits and overcoming market and regulatory decentralization failures. Accountability mechanisms, decisional rules that empower a broader range of actors, more open decisionmaking, and other responsiveness-promoting measures may, by generating more and better information, analysis, and consideration of consequences, produce better decisions, and more effective policies, thereby promoting “output legitimacy” for these bodies.<sup>28</sup> Mechanisms to engage the various interests affected by those decisions may also enhance their legitimacy and acceptance, thereby improving regulatory effectiveness. But these mechanisms may, to different degrees, also have costs and other drawbacks that can undermine regulatory effectiveness appropriate scope for technical expertise or deliberative confidentiality, administrative efficiency. Regulatory efficacy may also require accommodating the fundamental objectives of the most powerful states or other founders that maintain and support global regulatory bodies. Otherwise, powerful founders may fail to continue such support, impairing regulatory efficacy, or “exit” to other regimes that may be less favorable for those affected. Accordingly, different measures to promote greater regard for weaker states or diffuse societal interests, may on balance promote or undermine the delivery of regulatory benefits, depending on the circumstances.

Problems of disregard relate primarily to the character and distribution of the benefits and burdens generated by global regulatory regimes. But the circumstance that decisions adversely affect certain states, groups or interests, without more, does not represent a problem that justifies remedy. That depends on the norms applicable to decisions by the specific body in question. For example, decisions adopted by the WTO may adversely impact the profitability of certain business firms by removing barriers to wider competition, but such impacts do not give rise to concerns because the norms governing market relations do not protect firms against competition. We require normative grounds to distinguish those adverse effects that are unjust, inequitable or otherwise wrongful. These grounds may include norms particular to given fields of regulation, such as economic regulation, environmental protection, anti-terrorism, the regulation of refugees as well as more general norms of distributive or corrective or procedural justice.

The working assumption of this article is that is appreciable consensus on the existence of actual or potential problems of disregard—operating to the detriment of roughly identifiable states, groups, or societal interests—as well as the desirability of adopting measures to enhance decisional responsiveness to the disregarded and secure a more equitable distribution of regulatory benefits and burdens. The further premise is that such consensus implies corresponding norms to guide diagnosis and remedy. Such an understanding, however, is likely to be highly context-specific, related only very loosely to more encompassing normative approaches, with an aspiration of eventual convergence in a more complete and robust normative theory of global regulatory governance.

Curing disregard is not a complete or self sufficient normative theory. But building such a theory confronts a severe double challenge. Most normative theories of government have been developed in the experience of democratic nation states with constitutional systems of representative democracy and rights protection, governed by a legislature, executive, and independent judiciary with generic authority. The conditions of global regulatory governance are radically different in at least two respects. First, there is no system of global electorally-based democratic government along the lines of domestic systems, nor any foreseeable possibility of such a system. Second, global regulatory governance is highly fragmented.

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<sup>27</sup> Kingsbury, *supra* note 7, Part IV.

<sup>28</sup> On the concept of output legitimacy, see Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (1999)

There is no general purpose legislature, executive, or judiciary. The fragmented, piecemeal character of global regulatory governance may be deliberately fostered and maintained powerful states and economic actors to enhance their interests and limit the influence of weaker states and groups, of NGOs representing diffuse societal interests, and of international law and emerging international norms of democratic or legitimate governance.<sup>29</sup> Any normative theory must be suitable for application to very different special-purpose regulatory bodies pursuing very different objectives in circumstances that require a high degree of specialized knowledge, judgment, and administration. In these circumstances, it may be quite difficult to develop appropriate globally applicable theories of democracy or justice, as proponents of global constitutionalism aspire to do.<sup>30</sup> Consider such diverse bodies as WIPO, the Basel Committee of national bank regulators, a developing country agency's administration of water supply franchises with foreign investors, the Forestry Stewardship Council, or the International Standards Organization.<sup>31</sup> Ideally, the problem of substantive disregard might be recast in terms of some substantive theory of democracy or justice for special-purpose global regulatory regimes, but no such theory has yet appeared.

This article approaches procedural and institutional arrangements as instrumental to redressing problems of substantive disregard. The ultimate criteria are an effective provision of regulatory benefits, together with just or fair treatment of those benefited or burdened. But normative understanding must consider that individuals, groups (states), or societal interests might have intrinsic rights, based on process, dignity or sovereignty values, to certain procedures or remedies, regardless of their ability to promote these substantive objectives. Perhaps the strongest situation for recognizing an intrinsic procedural right is where an individual is singled out for condemnatory sanctioning by a global body. Examples include the listing by the UN Security Council 1267 Committee of suspected terrorist financiers (which triggers a freeze of their assets), or disqualification of athletes by the World Anti-Doping agency. In such cases, it is plausible that at least some procedural rights have an intrinsic element and do not function solely as a means to protect an individual's substantive rights or to channel power through the rule of law.

The claim to intrinsic procedural rights is more difficult when, as is much more often the case, global regulatory decisions involve general norms affecting many. The right to vote in elections to select high-level government decisionmakers may be regarded as such a right, but only in the domestic context. Conceivably there are other types of intrinsic procedural rights vis-à-vis global bodies to compensate for the lack of electoral rights. They might, for example, include the right to hold global authorities to account through legal or other mechanisms and secure remedies for unjustified treatment, or the right to have representatives exercise a share of such authorities' decisionmaking powers. But it seems very difficult to develop basis for specifying such rights, or dealing with problems of practicality in implementing them, especially given the highly fragmented character of global regulatory governance, with hundreds of special purpose regulatory bodies. The sheer number and variety of these affected, including states, groups and diffuse societal interests, also poses a severe challenge. The remarks of Justice Holmes—in a U.S. Supreme Court case refusing to recognize a constitutional right to an administrative hearing by group of taxpayers protesting a state agency decision sharply raising their taxes—apply with even greater force in the global context: “Where a rule of conduct applies to more than a few people it is impractical that every one should have a direct voice in its adoption. . . . Their rights are

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<sup>29</sup> E. Benvenisti & G. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law* (ILJ Working Paper 2007/6) Fragmentation of regulatory decision making at the domestic level can have similar consequences. See Richard B. Stewart, *Madison's Nightmare*, -- *U. Chi. L. Rev.* – (19 ). Potential structural remedies for these effects of institutional fragmentation are beyond the scope of this paper.

<sup>30</sup> Dewet; Fassbender; Kumin; Petersmann, *How to Reform* (From Euan MacDonald Memo)

<sup>31</sup> See Jürgen Habermas, *The Postnational Constellation and the Future of Democracy*, in Jürgen Habermas, *The Postnational Constellation: Political Essays* 58 (2001).

protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”<sup>32</sup>

Further, a fixation on procedural rights as such risks the embrace of measures that provide a veneer of legitimacy without actually changing substantive decisions or redressing the problem of disregard. For example, procedural mechanisms such as the Basel II process for developing global bank regulatory standards or the norms of regulatory due process for domestic agencies adopted by bilateral investment treaty arbitral panels or WTO decisions may be used primarily by organized business and financial interests. The result may be an even greater disregard of the weak and vulnerable; the appearance of procedural legitimacy may veil and further entrench that disregard.<sup>33</sup>

Beyond normative theories based on the substantive rights of individuals, groups, societal interests or states to fair outcomes, or their intrinsic procedural rights for global regulatory governance might be subject to norms of institutional legitimacy that have a more systemic character, based for example on a vision of global democracy. For example, Terry and Kate MacDonald view the adoption of certain mechanisms of accountability to or participation by affected interests as first steps to the development of a global democracy, even where there is no identifiable demos to which electoral forms of accountability and control might attach.<sup>34</sup> Joshua Cohen and Charles F. Sabel have welcomed such developments as fostering conditions under which a deliberative version of global democracy can develop.<sup>35</sup> Eschewing such a visionary approach, Allen Buchanan and Robert Keohane have proposed a complex standard under which global institutions may be regarded as legitimate if they further cooperation for objectives enjoying wide public support, avoid extreme injustice, enjoy the ongoing support of democratic states, promote basic democratic values, and are structured so that their goals and performance in meeting them are subject to public scrutiny, contestation, and change.<sup>36</sup> Subjecting global decisionmaking to the Rule of Law represents still another systemic conception of institutional legitimacy.

Debates over whether a particular global regulatory body has unfairly disregarded and unjustly treated certain states, groups or societal interests asserted problems of disregard may often rest on disagreements over which norms should govern its decisions. Have WTO dispute settlement panels unjustifiably disregarded environmental interests in deciding that specific Member environmental regulations challenged by another Member are contrary to the disciplines contained in particular WTO agreements? Has the IMF unjustifiably disregarded global or domestic distributional justice in imposing conditions of fiscal austerity on developing countries receiving its assistance? Defenders of these institutions could well argue that these claims implicitly assume the applicability of general norms of environmental protection or distributional equity that these special purposes bodies have neither the authority nor the institutional competence to consider and implement. This article does not seek to resolve these questions of normative theory. But it would be remiss not to underscore that these questions are essential elements of global governance theory and practice, and that the institutional mechanisms analyzed in the remainder of this article must ultimately be evaluated in relation to a family of normative ends such as these.<sup>37</sup> This article proceeds, as noted above, on the premise of a working consensus that adopting measures to treat serious

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<sup>32</sup> *Bi-Metallic Inv. Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915)

<sup>33</sup> Chimni, *International Institutions*; Harlow [From Euan MacDonald memo]

<sup>34</sup> See e.g. Terry MacDonald and Kate MacDonald, *Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry*, 17 *EJIL* 89 (2006).

<sup>35</sup> See Joshua Cohen and Charles F. Sabel, “Global Democracy?”, 37 *New York University Journal of International Law and Politics* (2005) 763.

<sup>36</sup> See Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 *Ethics and International Affairs* 405 (2006). See also Keohane, *Accountability and World Politics* 86 (discussing concept of “epistemic legitimacy” as applied to global institutions).

<sup>37</sup> Positive political economy is another essential element in understanding global governance and improving its performance. [Cite KKS, etc.]; Benvenisti and Downs. It is also not specifically addressed in this article.

problems of disregard exist in the context of various specific global institutions, and require corresponding remedies. This approach appears consistent with a broad range of plausible normative theories of global regulatory governance, and can thus serve as a sound framework for the analysis which follows. The remainder of this part considers in turn each of the three basic types of institutional tools for promoting greater consideration by global regulatory bodies of disregarded interests. Part II.B examines accountability mechanisms, Part II.C deals with internal decisional rules, and Part II.D deals with other measures for promoting responsiveness to outside interests.

## **B. Accountability Mechanisms**

Accountability is all the rage. Accountability has become “something of a fetish,”<sup>38</sup> It has become a “fashionable concept, “an ever-expanding concept”<sup>39</sup> that “crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the burdens of democratic ‘governance.’”<sup>40</sup> It is rare indeed to find any writing on global governance—whether by lawyers, political scientists, international relations specialists, political theorists, or NGO advocates—that does not cry out for enhanced accountability of international organizations and other global regulatory regimes.<sup>41</sup> Indeed, such discourse has become so pronounced that whenever a domestic or international body shows any sign of asserted unresponsiveness or bias, the almost automatic response by pundits is that the problem and the solution both lie with accountability. They invoke various measures to strengthen accountability, including enhanced transparency, participation, rolemaking, reason-giving, deliberation, dialogue, benchmarking, and reporting.

Notwithstanding all the accountability talk, there has been relatively little careful and sustained analysis of the concept of accountability and its relation to specific governance needs and institutional reform proposals.<sup>42</sup> As Jerry Mashaw has noted, “accountability is a protean concept, a placeholder for multiple contemporary anxieties.”<sup>43</sup> A disciplined approach to the concept of accountability will help build a more rigorous and useful analytical framework for assessing these complexities and for building institutional solutions to the discontents of globalization.

This section examines the concept of accountability and its application to commonly invoked measures for better governance. It provides the conceptual tools that are needed to analyze and evaluate various governance measures and clarify the stakes involved in the choice among these measures. It shows that there are five distinct accountability mechanisms applicable to public or private governance. This number is substantially less than suggested in much of the global governance literature, which often uses the language of accountability loosely and uncritically.

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<sup>38</sup> Harlow at 189

<sup>39</sup> Edward Rubin, *The Myth of Non-Bureaucratic Accountability and the Anti-Administration Impulse*, in Dowdle 52

<sup>40</sup> Richard Mulgan, “Accountability”: An Ever-Expanding Concept? 78 *Pub Adm.* 555 (200), quoted in Harlow at 1.

<sup>41</sup> See, e.g., David Held and Mathias Koenig-Archibugi, *Global Governance and Public Accountability* (Malden and Oxford, Blackwell 2005)

<sup>42</sup> Jonathan Koppell posits that disagreement about the meaning of accountability is “masked by consensus on its importance and desirability.” Nevertheless, analysis of the concept of accountability within public administration is important because “conflicting expectations borne of disparate conceptions of accountability undermine organizational effectiveness.” Jonathan Koppell, *Pathologies of Accountability: ICANN and the Challenge of “Multiple Accountability Disorder”*. *Public Administration Review* 65:1 (Jan/Feb 2005).

<sup>43</sup> J. Mashaw, *Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law*, *Issues in Legal Scholarship: The Reformation of American Administrative Law*, 2005 Berkeley Electronic Press No. 4, 15.

### *The Five Accountability Mechanisms*

In recent work, Ruth Grant and Robert Keohane<sup>44</sup> have systematically examined accountability in the international relations context, as have Richard Mulgan,<sup>45</sup> and Jerry Mashaw<sup>46</sup> in the domestic context.<sup>47</sup> As shown by these and other authors, accountability is a relational concept. At a minimum, an accountability mechanism meets four basic requirements: (1) a specified accountant, who is subject to being called to provide account including, as appropriate, explanation and justification for some specified aspect or range of his conduct; (2) a specified account holder or accountee; (3) authority on the part of the accountee, to demand that the accountant render account for his performance; and (4) the ability and authority of the account holder to impose sanctions or secure other remedies for performance that he judges to be deficient, or, in some cases, to confer rewards for superior performance.<sup>48</sup> Some accountability regimes may include elements beyond these four essentials, for example a specified process for the rendering of account by the accountant and for evaluation of his performance by the account holder or a third party (such as a court). They may also include the giving of reasons or justifications by the accountant for his conduct, the giving of reasons by the account holder for her evaluations, and standards by which the accountant's conduct is to be evaluated. As explained below, however, these additional elements are not essential requirements of accountability.

Accountability mechanisms have both a structural and a substantive element. The structure is an ex post calling by one person of another actor to account for his prior conduct. The prospect of having to provide such accounting and the possible consequences of a negative evaluation provide ex ante incentives for the accountant, in making decisions, to give appropriate consideration to the interests of the accountee. Because accountability is not itself a theory of legitimacy but a family of mechanisms for control of power; independent normative principles, such as those surveyed above, must answer the basic substantive questions of who is accountable to whom for what, with what sanctions, and under what standards and procedures if any.

There are five basic types of accountability mechanisms applicable to decisionmaking by public or private governance bodies. Each includes the four minimum accountability elements:

Electoral accountability occurs when account holders are entitled to vote for the election of public or private office holders, the accountors. The electoral accountability mechanism comes into play when office holders seek reelection; those whose performance is judged deficient by a sufficient number of voters are not reelected.<sup>49</sup> The important right held by account holders in this context is not just the right to vote, but the right, in the context of electoral contestation, to remove unwanted representatives from

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<sup>44</sup> R. Grant & R. Keohane., *supra*.

<sup>45</sup> Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracy* (Palgrave Macmillan 2003)

<sup>46</sup> J. Mashaw, *supra*; see also e.g. Colin Scott, *Accountability in the Regulatory State* 27 *Jl Law & Soc* 38.

<sup>47</sup> For discussion of accountability in the context of the EU, see Carol Harlow, *Accountability in the European Union* (2002).

<sup>48</sup> These essential elements are broadly consistent with those identified by Grant and Keohane and by Mashaw, although these authors characterize a much broader range of measures as involving accountability. I argue below that this broader application is inconsistent with the core definition of accountability which they embrace.

<sup>49</sup> In proposing a strictly hierarchical view of accountability, Edward Rubin argues that elections are not accountability mechanisms. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 *Mich. L. Rev.* 2073 (2005). Concededly, elections are at best imperfect and at worst actually diminish democratic accountability. That an accountability mechanism is failing or is inefficient does not, however, signify that it is no longer an accountability mechanism.

continuation in office through a secret ballot process.<sup>50</sup> There is generally no set procedure for rendering account by office holders of their performance. Also, there are no standards that electors must follow in voting, nor do they have to give any reasons or otherwise account for their votes.<sup>51</sup>

Hierarchical accountability operates in governments, firms, and other organizations or between individuals where superiors (principals/masters) have the right to control and evaluate the performance of subordinates (agents/servants) and impose sanctions, including dismissal for inadequate performance, or rewards for superior performance.<sup>52</sup> In cases where subordinates have security of tenure—for example, government civil servants or unionized employees—there are generally regular procedures and standards and reasons for evaluations and sanctions. Where subordinates hold their position at the pleasure of superiors, these elements are often absent.

Supervisory accountability is a catch-all category for relationships in which there has been a delegation of authority or resources, and the delegator enjoys authority or power to evaluate performance and take action to protect his interests if the delegee's performance is deficient, but where no direct, hierarchical control is retained by the account holder over the accountant's conduct. Examples include the relations between clients and independent contractors or professionals, between shareholders and boards of directors, between the legislature and administrative agencies, and between states and the international organizations of which they are members. There may or may not be fixed procedures and standards and giving of reasons for evaluation of the accountant's conduct. Sanctions may include revocation or non-renewal of the authority or resources conferred as well as legal liability.

Fiscal accountability involves financial accounting and audit procedures by which the recipient or holder of funds accounts for their use to an account holder, often the grantor of the funds, in accordance with generally accepted accounting standards and evaluations accompanied by reasons. Consequences for faulty accounting and/or unauthorized or improper use of resources can include legal liability, revocation and return of funds, and denial of future funding grants.<sup>53</sup>

Legal accountability involves a legal proceeding initiated by a plaintiff account holder for the tribunal to determine whether a defendant accountee violated legal standards applicable to his conduct and thereby violated the account holder's rights. The tribunal may impose liability or other sanctions for unlawful or wrongful conduct by the accountee. Such actions may be brought against private actors, including trustees and other fiduciaries, or against public authorities and officials. There are specified procedures for rendering account, and the court uses established standards and gives reasons for its evaluation.

All of these accountability mechanisms operate both in decisionmaking by governments and public authorities and by private actors including corporations and non-profit organizations. All involve relational structures involving a separation between those who have the power of choice and those who bear the consequences of choice. They deal with the resulting problem of decisional externalities—which in many cases creates problems of disregard—by giving entitlements or authority to those affected to

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<sup>50</sup> “Every citizen shall have the right and the opportunity...to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.” International Covenant on Civil and Political Rights, Article 25. See Issacharoff.

<sup>51</sup> The importance of voters' right to register their preferences without having to reveal or account for them is discussed in Ferejohn.

<sup>52</sup> Hierarchical accountability may also operate between individuals in principal/agent, master/servant relations.

<sup>53</sup> Fiscal accountability often operates in conjunction with hierarchical, supervisory, or legal accountability. But because the concept of accountability originated in rendering account in financial matters, fiscal accountability however, has distinct and specialized traditions, standards, and procedures, and accordingly is retained in this analysis as a separate category.

protect their interests by imposing sanctions or by obtaining other remedies for deficient performance and thereby providing incentives for power holders to give those interests greater regard.

### *The Two Basic Sources of Accountability Relations*

Although sharing many common features, the five accountability mechanisms are based on two fundamentally different types of accountor-accountee relations that arise in two quite different ways.

The first basic type of accountability relation is exemplified by electoral, hierarchical, supervisory, and fiscal mechanisms. In each, the relation is created by a grant, delegation or transfer of authority or resources from one actor or set of actors (account holders) to another actor or actors (accountors), where the accountors are to act in the interest of the grantors or third persons. Elections involve a grant by voters/electors of authority to those elected to hold and exercise the power of office. In hierarchical or supervisory accountability, there is a grant or delegation of authority and/or resources. Fiscal accountability involves a grant of funds or other resources. In all of these cases, the purpose of the holding to account is to ensure that the grantee/accountor has acted consistently with the terms of the grant and appropriately in the interests of the grantor or a third party beneficiary. Where the grantor judges performance deficient, he has the right either to revoke or not renew the grant and in some cases pursue affirmative liability or other legal claims against the grantee.<sup>54</sup>

The second type of situation involves conduct by the accountor that the law prohibits or for which it requires payment of compensation or other redress. The account holder, institutes an action in a court or other tribunal against the accountor to determine whether the accountee's legal rights have been infringed and, if so, to obtain an appropriate remedy. Legal accountability, created both by public and private law, is found in many different situations, including various types of administrative action, violations of regulatory statutes, breaches of fiduciary duties, and infringement of rights protected by tort, contract, or property law. Some cases involve preexisting fiscal, hierarchical, or supervisory relations between the parties. But in other cases, including many tort cases, the parties are strangers. This second type of accountability relation is often overlooked by authors focusing on delegation-based accountability mechanisms.<sup>55</sup>

Legal accountability systems generally give the plaintiff – account holder the right to a hearing before the tribunal deciding the case. But this is quite different from the right to participate in decisionmaking by the accountor.

The circumstance that a person or group is adversely affected, even significantly, by a decision is not a sufficient basis for the right to hold a decisionmaker accountable.<sup>56</sup> Accountability exists only when the person invoking it has delegated authority or resources to the decisionmaker, or where the law recognizes legal accountability. Thus there will be many instances where persons significantly and adversely affected by a decision cannot hold the decisionmakers to account. Electoral accountability, for instance, is exercised by citizens—members of a political community who constructively delegate power to elected officials and have been granted the right to participate in elections—but not by many of those affected by

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<sup>54</sup> In some cases, such as at will employment, or the relation in the US federal government between the President and high executive branch officials that serve at his pleasure, or most cases of participation by states in international organizations, there are no fixed procedures or standards for evaluation and grantor had plenary discretion in withdrawing the grant. In other cases, such as civil service or unionized employment, certain statutory and contractual arrangements for grants, and trusts, there are often defined evaluative procedures and standards and the grantor's ability to withdraw the grant is constrained.

<sup>55</sup> See e.g. Colin Scott, *supra* at 39: “[T]here is implicit in the capacity to call to account some element of control capacity.”

<sup>56</sup> Compare Grant and Keohane.

the officials' decisions, such as foreigners or alien residents. Decisionmakers may often unjustifiably disregard those who do not vote or have not otherwise delegated authority or resources to them. But that does not mean that all such problems of disregard can or must be solved through an accountability mechanism. Some cases might be addressed by broadening existing accountability relations. Conceivably some form of right to vote could be extended to foreigners pursuant to an expanded conception of the polity. Legal redress could be expanded to include additional types of plaintiffs and causes of action. But there are good reasons not to deal with every problem of disregard through expanded use of legal or other accountability mechanisms, especially given the availability of other types of governance tools, as summarized above and developed further below, to address such problems. By the same token, there are good reasons not to analyze every deficiency in governance as an accountability problem.

### *Other Asserted Accountability Mechanisms*

The above list of accountability mechanisms (five) is larger than those of Richard Mulgan and Edward Rubin, who restrict accountability to hierarchical relations. But it is significantly shorter than those of other thoughtful scholars who have written on the subject, including Grant and Keohane<sup>57</sup> and Mashaw,<sup>58</sup> who characterize additional institutional practices and influences as accountability mechanisms. These practices and influences, however, lack the requisite structure of accountability relations and mechanisms. Each lacks at least one of the four elements set forth above. Accordingly, these measures should be regarded not as accountability mechanisms but as responsiveness-promoting measures. They include the following:

Participation is sometimes invoked as an accountability mechanism.<sup>59</sup> Robert Keohane and Ruth Grant regard participation as a form of accountability through which “the performance of powerholders is evaluated by those affected by their actions.”<sup>60</sup> The World Bank extols “participatory accountability,”<sup>61</sup> but, participation in general does not satisfy the minimum elements of an accountability mechanism. Myriad forms of participation in decisionmaking, including voting, submission of comments, consultation, etc which by themselves do not involve any authority or ability on the part of those participating to call decisionmakers to account for their decisions or impose sanctions. Accountability mechanisms come into play after decisions are made. Some of these accountability mechanisms do involve, ex post, certain forms of participation in their operation. Thus, plaintiffs invoking legal accountability mechanisms enjoy the right to participate in hearings before the court or tribunal that decides their claim for redress against decisions made by the defendant.<sup>62</sup> And, under electrical accountability, voters participate in elections that enable them to deny reelection to representatives whose decisions they dislike. But participation as such is not a distinct accountability mechanism, although certain forms of participation play a role in the operation of some of the five accountability mechanisms.

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<sup>57</sup> Grant and Keohane identify the following accountability mechanisms: Hierarchical; Supervisory; Fiscal; Legal; Market; Peer; Public Reputational. Grant & Keohane supra at 8 Table 2.

<sup>58</sup> See Mashaw, supra at 27, Figure 1 (political, administrative, legal, product market, labor market, financial market, family, professional and team accountability). Similar to that of Grant and Keohane, Mashaw's framework divides human relations, and their corresponding accountability mechanisms, into three categories: state governance, private markets, and social networks. However, the analysis in this paper focuses on governance of regulatory authorities.

<sup>59</sup> Grant & Keohane.

<sup>60</sup> Grant & Keohane at 3. The authors acknowledge, however, the difficulties of apply this concept of accountability to the global context because of the wide-ranging effects of many decisions by global regulatory bodies, the absence of a “global public” and the difficulties in developing a workable and legitimate system of representation for those affected, providing an appropriate system of representation

<sup>61</sup> See id at 9.

<sup>62</sup> Some forms of administrative law, such as the US Interest Representation Model, may confer an ex ante right to submit evidence and argument to government agencies on proposed rules and other decisions as an integral part of a legal accountability regime. See discussion below, XXX>

Markets, constituted by contract and regulatory law, impose ex post disciplines for inadequate performance on firms and other market actors and reward superior performance through operation of the legally-secured right of consumers or suppliers to instead deal with competitors. Consumers can “exit” relations with manufacturers and sellers by switching their patronage to other brands or vendors, or they may never patronize a given firm in the first place. Workers and suppliers to firms of goods and services, capital and credit enjoy similar latitude, as do investors, shareholders, or suppliers of credit. They can choose to deal with rivals whom they prefer.<sup>63</sup> These sanctions for deficient performance can include loss of sales, high resulting costs of capital or labor, reduced share price, operating deficits, or even bankruptcy. These market arrangements provide powerful incentives for firms to be responsive to their actual or potential market partners.

These market arrangements share certain structural elements with accountability mechanisms. They involve a defined (contractual) relation between identifiable decisionmakers (firms) and those affected (customers, suppliers, investors and creditors) that empowers those affected to evaluate and sanction (or reward) decisionmakers based on their conduct. But a core element of accountability –the authority of those affected to require decisionmakers to provide them an account of their conduct, including as appropriate explanation and justification – is missing. As Mashaw points out, accountability is defined as “liable to be called to account; answerable.”<sup>64</sup> Consumers and suppliers have no authority to require answers, and firms are not obliged to provide them. The market remedy is simply to exit, or never to “enter.” The dialogic “voice” element of accountability is absent.<sup>65</sup> Thus, market actors are literally not accountable to their existing or potential contractual partners.<sup>66</sup> Use of the term accountability in the market context is at best metaphorical.<sup>67</sup>

The same conclusion also applies where government decisionmakers are subject to competitive disciplines in the “market” for regulation.<sup>68</sup> If national or sub-national governments adopt unduly costly or burdensome regulations that fail to provide commensurate benefits, business investment may flow or residents may move to other jurisdictions. Different global regulatory bodies, including private standard setting bodies such as ISO and its competitors, often compete in providing regulatory standards to governments or firms.<sup>69</sup> The need to attract patronage and the threat of exit can impose powerful incentives to be responsive to those “consumers” of regulation that can effectively exercise choice. But these consumers as such have no authority to hold the vendors of regulation to provide an account of their conduct. As in the case of markets for goods, services, and capital, even where such accounts may in fact be given, it is a contingent occurrence and far less important than the fundamental right of market choice.

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<sup>63</sup> Mashaw labels market forces as accountability mechanisms within a separate, economic sphere. Mashaw at 123. “Regimes of market accountability are sharply distinguishable from public law accountability systems.” See also Kingsbury, et al. *Law and Contemporary Problems* at 2 (distinguishing the two spheres by describing the laissez fair market system as regulation by non-regulation).

<sup>64</sup> Mashaw at \_\_\_\_

<sup>65</sup> Hirschman.

<sup>66</sup> Of course the relevant contractual relationships may give rise of legal accountability. And, markets may spawn governance structures, such as corporations or trust indentures, that enable some market partners, such as shareholders or bondholders, to exercise supervisory or fiscal accountability mechanisms. But these are distinct from market disciplines based on market choice.

<sup>67</sup> Rubin argues that markets shouldn’t be called accountability mechanisms for different reasons, including the fact that markets distribute benefits with stunning unevenness and produce inequality. This by itself, however, does not suffice to show why markets fail as regulatory accountability mechanisms. See supra note XX (discussing electoral accountability).

<sup>68</sup> John Donahue, *Market-Based Governance: Supply Side, Demand Side, Upside, and Downside* (arguing for a market-based approach for pursuing the goals of governance).

<sup>69</sup> Citations

This is also the case of organizations of consumers or investors to promote specific social regulatory policies, such as worker or environmental protection, on the part of firms with whom they transact.<sup>70</sup> Consequently, market competition arrangements in all of these different contexts should be seen merely as responsiveness-promoting measures and not as accountability mechanisms.

Peer norms and peer reputational incentives operate among members of a profession, discipline or other community based on specialized knowledge or work with a common methodology or norms of appropriate conduct. As noted by Grant and Keohane, peers influences may affect decisions by global institutions that operate in a non-hierarchical environment and often require the cooperation of other global bodies to function effectively. “Organizations that are poorly rated by their peers are likely to have difficulty in persuading them to cooperate and, therefore, to have trouble achieving their own purposes.”<sup>71</sup> But peers generally lack authority to require decisionmakers to account for their conduct, and it is strained to speak of reputation decline as a sanction. There may in some cases be fixed procedures and standards for evaluation and sanctioning or reward, such as professional disciplinary procedures for lawyers and doctors, election to professional societies, or acceptance of papers for publication in peer reviewed journals. These can be regarded as genuine supervisory, legal or electoral accountability mechanisms.

Public reputational influences on conduct are, as Grant and Keohane note, a pervasive form of “soft power,” operating through the general opinion held by various publics of the conduct of various public and private actors including organizations and firms. These influences affect global regulatory bodies and their decisionmaking. But these influences do not constitute a form of accountability. They are extremely diffuse in operation, do not involve any defined accountee-accountor relations, nor any authority on the part of the public to hold decisionmakers to provide account. Further it is quite strained to call changes in all actor’s general reputation as “sanction” or “reward.”

General political influences on conduct includes a wide variety of mechanisms, through which actors seek to influence government decisions through activities including financial support, cooperation, campaign work, lobbying, and mobilization of public support for political causes. These likewise do not involve any defined accountor-accountee relations or authority to hold decisionmakers to provide answers for their conduct.

Mashaw’s taxonomy of accountability mechanisms includes influences on conduct encompassing a wide variety of quite informal processes in which one’s behavior is reviewed and evaluated by family, friends, and members of various other social communities in relation to norms prevailing in the relevant social community. There are generally no fixed procedures or standards and “sanctions” and “rewards” take the form of informal social judgments and incentives. There may well be scenarios that qualify as accountability mechanisms within the social sphere, such as a parent “grounding” a child for failure to perform his chores, a dissident congregant’s formal loss of privilege within a religious society, or a neighborhood refusing to reelect a certain delegate to their country club activities committee. In such circumstances, legitimate supervisory or hierarchical accountability mechanisms might be present. As Mashaw recognizes, these influences operate within the realm of the social community, and have only an incidental relevance to issues of public governance.

Carol Harlow equates accountability with Rule of Law practices for channeling the exercise of power through rulemaking and publicly justified rules.<sup>72</sup> She also includes in accountability mechanisms practices of open decisionmaking and freedom of information practices, which are said to represent “a

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<sup>70</sup> These organizations are themselves global regulatory bodies, and in some cases may involve the firms whose conduct they target in the organization in ways that give rise to accountability relationships.

<sup>71</sup> Grant & Keohane at 9.

<sup>72</sup> Harlow at 10.

continual process of ‘giving an account’ to an informed and active civil society.”<sup>73</sup> In its Final Report, The International Law Association Committee on Accountability of International Organizations equates accountability with greater transparency and other practices that promote “internal and external scrutiny and monitoring” of such organizations’ conduct.<sup>74</sup> Advocates of global governance reform regularly call for greater transparency and opportunities for public comment as mechanisms for securing accountability to “stakeholders.”<sup>75</sup> Evaluative practices such as “gender impact statements, social auditing and human rights benchmarking” are advanced as accountability mechanisms.<sup>76</sup> At least one European Central Bank official has invoked a performance concept of accountability, asserting that the success or failure of the Bank’s decisions on monetary policy by itself constitutes accountability to the public.<sup>77</sup>

None of these practices and governance influences satisfies the minimum elements of an accountability mechanism. They typically do not specify accountees who have authority to require an accounting from defined account holders for their treatment of the accountor’s interests and impose a sanction or obtain a remedy for deficient performance.<sup>78</sup> The same conclusion applies to the general processes of social norm inculcation, conduct assessment, and norm reinforcement emphasized by the constructivist school of international relations.<sup>79</sup>

It does not necessarily follow that the list of accountability mechanisms for governance is irrevocably closed. For example, it may be possible to regard iterative reciprocal practices of cooperation, monitoring, evaluation, and response that operate in regulatory networks and regimes such as the Open Method of Cooperation as an emerging distinct form of accountability mechanism for governance.<sup>80</sup>

Also, it must be acknowledged that market disciplines and peer, regulation and political influences bear some functional similarities to accountability mechanisms, in that they involve evaluation by those affected of decisionmakers’ choices and the deployment of incentives and influences to promote greater regard by decisionmakers for the interests of those affected. Even if they do not include authority to hold decisionmakers to answer for their choices, and often do not involve defined accountor-accountee relations, why should they not be included in the category of accountability mechanisms, or perhaps recognized as a related category of “diffuse accountability” mechanisms? Accordingly, we might recognize a continuum or extended family of governance practices that could warrant calling peer, reputational, and political influences as accountability mechanisms.<sup>81</sup> The expanding application of accountability rhetoric can be seen as support for this reconceptualization.

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<sup>73</sup> Harlow at 12.

<sup>74</sup> Final Report (220\$)

<sup>75</sup> E.g., High-Level Panel on IMF Board Accountability: Key Findings and Recommendations (2007)

<sup>76</sup> Bronwen Morgan, in Dowdle at 252

<sup>77</sup> Harlow at 50-51

<sup>78</sup> Grant and Keohane recognize that market, peer and public reputational accountability do not fit the delegation model of accountability and term them illustrations of a “participation” model. But as discussed earlier, the “participation” fails to form a proper basis for accountability, and these additional mechanisms that they list are better described as responsiveness-promoting measures.

<sup>79</sup> Goodman

<sup>80</sup> For example, Robert Scott has proposed an “interdependence” model of accountability applicable to regulatory networks. Robert Scott, *Accountability in the Regulatory States*, 27 *Jl L & Soc’y* 38 (200). Carol Harlow cautions that this approach can involve such a diffusion of decisional responsibility that no one can be held accountable. Harlow at 27, 184. Bronwen Morgan has proposed the concept of “co9nvivial accountability” between the hierarchic and technocratic governance structures associated with globalization and the territorial and functional communities impacted by their decisions, Morgan in Dowdle.

<sup>81</sup> Jerry Mashaw further states that different accountability “systems actually blend into each other and provide alternative paths to a similar overall good, that of promoting responsible behavior.” Mashaw at 123

Nonetheless, for the sake of clear prescription and sound analysis, I think we do better to limit the term accountability mechanism to the five long-recognized practices – electoral, fiscal, and hierarchical supervisory and legal that meet the four minimum conditions set forth above. The looseness of the current accountability rhetoric should be resisted, not accommodated.

As Mulgan observes: “How far ‘accountability’ extends in meaning is partly a question of linguistic convention but may also involve a judgment of institutional priorities.”<sup>82</sup> What distinguishes the core class of five accountability mechanisms is that they involve certain structures of power relations and techniques for its control that may be invoked as of right by those whose interests have been disregarded. They enjoy this right by virtue of the fact that the power of accountors is subject to substantive conditions on its exercise for the benefit of the account holder. In the delegation based accountability mechanism, these conditions (which may often be implied) are for the benefit of those who delegate the authority or resources in question. In the case of legal accountability mechanisms, the condition is imposed by the law for the benefit of those to whom decisionmakers owe a legal duty. In both cases, the condition accrues to certain beneficiaries and thereby serves, in the context of any given decisional authority, to define those persons who have standing to invoke accountability mechanisms to review its conduct and impose sanctions for deficient performance. They also have standing to enforce the “liability [of the accountant] to reveal, to explain, and to justify what one does.”<sup>83</sup> These features of accountability mechanisms have well defined normative foundations. These features are lacking in the other practices, such as participation, market competition, peer evaluation, and reputational influence. While claimed to involved accountability relations, the structure of these practices often fails to identify who has standing to invoke accountability. The obligation on the part of decisionmakers to “answer” for their conduct and ability of the disregarded to deploy “remedies” is at best murky and highly contingent. The distinctions between having a right to demand and invoke a remedy and various avenues of influence is especially significant for the weak and vulnerable that suffers most from disregard, and is too important to be glossed over by expansive definitions

Insistence on the distinctive character of accountability mechanisms, however, does not mean that they are inevitably superior to the other influences and practices. The very fact that they involve specific accountant-accountee relations and the authority of account holders to require, through various procedures, accountors to answer for their conduct limits the scope for their application or may make it impractical or unduly burdensome to deploy them. It also does not mean that the other practices and influences listed above and classified by some authors as accountability mechanisms are unimportant or could not be used to promote greater responsiveness by global regulatory bodies to disregarded interests.

#### *Accountability and Principal/Agent Relations*

Many authors in the governance/accountability literature employ a non-legal conception of principal/agent relations—called herein P/A—to analyze accountability.<sup>84</sup> Under the P/A conception, Ps, which include legislators, political superiors in government, states, and shareholders, delegate authority and/or resources to As, such as administrative agencies, subordinates, international organizations, and corporate management, respectively. Accountability mechanisms are instituted by Ps to limit “agency

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<sup>82</sup> See Richard Mulgan, *supra* at 22

<sup>83</sup> Scott, *Accountability in the Regulatory State*, 38.

<sup>84</sup> See e.g. Darren Hawkins et al., *Delegation and Agency in International Organization* (Cambridge, Cambridge Univ. Press, forthcoming 2006); Daniel Nielson and Michael Tierney, *Delegation to International Organizations: Agency Theory and World Bank Environmental Reforms*; Richard Mulgan, *Contracting Out and Accountability*, *Australian Journal of Public Administration* 56:4 (2007); Edward Rubin, chapter in Dowdle book. The legal conception of principal and agent is discussed below, including Grant and Keohane and other international relations theorists, Mashaw, and McCubbins and others writing in the positive political economy vein.

costs”—the tendency of As to pursue their own interests at the expense of the P’s interests. This tendency of As to indulge in various forms of “slack” or “drift” at the P’s expense is often exacerbated by information asymmetries between P and A.<sup>85</sup> If A’s actions cannot be easily observed and evaluated, agency costs are also compounded by moral hazard.<sup>86</sup> These problems can be reduced through use by Ps of ex post accountability mechanisms as well as other means for controlling As, such as ex ante authorization procedures. But these mechanisms themselves involve costs for Ps, including monitoring and sanctioning costs and the danger of chilling beneficial innovation and risk-taking by A. The general problem facing Ps is how to optimize the trade offs between agency costs and moral hazards on the one hand and the costs of information gathering accountability mechanisms, and other control mechanisms on the other.

The P/A conception can prove illuminating in analyzing some accountability relations, but it can also seriously mislead.<sup>87</sup> It is simply not applicable to the second basic type of accountability relation, involving harm by A to B’s legally protected interests.<sup>88</sup> And, many accountability relations of the first type, involving grants of authority or resources, do not involve a principal-agent relation as the law defines it. In the law, the agency relationship is one where one person (the agent) acts on behalf of and subject to the control of another (the principal). Most cases of hierarchical accountability fit this definition, but many or most instances of fiscal accountability, electoral, and supervisory accountability do not. For example, in many cases involving financial transfers (including from shareholders and creditors to corporations,) the grantor does not have general authority to control the conduct of the recipient. Voters cannot dictate the conduct of elected officials. The same is true in most supervisory accountability relations within government. These accountability relations are established and operate against the background of legal institutional frameworks and decision rules that significantly constrain the ability of the transferor to direct the conduct of the transferee.<sup>89</sup> The controls that may be exercised are legally limited to defined modes. Voters can generally not instruct their elected representatives as to how to vote on legislation.<sup>90</sup> The legislature may modify an administrative agency’s budget or authorizing legislation, but it cannot direct its conduct or tell it how to interpret the law.<sup>91</sup> The President cannot dictate

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<sup>85</sup> See Martin Lodge, *Accountability and Transparency in Regulation: Critiques, Doctrine and Instruments*, in Jacint Jordan and David Levi-Faur, *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* 124 (Cheltenham, Edward Elgar 2004); M. McCubbins, R.G. Noll and B. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 *Jl Law, Economics and Organization* 243 (1987)

<sup>86</sup> Jay Barney, *Moral Hazard and Performance Incentives*, 1 *Organizational Economics* 167 (1986). For diverging views on the effect the moral hazard problem should have on designing social policies, particularly with regard to distributional justice, compare John Rawls, *The Law of Peoples* (2006) with Tom Baker, *On the Genealogy of Moral Hazard*, 75 *Tex. L. Rev.* 237 (1996).

<sup>87</sup> Mashaw, *supra* note XX, at 124. [Note: he makes basically the same argument you make here.]

<sup>88</sup> Some cases of legal accountability may happen to involve parties who are principal and agent, but this relation only has a contingent relation to the basic legal accountability relation, that between duty bearer and right holder. The law does impose duties on agents and grants correlative rights to principals which principals may enforce against agents. See generally American Law Institute, *Restatement of Agency* 3d (2006). But most structures of legal accountability do not arise between principals and agents, as illustrated by examples such judicial review of agency action, tort actions against government agencies and officials, and most forms of private law and regulatory liability actions among private parties.

<sup>89</sup> The discretion required for those who have delegated power indicates that in some cases, disregard might not be much of a problem. See *infra* note 112. See also Freeman, in Dowdle, at 105. (arguing that when a task is highly complex and involves deeply held beliefs or contestable value judgments, the government should fill in the gaps in adherence with public law norms.)

<sup>90</sup> Jurisdictions that authorize voter initiatives represent a partial exception to this generalization. Recall procedures introduce an element of hierarchical control by voters over legislators. I am grateful to Stephen (**cut off on draft**)

<sup>91</sup> See *Hazardous Waste Treatment Council v. EPA*, F.2d (D.C. Cir ). These legal constraints are reinforced by the development by institutional transferees of decisional structures, specialized knowledge and skills, and supporting client interests that enhance their effective decisional autonomy. Of course, the legislature’s control of

decisions by high officers of government invested with decisional authority by Congress, much less civil servants. The important point is that liberal democratic forms of representative government deliberately separate--in varying degrees and in different ways--decisional authority within government and also between the government and the electorate in order to restrain power and to promote its wise exercise. Similar constraints operate in the case of states and international organizations and in the case of shareholders and directors in corporate governance. These limitations are not a contingent function of agent accountability costs but embody fundamental governance values. Use by analysts of P/A conception based on plenary authority obscures these vital features of the legal institutional structures within which many accountability relations operate.

### *Accountability, Standards, and Reason Giving*

There is a reciprocal relation between the giving of reasons and the use of evaluative standards in accountability mechanisms. Where evaluative standards are established, it is inevitable that reasons will be given by the accountor in attempting to show that his conduct conforms to those standards, and by the account holder if she believes that the conduct does not measure up and seeks to impose sanctions or other remedies. While fiscal and legal accountability mechanisms invariably include standards and reasons, standards are generally not specified nor reasons required in most instances of electoral accountability and in many settings of supervisory accountability and hierarchical accountability. At first blush, these absences seem surprising, for one might naturally suppose that standards and accompanying reason giving would promote accountability by providing clearer direction for accountees and promote mutual confidence and cooperation.<sup>92</sup> In fact, both the Mashaw<sup>93</sup> and the Grant and Keohane<sup>94</sup> models list evaluative standards as a necessary component of accountability mechanisms. Certainly standards—like transparency, the giving of reasons, and formalized processes—can enhance accountability mechanisms. But they are not essential to accountability.<sup>95</sup> These practices involve transaction costs. And, the specification of standards, especially if the burden is on an employer or other account holder to show that the accountee has failed to conform to them, may actually thwart accountability. But these P/A cost variables are not sufficient to explain the absences of standards and reasons in certain important governance relations, including electoral and certain high-level supervisory and hierarchical relations.

John Ferejohn argues that reason-giving and accompanying legal accountability operates as a substitute for democratic electoral and legislative control.<sup>96</sup> Citizen-voters need not give reasons for their votes and there are no substantive standards for voting in general elections. Elected legislators are not legally required to give reasons, even if they generally follow a practice of doing so, nor are they subject to standards. Agencies, which are subject to a degree of political accountability, are subject to a moderate reason-giving requirement and are subject to legal standards. Courts, the institutions most removed from the complex of political accountability mechanisms, follow a strong reason-giving practice and are also

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agency budgets and its power to enact new legislation enables it to influence agency decisions by more informal means, but such controls and powers are often difficult or costly to use, limiting the corresponding potency of informal influences.

<sup>92</sup> Ubaibir S. Das and Marc Quintyn, *Crisis Prevention and Crisis Management: The Role of Regulatory Governance*, IMF Working Paper, September 2002 at 10 (“[A]ccountability is easier to implement when the agency has a clearly defined and measurable objective.”) And the failure to provide for reasons would preclude a dialogic process of decision making, as discussed below.

<sup>93</sup> Mashaw at 118.

<sup>94</sup> Grant and Keohane at 29.

<sup>95</sup> Steve Charnovitz, *Accountability of Nongovernmental Organizations (NGOs) in Global Governance* (George Washington University Law School Public Law and Legal Theory Working Paper No. 145, April 2005). (criticizing the Grant and Keohane model for including standards as a necessary component of accountability).

<sup>96</sup> John Ferejohn, Remarks at Global Administrative Law Conference, New York University School of Law April 2005; forthcoming, *NYU JI. Intl L.& Policy* (2006)

subject to legal standards. Pointing to this pattern, Ferejohn argues persuasively that standards and reason-giving operate as a discipline on power that serves as a functional substitute for electoral accountability. They also provide a foundation for legal accountability and can also promote supervisory accountability on the part of administrative officials to elected officials who are in turn accountable to the voters.

While Ferejohn's analysis is illuminating, still more can be said as to why voters and legislators are not required to give reasons. Requiring voters to give reasons for their votes would effectively require their votes to be known, exposing them to undue influence or intimidation by government or politically powerful groups.<sup>97</sup> Requiring the giving of reasons also supports demands that reason-givers in the future act consistently with the reasons that they have given in the past.<sup>98</sup> A requirement that they follow certain standards in voting would constrain voters' freedom, and could be exploited by those in power to entrench themselves. Subjecting legislators to externally enforceable requirements of reason-giving or to standards would similarly constrain them. Such constraints would undermine the dynamic and contestatory character of democratic politics and the free development of new political issues, values, and interests. It would reinforce the political status quo and currently dominant interests. The political virtue of the "public sphere" of political discourse and debate is its unrestricted and spontaneous character, unrestrained by Rule-of-Law norms.<sup>99</sup> "Here new problems can be perceived more sensitively, discourses aimed at achieving self-understanding can be conducted more widely and expressively, collective identities and need interpretations can be articulated with fewer compulsions than is the case with procedurally regulated public sphere [of government decisions]."<sup>100</sup> The democratic virtues of political innovation and entrepreneurship also help explain why standards, and accompanying reasons, are not found in some supervisory and hierarchical relations, including those among high government officials and those between legislators and their staffs.<sup>101</sup> In the case of administrative bodies, the need for such flexibility is outweighed by the desirability of reasons and a degree of decisional consistency in order to secure "rule of law" values of impartiality and predictability and promote the accountability of unelected officials. These considerations are even stronger in the case of the courts.<sup>102</sup>

As discussed further below, Jürgen Habermas and many students of global governance who have followed his lead have celebrated open reasons-based discourse and dialogue among all affected as the model of democratic decision making.<sup>103</sup> But democratic practice argues powerfully that, in some contexts, a requirement or standard practice of reason giving would subvert important democratic values.

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<sup>97</sup> Somewhat analogous considerations may help explain why corporate shareholders need not give reasons for their votes.

<sup>98</sup> See Stephen Breyer, Richard Stewart Cass Sunstein, and Matthew Spritzer, *Administrative Law and Regulatory Policy* Ch. 5 (5<sup>th</sup> ed. 2003) [hereinafter Breyer and Stewart, *Administrative Law*].

<sup>99</sup> But see Issacharoff. *Fragile Democracies* (arguing in favor of restrictions on political speech, debate and organization where necessary to preserve ongoing democracy against usurpation).

<sup>100</sup> Jürgen Habermas, *supra*, at 308. See also *id.* at 171.

<sup>101</sup> The creation of civil service status for lower-level government employees reflects the countervailing value of limiting the scope for political control that inevitably has a partisan element.

<sup>102</sup> Reason giving promotes accountability for judges by two mechanisms. Vertically, higher-level courts exercise hierarchical control through legal accountability over lower-level courts by reviewing the reasons that they give for their decisions. Horizontally, in decisions by multi-member panels, a form of peer or mutual supervisory review. Judges make decisions to join or not join the position and opinions of other judges based at least in part on the reasons that they adduce for their position. In my experience, judges pay very little if any attention to reviews of their opinions by academics or other outsiders. Thus, what might be characterized as a form of peer review operates only within the much particularized context of a court decision-making structure where judges have strong incentives to induce colleagues to join their positions and opinions.

<sup>103</sup> Jürgen Habermas, *Between Facts and Norms : Contributions to a Discourse Theory of Law and Democracy* (MIT Press, Cambridge 1996). [Hereinafter Habermas, *Between Facts and Norms*]

*Institutional Complexes of Accountability Mechanisms and Decisional Rules in Domestic and Global Governance*

In the purely domestic context, the two basic types of accountability mechanisms (delegation-based and legal) are composed in a complex structure through which government authorities are held accountable to affected societal interests. First, an interlocking set of *supervisory*, *hierarchical*, and *fiscal* accountability mechanisms renders regulatory officials accountable to legislators and the head of government, while the latter face *electoral* accountability to the voters. This system of *electorally-based governmental accountability* is best understood not as a distinct accountability mechanism but as a complex of such mechanisms. Second, regulatory officials are *legally* accountable, through constitutional and administrative law, to regulated actors or other affected persons through the courts. Accountability through administrative law ensures that officials obey relevant statutes, providing to that extent a transmission belt of electorally-based legitimacy for agency decisions. These accountability mechanisms operate in conjunction with decisional rules that allocate competence among these various bodies and specify the decisional procedures which they must follow.

Overall, most global regulatory bodies (other than domestic agencies implementing global norms) are much less subject to external electoral and legal accountability mechanisms than are domestic or supranational bodies but are often subject to strong but informal supervisory accountability to powerful states and other entities that found or support them. Since each type of global body presents unique accountability challenges, they will be examined individually.

*Treaty-Based International Organizations (Type 1)*: Domestic political and legal accountability mechanisms continue to operate when states join through accession to treaties and participate through their government officials in international treaty-based bodies. But effective accountability is undermined by the many, often weak links in the chain. Non-adhesion or withdrawal from such regimes is for many reasons typically not a practical option, especially for less powerful states. The top management of treaty-based organizations is often subject to electoral accountability to member states. Hierarchical accountability generally operates within such organizations, but in some cases is undermined by member state influences and in others is limited by the independence of regime tribunals or committees composed of member state representatives or independent experts. Legal accountability is rare (albeit increasing), because of the general reluctance of member states to establish independent reviewing tribunals and the limited availability of compulsory jurisdiction before international courts, organizational immunities in national courts, and the restricted ability of domestic administrative law systems to review the global elements in domestic regulatory decisions.<sup>104</sup> Further accountability problems arise because many treaty-based bodies have not developed adequate mechanisms of their own for accountability to societal interests affected by their decisions. As a result, they disregard such interests. Targets of such criticisms include, for example, the WTO, the World Bank, and arbitral tribunals established under bilateral investment treaties. It is hardly feasible to address such problems by constructing a global system of electorally-based political accountability analogous to that operating in liberal democratic nation states, although there is the possibility of developing mechanisms of legal accountability for the decisions of global regulatory bodies.

This situation, however, does not mean that these bodies are not accountable. They are often subject to powerful but in many cases informal mechanisms of supervisory and fiscal accountability to the most powerful states that create, fund, and support these global institutions. Behind these states stand the interests and views of the high national government officials who determine government policies

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<sup>104</sup> See R. Stewart, U.S. Administrative Law: A Model for Global Administrative Law? 68 *Law & Contemp. Probs.* 63 (2005) [hereinafter R. Stewart, U.S. Model for Global Administrative Law?]; R. Stewart, The Global Regulatory Challenge to U.S. Administrative Law, 37 *NYU JI Intl L & Politics* 695 (2005).

regarding them. Further, many thoughtful students have found that these policies are often strongly influenced by well organized financial, business, and other economic actors, which operate more effectively and exert greater sway in the informal, opaque, negotiation-driven networks of national-global regulatory decision making than more weakly organized general societal interests.<sup>105</sup> Thus the problem is often not lack of accountability, but disproportionate accountability to some interests and inadequate responsiveness to others.<sup>106</sup>

*Intergovernmental Networks (Type 2):* In the case of intergovernmental regulatory networks, constituted by participating government officials and agencies with specialized responsibilities, gaps in domestic nation-state electorally-based political and legal accountability mechanisms are typically even more pronounced than in the case of treaty-based regimes. The decisions of these regulatory networks are subject to supervisory accountability to the governments whose officials constitute the network, but these officials often enjoy a considerable degree of effective autonomy because of the specialized character of their work. The specialized regulatory environment may often lead to problems of tunnel vision.<sup>107</sup> Because of their informal character, accountability mechanisms may have only a limited role in internal governance of networks, although they are likely to assume a greater role in those networks, such as the Basel Committee of bank regulators, that are becoming institutionally more complex and internally differentiated.

*Domestic Agencies Implementing Global Law (Type 3):* Distributed administration is subject to legal accountability through review by WTO and other regional or bilateral trade and investment tribunals, and by domestic courts to the extent that they recognize and enforce global norms on behalf of affected interests. Here, the accountability problem has a quite different character than is the case with international or transnational bodies, since the decision-making body is a domestic agency and the disregarded interests are primarily those of foreigners—producers, investors, societal interests, or individuals. Because these foreigners do not vote and typically do not reside in the jurisdiction making decisions that affect them, mechanisms of electorally-based political accountability do little to protect their interests. Here again, the problem is not total lack of accountability, but rather skewed accountability. Indeed, the greater the political accountability of domestic administrators responsible for implementing global norms, the worse it will likely be for the foreign interests. As for legal accountability, foreigners may not have the right to invoke domestic legal remedies, or effective of procedural and remedial protections may be unavailable for the types of decisions that concern them. The burdens of international legal accountability or distributed administration, for example the investor-protection provisions in bilateral investment treaties, often fall disproportionately heavily on developing countries. Governments in these countries are also subject to fiscal accountability where they receive funds or other financial support from the World Bank and other multilateral development banks, the IMF, and other international or bilateral donors. Where conditions, such as environmental and social requirements, are imposed on such grants, there is also potential legal accountability as well.

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<sup>105</sup> Those who have analyzed the problem of disregard through a procedural lens have generally approached accountability through a zero-sum mentality. If this assumption is mistaken, then disproportionately strong power held by one group might not necessarily entail the problem of disregard. **CITATION** But even if accountability is not necessarily zero-sum, more accountability to one actor often means less to another. Krisch in EJIL at 251.

<sup>106</sup> See Keohane; Grant and Keohane; Buchanan, *supra* note 36, and Krisch in EJIL at 250 (“To speak of an ‘accountability deficit’ in global governance is...somewhat misleading. Many regulatory institutions on the global level are in fact highly accountable—up to the point that they often enjoy little freedom of independent action and are closely tied to the wishes of their constituents...The problem is that these institutions are accountable in the wrong way: in part, they are accountable to the wrong constituencies.”).

<sup>107</sup> See Anne-Marie Slaughter, *A New World Order*, at 219 (Princeton, Princeton University Press 2004) (evaluating criticism against unelected regulators—technocrats—who “share a common functional outlook on the world but who do not respond to the social, economic, and political concerns of ordinary citizens”).

*Hybrid Public-Private (Type 4) and Purely Private (Type 5)*: Private and hybrid public-private global regulatory bodies often have rather complexly differentiated internal decisional rules and structures that establish correlative internal accountability mechanisms. The complex decision-making structures and procedures of the International Standards Organization (ISO) are a prominent example.<sup>108</sup> In an external perspective, political and legal accountability mechanisms may not apply at all, or only to a limited extent. As is the case with treaty-based organizations, these bodies are accountable through fiscal and supervisory mechanisms, but primarily to their founders—the governmental officials, business firms, NGOs, or other entities that constitute and support the body. As a result, the decisions of these different types of bodies may often disregard important affected societal interests.

### **C. Decisional Rules and Practices**

A second means of promoting greater responsiveness to disregarded interests by global regulatory bodies is to change such bodies' decisional rules to include representatives of such interests as voting members of one or more of the organization's collegial decision making bodies and thereby make "outsiders" into "insiders." In the strongest form, such representatives would be given the right to sit on and vote in the general decisional body of the organization—its governing council or the equivalent. While the exercise of such authority is, as explained above, not itself an accountability mechanism, it generally carries with it substantial influence over an organization's policies and activities and entails the right to exercise supervisory, fiscal, and in some cases electoral accountability over subordinate decision makers within the institution.<sup>109</sup> Alternatively, representatives of affected interests could be included as decisional participants on boards, committees, and other subsidiary or separate organs responsible for particular types of decisions. These participation rights are conditioned by various rules for collegial decision making, such as majority vote, supermajority vote, and consensus/unanimity. There are no standard models. The possible configurations are too various for this paper to explore.

This section will focus on two issues. First, it will explain why giving disregarded interests a general decision making role in global regulatory institutions is unlikely to be a feasible general solution to the problem of disregard. Second, it will address a particular mode of decision—deliberative, consensus-based decision making—that has recently attracted a great deal of favorable attention in the literature on EU regulation and global regulatory governance. This model will be further considered in the discussion of American and EU approaches to global governance in Part IV.

#### *The Doubtful Feasibility of Decisional Rights for Disregarded Interests*

Several serious obstacles stand in the way of granting significant decisional authority to disregarded societal interests within global regulatory bodies. These include power realities, the need for specialization and efficiency, and the problem of representation.

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<sup>108</sup> Cite Shamir-Borer paper

<sup>109</sup> For example, many international organizations constituted and composed of states have a governing body composed of representatives of states. States also contribute funds to the organization (fiscal accountability). Their governing representatives often elect the top management (electoral accountability) and review its policies and practices, with the option for the state that they represent of withdrawing from the organization or reducing compliance or support if dissatisfied (supervisory and fiscal accountability). Linkages with other organizations may also involve one or more of these forms of accountability. Such accountability mechanisms tend to reinforce the influence of decisional authority in promoting the organization's responsiveness to the account holder states, organizations, or other parties. Steps to promote internal transparency to organizational decision makers in order to enhance accountability to those decision makers may in some cases conflict with measures to promote external transparency to broader constituencies. This may be the case, for example, with respect to corporate environmental audit and management programs. See Stewart, Second Generation.

Global regulatory bodies are constituted by founders—states, specialized domestic regulatory agencies, international organizations, associations of business firms and/or NGOs—to help solve coordination and cooperation problems and to advance their mutual interests. The founders/members provide resources and other forms of support to such bodies. They abrogate the most significant internal decisional authority to themselves or their representatives. Founders will be most reluctant to share such decisional authority with non-founder interests, especially self-appointed representatives of general societal interests.<sup>110</sup> Such interests, because of their collective character, are generally unable to contribute resources to the organization. Giving them decisional authority will complicate and make it more difficult to reach decisions. They are likely to divert the organization from solving the problems that motivated the founders' creation of the body, or promote solutions contrary to the founders' interests. In order to meet criticisms and shore up the legitimacy of the organization, it may be necessary to give greater consideration to disregarded interests and perhaps grant them some rights. But founders will generally prefer to meet such needs by means short of granting decisional or accountability rights. These means include the procedural rights discussed in Part II.D: enhanced transparency and non-decisional modes of participation, including consultation, membership on advisory committees, and opportunity for comment on proposed measures. Decisional rights are likely to be granted only as a last resort, and then only to the minimal extent.<sup>111</sup>

There are also legitimate functional reasons, beyond *realpolitik*, to limit decisional authority within global regulatory bodies and not extend it broadly to representatives of the myriad of societal interests that may be affected by their decisions. Such bodies are typically specialized, focused on solving coordination and cooperation problems in a given field of regulation. Specialization is necessary to develop the knowledge and operational experience to analyze and solve regulatory problems. It is also necessary to promote decisional and operational efficiency. Giving representatives of a wide range of potentially affected societal interests a decisional role in specialized global bodies regulating various aspects of trade, banking, monetary policy, money laundering, environmental standard setting, and so on would drain the advantages of specialization and undercut efficiency.<sup>112</sup> At the limit, every global regulatory body would be required to consider and address all of the global, national, and local impacts of its decisions in relation to a host of interests, and give representatives of those interests a role in making decisions. In order to retain as much as possible of the welfare-promoting advantages of specialization and efficiency,<sup>113</sup> other methods to promote consideration of disregarded interests, such as those discussed in Part II.D, are presumptively preferable.

A third obstacle to extending decisional rights to affected societal interests lies in the principle and practical machinery of representation. Founders dominate decision making in such bodies not just because

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<sup>110</sup> There is no prospect that disregarded interests could gain a decisional role in the case of distributed administration by domestic regulatory agencies subject to global decisional norms (Type 3) within such bodies. Many such bodies are headed by a single responsible official, leaving no basis for representation of diverse interests in decision making. Even in those agencies with a collegial decisional body, it would be politically unthinkable for domestic legislators to give foreign nations and firms a decisional role. One exception to this generalization is where foreign multinationals pay local army units or police to protect their investments.

<sup>111</sup> In some cases, however, organizations might choose to grant a decision making role to certain representatives of collective interests, planning to co-opt them.

<sup>112</sup> “Relatively neutral government officials who are aware of the larger social trade-offs surrounding decision making on a particular issue will produce more democratic outcomes than decisions shaped primarily by deeply interested private citizens—even those acting with substantial knowledge of the issue and the best of intentions.” Slaughter, *supra* note 107 at 224.

<sup>113</sup> Like the need for discretion, the advantages of efficiency and specialization might in some cases trump the resulting problems of procedural disregard when a certain stakeholder deserves, but does not receive, decision making authority or even accountability mechanisms. [Note: But in terms of disregard, that argument takes a value judgment by itself—efficiency trumps other stuff.]

they are founders but because they are significant institutions representing legitimate interests and are either accountable, however imperfectly, to those interests through domestic or international political processes or are subject to market disciplines that promote responsiveness. But in most cases, the representatives of other affected societal interests are not subject to comparable institutional machinery. A hypothetical system of global democratic government might provide such representation, to which global regulatory bodies could be linked through mechanisms of delegation, supervision, and review. In the real world, it is necessary to devise, for each global regulatory body on a case-by-case basis, some system to identify the relevant societal interests that deserve decisional rights and to select representatives of such interests, most likely NGOs who claim to speak for them.<sup>114</sup> The choice would almost inevitably have to be left to the global regulatory body itself, presenting a risk of bias and cooption in the selection of interests and their representatives.<sup>115</sup>

### *Deliberative decisionmaking*

Deliberative conceptions of decisionmaking provide another perspective for addressing the problem of disregard. Under this conception, decisions are arrived at by a process of open dialogue among participants based on a reciprocal and repeated process of presentation of reasons and evidence, respectful consideration of others' presentations, and reasoned response in an effort to arrive at shared understandings and solutions based on approaches and measures that emerge through this process. In case where public authority is exercised, the goal is to reach decisions based on public reason and norms that reflect and secure the common values and welfare of the entire society. Such processes of dialogic consensus based on convergent reasoning are contrasted with decisions imposed by power (including majority voting power), or bargains arrived at through strategic negotiation among competing interests, or market-based mechanisms for composing those interests. The analysis thus far in this paper may be understood as implicit based on power or interest based conceptions. The problem of disregard is diagnosed as one of imbalance in the effective power or influence of different social and economic interests in the decisions of global regulatory bodies. The various remedies discussed above are designed to redress that imbalance in order to produce a different decisional vector more favorable to the disregarded. The deliberative approach, by contrast, would focus on ensuring that the voices of disregarded interests are included as part of deliberative processes for global governance aimed at generating decisions based on encompassing conceptions of public reason.

The growing interest in deliberative approaches to global governance stems from their celebration in certain European forms of supranational or transgovernmental regulatory decisionmaking, most notably the closed comitology process for issuing Community regulations and the more accessible open method of coordination for developing certain social and economic policies among member states.<sup>116</sup> The extent to which the actual decisional processes of these institutions approximate the deliberative ideal is,

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<sup>114</sup> Some proponents of global constitutionalism suggest that there are emerging, generally applicable substantive and procedural norms for governance that might assure proper representation of, or other means for adequate consideration of affected societal interests, but thus far these suggestions remain highly abstract and fail to provide helpful guidance on redesign of global institutions.

<sup>115</sup> These obstacles can be ameliorated to the extent that certain founder/member entities represent disregarded interests. In that event, greater decisional authority could be accorded to such entities. For example in the case of treaty-based international organizations (Type 1 bodies), it has been proposed to give developing countries greater de jure or de facto decisional authority in bodies such as the World Bank, the IMF, and the WTO in order to promote greater responsiveness to developing country interests. Where such countries are not members of such bodies, they could be admitted. The same strategy could be followed in regulatory networks (Type 2 bodies). But, governments may not faithfully represent the interests of their citizens. Similar criticisms are made of NGOs.

<sup>116</sup> See discussion in Part III.C, below.

however, contested.<sup>117</sup> Some European scholars have invoked these respective practices as models for deliberative global regulatory governance.<sup>118</sup> At the same time, political theorists, including some strongly influenced by Habermas, have advocated strong forms of deliberative democracy in the purely national context. Under these conceptions, all citizens are, by various means, effectively represented in open processes of public reason for informing and guiding political decisionmaking. The goal, to be achieved by various forms of dialogic practice, some strongly institutionalized and others not, is to develop society's collective capacity to pursue justice while finding mutually acceptable terms of social cooperation, even when disagreements persist.<sup>119</sup> In the context of global governance, these strands have converged in many calls by advocates to build a system of global deliberative democracy based not on (unattainable) electoral mechanisms of representation but on institutions and processes for generating decisions based on global public reason and justice.<sup>120</sup> This conception might point to means for enlarging and amplifying the range of voices heard in deliberation about global regulatory policies and thereby promote decisions that give greater regard for all relevant societal interests and values. Steps might be taken for furthering this goal even if powerful founders were unwilling to share decisional authority or other forms of bargaining leverage to representatives of disregarded interests or accede to the creation of accountability mechanisms in their favor.

Deliberative processes of decisionmaking do not arise spontaneously. The various institutional arrangements discussed above, including different means of decisional participation, accountability mechanisms, and other responsiveness-promoting practices could be potentially be designed or redesigned to nurture deliberative processes to help remedy the problem of disregard. Conceptions of global deliberative democracy, however, remain highly general and abstract and provide little guidance on these questions. The European experience with new approaches to regulatory governance provide a more concrete and potentially helpful reference point for potentially addressing the problem of disregard in specific global regulatory governance regimes. The potential implications for global governance and solutions to the problem of disregard, and most specifically the experience with the comitology process, are examined in Part III.C. Several practical problems, examined in Part III.C., indicate that the very conditions required for the success of consensus-based deliberative decision making in comitology may, as a practical matter, make it difficult or impossible to ensure adequate regard for all those affected by global regulatory decisions. No matter how successful deliberative approaches to regulatory governance may be in some other contexts, the ultimate issue is whether or how well they can overcome the problem of disregard in global regulatory bodies..

#### **D. Other Responsiveness-Promoting Measures**

This section discusses institutional measures for addressing the problem of disregard that are not decision-making rules but are also not accountability mechanisms because they lack the requisite structural features. There are many such measures that might promote responsiveness, including consultation, creation of advisory committees, public dialogues, and the like. The discussion here is limited to three such measures that have received wide attention in global governance discourse: public provision of information (transparency), non-decisional participation through submission of comments on proposed decisions, and the practice of giving reasons for decisions. These measures, designed primarily for external constituencies and generally available to the public as a whole,<sup>121</sup> are also important elements of

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<sup>117</sup> [Citations]

<sup>118</sup> E.g., Neyer.

<sup>119</sup> See Amy Gutman and Dennis Thompson, *Democracy and Disagreement* (1996); [other citations]

<sup>120</sup> [Citations]

<sup>121</sup> These measures may also affect, in various ways, the operation of decision making rules in which "insiders" play decisional roles.

emerging principles of global administrative law,<sup>122</sup> as reflected for example in the first two pillars of the Aarhus Convention.<sup>123</sup> Although these measures are often characterized and advocated as accountability mechanisms, they are not. Without integration with some form of review on the merits of an underlying decision, these measures cannot be mechanisms of legal accountability on their own, even if they are legally guaranteed. Responsiveness-promoting measures can, however, improve the efficacy of accountability mechanisms and help mobilize other social practices and influences in order to promote responsiveness. After reviewing these three measures, the discussion considers whether a package consisting of all three—information, non-decisional participation, and reason-giving—in the context of regulatory governance might be regarded as a new form of accountability mechanism: a purely procedural system of administrative law without judicial review.

These means of promoting responsiveness to disregarded societal interests are especially important in the global regulatory context, because typically marginalized interests cannot invoke accountability mechanisms to control or influence the decisions of global regulatory bodies, nor do they enjoy decisional rights within such bodies. High-level internal decision making and the four delegation-based accountability mechanisms are limited to or dominated by the states, domestic government agencies, international organizations, or business firms that are founders/members of global regulatory bodies of Types 1-2 and 4. In a few instances, representatives of general societal interests are given authority to invoke mechanisms of legal accountability, in but these mechanisms are currently quite limited. Legal accountability by domestic regulatory agencies operating under global norms (Type 3) to foreign actors generally extends only to commercial and financial interests. Only certain hybrid public-private global regimes (Type 5) have as founders NGOs that enjoy decision making power and speak for certain types of general societal interests.

### *Transparency*

NGOs and many students of global governance have widely advocated greater public information access in order to promote accountability by global regulatory bodies to affected societal interests.<sup>124</sup> Many bodies of all types have taken substantial steps to make information about their decisions, procedures, and policies publicly available. In the case of Type 3 domestic agencies, these steps have been mandated by global law such as the WTO TRIPS, TBT and SPS Agreements, and the Aarhus Convention. The provision of information, however, is not by itself an accountability mechanism. It lacks the requisite structural features. There is no specified accountee when information is released to “the public.” And even where the public provision of information is legally required, members of the public generally do not have the authority to secure a remedy for non-compliance.<sup>125</sup> Moreover, what advocates of greater

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<sup>122</sup> B. Kingsbury, N. Krisch & R. Stewart, *supra*; Symposium, *The Emergence of Global Administrative Law*, *supra*.

<sup>123</sup> The three pillars of the Aarhus Convention are (1) public access to information, (2) public participation in decision making, and (3) availability to the public of administrative or legal hearings. The Convention is applicable to environmentally significant domestic agency decisions by States party to the Convention. In many cases the environmental consequences of these decisions extend to other states or to a global commons. In such cases, these agencies function as Type 3 global regulatory bodies subject to the global administrative law disciplines set forth in the Convention. The Convention provides that it may also be applied to international organizations, functioning as an administrative law for Type 1 and possibly Type 2 global regulatory bodies.

<sup>124</sup> Public availability of information may include passive information provision (furnishing information in response to specific requests from outsiders) and “active” provision (routinely and affirmatively making information available to the public through web sites etc.). It may include various categories of information, including decisions, policy statements, reports, various kinds of internal documents, minutes or transcripts of proceedings, organized data, etc.

<sup>125</sup> The Aarhus Convention is an exception to this generalization. The public information requirements in its first pillar, Articles 4 and 5 may be enforced by members of the public through the access to justice provisions in its third pillar, article 9.

global accountability advocate and envision is accountability for the substantive policies and decisions of global bodies. Independent review mechanisms that would provide such accountability are rare.

Put simply, the provision of information is a necessary but not sufficient condition for accountability. The availability and provision of information regarding accountors' conduct, and the background conditions, influences on, and reasons for their decisions are critical for the operation of the five accountability mechanisms. Without such information, account holders are not able to effectively evaluate the accountor's performance and take appropriate remedial actions. Lack of information will correspondingly undermine the ex ante incentive effects of ex post accountability. Accordingly, each of the core accountability mechanisms typically includes built-in mechanisms or powerful incentives for the provision of information by accountors to account holders. Compulsory discovery is available to account holders in legal proceedings. In the case of fiscal, hierarchical, or supervisory accountability, both the right of the account holder to receive information from the accountor and the specific obligation of the accountor affirmatively to provide information are typically specified by law. And in the context of elections, competition and media scrutiny provide strong incentives for candidates to disclose information to voters.

Even in the absence of accountability mechanisms, public information disclosure can strengthen the operation of other responsiveness-promoting practices, including market competition, general political mechanisms, and peer, public reputational, and social practices and incentives. Outside affected interests, even if they lack accountability rights, can use information to learn about forthcoming decisions by decisional bodies and the influences on them in order to mobilize and take actions to steer decisions in their favor. Indeed, the provision of information alone may promote responsiveness to disregarded interests because of the anticipation of such effects. The role of public opinion in modern government, recognized by A.V. Dicey well over a century ago, has acquired even greater force in the twenty-first century and in the context of global governance.<sup>126</sup> Information disclosure may also be vital for the effective exercise of decisional participatory power by those who are not part of management or representatives of the most powerful founders/members.

Merely making publicly available reams of undigested documentary material, however, may do little to promote informed debate and discussion of decisions. Buchanan and Keohane emphasize that in order to permit effective public scrutiny of and accountability for its decisions, a global authority must secure an adequate degree of "*epistemic deliberative quality*" by making available "reliable information needed for grappling with normative disagreement and uncertainty regarding its proper functions."<sup>127</sup> Such information must be accessible at reasonable cost, "properly integrated and interpreted" and directed at the public to allow practical accessibility and evaluation.<sup>128</sup>

Transparency is not costless. In addition to the resources involved in collecting and providing information, it may affect the operation of internal decisions in untoward ways. For example, it has been claimed that disclosure of internal decisional deliberation in the WTO context may mobilize protectionist interests and undermine trade liberalization. In the context of environmental audit and management systems, broad external transparency may inhibit the free flow of information within the organization to management, thereby undermining internal transparency and producing environmentally inferior outcomes. External transparency, as discussed below, may also undermine the success of consensus-based deliberative processes of decision.

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<sup>126</sup> A.V. Dicey, *Lectures on the Relation Between Law and Public Opinion in England: During the Nineteenth Century*.

<sup>127</sup> See Buchanan, *supra* note 36, at 426.

<sup>128</sup> *Id.* at 427.

### *Non-Decisional Participation*

In addition to the methods of decisional participation discussed in Part II.C.—where participants have a role in actual decisions, either through voting or participating in a consensus-based process—there are various forms of non-decisional participation in regulatory governance decisions; these include submission of evidence and argument to decision-makers in connection with a specific forthcoming decision;<sup>129</sup> attendance at meetings where a pending decision is being considered by decision makers, possible including participation in the discussion regarding the decision, without the right to vote or otherwise have a role in the making of the actual decision; and participation in consultation or other processes initiated by an organization including membership on advisory bodies and other forms of involvement in discussions regarding the policies and practices of an organization. These provide organizational “outsiders” with different types of opportunities to persuade the “insiders” who make decisions. In much of the governance literature, “participation” generally refers to non-decisional participation, but the distinction between decision and non-decisional participation is not always carefully observed.<sup>130</sup> The discussion in the remainder of this subsection is limited to non-decisional participation. Decisional participation is discussed in Part II.D.

Like information provision, non-decisional participation by the public in global regulatory bodies’ decisions is widely advocated as a means of securing accountability to disregarded interests. In the case of domestic administrative bodies (Type 3) and in accordance with the Aarhus Convention and certain WTO agreements as well as bilateral and regional investment treaties, agencies confer rights (to the public, to foreign countries and private entities engaged in trade, and to investors, respectively) to submit views, evidence and analysis in relation to specific pending decisions. Like public information provision, non-decisional participation is not an accountability mechanism because, by itself, it does not include the right to hold decision makers to account for their decisions or impose a sanction or remedy for a deficient decision.<sup>131</sup> But, like transparency, it can promote the effectiveness of other responsiveness-enhancing practices. First, the presentation of evidence and argument may by itself persuade decision makers to make different decisions by supplying new information, pinpointing neglected impacts and issues, and marshalling persuasive reasons for a different course. The degree of such consideration is likely to be enhanced to the extent that participants have the right to be physically present when decision makers discuss a proposed decision.<sup>132</sup> Second, presenting evidence and argument can be a platform for

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<sup>129</sup> In certain adjudicatory proceedings in some legal systems, this form of participation includes the right to present evidence through witnesses and cross-examine the witnesses presented by other parties.

<sup>130</sup> Various forms of non-decisional participation also play important roles in accountability mechanisms. In legal accountability, where the right to present evidence and argument to an administrative agency or court in one’s own case is essential to securing effective judicial review of the resulting decision. Under requirements for exhaustion of administrative remedies, such presentation may be required as a prerequisite to securing judicial review. Presentation of evidence and argument to boards of directors or trustees may likewise be essential to obtaining judicial redress for violation of fiduciary duty. The opportunity to review and comment on draft accounting statements and audits promotes fiscal accountability. The opportunity of superiors or supervisors to consult and comment regarding upcoming decisions by subordinates or supervisees promotes hierarchical and supervisory responsibility. Participation in legislative or administrative decisions can also enhance electoral accountability by enabling participants to evaluate the consequent responsiveness of government decision makers to their views, values and interests.

<sup>131</sup> Decisional participation is also not an accountability mechanism, but for a different reasons. Accountability relations involve a separation between the people who makes decisions (the accountor) the person whose interests are affected thereby (the account holder). If a person is a decision maker, to that extent he cannot demand accountability for such decisions.

<sup>132</sup> The discussion of the deliberative, consensus-based process in Part III.C. notes that this practice—allowing observers to attend committee meetings at which decisions are discussed and made, such as in the committee of the Codex Alimentarius—may morph into a form of decisional participation by such observers as they become engaged

mobilizing general political influences, influences based on peer and general public reputation, and social influences. Third, such presentations provide a benchmark for judging the responsiveness of the resulting decisions, which can be a further basis for mobilizing these non-accountability influences. In addition, participation may have intrinsic value for affected societal constituencies.<sup>133</sup>

### *Reason Giving*

A third measure to promote responsiveness is a requirement or practice that global decisionmakers give reasons for their decisions. Such a requirement is, for example, found in the Aarhus Convention and in a number of WTO Agreements. Standing alone, it is not an accountability mechanism. But, requiring a decision maker to state reasons can be an important part of certain legal, fiscal, hierarchical, and supervisory accountability mechanisms by enabling an account holder to invoke remedies based on the accountee's failure to justify a decision by valid or sufficient reasons.<sup>134</sup> <sup>135</sup> Even if accountability mechanisms are absent, general political, reputational, social and even market influences and incentives will often lead decision makers to provide reasons for decisions and then seek to justify them under public norms recognized as legitimate. The giving of reasons for decisions enables those adversely affected to critique and challenge publicly the norms invoked and/ or critique the decision as unsupported by the norms invoked. Reasons also imply a degree of decisional consistency, which can be an additional check against arbitrary decisions. In the absence at the global level of electoral mechanisms to link the public sphere of opinion and will formation with the institutions of governance, the objections to reason giving in connection with voting that apply in the domestic context are inapplicable; indeed, communicative reason-giving could become an important link between the global public sphere and decisions by global regulatory bodies,<sup>136</sup> and provide a possible toehold for developing practices of global deliberative democracy.

### *A Purely Procedural Global Administrative Law?*

Consider the following package of rights for affected societal interests that combines these three responsiveness-promoting mechanisms: substantial disclosure of general information about a global body's decisions, policies, and activities as well as specific information on the foundations of a particular proposed decision and alternatives to it; non-decisional participation in the decision through submission of evidence and argument on forthcoming decisions; and the giving of reasons for the decision based on the relevant evidentiary and analytical material. The three elements are strongly complementary.

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in the deliberative process. Therefore the line between decisional and non-decisional participation may blur in practice.

<sup>133</sup> In analyzing the psychological effects of non-decisional participation and their impact not on accountability but on legitimacy, Tom Tyler concludes that "people are much more willing to accept third-party decisions about how to resolve their disputes if they feel they have had a chance to tell their stories." Tom Tyler, *Is the Rule of Law Waning in America?*, 56 DEPAUL L. REV. 661, 693 (2007).

<sup>134</sup> In principle, one might have a system of accountability for a purely procedural requirement of reason giving, while evaluation of the substantive soundness of the reasons given would be left to general political, peer and general reputational, market and social practices and influences. In practice, however, it may be difficult to limit review to purely procedural conception of reasons giving, for what counts as a reason for a particular decision may inevitably involve some evaluation of the fitness of the stated reason for the particular decisional context. See generally M. Shapiro, *The Giving Reasons Requirement*, 1992 Univ. Chicago L. F. 180.

<sup>135</sup> "When a decision is presented, authorities should emphasize that it accords with the ideas underlying the rule of law. In particular, they should explain the decision by reference to rules and legal principles that show the decision is not based on personal prejudice or bias. People are more accepting of a decision if they understand the principle of law behind it. When decisions go against a person, it is important to show that the decision was made by properly applying the rules to the relevant facts...The belief that courts make decisions based upon the neutral application of principles to the facts of particular cases is central to the legitimacy of the courts." Tyler, *supra* note 133, at 694.

<sup>136</sup> Cf. Jürgen Habermas, *The Post-National Constellation*, *supra* note 31, at 111-112.

Transparency permits more effective participation. Participation allows for presentation of evidence and argument that decision makers are under strong informal incentives to address in the reasons that they give. The reasons given for decisions can be more effectively evaluated with the benefit of the information obtained through transparency and the benchmark provided by the evidence and argument presented by participants. As discussed below, this procedural package is, to varying degrees, emerging in global administrative law and practice. Independent reviewing mechanisms would provide additional pressures for global bodies to consider otherwise disregarded interests,<sup>137</sup> but such accountability mechanisms are infrequent except in some cases of distributed administration (Type 3). Could such a package, even in the absence of review, represent a form of administrative law—an administrative law lite? Could it be regarded as an accountability mechanism?

The common law tradition points strongly to the conclusion that there is no administrative law without judicial review. Historically, judicial review of official actions preceded and was often the source of procedural requirements for administrative decision making, including requirements of public information provision, participation, and reason giving, which gradually emerged much later. And, many aspects of these procedural requirements are best explained by the need to ensure effective judicial review. In the U.S. interest representation model of administrative law, discussed in Part III.A., judicial review plays a vital role in ensuring that the reasons given by agencies for discretionary policy choices take due account of all of the relevant affected interests as well as ensuring fidelity to law. The particular institutional features of global regulation may, however, call for a different answer to the question of whether or not independent legal review is essential to a system of administrative law.<sup>138</sup> These include a relative absence of binding dispute settlement or independent reviewing mechanisms and much greater reliance on other mechanisms and incentives to secure sufficient compliance with norms having the force of law. These features, developed in the context of a state-centric conception of international law, characterize many global regulatory regimes. Thus, one can imagine the three essentially procedural elements of the package emerging as binding norms of global law even in the absence of a review mechanism to enforce them. From the perspective of domestic or supranational models of administrative law, however, another vital element would still be missing, namely, binding general substantive norms for global regulatory decision making. Such norms are at best in a nascent state of development.<sup>139</sup> Still, the possibility of a purely procedural global administrative law can not be dismissed, and indeed there are grounds for concluding that it is already appearing.

Would a package of the three procedural elements, by itself amount to an accountability mechanism?<sup>140</sup> Without a means that enables account holders to obtain, as of right, an accounting and an appropriate remedy, how could it? The argument that they are indeed a new form of accountability mechanism is that these three elements, operating in the context of general political, peer and public reputational, social and market influences, enable affected societal interests to obtain a public accounting from global regulatory bodies by effectively requiring them to justify their decisions by reference to publicly recognized norms,

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<sup>137</sup> Daniel Bradlow, *Private Complainants and International Organizations*, 36 *Georgetown J. of Int. L.* 403 (2005).

<sup>138</sup> See Elizabeth Fisher, *The European Union in the Age of Accountability*, *Oxford Journal of Legal Studies* (Sept 2004). In discussing others' theories of accountability, particularly dealing with the EU, Fisher declares that "there is a common presumption that accountability no longer only denotes those traditional processes such as ministerial responsibility and judicial review. Accountability now refers to an array of processes and mechanisms that have appeared with the evolution of administrative governance."

<sup>139</sup> See Sabino Cassese, *Global Standards for National Administrative Procedures*, 68 *L. & Contemp. Probs.* 109 (2005); G. della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, *Eur L. Rev.* (2003).

<sup>140</sup> See supra note 34. MacDonald and MacDonald argue that just because global elections have heretofore been impossible, global democratic accountability is not impossible. They argue for recognizing a non-electoral democratic accountability mechanism in the global context which combines two procedural elements—mechanisms of public transparency and mechanisms of public disempowerment.

and to sanction decisions that disregard their interests by publicly challenging them. The argument is seductive. I believe, however, that for the sake of clear analysis and sound prescription it is better to maintain a firm distinction between accountability mechanisms that create substantive entitlements on the part of account holders and other practices and influences that, however efficacious they may be, do not.

### III. GLOBAL REGULATORY GOVERNANCE AND THE DISREGARDED: AMERICAN AND EU MODELS

This part examines contrasting American and EU approaches to regulatory governance and their potential for global application, including for addressing the problem of the disregarded. As an oversimplified but nonetheless useful generalization, Americans prefer to use relatively open and contestatory accountability mechanisms for to control and legitimate administrative regulation. These mechanisms have been characterized as “adversary legalism.”<sup>141</sup> These weapons of Mars include the political accountability package founded on elections and especially legal accountability through administrative law and liability actions. Europeans often tend to prefer more closed and less legalized processes, relying on corporatist approaches to representation of affected interests and informal methods of reaching accommodation—the arts of Venus.<sup>142</sup>

In examining these different approaches, this part focuses on the U.S. interest representation model of administrative law and the comitology process for European regulatory standard setting. These two models make very different use of the three types of responsiveness-promoting measures examined in Part II. The US model relies on “external” legal accountability supplemented by the other responsiveness-promoting measures discussed in Part II.C, including transparency and non-decisional participation. The European model largely eschews external mechanisms and focuses on internal decision making structures and practices. How might these very different approaches be applied to global regulatory governance and their potential for solving the problem of disregard? Does one approach dominate the other? Is the US model superior in some applications, the European model in others? Can the two approaches be synthesized to develop a superior hybrid? These are the questions examined in the rest of this part.

#### A. The U.S. Model: External Accountability Mechanisms

The U.S. has relied strongly on electorally-based political and on legal accountability mechanisms to control and legitimate governmental power, including administrative regulatory power. These external measures are open, participatory, and contestatory. Such characteristics are well suited to the pluralist, dynamic character of American society and Americans’ distrust or skepticism regarding government. Americans accordingly have a high regard for accountability mechanisms, especially the vote and the lawsuit that they can invoke and deploy as of right to protect their interests, individual or collective, within a highly diverse and competitive society. At the same time Americans lack Europeans’ intimate experience with transnational and supranational governance.<sup>143</sup> It is thus unsurprising that Americans tend to suppose that the accountability mechanisms familiar from their domestic experience are appropriate for the problems of global regulatory governance.

#### *Strengthened Domestic Political Accountability for Global Regulatory Decisions*

Some American students of global governance, most notably Anne Marie Slaughter, have argued for strengthening mechanisms of domestic political accountability for global regulatory decisions by treaty-

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<sup>141</sup> See Robert A. Kagan, *supra* note 2.

<sup>142</sup> *Ibid*; Bignami articles.

<sup>143</sup> NAFTA represents but a limited venture in transnational market governance.

based regimes and intergovernmental networks (Types 1 and 2).<sup>144</sup> The means would include closer oversight by domestic political actors and legislatures over the global regulatory activities of their governments and strengthened mechanisms of electoral, supervisory and perhaps legal accountability over the responsible domestic government officials. These mechanisms would in turn enhance the accountability of global regulatory bodies. Those advocating this approach, however, have not considered its impact on domestic regulation affecting foreign interests (type 3) or on private or hybrid public-private regulatory bodies (types 4 and 5). Even as applied to treaty-based regimes and intergovernmental networks, it is unclear how feasible and effective these measures might be. Further, there has been no sustained consideration of how measures to enhance domestic political accountability would affect the balance between developed country and developing country interests, or their impact on global social, environmental and economic interests. Examples are quite mixed. Thus, US domestic politics produced the World Bank Inspection panel and the NAFTA environmental and labor side agreements, but also opposition to any international agreement on climate regulation and the International Criminal Court.<sup>145</sup>

#### *Legal Accountability for Regulatory Governance: Interest Representation Through Administrative Law*

The US government, US NGOs, and many American students of global governance have strongly urged application of domestic models of U.S. models of administrative law to global regulatory governance. The US government has pushed “good government” initiatives for developing countries through in the World Bank, IMF, and US ODA policies. The US government and many US-based NGOs have also exported US administrative law models to a variety of global regulatory bodies. The latter efforts have been endorsed by many international NGOs, especially in the environmental and human rights fields. These efforts have contributed to the emergence, discussed below, of a global administrative law to govern decision making by global regulatory bodies.<sup>146</sup>

At the outset, one must distinguish adjudication affecting rights of specific persons and development and implementation of general norms through rulemaking or otherwise. In adjudication there is a powerful case for legal accountability in order to protect individuals who often lack political influence, promote even handed and impartial administration and ensure the legality of government incursions on private property and liberty. The case for legal accountability is less compelling in cases involving administrative adoption and implementation of general norms emphasized by Justice Holmes in the opinion previously quoted. Here the basic objective is not to protect individual rights but to ensure informed and considered decisions that take due account of relevant affected collective interests and values. As discussed in Part II, there are a wide range of accountability mechanisms, decision rules, and other measures to promote these objectives.

Nonetheless, the US has developed an extensive system of administrative law for administrative rulemaking and other decisions involving the development and implementation of general regulatory norms decisions.<sup>147</sup> This system affords a broadly available package of rights for individuals and

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<sup>144</sup> See Slaughter, *supra* note 107. This strategy is also advocated by scholars elsewhere. E.g., Ngaire Woods, *Parliaments and the Accountability of the IMF* (forthcoming).

<sup>145</sup> Because global regulation is a two-level, or more accurately, a complex heterarchical system, the impacts of heightened domestic political accountability for various types of global regulatory decisions are difficult to sort out. There is a perception that industrial and financial interests currently enjoy a dominant influence and are advantaged relative to other domestic economic and social interests, who might benefit from a higher level of oversight and debate. Energizing domestic political activity is likely to have greatest impact in developed countries, which may work to the relative disadvantage of developing countries and their domestic interests.

<sup>146</sup> See B. Kingsbury, N. Krisch & R. Stewart, *supra*.

<sup>147</sup> See R. Stewart, *The Reformation of American Administrative Law*, 88 Harv. Rev. 1669 (1975) [hereinafter R. Stewart, *Reformation*].

organizations representing affected social, environmental, and economic interests.<sup>148</sup> These rights include effective and speedy access to government information; notice and non-decisional participation in administrative decisions through submission of comments, evidence and analysis; a requirement that the agency provide reasons for its decision including a full discussion of the evidence and views submitted by commenters, and review of the legality of the decision by a court. Under the “hard look” approach to judicial review of agencies’ exercise of law and policymaking discretion, courts often demand that agencies give a detailed explanation, supported by evidence in the administrative record, of the reasons for their decisions, including a discussion of the contrary views and proposals submitted in public comments. This interest representation model of administrative law was created to fill the gaps in mechanisms of political accountability resulting from by the broad delegation of law and policymaking discretion to administrative bodies. More specifically, it was designed to meet the wide perception that these bodies were insufficiently responsive to regulatory beneficiaries and other affected societal interests by giving representatives of these interests legal rights to hold agencies to account for their decisions and thereby promote greater responsiveness to those interests.<sup>149</sup> Many in the U.S. and the international NGO community believe that this interest representation model can and should be applied to global regulatory bodies to address analogous accountability gaps and problems of disregard.

The “hard look” approach to judicial review of agency discretion was developed by judges invoking a partnership conception of the relation between agencies and courts to promote inter-institutional dialogue on the public values involved in the administrative decisions. In US administrative law, any individual or entity can submit comments in agency rulemaking or other proceedings. Any individual or entity can obtain judicial review on a showing that it is or would suffer “injury in fact” from an agency decision, and that its interest is recognized as relevant by the statute under which the agency is proceeding. While the party’s motivating interest may often be private, it must adduce statutorily-relevant public values in support of its preferred policy outcome. The court reviews the justifications—again in public norms—given by the agency for its choice and for its rejection of alternatives proposed by commenters. If it finds the reasons given inadequate or insufficiently supported by the administrative record, it remands the matter to the agency, which may reconsider and make a fresh decision. It can thus be understood as a particular institutionalized version of democratic discourse based on communicative reason. It can also be regarded as a legal construction of a surrogate legislative process. The US procedure, however, has an entirely different structure than the collegial European comitology model of regulatory decision. In the US model, the dialogue is structured through legal procedures and only two institutional actors—the agency and the court—have decision making roles. The agency is a unitary actor with the ultimate decisional authority. The court plays a supervisory and regulative role in ensuring a reason-based decision. The public sphere is represented both by the government and through the diverse other public and private actors, including business firms, labor organizations, and NGOs, that submit comments and seek judicial review.

### *The Shortcomings of Interest Representation Administrative Law*

There is resistance in many quarters, especially in Europe, to an interest representation model of administrative law for regulatory governance.<sup>150</sup> In the context of global regulatory governance, such resistance is related to more general issues regarding legalization of international governance.<sup>151</sup> This

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<sup>148</sup> See Breyer and Stewart, *Administrative Law* 415-488.

<sup>149</sup> See R. Stewart, *Reformation*.

<sup>150</sup> E.g., Robert A. Kagan, *supra* note 2; Michelle Everson, *The Constitutionalization of EU Administrative Law: Legal Oversight of a Stateless Internal Market*, in Christian Joerges and Ellen Vos, *EU Committees* 281. See also J. Weiler, *Epilogue: “Comitology” as Revolution — Internationalism, Constitutionalism, and Democracy* in *id.* At 339 (criticizing “facile” U.S. norms of transparency and procedural fairness based on US Administrative Procedure Act).

<sup>151</sup> See generally Judith Goldstein, Miles H Kahler, Robert Keohane and Anne-Marie Slaughter, *Legalization and World Politics* (Cambridge, MIT Press 2001)

resistance is based in part on legitimate concern with the costs and other dysfunctions of the interest representation model. It also reflects a strong preference, conditioned by historical practice in the member states and reinforced by the recent successful European experience with supranational government, for less legalized, more cooperative, and more closed regulatory decision making processes, relying on specialized government officials and corporatist approaches to interest representation through established organizational channels.<sup>152</sup> There may be greater receptivity to the US approach in Eastern and Central Europe, as a result of its transition from Communist rule. It is notable that Western European nations as a group were the last to ratify the Aarhus Convention, and that the European Community also delayed ratification.<sup>153</sup>

There are potentially good reasons for resistance to the US model. Mechanisms of legal accountability have many of the problems associated with legalization and litigation generally. They are costly to deploy. They require resources and often involve significant transaction costs and delay. These costs include not only the direct transaction and other resource costs involved but also opportunity for delay, stifling of initiative and flexibility, and erosion of the advantages of specialized administrative knowledge and operational experience, especially if the reviewing body is a court of general jurisdiction. Many commentators have found that in the US context these costs are exacerbated by the strongly adversarial character of the US legal culture, with the result that interest representation administrative law has produced an “ossification” of the regulatory process.<sup>154</sup>

Some observers also view the notion of institutional dialogue and decisions guided by public reason as hopelessly unrealistic in the context of American adversary legalism and the political character in administrative decision making. They view the US rulemaking process as fostering a highly manipulative game, in which commentators invoke whatever arguments and facts are available to vindicate their private interests, and agency lawyers provide elaborate legal and analytical rationalizations for decisions reached on subterranean political grounds.<sup>155</sup>

As a number of US scholars have advocated, these problems could be addressed by scaling back the rigor of hard look review, and giving much more deference to agency judgments in judicial review of discretionary policy choices.<sup>156</sup> This step would diminish the extent of judicial protection for affected

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<sup>152</sup> There are, however, some signs of US-style legalization of the European administrative process. See Robert A. Kagan, *supra* note 2; Carol Harlow, *Accountability in the European Union* 159-162 (2002).

<sup>153</sup> For discussion of the development, often reluctant, of procedural elements of administrative law for EU Community regulatory decisions, see Francesca Bignami, *Three Generations of Participation Rights Before the EU Commission*, 68 *L. & Contemp. Probs.* 61 (Winter 2004). [hereinafter Bignami, *EU Participation*]

<sup>154</sup> See T. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 1992 *Duke L. J.* 1385; R. Pierce, *Seven Ways to Deossify Agency Rulemaking*, 47 *Admin L. Rev.* 59 (1995). The administrative record in important, controversial rulemaking proceedings is often massive, running to millions of pages of agency documents and public comments. The agency, conscious of the need to pass “hard look” scrutiny by reviewing courts, must not only prepare a long and elaborate opinion justifying its decision, but often finds that it must gather additional data or conduct new analyses to address problems raised in public comments. The agency may have to expose this new material to an additional round of public comment. It is common for such rulemakings to take five years or more, followed by an additional year or two for judicial review, which may in turn be followed by a remand for further administrative proceedings. Some American students of U.S. administrative law believe that parties participating in rulemaking seek to “game” the proceedings by loading their comments with numerous contentions and extensive data and analysis, even on issues which they do not regard as important to their interests, in the hope of being able to persuade a reviewing court that the agency failed to deal appropriately with one or more of these peripheral issues and set aside an agency decision which they oppose for other reasons.

<sup>155</sup> Don Elliott.

<sup>156</sup> See, T. McGarity, *supra*; R. Pierce, *supra*. But see M. Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking* (stressing impact of uncertainty in application of “adequate consideration” standards of review in producing highly conservative agency strategies in

interests and mute the ideal of dialogic partnership but allow greater administrative flexibility and dispatch. Other, non-legal mechanisms of accountability and responsiveness would remain and could arguably fill some of the gaps created by reducing the extent of legal accountability. In the context of global governance, it would no doubt make sense in most cases to adopt a “soft look” version of an interest representation model in those cases where a reviewing mechanism is provided. This would reduce, if not eliminate, many of the drawbacks associated with US interest representation administrative law. And, there is the option of doing without independent review on substantive matters and applying only a purely procedural version of interest representation. Thus, elements of the US model can and indeed, as discussed below, are being adopted for global regulatory decisionmaking without some of the more serious drawbacks associated with the US domestic version.

A further European criticism of the pluralist US model is the problem of financing representation of collective social and economic interests and the resulting problem of imbalance in representation. Europeans tend to follow a corporatist approach of representation of such interests through officially recognized consumer, environmental, etc. organizations that often receive state financial support.<sup>157</sup> Representation in the US operates on a private, voluntaristic, competitive basis.<sup>158</sup> Well-organized economic actors, including business firms and labor unions are equipped to participate effectively in the interest representation administrative law system. But the organizational advantage enjoyed by these entities relatively to more diffuse collective interests has been at least partially offset in the US by the rise of public interest law. US civil society traditions and government tax incentives have generated substantial funding for public interest legal advocacy groups representing environmental, consumer, minority, handicapped, and animal rights. These groups, whose staff includes economists, scientists, and other professionals in addition to lawyers, have been able to participate quite effectively in the administrative process. While business firms and other organized economic actors may still maintain a relative advantage, public interest groups believe that they are able to enjoy far more influence and greater effectiveness under the interest representation model than under the preexisting traditional model of administrative law. Under that model, standing to secure judicial review was generally limited to regulated economic actors; other collective interests generally could not obtain legal accountability by agencies. Furthermore, the problem of resource imbalance will not disappear if the US model is not followed. Substantial resources, including economic, scientific, and engineering expertise, will inevitably be needed to participate effectively in specialized regulatory decision making, regardless of whether or not it occurs through legalized processes.

## **B. The Rise of Global Administrative Law**

A global administrative law for the five different types of global regulatory bodies is rapidly emerging, discussed above albeit in a piecemeal fashion.<sup>159</sup> These processes involve two basic mechanisms, bottom up through review by national courts of the domestic reception and implementation of global norms, and top down through the adoption of administrative law procedures and institutional mechanisms by global regulatory bodies.<sup>160</sup> This new body of law and practice addresses both adjudicatory decisions and option and implementation of general norms. an example of bottom up initiatives in the adjudicatory context,

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rulemaking). The question of whether an agency properly interpreted and complied with relevant statutes presents different issues.

<sup>157</sup> See Francesca Bignami, *Civil Society and International Organizations: A Liberal Framework for Global Governance* (forthcoming)(discussing approaches to administrative law interest representation in the US, Germany and France)

<sup>158</sup> These differences in approach also characterize regulatory standard-setting by industry-based standards bodies in Europe and the US.

<sup>159</sup> This new field of legal practice and theory is the object of the Global Administrative Law Project at New York University School of Law. See <http://www.iilj.org>.

<sup>160</sup> See B. Kingsbury, N. Krisch & R. Stewart, *supra*; R. Stewart, *U.S. Model for Global Administrative Law?*, *supra*.

domestic courts have rejected claims of executive prerogative in order to review domestic administrative decisions implementing Security Council regulations freezing the assets of asserted terrorist financiers, invoked global norms to overturn deportation orders, and provided remedies to athletes challenging decisions by international sports authorities imposing sanctions for illegal doping.<sup>161</sup> In order to fend off such challenges in domestic courts, global regimes have strong incentives to develop their own systems of procedure and review. This has already happened, for example in the case of global sports bodies.<sup>162</sup> Such initiatives can also flow in the other direction. An example is provided by arbitral tribunals established under bilateral and regional investment treaties. These tribunals are enforcing procedural as well as substantive global administrative law disciplines on domestic administrative bodies claimed to have engaged in regulatory expropriation of foreign investors' property. There is nothing distinctively American about this aspect of global administrative law. Such rights of defense are widely recognized in Anglo-Commonwealth common law jurisdictions, in continental European countries and, somewhat belatedly, by the European Community.<sup>163</sup> As global regulatory decisions impact individual non-state actors—whether individuals seeking refugee status or investors financing in Clean Development Mechanism projects under the Kyoto Protocol—there will be a corresponding need to develop appropriate global mechanisms of legal accountability to protect their rights.

There is also an emerging global administrative law governing the adoption and implementation of general regulatory norms. It reflects the general objectives and includes many of the elements of the US interest representation model. These elements are absent or quite underdeveloped in most European and the Community legal systems. US courts have applied administrative law disciplines to domestic agencies implementing global regulatory norms, notwithstanding arguments for deference to the executive in foreign affairs.<sup>164</sup> The Congress and the President have required domestic government officials to afford public notice and opportunity for comment on the positions that they will take in global regulatory negotiations.<sup>165</sup> Many international regulatory organizations (Type 1) and some intergovernmental regulatory networks (Type 2) have adopted elements of administrative law procedures for the adoption of general norms. A number of private and hybrid public private regulatory bodies (Types 4 and 5) have also adopted such measures.<sup>166</sup> The global regulatory bodies that have adopted such measures are as diverse as ISO, the OECD, the World Anti-Doping Agency, the World Bank, the Basel Committee of national bank regulators, and the Forestry Stewardship Council.<sup>167</sup> Further, the WTO and investment treaty arbitral panels are developing and enforcing global administrative law requirements for regulation by domestic authorities (Type 3), including transparency, opportunity for notice and comment, and reasoned decision.

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<sup>161</sup> See D. Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 *L. & Contemp. Probs* 127 (2005);, *Regulatory Features and Administrative Law Dimensions of the Olympic Movement's Anti-Doping Regime*, NYU *Jl Intl L & Policy* (forthcoming).

<sup>162</sup> See A. Van Vaerenbergh, *supra*.

<sup>163</sup> See F. Bignami, *EU Participation*.

<sup>164</sup> For a review of these decisions as well as decisions refusing to impose administrative law disciplines in some cases, see R. Stewart, *U.S. Model for Global Administrative Law?*

<sup>165</sup> See *id.* at 85-86. Such measures should serve to strengthen domestic mechanisms of political accountability for the activities of domestic officials in global regulatory decision making.

<sup>166</sup> The apparent reasons for these steps include a desire to address criticisms based on deficient accountability and responsiveness, enhance to perceived legitimacy and acceptance of their decisions, improve decision making, and in some cases perhaps defuse the threat of review by domestic courts.

<sup>167</sup> See, e.g., Benjamin Cashore, Graeme Held and Donna Newsom, *Governing Through Markets: Forest Certification and The Emergence of Non-State Authority* (New Haven & London, Yale Univ. Press 2004); J. Salzman, *Decentralized. Administrative Law in the Organization for Economic Cooperation and Development*, 68 *L. & Contemp. Probs* 189 (2005). (discussing OECD Mutual Acceptance of Data system for the non-clinical safety data of chemicals).

The most notable example is the WTO Appellate Body decision in the US Shrimp Turtle case.<sup>168</sup> The growing numbers of other international tribunals and the potential application of the Aarhus Convention norms to global authorities will stimulate further application of global standards of regulatory due process.<sup>169</sup> These developments have already gone a substantial way towards creating a purely procedural model of global administrative law.<sup>170</sup> These procedural safeguards extend to private actors,<sup>171</sup> and promote the engagement of NGOs as well as business interests in global regulatory decision making.<sup>172</sup>

Instances where global regulatory regimes have established or required independent reviewing authorities are, however, infrequent. Examples include the World Bank Inspection Panel and similar institutions in other multilateral global financial institutions,<sup>173</sup> provisions in the WTO TRIPS and GATS agreements requiring independent review for domestic decisions affecting foreign economic interests, and the independent review system for adjudication of anti-doping cases involving athletes established by the World Anti-Doping Agency. Yet, the number of international tribunals with competence over the development and administration of global regulatory norms is increasing. This trend, together with pressures from international NGOs and from the US and other developed country jurisdictions, and the threat of domestic court review, will likely stimulate further development of independent legal review mechanisms for global regulatory decisions.

The overall result is a largely procedural version of global interest representation administrative law. Although falling short of an accountability mechanism, these measures can promote greater responsiveness to disregarded interests. Even where review mechanisms are absent, the procedural elements provide important rights which can be used by NGOs and other entities to expose, contest, and promote public awareness of and debate over the policies and decisions of global regulatory bodies, and thereby trigger responsiveness-promoting influences. These practices foster decisional processes that are more open, competitive, and contestatory. These characteristics fit the fluid, dynamic character of global regulatory issues and interests.

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<sup>168</sup> United States — Import Prohibition of certain shrimp products, 12 October 1998 WT/DS58?AB/R. US administrators instituted a ban on imports of shrimp products from Southeast Asian countries for failure to use turtle-protection devices in shrimp harvesting as required by US law. The Appellate Body required the US to adhere to global procedural norms of regulatory due process [WHICH?] as well as substantive norms in order to assure due protection of the foreign producers' interests.

<sup>169</sup> See S. Cassese, *supra*; G. della Cananea, *supra*. These norms are likely to be internalized by domestic courts, and invoked by foreign plaintiffs seeking review of domestic agency decisions adversely affecting them.

<sup>170</sup> S Cassese citations.

<sup>171</sup> Stefano Battini, *International Organizations and Private Subjects: A Move Towards a Global Administrative Law* (forthcoming).

<sup>172</sup> See R. Nickel, *Participatory Transnational Governance* (EUI Working Paper Law No. 2005/20)[hereinafter Nickel, *Participatory Transnational Governance*].

<sup>173</sup> See D. Bradlow, *Private Complainant and International Organizations: A Comparative Study of Independent Inspection Mechanisms in International Financial Institutions*, 36 *Geo. L. J.* 405 (2005); Dana Clark, Jonathan Fox and Kay Treacle, eds., *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel* (2003). Jonathan Fox & L. David Brown, eds, *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (Cambridge and London, MIT Press, 2000). The World Bank Inspection Panel has elements of supervisory accountability to the Bank's member states and higher management as well as legal accountability to outside societal interests. It was adopted as a result of pressures from the US Congress and NGOs to ensure that Bank staff making decisions to fund development projects in developing conditions complied with environmental and social guidelines previously issued by Bank management but largely ignored. As Bradlow shows, the Inspection Panel and similar institutions in other international financial organizations can potentially serve three different functions: assuring compliance with binding norms; problem solving (how to minimize adverse environmental and social impacts associated with development); and promoting organizational learning. The latter two functions can be regarded as complex deliberative processes. .

At the same time, this approach has potentially significant limitations. Without a right to independent review, the administrative law model fails to secure accountability and, perhaps, greater effectiveness in greater responsiveness to disregarded interests. Another problem is providing adequate financial and other resources for effective participation in relatively legalized regulatory processes. Experience shows that this is a problem for many countries, not to mention general social and economic interests. Beyond these concrete problems is the lurking fear that use of US models will bring with it the excesses of US adversary legalism, although these problems will be much reduced if judicial review is absent.

### **C. European Models of Deliberative Supranationalism**

Their own experience, together with the drawbacks of the US administrative law model, has led many European observers believe that a deliberative consensus-based model of decision making is well suited for global regulatory governance. As discussed below, versions of the deliberative approach have been successfully used to set European regulatory standards through Community comitology procedures and private-public standard setting organizations. A different version of deliberative decisionmaking is arguably emerging in the Open Method of Cooperation for harmonizing certain member state economic and social policies. Because many European scholars find a strong similarity between character of European government and the conditions of global regulatory governance, they have suggested use of these or similar deliberative processes in global decisionmaking.<sup>174</sup>

The logic of the deliberative, consensus-based approach is cooperative rather than adversarial, based on persuasion rather than power and bargaining. It aims at joint problem solving, not victory in combat. The deliberative approach does not deny that the participants, and those whom they represent, have divergent interests or values, and that the participants will seek to promote them. But it does assume that, especially under conditions of ongoing interdependence where cooperation can produce mutual benefits, participants will not always act strategically, will be open to persuasion by the reasons and evidence given by others, and will often, through the deliberative process, come to accept outcomes that they would not have supported before the deliberation began, paving the way for consensus solutions. These possibilities are enhanced if the nature of regulatory problems and the best means for addressing them are uncertain.<sup>175</sup> A rule or practice of decision by consensus rather than some majority of votes encourages this deliberative approach. This mode of decision making is best adapted to issues that are not matters of serious contestation, especially those that have a technical component requiring the mobilization of specialized knowledge. Powerful states and other powerful actors may therefore be willing to adopt such decisional methods, especially in the context of subsidiary decisional bodies of an administrative character, if they can better solve problems arising from interdependence.

Some proponents of consensus-based deliberative processes for regulatory governance link them with Habermas's theory of communicative reason, which invokes a conception of discourse grounded either in implicit claims of moral or ethical truth or in pragmatic claims that can be supported by sound reasons recognizable as such by interlocutors.<sup>176</sup> This communicative conception of decision making over matters

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<sup>174</sup> Nickel, others.

<sup>175</sup> See Thomas Gehring, *Communicative Rationality in EU Governance? Interests and Communicative Action in Functionally Differentiated Single Market Regulation*, in Erik Eriksen, Christian Joerges and Jürgen Neyer, *EU Governance, Deliberation, and the Quest for Democratization* (ARENA, Oslo, 2003). [hereinafter Eriksen, Joerges and Neyer, *EU Governance and Deliberation*]

<sup>176</sup> See Jürgen Habermas, *supra*, at 18: "Communicative action, then, depends on the use of language oriented to mutual understanding. This use of language functions in such a way that the participants either agree on the validity claimed for speech acts or identify points of disagreement, which they conjointly take into consideration in the course of further interaction. Every speech act involves the raising of criticizable validity claims aims at intersubjective recognition. A speech-act offer has a coordinating effect because the speaker, by raising a validity

involving conflicting interests or values offers the participants an alternative means, based on public reasons calculated to win general assent among fair and open minded persons, to power-based strategic approaches. Under discourse theory, the ground for the validity of arguments, propositions, and decisions is procedural. Legitimate decisions emerge from a public-reason-based deliberative process in which all are equals, under which the public-regarding reasons given by each is entitled to full respect and open-minded consideration by others.<sup>177</sup> Other scholars advocate a somewhat different version of deliberative democracy not explicitly based on Habermasian structures.<sup>178</sup> The most aspirational interpretation of these approaches is that they could be used to establish a democratic system of global governance under constitutional arrangements that would encourage and support deliberative dialogue among all relevant interests and values, generating practices and policies guided by global public reason.<sup>179</sup> These arrangements, and how they would operate, however, remain to be specified. This section has a much more limited focus, considering how the European experience with consensus-based approaches to regulatory decisionmaking might potentially be applied to decisionmaking by individual global regulatory bodies to promote greater regard for the currently disregarded.

### *Deliberative Decision Making for EU Regulation: Comitology and the New Method*

A deliberative approach to consensus-based decision making for setting European product and services regulatory standards has been widely and generally successfully used by two different types of institutions: comitology committees for adopting regulations to implement European directives, and industry-based standard setting bodies operating under the Community's New Approach to regulation. In comitology, member state representatives expert in a given regulatory area meet in committee with a Commission official as chair to decide upon detailed product regulatory standards to implement Community directives.<sup>180</sup> Under the New Approach, responsibility for developing detailed standards is remitted to representatives of industry-based member state standard setting bodies under the aegis of European federations of such organizations. Both of these innovations were a response to difficulties experienced in setting detailed regulatory standards through the Community legislative process, to inadequate expert knowledge and resources in the Commission, and conflicts among member states over the content of harmonized standards.<sup>181</sup> Comitology and the New Approach seek to marshal expert resources while at the same time ensuring consideration of the needs of market integration and the interests and views of the member states in the context of a more deliberative, less politicized decisional process.<sup>182</sup>

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claim, concomitantly takes on a sufficiently credible guarantee to vindicate the claim with the right kind of reasons, should this be necessary.”

<sup>177</sup> See A. Herwig, *Transnational Governance Regimes for Foods Derived from Bio-Technology and Their Legitimacy*, in Christian Joerges, Inger-Johanne Sand and Gunther Teubner, *Transnational Governance and Constitutionalism* 199 (Oxford and Portland, Hart Publishing 2004) This conception can be understood as an exemplification of pure procedural justice. See Robert Nozick, *Anarchy, State and Utopia*.

<sup>178</sup> See Thompson and Gutman, *supra*; [additional citations].

<sup>179</sup> [Citations]

<sup>180</sup> See Christian Joerges & Ellen Vos, eds., *EU Committees, Social Regulation, Law and Politics* (Oxford and Portland, Hart Publishing 1999) [hereinafter Joerges and Vos, *EU Committees*]. Comitology committees are only one of a number of different types of committees engaged in the European supranational lawmaking and implementation process. See Paul Craig, *EU Administrative Law*, Chs 4, 5 (2006); .Mario Savino, *The “third” dimension of EU Suprnationalism: Deliberative or Procedural?* (2007)

<sup>181</sup> See Harm Schepel, *The Constitution of Private Governance: Products Standards in the Regulation of Integrating Markets* (Oxford and Portland, Hart Publishing 2005)[ hereinafter Schepel, *Constitution of Private Governance*]

<sup>182</sup> The OMC involves quite different subjects and a different institutional structure. It has been developed in certain areas of domestic social and economic policy, including unemployment, economic policy, and social protection, where the Community lacks legislative competence because of member state unwillingness to grant it. OMC is a structured process, established by the Community and supervised by the Commission, for member state policy

Much of the literature finds that Comitology committees and EU/member state standard setting organizations have successfully resolved member state differences, reduced protectionist pressures, and adopted rather quickly and efficiently a large number of product regulatory standards to support a single market.<sup>183</sup> The shift is from political bodies subject (indirectly) to electoral accountability, or formal administrative processes subject to administrative law, to informal deliberation among experts with shared competences and a problem solving orientation.

The general terms of much of Community regulatory legislation often affords committees and industry-based standard setting bodies considerable discretion in the selection of regulatory standards. Both systems operate in a rather closed manner. Both processes operate with a substantial independence from legal or direct political accountability. Judicial review of comitology committee decisions is rare, as is intervention by the Council or Parliament. Industry-based standard setting bodies generally operate with an even greater degree of insulation.<sup>184</sup> Many legal scholars, including Joseph Weiler, Paul Craig, and Francesca Bignami, have questioned these arrangements, voicing concerns over lack of transparency and accountability, lack of mechanisms for representation of affected societal interests and broader values, the dangers of expert tunnel vision, and their anomalous position within the European constitutional order.<sup>185</sup> Others have questioned the extent to which deliberative approaches in fact prevail over bargaining in these bodies.<sup>186</sup> Nonetheless, these standard setting processes do not appear to have provoked widespread criticism or legitimacy concerns, notwithstanding the absence of the external accountability or accessibility mechanisms discussed in Parts II.B and II.D above.<sup>187</sup> They are generally accepted as

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coordination. It involves comparisons and evaluation of program performance in different member states in accordance with common criteria and procedures established in guidelines, benchmarking of performance, and reporting, all on an iterated cycle. The Community has adopted the OMC in the hope that it would enable member states, through a process of information-sharing, networking, and collaboration, to learn from each others' experience in addressing these problems and foster voluntary upward policy convergence, leading, perhaps, to eventual Community regulation in these fields. The OMC process is still in a relatively early stage—too early for a considered assessment of its performance and potential for application in the global context. For preliminary assessments of OMC, see K. Jacobsson and Å. Vifell, *Integration by Deliberation? On the Role of Committees in the Open Method of Coordination*, in Eriksen, Joerges and Neyer, *EU Governance and Deliberation* 412; C. de la Porte & P. Nanz, *OMC—A Deliberative-Democratic Model of Governance?* in Eriksen, Joerges and Neyer, *EU Governance and Deliberation* 459; B. Eberlein & D Kerwer, *Theorizing the new Modes of EU Union Governance*, 6 *EU Integration Online Papers* No. 5.

<sup>183</sup> See Ch Joerges and J. Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology* 3 *Eur. L.J.* 273 (1997); Christian Joerges and Ellen Vos, *EU Committees: Social Regulation, Law and Politics* (Oxford and Portland, Hart Publishing 1999); Schepel, *The Constitution of Private Governance* 63 ff; Paul Craig, *supra*, Ch. 4 (2006).

<sup>184</sup> The decisions of industry standard-setting bodies may, however, be subject to review in litigation based on competition and tort law. See *id.*, Chs 9, 10. There are at least questions as to how effective these disciplines would be in the context of global regulatory standard setting.

<sup>185</sup> {citations} See also Ellen Vos, *EU Committees: The Evolution of Unforeseen Institutional Actors in European Product Regulation*, in Joerges and Vos, *EU Committees* 19; Renaud Dehousse, *Towards a Regulation of Transnational Governance? Citizen's Rights and Reform of the Comitology Process*, *id.* 109; Carol Harlow, *Accountability in the European Union* 64-69 (2002).

<sup>186</sup> {citations}

<sup>187</sup> Consensus-based deliberation can not be regarded as a mutual accountability mechanism for participants in a deliberative consensus based decisional process. Because all participants are decision makers, there is lacking the separation of decision making (by accountees) and impacts on non-decisionmakers (account holders) that is the foundation of accountability relations. Further, there is no mechanism by which a participant can hold another participant to account for the failure to adhere to deliberative norms (for example, by failing to participate in good faith dialogue based on reasons) and impose a sanction against that participant for such failure. All that the disappointed participant can do is withhold assent to a proposed decision or withdraw.

pragmatically successful problem-solving institutions.<sup>188</sup> Is the general acceptance of the comitology process and similar New Method processes explained by their superior performance in efficiently producing workable common regulatory standards? By peer esteem for superior expertise? By informal links with EU and member state government bodies and domestic constituencies?<sup>189</sup> By the informal political linkages between member state representatives on comitology committees and domestic constituencies, which ensures that their views and interests are adequately considered in the decision process? Or, as some have suggested, is the use of deliberative processes self-legitimizing because of their inherent normative virtues?<sup>190</sup>

Christian Joerges and colleagues attribute the success of comitology to the prevalence of a consensus-based dialogic processes in committee decisionmaking, arguing that it has produced a new form of “deliberative supranationalism” that has successfully fused Community and member state interests. In order to meet criticism like those of Joseph Weiler, Joerges has suggested a project of constitutionalizing comitology in order to promote broader application of deliberative supranationalism and enhance its legitimacy. What this project might involve remains unspecified. Others have emphasized sociological factors including small group cohesiveness, European corporatism, and traditions of consensus-based regulatory standard setting embedded in “shared cultural understandings and institutions.”<sup>191</sup> Mario Savino, on the other hand, has focused on the comitology decisionmaking procedures, which give the Commission the power to set agendas and make or withdraw proposals, as critical to producing consensus outcomes that advance Community objectives. His analysis finds support in a review by Peter Strauss of approximately 5200 committee actions during 2001-2003, which found that all but handful Commission proposals were ratified without significant committee opposition or change.<sup>192</sup> This evidence casts doubt on the claimed advantages of committee deliberation in generating new and superior solutions to regulatory problems.<sup>193</sup>

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<sup>188</sup> The generally optimistic view in the literature of comitology and the New Approach is, with a few exceptions {cite Joerges foodstuffs study}, the product of analysis and evaluation at a considerable level of generality. More empirical investigation, including case studies, are needed on several issues, including the following: the extent to which deliberative versus bargaining approaches to decision making are actually followed, how competitive rivalries among different firms within industries affect standard setting, the types of tradeoffs involved in setting standards, the extent of participation by representatives other than those from industry and governments, and whether there are characteristic differences in the decisional processes or outcomes of comitology and of industry-based standard setting bodies

<sup>189</sup> Schepel finds that close relations between national industry-based standards bodies and member state governments has facilitated the success of New Approach. Schepel, *Constitution of Private Governance* 101. The fact that the standards process has nonetheless succeeded in overcoming parochial protectionist forces in producing EU standards is evidence that the switch from Community legislative processes to the decisional processes followed by industry-based bodies has had a significant impact.

<sup>190</sup> See I-J Sand, *Polycontextuality as an Alternative to Constitutionalism*, in Christian Joerges, Inger-Johanne Sand and Gunther Teubner, *supra*, at 41

<sup>191</sup> See *id.* at 122, 144. Schepel indicates, however, that these sociological roots may not be as strong when standard setting shifts to the EU level. The addition of new member states is likely to raise further questions. See Francesca Bignami, *The Challenge of Cooperative Regulatory Relations After Enlargement*, in George Bermann and Katharina Pistor, eds. *Law and Governance in an Enlarged EU Union* (Oxford and Portland, Hart Publishing 2004) 97.

<sup>192</sup> [Citation] Strauss also found that during this period only seven committee decisions were referred to the Council and that none provoked intervention by the Parliament. These facts are consistent with the view that the comitology process produces broadly acceptable decisions. But the fact that the nearly all Commission proposals were ratified by committee without significant change undercuts the significance of the committee role in the process and claims of the superior-problem solving performance of committee deliberation.

<sup>193</sup> The statistics suggest that Commission proposals were generated through advance consultation with member state representatives, against the background of the procedural powers enjoyed by the Committee in the committee process.

*Promoting Greater Responsiveness to Diverse Societal Interests and Values*

If the deliberative supranationalism model were to be applied to global regulatory governance, how would adequate consideration of affected societal interest and values, in particular those of the disregarded, be secured? This would be a minimum objective. Under a more ambitious vision aimed at democratic deliberation and “participatory transnational government,”<sup>194</sup> the decisional processes would have to be institutionally open to and linked with the global public sphere in order to ensure a “constitutionally regulated circulation of power.”<sup>195</sup> Measures that might promote these objectives fall into the three basic categories analyzed in Part II: change the decision rules to permit decisional participation by representatives of a wider range of interest and values; establish external accountability mechanisms; and take steps to promote greater transparency, non-decisional participation, and public reason-giving. Each of these strategies has been urged by various European critics of the existing comitology process.<sup>196</sup> But none has been adapted to any significant extent, which suggests that they may be inconsistent with successful operation of that process.

Expanding decisional participation in regulatory decisionmaking runs up against serious problems of numbers and representation. The participants must be kept to a manageable number while ensuring broad representation. They must have adequate expertise and resources for effective engagement. And, there must be appropriate procedures and criteria selecting who gets the limited number of slots available. Analysis of deliberative decision making in the US indicates that a limitation to 15 participants is desirable with a maximum of around 20.<sup>197</sup> Limiting participation to such numbers while ensuring adequately broad representation may be manageable in cases where the decisions have relatively narrow impact and are not highly controversial. But where they affect a broader range of interests and values and are more strongly contested, the problem of ensuring adequate representation while maintaining the deliberative quality of the process becomes much more difficult.

If the number of decisionmakers must be sharply limited, how will they be selected? In European standard-setting, participation is determined by the founder entities—such as the Commission, member states, or national industry-based standard setting bodies—that constitute these regulatory processes. These founders will naturally wish to structure these processes and select participants that will advance their own interests and goals. They are unlikely to cede such decisions to outside authorities. Even if it were feasible to have independently developed procedures and criteria for selection, what would they be? This question poses a fundamental ontological challenge for theories of democratic deliberation which hold that substantive norms can only be legitimated as the result of an open deliberative process. To use such norms to constitute the process that must produce and justify them is circular.<sup>198</sup> If some other, exogenously derived valid normative standards exist and can be appropriately used to constitute a deliberative process, why can they not be equally used to critique the substance of the decisions reached by that process?<sup>199</sup> Further, the practical experience with steps by the Commission to broaden

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<sup>194</sup> See Nickel, *Participatory Transnational Governance*.

<sup>195</sup> See Habermas, *Between Facts and Norms* 354. See also *id.* at 430-442 (discussing challenges in ensuring a democratic character for administrative regulation in the context of democratic discourse theory).

<sup>196</sup> [citations]

<sup>197</sup> If these numbers are correct, the expansion of the EU may spell trouble for the success of comitology. See Francesca Bignami, *The Challenge of Cooperative Regulatory Relations After Enlargement*, in George Bermann and Katharina Pistor, eds. *Law and Governance in an Enlarged EU Union* (Oxford and Portland, Hart Publishing 2004)

<sup>198</sup> This problem cannot be avoided by positing some higher order deliberative process to determine the principles of representation that will govern lower-level deliberative processes. One must determine principles for selecting those who will participate in the higher level process.

<sup>199</sup> At a minimum, exogenous substantive criteria for representation are likely to extend to an evaluation of the deliberative process itself. If such criteria imply a right on the part of certain interests to participate in the deliberation, they may legitimately complain in particular cases that this right was denied because of failures in the

participation and representation in comitology and other regulation-related committees to include representatives of general social and economic interests is not encouraging. Beyond rather scattered and unproductive efforts to engage the social partners (officially-recognized representatives of industry and labor), the efforts of the Commission to promote broader interest representation do not appear to have borne much fruit.<sup>200</sup> Reliance on corporatist approaches to representation is in any event unlikely to promote vigorous public debate and the possibility of basic change.

The interest representation model avoids these intertwined problems of numbers and representation by relying on external strategies rather than decisional rules for promoting accountability and responsiveness to affected interests, and by relying on an open volunteer process for representation.

One alternative to expanding the decisionmaker-participants in deliberative processes is to establish one or more of external accountability mechanisms discussed in Section II.B to make the “inside” decisionmakers accountable to “outside” representatives of broader societal interests. But, delegation-based models for securing accountability to outside “principals” would tend to turn deliberation by “agents” into bargaining, and sap the ability of participants to make binding agreements. Legal accountability could produce posturing, would involve delay, and would make consensus agreements vulnerable to invalidation by non-participants, or indeed by participants. It is unsurprising that proposals for strengthening the accountability of comitology committees to Parliament or expanded judicial review of their decisions have come to naught.

Another alternative is to use other external arrangements, including measures to promote transparency, non-decisional participation, and reason-giving as discussed Section II.D, to promote broader responsiveness by regulatory committees. But such measures may well jeopardize the success of the internal dialogic process by exposing it to outside scrutiny and pressure, strengthening the role of external “principals” and undermining the effort to depoliticize the standard setting process. The comitology process is conspicuous for its lack of transparency and opportunity for public participation.. Meetings are closed and until recently agendas and background documents have rarely been available. Documentation has become more widely available, but often in such an undigested and indiscriminate form as to be of little use except to “insiders.”<sup>201</sup> There is no notice or opportunity for public comment before a final decision is made. Proposals to provide such opportunities<sup>202</sup> have gone unheeded. Thus, the committee system works efficaciously but obscurely, and is strongly resistant to changes of the sort discussed.<sup>203</sup>

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dialogic process, for example the convener was biased, some other participants were not participating in good faith, that it did not consent to the decision announced, etc. Applying these criteria may also require examination of the substance of such a decision. Yet, the exercise or threatened exercise of any such external review and remedy, subject to invocation by any participant, could so intrude on the dialogic process itself as to undermine its autonomy and integrity. Rather than engaging in a full, open, and frank exchange with other participants, participants might engage at least in part in the anticipation of external reviewer. Such a practice, or the fear that it might occur, could undermine the quality and success of the dialogic process. See *U.S./ Group Loan Services v. U.S. Department of Education*, 83 F.3d 708 (7<sup>th</sup> Cir. 1996)(7<sup>th</sup> Cir. 1996)(refusing to set aside rulemaking based on regulatory negotiation process; challenger claimed responsible regulatory agency acted in bad faith in the negotiation/rulemaking process).

<sup>200</sup> See Ellen Vos, *EU Committees: The Evolution of Unforeseen Institutional Actors in EU Product Regulation*, in Christian Joerges and Ellen Vos, *EU Committees* 19. Indeed, it is unclear from the literature the extent to which even the social partners are effectively engaged in the comitology process.

<sup>201</sup> See footnote 55 and accompanying text.

<sup>202</sup> Bignami

<sup>203</sup> See *id*; Renaud Dehousse, *Towards a Regulation of Transnational Governance? Citizen’s Rights and Reform of Comitology Procedures*, in Christian Joerges and Ellen Vos, *EU Committees* 109;E. Eriksen, *Integration and the Quest for Consensus*, in Erik Eriksen, Christian Joerges and Jürgen Neyer, *supra* at 159.

Some analysts have suggested that use of the measures discussed in Part II may be unnecessary in the context of transnational or supranational product and service regulation because of the self-interest of the regulated industry in ensuring the social acceptability of the market and avoiding incidents that will damage consumer and societal confidence. In these circumstances, relatively closed deliberative methods will assertedly find “a productive pattern of self-stabilizing coordination, generated by emergent efforts at self organization,”<sup>204</sup> that adequately protects societal interests. This argument, however, fails to come to grips with the powerful asymmetries in information between industry and consumers that justify government regulatory programs in the first place. And, firms may wish to reassure consumers and public regulatory authorities regarding the quality and safety of their products and prevent reputation-damaging incidents.<sup>205</sup> But, in light of information asymmetries, this last incentive alone by no means ensures that the resulting standards will be adequate.

*The Open Method of Competition: A New Model of Democratic Discourse?*

[This subsection will address the Open Method of Coordination (OMC) that is used in the EU to coordinate and promote convergence among member state policies regarding employment, fiscal and economic, and social inclusion issues that are not within the direct regulatory competence of the Community.<sup>206</sup> Within frameworks established by Community law, member state authorities develop goals and plans in accordance with specified criteria and procedures, gather information on their performance and report to it to the Commission and other member states, and engage in consultation and discussion with the Commission and other member states on problems encountered and best practices for achieving

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Harm Schepel, the preeminent student of the New Approach, has found that the procedures of European industry-based standard setting bodies seem to be somewhat more transparent and accessible. The deliberative processes of standard-setting committees are generally closed, but notice and comment on proposed standards is often afforded, although there is little evidence of effective “outside” engagement in the standard setting process. It is claimed that the decisional processes used by those bodies provide for either actual or virtual representation of the interests of consumers and other affected social and economic interests, but concrete evidence to support such claims is hard to find. Thus, the Commission has enunciated a principle of NGO participation in standard-setting bodies, and there are provisions for “balanced interest” representation in some member states. See Schepel, *Constitution of Private Governance* at 6, 72, 114, 125. But the fruit of these efforts is not evident. Schepel notes, without elaboration, that in the UK there have been criticisms of industry “capture” of the standard-setting process. *Id.* at 125. He also states that the standard setting process has achieved regulatory due process. He asserts that industry-based standard setting has achieved the same level of regulatory due process as public authorities. Nonetheless, he states that “private standardization has assimilated the acnonos of administrative rulemaking to such an extent that it is hard to find a difference between its procedures and the procedures that sanctions delegations of regulatory power to public agencies”<sup>203</sup> Schepel at 409 [check]. See also *id.* at 6. But Schepel does not supply supporting detail, and he provides no evidence of substantial NGO participation in the standard setting processes.

<sup>204</sup> K-H Lauder, *Towards a Legal Concept of Network in EU Standard-Setting*, in Christian Joerges and Ellen Vos, *EU Committees* 151, 162. Schepel, *Constitution of Private Governance* 257; Ch. Joerges, *Juridication Patterns for Social Regulation and the WTO: A Theoretical Framework* (draft 2004)(stressing interests of industry in self-regulation to ensure social legitimacy of markets); Ch. Joerges, H. Schepel and E. Vos, *The Law’s Problems with the Involvement of Non-Governmental Actors in Europe’s Legislative Process: The Case of Standardization under the “New Approach,”* 26 (EUI Working Papers Law No. 99/9) (Standards are produced by the consensus of market players . . . Standards operate on the assumption that quality, and high levels of safety, are a marketing argument . . . .”)

<sup>205</sup> These incentives are much weaker in the case of regulatory standards for production and process (PPM) methods, such as pollution control standards, as opposed to product standards. It is notable that the Community has solved problems of political gridlock in setting European standards for PPMs by delegating substantial discretion to the member states rather than relying on comitology or the New Approach to set detailed standards.

<sup>206</sup> See Pail Craig, *supra*, Ch. 6; [citations]

progress. The OMC relies “on a soft law approach fostered through deliberation, learning, and discourse.”<sup>207</sup> The basic points of the subsection are as follows:

- The OMC process is more open and potentially inclusive than the comitology and New Method processes discussed above. Some analysts have argued that OMC represents a highly promising model for a more decentralized and democratic method of discourse and extensive rather than closed deliberation that will foster mutual learning, and policy innovation across nations or regimes while at the same time promoting responsiveness to local needs and circumstances. Some of these analysts have suggested that the model has great relevance and promise for global governance as a means for more inclusive discourse and collaborative decisionmaking. Charles Sabel has christened this approach as “directly deliberative polyarchy.”
- The OMC is still in a relatively early stage of development in Europe, and empirical analysis of its performance is still preliminary. A number of analysts have found that the process is dominated by government officials and specialists and that the degree of broader societal openness and engagement is limited.
- The OMC model and experience may be suitable for global regulatory problems calling for coordination between national governmental bodies or linked global regimes but is likely to have limited relevance for other types of global regulatory problems and institutions, especially those involving significant contestation.]

#### *European Governance as a Model for Global Deliberative Democracy*

[This subsection will briefly discuss suggestions by European academics that aspects of the entire system of European governance (as opposed to particular institutions like comitology, the New Method or OMC) constitute a multi-level, hetarchical method of discourse and decisionmaking that is an appropriate model for a constitutionalized global governance system based on democratic deliberation. These suggestions are implausible and in any event too vague and general to be of help in addressing current problems of global regulatory governance, especially the problem of disregard.]

#### **D. Consensus-Based Deliberation for Global Regulatory Governance**

Can the particular forms of regulatory governance used with such apparent success in Europe standard setting be successfully transplanted to the various forms of global regulatory governance? On the face of it, there are substantial similarities between the tasks addressed and the basic institutional structures of European “deliberative supranationalism” and those of many global regulatory regimes. A large number of global regulatory bodies also deal with the task of harmonizing regulatory standards within a free trade regime, and do so in the context of international organizations that manage a decisional forum involving representatives of national governments. Yet, there are also important differences. In Europe, comitology and industry-based standard setting operates against an institutional background of relatively close supervision by the Commission and more distant oversight by other Community bodies and member state authorities that can, if need be, intervene to mandate regulatory standards, change decision making procedures, or take other steps to safeguard affected societal interests.<sup>208</sup> The potential invocation of these “backstopping” mechanisms likely promotes consideration of such interests in the regulatory decision process. These institutional safety nets are largely lacking in the global context. More fundamentally the European decisionmaking processes operate in the context of a strongly constitutionalized system of supranational government that enjoys wide competence. Its constituent states

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<sup>207</sup> See Paul Craig, *supra*, at 205.

<sup>208</sup> See Carol Harlow, *Accountability in the European Union* (2002)

have a shared history and culture and only moderate variation in economic and social conditions. Institutions for global governance are far more fragmented and far weaker. Heterogeneity is far greater, the problem of disregard is far more acute, and contestation over many issues is much sharper.

These and the shortcomings of European regulatory committees in securing responsiveness to a broad range of societal interests and values may, however, be outweighed by their pragmatic advantages when used for solving “conflicts of laws” problems of transnational product and service regulatory harmonization that do not involve a significant degree of normative contestation.<sup>209</sup> The European model of deliberative supranationalism may be appropriate for a significant subset of global regulatory decisions.<sup>210</sup> Indeed, there is already extensive use of such processes in the global context. Consensus-based deliberative processes similar to those used in comitology and the New Approach are widely followed by committees, boards, and other bodies of an administrative character charged with developing and implementing regulatory norms in a wide variety of global regulatory bodies. Many Type I treaty-based regimes such as the WTO, the UNFCCC and Kyoto Protocol, WIPO, CITES, and the IMF have committees, boards and other subsidiary organs that follow this model. Decisional techniques like those used in EU regulation are also used by specialized committees and boards operating within Type II regulatory networks like the Basel Committee and ISOCO, and in Type IV and V bodies such as the Forest Stewardship Council and ISO. There are, however, few detailed, systemic studies of how these processes actually function, or the extent to which they and their performance differ among different types of global regulatory bodies and subject areas.

[Discussion of applying the OMC model to global regulatory decisions to be supplied.]

But the same characteristics of “deliberative supranationalism” that promote its success in this limited context may significantly limit its ability to meet the problem of disregard in the context of many other global regulatory issues. Moreover, even in the product and services regulatory context, there is a risk of cartelization by dominant firms and other forms of “capture.”<sup>211</sup> Another danger is “tunnel vision”—the tendency of experts with a specialized decisional mission to focus decisions on the scientific and technical issues presented by regulatory issues, to the neglect of broader social and ethical values.<sup>212</sup> As Christian Joerges has himself emphasized, regulatory governance is not just problem solving. It often involves normative choices among competing interests and values.<sup>213</sup> Further, there are the problems of representation already discussed. The potential self-interest of founders in resolving representation issues

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<sup>209</sup> Joerges

<sup>210</sup> Even in the US, processes of negotiation/deliberation have been used for, among other matters, the negotiation of new regulations at the federal level (“RegNeg”), see Breyer and Stewart, *Administrative Law* 737-742, . and in the resolution of local or regional environmental disputes, see Lawrence Susskind, Paul F. Levy, And Jennifer Thomas-Larmer, [Negotiating Environmental Agreements : How To Avoid Escalating Confrontation, Needless Costs, And Us](#) (Washington, D.C Island Press, 1999). Such processes may hold special promise for new systems of network regulatory governance that have emerged at the domestic level in the US and other countries as a result of the adoption of new regulatory strategies in response to the limitations of command and control mechanisms. Traditional administrative law mechanisms, and the interest representation model, have been generated in the context of those mechanisms, and may not be well-adapted for different regulatory strategies.

<sup>211</sup> See M. Shapiro, “Deliberative,” “Independent” Technocracy v. Democratic Politics: Will the Globe Echo the EU?, 68 L. & Contemp. Probs. 357 (2005)

<sup>212</sup> See *ibid.* See supra note XX.

<sup>213</sup> See Ch. Joerges, *Bureaucratic Nightmare, Technocratic Regime and the Dream of Good Transnational Governance*, in Christian Joerges and Ellen Vos, *EU Committees* 3, 6 (criticizing Giandominico Majone for ignoring inevitably distributional and political judgments involved in regulatory decisions); Ch. Joerges, “Good Governance” Through Comitology, in Christian Joerges and Ellen Vos, *EU Committees* 311 (noting problems of in combining expert problem solving and consideration and engagement of broader social interests in the comitology process).

is endemic.<sup>214</sup> And even where global bodies purport to provide representation for more broadly affected interests, there is the danger of bias and cooption in the selection process.<sup>215</sup> Finally, in the national context, a system of public law is available to address rights and solve problems of participation and representation of societal interests in regulatory decision making. There is no global public law, and no supervisory global authorities to articulate and apply norms for participation and representation to global regulatory bodies.<sup>216</sup>

These problems should not stand in the way of pragmatic and experimental efforts to broaden representation within specialized deliberative bodies, based on study of experience with such efforts in domestic, supranational, and global settings. In the US, students of regulatory negotiation for rulemaking and other forms of negotiated dispute resolution are optimistic that it is generally possible to assure representation of all material relevant interests while limiting the number of participants to a workable total, including through formation of coalitions of interests with a single representative if necessary.<sup>217</sup> There is undoubtedly much to be learned from similar efforts in Europe, in other nations, and in the various different types of global regulatory bodies in which consensus-based deliberation is being used for regulatory decisions.

### **E. Strategies for Applying the U.S. and EU Models to Global Regulatory Governance**

The US interest representation model and the European model each have significant strengths and drawbacks as applied to global regulatory decisionmaking. Are there strategies for maximizing their advantages and minimizing their shortcomings in applying them in this new context? [discussion which follows to include OMC model]

#### *A Hybrid Approach*

One strategy is to combine the US and European approaches in a hybrid model of open deliberative participation. At first look, this appears impossible. The two models seem to be oil and water. They seem to rest on very different premises and values. Achieving a deliberative quality in regulatory decision making is at the very least in serious tension with assuring adequate representation of different affected interests and public debate and oversight.<sup>218</sup> Yet it may be possible to develop a mixed approach that would involve some mix of the two components: First, an open “outside” process that involves a high measure of transparency, wide public access to information, public comment on proposed decisions, and publicly stated reasons for decisions. Second, a more restricted “inside” decisional process based on deliberation among a limited number of experts and interest representatives. The two processes would be linked through the public availability of information about the inside decisional agenda and proposed and

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<sup>214</sup> See Rainer Nickel, *The Missing Link in Global Law: Regime Collisions, Societal Constitutionalism, and Participation in Global Governance* (forthcoming) (critiquing views of Gunther Teubner); J. von Bernstoff, *The Structural Limitations of Internet Governance: ICANN as a Case in Point*, in Christian Joerges, Inger-Johanne Sand and Gunther Teubner, *supra*, at 258.; Cf. M. Lips and B Kooops, *Who Regulates and Manages the Internet Infrastructure: Democratic and Legal Risks in Shadow Global Governance*, 10 *Information Polity* 117 (2005) (noting risks but reaching generally optimistic assessment of current diffuse network structure of internet governance).

<sup>215</sup> the critical question of standing Josh Bolton and Mussolini, quoted in Nickel

<sup>216</sup> Tort law and competition law, which play substantial role in policing private standing in the US and Europe, see may for a variety of reasons be substantially less effective in the context of global standard setting.

<sup>217</sup> See Lawrence Susskind, Paul F. Levy, And Jennifer Thomas-Larmer, *supra*. More skeptical assessments are found in W. Funk, *When Smoke Gets in Your Eyes, Regulation, Negotiation and the public Interest — EPA’s Woodstove Standards*, 18 *Env’t L* 55 (1987); C. Coglianese, *Assessing Consensus: The Performance and Promise of Negotiated Rulemaking*, 46 *Duke L. J.* 55 (1997).

<sup>218</sup> See Ch. Joerges, H. Schepel and E. Vos, *supra*, at 40.

final decisions, opportunity for public comment, and a statement of reasons for proposals and decisions. The availability of an open outside process would alleviate some of the anxieties about ensuring full inside representation of all affected interests. This approach has not been followed in the EU regulatory practice, especially in comitology, in part perhaps out of fear of triggering pressures from protectionist and other parochial national interests that might hinder agreement on common standard. But there appears no reason why it could not be attempted in other regulatory settings.

Indeed, practice in a number of global regulatory bodies already resembles such a hybrid. One example is the Codex Alimentarius process for developing sanitary and phytosanitary regulatory standards. Until fairly recently, standards setting was carried out primarily through committees composed of representatives of a limited number of member states and experts selected by them.<sup>219</sup> NGO pressures for broadened participation led to granting NGO representatives the status of non-voting observers at committee meetings. As practice has developed, however, NGO observers have often engaged actively in the deliberation over standards and in some cases had a substantial influence on outcomes (this experience shows that in practice there may in some cases not be a sharp line between decisional and non-decisional participation). Until recently, committee decisions were made by consensus, and this continues to be the case save in highly controversial cases.<sup>220</sup> Along with the consensus-based deliberative process within committees, there is a fairly extensive system of external transparency and opportunity for public comments. Committees often produce lengthy reports on their decisions. Notwithstanding these elements, however, concerns have been raised about the effectiveness of developing country and NGO participation, in part due to resource constraints, and the dominance of narrow expert perspectives.<sup>221</sup> Thus the Codex experience may be regarded as a promising but imperfect version of the hybrid approach.

Another example of a hybrid approach that has been quite successful is found in the OECD Mutual Acceptance of Data program. The program, which issues testing guidelines and promotes mutual recognition arrangements for safety testing of internationally traded chemicals, is being used by over 30 countries to rely on each others' testing results.<sup>222</sup> Guidelines for good laboratory practices are developed by expert committees that include non-state experts overseen by OECD working groups. Representatives of OECD's Trade Union Advisory Committee and Business Industry Advisory Committee have full decisional participation rights. Other civil society NGOs, representing environmental, animal welfare, and other interests, attend as observers. Draft guidelines are publicized and subject to peer review by an extensive network of outside experts. The system has worked successfully in dealing with controversial issues such as animal welfare in chemical testing assessing the risks of GMOs.

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<sup>219</sup> There is an elaborate process for committees to report to a governing council composed of all member states, which must eventually approve standards

<sup>220</sup> Such controversies have become more frequent and acute following the adoption of the SPS Agreement, which elevated the significance of Codex standards by providing nations that adopt them with a defense against challenge under the Agreement. This shift has led to majority voting in some cases and deadlock in others. It has to a considerable extent changed the nature of the decisional process from reason-based argument to power-based bargaining.

<sup>221</sup> See A. Herwig, *supra*. See also P. Nan, *Legitimation of Transnational Governance Regimes and Foodstuff Regulation at the WTO*: Comments on Alexia Herwig, in Christian Joerges, Inger-Johanne Sand and Gunther Teubner, *Transnational Governance and Constitutionalism* 223 (discussing preconditions for successful involvement by NGOs in global governance decision making). The tendency in expert specialized deliberative processes to focus on scientific and technical issues to the exclusion of broader social and normative issues may be greater in the global than the domestic context because of the absence of "backup" institutions of supervision and control linked to political processes.

<sup>222</sup> See Salzman, *supra*, at 200-205.

### *Differential Application of U.S. and European Models*

A different strategy is to follow the US model for some global regulatory bodies and decisions, and European models for others, depending on the characteristics of the institution and issues in question and the relative suitability of the respective models.

For example, one such principle would be to use the model of deliberative supranationalism in cases where the issues are predominantly technical, impacts on interests other than those regulated are limited, and the issues do not engage strongly controverted social values. In such cases, there is a high value in deliberation among experts, and less need to ensure wide access to general social interests and values.<sup>223</sup> For types of matters that turn to a lesser degree on technical issues, involving a wide range of affected interests, and implicate strongly contested social values, the more open, less deliberative US approach may be preferable. The obvious difficulty with this strategy is that regulatory regimes do not fall neatly and consistently into these two categories. Many regulatory decisions—nuclear power, GMOs, and intellectual property are examples—depend centrally on the resolution of highly technical issues where expert judgment is crucial yet also implicate controversial values of concern to a wide range of interests. The regulatory issues in a given regulatory body, such as Codex, may have been successfully resolved over many years primarily on the basis of expert judgments, only to erupt into matters of rather high politics, as exemplified by standard setting for GMOs. Also, to limit deliberative processes to the resolution of issues that are primarily technical in character would forgo their use in controverted decisions involving clashing social values and interests. It is precisely with respect to such decisions that deliberative processes built on Habermasian principles might have the most to offer, although it may also face great challenges.

Another, somewhat related basis for allocating application of European and US approaches is suggested in recent work by Buchanan and Keohane on the legitimacy of global institutions. They argue that legitimacy requires that such institutions provide the preconditions for effective public examination of and debate over their core purposes and their performance in carrying them out.<sup>224</sup> In order to have concreteness and impact, this inquiry must be carried out in the context of particular decisions as well as through a more general review. At a minimum, global bodies must assure the availability of reliable and relevant information, produced in an integrated and interpreted form that will foster public understanding and evaluation of the institution. They must engage in open justification of and debate over their missions, guiding norms, and activities. This approach can be understood as an institutional means of operationalizing Habermas's conception of communicative reason in order to promote the democratic character of global governance.<sup>225</sup> The need for these "epistemic virtues" will be greatest in those institutions whose legitimacy is most heavily questioned. For such institutions, the US model is more appropriate, as it provides a fuller measure of transparency, participation, and opportunity for open debate. There is a correspondingly greater risk, under the European approach, that the strongest and most effective critics will be excluded from inside decisional participation. Of course, those institutions that feel themselves most vulnerable to challenge may be the most reluctant to embrace a US approach, including the step of establishing an independent reviewing body.

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<sup>223</sup> See Thomas Gehring, *Bargaining, Arguing and Functional Differentiation of Decision-making: The Role of Committees in EU Process Regulation*, in Christian Joerges and Ellen Vos, *EU Committees* 195 (finding that consensus-based deliberation functioned more successfully in "weak" committees with a limited mandate and committees that had been delegated the task of addressing the technical aspects of larger regulatory problems that also raise politically controverted aspects that were addressed elsewhere).

<sup>224</sup> See Buchanan, *supra* note \_\_. See also Philip Pettit, *Two Dimensional Democracy, National and International* (Monist 2005)(public contestation of norms and performance of international governance institutions an essential democracy-promoting element).

<sup>225</sup> See Jürgen Habermas, *supra* note 6.

This last point raises the political economy of changing existing global governance arrangements in order to promote responsiveness to disregarded interests. These and other political economy questions have been conveniently ignored in this essay and in much of the global governance literature, but are a vital subject for systematic study.<sup>226</sup> Such inquiry would consider, among other matters, the political economy of using accountability mechanisms, decisional rules, and other responsiveness-prompting practices in the context of different types of global regulatory issues and regimes, depending on the nature and structure of the interests involved. In this connection, it would address the incentives of powerful states and private economic actors to accelerate the institutional changes, already underway, from global approach based on bargaining among dominant entities to approaches that are both more differentiated and specialized and more democratic. Such an inquiry must also consider how transplants of European or US models from their native environments to various global regulatory contexts would affect their performance. To give just two examples: The experience with the European model may translate fairly successfully to global product regulation because of the interests of the dominant business firms in developing common standards. But can it be used with equal success to develop environmental standards for manufacturing or resource extraction, or labor standards? The US model may enjoy interest group support because it addresses with some success problems created by the US system of divided congressional/Presidential government, in the context of a highly active, pluralistic public sphere. Will it enjoy similar success in the global context?

#### **IV. CONCLUSION**

Solving the problem of the disadvantaged in global regulatory governance is essential to securing its legitimacy and successful functioning. This requires careful analysis of the institutional tools for promoting greater responsiveness to the disadvantage. While the erosion of established political and legal accountability mechanisms has contributed to the problems of disregard in global regulatory governance, greater accountability is not a magic wand for curing the discontents of globalization. Lack of accountability by global regulatory bodies is often not at the heart of the problem. The problem is rather disproportionate accountability to Founders and well organized economic interests, to the detriment of less cohesive societal interests. Further, the number of accountability mechanisms is limited. The tendency to use accountability rhetoric loosely to include a wide range of other measures to address the discontents of global regulatory governance must be resisted. What is needed is dispassionate study of the variety of institutional tools that are available or might be developed, including not only accountability mechanisms but decisional rules and other measures to promote responsiveness to the disregarded. Different combinations of these tools, adapted to different global regulatory problems and institutions, will be needed in order to promote responsiveness to disregarded societal interests and more democratic global governance while at the same time assuring sound and effective solutions to global regulatory problems. The potential for adapting at the global level approaches developed in the US, Europe, and other jurisdictions, including in developing countries, should be carefully examined, along with the experience that is developing within and among global regulatory bodies. This paper has sought to contribute to this effort. A full analysis must include issues of global democracy, institutional legitimacy, and political economy.

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<sup>226</sup> For an example of such a study, see Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions*, 68 *L & Contemp. Probs.* 319 (2005)