



INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE  
NEW YORK UNIVERSITY SCHOOL OF LAW

**ACCOUNTABILITY IN GLOBAL GOVERNANCE**  
**A GLOBAL ADMINISTRATIVE LAW PROJECT WORKSHOP**  
**(Faculty Library, Vanderbilt Hall)**

**NOVEMBER 17, 2006**

**1-4:30 PM**

**CHAIRS:** Benedict Kingsbury, Richard Stewart

**FACULTY PARTICIPANTS:** Grainne de Burca , Fabrizio Cafaggi, John Ferejohn, Thomas Franck, Richard Goldstone, Ryan Goodman, Steven Holmes, James Jacobs, Robert Kagan, Micheal Levine, Steve Macedo, Jerry Mashaw, Rick Pildes, Jeremy Waldron

**CASE STUDIES:** Jessica Green, Andrej Lang, Mike Livermore, Gisela Paris, Eran Shamir-Borer

**RAPORTEURS:** Doreen Lustig, Eran Shamir Borer, Surabhi Ranganathan; report prepared by Surabhi Ranganathan

*More about the Global Administrative Law Project at*  
[http://www.iilj.org/global\\_adlaw/index.htm](http://www.iilj.org/global_adlaw/index.htm)

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## INTRODUCTION

*“Imagine the development of administrative law as a waltz, a three-step pattern repeated over and over again. First, something happens in the world. Second, public policymakers identify that happening as a problem, or an opportunity, and initiate new forms of governmental action to take advantage of or to remedy the new situation. Third, these new forms of action generate anxieties about the direction and control of public power. Means are thus sought to make the new initiative fit within existing understandings of what it means to be accountable to law.”*

Jerry L Mashaw  
Recovering American Administrative Law:  
Federalist Foundations, 1787-1801  
115 Yale L.J. 1256 (2006)

Applying this succinct summary of the evolution of Administrative Law in the United States, to the process of development of Global Administrative Law, Professor Richard Stewart defined the following goal for the workshop: to focus on the different conceptions of the catch-all term ‘accountability’, attempt to achieve a common understanding of its critical elements and the mechanisms by which it can be secured to limit the exercise of power by those in positions of authority.

He raised the following primary questions for discussion:

- What are the elements of accountability and how do we make power holders accountable?
- Who can invoke these mechanisms and to what ends?
- How would we operationalize these mechanisms towards decision making techniques?

In this context, he referred to the range of so-called accountability mechanisms – from those which require specific responses or impose concrete justiciable obligations to those others which may only encourage greater ‘responsiveness’ on the part of the power holders. Often the same body may be subject to varying forms of accountability internally and externally. Based on this he also proposed some critical considerations to take into account for structuring accountability mechanisms in the global context:

- The degree of institutional differentiation and what would characterize a body as an administrative body.
- Complex structural relations between administrative bodies.
- Ability of power holders to shift and exit from one decision mechanism to another and the dealing with strategic actors.
- The role of the legal system in the operation of these accountability mechanisms.
- Greater normative concerns such as the rule of law and democracy.

The participants agreed that is important to arrive at a critical understanding of what constitutes accountability, or qualifies as a mechanism for securing accountability, though there was some amount of disagreement on whether this term should be interpreted broadly or narrowly. A majority preferred a broad interpretation and supported greater use of non-coercive mechanisms i.e. mechanisms that did not provide for specific material sanctions, like peer review, publicity and reputation based mechanisms, etc to promote accountability, especially in areas where legal mechanisms were not readily available; political mechanisms, it was agreed were much weaker in the international context than they were in the domestic system. Some caution was expressed in readily accepting ex-ante devices for influencing behavior – such as persuasion – as ‘accountability mechanisms’. It was agreed that it was important to distinguish between measures aimed at

promoting the rule of law in general, and measures promoting rule of law for greater accountability was also made. Similarly, it was suggested that a distinction be drawn between “democracy” and “accountability” especially in the international sphere. However, this was not the unanimously accepted view, for many panelists believed that democracy was the very basis on which claims for accountability could be based.

## **STRUCTURE OF THE WORKSHOP**

To facilitate a discussion grounded in concrete examples, a set of five case studies exemplifying different structures of global regulation, illustrating the immense variety of relations between legal accountability (and associated Rule of Law norms), domestic political accountability, more diffuse forms of accountability or responsiveness (based on transparency, participation and reason giving) to collective social interests, and the traditional international practices of flexible, negotiated decision making were presented. The topics they addressed were\*:

- Security Council Listing of Individuals for Asset Freezes – The Hassan Case
- Delegation and Accountability in the Montreal Protocol – NRDC v. EPA
- The International Standards Organization
- World Bank Inspection Panel: The Yacyreta Dam Case (Argentina-Paraguay)
- World Trade Organization - Exit, Voice and Accountability

This was followed by a structured discussion among the panelists in three sessions dealing with the following broad questions:

- (1) What are the essential elements of accountability?
- (2) What are different means of securing accountability?
- (3) What are the potential normative goals of accountability mechanisms?

## **THE PANEL DISCUSSION**

### **SESSION I: ELEMENTS OF ACCOUNTABILITY**

***Chair: Richard Stewart, John Edward Sexton Professor of Law; University Professor; and Director of the Center for Environmental and Law Use Law, New York University***

**John Ferejohn, Carolyn S.G. Munro Professor of Political Science and Senior Fellow, The Hoover Institution, Stanford University; Visiting Professor of Law, NYU School of Law (2006-2007)**

Professor Ferejohn discussed different standards for evaluating accountability. He posited that there are two basic forms of accountability at the national level: political and legal. Political accountability is a fairly strong form of accountability, as citizens have full discretion to vote their elected officials out of office without giving reasons. Officials are therefore made vulnerable and have to exercise their power in conformity with what people want. In such case, the absence of clearly articulated standards, or the existence of opaque procedures is not a major concern. This theory – which claims

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\* Brief summaries of the case studies are provided in an appendix at the end of this document. For the full text, see [http://www.law.nyu.edu/kingsburyb/fall06/globalization/speakers\\_papers.html](http://www.law.nyu.edu/kingsburyb/fall06/globalization/speakers_papers.html).

that officials remain in power as long as they cater to the interests of their population, is called the theory of folk democracy.

However, at the international level, this political form of accountability backed by elections is not available and thus there is more pressure to apply legal mechanisms and hence, the need for clear legal standards. The theory thus includes the ideas of:

- (a) Consent – a procedural requirement for the development of rules; usually refers to consent by states.
- (b) Deliberative democracy – a substantive requirement that policy reflect common concerns of all stakeholders. A deliberative process must be undertaken and should result in concrete normative expression of the ideals to be achieved, and officials must be bound by the same. This is not required in the folk democracy context – where people are free to keep modifying their wants and the government officials must strive to grant the same.

Who should be involved in the deliberations? Again, the obvious idea would be states because they are in turn politically accountable to their own populations; but the problem is that at the global level there is unevenness in the ability of states to protect the interest of their citizens, and to provide for democratic expression of the viewpoints of different groups. The *Hassan* case for instance, which provides that individuals should approach their parent states to take up their claims, is not an ideal response for while it may be reasonable to rely on Europe to 'do the job', it may be a very ineffective strategy with regard to other countries. Furthermore even Europe and other states which can be depended upon to espouse the claims of their citizens in this context, may not be able to do so in others. The WTO and ISO are areas where the capacity of citizens to rely on their nation states is often weaker.

One response to this is to remedy this unevenness in democratic representation of all groups of citizens. The judiciary could play a role in this regard. International organizations can play a role too-through standards or mechanisms that aim directly at improving the domestic (intra-state) conditions of individuals. These standards should not be bound only by what states want, but should comport with individual interests to provide worthwhile forms accountability.

### **Jerry L Mashaw, Sterling Professor of Law, Yale University**

Professor Mashaw addressed the debate between the broad and narrow characterizations of accountability.

The parties to this debate are, on one side Ruth Grant, Robert Keohane and Mashaw himself, who take a broad view of accountability, as having 'specific' and 'diffuse' elements. They exclude only concepts like 'checks and balances' and 'balance of power'. On the other hand, Richard Stewart views accountability more narrowly – limiting his conception to fiscal, legal, electoral, hierarchical and supervisory, he thus excludes market disciplines, peer norms and review, general political influences, reputational influences and social influences.

Mashaw argued that we should take an instrumental view of accountability based on the problem we are trying to address - 'the failure to sort out accountability mechanisms from the other constraints.' In this context he referred to Stewart's paper on "Accountability and the Discontents of Globalization: US and EU Models for Regulatory Governance" in which accountability is limited to mechanisms under which 'account holders' have specific entitlements; and to his own work, which addresses institutional design, i.e. 'how do we sort the institutions that we observe in a way that

would provide us information on what the dispute is about'. Drawing upon Hegel's theory, he divided the world into public and private spheres and mentioned some common questions of accountability would one ask for each sphere (who is accountable; to whom; standards of appraisal; about what; through what process; with what effects).

Between the broad and narrow frameworks, Mashaw prefers the former because it seems to respond to a wider range of the problems of accountability one witnesses, and has emphasized on developing grammar that would apply across different accountability regimes. He did not however fully embrace Keohane's idea of an accountability continuum ranging from the more diffuse to the more specific forms of accountability. He agreed there is a continuum, but only in the sense that the law relates to different regimes in different ways: for instance public-law regimes are extremely restrictive, what is not permitted is prohibited; in the market context, usually what is not prohibited is permitted, law steps in to make micro adjustments; in social networks the law protects from intervention, prohibitions are minimized. By and large, law in liberal democracies protects most sectors from accountability.

### **Fabrizio Cafaggi, Professor of Comparative Law, European University Institute**

Professor Cafaggi addressed the question of remedies. He argued that self defining orders like the WTO and the ISO generate externalities – and we need measures to prevent these and mitigate them when they occur. There are, according to him, three types of accountability mechanisms for this purpose:

- (1) Ex-ante mechanisms: Contract - requires steady flow of information, which requires participation.
- (2) Participation (when contracting fails) – account holders involve themselves in the administrative process.
- (3) *Ex post* accountability: Through legal claims. The easiest example is a tort claim. Here account holders remain external to the process.

Accountability mechanisms operate both through property and liability rules.

He also stated that though he had presented the above scheme as a set of alternatives, we need to combine the three remedies for the most optimal accountability regime at the global level.

### **Open discussion**

One of the major threads of the discussion revolved around whether, in trying to implement legal and deliberative mechanisms at the international level, Global Administrative Law was attempting to achieve more accountability in the international law regime than the level within nation states. Related to this was also a concern that global administrative law essentially selected a few from the many mechanisms which exist in different states for application at the global level. Mike Levine, who pointed this out questioned both the legitimacy of this process, which in essence amounted to judgment of what were or were not desirable practices and also its efficacy, for each state would finally make its own judgment on whether or not they should embrace these mechanisms according to what they think is right. The response, from John Ferejohn was that the idea was to export the 'best practices' to the global level but agreed that it was not clear how these could be identified generally.

A second theme related to the question of representation of people's views and on whether international organizations should aim essentially at articulating the interests of different groups at the global level, by giving them better opportunities to state their interests or whether they should aim to further normatively desirable ends. Ferejohn cautioned against over-theorization of international law and suggested that the expressed interest of people should be used at least as a starting point for the discussion on the best course of action.

Carrying the discussion on broad and narrow conceptions of accountability further, Professor de Burca asked whether the rationale for limiting the concept of accountability to focusing on law-like accountability mechanisms, is because it is more helpful to the design of administrative regimes. Stewart responded that we have to consider whose interests we are taking into account and under what (micro-level) criteria as well as thinking of what larger norms we need to look up to. We need to think of who we can call into account. There are advantages in adopting an institutional design where we have a limited structure of relations to view against the broader background of incentives. It is useful to distinguish those cases where it is clear that A could call B to account, from other cases, where A has no specific right against B. It was however pointed out that specific accountability mechanisms do not adequately deal with the problems in every case. Macedo for instance suggested that the Hassan case was not so much a problem of legal accountability but a due process issue and should have been constructed as such. By characterizing such types of due process issues as accountability problems, we are in effect subsuming legitimacy problems as a whole under the concept of accountability. Waldron also agreed with that some issues are of accountability and others are not and suggested we keep in mind the relation between political accountability and power - that power was not unconditional but highly conditional; in fact those who hold power are the ones who are under the highest threshold of accountability.

## II: INSTITUTIONAL MEANS OF SECURING ACCOUNTABILITY

*Chair: Professor Richard Stewart*

**Rick Pildes, Sudler Family Professor of Constitutional Law, NYU School of Law**

Professor Pildes addressed the role of courts in the context of the conditions that make different types of accountability relevant. In America, issues of accountability are raised in the context of the delegation of power to agents. Does this teach us anything for the international context? Certain forms of accountability depend on the agreements that are being enforced: the more specific the initial delegation, the lesser the pressure for accountability and the greater the ease of the *ex post* exercise of accountability.

The Montréal protocol for instance is narrowly targeted and focused – and thus made it easier to invoke legal mechanisms of accountability. To explain the decision reached in the NRDC v. EPA case, he suggested that the question put to the Court - framed as ‘whether the agreements became binding law in the US’ – was too broad for the Court to answer in the affirmative. However, what the Court could have done, but didn't do, was to take note of the provisions in the 1997 Clean Air Act methyl bromide amendments which authorized EPA to exempt critical uses of methyl bromide from phase out requirements “[t]o the extent consistent with the Montreal Protocol and ask the EPA account for why it had accepted some parts of the agreement and rejected others. This would not have the effect of declaring international law as binding on domestic actors, but would make them articulate why they do or do not accept international law norms.

The more difficult it is to specify the terms of agreements in advance, the more pressure there is going to be on the courts to clarify issues of accountability and democracy in the process of giving content to these treaties; which will impede the decision making process.

Another issue he raised was the problem of participation leading to extremism. Participation is often romanticized but there are serious problems with the representative character of the NGOs. Normally the most active NGOs tend to be the ones most driven by single minded-ideological considerations over everything else, and may not thus be adequately representative of the real and more complex interests of the people. Therefore unless one really believes in an ‘expertise’ based model of representation (which Europeans are less skeptical about than Americans) then we are facing a serious problem. However, because of the lack of electoral accountability, there are no real substitutes to NGO participation either, so we need to set up mechanisms to channel their participation in a disciplined manner, apart from the existing ones - exit, withdrawal of funding, etc.

**Ryan Goodman, Rita E. Hauser Professor of Human Rights and Humanitarian Law, Harvard University**

Goodman spoke about the various forms of influence on the behavior of different institutions and actors. He began with an analysis of the behavior of states, in influencing which, he acknowledged that the diffuse mechanisms of accountability suggested by Robert Keohane have a major role to play. Among these Goodman stressed particularly on the phenomenon of “acculturation”, through emulation and mimicry, whereby states may be observed to emulate behavior of other states without paying heed to the deeper reasons which direct this behavior. In other words states sometimes blindly copy the behavior of other states.

This phenomenon is often ignored, but empirical research indicates that this idea – or theory – of acculturation has concrete manifestations and can be utilized to influence behaviour.

He went on to describe two characteristics of “acculturation” and how it could be put to use:

1. It is thought of as a second-best alternative but acculturation may actually be more effective than coercive mechanisms. The empirical data from Stanford School provides evidence that supports both the strong form of the argument on efficacy – that they are more effective than specific forms of accountability, and the weak form – that over time, they have some effect in shaping state behavior. The WTO makes some use of this theory of acculturation, for it endorses media campaigns and reputation-based accountability mechanisms.
2. Reputational effects and peer review are not ‘sanctions’ and thus not given great weight by some people, including Richard Posner, but these people ignore the fact that mimicry operates as cognitive framework related directly to concepts of community and identity; and is not based on any cost-benefit calculation.

These features provide three lessons:

- A. Since this theory suggests that states are driven by environmental influences, the access of NGOs to rule making processes is important even if they are only able to observe; for the mere fact of their surveillance induces some form of pressure that affects the other actors (states) even if there is no cost or sanction that flows from it.
- B. Acculturation proceeds through a system of social rewards and punishment for displaying certain behavior. This does not take the form of formal coercion but operates through social

mechanisms such as back-patting and shaming that can affect behavior. Mechanisms that utilize these phenomena may be applied to encourage desirable trends in behavior.

- C. Imprecise principles affect behavior of states more than precise principles. Since emulation is not based on a judgment on the content of the rules followed by other states, but only on the fact that they follow them, the more imprecise rules generate greater mimicry, for they do not clearly articulate the set of conditions which make it desirable to follow them or reject them. Precise rules may emphasize the particular context in which the rule may be inappropriate or otherwise for one state though it might be relevant for others. As Goodman stated in his seminal article with Derek Jinks<sup>†</sup>, and which he referred to in the course of his talk “precision, is more likely to emphasize disagreements--triggering cognitive cues that the would-be reference group is importantly dissimilar from the target actor.”

Finally, there is one possible negative impact of acculturation - the race to the middle. Acculturation can have a negative impact upon some states, who may be induced to do worse; in order to achieve uniformity with the practice of other states.

### **Open Discussion**

The discussion began with statements on the role of pressure groups. It was agreed that while they do influence the decision making process, they could also obscure the process because of the absence of checks upon them in the international arena.

A matter of some debate was the nature of checks that could be imposed and their relative effectiveness. One of the speakers noted that the number of discrete bodies that aim at improving accountability in the international sphere makes it impossible to think of a general institutional design for accountability. It is easier to develop and rely upon diffuse mechanisms and for this reason, defining accountability as legal accountability alone would be problematic.

On the specific impact of reputational concerns, etc that are presumed in acculturation processes, Professor Kagan noted that studies on business compliance with environmental mechanisms, demonstrated an astonishing concern among businesses for their reputation.

Transparency and modes of participation short of voting, it was felt, would serve to improve accountability in general.

Another issue that came up was whether the theory of ‘delegation of power’ was an adequate justification for the requirement of accountability for all forms of networks in the global sphere. Taking the example of the ISO, Professor Cafaggi stated that delegation was not an appropriate characterization of the role private networks played in the global sphere. Furthermore, the idea of delegation also affects the manner in which contracts are conceived. In delegating you assume that the greater the discretion the higher the costs, but the Montreal Protocol demonstrates that it is better to have wider contracts and interpret the specific terms in context.

The Montreal Protocol was felt by many to be a brilliant solution, which achieved the right level of discretion. There was room to renegotiate but it was a constrained adjustment process, on the whole was a very attractive model.

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<sup>†</sup> Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004).

Of course, delegation is an important characteristic of some other networks, for instance, international organizations with more or less binding effects. That distinction is important. It was in fact important to take into account the number and range of actors and issues, and work from the premise that no one mechanism would suit all.

Finally the panelists discussed the acculturation phenomenon. It was agreed that emulation could be a powerful factor in the behavior of states but a number of panelists were concerned about whether it was always an optimal or even rational option and also wondered how its effectiveness could be evaluated.

Professor Goodman agreed with these concerns to some extent. He said it was essentially a descriptive and positive analysis and networks could have negative and superficial effects as well as positive effects. An effort is required to facilitate the emulation of best practices or of values that there is consensus upon.

### **III: POTENTIAL NORMATIVE GOALS OF ACCOUNTABILITY MECHANISMS**

*Chair: Benedict Kingsbury, Murry and Ida Becker Professor of Law; Director, Institute for International Law and Justice; New York University*

Professor Kingsbury defined the aim of this session as an effort to give some framework to the normative agenda of global administrative law and its associated modalities and pathologies.

#### **Grainne de Burca, Professor of European Law, European University Institute**

Professor Grainne de Burca addressed the question of whether there was a relationship between democracy and accountability. She pointed out that most people talk about international organizations and transnational bodies in terms of accountability only, not in terms of democracy. Why is this so? Democracy includes accountability but is a distinct concept understood in the state based context. The idea of democracy is self government which translates into participation of all members in decision making. This does not happen in the international context; in fact securing equal participation of all is not on the normative agenda of many transnational organizations, which revolves around securing better 'output' in whatever they are set up to do. Accountability is also pointed towards this end. The idea of 'legitimacy' defines the normative agenda much better than democracy does.

We can argue that democracy should be the normative ideal in the global context as well, especially in the context of global governance. Some kind of fair participation is essential and perhaps can be defined in alternative terms such as 'responsiveness to society', a term suggested in Professor Stewart's paper, lying between the abstract notion of 'good governance' and the specific ideal of 'democracy'.

She also described three problems, outlined by Professor Stewart, which hinder a move in the direction of democracy.

- (1) Problem of realpolitik - lack of political will and power-capture which hinders the designing of a specific institutional regime.

- (2) Specialization - In general the tendency is to perceive governance as based on expertise. There is reluctance to broaden stakeholder representation in the name of maintaining expertise. However, in reality decisions are not only professional but also highly political.
- (3) Problem of representation. How should representatives of stakeholders groups be chosen?

While this last problem could be overcome by appropriate institutional design, the first problem – of lack of political will - is the most serious one because it prevents such appropriate design from being generated. It is only a major crisis that can in its aftermath trigger the creation of an institutional regime that is not in the interests of the powerful.

**Steve Macedo, Laurance S. Rockefeller Professor of Politics and the University Center for Human Values, Princeton University; Visiting fellow in the Program in the History and Theory of International Law, NYU School of Law (2006-2007)**

Professor Macedo felt that there were some parallels between the present discussion on accountability and democracy with respect to the international order and previous questions of federalism and asked if participation was at the core of self-governance then how would we have a federal regime?

He claimed that moving governance from the national level to the international level could improve constitutional democracy if we think of it as collective self-governance. Even within the state system, though periodic elections are crucial so that the government is of the people and for the people - elections are not of qualitative value, and do not secure representation of all groups equally.

Movement of government up to the international level could resolve this problem by securing wider representation through the involvement of governments and NGOs. However it is difficult to assure qualitative participation even at this level because too many interest groups exist, so another avenue that can be explored is of empowering collective interests domestically – but constraining government abuse of human rights, guarding against the domination of state policy by organized, powerful minority factions by imposing obligations directly on the Executive. The Montreal Protocol is a good example, under which State Executives are put under obligations to meet specific standards which domestic legislatures may not have imposed upon them. Multilateral institutions also provide fora for exchange of ideas and information about best practices between government executives of different states and through exposing states of external criticism of their policies. In all these ways they contribute to enhanced democratic governance.

**Jeremy Waldron, University Professor, New York University**

Professor Waldron laid out the broad normative framework within which accountability should be viewed.

First, he stated that when discussing political accountability we should bear in mind several principle points:

- a. Service conception. The exercise of political power should be understood under a service conception. Political power is not being exercised for the sake of its exercise, but in order to serve the interests of the larger society.
- b. Conditional nature of political power. Political power is forever conditional. This is an important element of political theory. Therefore, when the conditions for the exercise of political power

are not fulfilled, those who are served have a right take away the right to exercise power. We should not think of that in terms of punishment or sanction, but more in terms of effect (drawing on Professor Mashaw's terminology) of not complying with the condition for the exercise of the power. For example, the rejection of the European Constitution should not be regarded as a punishment of the Constitution's drafters. It is simply an effect.

- c. Standing. Those who are served have unconditional standing. They are self-generating centers of assessment.
- d. Rationality notion of the mutual intelligibility of the exercise of political: power holders have to exercise power in ways that are intelligibly positive to the beneficiaries.
- e. Institutional regularity as a feature of accountability.

On legal accountability he clarified that not every mechanism that is intended to check power is an accountability mechanism. He made several remarks on the relationship between accountability and the rule of law which he explained as follows: the 'rule of law' is a theory of governance. Making power more accountable is one of the things that the rule of law does. The law establishes procedures, standards, etc. the rule of law is the respect of these legal institutions. All this is true at the local level, and something similar should apply at the global level as well. However, not every exercise of the rule of law (e.g. demand for transparency and reasoning) is intended to fulfill purposes of accountability.

### **Open Discussion**

The discussion revolved around the implication of segregating democracy from accountability. It was generally agreed that without democracy, one would have no rational explanation for why people would really care about accountability; for the moral force which guides the need for accountability would disappear.

It was also agreed that 'accountability' may lead to highly risk averse behavior – which might not always be desirable; and thus accountability mechanisms must preserve the incentives for taking risk.

Finally left as an open question for further discussion, was the debate on whether we should evaluate institutions for performance first and then look at the procedures used, or whether scrutinizing procedures rather than the output was a better way of judging the institutions.

## **APPENDIX**

### **CASE STUDIES**

#### **The Hassan Case - Security Council Listing of Individuals for Asset Freezes**

*Andrej Lang*

The Security Council issued Resolutions 1267 (1999) and 1333(2000) under which member states were to impose a freeze on the funds and other financial resources of persons listed as terrorist financiers by the Sanctions Committee. The flexible, confidential process provided is in stark conflict with strong domestic norms of legal accountability (hearing and judicial review) in individual adjudicatory decisions triggering a deprivation of property. Nevertheless the European Union

adopted Regulation No. 881/2002 stating its intention to comply with the freezing of funds of persons listed by the sanctions committee. A right to be heard prior to the imposition of the freeze was not provided. The legality of this Regulation, and the Security Council Resolutions upon which it was based was challenged by Hasan and others whose funds had been frozen in this manner.

How did the EUCI deal with this issue?

(1) Putting the onus on the states: stated that individuals have a legally enforceable right to petition the government of their state of nationality or residence to submit their case to the Committee's opaque delisting procedures.

(2) Judicial Review of the Security Council Resolution for compliance with jus cogens norms. The Court claimed that it could review the resolution on this basis, but that there was no violation of jus cogens norms in this instance.

What the Court declined to do, thereby exposing the lack of judicial accountability of the Council was to review the Resolution for compliance with fundamental rights as they are embodied in the European law. This accountability gap is even more striking for its presence in a case of a deprivation of property rights.

### **NRDC v. EPA - Delegation and Accountability in the Montreal Protocol**

*Jessica Green*

The NRDC v. EPA decision regarding Montreal Protocol implementation illustrates a different aspect of the relation between negotiated global decision making and domestic accountability mechanisms. The Montreal Protocol provides for an adjustment procedure, allowing the Members to adopt changes to the schedule of reductions, or the quantity of allowable ozone-depleting substances without the need for time-consuming ratifications by the Parties. These 'adjustments' do not require a consensus decision and may be carried out by a 2/3<sup>rd</sup> majority.

In 2004, the Protocol Parties unanimously agreed, by Decision Ex.I/3 on the basis of general guidelines for critical-use decisions previously adopted in Decision IX/6, to give the US specified critical use exemptions for methyl bromide. EPA issued a regulation implementing the exemption provisions in Decisions IX/6 and Ex.I/3. The EPA regulations were challenged by NRDC on the ground that they permitted more production and use of methyl bromide than that authorized by the Decisions. The court rejected NRDC's challenge, holding that Decisions are not binding "law" in the US, thus not enforceable in federal courts, and accordingly, could not be a basis for challenging the EPA's rule. It was concerned about the 'delegation of authority' to an international body that this adjustment procedure had effected and felt that enforcing legal accountability for regulatory decisions made by the Executive and other states in global negotiations, would undermine political accountability to the Congress, and through it to the electorate.

The issues for discussion raised by this decision:

- Scope of delegation: to what extent can the state parties take decisions that are binding on their national bureaucracies?
- Institutional design: how should we deal with the tension between flexibility (which the adjustment process was aimed at) and accountability?
- Compliance: there is a strict compliance mechanism in the Protocol; however it hasn't been used up to date despite violations of the treaty. What does this imply about the effectiveness of

treaty mechanisms and how do we hold states accountable to obligations undertaken by them in the international fora?

## **International Standards Organization**

*Eran Shamir-Borer*

The ISO example involves global standard setting by a private body that has significant power because both private firms and states have powerful incentives to follow or adopt ISO standards. Yet, like private national standard setting organizations, it is largely free of the political and legal accountability mechanisms that would apply to domestic regulatory agency decisions, although the possibility of review in domestic courts under tort, antitrust, or administrative law can not be excluded. It is also largely free of the accountability mechanisms, domestic and international, that apply to the decisions of treaty-based global regulatory bodies.

The ISO, in order to boost its legitimacy and perhaps improve its decisions, has sought to promote transparency, participation opportunities, and reason-giving in connection with its standard-setting decisions. Also, the WTO has (ironically from some perspectives) has been a force promoting greater transparency and participation in ISO and other international standards bodies. Yet participation by consumers, environmental and social groups is largely restricted to the level of national standards bodies, which generally follow a corporatist approach to interest representation. NGO participation at the global level has been limited.

The presumption is that its accountability and responsiveness are based on the national level. When various ISO members are participating in transnational standardization they are expected to provide an aggregated “national position” that takes into account of all relevant stakeholders at the national level. Many ISO members fail to implement such democratic procedures. ISO rarely interferes in the national procedures. Should ISO compensate for the lack of participation at the national level? When ISO does interfere, it could, intriguingly, promote democracy at the national level.

The problem is that broad based participation to include sectoral and geographical stakeholders at has costs in terms of efficiency and inducing exit for stakeholders like businesses, who turn to other arenas where their opportunity costs of exit aren't so high.

Given this, the question arises whether greater democratic participation is desirable. Werle for instance talks about the low feasibility of democratic participation (“input legitimacy”). He presents, as an alternative, “output legitimacy” i.e. developing mechanisms that invite involvement of stakeholders without having them present in the room.

## **The Yacyreta Dam Case (Argentina-Paraguay) - The World Bank Inspection Panel**

*Gisela Paris*

The Yacyreta Dam case juxtaposes a negotiated project decision between an international organization, the World Bank, and Argentina (and Paraguay), and review by a special-purpose global tribunal, the Bank’s Inspection Panel, rather than a domestic court.

The Inspection Panel is an independent entity within the World Bank that reports directly to the Board of Executive Directors. Its mandate is to ascertain, in response to requests related to specific projects, whether the Bank has complied with all applicable policies and procedures with respect to project design, appraisal and supervision. The Panel was established by the Bank’s Board to ensure

the Bank management (staff) complies with the environmental and social standards for bank-funded projects that were adopted by the Bank in response to pressures from NGOs, the US Congress, and others. The Panel is composed of independent members who are authorized to hear complaints of non-compliance with Bank standards from persons adversely affected by projects approved for funding by Bank staff. It gathers information about the effects of the project, considers alternatives, and makes findings and recommendations that are submitted to the Bank's top management and Board. It thus promotes the consideration of collective and social interests.

However the panel has no direct enforcement powers. Also the range of remedial measures that may realistically be taken, and that the borrowing state is willing to accept and pay for, is often limited by the time the Panel takes to bring out its report, by which time considerable momentum to proceed with the project may have already gathered.

Also project sponsors (states and/or private firms) may be able to "exit" environmental and social regulatory conditions by securing alternative sources of funding, a possibility expanded by China's recent initiatives in the aid field.

It is not clear whether the Inspection Panel, Management Response, and Board discussion, together establish a maximally effective learning process that spills over into Bank consideration of future projects in other regions. NGOs try to draw links between past problems and future projects, as do consultants – but this process may be haphazard. A question arises as to whether Argentina, Paraguay, and their parliaments, NGOs etc should have input into a wider Bank learning process, rather than being confined to discussion of their own project's problems.

Lurking in the background in the Yacyreta case is the possibility of litigation in domestic courts. It is reported that the World Bank was sued in Argentina, and that a judge initially declined to accept its claim to immunity, but that after urgent representations by the Bank, its immunity was restored. Whether this immunity will survive – and should survive - on a blanket basis in all countries in the future, is a question to be considered. The existence of the Inspection Panel and of remedial measures arrangements helps the Bank to buttress its immunity claims, on the basis that other effective (perhaps more effective) remedies are available.

It finally raises the question - should countries have a right to participate and provide input to the inspection panel itself, rather than deal with it on a case to case basis?

## **World Trade Organization - Exit, Voice and Accountability**

*Michael Livermore*

The WTO materials show how the Rule of Law disciplines of a (relatively) highly legalized international treaty-based regulatory body have been softened by providing for various forms of retail "exit" for individual states on specific issues, responding to domestic political pressures or perceived imperatives of national interest. For example, governments enjoy flexibility in compliance with adverse Dispute Settlement Body decisions by limitations in enforcement mechanisms and the refusal of domestic courts to give legally binding effect to such decisions. Countries can also exit after receiving unfavourable decisions, by deciding to pay the cost of sanctions (see the Hormones case). There are two problems with this right of exit: (i) This is an option for powerful economic actors and less of weaker ones; (ii) It strengthens the perception of the WTO as a bargaining regime, rather than a rule of law regime.

The WTO materials also indicate that in a regime that lacks significant subsidiary lawmaking capability (in contrast to the Montreal Protocol for example); the opportunities for effective NGO access and participation are limited. The limits on amicus briefs before the Dispute Settlement Body illustrate this. On the other hand, the AIDS/generic drug controversy shows how public pressures and general reputational incentives can on occasion trigger accommodation of wider social interests. Furthermore though the WTO also does not have developed subsidiary bodies, it is affiliated with bodies, such as the Codex Alimentarius Commission, that develop regulation.