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**ADDRESSING PROBLEMS OF DISREGARD
IN GLOBAL REGULATORY GOVERNANCE:
ACCOUNTABILITY, PARTICIPATION
AND RESPONSIVENESS**

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INTRODUCTION

Global regulatory administrative authorities systematically give greater regard to the interests and concerns of some actors and lesser regard to those of others in making their decisions. Because of deep-seated structural factors, they tend overall to give greater consideration in weight to the interests of powerful states and well-organized economic actors, and disregard the interests and concerns of more weakly organized and less politically powerful groups and vulnerable individuals. This article refers to these disfavored groups and individuals as the disregarded. The overall pattern of global regulation reflects a similar bias. The most powerful global regulatory regimes promote the objectives of dominant states and economic actors, while regimes to protect the disregarded are weak or virtually nonexistent. This constitutes structural disregard. A result of these two forms of disregard, the powerful actors in global regulatory governance enjoy disproportionate benefits from international cooperation while the disregarded suffer deprivation and often serious harm.

This article has two related objectives. First, it examines, as a matter of positive analysis, the institutional mechanisms for global regulatory decision-making and the institutional structures that generate disregard. It presents a new conceptualization of these mechanisms, distinguishing three basic types: decision rules, accountability mechanisms, and other regard promoting measures. In doing so it unpacks notions of accountability and participation -- so widely and often indiscriminately invoked as remedies for global governance ills -- and clarifies their respective roles. Second, the article uses this conceptual framework to explain how existing governance arrangements systematically generate disregard and identify strategies that the disregarded can use in order to promote regard for their interests and concerns and thereby secure a more just system of global regulatory governance.

As regulative ideal, the growing and powerful array of global regimes for international regulatory cooperation should respect the same basic normative principle that animates democratic states: equal respect and regard for the interests and concerns of all relevant individuals and groups. This article understands *interests* as grounded in the material conditions of human welfare, such as, sustenance, health, security, housing education, and so on, that can be more or less objectively determined. *Concerns* have a more subjective character, reflecting values like individual dignity, justice and equity, integrity of institutions, community, and cultural, religious, social, and ecological values.

There are enormous obstacles to realizing this democratic ideal under the current circumstances of global governance. Authority is dispersed among many diverse administrative regimes pursuing specialized missions without any superior authorities for supervision, accountability, coordination, and correction. Like their domestic administrative agency counterparts, specialized global regulatory bodies tend to disregard affected interests and concerns outside of their core missions and promote the interests of their core sponsors and constituencies. Further, the shift of much regulatory decision-making from the domestic to the global has strengthened the relative power of executive's vis-à-vis legislatures and courts, which in the domestic regulatory context can often serve to protect the interests and concerns of more weakly organized groups and individuals. As a result, many of the most important global regulatory bodies are dominated by powerful states, often in alliance with well-organized economic actors, with the result that they fail to take adequate account of the disregarded. These same factors have produced in an uneven

and inequitable pattern in global regulatory program. Many powerful global regulatory regimes promote trade, investment, and production, but regimes to secure social and environmental interests and concerns are thin and weak, leaving significant gaps in protection for less well-organized and politically powerful groups. These structural gaps themselves operate as a pervasive form of disregard. This pattern is by no means uniform. The missions of some global authorities align with the interests and concerns of the disregarded, and their programs often serve to promote their interests and concerns. But the overall structure of global regulation and its governance is biased in the other direction. Furthermore no global systems of social insurance or redistribution operate to offset the losses suffered by the disregarded.

One potential response to these circumstances is to establish overarching global institutions that could exert authority over the diverse administrative bodies, fill gaps in regulatory protections, rebalance decision-making in favor of currently disregarded interests and concerns, and ensure a fairer overall distribution of the gains from international regulatory cooperation. The challenges to realizing this ambition in the foreseeable future are, however, overwhelming. This article, like the Global Administrative Project of which it forms a part, focuses instead on reforming and using the institutional mechanisms and arrangements that currently exist or that could be developed at the level of specific global regulatory regimes in order to address the problem of disregard.² We believe that the strategy for consistently applying this decentralized, incremental, yet realistic approach can achieve in the aggregate very significant progress in bringing about a more just and equitable system of global governance.

In order to provide a foundation for reform efforts as well as further understanding of how global regulation operates, this article identifies and analyzes the basic governance mechanisms that allocate and influence decision-making power in the myriad different global administrative bodies that regulate in activities in many different fields. These bodies include treaty-based international organizations (e.g. WTO, World Bank) and intergovernmental regulatory networks (e.g. Financial Action Task Force, Basel Committee on Bank Regulation) established by governments. There is also a growing and important array of private and hybrid public regulatory bodies governed in whole or part by nonstate actors including NGOs and business firms as well in some cases as public authorities. These bodies have generally been created to address the shortcomings of state-based regulatory programs in the face of global economic integration growth and other forms of interdependency by implementing regulatory programs to achieve coordination and cooperation on a global scale, to the mutual benefit for the founders of these regimes.

There are hundreds or thousands of these special purposed global bodies exercising regulatory authority in different fields. These diverse bodies facilitate and regulate trade, investment, and other forms of economic activity, promote law enforcement and security, fund and regulate economic development programs in less developed countries, deliver health, education and other social services, promote environmental protection, help secure human rights, and regulate the international movement of persons. These regulatory programs generate many significant

² For an overview of global administrative law see Kingsbury, Krisch & Stewart, *The Emergence of Global Administrative Law*; GLOBAL ADMINISTRATIVE LAW CASEBOOK (Sabino Cassese et al. eds., 3d ed. 2012), available at <http://www.irpa.eu/wp-content/uploads/2012/08/The-Casebook-Chapter-1.pdf>.

societal benefits. Overall, they make vast contributions to aggregate human welfare and also promote important moral and ethical concerns in such fields as human rights and environmental protection.

These diverse regulatory regimes operate in a global administrative space, substantially free of the legal and political controls that apply to domestic administrative authorities and the international law norms governing states and treaty-based international organizations.³ The article identifies three basic types of institutional mechanisms that govern these bodies: decision rules; accountability mechanisms; and other regard-promoting practices including transparency, reason giving, no decisional participation, peer and public reputational influences, and market competition. The article develops and applies this tripartite framework to examine how global administrative decision-making arrangements allocate and regulate power and influence among different actors. Each of these three types of mechanisms operates, through different means, to enable certain actors to secure regard by decision makers for their interests and concerns. In the case of decision rules, influence is wielded by those who share in decisional authority. In the case of accountability mechanisms, it flows to those who have the authority to hold the decision makers to account. The other regard-promoting measures can be accessed by a wide variety of actors and interests.

All of these different mechanisms operate in concert in different configurations in different global regulatory bodies. The particular configuration as well as the field of regulatory activity in large part determines whose interests and concerns are given greater or lesser regard in decision-making. The efforts of various actors to influence and change these institutional arrangements must be analyzed through the perspectives of political economy and constructivist understandings of governance.⁴ In the most important global regulatory regimes, powerful states and their interest group allies dominate access to and use of the governance mechanisms. This article examines corresponding opportunities for the disregarded to use those mechanisms to secure greater regard for their interests and concerns.

Accountability and participation are ever-present slogans in the globalization debates.⁵ Often demands are made for greater accountability and participation by global authorities without

³ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15,18(2005) (explaining concept of concept of global administrative space)[hereinafter Kingsbury, Krisch & Stewart, *The Emergence of Global Administrative Law*].

⁴ On considerations of political economy in global regulatory governance, see *id.* at 15 (2005); Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007). On constructionist influences see RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013); see generally Emanuel Adler, *Seizing the Middle Ground: Constructivism in World Politics*, 3 EUR. J. INT'L REL. 319 (1997).

⁵ See TAN xxx *infra* (discussing and referencing these criticisms). The problem of disregard is not limited to global regulation; domestic governments may face criticism as well using similar normative vocabulary. *E.g.*, Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587 (2010); Anthony Boadle & Tatiana Ramil, *Fresh Protests Under Way in Brazil Despite Government Concessions*, REUTERS.COM (Jun. 26, 2013 3:32 PM EDT), <http://www.reuters.com/article/2013/06/26/brazil-protests-idUSL2NOF20SK20130626> (describing the source of the protests as problems of accountability and transparency in the Brazilian government). Specific instances of the broader concept of disregard occur in numerous domestic legal contexts, including corporate, constitutional, and administrative law. *Cf.* Daryl J. Levinson, *Rights and Votes*, 121

serious analysis of what they consist in, what their functions are, how they can be implemented, and how they can advance ideals of equal regard. This article clarifies both concepts and the character and roles of the different types of accountability and participation mechanisms in relation to the three basic types of governance mechanisms. It also evaluates the potential for using the mechanisms to rebalance decision-making and correct disparities in the regard accorded to different interests and concerns.

Equal regard is a regulative ideal. Initiatives to realize that ideal must necessarily involve prudential compromises with existing power structures. In addition, the rule of law requires that decision-making procedures such as the opportunity to submit comments on proposed decisions and obtain review of decisions made be equally available to all actors. Regular, transparent public procedures like these are vital to ensuring the disregarded have effective access to and influence on decision-making processes, even if better organized and financed groups can invest more resources in using them.

Part I of this article first presents the four basic types of specialized global regulatory bodies—treaty-based, intergovernmental, private, and hybrid -- and the distributed administrations that implement their rules and decisions but also influence them as a result of decisional feedback loops. It explains why these global bodies have assumed a strongly administrative character and exercise substantial decision-making discretion, operating beyond states' domestic legal and political controls and public international law principles of state consent and responsibility. Part I also explains the pervasive structural factors that lead these administrative bodies, systematically to slight the interests and concerns of the disregarded and create gaps in global regulation that leave the disregarded without protection against serious harms.

Part II turns to a discussion of potential remedies for disregard, including the following:

- Strengthening domestic controls over global regulatory decision-making;
- Influencing implementation of global norms and decisions by distributed administrations;
- Establishing new global regulatory regimes to fill gaps in regulatory protections; modifying the decision-making mechanisms of existing global bodies and using them to promote greater regard to the disregard
- Modifying the decision-making mechanisms of existing global bodies and using them to promote greater regard to the disregard.

Although the discussion addresses all of these strategies, it focuses on the fourth. Part II concludes by presenting the three basic types of governance mechanisms – accountability,

YALE L.J. 1286, 1288–91 (2012) (considering the variety of methods that political institutions protect minorities, particularly legally enforceable rights, and votes, broadly considered). Some may object to the term “disregard” as a mere redefinition of problems of “democratic deficits” or “accountability deficits.” Disregard is preferred here for the sake of accuracy. As discussed herein, there are many institutional mechanisms that help alleviate disregard that are not accountability mechanisms. Moreover, some of these mechanisms, such as the use of global contractual arrangements by multinationals based in developed countries, or the transnational supply chain regulatory regime to improve environmental and labor conditions in developing countries where production for the chains occurs, are not straightforwardly democratic.

decision rules and other responsiveness-promoting measures -- for decision-making by global regulatory authorities. These mechanisms provide the institutional tools for reform of global regulation under the fourth strategy.⁶

Parts III-V examines the three categories of global governance mechanisms and their potential for redressing disregard. Part III addresses the structures and procedures that define and allocate global bodies' decisional authority among its members and administrative components and determine voting and other decision-making arrangements. It concludes that changing the decision rules of global authorities to include or give greater decisional power to disregarded interests is often not a promising option, due to the reluctance of powerful states and other members to share authority, the risk of impairing the organization's effectiveness in achieving its specialized mission, and the practical difficulties in effective representation of weakly organized groups and diffuse societal interests and concerns. NGOs have, however, succeeded in establishing private and hybrid global regulatory regimes, including regulatory bodies for environmental and labor protections in global supply chains. These initiatives show that disregarded interests may compensate for the inability to obtain decisional power within established global bodies such as the WTO by forming new bodies in which they are dominant actors, in accordance with the third strategy outlined above. Furthermore, the growth of network models of regulation and of deliberative consensus-based approaches to decision making that include a broad array of stakeholders may extend some form of decisional participation to the disregarded.

Part IV examines accountability and the mechanisms for achieving it. It argues that, in order to retain its analytic integrity and utility the accountability label should be restricted to institutional mechanisms that give identifiable persons (account holders) the authority to obtain an accounting from an identified decision maker (accountors) for their conduct, evaluate that conduct, and impose a sanction or obtain other remedy for deficient performance. Only five mechanisms meet these requirements: electoral, hierarchical, supervisory, fiscal, and legal accountability. The first four involve delegations of authority or resources from principals to agents, and provide the principals with the means to monitor the agents' conduct and redress shortcomings. Legal accountability involves right-duty relations established by law and provides right holders to redress violations of their rights by those who owe them duty.

The analysis in Part IV concludes that the potential for using the first four of these accountability mechanisms to redress disregard is rather limited, especially for the most important treaty-based and intergovernmental global authorities. Mechanisms for supervisory, hierarchical, and fiscal accountability are dominated by members and funders, and are accordingly not available to the disregarded. The exception is when NGOs that represent or advocate for their interests and concerns are important members of global regulatory bodies. Electoral accountability is absent in most global regimes, although multi-stakeholder models of representation that include the disregarded are found in some private and hybrid regimes. Generally the most promising option for disregarded in the regimes dominated by governments is legal accountability through review

⁶ For an overview of global administrative law see Kingsbury, Krisch & Stewart, *The Emergence of Global Administrative Law*; GLOBAL ADMINISTRATIVE LAW CASEBOOK (Sabino Cassese et al. eds., 3d ed. 2012), available at <http://www.irpa.eu/wp-content/uploads/2012/08/The-Casebook-Chapter-1.pdf>.

of their decisions by specialized reviewing bodies or by international and domestic courts and tribunals.

The article rejects claims that accountability should be defined more broadly to include non-decisional participation, transparency, reason giving, market competition and peer and public reputational influences. These seven mechanisms and practices lack the distinctive structural and functional features of the five accountability mechanisms identified above, and cannot be invoked as of right by identifiable persons to require decision makers to account for their decisions. These other mechanisms, however, can be accessed by a very wide variety of actors. Their influence on decision-making is typically more indirect and indeterminate, but can nonetheless be quite powerful. Accordingly, these seven measures, which this article classifies under the heading of other regard- promoting mechanisms, have considerable d for promoting greater regard for the disregarded..

Part V examines these seven other regard- promoting mechanisms. It provides an overview of the roles of market competition in goods, services, and investment, competition in the market for regulation, and peer and public reputational influences. It examines at greater length transparency, non-decisional participation, and reason giving in global regulatory decision-making. It concludes that these three practices, especially when operating together, have significant potential to promote greater regard for the disregarded. Part V concludes by examining the possibility of an (incomplete) global administrative law comprised of these three decision making procedures without the availability of review by a court or tribunal of the decisions reached.

Part VI presents a short conclusion.

I. THE STRUCTURE OF GLOBAL REGULATION AND THE PROBLEM OF DISREGARD

This part provides an overview of the fragmented structure of global regulation and explains how it systematically generates failure to consider and protect the interests and concerns of the disregarded. It then explains the concept of disregard as a normative framework for evaluating and reforming global regulatory governance.

A. The Proliferation of Specialized Global Administrative Regulatory Bodies

This article, like the companion Global Administrative Law Project at New York University,⁷ defines global regulation broadly as encompassing a broad range of programs and activities that adopt and implement rules and other norms in order to steer and coordinate conduct by numerous actors for achievement of common objectives.⁸ Global regulatory programs are found in many different fields including the facilitation management of markets; law enforcement and security;

⁷ Materials on the NYU Global Administrative Law Project and other research activities in the field can be found at www.iilj.org/gal.

⁸ Richard B. Stewart, *Enforcement of Transnational Public Regulation*, in ENFORCEMENT OF TRANSNATIONAL REGULATION 41 (Fabrizio Cafaggi ed., 2012), discusses this broad concept of regulation in the global context.

development and other forms of finance; health, education and human development; environmental protection; human rights, and transborder movement of persons.⁹ These regulatory programs have been adopted the global level in order to manage effectively the pervasive and complex interactions, spillovers and interdependencies created by globalization.¹⁰ They fall into three broad categories: security; promotion and regulation of markets; and advancing human rights, broadly conceived to include development, environmental protection, health and safety, and political, civil, economic, and social rights. In practice, these different objectives overlap and often conflict.

In response to these demands, governments have established numerous transnational systems of regulation or regulatory cooperation through international treaties and more informal intergovernmental networks of cooperation among domestic officials, shifting much regulatory decision-making from the national to the global level. Further, representatives of businesses, NGOs, national governments, and intergovernmental organizations have established an astonishing variety of private and hybrid public-private global regulatory and administrative bodies; these regimes have mushroomed in the last two decades.¹¹

These transnational regulatory bodies assume four basic types, (1) formal treaty-based international or intergovernmental organizations (such as the WTO, the Security Council, the World Bank, the UNFCCC regime, etc.); (2) transnational networks of domestic regulatory officials (such as the Basel Committee on Banking Supervision); (3) private regulatory bodies -- ranging from the international sports federations, to The Society for Worldwide Interbank Financial Telecommunication (SWIFT) to the Forestry Stewardship Council -- constituted by nonstate actors, including business firms, trade and professional associations, and NGOs;¹² and (4) hybrid public-private regulatory bodies --such as the Internet Corporation for Assigned Names and Numbers (ICANN), the World Anti-Doping Authority, and the Global Fund -- composed of nonstate actors and international organizations and/or governments. These administrative authorities issue regulatory rules, standards, and decisions. Many of them adjudicate or make other law-based determinations of particular matters. They also gather and disseminate information, engage in the consultations and deliberations, promote, monitor, and in some cases supervise implementation of their regulatory norms and take other steps to promote their adoption.

Some global regulators may implement their rules and decisions by actions directly against persons subject to regulation. Examples include the World Bank procedures for blacklisting corrupt contractors and International Olympic Committee disqualification of athletes engaged in doping. More commonly, global regulators rely on distinct institutions and entities that implement their norms, decisions and policies. These bodies form the *distributed administration*

⁹ See, Kingsbury, Krisch & Stewart, *The Emergence of Global Administrative Law*. 15 (2005).

¹⁰ Richard B, Stewart, *Enforcement of Transnational Public Regulation*, in ENFORCEMENT OF TRANSNATIONAL REGULATION 41 (Fabrizio Cafaggi ed., 2012), discusses this broad concept of regulation in the global context.

¹¹ Sabino Cassese ---[data];JESSICA GREEN, RETHINKING PRIVATE AUTHORITY: AGENTS AND ENTREPRENEURS IN GLOBAL ENVIRONMENTAL GOVERNANCE (2013).

¹² Kingsbury, Krisch & Stewart, *supra* note 3, at 20 (cataloging five types of global administration).

of global regulatory regimes. They operate within frameworks and pursuant to norms and procedures established by the global body.

In the case of treaty-based international organizations and transnational networks of domestic regulators, the distributed administrations typically consist of domestic administrative agencies of the participating states and governments that implement the rules and decisions of the global body. Private global regulatory bodies recruit as distributed administrations for-profit firms, non-profit entities, or NGOs, often accrediting them to certify compliance by private actors with the global body's regulatory standards. This approach to distributed administration is followed by bodies such as the International Standards Organization (ISO) and the Gold Standard for environmentally sustainable carbon offsets. Hybrid global regulatory bodies employ various types of distributed administrations, including domestic governmental agencies; private certifying entities, or hybrid public-private bodies established in individual countries; these may often follow the structure of the global body, as illustrated by the practices of the Forest Stewardship Council, the Global Fund and the Extractive Industry Transparency Initiative (EITI).

These organizations along with a great variety of other public and private actors operate in a global administrative space that is kaleidoscopic in character.¹³ Global regulators operating in a given field interact in complex patterns of competition and cooperation. Often, two or more global bodies exercise regulatory authority over the same activities; for example, ten different global bodies regulate Internet infrastructure.¹⁴ Such bodies may sometimes function together as regulatory regime complex for given sector.¹⁵ Analyses using organizational ecology have sought to trace and explain the development of different types of global bodies in different global policy sectors and their resulting distributions.¹⁶ Notwithstanding functional interdependencies in specific sectors, the overall pattern of global regulation is highly fragmented, without any overarching system or process for oversight, coordination, or review.

Of course, large numbers of disparate specialized regulatory and other administrative agencies also operate within nations. These agencies, however, are subject to legislative and executive authorities with broad overarching powers that assign, supervise, and orchestrate their activities, undertake needed redistributions, or otherwise deal with either the local or aggregate

¹³ On the concept of global administrative space on the concept of a global administrative space, see KKS; on the kaleidoscopic character of global regulatory structures, see Edith Brown Weiss, *On Being Accountable in a Kaleidoscopic World*, 104 ASIL PROC 477-90 (2010).

¹⁴ 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).

¹⁵ Kal Raustialia & David Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORGS. 277 (2004); Robert Keohane & David Victor, *The Regime Complex for Climate Change*, Discussion Paper 10-33, Harvard Project on International Climate Agreements (Jan. 2010), available at http://belfercenter.hks.harvard.edu/files/KeohaneVictor_Final.pdf.

¹⁶ Kenneth W. Abbott, Jessica F. Green & Robert O. Keohane, *Organizational Ecology in World Politics: Institutional Density and Organizational Strategies*, Int'l Stud. Assoc. Annual Convention (2013), available at <http://www.iijl.org/research/documents/Organizational.Ecology.Abbott.Green.Keohane.pdf>.

consequences of their decisions.¹⁷ The decisions of domestic regulatory bodies are also subject to judicial review through a system of courts that can be accessed by citizens as a matter of right. There are no counterparts to these institutions in the global administrative space.

Like their domestic counterparts, global regulatory bodies have an administrative character.¹⁸ They are typically managed by full time officials and staff. Most also include a council or similar body composed of representatives of members. These various actors make and implement regulatory decisions. They generally operate under broad legal charters, although intergovernmental networks often have no charters at all. The global regulators develop and further implementation of regulatory norms through rulemaking, adjudicating controversies between competing regulatory interests, and making other law-based determinations. They also issue guidance and statements of policies and best practices. Global administrators regularly gather information, monitor the implementation of their regulatory programs, track compliance, and make all manner of informal decisions, all in order to direct or influence, in a systematic, coordinated fashion, the conduct of the actors subject to regulation. They undertake all these activities with the goal of preventing money laundering, staging the Olympic Games, securing the international trading system, funding suitable development projects, ensuring humane treatment of refugees, and so on. These activities are the global version of the functions, recognized by public lawyers as administrative in character, discharged by domestic and supranational regulatory bodies.

The institutional structures of some global regulatory bodies have a bureaucratic structure similar to that of traditional national administrative agencies. Examples include the World Bank, the International Monetary Fund and the World Health Organization.¹⁹ Like their domestic counterparts, however these organizations are not monoliths. They include many specialized components—including bureaus, secretariats, committees, boards, and other entities—that carry out defined tasks and functions. These components often provide for participation by outside experts and representatives of various constituencies in order to engage their knowledge, views and support. Other global administrative bodies, especially private and hybrid bodies, have a more strongly horizontal, networked character. Regulatory norms and policies are established through intensive processes of deliberation, exchange and interaction among representatives of and experts from domestic government agencies, NGOs, business firms and associations, professional groups, academic and research bodies, and international organizations. These constituencies are typically subject to the regulatory norms being generated or otherwise play a significant role in their implementation. Examples include the International Standards Organization (ISO), Codex Alimentarius, Greenhouse Gas Protocol, World Anti-Doping

¹⁷ Richard L. Revesz, *Federalism and Environmental Regulation: Lessons for the European Union and the International Community*, 83 VA. L. REV. 1331 (1997).

¹⁸ “Conceptually, administrative action can be distinguished from legislation in the form of treaties, and from adjudication in the form of episodic dispute settlement between states or other disputing parties. Global administrative action is rulemaking, adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties.” Kingsbury, Krisch & Stewart, *supra*, at 17.

¹⁹ The officials that manage these bodies are supervised by and generally selected by a council or other collective body composed of representatives of the body’s members. This arrangement is some work to those in domestic commissions or boards headed by plural authority.

Authority (WADA), Marine Stewardship Council, Global Hydropower Forum, and the International Conference on Harmonization (which deals with the pharmaceutical regulation). These various forms of networked governance, including “experimentalist governance” initiatives,²⁰ embody regulatory strategies that are also increasingly being adopted in domestic and supranational regulatory programs.²¹

The various different global regulatory bodies exercise significant discretionary decision-making powers. Such discretion is inherent in creation -- whether at the domestic, supranational, or global level -- of a special purpose entity with responsibility for regulating a given sector of activity. In such circumstances, it is not feasible or desirable for the principal establishing the administrative body to lay down detailed instructions for the agent’s decisions in advance. The principal’s ability to monitor and evaluate the agent’s performance and take necessary corrective action *ex post* is inherently limited because these tasks require detailed, continuously updated knowledge and experience which the principal does not have.²² As noted long ago by Max Weber, bureaucracies have incentives to avoid transparency in order to hoard the power that specialized knowledge and experience confer.²³ As a result, the regulator/agent enjoys a greater or lesser degree of free reign or “slack” including discretion to adopt policies contrary to the goals and interests of the principal.

The discretion enjoyed by agents is generally even greater when the administrative authority has been established by multiple principals, which makes it more difficult effectively to police the agent’s performance. Global regulatory bodies are almost always established by multiple principals, including states in treaty-based organizations, domestic regulatory agencies in the case of intergovernmental networks, and various types of private and public entities in the case of private and hybrid public-private regulatory bodies. In cases where a few quite powerful governments or other principals can assert dominant control, they may be able, at least in cases of high moment, to have their way. Nonetheless, administrative agents will inevitably retain substantial discretion. Established public procedures for administrative decision-making, including notice of proposed decisions, opportunity for comment, reason-giving, and opportunity for some form of review, also constrain, in a different way, the ability of powerful principals to

²⁰ Gráinne de Búrca, Robert O. Keohane & Charles Sabel, *New Modes of Pluralist Global Governance*, 45 N.Y.U. J. INT’L L. & POL. 723 (2013) (on experimentalist governance).

²¹ See Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, in *THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE* (Jacint Jordana & David Levi-Faur eds., 2004); Julia Black, *Paradoxes and Failures: “New Governance” Techniques and the Financial Crisis*, 20 MODERN L. REV. 1037 (2012); *E.g.*, Tim Conner & Fiona Haines, *Networked Regulation as a Solution to Human Rights Abuse in Global Supply Chains? The Case of Trade Union Rights Violations by Indonesian Sports Shoe Manufacturers*, 17 THEORETICAL CRIMINOLOGY 197 (2013).

²² Arthur Lupia & Matthew McCubbins, *Designing Bureaucratic Accountability*, 57 LAW & CONTEMPORARY PROBS. 91 (1994); Arthur Lupia & Matthew McCubbins, *Learning from Oversight: Fire Alarms and Police Patrolled Reconstructed*, 10 J.L. ECON. & ORG. 96 (1994).

²³ Louis M. Imbeau, *Transparency in the Budget Process of a Bureaucratic Organisation: A Principal-Agent Model of Budgeting*, in *THE ECONOMICS OF TRANSPARENCY IN POLITICS* 189, 189-90 (Albert Breton ed. 2007) (discussing Weber).

dictate specific decisions that they may also limit the agent's freedom of action.²⁴ Among other effects, such procedures will tend to ensure that regulator/agents adhere to the terms of their authorizing charter (which in practice may not be very constraining) and (more important) to the rules and procedures they have previously established unless and until changed through regular processes. Through the perspective of political economy, administrative law and the availability of independent review of administrative decisions at the behest of those adversely affected by them can be understood as mechanisms by which principals can indirectly constrain agency discretion.²⁵ These mechanisms can also advance the principals' objectives by enhancing the quality and effectiveness of regulatory outputs. In normative perspective, they operate to limit decision on the basis of power and expediency and promote the rule of law. Such techniques for disciplining administrative decision-making are familiar in domestic administrative law. They have increasingly been adopted in global regulatory governance, fostering the emergence of a global administrative law.²⁶

B. The Problem of Disregard

Many global regulatory authorities have been justly criticized for giving inadequate regard to the interests and concerns of vulnerable and politically weak groups, diffuse and less well organized and resourced societal interests, and individuals in making decisions, resulting in decisions that cause them unjustified harm or disadvantage. This article refers to these practices and their institutional sources, operating at the global level and their distributed administrations, collectively as the problem of disregard. "Harm," "disadvantage," and "unjustified" are general terms with normative import that require further specification, as discussed in section I.D.

The concept of disregard is implicit in much criticism of global governance, but is rarely articulated and has not been systematically analyzed. The criticism rests on normative principles of regard -- principles which serve to identify which affected groups, interests and individuals are entitled to have their interests and concerns considered and taken into account by particular global regulatory bodies with specialized missions. Section I.D also discusses these principles. This section provides examples of disregard in global regulatory governance in order to provide concrete context.

A further preliminary point. The decisions of global regulatory bodies often also disregard the interests and concerns of weaker states, especially developing country states. In some cases these states may be members of the body; in others not. This problem and its potential remedies

²⁴ See generally Mathilde Cohen, *Reason-Giving in Court Practice: Decision-Makers at the Crossroads*, 14 COLUM. J. EUR. L. 257 (2008); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253 (2009).

²⁵ See Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. Law Econ. & Org. 243 (1987); . Arbitration CAS 2008/O/1455 Boxing Australia v/AIBA, award of 16 April 2008 (Court of Arbitration for Sport invalidating athlete disqualification by Australian Boxing Federation; decision represented unjustified departure from prior rules).

²⁶ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBLEMS 15 (2005); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 L. & CONTEMP. PROBLEMS 63 (2005); see also GLOBAL ADMINISTRATIVE LAW PROJECT, INSTITUTE FOR INTERNATIONAL LAW & JUSTICE, <http://www.iilj.org/GAL/default.asp>.

present issues that are significantly different from those presented by disregard of groups and individuals; they will not be addressed in this article.

Among the many diverse examples of disregard are the following: The TRIPS and TRIPS-Plus regimes have slighted the needs of developing country populations for access to essential medicines.²⁷ The WTO regime for a long time effectively proscribed environmental regulations aimed at products produced by environmentally unsound processes in international waters or other countries.²⁸ Investment arbitration tribunals have denied recourse to citizens seeking to defend environmental and social regulatory actions claimed by foreign investors to constitute compensable expropriation of their investments.²⁹ The World Bank and the IMF have historically acted to prop up despotic regimes and feed a culture of corruption, sending billions of dollars in development funding to developing countries while ignoring that their officials were pocketing it.³⁰ The multilateral development banks have regularly funded infrastructure projects such as dams that displaced local populations and destroyed local communities without adequate consideration or recompense.³¹ The UN has systematically disregarded those wrongfully harmed by its operations, including the eight thousand Haitians who died of cholera introduced by UN peacekeepers as a result of failures to ensure proper sanitation.³² The UN

²⁷ E.g., BALANCING WEALTH AND HEALTH (Rochelle Dreyfuss & César Rodríguez-Garavito eds., forthcoming 2014); Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008).

²⁸ The WTO's practice is discussed in critique in Robert Howse, *The New Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environmental Debate*, 27 COLUM. J. ENVIRONMENTAL L. 491 (2002); Robert Howse & Donald Rega, *The Product/Process Distinction – An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy*, 11 EUR. J. INT’L L. 249 (2000). See also Jonathan Skinner, *A Green Road to Development: Environmental Regulations and Developing Countries in the WTO*, 20 DUKE ENVIRON. L. & POL’Y FORUM 245, 266 (2010) (noting progress in overcoming disregard in this field).

²⁹ Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democracy Deficit?*, 41 VAND. J. TRANSNAT’L L. 775, 799 (2008); Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, in 14 ICCA CONGRESS SERIES, 50 YEARS OF THE NEW YORK CONVENTION 5 (Albert Jan van den Berg ed., 2009).

³⁰ E.g., MICHELA WRONG, IN THE FOOTSTEPS OF MR. KURTZ: LIVING ON THE BRINK OF DISASTER IN MOBUTU’S CONGO (2002) (detailing how the World Bank and IMF supported Mobutu’s regime in Congo). World Bank’s programs coincide with government action that harms vulnerable populations, such as the Promoting Basic Services (PBS) program, which Human Rights Watch links to the Ethiopian government’s “villagization” regime of sometimes-violent forced relocation. *Abuse-Free Development: How the World Bank Should Safeguard Against Human Rights Violations*, http://www.hrw.org/sites/default/files/reports/worldbank0713_ForUpload.pdf at 36-39.

³¹ Komala Ramachandra, *Recent Development: Sardar Sarovar: An Experience Retained?*, 19 HARV. HUM. RTS. J. 275, 277 (2006) (on Narmada River dams); Erin K. MacDonald, Comment: *Playing by the Rules: The World Bank’s Failure to Adhere to Policy in the Funding of Large-Scale Hydropower Projects*, 31 ENVTL. L. 1011, 1034 (2001) (on the Bank’s violations of its own compensation and participation policies). But see John W. Head, *For Richer or for Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks*, 52 U. KAN. L. REV. 241, 288 (2004) (suggesting that multilateral development banks have largely left the dam-building business); Human Rights Watch, *Abuse-Free Development: How the World Bank Should Safeguard Against Human Rights Violations*, http://www.hrw.org/sites/default/files/reports/worldbank0713_ForUpload.pdf at 36-39; Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 HARV. HUM. RTS. J. 205 (2002).

³² *UN Sued Over Haiti Cholera Epidemic*, BBC (Oct. 9, 2013), <http://www.bbc.co.uk/news/world-latin-america-24457195>.

denied compensation for the resulting harms,³³ and has failed to give any serious consideration to establishing a standing administrative system that would provide adequate and assured compensation for wrongful harms that its operations cause.

These and many other examples involve administrative authorities established by states and domestic agencies to promote trade, investment, economic development and other economic objectives. In some cases these bodies have since adopted corrective measures but in many others not. Various forms of disregard also occur in hybrid public- private regulatory bodies, such as the International Conference on Harmonization (ICH), composed of representatives of the EU, US and Japan and the multinational pharmaceutical industry. The drive for harmonization of drug testing protocols and the attractions for multinational pharmaceutical companies of lower costs for clinical trials in developing countries has marginalized the ethical concerns of doctors and some developing countries over use of placebos in such trials.³⁴ ICH has broadly authorized use of placebos, notwithstanding deaths and other abuses that have resulted from this practice the past.³⁵ Private and hybrid global bodies that establish uniform technical standards for goods and services may disregard the interests of less powerful and influential firms and adopt standards that disadvantage them in competition.³⁶

As examples of disregard of the interests and concerns of individuals, global regulatory bodies have imposed serious sanctions and liabilities or made adverse determinations of individuals' legal status through procedures that are not adequately impartial and reliable. Examples have included the UN Security Council listing of asserted terrorist financiers in order to freeze their assets and restrict their travel; blacklisting by multilateral development banks of project contractors charged with corruption; refugee status determinations by the UN High

³³ Letter from Patricia O'Brien, Under Secretary-General for Legal Affairs, United Nations, to Brian Concannon, Director, Institute for Justice & Democracy in Haiti (July 5, 2013). A standing system for compensation would create caretaking incentives for the UN.

³⁴ Michael J. Malinowski & Grant G. Gautreaux, *All That is Gold Does Not Glitter in Human Clinical Research: A Law-Policy Proposal to Brighten the Global "Gold Standard" for Drug Research*, 45 CORNELL INT'L L.J. 185 (2012) (suggesting scientific objections to ICH's standards); Howard Wolinsky, *The Battle of Helsinki*, Science & Society, 7 EMBO REPORTS 670, 671 (2006).

³⁵ In one well-known case, which sparked a decade of debate, an NIH-funded experiment in Thailand gave some participants, pregnant mothers with HIV, placebos instead of drugs that were known to reduce the rate of maternal transmission of the virus. P. Lurie & S.M. Wolfe, *Unethical Trials of Interventions to Reduce Perinatal Transmission of the Human Immunodeficiency Virus in Developing Countries*, 337 N. ENGL. J. MED. 853 (1997). While some bioethicists agree with regulators that their use is acceptable in foreign countries where patients would not otherwise have access to care, the Helsinki Declaration expresses the view of most bioethicists that placebo controls should generally not be used. See The Declaration of Helsinki, <http://www.wma.net/en/30publications/10policies/b3/> (last visited Feb. 19, 2014); GUIDANCE FOR INDUSTRY AND FDA STAFF: FDA ACCEPTANCE OF FOREIGN CLINICAL STUDIES NOT CONDUCTED UNDER AN IND FREQUENTLY ASKED QUESTIONS (March 2012); INTERNATIONAL CONFERENCE ON HARMONISATION, GUIDELINE FOR GOOD CLINICAL PRACTICE E6 (1996); see also Michael D.E. Goodyear, *Does the FDA Have the Authority to Trump the Declaration of Helsinki?*, 338 BRIT. MED. J. 1157 (2009) (questioning the FDA's use of the ICH standards); Howard Wolinsky, *The Battle of Helsinki*, Science & Society, 7 EMBO REPORTS 670, 671 (2006) (describing the controversies surrounding the FDA's former standard, the Declaration of Helsinki).

³⁶ See Harm Schepel, *The Constitution of Private Governance; Product Standards in the Regulation of Integrating Markets* Ch (2005) (discussing legal remedies in tort, contract and competition law for this form of disregard).

Commissioner for Refugees; and disqualification by international sports federations of athletes for doping. Actions taken against individuals as a result of unreliable decisional procedures may also harm third parties. When the Security Council lists individuals or entities suspected of financing terrorism in order to freeze their assets and restrict their travel, those listed have no procedural rights and do not know they are being considered until the process is over.³⁷ As an example, two Swedes and a Somali banking network, Al-Barakaat, listed; the network handled money transfers to Somalia.³⁸ The blocking of its assets had serious adverse effects on tens of thousands of Somali citizens.³⁹

As discussed below, almost by their nature, specialized regulatory bodies often cannot practicably consider the interests and concerns of all those who are affected by their decisions and should not be applied to do so. For similar reasons, they may not be obliged to expand their missions in order to fill regulatory gaps in order to address structural disregard. In such cases, disregard may be justified. And, what constitutes adequate regard as opposed to unjustified harm or disadvantage is often highly contestable. Nonetheless, there are many instances in which global regulatory and administer programs have followed and continue to follow policies and make decisions that represent clear cases of disregard.

C. The Concept of Disregard as a Normative Heuristic for Global Regulatory Governance

What is disregard? More concretely, by what principles and criteria do we determine when those adversely affected by the decisions of a global regulatory body have been unjustifiably disregarded by that body? This subsection seeks to make progress in addressing these questions without being able to answer them fully.

Global normative theory for radically fragmented decision making.

³⁷ For an overview of the terrorist listing process and how it has changed over the years, see Craig Forcese & Kent Roach, *Limping Into the Future: The U.N. 1267 Terrorism Listing Process at the Crossroads*, 42 Geo. Wash. Int'l L. Rev. 217, 221-27 (2010). For recent reforms made in response to litigation, including the requirement that a summary of reasons for listing a person or entity must be provided to the listed person or entity, see *id.* 243-52.

³⁸ Noah Birkauser, *Sanctions of the Security Council Against Individuals – Some Human Rights Problems*, available at <http://www.esil-sedi.eu/sites/default/files/Birkauser.PDF>.

³⁹ Tens of thousands of Somalis dependent on funds from relatives outside the country could not access them because of the sanctions, causing great hardship. Small businesses had to close. The company was the largest employer in Somalia.³⁹ See SELECT COMMITTEE ON ECONOMIC AFFAIRS, IMPACT OF ECONOMIC SANCTIONS, REPORT, 2006-2007, H.L. 96-II, at 128 (U.K.). *Somali Economy Hit*, BBC (Aug. 27, 2002), http://news.bbc.co.uk/2/hi/in_depth/world/2002/september_11_one_year_on/2219680.stm.

³⁹ *Somali Economy Hit*, BBC (Aug. 27, 2002); *US Shuts Down Somalia Internet*, BBC (Nov. 23, 2001), <http://news.bbc.co.uk/1/hi/world/africa/1672220.stm>. Sweden petitioned the United States to de-list and the United States and the Security Council eventually acquiesced. *U.S. Drops Names of 2 Swedes from Al Qaeda List at U.N.*, NY TIMES, Aug. 23, 2002. The company's entry on the U.N. list was also litigated before the European Court of Justice. *Joined Cases C-402 & 415/05 P, Kadi & Al Barakaat Int'l Found. v. Council & Comm'n*, 2008 E.C.R. I-6351.

Curing disregard is not a complete or self-sufficient normative theory. But building a comprehensive normative theory suitable for global governance confronts severe challenges. Most contemporary 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, and executive, and in independent judiciary, each with robust general authority to govern. Such institutions do not exist at the global level. Instead, we have myriad special-purpose regulatory bodies pursuing different objectives and governed by different combinations of various public and private actors. In these circumstances encompassing conceptions of democracy or justice framed at the level of the entire global governance complex, like those contemplated by some global constitutionalists,⁴⁰ are simply not persuasive or viable.⁴¹

Yet, normative aspiration, assessment, and prescription must and can proceed through decentralized basis.⁴² Progress in securing greater equity in global administration need not await a credible global theory of justice. Just as with domestic law and governance reform, taking specific steps to prevent and remedy of discrete unjustified harms and deprivations imposed on weak or marginalized groups and vulnerable individuals is a fundamental starting point. The concept of disregard can serve as a fruitful heuristic for building, contextually and incrementally, useful conceptions of justice in global governance. The further goal of achieving an equitable division of the benefits of global cooperation would be far more challenging to define and implement.

What do regard and disregard consist in?

Disregard has both procedural and substantive elements. Disregard is evinced by decision-makers' failure or refusal to gather information regarding the interests and concerns of groups and individuals that will be affected by their decisions and the impacts of their decision on them; refusal or failure, to provide them with access to relevant information and the opportunity submit evidence and argument on proposed decisions or any other role in the organization's decision-making processes; and by failure to address their interests and concerns in explaining or giving reasons for the decisions made.⁴³ Disregard is more strongly evinced when other groups and

⁴⁰ Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L. Q. 51 (2006); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907 (2004); Bardo Fassbender, *The United Nations Charter As Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529 (1998); Ernst-Ulrich Petersmann, *How to Reform the UN System? Constitutionalism, International Law, and International Organizations*, 10 LEIDEN J. INT'L L. 421 (1997).

⁴¹ See Jürgen Habermas, *The Postnational Constellation and the Future of Democracy*, in *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* 58 (2001). Consider how to generate a theory of global justice or democracy suited for such diverse bodies as the Financial Action Task Force, the Global Competition Network, the International Olympic committee, the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use, a developing country agency's administration of water supply franchises with foreign investors, the Forestry Stewardship Council, Interpol, or the International Standards Organization.

⁴² This approach informs Amartya Sen, *The Idea of Justice* (2009).

⁴³ For discussion of the procedural and substantive elements of what constitutes adequate consideration of affected interests by administrative decision makers, see Richard B Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1712-60 (1975).

individuals are treated more favorably in these regards. Substantive disregard consists in failure to give adequate consideration to the interests and concerns of those significantly affected in decisions and policies and consequently making decisions that unjustifiedly harm or disadvantage them

Regard is the antonym and remedy for disregard. At a minimum, regard requires that the decision-maker has available and reviews information about the effects of proposed decisions on the various groups, individuals, interests and concerns entitled to consideration, weighs the benefits for and burdens on them of alternatives, and determines that decisions which impose disadvantage or harm on some affected groups and individuals are justified by relevant decisional norms. The appropriate extent of the consideration that must be afforded and the extent and form of any regular processes for doing so will vary widely depending on nature of the regulatory or other administrative program, its objectives, the type of decision in question (for example, is it rulemaking, adjudication, or decision some other particular matter), the character of those affected, the type and intensity of adverse effect, and other contextual factors. Due regard for the various relevant affected groups and individuals and their interests and concerns almost never points to a single decisional outcome. Decision makers almost always enjoy a greater or lesser range of judgmental discretion. But procedures and practices to enable and promote consideration of those whose interests and concerns are entitled to regard goes far to prevent arbitrary or unjust decisions.

Which global regulatory bodies are subject to obligations of regard?

In the compass of this article, only a sketch of an answer to this question can be provided. Global regulatory bodies that are constituted in whole or part by public authorities, including states, domestic administrative agencies, and international organizations, prima facie have attributes of publicness that oblige them to give due consideration to all relevant interests with a significant stake in their decisions, and follow, to the extent feasible, procedures and practices to do so.⁴⁴ Bodies constituted entirely by private actors may also be subject to these obligations, depending on the kind and degree of power that they exercise, the impact of their decisions on those adversely affected, and whether public authorities are available to monitor their decisions and take needed corrective action.⁴⁵ Because public supervision and correction is less often available in the context of global regulation, the need to impose obligations of regard on private regulatory bodies may be greater than in the domestic context.

Who is entitled to regard?

Which groups, collective interests, individuals are entitled to regard in global regulatory decisions and, potentially, rights to participate in or initiate decisional processes that promote such regard?

One possible starting point is the Roman law principle *quod omnes tangit, ab omnibus tractari et approbari debet*—all those affected should be heard and agree. Under Roman law, in cases of

⁴⁴ C.f. Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23 (2009) (on the concept of publicness).

⁴⁵ Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* 292 (2005) (discussing the transference of monitoring power from public authorities to private bodies).

multiple guardianships of a ward or multiple parties with an ownership interest in a res, all should be heard and agree to the resolution of the guardianship or res. In medieval England, the Roman law maxim was invoked in the disposition of church offices and governance of political communities and realms. Notice and opportunity to participate was required for all members of the relevant community, but the further requirement of actual consent fell away.⁴⁶ Literature

Applying and implementing the *quod omnes* principle in the context of special-purpose global regulatory bodies presents perplexing problems. There is typically no well-defined community that includes all those significantly affected by a given body's decisions. For this and other reasons, electoral representation, which can be regarded as a contemporary translation of *quod omnes* in democratic states, is generally infeasible and in any event would often be undesirable given the nature of the specialized administrative tasks in issue.⁴⁷ Furthermore, the identity of the groups, individuals and interests that have some appreciable stake in regulatory decisions shifts and varies widely from one regulatory body and program to another, as does the character of those decisions' effects on them. We require normative grounds to distinguish those interests and persons that should be accorded regard by regulatory decision makers.

The circumstance that a specific regulatory decision adversely affects certain individuals or interests, without more, does not entail that they are entitled to regard. That depends on the mission of the specific body in question and context-relevant norms. Many global administrative regimes are established to promote societal welfare in specific policy fields and sectors where decentralized domestic actions alone cannot. These bodies should be able effectively to carry out their missions without unduly burdensome obligations of regard extending to all of the groups and individuals affected in some way by their decisions.

As a general matter, neither regard nor process need be provided where the individual or collective "touching" is de minimis. Global regimes, such as the International Standards Organization (ISO) and the Greenhouse Gas Protocol, that solve coordination games by setting technical standards for products and services often do not have significant impacts beyond the regime participants. In other global regimes, the consequences of regulatory decisions may be matters of life and death (patent protection for essential medicines) or destruction or not of one's home community (hydropower project funded by a multilateral development bank), or the ability to travel (refugees seeking asylum or those listed as terrorist financiers). Where the decisions of administrative authorities cause such serious harms to discrete groups and individuals, their

⁴⁶ See Nicklaus Luhmann, *Quod Omnes Tangit: Remarks on Jurge Habermas's Legal Theory*, 17 CARDOZO L. REV. 883 (1996); GAINES POST, JR., *STUDIES IN MEDIEVAL LEGAL THOUGHT: PUBLIC LAW AND THE STATE* 1100-1322, Ch. IV; Romano Canonical Maxim, *Quod Omnes Tangit*, in BRACON AND IN EARLY PARLIAMENTS, 163-238 (1964). I am indebted to John Ferejohn for these references. Luhmann, *supra*, suggests that the principle is "absolutely valid." Luhman at 884.

⁴⁷ Andrew Moravcsik, *The Myth of Europe's "Democratic Deficit,"* 43 INTERECONOMICS 331 (2008). It might, however be feasible to provide certain forms of decisional or non-decisional participation to affected groups and interests, including through business and professional associations or NGOs that speak on behalf of environmental, worker, and social interests This is a common theme of recent theories of international or global democracy. *E.g.*, TERRY MACDONALD, *GLOBAL STAKEHOLDER DEMOCRACY* 7 (2008). Certain NGO regulatory bodies, most notably the Forest Stewardship Council follow such a practice.

moral claims for regard, including adequate processes to ensure, are overwhelming. The case for regard may be weaker when adverse effects are greater than de minimis but are diffuse and individually small, yet the effects may nonetheless be significant in the aggregate.

Even where “touchings” are significant, not all of those harmed or disadvantaged by a decision are necessarily entitled to consideration in making it; that may depend on the charter of the regulatory body in question and governing norms. For example, decisions by the WTO may legitimately ignore and as a result impose economic ruin on business firms by promoting global market competition. The mission of the WTO is to promote global economic welfare through trade liberalization; the norms governing market relations do not protect firms against expanded competition. In some instances, a specialized global regulator may also appropriately exclude consideration of some of the effects of its decisions as beyond its remit or competence. Such grounds may, for example, justify WTO refusal to consider the effects of trade liberalization on demand for natural resources even though it regularly considers the WTO-compatibility of particular environmental regulations adopted by members. Yet the consequence of such refusals may be that the environmental consequences of trade liberalization will fall through the cracks in the fragmented and uneven global regulatory system and not be addressed by any global or domestic authority.⁴⁸ It may simply not be practicable or desirable to try to remedy such instances of structural disregard by imposing obligations on existing regulatory bodies. Beyond these very general principles, the question of who is entitled to regard and to process must be addressed and resolved case-by-case through more or less complex institutional, legal and political processes. This endeavor is quite similar to those domestic courts take on in determining how far to extend procedural rights in agency decision-making and standing to secure judicial review to individuals and groups that assert a stake in administrative decisions.⁴⁹

Decisions as to who is entitled to regard, and the extent of that regard -- in terms of the weight that should be given to their interests and concerns in making decisions -- must be resolved through practical normative and institutional judgments that take account of experience under other global administrative regimes. These judgments must include prudential considerations, including the need to make some accommodation with configurations of power. There are no general institutional solutions to problems of disregard. Following the approach of the Global Administrative Law Project, this article proposes an incremental “retail” rather than “wholesale” strategy for global governance diagnosis and reform.

Intrinsic process values. This article approaches procedural and institutional arrangements primarily as means for ensuring that the interests of those affected by global regulatory decisions are given due consideration and sufficient weight in the ultimate decisions made. Problems of disregard are ultimately manifested in decisions and measures that unjustifiably harm or disadvantage certain individuals or interests. Processes, including the opportunity to submit evidence and argument in adjudications, rulemakings, or other decisions of particular matters, or the opportunity to secure judicial review, are ultimately methods to help ensure that the

⁴⁸ Richard L. Revesz, *Federalism and Environmental Regulation: Lessons for the European Union and the International Community*, 83 VA. L. REV. 1331 (1997).

⁴⁹ *E.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *In re Global Indus. Techs., Inc.*, 645 F.3d 201 (3d Cir. 2011); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

substantive decisions reached give appropriate regard for the interests and concerns of the relevant groups and individuals. We must, however, also consider that individuals, groups, states, or societal interests might have intrinsic rights, based on process, dignitary or sovereignty values, to certain procedures or remedies, regardless of their effect on decisional outcomes.

A strong case for recognizing an intrinsic procedural right is where an individual is singled out for condemnatory sanctioning by a global body such as the UN Security Council 1267 Committee or the World Anti-Doping Authority. In such cases, access to processes may have a dignitary or other intrinsic value, independent of their function as a means to protect an individual's substantive rights or to channel the exercise of power through the rule of law.⁵⁰ The claim to intrinsic procedural rights is far more problematic when global bodies issue general rules or decide particular matters affecting many interests and individuals such as the location of infrastructure projects or the designation of an Olympic host city. In the domestic context, the opportunity to vote in elections to select high-level government decision makers may be regarded as an intrinsic process right. The possibility of analogous process rights in the context of fragmented global regulatory decision-making cannot be excluded. Yet there are grave challenges in conceptualizing and realizing any such rights, given the absence of defined global political communities and the sheer number and variety of global regulatory bodies and of those affected in various ways by their decisions.⁵¹

II. THE STRUCTURAL ROOTS OF DISREGARD AND STRATEGIES FOR REDRESS

This Part first explains how systematic disregard is rooted in the institutional structures of global regulation. It then considers for strategies that the disregarded might use to secure greater regard for their interests and concerns, and discusses more fully the strategy of using and reforming the governance mechanisms of global regulatory bodies.

A. The Structural Roots of Disregard

The nature and extent of disregard and its causes vary greatly depending on the type of global regulatory body in question, its mission, and the public or private actors that govern it and/or are most significantly affected by its decisions. Notwithstanding these variables, a systemic cause of disregard is the limited, specialized mission of global regulatory bodies, typically focused on a

⁵⁰ Armin von Bogdandy, Philipp Dann & Matthias Goldmann, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, 9 GERMAN L.J. 1375, 1379-80 (2008); Matthias Goldmann, A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and Not Law), at 11-12, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2260293.

⁵¹ The thrust of Justice Holmes' remarks a U.S. Supreme Court case refusing to recognize a constitutional right to be heard in an administrative rulemaking by group of taxpayers protesting a decision sharply raising their taxes apply with great force in the global context: "Where a rule of conduct applies to more than a few people it is impractical that everyone should have a direct voice in its adoption. . . . Their rights are 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." *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915)

specific sector or subject within the three broad categories of global regulation. Charged by their principals with achieving a given objective -- such as preventing money laundering, liberalizing international trade, promoting economic development by funding infrastructure projects, or ensuring protection of intellectual property rights -- the officials, including member representatives, and staff that make decisions and manage the organization tend to develop institutional tunnel vision and professional blinders to the interests of interests and individuals that are not clients or instrumental to achievement of the mission. They accordingly lack incentives to generate or consider information regarding the effects of their decisions on them. These biases are often reinforced by the economic and political interests of their principals and their allies, as illustrated by the global trade, investment, intellectual property, global sports, and development assistance regimes. Such problems are often far less acute in global regimes with missions such as environmental or health protection, but may nonetheless occur. For example, the administrations of the Kyoto Protocol Clean Development Mechanism and the Voluntary Carbon Scheme do not consider the environmental and social impacts of projects such as industrial tree farms in certifying carbon reductions achieved by such projects.⁵² Global regulatory bodies that establish uniform technical standards to facilitate trade in goods and services, which are often private or hybrid private-public in nature, may disregard the interests of less influential firms and adopt standards that give competitive advantage to the more powerful.⁵³

In the case of disregard of individuals, global bodies with international security missions may ignore or slight procedural safeguards in imposing sanctions because their domestic government principals want a high degree of speed, flexibility, expediency, and confidentiality in making decisions and may have little regard for possible false positives. The listing procedures of the Security Council Al Qaeda Sanctions Committee reflect these influences. Similar influences may operate in other types of global regulation, such as sports, where administrations may want to act quickly to sanction athletes in order to assuage public concerns over doping. Procedural failings may stem from use of familiar and expedient bureaucratic decision-making practices, for example in blacklisting contractors charged with corruption., Use of such practices may be reinforced by resource limitations, as reflected in UNHCR refugee status decision-making. Often the individuals given procedural short shrift are members of disfavored or otherwise politically weak groups, so that the treatment of individual cases reflects systemic disregard of the group.

Disregard operating within global regulatory bodies may be transmitted to their distributed administrations. Thus, the domestic administrations of WTO members are obliged by TRIPS to respect and enforce the intellectual property rights held by citizens of other WTO members. The TRIPS requirements, backed by WTO dispute settlement procedures, are calculated to overcome domestic authorities' disregard of foreign competitors. While addressing this form of disregard,

⁵² Kylie Wilson, Private Governance of the Voluntary Carbon Offset Market (paper on file with the author).

⁵³ HARM SCHEPEL, THE CONSTITUTION OF PRIVATE GOVERNANCE: PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS (2005)

the TRIPS regulatory regime disregards and harms individuals who can no longer afford essential medicines, whose interests and concerns lie outside its mission.⁵⁴

Applying political economy analysis, Eyal Benvenisti and George Downs have highlighted two other structural features of global regulatory governance that tend systematically to generate disregard.⁵⁵ First, they argue that shifts in regulatory decision-making to the global level have increased the power of domestic executives relative to that of legislatures and courts in making regulatory policies, and that the executive's position on regulation is often aligned with by that of powerful well organized economic interests. The executive negotiates and oversees governments' participation in international treaty-based regimes and transnational regulatory networks as well as in many important hybrid global regulatory regimes such as ICH. Domestic legislatures are largely fenced out of these decisions, which are also generally not subject to review in domestic courts. As a result, regulatory policymaking is no longer subject to domestic institutional checks on the ability of well-organized economic interest groups to dominate specialized administrative decision-making to the disadvantage of diffuse interests. Equivalent checks are absent or underdeveloped at the global level. This argument has also been made by environmental, health and consumer advocacy groups as well as by scholars, who contend that global regulations reflecting the interests of dominant economic interests have in many cases displaced more stringent domestic regulations, weakening environmental and health protections.⁵⁶

Their second and related argument is that the phenomenon of fragmentation in global regulatory institutions, with myriad different regulatory regimes each specialized missions, works systematically to the overall advantage and interests of the most powerful developed countries and their business and financial allies.⁵⁷ They view global regulatory fragmentation as reflecting a divide and conquer strategy which prevents developing countries for mobilizing across issue areas to present a counterweight to develop country dominance of the various individual global regimes.

The result is a highly uneven and biased pattern in global regulatory programs. There are robust global regulatory regimes for achieving security, constituting efficient global markets and promoting trade, investment, transport, and communications. Regimes for addressing important market failures associated with the powerful growth of the global economy, including in protection of environment, health, safety, and securing human rights are weak. Democratic developed countries have adopted domestic regulatory programs to provide such protections as well as social insurance and service programs. These form an essential part along with market

⁵⁴ See Dreyfuss and Rodrigues, *supra*, and Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008).

⁵⁵ Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007).

⁵⁶ See Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 NYU Journal on International Law and Politics 695, 708 (2006); David Vogel, *The Private Regulation of Global Corporate Conduct*, in *THE POLITICS OF GLOBAL REGULATION* (Walter Mattli & Ngaire Woods eds., 2009).

⁵⁷ Fragmentation of regulatory governance at the domestic level can have similar consequences. See Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335 (1990). Potential remedies for these structural effects of institutional fragmentation are beyond the scope of this article.

capitalist institutions of a social compact of “embedded liberalism.”⁵⁸ Many developing countries do not have the resources or capacity to provide such protections to their citizens. Further, the authoritarian governments of some countries have little regard for the welfare of most of their citizens. At the global level, regulatory programs to address market failures have major gaps and significant weaknesses, and global social insurance and service programs are rudimentary and patchwork. These circumstances have frustrated the realization of the social compact based on embedded liberalism at the global level. Among others, the shortcomings have left many people, especially those in developing countries, vulnerable to serious risks of insecurity and harm. The continuing failure to reach agreement on an effective global climate treaty is the most dramatic case in point.

The biased pattern of global regulation results in an inequitable distribution of the benefits from global cooperation. It results in structural disregard of interests that are rendered vulnerable by economic globalization but are not effectively protected by any global regulatory regime. In order to address this injustice advocates for the disregarded press global regulators with other missions, such as trade, to take steps to address their interests and concerns. Unsurprisingly, these bodies strongly resist such demands.

B. Strategies for Addressing Disregard

This subsection first outlines four potential strategies for addressing the problem of disregard in global regulatory governance. It then focuses on the fourth of the strategies, focused governance mechanisms within global regimes. The subsection presents the three basic types of governance mechanisms, which are discussed in detail in Sections III-V of this article as vehicles for addressing disregard by global regulatory bodies. It then uses this framework to examine general calls for enhanced accountability and expanded participation as remedies for the ills of global governance and lays the basis for a more precise analysis of these tools in the context of their operation within the three governance mechanisms. In evaluating the potential of these instruments to address disregard and developing strategies to deploy them, reformers must pay close heed to insights from political economy analysis and constructionist theories of inter-institutional influences. They must do so in order to understand the design and operation of existing global regulatory institutions and the possibilities for changing them.

Strengthening domestic controls over global regulatory decision-making.

As discussed, a critical source of disregard problems is the shift of regulatory decision-making from domestic to global levels, short-circuiting domestic democratic political and legal controls over regulatory decisions. Thus, NGOs argue that regulatory decisions by the WTO, investment treaty arbitral tribunals, and other global bodies are undermining environmental, health, and

⁵⁸ For discussion of the concept of embedded liberalism in both the domestic and global contexts, see John Ruggie, *Trade, Sustainability and Global Governance*, 27 *Colum. J. Enviro. L.* 297 (2002); Evaristus Oshionebo, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities*, 19 *Fla. J. Int'l L.* 1 (2007); Ursula A. Wynhoven, *The Protect-Respect-Remedy Framework and the United Nations Global Compact*, 9 *Santa Clara J. Int'l L.* 81 (2011).

safety protection laws and programs in the as well as other countries.⁵⁹ The correlative remedy that they propose is to assert domestic legislative and judicial controls by, for example, refusing to recognize global regulatory norms in domestic legal systems or limiting the delegation of regulatory authority to global bodies.⁶⁰ This strategy suffers from significant limitations as a general solution to the problem of disregard in global regulatory governance. Security, prosperity, and effective health and safety and environmental protection often require close global regulatory cooperation among governments, including uniform or coordinated regulatory rules and programs. The executive must necessarily play a large role in the negotiation and implementation of such programs. The ability of domestic courts and legislatures to exercise significant and ongoing supervision and control over such programs is limited by their institutional circumstances and the principal-agent problems discussed above.⁶¹ Further, only the very most powerful nations can assert significant control over global regulatory rules and programs. Some of these are authoritarian. Greater control by powerful states can cause the disregard of the interests of citizens in smaller and weaker countries, including citizens in developing countries whose interests are ignored and disserved by their own governments. Finally, a significant and increasing proportion of global regulatory bodies are private or hybrid character, limiting the opportunities for domestic political and legal controls.⁶²

Contestation and resistance in distributed administrations.

A second strategy for the disregarded is to contest and thwart implementation by distributed administrations of regulatory programs that disregard their interests.⁶³ Many global regulators rely on domestic governments to implement their regulatory rules and decisions, opportunities are created for the disregarded to use domestic courts, administrative bodies and legislatures as

⁵⁹ E.g., Public Citizen, *Global Standard Setting in International Trade*, 1-3 (2004), available at <http://www.citizen.org/trade/harmonization/harmonization/>; Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 695 (2005). However, it is been forcibly argued that global regulatory regimes, including in the areas of free trade and human rights, can enhance domestic democracy. See Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1 (2009).

⁶⁰ 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 STAN. L. REV. 1557 (2003); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004); Robert O. Keohane, *Accountability in World Politics*, SCANDINAVIAN POLITICAL STUDIES Vol. 29, No. 2 at 80-81 (2006); Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 NYU Journal on International Law and Politics 695, 709 (2006).

⁶¹ Richard B Stewart, *id.*, at 723.

⁶² Powerful states may be able on occasion promote adoption by global regulatory bodies of policies more favorable to the disregarded and of institutional mechanisms than global bodies to ensure those policies are carried out, as exemplified by the U.S. Congressional pressures that led the World Bank to establish environmental and social guidelines and inspection Panel. Yet, these interventions do not amount to a general strategy. Moreover, authoritarian states may exert influences that are not benign.

⁶³ On the other hand, where the global human rights and environmental health and safety regulatory regimes are protective of interests that are disregarded at the domestic level, the disregarded seek to lobby available and responsive domestic fora in order to promote implementation and enforcement of the global rules and decisions.

fora to voice opposition and obstruct implementation of the global body's measures. For example, Latin American NGOs and human rights advocates for local citizens right to essential medicines have successfully lobbied to limit domestic authorities' recognition and enforcement of pharmaceutical companies' intellectual property rights.⁶⁴ Human rights advocates have secured domestic and European court decisions refusing to enforce travel restrictions and asset freezes on persons listed as terrorist financiers by the Security Council without affording them any procedural rights.⁶⁵ This strategy requires that the disregarded have capacity to effectively organize and advocate, and receptive domestic fora.⁶⁶ This strategy is of little use when the distributed administrations consist of private actors, such as business firms and nonprofit bodies that certify compliance with global standards.

Creating new global regimes to fill regulatory gaps.

Rather than seeking to change the procedures and policies of existing regimes in order to redress disregard, increasingly NGOs that advocate for the disregarded have founded new global regulatory bodies in order to protect them. They have done so in collaboration with multinational firms, governments, and international organizations in order to leverage their resources and support. Examples include global regulatory bodies that regulate the labor, human rights, and environmental practices in global supply chains, certify the environmental sustainability of carbon offset projects, promote transparency in payments by extractive industries to host governments, and certify sustainably produced forest products.⁶⁷ Rather than using "voice" to try to change the practices of existing regimes, these initiatives reflect an "exit" strategy.⁶⁸ As the examples reflect, this strategy is particularly apt for dealing with structural disregard resulting from gaps in existing global regulatory programs, where the other three strategies are of little avail.

Reforming global regulatory bodies' decision-making mechanisms.

A fourth strategy for the disregarded is to use or modify the existing decision-making mechanisms and arrangements of global regulatory authorities so as to secure greater regard by global regulatory authorities of their interests and concerns. This strategy is the focus of the remainder of the article.

C. Reforming Global Regulatory Bodies' Governance Mechanisms

⁶⁴ BALANCING WEALTH AND HEALTH (Rochelle Dreyfuss & César Rodríguez-Garavito eds., forthcoming 2014) (examining the intersection of patent rights and access to medicine).

⁶⁵ See, e.g., A, K, M, Q & G v. H.M. Treasury, [2008] EWCA Civ 1187, No. T1/2008/1080.

⁶⁶ BALANCING HEALTH AND WEALTH, supra.

⁶⁷ E.g., Patrícia Galvão Ferreira, , EITI: Using Global Regulation to Address the Domestic Governance Deficit in Resource-Rich Developing Countries (Extractive Industries Transparency Initiative); Jessica F. Green, *The Greenhouse Gas Protocol: A Case of Private Entrepreneurial Authority*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1450434; Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 EUR. J. INT'L L. 1, 47-87 (2006).

⁶⁸ ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970).

As Ruth Grant and Robert Keohane point out, there are many different types of practices for generating, constraining, directing, and influencing the exercise of power.⁶⁹ In the context of global governance, these practices include informal cooperation for mutual advantage, the exercise of various forms of compulsion or their threat, “go it alone” power and the accompanying threat of exit,⁷⁰ negotiation and bargain, competition or cooperation among different global regimes, and public and peer reputational influences.

This article focuses on institutional mechanisms for the governance of global regulatory bodies, which are of three basic types. These mechanisms are used by many different types of actors, including states, business firms and associations, international organizations, NGOs and in some cases individuals to secure and promote their interests. This article focuses on their use for redressing disregard.

Accountability mechanisms include institutional structures of five basic types: hierarchical, supervisory, fiscal, electoral, and legal. Each mechanism involves an account holder who can require administrative decision makers to account for their decisions and the ability of the account holder to impose disciplines or sanctions for deficient performance. The prospect of being required to make account and potentially incur sanctions or disciplines gives decision makers incentives to respond to the interests of the account holders. As applied in global regulatory governance, the first four mechanisms are generally used a global body’s most powerful members or benefactors to control or influence its decision; they are generally not accessible by the disregarded. In some cases outsiders can invoke mechanisms of legal accountability by obtaining review of the global body’s decisions by domestic or international court or other independent reviewing body in order to secure regard for their interests and concerns.

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. Decisional authority is generally exercised by representatives of the body’s members. In the case in the case of the most powerful In the case of the most powerful global bodies these members are states, government officials, and international organizations who have established and fund and otherwise support the organization. Members are reluctant to share decisional power with others, especially the disregarded, whose interests often conflict with realization of the organization’s mission. If, however, advocates for the disregarded succeed in establishing new global regulatory bodies, as discussed above, they will enjoy decision-making power in these organizations and also be able to invoke the grant-based accountability mechanisms to influence decisions.

Third, **other regard-promoting measures** are institutional arrangements or practices that are neither decision rules nor accountability mechanisms, but provide global bodies with various incentives to give greater regard to disregarded interests. Examples include transparency

⁶⁹ Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 30 (2005).

⁷⁰ See K. Abbott and D. Snidal, *The Governance Triangle, Regulatory Standards, Institutions and the Shadow of the State*, in THE POLITICS OF GLOBAL REGULATION 46 n.8, 59 (Walter Mattli & Ngaire Woods, eds. 2009).

requirements or practices under which regulatory bodies affirmatively provide information about their activities, procedures that enable outsiders to participate in organizational decisions without exercising decisional authority (for example, by consultation practices or submitting comments on proposals), and giving reasons for decisions. Other potential mechanisms include initiatives to mobilize peer reputational influences on global decision makers, promote competition among different global regulatory bodies in the same field of regulation, or mobilize market forces in social and environmental regulation along global commodity chains. Many of these mechanisms can be accessed by the disregarded and used to exert influence.

Decision rules and accountability mechanisms tend to assign defined authorities and responsibilities to specified actors. The other responsiveness-promoting practices do not. Their operation is typically more diffuse and indeterminate the three different types of governance tools may function either as substitutes or complements. Or, they may conflict and operate at cross purposes. Their impact on the ability of a global body effectively to carry out its mission must also be considered.

Greater accountability as a general remedy for disregard

Critics of global governance often contend that the ills of global governance are due to the fact that global authorities are not accountable; they propose greater accountability as a solution.⁷¹ Yet despite claims of an “accountability crisis,”⁷² these authorities do not lack accountability. Rather, as Robert Keohane has made clear, they are often all too accountable to the states, powerful economic actors, and other entities that establish and support them. The questions are to whom global decision makers are or should be accountable and by what means. The critics often fail to specify the precise character of asserted accountability failures that they assert or the specific type of accountability mechanisms that should be adopted in response.⁷³ This article seeks to provide a framework for understanding accountability and the institutional mechanisms for securing it that provides needed analytic clarity.

A more fundamental problem with the accountability agenda is that the root problem is not the absence of accountability mechanisms as such, but disregard. The growth of global regulatory governance has indeed undermined the efficacy of the political and legal accountability mechanisms operating in the nation-state context. But it does not follow attempting to develop and apply analogous accountability mechanisms to global decision-making is the solution. Using

⁷¹ Lauren Groth, *Transforming Accountability: A Proposal for Reconsidering How Human Rights Obligations Are Applied to Private Military Security Firms*, 35 HASTINGS INT’L & COMP. L. REV. 29 (2012); Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT’L L. 173 (2002); Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT’L L. 177 (2005); Ronli Sifris, *Weighing Judicial Independence Against Judicial Accountability: Do the Scales of the International Criminal Court Balance?*, 8 CHI.-KENT J. INT’L COMP. L. 88 (2008); Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 Harv. Hum. Rts. J. 205 (2002).

⁷² E.g., J. Wouters, B. De Meester & C. Ryngaert, *Democracy and International Law*, in Netherlands Yearbook of International Law 139, 180 (2003) (on democracy in international organizations).

⁷³ E.g., Jose E. Alvarez, *Accounting for Accountability*, 37 Colum. J. Transnat’l L. 1003, 1008 (1999) (reviewing STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW (1997)) (“For a book that is ostensibly about ‘accountability,’ it says little about what the concept means.”).

the other mechanisms -- decision rules and other responsiveness-promoting measures -- may often be more productive. Focusing simply on accountability threatens to misdiagnose the fundamental problem and prescribe the wrong remedies.

Expanded participation as a general remedy for disregard

Many global regulatory critiques and cures are also couched in the language of participation. The weak and marginalized are often said to have been neglected because their representatives did not have an adequate opportunity to participate in decisions by global authorities that affect them in important ways.⁷⁴ The corresponding remedy is creation or expansion of participation rights.

Participation is indeed an important remedy for problems of disregard. Participation, however, assumes many different forms that operate in a variety of different decision-making contexts. These differences, and the need carefully to analyze them, are not always observed in calls for greater participation. This article seeks to help clarify analysis and prescription regarding participation in global regulatory governance.

Participation does not comprise a single type of governance mechanism. There are two basic types of participation —decisional and non-decisional— that operate and must be examined within the tripartite framework of governance mechanisms presented in this article. Decision rules may give identified persons the right to vote on or otherwise play a role in the making of authoritative decisions by a body, thereby conferring decisional participation rights, discussed in Part III. These rights may in some cases be exercised by representatives who are elected by a given group of instructions or persons, creating electoral accountability between the representatives and the electors. Other participation rights are non-decisional; the participant has no role in actually making a decision but can make submissions or express views to those who do. Decisional participation is often restricted to organizational “insiders” including members of the global body and its principal officials but non-decisional participation, as discussed below in Part IV, can function as a responsiveness -promoting mechanism by giving “outsiders” access and put to decision-making procedures.

Certain forms of non-decisional participation may play an important role in accountability mechanisms, most notably those for legal accountability, which typically confer rights to submit evidence and argument to a tribunal or other body reviewing the global body’s decision in order, among others objectives, and to generate a record for review. They may also include the right (in order to generate a record for review) to submit evidence and argument to the global administrative organ making the initial decision on, for example, blacklisting a contractor charged with corruption or granting refugee status to a person seeking asylum.

More often, non-decisional participation does not operate as part of an accountability mechanism but simply represents an input to the global body’s decision-making. Thus, a global body may afford selected “stakeholders” or the public generally the opportunity for consultation or submission of views or comments regarding a global body’s forthcoming decisions. Non-

⁷⁴ B.S. Chimni, Co-option and Resistance: Two Faces of Global Administrative Law, 37 N.Y.U. J. INT’L L. & POL. 799 (2005).

decisional participation rights and opportunities are quite varied. They may be provided as a regular practice in accordance with published procedures or granted on a discretionary basis.

It may be infeasible, impractical or dysfunctional to extend “strong” forms of participation -- such as the right to play a role in making decisions or the right to a hearing through legal accountability mechanisms --to the wide range of those affected by a global body’s decision. Non-decisional participation in the form of consultation or submission of comments may in practice be dominated by well-organized and financed economic interests⁷⁵ or may be otherwise ineffective in remedying disregard.⁷⁶ Domestic experience shows that granting rights to participate, whether in the form of decisional participation or otherwise, does not necessarily solve problems of disregard.⁷⁷

A single-minded focus on participation, like a single-minded focus on accountability, may obscure the underlying problem of disregard in decision-making and overlook the potential for using other institutional mechanisms and remedies that may be more effective in promoting regard. The three Parts which follow provide the foundation for comprehensive analysis and assessment.

III. DECISION RULES

One means of promoting greater regard by global regulatory bodies for the disregarded is to change their decision rules to give them decisional power. For example, a global regulatory body could include representatives of disregarded as voting members of one or more of the organization’s decision making bodies and thereby make “outsiders” into “insiders.” These

⁷⁵ For example, in an effort to provide greater participation to its decision making process, the Basel Committee on Bank Supervision adopted a notice and comment type procedure. *See* Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT’L L. 15, 24–26 (2007) (describing the development of notice and comment type rulemaking at the Basel Committee). As Barr & Miller note, while some community groups did participate in the process, the most common participants were academics and major industry groups. *See id.* The comment letters to the Basel consultative documents may be viewed online, and these confirm the general observations about the composition of participants. *E.g.*, Comments Received on the Consultative Document “Capitalisation of Bank Exposures to Central Counterparties”, <http://www.bis.org/publ/bcbs190/cacomments.htm> BASEL COMM. ON BANKING SUPERVISION (last visited Jul. 17, 2013).

⁷⁶ B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT’L L. 1 (2004), available at <http://www.ejil.org/article.php?article=334&issue=19>; Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT’L L. 187 (2006).

⁷⁷ Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 Int’l Org. 1 (2009), *supra* note XX. *See also* United States v. Carolene Prods. Co., 304 U.S. 144 (1938); John Hart Ely, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT’L L. 539, 605 (1992) (arguing that the United Nations’ stance on human rights would be undermined if it gave seats to governments that disregarded the result of a monitored election); Dale Ho, *Minority Vote Dilution in the Age of Obama*, 47 U. RICH. L. REV. 1041 (2013) (arguing for continued protections for minority voters in the face of persistent racial polarization and vote dilution); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997) (arguing that adequate representation in class actions does not sufficiently protect class members who wish to participate actively in the suit).

representatives might be appointed by an NGO or other entity speaking for the disregarded or they might be chosen through systems that involve collections.

In the strongest form, representatives of the disregarded would be given the right to sit on and vote in the general decisional body of the organization—its governing council or the equivalent. Alternatively, representatives of affected interests could be included as decisional participants on boards, committees, and other subsidiary or related organs that play specified roles in the making of certain specific decisions without exercising general authority. The power exercised would be conditioned by decision-making rules for plural bodies, such as majority vote, supermajority vote, and consensus/unanimity, and by the division of authority among different internal bodies and their interrelation.

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 general solution to the problem of disregard. Second, it will address a particular mode of decision making—deliberative, consensus-based decision making-- that might have greater promise.

A. Obstacles to Granting Decisional Authority to the Disregarded

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

Regime members' resistance to sharing power with the disregarded

Global regulatory bodies are often created and dominate by founders—states, domestic agencies, international organizations, business and professional groups, NGOs—to solve coordination and other cooperation problems and to advance their mutual interests. The founders/members provide such bodies with resources, authority, and other forms of support. They arrogate to their agents or representatives the most significant decisional power within the organization. The members and officials of global regulatory bodies are generally unwilling to share decisional authority with others.

There are, however, growing exceptions to this generalization. Global regulators, including those with economic regulatory and other missions, may admit a broader range of actors into a body's governance if doing so will advance the organization's goals.⁷⁸ The circumstances of global regulation and administration increasingly require such inclusion. However, in most instances the decisional role, if any, recorded to these actors is generally quite limited and grants of decisional authority to representatives of the disregarded are rare in many fields of global regulation. But some global authorities, particularly those involved in environmental and social regulation and delivery of health and social services-- especially those constituted by NGOs and

⁷⁸ A prominent example of this phenomenon is the permanent membership of the UN Security Council, which, as scholars have observed, reflects geopolitical calculations of a bygone era. See, e.g., Hilary K. Josephs, *Learning from the Developing World*, 14 KAN. J.L. & PUB. POL'Y 231, 233 (2005); Tony Karon, *India's Security Council Seat: Don't Hold Your Breath*, TIME, Nov. 10, 2010, available at <http://www.time.com/time/world/article/0,8599,2030504,00.html>.

international organizations -- have missions to benefit the disregarded and may provide a sometimes significant decisional role for organizations that represent them.

The need for broad coordination and support in order to compete with rival regulatory bodies and implement their programs has increasingly led global regulatory bodies to engage other actors and constituencies. These include representatives of other global and domestic bodies, business firms, NGOs, and expert groups whose input and support is valuable to the organization.⁷⁹ Private and hybrid public-private regulatory regimes characteristically adopt this strategy, often assuming a strongly horizontal structure, but increasingly so do global regulatory bodies and networks constituted by governments. Global regulatory bodies for economic, environmental and social regulation, development assistance, and social services delivery have accorded some form of decisional role to funders, implementation partners, and expert bodies in order to further their work.⁸⁰ This role typically consists of membership on advisory and consultative bodies that provide input to the ultimate decision-makers,⁸¹ or that play a defined, limited role in a multi-step decision process without exercising final authority. In some circumstances representatives of various outside constituencies may participate directly in formulating and establishing regulatory rules.⁸²

These complex decision-making arrangements often extend to the structures of the distributed administrations of global regulatory bodies.⁸³ The participants may include representatives of other global or domestic organizations, business firms, NGOs, and expert groups whose input

⁷⁹ See him Lorenzo Casini, "Down the Rabbit Hole" the Projection of the Public-Private Distinction beyond the State (forthcoming); Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It be Democratic?*, 8 CHI. J. INT'L L. 513, 522 (2008).

⁸⁰ For example, the World Heritage Convention, adopted by UNESCO in 1972 and administered by the World Heritage Committee, establishes the criteria that qualify a site for designation and protection as World Heritage site. Sites are designated by the World Heritage Committee, composed of representatives of 21 of the states that are parties to the convention. Three international expert bodies, the International Union for Conservation of Nature; the International Council on Monuments and Sites; and the International Centre for the Study of the Preservation and Restoration of Cultural Property must provide advice to the committee on the suitability of candidate sites before designations are made. Although not bound by the Advisory Bodies' recommendations, the Committee benefits from their expertise as well as their legitimacy. However, since all States are represented in the Advisory Bodies, this arrangement may not prevent possible Committee favoritism for well-known sites and more powerful States. See *The World Heritage Convention*, UNESCO WORLD HERITAGE CENTER, <http://whc.unesco.org/en/convention/>.

⁸¹ Eleonora Cavalieri, *The Role of Advisory Bodies in the World Heritage Convention*, in GLOBAL ADMINISTRATIVE LAW CASEBOOK I.E.15 (Sabino Cassese et al. eds., 3d ed. 2012).

⁸² See Jessica Green, *supra*.

⁸³ There is scant 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; for an example of resulting tension, see Drew Hinshaw & Chuin-Wei Yap, *Arrests in Ghana Stoke Tensions*, Wall Street Journal, June 7, 2013, available at <http://online.wsj.com/article/SB10001424127887324069104578531183642717120.html>.

and support is valuable to the organization.⁸⁴ They also often include formal as well as informal linkages with other global regulatory bodies operating in the same general field.⁸⁵ Such linkages are one important element of the inner institutional dynamics within a global administrative space that has become more densely populated by various regulatory regimes. Governance 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.”⁸⁶

Some of these arrangements provide for representation of the disregarded on advisory and consulting bodies, more rarely in decision-making. For example, global regulatory bodies for social and environmental regulation of global supply chains and whose founders include NGOs have sought to give decisional roles to representatives of labor, environmental, and local interests in developing countries, with varying success.⁸⁷ These efforts confront thorny problems of how best to ensure effective and responsive representation of weakly organized interests and groups, including those that are poor and marginalized.⁸⁸ In other instances the role accorded to representatives of disregarded interests may be superficial.⁸⁹

Strong resistance to sharing decision-making power with NGO representatives of the disregarded persists in global regulatory bodies for economic regulation, economic development and security that are governed and funded by powerful states; it is precisely these organizations where problems of disregard are often most acute.⁹⁰ Granting decisional powers to such NGOs threatens contestation and conflict that would divert the organization from its core mission and promote policies contrary to members’ interests. In order to meet criticisms and shore up its

⁸⁴ See him Lorenzo Casini, "Down the Rabbit Hole" the Projection of the Public-Private Distinction beyond the State (forthcoming); Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It be Democratic?*, 8 CHI. J. INT’L L. 513, 522 (2008).

⁸⁵ E.g., WTO and Codex, etc

⁸⁶ Grant & Keohane, supra note XX, at 30.

⁸⁷ See Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 CHI. J. INT’L L. 513, 530-31 (2008).

⁸⁸ See Sungjoon Cho & Claire R. Kelly, *Are World Trading Rules Passe?*, 53 Va. J. Int’l L. 623, 664-65 (2013) (on the complexity of today’s global supply chains and the marginalization of non-state actors in the system).

⁸⁹ Li-Wen Lin, *Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China*, 15 Cardozo J. Int’l & Comp. L. 321 (2007) (reviewing criticisms of global supply chain reforms).

⁹⁰ E.g. WORLD TRADE ORGANIZATION ENVIRONMENT COMMITTEE, http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm (last visited Feb. 15, 2014); Rahim Moloo, *The Quest for Legitimacy in the United Nations: A Role for NGOs?*, 16 UCLA J. INT’L L. & FOREIGN AFF. 1 (2011). 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; for an example of resulting tension, see Drew Hinshaw & Chuin-Wei Yap, *Arrests in Ghana Stoke Tensions*, Wall Street Journal, June 7, 2013, available at <http://online.wsj.com/article/SB10001424127887324069104578531183642717120.html>.

reputation with various the “legitimacy audiences,”⁹¹ such organizations may afford NGO and other representatives of the disregarded roles of a non-decisional sort such as membership on advisory or consultative bodies.⁹² They are generally able to have only very limited influence through these forms of participation, which have been criticized as window dressing that provides only the appearance of engagement.⁹³

Organizational mission effectiveness

A second obstacle to according disregarded interests decisional rights is the need for organizational effectiveness. Realizing the benefits of specialization may require that decisional authority in global regulatory bodies be restricted to a core constituency invested in promoting its specific mission --whether it be to liberalize trade, secure robust and efficient financial markets, reduce greenhouse gas emissions, ensure the safety of pharmaceuticals, or deliver healthcare --- and not extended to representatives of other constituencies that are affected by the body’s decisions that have somewhat different interests. These representatives in decision-making would make it more difficult to reach agreement and tend to sap the advantages of specialization, increase transaction costs, and undercut efficiency and the accountability of the organization’s officials and staff to the members.⁹⁴ The risks of diverting the organization from its core task and dissipating energies maybe be greatest when global regulatory bodies are asked to deal with structural disregard created by gaps in global regulation. According the disregarded decisional authority or access to accountability mechanisms may cause significant reductions in the global benefits from institutional specialization that could justify refusal to take such steps, notwithstanding the disadvantages or harms suffered by the disregarded.⁹⁵

Problems in securing effective representation of the disregarded

⁹¹ The concept of "legitimacy audiences" is discussed in Eran Shamir-Borer, Legitimacy Without Authority in Global Standardization Governance: The Case of the International Organization for Standardization (ISO), in GLOBAL ADMINISTRATIVE LAW CASEBOOK I.C.1 (Sabino Cassese et al. eds., 3d ed. 2012), available at <http://www.irpa.eu/wp-content/uploads/2012/08/The-Casebook-Chapter-1.pdf>.

⁹² Seema Sapra, *The WTO System of Trade Governance: The Stale NGO Debate and the Appropriate Role for Non-State Actors*, 11 OR. REV. INT’L L. 71, 88 (2009) (describing three instances where the WTO has established consultative schemes for NGOs); see also Peter J. Spiro, *Accounting for NGOs*, 3 CHI. J. INT’L L. 161, 167 (2002) (noting that major NGOs “already effectively have a seat at the table”). C.f. Sophie Smyth, *NGOs and Legitimacy in International Development*, 61 U. KAN. L. REV. 377, 434-44 (2012) (on the “exclusion norm” that NGOs face, inhibiting participation).

⁹³ Rafael Leal-Arcas, *The EU Institutions and Their Modus Operandi in the World Trading System*, 12 Colum. J. Eur. L. 125, 141-44 (2005) (on attempts to improve civil society engagement).

⁹⁴ “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 X at 224.

⁹⁵ The lack of global redistributive mechanisms may, however, require global regulatory bodies to give greater weight to the distributional impacts of their decisions than similar domestic regulatory bodies. And, welfare maximizing considerations may well not justify the imposition of foreseeable and targeted harms on particular persons and discrete groups, such as asserted terrorist financiers denied the right to travel or indigenous communities wiped out by internationally funded development projects.

A third obstacle to extending decisional rights disregarded interests is the difficulty of developing principled and practicable means for representing them in decision-making. Founders, including states, international organizations, business firms, and in some cases NGOs dominate decision making in such bodies not just because they are founders but because they are established, resourced, and effective institutions representing important interests. They are accountable, however imperfectly, to those interests through domestic or international political processes or are subject to market or market-type disciplines that promote appropriate regard. The disregarded are at best loosely and weakly organized, creating serious difficulties in vesting them with decisional authority in global bodies.⁹⁶

These difficulties in providing effective representation are much less serious in the case of non-decisional participation. A global body may rather extend the opportunity, for example, to submit comments on proposed rules and decisions to the general public, including representatives of interests and groups outside its core constituencies, without risking major dysfunctions. But the challenges are much greater when extending the right to make the decisions. One must specify the groups and societal interests that should be at the table and identify a representative that would occupy their seats.⁹⁷ Where a decision directly affects a discrete group, such as a local community impacted by a development project, this task may be comparatively easy. It is much more difficult when the effects of regulatory decisions are more diffuse and widespread. The choices as to which interests are to be represented and by which representatives would to a substantial extent have to be left to the global authority itself, presenting risks of bias and cooption in the selections.⁹⁸ NGO-initiated environmental and social regulatory regimes, such as the Forest Stewardship Council,⁹⁹ have made progress in solving these problems, although disparities in organization and resources and other factors have created difficulties in ensuring effective representation for interests in the global South.¹⁰⁰ And, however successful these

⁹⁶ The Forest Stewardship Council does not allow government agencies or officials to become members, though governments can participate in standard-setting and observe in the FSC General Assembly. Each stakeholder, when applying for membership, selects either the environmental, social, or economic chamber, and the subchamber depends on whether legal registration is in a high-income country (North) or low-income country (South), per World Bank definitions. Individual members comprise 10% of the vote in each chamber and organizations comprise the remaining 90%. The subchamber divisions into North and South are intended “to guarantee equal weight of vote and influence among the various countries and economic powers represented.” FOREST STEWARDSHIP COUNCIL – UNITED STATES, FREQUENTLY ASKED QUESTIONS, <https://us.fsc.org/download.membership-faqs.130.pdf>.

⁹⁷ Some proponents of global constitutionalism suggest that there are emerging, generally applicable substantive and procedural norms for governance that might assure proper representation, 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.

⁹⁸ Administrative and regulatory authorities in European countries and the EU operate within neo—corporatist traditions and practices that enable them to recruit labor unions, trade associations, professional groups, and environmental and consumer NGOs, and other groups that governments have recognized as authoritative representatives of the interests in question. This practice is generally not feasible nor is it likely to be desirable in the emergent and fluid circumstances of global regulation.

⁹⁹ Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 *EUR. J. INT’L L.* 47 (2006); Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 *CHI. J. INT’L L.* 513, 530-31 (2008).

¹⁰⁰ Klaus Dingwerth, *North-South Parity in Global Governance: The Affirmative Procedures of the Forest Stewardship Council*, 14 *GLOBAL GOVERNANCE* 53, 61-64 (2008). In his study of the Forestry Stewardship Council,

efforts may prove in the regulatory sectors in which they operate, there would be enormous difficulties in transposing them to many other sectors of global regulation, including in the fields of security, global economic regulation, and development finance.

B. Deliberative Decision-Making: A Promising Pathway to Overcoming Disregard?

Under deliberative conceptions of decision-making, consensus decisions on particular matters are reached through a process of dialogue among participants representing the interests and concerns of those with a legitimate stake in the decisions. The dialogue involves the mutual exchange and consideration of reasons and evidence through a problem-solving approach in order to arrive at shared understandings and solutions. Such processes of dialogic consensus through intensive discussion and convergent reasoning are contrasted with decisions imposed by power (including voting power exercised under decision rules other than unanimity), or bargains arrived at through strategic negotiation, or market-based mechanisms for composing divergent interests and preferences. Under the latter approaches, the problem of disregard can be viewed as one of imbalance in the effective power, resources and influence of different social and economic interests. The remedy would be to devise voting rules or other governance mechanisms to redress that imbalance in order to produce a decisional vector more favorable to the disregarded. The deliberative approach, by contrast, would focus on ensuring that the voices and views of the disregarded are heard, and generating consensus decisions based on reasoned consideration of their interests and concerns along with those of other affected groups and interests, in accordance with the *quod omnes* principle.

The growing interest in deliberative approaches to global governance stems in part from practices in European governance, such as the Comitology process for harmonizing regulatory standards for goods and services and the Open Method of Coordination for cooperative development by member states of certain social and economic programs. A number of scholars view these practices as successful instances of deliberative decision-making.¹⁰¹ The extent to which the actual decisional processes approximate the deliberative ideal, include and consider all relevant interests, or operate effectively, is contested.¹⁰²

Dingworth found that procedures adopted to promote greater regard for South interests did not close the gap in effective influence between the global North and South. Standards disproportionately favored northern interests. Furthermore, although some areas in the global south were well represented, their representation might lack resources or ability to influence decisions. He concludes that a broader array of governance arrangements is needed to solve the problem of disregard. *Id.* at 61-64, 66-67.

¹⁰¹ Christian Joerges, From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology, 3 *Eur. L.J.* 273 (1997); Christian Joerges, “‘Good Governance’ Through Comitology?”, in *EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS* 311 (Christian Joerges & Ellen Vos eds., 1999); Jürgen Neyer, Discourse and Order in the EU, 41 *J. COMMON MARKET STUD.* 687 (2003); Charles F. Sabel & Jonathan Zeitlin, Learning from Difference: The New Architecture of Experimentalist Governance in the EU, 14 *Eur. L. J.* 271, 274 (2008) (arguing that OMCs “give precise definition” to deliberation); Joshua Cohen & Charles Sabel, Directly-Deliberative Polyarchy, 3 *EUR. L. J.* 313 (1997); Joshua Cohen & Charles F. Sabel, Global Democracy?, 37 *N.Y.U. J. INT’L L. & POL.* 763 (2005).

¹⁰² See Mark A. Pollack, Control Mechanism or Deliberative Democracy? Two Images of Comitology, 36 *COMP. POL. STUD.* 125 (2003); Bart M.J. Szewczyk, European Citizenship and National Democracy: Contemporary Sources of Legitimacy of the European Union, 17 *COLUM. J. EUR. L.* 151, 184 (2011). See generally Chen-Bo Zhong, The Ethical Dangers of Deliberative Decision Making, 56 *ADMIN. SCI. QUART.* 1 (2011); Michael E.

At the same time, decisional practices that have a deliberative character are operating quite successfully in a variety of global regulatory and other administrative bodies. Most of these practices, however, do not resemble those envisaged by advocates of global deliberative democracy. The most notable uses of deliberative practices are by the myriad global bodies that set specialized technical and regulatory standards for internationally traded products and services, anti-money laundering programs, or clinical trials on the safety and efficacy of new drugs. Their decisional processes are variously populated, depending on the regime in question, by representatives of business organizations, expert groups, and domestic regulatory officials from major jurisdictions, and, depending on the regime and its regulatory mission, representatives of NGOs. Deliberative processes are also used in a vast number of expert advisory and consultant bodies that play a subsidiary role in the decision-making of many global administrations.

Global bodies have adopted these decisional procedures because of their problem-solving utility for the organization in advancing its mission. Deliberative processes are practicable and work best where the participants share common professional experience and outlook, all have adequate resources to participate effectively, and distributional consequences are not great. In many cases, however, these processes, much less the ultimate decisions made, are rarely purely deliberative; they usually include some greater or lesser admixture of interest, power, and bargain¹⁰³. In most instances environmental, consumer, and social interests, including those of developing country workers and citizens are generally either not represented at all or only marginally.¹⁰⁴ This circumstance, however, is not of great concern in the case of many technical standard-setting activities that have only very modest and peripheral distributional implications for broader social interests.

NGO-led global regulatory programs, ranging from the Greenhouse Gas Protocol¹⁰⁵ to the Extractive Industries Transparency Initiative,¹⁰⁶ to various global supply chain social and

Morrell, *Deliberation, Democratic Decision-Making and Internal Political Efficiency*, 27 *POL. BEHAVIOR* 49 (2005); Timur Kuran, *Insincere Deliberation and Democratic Failures*, 12 *CRITICAL REV.* 525 (1998). Kenneth Armstrong & Claire Kilpatrick, *Law, Governance, or New Governance? The Changing Open Method of Coordination*, 13 *COLUM. J. EUR. L.* 649, 658-61 (2007) (noting the difference between the ideal of the OMC and its practice); Timo Idema & R. Daniel Keleman, *New Methods of Governance, the Open Method of Co-ordination and Other Fashionable Red Herring*, 7 *PERSP. EUR. POL. & SOC'Y* 108, 108, 110 (2006) (questioning the ideal of the OMC and its ability to enhance the legitimacy of EU policy making, and questioning the OMC's ability to promote deliberation).

¹⁰³ See Neil Craik, *Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments*, 38 *VICTORIA U. WELLINGTON L. REV.* 381, 386, 390 (2007) (distinguishing deliberation as less vulnerable to differences in bargaining power than aggregative models, and suggesting that using deliberative processes in science-based decisions may address power differentials between experts and non-experts).

¹⁰⁴ See Ayelet Berman, *supra*, on the International Conference on Harmonization (ICH) standards for pharmaceutical safety testing set by representatives of EU, US and Japanese regulators and major pharmaceutical comp She finds that the standards fail adequately to consider consumer and developing country interests. See also Sarah Molinoff _____ (finding that ICH standards allowing use of placebos in clinical trials reflects dominant influence of interests of the pharmaceutical manufacturers and US, EU and Japanese regulators, disregarding ethical concerns of global medical and medical research bodies and some developing countries).

¹⁰⁵ Greenhouse Gas Protocol, <http://www.ghgprotocol.org/>; for discussion, see JESSICA F. GREEN, *RETHINKING PRIVATE AUTHORITY: AGENTS AND ENTREPRENEURS IN GLOBAL ENVIRONMENTAL GOVERNANCE* (forthcoming, December 2013).

environmental regulatory programs,¹⁰⁷ present rather encouraging examples of a more inclusive approach to deliberative decisional processes. Global regimes constituted by governments and international organizations are increasingly using of consultative bodies representing a broader range of constituencies that follow some version of deliberative processes. These bodies might gradually assume some form of decisional role, transforming non-decisional participation into decisional participation.¹⁰⁸

Notwithstanding these encouraging developments, efforts to promote broad use of more inclusive deliberative processes for global regulatory decision making face the same three basic obstacles discussed above: the reluctance by dominant members, especially powerful governments, to share authority; the need for efficient specialization; and the problems in providing effective representation for disregarded interests. Some progress has been made in addressing these obstacles, as the examples above illustrate, global regulatory bodies, especially private and hybrid bodies, increasingly include a broad range of “stakeholders” in their governance processes, including in deliberative decision-making processes. They do so in order to enhance the quality and uptake of their regulatory products. Particularly in the context of networked regulatory strategies and organizations, decisional participation through deliberative modes has in many instances been successful in promoting these objectives. The stubborn problem of securing effective representation for poorly organized and under resourced groups and interests persists. It is inconceivable that multi-stakeholder processes, in some cases involving deliberative decision-making will be adopted for significant decisions in the more important and powerful global regulatory bodies. And, they may be unsuited for use due to the character of regulatory problems in their needed solution, for example in the field of security.

IV. ACCOUNTABILITY MECHANISMS

Accountability represents the second basic category of global regulatory governance mechanisms. To the extent that it is not feasible to provide the disregarded with decisional authority, can the resulting imbalances in regard be corrected by enabling them to access and use accountability mechanisms in order to ensure that decision makers give regard to their interests and concerns?

Accountability is all the rage. Accountability is “an ever-expanding concept”¹⁰⁹ that “crops up everywhere performing all manners of analytical and rhetorical tasks and carrying most of the

¹⁰⁶ EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <http://eiti.org>.

¹⁰⁷ Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 CHI. J. INT’L L. 513 (2008).

¹⁰⁸ An analogous development has occurred in the Codex Alimentarius Commission, where civil society organization representatives, including business representatives and NGOs, have to obtain the right to attend and speak at meetings where government representatives decide on Codex standards. Some observers, however, find that Codex decisions on standards still unduly favor producer interests. See Michael Livermore, *Note: Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 N.Y.U. L. REV. 766 (2006).

¹⁰⁹ Edward Rubin, *The Myth of Non-Bureaucratic Accountability and the Anti-Administration Impulse*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS, AND EXPERIENCES 52 (Michael Dowdle ed., 2006).

burdens of democratic ‘governance.’”¹¹⁰ The term functions as “a placeholder for multiple contemporary anxieties.”¹¹¹ 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 institutions. All manner of measures are advocated to strengthen accountability, including enhanced transparency, participation, rulemaking, reason-giving, deliberation, dialogue, benchmarking, and reporting.

Accountability mechanisms are important institutional tools that can improve governance in many contexts including global regulatory governance, but they are not a cure-all. Notwithstanding all the accountability talk, there has been relatively little careful and sustained analysis of the concept of accountability and its relation to specific global governance needs and possibilities for institutional reform.¹¹² This article seeks to augment and enrich that corpus. It explicates the structural features and functions of accountability mechanisms in order to clarify their role in governance. The article first offers a generic account of accountability, applicable to any realm of governance. It takes a positive and not a normative approach to analyzing accountability. It treats accountability not as a hallmark of legitimacy but as a family of institutional arrangements for conferring and controlling power and resources. These instruments can be used to advance various ends, including normative ends such as redress of disregard. The article then examines the role of accountability mechanisms in global administrative regulation and their potential for fostering greater regard for the disregarded.

The article argues that there are five distinct accountability mechanisms. The accountability literature, including that in the field of global governance, gives many other types of arrangements the accountability label. This article argues, for reasons elaborated below, for restricting the label to the five mechanisms in the interests of analytic clarity and sound prescription.

¹¹⁰ Ricard Mulgan, “Accountability”: *An-Ever-Expanding Concept?*, 78 PUB. ADMIN. REV. 555 (2000), quoted in Harlow, *supra* note X, at 1.

¹¹¹ 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 15.

¹¹² 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,”* 65 PUB. ADMIN. REV. 1 (2005). For a dissection of the concept of accountability based on the actors involved and the way they interact, see Mark Bovens, *supra*. See also Susan Rose-Ackerman, *Regulation and Public Law in Comparative Perspective*, 60 U. TORONTO L. J. 519, 523 (2010) (arguing for three kinds of accountability that support legitimacy: effective performance of government programs, protection of human rights, and creation of democratically-supported policies); Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMP. L. 859, 872 & n.32 (2011) (finding four kinds of accountability relations in domestic public administration: relations with elected politicians, organized interests, courts, and the public, and arguing that the transnational dimension operates in the same way); JONATHAN G.S. KOPPELL, *Accountability and Legitimacy-Authority Tension in Global Governance*, in WORLD RULE: ACCOUNTABILITY, LEGITIMACY, AND THE DESIGN OF GLOBAL GOVERNANCE 31 (arguing for five kinds of accountability: transparency, liability, controllability, responsibility, and responsiveness).

A. The Five Accountability Mechanisms

The five basic types of institutional mechanisms are electoral, hierarchical, supervisory, fiscal, and legal accountability mechanisms. Each satisfies three fundamental requirements: (1) a specified accounter, who is subject to being called to provide account including, as appropriate, explanation and justification for his conduct; (2) a specified account holder who can require the accounter to render account to him for his performance; and (3) the ability and authority of the account holder to impose sanctions or mobilize other remedies for deficient performance and perhaps also confer rewards for superior performance.¹¹³

Ruth Grant and Robert Keohane have systematically examined accountability in the global governance context,¹¹⁴ while Richard Mulgan,¹¹⁵ Mark Bovens,¹¹⁶ and Jerry Mashaw¹¹⁷ have done so in the domestic context.¹¹⁸ Others have studied accountability in the context of international organizations¹¹⁹ and regulatory administration.¹²⁰ As shown by these and other authors, accountability is a relational concept. Some accountability regimes may include elements beyond these four essential requirements, for example a specified process for the rendering of account by the accounter and for evaluation of his performance by the account holder or a third party (such as a court). Some regimes may also include the giving of reasons or justifications by the accounter for his conduct, the giving of reasons by the account holder for her evaluations, and standards by which the accounter's conduct is to be evaluated.¹²¹ These additional elements are not essential requirements of accountability and can, as discussed in Part IV of this article, function independently of accountability measures to address the problem of disregard.

¹¹³ 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 that they embrace. Mark Bovens, *supra*, defines accountability more narrowly as a relationship between an actor and a forum in which the actor must explain and justify her conduct, the forum can ask questions and judge the conduct, and the actor may face consequences. Bovens' taxonomy of accountability relations stems from three questions: who is giving account, to whom the actor is giving account, and the kind of conduct in question.

¹¹⁴ R. Grant & R. Keohane. *supra*.

¹¹⁵ Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracy* (2003).

¹¹⁶ Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L.J. 447, 448 (2007).

¹¹⁷ J. Mashaw, *supra*; *see also, e.g.*, Colin Scott, *Accountability in the Regulatory State*, 27 J.L. & SOC'Y 38 (2000).

¹¹⁸ For discussion of accountability in the context of the EU, see CAROL HARLOW, *ACCOUNTABILITY IN THE EUROPEAN UNION* (2002).

¹¹⁹ International Law Association, *Accountability of International Organizations*, Final Report (2004) [hereinafter ILA, *Accountability of International Organizations*]; 36 *Netherlands Yearbook of International Law*, Symposium on *Accountability in the International Legal Order* (2005), especially Deirdre Curtin and André Nollkaemper, *Conceptualizing Accountability in International and European Law*, *id.* at 3, and Ige F. Dekker, *Making Sense of Accountability in International Institutional Law*, *id.* at 83.

¹²⁰ E.g. Julia Black, *Paradoxes and Failures: "New Governance" Techniques and the Financial Crisis* 75 *MLR* 1037 (2013); Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, in the *Oxford Handbook of Regulation* R. Baldwin, M. Cave, M. Lodge, eds 349 (2010)

¹²¹ While examining the accountability of International Election Monitors, Anne van Aaken and Richard Chambers describe an accountability process that hinges on reason giving. Anne van Aaken & Richard Chambers, *The Accountability of International Election Observers*, 6 *INT'L ORG. L. REV.* 541 (2009).

All five accountability mechanisms have a common structure: the ex post calling by one person of another actor to account for his prior conduct, and the authority and ability of the account holder to provide some form of sanction or other remedy for deficient performance.¹²² The prospect of having to provide such accounting and the potential consequences of a negative evaluation provide ex ante incentives for the accounter to give appropriate consideration to the interests of the accountee in making decisions.

There are two fundamentally different types of accounter-accountee relationships that arise through two quite different means.

The first category, which includes electoral, hierarchical, supervisory, and fiscal accountability mechanisms, involves a delegation or transfer of authority or resources from one actor or set of actors (account holders) to another actor or actors (accounters), where the accounters are to act in the interest of the grantors or third persons. This creates a principal-agent relation between grantor and grantee.

The second category consists of legal accountability mechanisms dealing with conduct by the accounter that the law prohibits or invalidates or for which it requires payment of compensation or other redress. The account holder has the authority to bring a legal action against the accounter in a court or other tribunal or reviewing body to determine whether the accountee's legal rights have been infringed and, if so, to obtain an appropriate remedy. No principle-agent relation is inherently involved.

Accountability mechanisms based on delegation of authority or resources

Where principal delegates resources or authority to an agent, the accountability mechanisms can function as a means for overcoming agency problems by enabling principals to require agents to account for their conduct and take needed corrective action. The potential for principals to use these mechanisms to discipline wayward agents creates incentives for the agents to give regard to the interests and concerns of the principal and their actions.

Electoral accountability exists when account holders are entitled to vote for the election of public or private office holders, the accounters. Elections involve a grant by voters/electors of authority to those elected to hold and exercise the power of office. 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.¹²³ The remedy for deficient performance is the right of the voters or electors to remove unwanted representatives from

¹²² See Andreas Schedler, *Conceptualizing Accountability*, in *THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* 14 (Andreas Schedler et al. eds., 1999). “[T]he notion of political accountability carries two basic connotations: answerability, the obligation of public officials to inform about and to explain what they are doing; and enforcement, the capacity of accounting agencies to impose sanctions on powerholders who have violated their public duties.”

¹²³ 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.¹²⁴ Although incumbents invariably render account for their performance in office there is generally no set procedure for doing so. Also, there are generally no standards that electors must follow in voting, nor do they have to give any reasons or otherwise account for their votes.¹²⁵

Hierarchical accountability operates in governments, firms, and other organizations or between individuals where superiors have the right to control and evaluate the performance of subordinates. In cases of inadequate performance, superiors can impose various sanctions such as cuts in pay, demotion, or termination and/or adopt other remedies, reassignment, retraining, or in changes in organizational policies and structures. They can also reward for superior performance. The relation involves some greater or lesser grant or delegation of authority and/or resources to subordinates. In cases where subordinates have security of tenure—for example, government civil servants or unionized employees—there are often 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 but where the grantor does not have the right directly to control the grantee's conduct. Examples include the relations between clients and independent contractors or professionals, between the legislature and administrative agencies, and between states and the international organizations of which they are members. There may or may not be established standards and procedures and giving of reasons for evaluation of the grantee's conduct. Sanctions and other remedies include revocation or non-renewal of the delegated authority or resources conferred or corrective measures including organizational and policy changes.

Fiscal accountability involves financial accounting and audit procedures by which the grantee of funds and other resources accounts for their use to an account holder, often the grantor, in accordance with generally accepted accounting standards and practices. Sanctions can revocation of the grant and return of funds, denial of future grants, or imposition of more restrictive conditions on the activities of the grantee.¹²⁶

¹²⁴ “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 Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869 (1995); Samuel Issacharoff, *Polarized Voting and the Political Process*, 90 MICH. L. REV. 1833 (1992).

¹²⁵ The importance of voters' right to register their preferences without having to reveal or account for them is discussed in John Ferejohn, *Incumbent Performance and Electoral Control*, 50 PUBLIC CHOICE 5 (1986). Historically, democratic mechanisms can be coupled with other forms of accountability, particularly legal accountability, which is described in further detail *infra*. For example, in Ancient Athens, certain public offices were required to submit to an end-term audit for how they performed in their public office and were subject to impeachment while in office, both before public tribunals. See R.K. SINCLAIR, *DEMOCRACY AND PARTICIPATION IN ATHENS*, 78–80. (1988). It should be noted that the selection of magistrates in Ancient Athens was partially done by lottery, and thus the system bears marked differences to modern systems of government. See *id.* at 17–18.

¹²⁶ 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 has

In all of these four cases, the purpose of the holding to account is to ensure that the grantee/accounter has given appropriate regard to the interests and concerns of the grantor/principal who is the account holder. Where the grantor/principal judges performance deficient, it has the right either to revoke or not renew the grant; this power is the ultimate source of the authority of the grantor/principal to take less drastic corrective measures and expect that the grantee will adhere to them.¹²⁷

Legal accountability

Legal accountability involves conduct by the accounter contrary to what law prescribes and for which it provides a remedy. The account holder obtains accountability by instituting an action against the accounter in a court or other adjudicatory forum to determine whether the accountee's rights have been infringed and, if so, to obtain an appropriate remedy. The remedy may be the of money or damages specific relief such as an injunction. But may also consist of a declaration that the accountee has (or has not) acted contrary to governing legal norms. There may or may not be institutional machinery to enforce such remedies. As experience under international law reveals, an authoritative determination that one party has acted contrary to the rights of the other may have significant practical effects, including benefits for the prevailing party, even in the absence of enforcement machinery.

Legal accountability does not depend on any prior delegation of resources or authority from a principal to an agent. Legal rights and mechanisms of legal accountability for their vindication are created bylaw, including the municipal public and private law of nations, by international law, and by the internal law of organizations. Some cases involve prior delegations of resources and authority from principal to an agent, but in such cases the legal rights and obligations are created by law and not the delegation. In most cases for example in tort or contracts or administrative law, there is no principal- agent relation between the parties. In all these cases, the prospect of legal accountability gives actor -accounters incentives to give regard to and respect the rights of right-bearing account holders.

Legal accountability for global regulatory administrative actions can be obtained through liability actions for compensation as well as through direct review of decisions by a court, tribunal or other reviewing body. Judicial review of official conduct through civil liability actions has historically been an important element of Anglo-American administrative law.¹²⁸ International law principles of responsibility and liability for wrongful actions by states has been extended to international organizations – but not to the other three types of global regulatory bodies. Moreover, liability extends only to acts wrongful under international law, and international organizations enjoy are typically assert immunity from suit in national courts.¹²⁹

distinct and specialized traditions, standards, and procedures, and accordingly is retained in this analysis as a separate category.

¹²⁷ In some cases, the grantor may also invoke legal accountability mechanisms to obtain additional redress against the grantee. Grantees may also in some cases be able to assert legal claims against the grantor for breach of employment contract, etc.

¹²⁸ LOUIS JAFFEE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 235-240 (1965).

¹²⁹ See Jutta Brunée, *International Legal Accountability through the Lens of Law of State Responsibility*, 36 *Netherlands Yearbook of International Law, Symposium on Accountability in the International Legal Order* (2005)

Private regulatory bodies, however, are subject to damages liabilities under contract, tort, and competition law.¹³⁰

Legal accountability is often overlooked by authors focusing on grant-based accountability mechanisms.¹³¹ With the growth of global administrative law, including the greater availability of review of global administrative decisions by regime-specific tribunals, by international and domestic courts and tribunals, and by other global administrative bodies, legal accountability is becoming a more important factor in global administrative governance.¹³²

Accountability is a concept and practice distinct from but often overlaps with the distinct concept of compliance by the regulated -- the addressees of regulatory norms. Compliance arrangements may include accountability mechanisms, such as the WTO dispute settlement mechanism for securing compliance by members with WTO disciplines or the UN Appeals Tribunal for ensuring that personnel decisions by UN staff comply with applicable procedures and standards. But compliance arrangements also include education, financial and technical assistance, peer review and “managerial” approaches.¹³³ Accountability mechanisms are used in global regulation for many purposes other than compliance, for example, in influencing the decisions of regulatory decision-makers, issuing directions to staff, imposing budget cuts, and terminating appointed representatives.

B. Using Accountability Mechanisms to Promote Regard

The ultimate function of accountability mechanisms is to promote due regard by account or for interests, concerns, and rights of the account holder.

All five accountability mechanisms operate in decision making by governments and public authorities, by private actors including corporations and non-profit organizations, and by the various types of global administrative bodies. All are grounded in relational structures involving a separation between those who have the power of choice and those who bear the consequences of choice. The mechanisms seek to ensure that those who decide give regard to the interests and concerns of those affected by giving the latter – the account holders – the right to invoke accountability mechanisms. Several different types of accountability mechanisms operate in

21 (discussing limitations of international law principles regarding the responsibility and liability in securing accountability for international organizations).

¹³⁰ HARM SCHEPEL, *THE CONSTITUTION OF PRIVATE GOVERNANCE: PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS* (2005)

¹³¹ See e.g. Colin Scott, *supra* at 40-41 (noting that the concept of accountability must address the increasing number of tribunals).

¹³² Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT’L L. & POL. 663, 669 (2005) (noting the relative importance of independent decision-making committees in global administrative law compared to domestic administrative law); Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN L.J. 1375, 1385-86 (2008) (arguing that when institutions make determinations, they are exercising public authority).

¹³³ See Ronald B. Mitchell, *Compliance Theory: Compliance, Effectiveness, and Behavior Change in International Environmental Law*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* 900, (D. Bodansky, J. Brunée and E. Hey eds. 2008).

most decision-making institutions, and in many cases all five, often functioning in complex interrelations.

The ability of disregarded interests to use accountability mechanisms to redress disregard by global administrative authorities is often quite restricted. Unless they are founders/members or funders of global regulatory bodies (examples of which have been discussed above) NGOs or international organizations as UNICEF and WHO that represent or advocate for the disregarded generally cannot access the four grant-based based accountability mechanisms to influence the decisions of most global regulatory bodies or their distributed administrations. Disregarded individuals are even less capable of accessing these mechanisms.

Increasingly, individuals and representatives of disregarded interests can invoke mechanisms for legal accountability with regard to decisions of global regulatory bodies. International and domestic courts have shown a growing willingness to exercise such review, for example in refusing or restricting enforcement of the Security Council's Al Qaeda sanctions regime.¹³⁴ Such review is generally episodic and not consistently available to those seeking remedy for disregard. Yet, even episodic court decisions finding global regulatory bodies' decision-making procedures deficient can stimulate adoption of changes that will promote greater regard for the disregarded.¹³⁵ A growing number of specialized tribunals have been established within global regulatory regimes that provide review as a matter of course. A notable example is the World Bank Inspection Panel and similar arrangements established by other international financial institutions to ensure compliance with social and environmental standards in funding infrastructure projects in developing countries. Local citizens threatened with harm by such projects can attain review of project funding decisions for conformance with the standards.¹³⁶ Among numerous other examples of regime-specific reviewing bodies are the Court for Arbitration of Sport (established by a Swiss foundation and itself subject to review by the Swiss Federal Court) and the Aarhus Compliance Committee; private parties can obtain review by both of these bodies. New forms of review are also emerging under NGO/business regimes for regulating compliance by multinational firms and their downstream contractors in developing countries with environmental and worker protection standards for production operations in developing countries.¹³⁷

¹³⁴ R. v Horncastle, [2009] S.C. 14 (U.K.); Abdelrazik v. The Minister of Foreign Affairs, [2009] F.C. 580, [2010] 1 F.C.R. 267 (2009); Joined Cases C-402 & 415/05 P, Kadi & Al Barakaat Int'l Found. v. Council & Comm'n, 2008 E.C.R. I-6351.

¹³⁵ See Anna-Maria Talihärm, *Human Rights and Counterterrorism, in* Capacity Building in the Fight Against Terrorism 18, 25 (U. Gürbüz ed. 2013) (noting that since 2001 the Security Council Committee publishes narratives explaining why individuals or entities have been listed, increasing transparency – a result of the Kadi decision and similar cases); Lorenzo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, 12 German L.J. 1317, 1319 (2011) (defining “lex sportiva” as the judge-made principles and rules of sport law).

¹³⁶ See *Demanding Accountability: Civil Societies Claim and the World Bank Inspection Panel* (Dana Clark, Jonathan Fox, & Kay Treakle eds., 2003); *The Struggle for Accountability: The World Bank, NGOs, and Grassroots Movements* (Jonathan Fox and L David Brown eds., 2000).

¹³⁷ David Vogel, *Private Regulation of Global Corporate Conduct*, in Mattli and Woods, eds, *The Politics of Global Regulation* 141 (2009) Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 *Journal of Law and Society* 20 – 38 (2011); Michael Carney, *Globalization and the Renewal of Asian Business Networks*, 22 *ASIA PACIFIC J. MGMT* 337, 344 (2005) (discussing social responsibility statements and compliance monitors).

As these examples illustrate, the bodies subject to review can include an internal decision-making component of a global regulatory body, such as World Bank or UNHCR staff, or decisions by the global body itself, such as the UN Security Council or the International Football Association. Review may be direct, by a tribunal like the World Bank Sanctions Board or the Court of Arbitration for Sport that is part of the same regime complex as the decisional body, or indirect, through review by domestic court of a domestic agency's implementation of global rules and decisions such as the Security Council Al Qaeda Committee listings.

Specialized review bodies such as the World Bank Inspection Panel illustrate how organizational principals may establish mechanisms for independent review in order to more effectively supervise and secure compliance by their agents with directions and requirements lay down by the principals. Indeed, domestic systems of administrative law have been analyzed in precisely these terms. The legislature establishes review by independent courts of administrative agency's decisions to ensure their compliance with governing statutes. In this conception, the legislature grants private actors the ability to secure review by courts in order to mobilize the private actors' energies as "fire alarm" mechanisms to seek out agency derelictions and redress them.¹³⁸ This logic was an important element in the early development of review by the royal courts in England of official action through suits by aggrieved citizens against officials.¹³⁹ Under this conception, one might conclude that those seeking review, including the disregarded, act as instruments to ensure that agents are (indirectly) accountable to their principals and have no accountability rights of their own. But this ignores that review also enables those who are entitled to invoke it rights of legal accountability in order to vindicate their own interests. It also blinks the reality that reviewing courts and other bodies for example the WTO Appellate Body enjoy some discretion to resolve cases in ways at variance with the interests of their principals, and may choose to do so.¹⁴⁰ Finally, the conception of review by third parties as an instrument for securing accountability to principals does not explain review of global bodies' decisions by international and domestic courts.

Although the growth of independent review is a welcome development, overall there are significant limits to mobilizing legal accountability mechanisms for securing addressing disregard by global regulatory bodies. The body's more powerful members may sometimes favor establishing specialized reviewing bodies in order to maintain the regime's integrity by securing compliance by its components and staff with the regime's governing norms, as exemplified by the creation of the Inspection Panel and the WTO Appellate Body. But more often they may oppose creation of independent review bodies as ceding too much power to such bodies and outsiders and impairing flexibility and expediency in decision-making. Legal accountability mechanisms also involve significant costs in term of resources and decisional delay. Multiplying accountability mechanisms may so diffuse responsibility as to actually undermine accountability

¹³⁸ See Arthur Lupia and Matthew McCubbins, *Designing Bureaucratic Accountability*, 57 *law and contemporary problems* 91 (1994); Arthur Lupia and Matthew McCubbins, *Learning from Oversight: Fire Alarms and Police Patrolled Reconstructed*, 10 *Journal of Law, Economics, & Organization* 96 (1994)

¹³⁹ See LOUIS JAFFEE, *supra*.

¹⁴⁰ See Judith Goldstein and Richard Steinberg, *Regulatory Shift: The Rise of Judicial Liberalization at the WTO*, in *THE POLITICS OF GLOBAL REGULATION* 211 (Mattli & Woods eds.)

to any particular accountee as well as impairing organizational effectiveness in other ways, provoking growing concern with “multiple accountability disorder.”¹⁴¹

C. Why Broader Definitions of Accountability Should Be Rejected

Many other scholars as well as official bodies and global governance reformers have invoked much broader conceptions of accountability mechanisms than those embraced in this Article;¹⁴² although a handful of scholars have followed a narrower approach.¹⁴³ Those following a broader approach have characterized one or more of the following measures as accountability mechanisms.¹⁴⁴

- Participation has been characterized as a form of accountability through which “the performance of power holders is evaluated by those affected by their actions.”¹⁴⁵
- Transparency; open decision-making and information disclosure is regarded as “a continual process of ‘giving an account’ to an informed and active civil society.”¹⁴⁶
- Reason giving is viewed as a process through which decision-makers account for their decisions.¹⁴⁷

¹⁴¹ Jonathan Koppell, Pathologies of Accountability: ICANN and the Challenge of “Multiple Accountability Disorder,” 65 PUB. ADMIN. REV. 1 (2005).

¹⁴² Grant and Keohane, for example, identify the following accountability mechanisms: Hierarchical; Supervisory; Fiscal; Legal; Market; Peer; Public Reputational. Grant & Keohane supra at 8 Table 2. Mashaw, supra at 27, Figure 1 identifies 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 the governance of regulatory authorities.

¹⁴³ Richard Mulgan and Edward Rubin restrict accountability to hierarchical relations. Richard Mulgan, ‘Accountability’: An Ever-Expanding Concept?, 78 Pub. Admin. 555, 571 (2000); Edward Rubin, *The Myth of Non-Bureaucratic Accountability and the Anti-Administration Impulse*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS, AND EXPERIENCES 52, 74 (Michael Dowdle ed., 2006).

¹⁴⁴ See, e.g. Grant & Keohane at 3 (participation a form of accountability through which “the performance of powerholders is evaluated by those affected by their actions.”); *id.* at 9.(World Bank extols “participatory accountability.”); ILA Report on Accountability of International Organizations [Pin cites] (including participation as an accountability measure)

¹⁴⁶ See, e.g., Harlow, Accountability in the EU, at 10; 12 (open decision-making and freedom of information practices represent “a continual process of ‘giving an account’ to an informed and active civil society.”); International Law Association Committee on Accountability of International Organizations, Berlin Conference, Final Report at 5 (2004), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/9>; .. High-Level Panel on IMF Board Accountability: Key Findings and Recommendations (2007), available at <http://www.new-rules.org/about-new-rules/publications/37-key-findings-and-recommendations-of-the-high-level-panel-on-imf-board-accountability>; see also David Gartner, *Uncovering Bretton Woods: Conditional Transparency, the World Bank, and the International Monetary Fund*, 45 GEO. WASH. INT’L L. REV. 121 (2013);. Bronwen Morgan, supra note X, at 252.

¹⁴⁷ ILA at ____

- Competition in markets for goods, services, and investment funds is viewed as a mechanism by which firms are accountable to customers and investors.¹⁴⁸
- Competition in markets for regulation can be regarded as a form of market accountability in which public or private entities that generate regulatory norms are rendered accountable to norm “consumers” deciding whether or not to adopt them¹⁴⁹
- Peer reputational influences and incentives are said to function as mechanisms whereby actors accountable to peers for their performance.¹⁵⁰
- Public reputational incentives and influence have likewise been characterized as a means by which organizations are accountable for their performance to the public generally.¹⁵¹

All seven of these measures, practices, and influences are highly important in global regulatory governance, and can potentially be harnessed to redress disregard. Like the five accountability mechanisms, each of these other measures can be deployed in different global regulatory institutional settings to promote greater regard for the disregarded. Yet, none is appropriately characterized as an accountability mechanism. None involves one of the foundations of accountability relations-- a delegation of resources or authority or a system of legal rights and duties. None exhibits the three structural elements of accountability mechanisms (1) a specified account holder, who is subject to being called to provide account for his conduct; (2) a specified account holder who can require the account holder to render account; and (3) the ability and authority of the account holder to impose sanctions or other remedies for deficient performance.

This conclusion is most evident in the case of transparency and (non-decisional) participation,¹⁵² neither of which involves a rendering of account to designated account holders. These practices may play a role in the operation of certain accountability mechanisms,¹⁵³ but in themselves are not accountability mechanisms. Public and peer reputational influences and pressures may reflect evaluation of conduct, carry negative consequences for conduct judged deficient, and lead actors

¹⁴⁸ Grant and Keohane at ____

¹⁴⁹ MARKET-BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE (John D. Donahue & Joseph S. Nye, Jr., eds., 2002) (arguing for a market-based approach for pursuing the goals of governance).

¹⁵⁰ Grant & Keohane, *supra* note X, at 9.

¹⁵¹ Grant & Keohane, at 36.

¹⁵² Decisional participation is part of the exercise of decisional authority, as contrasted with rendering account for decisions previously made.

¹⁵³ For example, in legal accountability mechanisms, such as those seeking review of administrative decisions enjoy the right to participate in hearings before the reviewing body, such as the ILO Administrative Tribunal, the World Bank Inspection Panel, and the Aarhus Compliance Committee. Also, the opportunity to build a record by submitting evidence and argument to the administrative decision-making body may be critical in securing effective review by a tribunal of its decision.

to pay heed to the interests and concerns of peers or the public, but do not involve a rendering of account by accountors to designated account holders.¹⁵⁴

Markets in, goods, services and investments as well as markets in regulation have certain features that resemble some of the features of accountability mechanisms.¹⁵⁵ They involve evaluation, here by current or potential consumers, of goods, services, investment opportunities, and regulatory programs and negative. Consumers visit negative consequences on those whose performance is judged inferior, leading suppliers to design their offerings to meet consumer preferences. Markets, however, contains no structured process whereby sellers render account for their conduct to consumers.. As Mashaw points out, accountability is defined as “liable to be called to account; answerable.”¹⁵⁶ Consumers and suppliers have no authority to require answers, and firms are not obliged to provide them. The market remedy for dissatisfied consumers is simply to “exit” and cease to buy deficient wares or never buy them in the first place. The dialogic “voice” element of accountability is absent.¹⁵⁷

Accordingly, these seven measures cannot be appropriately characterized as accountability mechanisms. Nor do they constitute decision rules. They do, however, function to help make global regulatory bodies responsive to “outside” interests and concerns, including those that are powerful and well-organized but also those that are much less so. This article accordingly characterizes these seven procedures and practices as other responsiveness-promoting measures, distinct from decision rules and accountability mechanisms. These measures and their potential for addressing disregard are discussed in Part VI.

¹⁵⁴ Global regulatory bodies increasingly employ for review and evaluation by members of other members’ compliance or performance, a practice for example followed by Financial Action Task Force, the WTO, and _____. This represents an important and growing practice of supervisory accountability.

Professional organizations may in some cases have 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. The first of these clearly involves accountability mechanisms, the latter two might be so regarded. Be se might be regarded as accountability mechanisms.

¹⁵⁵ In this regard, it is important to distinguish between the rules and institutions that form and constitute markets, such as contract law, the law of business associations, and competition law, and the ability for market competition to effect change in market participants. The constitutive rules of marketplaces may well use accountability mechanisms (alongside decisional rules and other mechanisms) to set the rules of the game. But this is a separate question from whether a consumer’s choice between different brands of shoes, for example, forms an accountability relationship between the consumer and supplier.

¹⁵⁶ Jerry L. Mashaw, *Structuring a Dense Complexity: Accountability and the Project of Administrative Law*, 6 ISSUES IN LEGAL SCHOLARSHIP 16 (2005), available at <http://www.bepress.com/ils/iss6/art4> (quoting WEBSTER’S NEW COLLEGIATE DICTIONARY (1959)).

¹⁵⁷ HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970). Thus, market actors are literally not accountable to their existing contractual partners unless the latter can assert tort or contract claims against them (legal accountability), or to their potential customers. 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.

These conclusions, however, pose the question of why we should limit the accountability label to mechanisms with the three structural accountant-account holder elements and not adopt a broader approach like that embraced by some other scholars and by many practitioners. Accountability can be defined in different ways.¹⁵⁸ It might conceivably be defined in different ways in different governance contexts. Nonetheless, we should insist on the three structural elements and restrict the accountability label to the five types of arrangements set forth above for the sake of clear headed analysis and sound prescription. Doing so enables us to distinguish the characteristics and operation of accountability mechanisms from those of the other governance arrangements and thereby make more informed choices among the several types of institutional tools that might be used to enhance responsiveness to the disregarded. What distinguishes the five accountability mechanisms from the other responsiveness-enhancing practices is that they enable identifiable account holders to invoke them as of right against identifiable decision makers in order to protect and advance their interests and concerns. Through these mechanisms, the exercise of power accountants is subject to enforceable conditions for the benefit of the account holder. They enable account holders enforce the obligation of accountants “to reveal, to explain, and to justify what one does,”¹⁵⁹ and obtain remedies for deficient performance.

The distinction between having a right to demand and accounting and invoke a remedy and the potential availability of more indeterminate forms of influence are especially significant for the weak and vulnerable that suffer most from disregard. This distinction is too important, both in principle and in practice, to be glossed over by embracing broader conceptions of accountability.¹⁶⁰ As Carol Harlow observes, extending the notion of accountability to a wide variety of loosely structured practices can involve such a diffusion of decisional responsibility that no one can be held responsible.¹⁶¹ The laxity of the current accountability rhetoric should accordingly be resisted, not accommodated.

¹⁵⁸ I am indebted to Bob Keohane for reminding me of the passage on the meaning of words in Alice in Wonderland: "I don't know what you mean by 'glory,'" Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knock-down argument for you!'"

"But 'glory' doesn't mean 'a nice knock-down argument'," Alice objected.

"When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things." Be defined

"The question is," said Humpty Dumpty, "which is to be master—that's all." It might be defined in somewhat different ways

¹⁵⁹ Robert Scott, *Accountability in the Regulatory States*, 27 J. L. & SOC'Y 38 (2000).

¹⁶⁰ One could attempt to maintain the distinction by having two or more different concepts of accountability, but in practice this risks blurring the distinction. Is far clear and more straightforward to restrict the accountability label in the first instance.

¹⁶¹ HARLOW, ACCOUNTABILITY IN THE EU, *supra* note X, at 27, 184. page numbers can't be right, As Bovens states, the concept of accountability needs saving from those who promote it. Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L.J. 447, 449 (2007) (citing M.J. Dubnick, *Seeking Salvation for Accountability*, paper presented at the Annual Meeting of the American Political Science Association (2002)).

Insistence on the distinctive character of the accountability mechanisms by no means implies that they are necessarily or always more effective than or otherwise superior to other institutional mechanisms for promoting greater regard, including those characterized in this article as other responsiveness-promoting measures, discussed in Part VI. Accountability mechanisms often involve significant costs and there are limits to their use to solve the problem of disregard global administration. The four delegation-based accountability mechanisms depend on the ability to have more secure significant authority or resources and confer them on other actors. The disregarded often lack this capability, although the development of market-based social and environmental global regulatory programs is a counterexample. Legal accountability mechanisms have significant potential to protect the disregarded but often face political and institutional barriers to their adoption and involve various costs and other drawbacks. Decision rules and the other responsiveness promoting mechanisms often play a more important role in global regulatory decision-making and might make a greater contribution to addressing disregard. The analytic ground-clearing undertaken in this article is not designed to advocate one set of governance mechanisms over others but to clarify the character and functions of the various mechanisms and their potential contributions to redressing disregard, for the benefit of both global governance analysts and reformers

V. OTHER REGARD-PROMOTING GOVERNANCE MECHANISMS

To the extent that the disregarded cannot secure decision-making power and are unable to access accountability mechanisms, what other means to have available to secure regard for their interests and concerns by global regulatory decision makers? This Part discusses seven mechanisms, identified in Part IV.D, that are neither decision-making rules nor accountability mechanisms: competition in markets for goods, services and investment; competition in markets for regulation; peer reputational influences; public reputational influences; non-decisional participation; transparency; and reason giving,

These measures -- which this article categorizes as other regard-promoting mechanisms -- differ in important ways from decision rules and accountability mechanisms. Their structure and operation is typically more diffuse. Also, they do not confer authority on identifiable persons. These can be accessed by a very wide array of outside actors and interests, including the disregarded, to influence regulators' decision-making in order to secure greater regard for their interests and concerns. To the extent that the disregarded lack decision-making authority and the ability to invoke accountability mechanisms, they can use these other mechanisms to help redress imbalances in regard.

This Part briefly summarizes the four market and reputational mechanisms and then focuses on, transparency, participation (especially the right to make submissions on proposed decisions close), and reason giving. These three procedures for decision-making are core components of

global administrative law, as exemplified by the first two pillars of the Aarhus Convention.¹⁶² After reviewing each of the mechanisms separately, the discussion concludes by addressing the question whether, in the absence of independent review, a combination of three procedures could be considered sufficient to constitute a system of administrative law.

A. Market and Reputational Mechanisms

Competition in markets for goods, services and investment. Market incentives are assuming an important role in protecting disregarded interests and filling global regulatory gaps through private global regulatory programs developed by NGOs representing environmental, worker and social interests in cooperation business firms. These programs mobilize developed country consumer interests and concerns regarding environmental sustainability, worker safety and fair labor practices in order to regulate fishing, timber harvesting, agricultural, and mining practices and factory working conditions in developing countries and fishing practices on the high seas that produce, either directly or indirectly through global supply chains for multinational companies.¹⁶³ In some cases these regimes include participation by host domestic governments and international organizations. Other global regulatory bodies promote socially responsible investment. Participating firms seek to gain competitively valuable reputational advantage among socially minded consumers and investors. These regulatory systems include monitoring and certification arrangements to secure compliance by participating firms and their contractual partners up the supply with the system's regulatory standards. These programs, which enlist multinational firms and their contractual partners to function as parts of their distributed administrations, exemplify how market competition can be harnessed to promote regard for the interests and concerns of the disregarded.¹⁶⁴

Competition in Markets for Regulation. Public and private global regulatory bodies often face competition from rival regulatory bodies in "markets" for regulation.¹⁶⁵ Different global regulatory bodies, including private standard setting bodies such as ISO and its rivals, often compete in providing regulatory standards to firms, governmental bodies, and other global

¹⁶² 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 review procedures. 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. The Convention provides that it may also be applied to international organizations that function as administrative bodies. On global administrative law generally, see B. Kingsbury, N. Krisch & R. Stewart, *supra* note X; Symposium, *The Emergence of Global Administrative Law*, *supra* note X.

¹⁶³ See generally Errol Meidinger, *Competitive Supragovernmental Regulation: Could it be Democratic?*, 8 CHICAGO J. INT'L L. 513 (2008),

¹⁶⁴ One can view multinational firms, operating through contractual networks in global supply chains, as private regulators. The global regulatory bodies discussed in the text effectively recruit these private regulators to advance their social and environmental goals. Peers

¹⁶⁵ MARKET-BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE (John D. Donahue & Joseph S. Nye, Jr., eds., 2002) (arguing for a market-based approach for pursuing the goals of governance).

regulatory bodies.¹⁶⁶ The need to attract patronage can impose powerful incentives to be responsive to those consumers of regulation that can exit to other providers. Private and hybrid global standard-setting bodies are increasingly adopting mechanisms for transparency, participation, and reason-giving as a business strategy in order to promote acceptance of and support for their standards.¹⁶⁷ Monitoring and other steps to ensure compliance with regulatory standards are important components in such programs.¹⁶⁸

Peer reputational norms, influences and incentives operate among members of a profession, discipline or other community based on specialized knowledge or activity and performance norms. High performance is a source of esteem and is also instrumentally advantageous in securing needed cooperation from others. Ryan Goodman and Christopher Jinks have shown that the conceptions held by members and officials of global regulatory bodies regarding their institutions' role and responsibilities and governance arrangements are very substantially influenced and shaped by the conceptions and practices of peer organizations.¹⁶⁹ Ruth Grant and Robert Keohane point out that peer influences are especially important global institutions that operate in a non-hierarchical environment (as most global institutions do): "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."¹⁷⁰ Peer reputational incentives and influences may operate to promote adoption by global regulatory bodies of governance practices that can to promote greater regard for the disregarded. These may include transparency, broadened decisional or non-decisional participation, multi-stakeholder governance arrangements including deliberative decision-making, reason giving, and independent review of decisions. Peer influences may lead business firms to join private or hybrid global regulatory regimes, like those just above, for protecting environmental, social, and worker interests.

Public reputational influences and incentives are, as Grant and Keohane point out, another and more pervasive form of "soft power," operating through the general opinions held by various publics of the conduct of prominent public and private actors including global regulatory

¹⁶⁶ Kenneth Abbot & Duncan Snidal, *supra* at 47, 58 (outlining a "decentralized process of competition for influence" and arguing that firms enjoy leverage over regulators because of the ease of relocation across states).

¹⁶⁷ Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 EUR. J. INT'L L. 47, 86 (2006); Errol Meidinger, *Multi-Interest Self-Governance Through Global Product Certification Programmes*, in *RESPONSIBLE BUSINESS: SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS* 259, 262 (2008) (noting that in the forestry sector, different certification programs "observe, mimic, compete, communicate, negotiate, and adapt to each other").

¹⁶⁸ THE FAIR LABOR ASSOCIATION, <http://www.fairlabor.org/> (last visited Feb. 15, 2014) (certifying and monitoring apparel industry supply chains to alleviate concerns about sweatshop practices); THE FOREST STEWARDSHIP COUNCIL, <https://us.fsc.org/> (last visited Feb. 15, 2014); Tracy M. Roberts, *The Rise of Rule Four Institutions: Voluntary Standards, Certification and Labeling Systems*, 40 Ecology L.Q. 107, 147-48. (2013) (on the FSC and the Fair Labor Association and its industry-funded competition).

¹⁶⁹ MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* (1996); RYAN GOODMAN AND DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013); Derek Jinks and Andrew K. Woods, eds. *Understanding Social Action, Promoting Human Rights* (2012). See John Gerard Ruggie, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge*. 52 INTERNATIONAL ORGANIZATION 855 (1998).

¹⁷⁰ Grant & Keohane, *supra* note X, at 9.

bodies.¹⁷¹ The reputational audience does not consist of peer organizations and officials but broader constituencies and the diffuse public upon whose support or positive estimation the organization depends. Many global regulatory bodies ultimately require favorable reputations among relevant publics in order to enjoy the support and authority that they need in order to function effectively.¹⁷² Accordingly, public reputational incentives may influence significantly the substantive policies but also the governance arrangements that they adopt. NGOs devote considerable effort to influencing these reputational incentives, using the media, the Internet, and various institutional networks. They seek, among other objectives, to induce global authorities to adopt arrangements for transparency, for broader decisional and non-decisional participation, and other practices that will enable them to obtain greater regard by decision makers for their interests and concerns. Practices such as transparency and non-decisional participation can in turn, as discussed below, be used by NGOs to stimulate public attention to problems of disregard, reinforcing public reputational incentives for global authorities to redress those problems.

B. 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.¹⁷³ Global bodies of many types have taken steps to enhance the transparency of their programs, policies, and decisions. 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.). Arrangements for transparency vary significantly in terms of their coverage and the types of information provided, such as agendas, minutes or transcripts of proceedings proposed and final decisions, rules, standards, guidance documents policy statements, reports, and various kinds of internal documents, and data collected by the organization. In the case of domestic agencies and other bodies that function as distributed components of global regulatory regimes, transparency practices have been mandated by those regimes, as exemplified by the WTO and the Aarhus Convention.

Information is a critical element of accountability mechanisms where they exist. Without information regarding accounters’ conduct and its consequences, account holders are not able to effectively evaluate the accountant’s performance and take appropriate remedial actions. Lack of information will correspondingly undermine the ex ante incentive incentives for regard generated by ex post accountability mechanisms. Accordingly, each of the core accountability mechanisms typically includes arrangements or incentives for accounters to provide information about their conduct to account holders. Compulsory discovery is often available to plaintiffs in legal proceedings. In the case of fiscal, hierarchical, or supervisory accountability, both the right of the

¹⁷¹ Grant & Keohane, and at 36.

¹⁷² See, e.g., JESSICA GREEN, *RETHINKING PRIVATE AUTHORITY: AGENTS AND ENTREPRENEURS IN GLOBAL ENVIRONMENTAL GOVERNANCE* (2013) (analyzing Greenhouse Gas Protocol),

¹⁷³ 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.

account holder to receive information from the accountant and the specific obligation of the accountant affirmatively to provide information are often provided by law. In the context of elections, competition among candidates and media scrutiny provide ensure that candidates disclose information to voters about their records and views.

Even in the absence of accountability mechanisms, public information disclosure can strengthen the operation of other responsiveness-promoting practices, including market competition for socially concerned consumers and investors, general political mechanisms, and peer and public reputational mechanisms and incentives. Where a global authority provides relevant information, outside affected interests, even if they lack decisional authority or accountability rights, can use it to learn about forthcoming decisions by the body and take actions to influence decisions in their favor. Information is also vital for the effective exercise of decisional participation rights by those who have some role in the internal decisional process but are not powerful founders or members. The public availability of pertinent information about the decisions of global administrators and their consequences fosters public discussion and debate about the body's policies and performance. These mechanisms can highlight problems of disregard and engage the attention and involvement of NGOs or other groups that have the resources run a publicity campaign, marshal market pressures, or challenge decisions through review mechanisms.¹⁷⁴ Anticipation of such consequences may lead global administrators to modify the policies that they would otherwise adopt behavior *ex ante*.¹⁷⁵ The power of public opinion in modern government, recognized by A.V. Dicey well over a century ago,¹⁷⁶ has acquired even greater force in the twenty-first century, including in the context of global governance. Information can also affect the reputation of global bodies with peer organizations, experts, and other groups whose support or at least tolerance they need.

Merely making publicly available reams of undigested documentary material, however, may do little to promote informed criticism and debate and consequent changes in policies. Buchanan and Keohane emphasize that in order to permit effective public scrutiny of and accountability for their decisions, global authorities 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.”¹⁷⁷ Such information must be accessible at reasonable cost, “properly integrated and interpreted” and directed at the public to allow practical accessibility and evaluation.¹⁷⁸

Transparency, however is not costless. Substantial resources are needed for collecting and providing information. Also, confidentiality is often essential in matters of security and law enforcement. Transparency may affect the operation of internal decisions in unexpected ways.

¹⁷⁴ See Hale, *supra* note XX, at 74, 77-81, 84.

¹⁷⁵ This effect can be strengthened when an accountability mechanism also exists. For example, World Bank managers have altered development projects once an Inspection Panel complaint is brought without going through the hearing process when the information disclosed indicates that a problem exists. *Id.* at 84 (noting that “in over half the cases brought before the panel, the mere release of information” had an effect on Bank behavior).

¹⁷⁶ A.V. Dicey, *Lectures on the Relation Between Law and Public Opinion in England: During the Nineteenth Century* (2d ed. 1962).

¹⁷⁷ See Buchanan, *supra* note XX, at 426.

¹⁷⁸ *Id.* at 427.

Decision through public deliberation may make it reach decisional closure through bargaining¹⁷⁹ and have other counterproductive effects. For example, transparency in internal decisional deliberation in the WTO context may serve to alert and mobilize protectionist interests and thereby undermine trade liberalization.¹⁸⁰ WHO 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 inferior decisions. External transparency may also undermine the ability of consensus-based deliberative processes for decision, as noted by some students of the Open Method of Coordination process,¹⁸¹ to reach necessary compromises. These various dynamics assume increasing importance as global regulatory bodies develop more complex decisional structures.

Global regulatory bodies have increasingly adopted formal transparency policies and arrangements, which are gradually making inroads on secrecy practices inherited from interstate diplomacy¹⁸² They have adopted these measures in response to criticisms and pressures by NGOs, the media, and powerful democratic member states, the influence of domestic transparency laws and practices, as well as the need to generate engagement, participation (both decisional and nondecisional) and support among constituencies whose support they need. This last factor is especially important in the case of hybrid and private global bodies, which often have very extensive transparency programs for. Distributed administrations are often required by global regulatory regimes to adopt transparency measures, ranging from the WTO to the World Anti-Doping Agency to the EITI, in order to further their regulatory objectives.

C. Non-Decisional Participation

In addition to decisional participation discussed in Part III—where participants have a role in making decisions -- global regulatory bodies often afford organizational outsiders opportunities for non-decisional participation. These procedures may include attendance at meetings where

¹⁷⁹ Jon Elster, *Introduction*, DELIBERATIVE DEMOCRACY 6 (Jon Elster ed., 1998) (defining pure bargaining as a system that results in outcomes determined by the parties' "resources that enable them to make credible threats and promises").

¹⁸⁰ Katharina Gnath, Stormy-Annika Mildner, & Claudia Schmucker, *G20, IMF, and WTO in Turbulent Times: Legitimacy and Effectiveness Put to the Test* 28 (German Institute for International and Security Affairs, 2012), available at http://www.swp-berlin.org/fileadmin/contents/products/research_papers/2012_RP10_Gnath_mdn_Schmucker.pdf ("[N]egotiations between WTO members take place behind closed doors. The scope for difficult compromises between negotiating partners has already shrunk under the watchful eye of the public. If negotiations were opened up still further, compromise would be all but impossible.").

¹⁸¹ Patrick Birkinshaw, *Freedom of Information and Openness: Fundamental Human Rights?*, 58 ADMIN. L. REV. 177, 192 (2006) ("Efficient government means that government needs space to formulate its policies in private and to consider alternatives; publicity may inhibit that process."); Mark Dawson, *Transforming Into What? New Governance in the EU and the "Managerial Sensibility" in Modern Law*, Wis. L. Rev. 389, 428 (2010) (arguing that the benefit of increased legitimacy outweighs the efficiency costs of transparency for the OMC).

¹⁸² See Megan Donaldson and Benedict Kingsbury, *The Adoption of Transparency Policies in Global Governance Institutions: Justifications, Effects, and Implications*, 9 Annual Review of Law and Social Science, 119 (2013). This article examines the influences that have led to wider adoption of transparency measures by global regimes and their effects on states, nonstate actors, and global governance institutions, and the global structures of global power and authority and global administrative law.

upcoming decisions or general policy issues are discussed, consultation processes initiated by the organization, membership on advisory or expert bodies, or other opportunities to have some form of input to the organization's programs and decisions.

Global administrative law accords particular significance to opportunities to submit evidence and argument to organizational decision-makers on specific forthcoming decisions, including adoption of general rules and standards; adjudication of the rights and liabilities specific persons, including through the submission of amicus briefs; and determinations of other particular matters such as funding of a development project or award of a franchise.¹⁸³ Such procedures are critical in the production by global regulatory bodies of rules, standards and decisions that are transmitted throughout the global administrative space. These normative products may be received, recognized, and adopted or otherwise used by other decision-makers in that space, including distributed administrations, regulated entities, and global or domestic public or private organizations. These recipients may in turn endorse, modify or augment the norms that they receive and in retransmit through the global administrative space. In this way, submissions by non-decisional participants to a given regulatory authority form a part of and contribute to a broader jurisgenerative process that continuously knits and reworks the fabric of global regulatory law and practice.

The several procedures for non-decisional participation provide organizational outsiders with various opportunities to persuade and influence the insiders who make decisions. In much governance literature "participation" generally refers to non-decisional participation, but the decisional and non-decisional is often not observed.¹⁸⁴ Like transparency, non-decisional public participation is widely invoked as a mechanism for securing greater accountability and regard for disregarded interests.¹⁸⁵ 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

¹⁸³ 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. It may also include the opportunity for affected third-party interests, including, disregarded interests, to submit amicus briefs. *E.g.*, Membership and its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy, 9 *Eur. L.J.* 496 (2003). In adjudications, review is generally available; in such cases, participation rights form part of a legal accountability mechanism.

¹⁸⁴ In legal accountability, 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.

¹⁸⁵ Magdalena Bexell, Jonas Tallberg & Anders Uhlin, Democracy in Global Governance: The Promises and Pitfalls of Transnational Actors, 16 *GLOBAL GOVERNANCE* 81 (2010); Steve Charnovitz, The Illegitimacy of Preventing NGO Participation, 36 *BROOK. J. INT'L L.* 891 (2011); David Gartner, Beyond the Monopoly of States, 32 *U. PA. J. INT'L L.* 595 (2010); Sophie Smyth, NGOs and Legitimacy in International Development, 61 *U. KAN. L. REV.* 377 (2012).

to account for their decisions or impose a sanction or other remedy for deficiencies.¹⁸⁶ Nonetheless, it may enable outsiders to influence the organization's decisions and can, like transparency, promote the effectiveness of other responsiveness-enhancing practices.

The presentation of evidence and argument may by itself influence decision makers by supplying them with new information, pinpointing neglected impacts and issues, and marshaling persuasive reasons for outcomes favored by presenter. Such influences, which can help correct institutional tunnel vision, may be enhanced if the participants have the right to be physically present when decision makers discuss a proposed decision.¹⁸⁷ Presenting evidence and argument can also present a platform for stimulating media attention, Internet campaigns and broader public awareness of the issues, and for mobilizing public and political pressures and reputational influences. The submissions also provide a benchmark for judging the responsiveness of the decisions subsequently made, providing a further basis for mobilizing these influences. In addition, participation may have intrinsic value for affected societal constituencies and vulnerable individuals, especially the in cases where they are the targets of serious harms or deprivations, such as destruction of their homes and communities by internationally funded development projects or denial of refugee status.

Like the other governance mechanisms examined in this article, procedures for non-decisional participation can be used by business and other economic interests as well as by groups representing social, environmental and other interests that are less well-organized and command fewer financial resources for taking advantage of the procedures. This disparity in resources may serve to some extent to skew decisional outcomes in favor of business and financial interests. It may also affect the relative influence exerted by different social and environmental interests. Notwithstanding such disparities, domestic experience with public interest law and the emerging experience with global administrative law shows that marginalized groups are generally better off having these tools available than leaving decisions to informal processes dominated by well-organized and powerful interests, even if those same interests can invest more resources in using the same mechanisms.¹⁸⁸

Disregarded interests must nonetheless muster a basic level of organization, financial resources, and expertise in order to exert influence.¹⁸⁹ Thus, better organized Northern NGOs with greater

¹⁸⁶ Decisional participation is also not an accountability mechanism, but for a different reasons. Accountability relations involve a separation between the person or entity who makes decisions (the accouter) and 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.

¹⁸⁷ 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 in the deliberative process. Therefore the line between decisional and non-decisional participation may blur in practice. For discussion of the role of industry representatives and environmental health and safety NGOs in the decisional processes of Codex, see Michael Livermore, Note: *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 N.Y.U. L. Rev. 766 (2006).

¹⁸⁸ See Steve Charnovitz, *The Illegitimacy of Preventing NGO Participation*, 36 BROOK. J. INT'L L. 891 (2011); Dragan Golubovic, *Framework for Citizen Participation in Public Policy: An Outline of Some of the Major Issues Involved*, 12 INT'L J. NOT-FOR-PROFIT L. 38 (2010).

¹⁸⁹ See WEALTH AND HEALTH; WOODS AND MATTLI

resources typically participate more frequently and effectively in global regulatory decisional processes, threatening, relative disregard of Southern interests. In the distributed administration of development projects and regulatory programs in developing countries, effective participation and engagement by affected communities and groups on the ground is critical but often difficult to achieve. Moreover, even where NGOs have substantial capacities they must choose to exert them. NGOs have devoted enormous resources to opposing genetically modified foods and crops, but none to participating in global financial regulatory proceedings, notwithstanding the enormous collective economic stake of consumers in the policies adopted. The Basel Committee has made public very extensive information and instituted notice and comment procedures for its adoption of bank regulatory standards. Large banks submitted most of the comments; NGOs did not participate in any substantial way.

Global administrative bodies have increasingly adopted various forms of non-decisional participation for the same basic reasons that they have adopted transparency measures. These include pressures from NGOs and other lobbying groups, the media, and in some cases influential members of the body; the example and influence of domestic governance practices and those of other global bodies, and a desire to engage and build support from key outside constituencies.

Transparency and non-decisional participation are closely linked because information about an organization's ongoing and proposed decisions and policies is essential in order to make submission of evidence and argument on proposed decisions effective. As global administrative law norms can greater acceptance, other global and domestic authorities will increasingly look to the procedures that global regulatory bodies follow. They will be more disposed to recognize and support rules and decisions by other global bodies through transparent procedures affording outside constituencies opportunity to make submissions on proposed decisions, regarding these procedures as hallmarks of decisional quality and legitimacy.¹⁹⁰ Global regulatory bodies increasingly call on domestic administrative agencies or other distributed administrations to follow such procedures in implementing their programs. Examples include WTO, WADA, FSC, EITI and Global Fund. The distributed administrations of FSC, EITI and the Global Fund replicate the multi-stakeholder hybrid public-private composition and inclusive approach to decision-making of their parents, enhancing the influence of this decision-making model.

D. Reason Giving

A third measure to promote broader regard by global regulators is for decision makers to give public reasons for their decisions. Although reason giving by itself is not an accountability mechanism. But, requiring a decision maker to state reasons can play an important role in legal and other accountability mechanisms by enhancing the ability of account holders to assess the decisions made by accounters and taking corrective action for their failure to justify a decision by valid or sufficient reasons.¹⁹¹ In the case of legal accountability, reason-giving is necessary

¹⁹⁰ See Richard Stewart and Michelle Ratton-Sanchez, *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, 9 *International Journal of Constitutional Law* 556 (2011)

¹⁹¹ "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

for courts or tribunals to exercise effective review of administrative decision as the European Court of Justice has emphasized.¹⁹²

Even if accountability mechanisms are absent, incentives and influences like those previously discussed in connection with transparency and non-decisional participation have encouraged global regulatory bodies to provide reasons for their decisions. These bodies undertake to justify their decisions in accordance with the stated norms of the regime as well as other norms viewed as relevant and appropriate by the various “legitimacy audiences” that may include global and domestic regulatory authorities operating in the global administrative space.¹⁹³ Giving reasons can enhance the legibility and quality of their rules and decisions and promote the likelihood that these other bodies will recognize and adopt or otherwise promote them. Some global regimes, for example, in the security field, avoid reason-giving in the interests of speed, confidentiality, flexibility, and untrammelled discretion to make decisions based on bargains and expediency. In law enforcement and some forms of financial regulation reason giving may undermine the effectiveness of regulatory programs. Reason giving may not be feasible or needed. In setting technical standards, deliberative consensus among representative experts generally serves as a sufficient touchstone of quality and legitimacy.

Global regulatory bodies increasingly require their staff and distributed administrations to give reasons for decisions in order to overcome principal agent problems and secure effective implementation of regulatory rules and decisions. For example, the staff of international financial institutions must give reasons for justifying development projects as compliant with applicable environmental and social guidelines, domestic regulatory authorities must give reasons for decisions by subject to WTO disciplines, and global and domestic sports authorities must give reasons in imposing sanctions for doping by athletes and other decisions disqualifying them from participation in sporting events.¹⁹⁴

The process of giving reasons that will be scrutinized by others serves to discipline decision-making and the exercise of administrative discretion.¹⁹⁵ Reason giving may help to ensure that decisions are justified by the body’s stated norms and objectives rather than simply serving the interests of powerful members or officials. The practice may also promote regard by decision-makers for other relevant norms and affected outsider interests. Reason giving obliges

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 XX, at 694.

¹⁹² [citation]

¹⁹³ Eran Shamir-Borer, Legitimacy Without Authority in Global Standardization Governance: The Case of the International Organization for Standardization (ISO), in *GLOBAL ADMINISTRATIVE LAW CASEBOOK I.C.1* (Sabino Cassese et al. eds., 3d ed. 2012), available at <http://www.irpa.eu/wp-content/uploads/2012/08/The-Casebook-Chapter-1.pdf>; Euan MacDonald & Eran Shamir-Borer, Meeting the Challenges of Global Governance: Administrative and Constitutional Approaches (Oct. 1, 2008), available at <http://iilj.org/courses/documents/MacDonald.Shamir-Borer.92508.pdf>. These audiences may include regime members; influential constituencies that can support the regime and its decisions; domestic and global authorities including courts and regulatory bodies, whose cooperation is needed for their effective implementation of decisions; and other affected interests, the media and the public generally.

¹⁹⁴ See Richard Stewart and Michelle Ratton-Sanchez, *supra* (WTO) [additional citations]

¹⁹⁵ Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1676 (1976).

officials to justify their decisions on the basis of public-regarding considerations that are relevant in the context of the body's specialized mission and goals. It enables those adversely affected to criticize and contest decisions as unsupported by the reasons adduced and argue that other norms and considerations should be taken into account. Requiring decision makers to give reasons for departing from prior decisions can promote a degree of decisional consistency, serve as a further check on arbitrary decisions, and foster the rule of law in global administration.¹⁹⁶ The Court of Arbitration for Sport, for example, set aside a decision by the Australian Boxing Federation disqualifying an athlete from participation in the Olympics as contrary to the rule of law; the Federation had not provided of reason basis for departing from previously established rules, given the athlete's legitimate expectations.¹⁹⁷

In these several ways, the practice of giving reasons operates as a safeguard against decisions dictated by raw power, bargain, and ad hoc expediency. A practice of making decisions that must be supported reasons that are open to public scrutiny and challenge may serve indirectly to promote regard for the disregarded.¹⁹⁸

E. A Global Administrative Law without Review?

The contributions of transparency, non-decisional participation, and reason giving to promote decision-making responsiveness to the disregarded is greatly enhanced when they are combined in a single system. Transparency informs and permits more effective participation. Participation allows for submission of evidence and argument on proposed decisions. Decision makers must give reasons for decisions they strong incentives to address the submissions in the course of justifying the decisions that they give. The information obtained through public information measures and the evidence and argument presented by participants, as well as the stated norms of the decision-making body and the reasons given for past decisions, enables those making submissions and other outsiders to evaluate the soundness of the reasons given for current decisions. Apart from responding to public and peer influences and expectations, it may be in the self-interest of regulatory regimes to adopt these practices for making decisions. They can improve the quality of regulatory outputs by tapping broader sources of information and experience. Requiring decision makers to accompany rules and decisions with publicly stated reasons that will be scrutinized by peers and regulatory partners. Giving reasons can provide useful guidance to those responsible for implementing and enforcing rules and decisions. It can also enhance their normativity, furthering the cooperation and compliance of the regulated. On

¹⁹⁶ "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." Tom R. Tyler, [Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority](#), 56 [DEPAUL L. REV.](#) 661, 694 (2007).

¹⁹⁷ Arbitration CAS 2008/O/1455 Boxing Australia v/AIBA, award of 16 April 2008.

¹⁹⁸ 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. I address these questions in a separate forthcoming article on Global Administrative Law and the Rule of Law.

the other hand, they consume resources and may impede needed dispatch and flexibility in making decisions.

The combination of transparency, opportunities to make submissions of proposed rules and decisions and reason giving is gradually becoming more prevalent in the decision practices of global regulatory bodies and their distributed administrations, particularly in adjudications but also in some other decisions of particular matters and rulemakings. The pattern, however, is uneven. These mechanisms are less prevalent or absent altogether in sectors such as security, development finance, social services delivery, and harmonization of technical standards. They are often more likely to be followed in regimes for economic and environmental health and safety regulation and human rights, albeit with considerable variation.

Even in combination, these three elements do not amount to an accountability mechanism because they lack the requisite account holder -accounter structure and the other accountability elements are also absent. The addition of review by an independent court or tribunal would constitute a robust system of administrative legal accountability. Review would ensure the availability and enhance the effectiveness of the three practices, which would in turn strengthen the effectiveness of review of the merits. The three procedures and review, operating together, could go far in fostering greater regard by global decision-makers to disregarded individuals and interests.¹⁹⁹

Specialized regime-specific reviewing bodies which afford review as a right are slowly growing in number but are far from ubiquitous.²⁰⁰ Review by domestic and international courts of the rules and decisions of global regulatory bodies is only occasionally available, although domestic courts regularly review decisions of domestic administrative agencies, including when they implement global rules and decisions of global bodies when acting as their distributed administration.²⁰¹ Nonetheless, both members and officials of many global administrations, including the most powerful can be expected to oppose creation of independent review mechanisms on the grounds that they are costly, burdensome, and dilatory, would impair necessary flexibility and efficiency, and would contribute little to the overall performance of the organization. These arguments may have substantial merit, especially in certain fields of global regulation such as security, delivery of development finance and social services, and harmonization of technical standards.

¹⁹⁹ Daniel Bradlow, *Private Complainants and International Organizations*, 36 GEORGETOWN J. INT'L L. 403 (2005).

²⁰⁰ Examples include the WTO Dispute Settlement Body, the Law of the Tribunal, the Århus Compliance Committee, the World Bank Inspection Panel and similar bodies for other international financial institutions, the Court of Arbitration for Sport, the World Bank Sanctions Board and similar bodies for other international financial institutions, and the UN Appeals Tribunal. In addition, there are the traditional international administrative tribunals of international organizations that address internal personnel matters.

²⁰¹ Domestic courts, however, face serious institutional and other limitations that greatly impair their ability to effectively to review the decision-making by global regulatory bodies that generates the norms being implemented by domestic administrative. See Richard B Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 695, 722 (2006) (noting that in the common situation where the decisions of global regulatory regimes are adopted by domestic administrative decisions, domestic courts are unlikely to review the procedures and decisions of global regimes directly).

Even without independent review, the combination of transparency, non-decisional participation through submissions on proposed decisions, and reason giving might be regarded as sufficient to constitute a system of administrative law in the context of global regulation. This combination of measures for administrative decision-making could go help ensure that decisions comport with governing law, give adequate regard to relevant affected interests and concerns, and are not arbitrary instruments of raw power, naked bargain, or private gain. It has long been accepted that there is far more to administrative law than judicial review. The constitution, management, and decisional procedures of administrative authorities form an integral and often in practice the most important part.²⁰² The structures, norms and procedures of internal administration have also played a central role in the continental tradition.

This important and in some instances dominant role of regular administrative procedures in securing impartial and even handed administrative decisions that effectuate public purposes does not, of course, establish that judicial review is not a necessary component of an administrative law system. Suggesting the contrary will strike many domestic administrative lawyers as heretical. Judicial review has played a central role in the conception and development of administrative law in both the common law and the continental legal traditions.²⁰³ At common law, judicial review of official actions preceded the development of any regular procedural requirements for administrative decision making, including requirements of public information provision, participation, and reason giving, which gradually emerged much later. In many respects, of these procedural requirements were developed and adopted in order to ensure effective judicial review. In the U.S. interest representation model of administrative law, judicial review plays a vital role in ensuring that agencies not only adhere to governing law but also that they give adequate reasons for discretionary policy choices and in doing so accord due regard to all relevant affected interests. Although continental administrative law followed a somewhat different path, judicial review has been a central feature ever since the establishment of the Conseil d'État and procedural requirements for administration were also developed only later. Thus, to suggest that administrative decision-making procedures alone, without judicial review, could constitute a system of administrative law would seem to turn the concept of administrative law and its history upside down.

Nonetheless, in the global governance context one might properly regard the combination of the three decision-making practices as a sufficient system of administrative law, a normative order that that many global authorities are obliged to respect, notwithstanding the absence of an

²⁰² Jerry Mashaw's history of the nineteenth century of American administrative law shows how administrative officials developed procedures and remedies that afforded citizens with regularized and responsive rules and decisions in an environment where judicial review was at best episodic and in many cases not available at all is a practical matter. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012). He has also shown the importance of the internal administrative law in the contemporary welfare state, which also operates with substantial autonomy from reviewing courts. JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983).

²⁰³ Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 *Am. J. Comp. L.* 859, 866 (2011) ("When all was said and done, administrative law boiled down to two components: administrative organization and judicial review.").

independent reviewing authority.²⁰⁴ Other forms of review operating within the global regulatory space and are growing in importance. As previously discussed, global regulatory bodies depend on other global or domestic administrative authorities as well as private actors to recognize, adopt, or implement their rules, standards and decisions. The practices followed by these and other actors in making decisions whether or not to accord such recognition and support amount to a form of (often informal) review that is pervasive in global administration and growing in importance even though it is far less formal, visible, and legally focused than review by courts or other independent reviewing bodies.²⁰⁵ Transparency, procedures for submissions on proposed decisions, and reason giving in the production of rules and decisions assists these other actors in reviewing the quality and relevance of the rules and decisions and also makes a positive assessment more likely. These processes of mutual review by global administrative authorities and other actors form pathways for broader circulation and uptake of regulatory norms, including through mutual recognition or convergence. Such practices are playing an important role in the overall development of global administrative law and regulation, fostering new constellations of law-governed administration. These reciprocal processes generate incentives for global regulatory bodies to adapt the tripartite procedural system in making decisions and encourage global authorities to give regard for norms, considerations, and interests beyond their specific missions and their members' immediate objectives; depending on the regulatory sector, this expanded regard may include the disregarded. Further, these processes promote recognition of the procedures not merely as good practice but as a system of administrative law for global regulation.

VI. CONCLUSION

This article has examined global regulatory governance through two perspectives, one positive and the other normative, in order to analyze its institutional mechanisms, diagnose its injustices, and provide conceptual purchase for thinking about its reform.

The article's normative framework is based on the concept of disregard. The structure of global regulation is made up of fragmented special-purpose bodies operating in a global administrative space without overarching supervisory and redistributive institutions. This structure has resulted in systematic disregard of the interests and concerns of numerous but politically weak groups and individuals – the disregarded -- causing them unjustified deprivations and harms. The article identifies two structural sources of systematic disregard global regulatory governance. First, decision-makers in global regulatory bodies, especially those pursuing on the economic and security goals of powerful member states, fail to heed the interests and concerns of the disregarded because they are fixed on their specialized missions and the interests of their

²⁰⁴ See Benedict Kingsbury, *The Concept of "Law" in Global Administrative Law*, 20 EJ IL 23 (2009).

²⁰⁵ See Abigail Dushman, *Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture*, 22 EUR. J. INT'L L. 1089 (2011) (case study of review by the Parliamentary Assembly of the Council of Europe of World Health Organization's handling of 2009 H1N1 pandemic); Richard Stewart and Michelle Ratton-Sanchez, *supra* at 23 (discussing horizontal review by one global regulatory body's norms by another).

members. Second, the pattern of global regulation is highly uneven, reflecting the influence of powerful states and economic interests. Strong regulatory regimes promote investment, trade, and economic development, while regimes to protect social and environmental interests and concerns are weak or nonexistent. As a result, the disregarded fail to receive protection against the harmful externalities generated by the activities promoted by the dominant regulatory regimes, resulting in structural disregard of their interests and concerns. The corresponding remedies for these two failings are to modify the mechanisms of global regulatory governance and fill gaps in regulatory protections so as to ensure proper regard for the disregarded.

The article's positive analysis complements its normative approach and agenda by providing a new conceptual framework for understanding global regulatory governance and identifying strategies for diagnosing and redressing disregard. The framework distinguishes three basic types of governance mechanisms: decision rules, accountability mechanisms, and other regard promoting measures. The article applies this framework to examine the role of the three mechanisms in the governance of the various types of global regulatory bodies and their distributed administrations in different regulatory fields. Decision rules and accountability mechanisms are basic elements of internal governance structures that determine who exercises power and influence in making decisions. The other responsiveness promoting mechanisms—market and reputational mechanisms, transparency, non-decisional participation, and reason giving—condition and shape the organization's interaction with outside organizations and actors and enable organizational outsiders to influence its decision making. To the extent that it is available to outsiders, legal accountability can also play this role.

The different ways in which the various mechanisms are configured and operate in different institutions and regulatory contexts provides rich opportunities for study and positive analysis. The important variables for analysis include the structural differences among the different types of global bodies and their distributed administrations; their constitution and membership; their field of regulatory activity and their objectives; their business models including strategies for mobilizing support, obtaining financing, and securing implementation of their rules and decisions; the identity and character of the other regulatory and administrative bodies operating in the same field; and the nature of the other actors, including governments, international organizations, business and professional bodies, and NGOs operating in the relevant regulatory space. Analysis of these variables can generate explanations of why, for example, independent reviewing bodies have been established in some types of bodies operating in some fields but not others, or illumine the role of the different mechanisms in inter- institutional relations.

The article's analytic framework also facilitates study of how and why different regulatory regimes have evolved to their present forms. To what extent can the adoption (or not) of measures such as independent reviewing bodies, consensus-based deliberative models of decision-making, non-decisional participation through submissions on proposed decisions, or reason giving be explained by considerations of political economy, including the interests of dominant members, competition from other organizations, or the initiatives and agendas of NGOs? To what extent can the patterns of institutional structure be explained by constructivist influences on the conceptions held by a regulatory body's members officials of its institutional identity and the appropriate notes for its governance, which may vary depending on the type of body and its regulatory field?

Finally, the article applies its institutional framework to map ways to further its the normative agenda of securing greater regard for the interests and concerns of the disregarded in global regulation. The agenda includes a role in decision-making for disregarded interests, expanding opportunities for them to secure legal accountability through independent review of decisions, and mobilization of market and reputational influences. It also includes further development of global administrative law mechanisms of transparency, opportunities for non-decisional participation especially submissions on proposed decisions, and reason giving by decision makers. These mechanisms promote decision-making through regular transparent procedures in accordance with public norms rather than the dictates of power and expediency, thereby promoting the rule of law in global regulatory governance. They also facilitate horizontal review of decisions by other institutions operating in the global space, furthering these same goals. Not least, a further option to create new global regulatory bodies to address the interests of the disregarded. Through the operation of regulatory competition and constructivist emulation, these initiatives may well have broader effect in overcoming disregard.

The conceptual framework and analysis presented in the article will assist global governance reformers. It provides reformers with a conceptual framework they can be used to diagnose the institutional sources of disregard in specific regulatory regimes and devise strategies for changes in governance mechanisms and other initiatives to address them. A potentially important strategy for these initiatives is the use of institutional judo. Through a combination of hardheaded analysis and creativity, reformers may succeed in orchestrating market and reputational influences with proposals for governance changes that speak to the institutional interests or self-conceptions of global regulators and at the same give greater decision making influence to representatives of the disregarded.

Disregard is deeply embedded in current global regulatory structures and practices. The task of securing proper regard for the disregarded and building a more just and equitable system of global regulation is a daunting one. This article marks a path forward. Here we must heed Justice Brandeis: “If we would guide by the light of reason, we must let our minds be bold.”²⁰⁶

²⁰⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280, 311 (1932)(dissenting opinion of Brandeis, J.).