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A NEW WORLD ORDER

CHAPTER SIX

A JUST WORLD ORDER

"Only governments bear the political imprimatur that is bestowed by political accountability. Neither multinational corporations nor international bureaucracies are a substitute. Addressing the most complex challenges posed by globalization requires the direct accountability carried by the representatives of sovereign nations."

Paul Martin, former Canadian Finance Minister and Chair of the G-20[1]

A search for the architects of world order is a Pogo-like quest: they are us. No hypothetical leaders or experts sit outside the world on some Archimedean platform, able to design and implement new global structures. Rather, heads of state, ministers, judges, legislators, heads of international organizations, civic and corporate leaders, professors, and pundits all make the choices and participate in the processes that design a blueprint of world order at any given moment and give it continually evolving substance.

Chapter IV outlined the structure of a disaggregated world order based on horizontal and vertical government networks co-existing with traditional international organizations. Chapter V described the mechanisms by which these networks can establish an effective world order -- in their current form and in a reconstituted or newly constituted and much more self-conscious form. But it is up to all of us to determine the actual substance of the outcomes that such a world order achieves and the ideals that it promotes. A feasible and effective world order is not

necessarily a desirable one. It must also be a just world order – or as just as human aspiration and capacity can make it.

Many of the descriptions and visions put forward in the previous chapters resonate more with the liberalism of progress than of fear.[2] I have focused more on what could go right than what could go wrong. Indeed, the very concept of "a new world order" has an inevitably utopian ring. But other observers of existing government networks, as well as critics of what they could become, have pointed out plenty of problems. This chapter tries to address those problems. In addition, I advance a set of my own prescriptions aimed at ensuring that a networked world order is as inclusive, tolerant, respectful, and decentralized as possible.

1. Problems with Government Networks

Critiques of government networks come from many different directions. Some are based on perception more than fact; some apply to some kinds of government networks more than others. Thus, for instance, fears that harmonization networks are circumventing democratic input into rule-making, discussed below, do not seem to have much bearing on information networks of regulators, judges, or legislators. More surprisingly, perhaps, even information networks have their detractors. Each of these different categories, of course, also holds many different networks, with different members and activities. Thus a grounded, systematic critique of "government networks" in general, or any specific category of networks, is difficult to mount at this stage.

A frequent and easy charge is "lack of accountability." Yet this claim highlights another difficulty with criticisms of government networks, and with figuring out how to respond to those criticisms. Accountability to whom? (Even assuming we know what "accountability" means in these circumstances.) Government networks are largely composed of national government officials, interacting either with each other, or, less frequently, with their supranational

counterparts. Those national officials are responsible to national constituencies for their domestic, and, as we shall see, their transgovernmental activities. At the same time, taken all together, government networks comprise a global governance system, which must somehow be accountable to the global community as a whole, constituted both as states and as individuals whose collective interests stem from a common humanity. Yet what may be desirable from a national point of view in terms of serving a particular set of interests may be highly problematic from a global point of view; conversely, positing and serving "global" interests can undercut or contravene specific national interests. In the listing of specific problems below, several have both a global and a national dimension.

We will return to these issues after discussing specific problems that have been raised by critics. But a final caveat is in order. Always present, whether explicit or not, is the problem of power. From a national perspective, the subtext of many critiques is the ways in which expanding the ambit of governance processes beyond national borders – even processes of gathering information and brainstorming about problems – changes a particular domestic political balance of power. From a global perspective, the perennial and unavoidable problem is stark asymmetries of power among different nations. It is worth remembering at the outset, however, that these problems are by no means limited to government networks. Those who would keep domestic borders hermetically sealed must contend with the far larger phenomenon of globalization. And those who would equalize the distribution of power across nations must grapple with the tremendous asymmetries built into our current world order, from the existence of permanent members on the Security Council to weighted voting in the IMF and the World Bank.

(a) *A Global Technocracy*

Perhaps the most frequent charge against government networks is that they are networks of technocrats – unelected regulators and judges who share a common functional outlook on the world but who do not respond to the social, economic, and political concerns of ordinary citizens. Antonio Perez, for instance, accuses government networks of adopting "Platonic Guardianship as a mode of transnational governance," an open "move toward technocratic elitism."[3] The affinity and even solidarity felt among central bankers, securities regulators, antitrust officials, environmental regulators, and judges, in this view, socialize them to believe that deeply political trade-offs are value-neutral choices based on "objective" expertise. To allow these officials to come together off-shore, free from the usual mandated intrusions of public representatives and private interest groups in their decision-making process, is to allow them to escape politics.

A related concern is a lack of transparency generally. According to Philip Alston, the rise of government networks "suggests a move away from arenas of relative transparency into the back rooms and the bypassing of the national political arenas to which the United States and other proponents of the importance of healthy democratic institutions attach so much importance." [4] Sol Picciotto agrees: "A chronic lack of legitimacy plagues direct international contacts at the sub-state level among national officials and administrators."[5] He attributes this lack of legitimacy to their informality and confidentiality, precisely the attributes that make them so attractive to the participants.[6]

The most frequent example of alleged global technocracy at work is the Basel Committee's adoption and enforcement of capital adequacy requirements (the Basel Capital Accords) among its members. Some experts have argued that these requirements ultimately contributed to a global recession.[7] Jonathan Macey argues that the Accords were an effort by the regulators themselves

to "protect their autonomy in the face of international competition," and that for the Japanese in particular, they "represented a hands-tying strategy" that allowed "the Japanese bureaucrats … to collude with bureaucrats from other countries in order to obtain more discretionary regulatory authority."[8] Yet central bankers are supposed to be independent domestically in many political systems; they are deliberately insulated from the direct political process. Indeed, as with courts, being perceived as "political" undermines their legitimacy, rather than bolstering it. Why should they be more politically constrained when coordinating policy with their foreign counterparts in an increasingly global economy?

In any event, a subsequent effort to adopt similar regulations by the Basel Committee failed, as did efforts to adopt common securities regulations by the Technical Committee of IOSCO. Overall, fears of an international cabal of some kind, secretly meeting and making rules, are hard to sustain on the facts. On the other hand, part of the point of this book is to point out ways in which some government networks could at least potentially exercise an actual rule-making capacity and that the rules they make would be directly enforceable by the members of the network themselves, without any other domestic or global political input. Concerns about unchecked technocratic rule-making authority could thus be more justified in the future.

The standard response to concerns about technocracy is to increase transparency. Yet transparency can make the network even more accessible to sectoral interest pressures, leading to "over-politicization" in the form of distorted representation of specific domestic or international preferences. At the same time, government networks can pose the problem of not knowing enough about who is making decisions and when they are being made to have meaningful input into them. As Joseph Weiler observes with regard to charges of a democracy deficit within the

EU: “Transparency and access to documents are often invoked as a possible remedy to this issue. But if you do not know what is going on, which documents will you ask to see?”[9]

Another frequent prescription to counter technocratic tendencies is to link government networks with broader policy networks of non-governmental organizations and corporations. The point here is not simply to put technocratic government officials into greater contact with activists from different constituencies. It is also to change the context of their decision-making. Even if the outcome of their deliberations with one another is a set of codes of conduct or best practices, compilations without any formal authority, the technical consensus represented may be worrisome. It is unlikely that the formulators of these codes have been challenged by consumers, environmentalists, or labor, on the one hand, or by corporate and financial interests, on the other. By “re-politicizing” the decision-making process, at least to a degree, regulators have learn to question their own professional consensus and deliberate over the best collective solution taking a much wider range of interests into account.

These charges of technocracy and lack of transparency are from the global perspective, mounted largely by international lawyers who seek to ensure the fairness and responsiveness of any system of global governance. Secret colloquies of technocrats, in this view, contrast unfavorably with the open, one-state one-vote negotiations and voting systems of many actual or envisioned international organizations. Again, concerns about inequalities of power are a critical part of this equation; shifting authority to technocrats means privileging the views of those nations who have technocrats – inevitably the most developed nations. Yet as the next section demonstrates, these concerns resonate also with weaker and non-expert constituencies within nations.

(b) *Distortion of National Political Processes*

Click on the website of the U.S. public interest organization Public Citizen.[10] The left side lists buttons identifying the issue areas of that are specific concern to the organization. They include “Fast Track, WTO, NAFTA, China,” and “Harmonization.” Click on harmonization and read on. Here is the definition of what harmonization is and why the American public should be concerned about it: “Harmonization is the name given to the effort by industry to replace the variety of product standards and other regulatory policies adopted by nations in favor of uniform global standards.”[11]

Public Citizen blames international trade agreements such as the NAFTA and the WTO for a major boost in harmonization efforts, arguing that they “require or encourage” national governments either to harmonize standards or recognize foreign government standards as equivalent to their own.[12] This substantive commitment is implemented through the establishment of “an ever-increasing number of committees and working groups to implement the harmonization mandate.”[13]

The problem with all these efforts, from Public Citizen’s perspective, is that most of these working groups are industry dominated, do not provide an opportunity for input by interested individuals or potentially-affected communities, and generally conduct their operations behind closed doors. Yet, under current trade rules, these standard- setting processes can directly affect our national, state and local policies.[14]

An immediate solution is to alert the public to what is happening. And indeed, Public Citizen publishes “Harmonization Alert,” a newsletter available in print and on line that “seeks to promote open and accountable policy-making relating to public health, natural resources, consumer safety, and economic justice standards in an era of globalization.”[15] It posts notice of

proposed changes to U.S. regulations, comment periods, and important meeting dates and times. The aim is to increase the transparency of the harmonization process and make "otherwise obscure information" available to the public, in the hope "that more citizens, groups and organizations will get involved and have an impact on global standard-setting."[16] Scholars such as Sidney Shapiro are also beginning to alert administrative lawyers to the worrisome side of harmonization efforts.[17]

Over the longer term, public activists must seek to extend U.S. domestic procedural guarantees to transgovernmental activity. Public Citizen paints a relatively rosy view of the requirements of U.S. administrative law, noting that "U.S., policy-making must be conducted 'on the record,' with a publicly accessible docket, under laws such as the federal Administrative Procedure Act." Other U.S. statutes, such as the Federal Advisory Committee Act, "[require] balanced representation on and open operations of government advisory committees."[18] On the international side, however, agency adherence to the U.S domestic procedures for notice, balance, openness, and public input has been spotty at best. U.S. federal agencies follow different procedures for involving the public in their international harmonization negotiations and make differing amounts of information available to the public at different stages.[19]

The natural response is thus to "apply the due process and participation requirements of existing U.S. laws, such as the Administrative Procedure Act, Freedom of Information Act, and Federal Advisory Committee Act, to all international harmonization activities."[20] In practice, this means requiring regulators seeking to develop U.S. positions at harmonization talks or considering proposals from foreign regulators to create a record of all their actions that is then subject to notice-and-comment rulemaking, allowing all interested members of the public full

input.[21] The resulting agency action would presumably also be subject to judicial review by U.S. courts.

At first glance, concern over harmonization arises primarily from the goal of harmonizing regulations, with the resulting danger of "leveling down" in levels of protection for public health, the environment, consumer safety, and other areas. But it's also the process. The idea of regulators meeting behind closed door, without input from a wide variety of interested public groups at a time when they can still have impact on the discussion and the outcome, is deeply worrying in itself. Knowing that they are just exchanging information about common problems or providing technical assistance to one another will trigger less immediate alarm than knowing that they are actively engaged in harmonizing national regulations. But to the extent that the deeper concern is that regulators in a particular issue area are operating on a technocratic, professional set of assumptions that do not take into account other perspectives, interests, and politics, transgovernmental regulatory interaction of any kind is likely to prompt demands for more public participation, or at least sufficient transparency to allow interested groups to decide for themselves whether they want to have input.

Unlike the old "clubs" of ministers, deputy ministers, or even working officials within international organizations such as the IMF, NATO, and the GATT, today the individuals involved are domestic regulators, public servants who are charged with formulating and implementing rules on a host of issues that have an everyday impact on ordinary citizens, and that are thus ordinarily subject to a host of rules designed to enhance public scrutiny. Their foreign activity is an extension of their domestic activity, rather than occurring in a separate and distinct "international" sphere created to address "international" problems. Critics thus argue that these officials should be subject to the same restraints abroad as at home.

(c) *Unrepresentative Input into Global Political Processes*

Another group of critics is less worried about existing government networks as described here, but rather about the larger phenomenon of "global policy networks" or "global issue networks," networks of all individuals, groups, and organizations, governmental and non-governmental, interested in a particular set of issues. The U.N. Secretary General, a Vice-President of the World Bank, and numerous scholars have championed these networks as optimal mechanisms of global governance.[22] And as just noted, these wider networks are often invoked as the solution to the problem of technocracy with pure government networks. But the problem that immediately arises is how to separate out the structures of government from the much more amorphous webs of governance.

According to Martin Shapiro, the shift from government to governance marks "a significant erosion of the boundaries separating what lies inside a government and its administration and what lies outside them."[23] The result is to advantage "experts and enthusiasts," the two groups outside government that have the greatest incentive and desire to participate in governance processes but who are not representative of the larger polity.[24] From this perspective, 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.

Instead of celebrating governance without government, critics like Shapiro argue for exactly the opposite: bringing government back into governance. Networks of government officials should become more readily distinguishable from the plethora of private actors that surround them – even from private actors purportedly acting in the public interest. The merging and

blurring of lines of authority are ultimately likely to blur the distinction between public legitimacy and private power.

From this perspective, the question is how to raise the profile of government networks as networks within broader policy networks. Identifiable government officials must be responsible for ultimate decisions on the same kinds of questions that they would decide in their home countries, as well as for new kinds of decisions about "best practices," codes of conduct, and the coordination of resources in the service of common problems. Determining and making clear who has the authority to make final decisions will also help regularize input into those decisions, preserving the contributions of the myriad private actors currently involved but also creating more established channels of participation.

(d) *Unrepresentative Input into National Judicial Decision-Making*

How troubling is it that judges draw on the decisions of foreign and international courts as part of their deliberations on how to decide a domestic case? As discussed in Chapter II, U.S. Supreme Court justices differ over this question – quite heatedly. Should we leave it to them to resolve? Should Congress take a hand? Should the Solicitor General, as the President's top advocate, take a position in arguments before the Court?

According to former justice of the Massachusetts Supreme Judicial Court Charles Fried, drawing on foreign decisions could change the course of American law. Fried writes thoughtfully on the difference between scholarship and adjudication, noting that rejection of comparative analysis on the part of scholars "would seem philistine indeed," but is not necessarily so on the part of judges.[25] Judges must hand down answers, constrained by a confined set of sources. Thus, Fried writes, referring to the debate between Justice Breyer and Justice Scalia in the *Printz* case:

> Justice Breyer's remarks on comparative constitutional law, if they had appeared in a law review article, would have been quite unremarkable . . . . As part of a judicial opinion, they were altogether remarkable. Why should that be? The reason is that if Justice Breyer's insertion into the case of comparative constitutional law materials had gone unchallenged, it would have been a step towards legitimizing their use as points of departure in constitutional argumentation . . . .[26]

If Breyer had succeeded, Fried continues, his recommendation would have been "something more than just a proposal or a good idea. It would have introduced a whole new range of materials to the texts, precedents, and doctrines from which the Herculean task of constructing judgments in particular cases proceeds."[27] By way of example, Fried points to the significance of allowing judges to cite sources other than pure case-law, such as scientific reports, policy analyses, and other non-legal materials. Expanding a judge's universe of information will expand the range of considerations she thinks is relevant to a decision. Expanding the range of considerations, in turn, makes it possible to make a wider range of arguments for or against a particular decision.

Thus, for instance, when Justice Ruth Bader Ginsburg faces a decision under U.S. law on the constitutionality of affirmative action, she finds it valuable to look to the Indian experience as well as the U.S. experience.[28] Knowing the Indian experience gives her a different perspective on the problems that U.S. institutions may encounter with affirmative action programs; it also gives her a wider sense of the available options. But is the Indian experience really relevant to the United States? The enormous differences between the two countries raise the possibility – indeed

the likelihood – that the same policy initiatives will have completely different results. But more fundamentally, does democracy mean the right to make our own mistakes?

To a group of professional academics, framing the question this way seems radically anti-intellectual. But to politicians, and the citizens they represent, the critical issue may be controlling the inputs into a particular political process – including judicial deliberation – so as to be able to control or at least manage the output. The problem, from this perspective, is not so much a lack of good ideas, which could be remedied by looking to other countries, but the underlying battle of interests that informs any policy choice. Allowing judges, regulators, and even legislators to inject new options into any policy debate by reference to the experience of other countries, and even to legitimate them based on that experience, makes the entire political process much harder to manage.

Similar concerns have been expressed outside the United States. Christopher McCrudden documents debates about the appropriateness of drawing on foreign judicial decisions in Israel, Singapore, South Africa, Australia, and Hong Kong.[29] A principal concern in these debates is arbitrariness in choosing when to pay attention to foreign law and when to ignore it, as well as in deciding which foreign courts to pay attention to. Yash Ghai reports from Hong Kong that "the approach to the use of foreign cases is not very consistent; they are invoked when they support the position preferred by the court, otherwise they are dismissed as irrelevant."[30] In some ways this critique is analogous to Macey's charge that Japanese banking regulators used the Basel Accords to bolster their domestic legitimacy and hence autonomy – judges can point selectively to foreign authorities to strengthen their arguments. But the response in the judicial context would be to require a high court to set forth a certain philosophy and even methodology about

when and how it is appropriate to canvass foreign decisions, which could in turn give rise to precisely the systematic expansion of legitimate legal sources that Fried worries about.

(e) *The Ineradicability of Power*

A final problem is the way in which government networks either replicate or even magnify asymmetries of power in the existing international system. Some government networks represent exclusive preserves of officials from the most economically developed and hence powerful nations. The Basel Committee, with its membership of Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, Britain, the U.S., Switzerland, and Luxembourg, is again a prime example. Similarly, the Technical Committee of IOSCO, where most of the important work is done, is comprised of a fairly predictable group of nations with well-developed securities markets.[31] If such networks are to form the infrastructure for a networked world order, they must be given incentives to expand their membership in meaningful ways, inviting in government officials from poorer, less powerful, and often marginalized countries as genuine participants rather than largely passive observers.

Supporters of government networks as mechanisms of global governance are well aware of this problem. Lord Howell celebrates the Commonwealth over institutions such as the OECD for its greater inclusiveness. The OECD, he writes, "lacks an obvious and centrally valuable feature of the Commonwealth – namely, its scope for bringing together and giving a common voice to both richer and poorer, developed and developing societies."[32] Greater inclusiveness also drives former Canadian Finance Minister Paul Martin's insistence on using the G-20 instead of the G-7. The "breadth of [the G-20's] membership is crucial," he writes, for we have learned a fundamental truth about policies to promote development: they will work only if the developing countries and emerging markets help shape them, because inclusiveness lies at the heart of

legitimacy and effectiveness. And the G-20 *is* inclusive. Nations at all phases of development are at the G-20 table – and no one side of it is dictating to another.[33]

If "global government networks" are in fact only partial government networks, they will ultimately fail. They cannot address the world's problems, or even what appear to be only regional problems, as members of an exclusive club. This point is problematic for the members of some current networks, at least to the extent that one of the major intuitive advantages of networking over more formal international institutions is the ability to engage selectively with other like-minded governments in pondering hard problems rather than enduring the tedious procedural formalities of global deliberation. If all government networks were to become mini-UNs in different substantive areas, little would be gained. Yet as the example of the Commonwealth and APEC demonstrate, it is possible to have much more inclusive government networks without formalizing procedures.

From the perspective of weaker countries, however, being included does not solve the problem of power. On the contrary, as discussed extensively in the last chapter, officials – regulators, judges, legislators -- are simply subject to the soft power of the strongest members of the network. Even training, information, and assistance that they seek out is likely to push them steadily toward convergence with both the substance and style of more developed countries in any particular subject area – from constitutional rights to utilities regulation. Having a voice in collective discussions is better than being silenced by exclusion, but it does not guarantee that you will be heard.

This substance and strength of this critique must be appreciated in context. First, as discussed in the last chapter, the same factors that press toward convergence can inform a considered position of divergence for any particular country. Second, countries may converge

toward multiple standards, as in competition policy. Third, it is possible for groups of weaker countries to band together and form "counter-networks" as a group of Southern African countries have done in the area of securities regulation. Fourth, as is evident in the judicial arena, the most influential national government institutions are not always from the most powerful countries, but rather from countries that themselves have had reason to canvass the positions of their fellow nations and develop a nuanced synthesis.

A final question in terms of power relations is whether weaker countries have more influence in governance mechanisms based on information exchange, discussion, and deliberation than in those based on weighted voting. Formal international institutions, with their various voting systems, will continue to exist alongside government networks; powerful nations will continue to have uneasy relationships with such institutions. Strong nations will continue to dictate terms to weaker nations in international institutions. And indeed, the more likely it is that vertical networks will exist to ensure direct enforcement by national officials of the agreements that result from those negotiations, the more careful strong nations will be about what they agree to.

In such a world, will weaker nations be better or worse off with a global lattice of government networks? Where possibilities of genuine learning exist, representatives of even the world's most powerful nations are likely to be surprised by what they do not know or have not thought of. Further, of course, as in the U.S.'s relations with the EU over 45 years, and the U.S. Supreme Court's relations with many newer constitutional courts, successful mentoring can often produce students who turn the tables on their teachers. And individual government officials could be strengthened through these networks in their efforts to improve the governance of their

entire country, ultimately strengthening its global position. These are the kind of factors that must be weighed in assessing the balance of power in a disaggregated world order.

2. A Menu of Potential Solutions

The critics of government networks are themselves a diverse lot, criticizing a diverse phenomenon for a variety of different faults. If one group sees government without politics, another worries that the "politics" sought to be introduced are likely to be selective and distorted. Still others, largely approving of government networks as a form of governance, charge them with too much selectivity in choosing their members. And all these perceived problems take on a different cast when the vantage point is a particular national polity versus a hypothetical global community.

Ultimately, policymakers who wish to respond seriously to these various problems will have to formulate a solution on a case-by-case basis, after conducting more systematic research to verify the substance and the scope of each problem across different government networks. But even at this level of generality, it is possible to put forward some broader proposals. The starting point should be simply to recognize government networks as a prime form of global governance, equivalent in importance and effectiveness to traditional international organizations.

If we think of national government officials as performing governmental functions at the global or regional level, then we must hold them to the same standards and expectations that we impose on domestic government officials. We must stop thinking of their relationships with their foreign counterparts as marginal or interstitial, or of their meetings as mere junkets or talking shops. When government officials interact across borders – whether judges, regulators, chief executives and their top ministers, or legislators – the form may be informal, but the substance is governmental.

We can begin by reconceiving the responsibilities of all national officials as including both a national and a transgovernmental component, such that they must all perform a dual function. That simple conceptual shift will prompt debate about what those responsibilities should actually be and how their performance should be monitored. Second is to make transgovernmental activity as visible as possible to legislators, interest groups, and ordinary citizens. Third is to ensure that government networks link legislators across borders as much as they do regulators and judges, to ensure that all three branches of government, with their relative strengths and weaknesses, are represented. Fourth is to use government networks as the spines of larger policy networks, helping to mobilize transnational society but at the same time remaining identifiably distinct from non-governmental actors. Fifth is a grab-bag of different domestic policy decisions and arrangements that express the views of particular polities on questions ranging from the legitimacy of consulting and citing foreign judicial decisions to the acceptability of autonomous rule-making capacity in regulatory networks.

(a) *Dual Function, Dual Accountability?*

In a representative democracy, regulators, judges, and legislators are held accountable for the job they do within national borders. Diplomats, on the other hand, held accountable for the state of the nation's foreign relations – a job that can only be done across borders. The first step toward ensuring that transgovernmental networks are subject to at least the same checks and balances as national officials acting within national territory is understanding that henceforth *all* domestic officials work both within and across borders. It must be assumed that they will come to know and interact with their foreign counterparts, in the same way that they would know their state or provincial counterparts in domestic federal systems.

Further, understanding "domestic" issues in regional or global context must become part of doing a good job. Increasingly, the optimal solutions to these issues will depend on what is happening abroad, and the solutions to foreign issues, in corresponding measure, by what is happening at home. Consulting with foreign counterparts would thus become part of basic competence in carrying out routine domestic functions. To take an example close to home, suppose that the members of Congress sitting on the Senate and House agriculture committees need to keep track not only of foreign agricultural subsidies and import barriers, but also of the movements of migrant agricultural workers from all over Latin America. This is hardly a far-fetched scenario. What would be unusual, however, is that rather than approach law-making in these areas unilaterally, the members of these committees would exchange information with their counterpart legislators in the relevant foreign countries, and even to coordinate policy initiatives or explore potential synergies or bargains.

Full-fledged international agreements would still have to be struck by chief executives and ratified by the full legislature as specified under domestic law, but the legislators themselves would be much more involved in the process *with their foreign counterparts*. Regulators of all kinds, from health to education to environment areas, would conduct their own foreign relations, subject to some kind of domestic inter-agency process that accepted this phenomenon but nevertheless attempted to aggregate interests. Prosecutors, judges, and law enforcement agents of all kinds would work actively with their foreign counterparts on problems requiring multiple coordinated initiatives across borders.

This concept of dual function would make it far easier for organizations like Public Citizen to mobilize ordinary Americans to understand that their government officials may well be playing on a larger global or regional playing field and to monitor their activities. These officials

may have two faces, internal and external, but they still have only one audience. It would also make it easier for critics like Martin Shapiro to insist that government officials be held separately accountable for their activities in larger "policy networks."

Dual function thus does not mean dual accountability. Yet in a full-fledged disaggregated world order, national government officials would simultaneously be representatives of their national government and participants in a larger global or regional institution. Here again is an essential difference between the conception of a disaggregated world order and various traditional conceptions that focus on international institutions. In the traditional view, two sets of government officials – one national and one international – perform the same functions at different levels of governance, like state and federal governments in federal systems. In a pure disaggregated view, one set of government officials operate at both the national and the global/regional levels, performing a set of inter-related functions. But these officials would have to represent both national and global interests, at least to the same degree that heads of state and foreign ministers now do in conducting international negotiations and delegating responsibility to formal international institutions.

What would this mean in practice? Since September 11, it has not been hard to convince Americans in even the smallest communities what citizens of other countries have felt for decades: it is impossible to shut ourselves off from the world. Parents who adopt a foreign child; merchants who import and export goods; immigrants who maintain ties to their home communities; migrants and the employers who depend on them; labor, human rights and environmental activists; educators who must teach children from different cultures speaking different languages – no corner of once "local" life is immune. The ties that bind a society together, that can weave a community into being, are increasingly transnational.

These are the clichés of globalization. But by changing individual lives, they ultimately change the character of communities. More gradually still, they change the nature of polities – of the constituencies that government officials must represent and serve. Foreign citizens need not vote to be represented. For instance, if Romania shuts down its adoption services; if wages rise in China; if India makes it easier to remit money earned abroad; if Mexico's standard of health declines; if fires destroying the rain forest increase global carbon dioxide – the impact will ultimately be felt in a U.S. community in a way that is likely to cause U.S. voters to demand a government response.

It is still a leap, however, from the point that U.S. government representatives, in every branch, must take account of international events, trends and interests to represent their constituents adequately, to the argument that they should also see themselves as representing a larger transnational or even global constituency. Under the U.S. Constitution, our senators and representatives represent their state or district to ensure that the voices of their particular constituents are heard in the larger debate. But they are also expected to understand and safeguard the larger public interests of the nation as a whole, of which their constituents are part. If that whole should founder, the parts cannot survive.

A similar integration of national and global interests would have to take place, although much less formal and complete. In a true world government, representatives would be elected to some kind of global legislature from every nation. They would represent the citizens from their nation in a collective effort to make rules and set policy for the world. Invariably, such global parliamentarians would have to sort out the respective weights of their national interest and the global public interest. The larger backdrop for this exercise would be the deep understanding on

the part of all peoples and their leaders that without a collaborative effort to resolve collective problems, we would all be imperiled.

A networked world order rejects such a formal, top-down, and inevitably centralized approach to global governance. National governments and national government officials must remain the primary focus of political loyalty and the primary actors on the global stage. However, if they are to be actors in national and global policymaking simultaneously, officials would have to be able to think simultaneously in terms of the national and the global interest and to sort out the relative priorities of the two on a case-by-case basis. A national environmental regulator would have to be able to push for a set of global environmental restrictions that do not unduly burden her national constituents, while at the same time making the case for those restrictions to her constituents. And at times she might have to agree to restrictions that would be considerably tighter than her constituents wanted to get an agreement that advanced the collective interests of all nations.

In short, to avoid global government, national government officials will have to learn to think globally. They must become Janus-faced, following the old Roman god of gates and doors, or beginnings and endings, with one face pointing forward and the other backwards. But in this case one face must look inward and the other outward, translating quickly and smoothly from the domestic to the international sphere.

(b) *Making Government Networks Visible*

In a true world government, government activity would take place in formal, physical institutions sited in the "world's capitol," or perhaps capitols. These institutions would be the focus of monitors and lobbyists, as now occurs in Washington, London, Tokyo, New Delhi, Beijing, or Brussels. They would also physically define the "public sphere," within which actors

must "regularly and routinely explain and justify their behavior."[34] John Rawls built an entire political philosophy on this principle, relying on the value of "public reason."[35] But public reason cannot exist without public space, whether real or virtual.

To create a public sphere for the operation of government networks, we must try to achieve two distinct goals. First is making clear where exactly processes of governance are taking place. The space must be the equivalent of a physical site, for symbolic and practical reasons. We must replace the image of shadowy networks making "offshore" decisions with an actual vision of regularized governance processes in accessible places.

Second, we must create a space in which individual citizens can figure out what is actually happening. The buzzword response to accountability concerns has been "transparency." Make everything open and accessible, at every level of governance. The decentralization of governance, however, makes this an increasingly less satisfying response. Consider, for instance, the plethora of networks in the EU. Having access to minutes of countless meetings and records of complex decision processes threatens overload more than promising oversight.

A partial answer to both these problems may be to create virtual space. It is possible to centralize information on a website that is the global equivalent of the massive carved buildings that host national departments of justice, treasury, defense, and social services. At the same time, this website would be linked to as many different national websites in the particular issue area as possible. Thus a citizen of any country seeking to learn about policymaking in any particular area could start at with either a national website or the global website, each of which would send her to the other.

This is not a fantasy. Examples already exist. The web site of the International Monetary Fund offers links to the web sites of national central banks and finance ministries and provides

relevant articles and policy positions relating to each country's relationship with the IMF.[36] The Canadian Government has created an innovative inward- and outward-looking portal: Citizens can access local (provincial) government sites and, via the Foreign Affairs web site, also obtain information on, and links to, other countries and international organizations, like the European Union, the Organization of American States, or APEC.[37] On the European Union web site, the EUR-Lex project is a "first step" aimed at "bringing together the whole body of EU official acts for consultation." Citizens of member state and other interested individuals can review the EU's Official Journal; treaties; legislation (both acts that are in force and those in preparation); case law; Parliamentary questions; and documents of public interest.[38] Clicking on "legislation in preparation" produces a page entitled "pre-lex," which allows a viewer to see a host of Commission proposals, records of Parliamentary activity, and Council documents. It also offers a specific guide to "monitoring the decision-making process between institutions."

Virtual public spaces are emerging also around international judicial bodies. The web site for the proposed International Criminal Court (ICC), whose enabling statute will enter into force on July 1, 2002, provides valuable information on the functions of the Court; the ratification status of individual countries who have signed the treaty; press releases; the work of the Preparatory Commission; as well as the text of the Rome Statute itself and related documents. The site also provides links to the International Law Commission; the International Court of Justice; the International Criminal Tribunals for Rwanda and the Former Yugoslavia; as well as to the UN's international law page.[39] It is not hard to imagine further links to national constitutional courts, particularly to their criminal law decisions.

Linking national governments in virtual space and providing a central forum for citizens and groups from all countries would at least help convince officials operating in transgovernmental

networks that they are under scrutiny and that in at least some circumstances they must justify their actions. That requirement sets in motion the process of dialogue between the holders and the subjects of power that can both articulate and resolve problems. More broadly, the creation of even a virtual public sphere would be a principal mechanism for placing government networks in the context of broader policy frameworks, which is likely to mean a renewed exposure to the messy demands of interest-group politics. In this space it regulators could no longer advance specific, national preferences within groups of more-or-less likeminded colleagues; rather, they would have to defend their positions and proposals within the broader context of other competing interests, advanced by government officials from other sectors and a wide range of private actors, from corporations to non-governmental organizations. Winning arguments in this setting is more likely to require appeals to principle than statements of preference, appeals that in turn are likely to be couched in terms of both the national and the global public interest.

(c) *Legislative Networks*

Legislative oversight is the standard response to administrative delegation in both parliamentary and presidential systems. Where administrative officials are increasingly making decisions in conjunction with their foreign counterparts, legislative oversight committees would do well to coordinate with their counterparts as well. Regular meetings between directly elected representatives from different countries on issues of common concern will help broaden the horizons of individual legislators in ways that are likely to feed back to their constituents. Coordinating legislation through direct legislator interaction rather than through treaty implementation may also result in faster and more effective responses to transnational problems, although the ability to generate legislation independent of the executive obviously varies in different national political systems.

In some areas, national legislation has been used to facilitate the growth of government networks.[40] In others, such as human rights and the environment, national legislators are increasingly recognizing that they have common interests. Global Legislators for a Balanced Environment (GLOBE) was founded in 1989 and is essentially an environmental NGO composed of parliamentarians.[41] As discussed in Chapter III, governments in the European Union must increasingly submit their European policies to special parliamentary committees, who are themselves networking. The result, according to German international relations scholar Karl Kaiser, is the "reparliamentarization" of national policy.[42] But encouragement of legislative networks across the board would help ensure that the direct representatives of peoples around the world communicated and coordinated with each other in the same ways and to the same degree as do their fellow government officials. It would help address the perceived problems of both global technocracy and distortion of national political processes, as well as adding another category of accountable government actors into the mix of entities participating in policy networks. It might also help expand the membership of existing government networks.

Richard Falk and Andrew Strauss have called for a global parliament as the backbone of global democracy.[43] Such a body would be huge and unwieldy; its members would also be two removes from their purported constituents. They would not be elected to exercise the direct national power that leads voters both to value them and to monitor them closely, but rather to engage in vague global deliberations. Contrast the vision of Louise Doswald-Beck, former Secretary-General of the International Commission of Jurists: "When members of Parliament are able to consider, in relation to any issue, what solution is in the best interests of the international community and of their own States in the medium-to-long term, they are able to contribute more effectively to global policy-making."[44]

Legislative networks are beginning to emerge to monitor the activities of traditional international organizations such as the World Bank and the World Trade Organization. The Parliamentary Network on the World Bank held its first conference in May 2000 and its second in January 2001 in London, where it was hosted by a select committee of the House of Commons.[45] The Network has no official connection to the World Bank; it is an independent initiative by parliamentarians who want to play a more active role in global governance. Similar efforts to organize parliamentarians to oversee the activities of the WTO are ongoing, spurred by a meeting of parliamentarians at the WTO Ministerial Conference in Doha, Qatar, in November 2001, which was organized by the Inter-Parliamentary Union.[46]

Addressing the assembled parliamentarians at Doha, WTO Director-General Michael Moore expressed precisely the sentiment that should motivate the formation of legislative networks of all kinds: "Parliamentarians have a vital role to play in bringing international organizations and people closer together and holding us and governments accountable. . . . Can I suggest that we should assemble more often and that all the multilateral institutions that you have created, that you own, could do with your assistance and scrutiny."[47] Parliamentarians have an equally vital role to play in monitoring the activities of transgovernmental regulatory networks and in helping to establish both regulatory and judicial networks more formally in ways that will allow them to play a more active role in strengthening domestic governance in different countries. By constituting themselves as legislative networks, they can provide the same support for parliamentarians in different countries. They can also pursue their own initiatives in terms of tackling global problems cooperatively through coordinated national legislation.

(d) *Mobilizing Transnational Networks*

Government networks deploy information as power in a variety of new and effective ways. They collect, distill, and disseminate credible information. One of the most important corollaries of this activity is the empowerment of ordinary citizens within and across borders. Where the principal activity of an international entity is the production of accurate and considered information that has the imprimatur of collective deliberation by officials from many of the world's governments, individuals and groups in domestic and transnational society can readily use this information to build and press their case on a particular policy issue in domestic politics.

Even more valuable, from the perspective of domestic political activists of all sorts, is the ability to participate directly in global policy networks. Kofi Annan has encouraged the formation and use of such networks from his U.N. bully pulpit, calling for the "creation of global policy networks" to "bring together international institutions, civil society and private sector organizations, and national governments in pursuit of common goals."[48] More generally, Wolfgang Reinicke and Francis Deng have developed both the concept and practice of the global public interest, promoted and pursued through networks.[49] Reinicke describes global public policy networks as "loose alliances of government agencies, international organizations, corporations, and elements of civil society such as nongovernmental organizations, professional associations, or religious groups that join together to achieve what none can accomplish on its own."[50]

These are the kinds of networks that Shapiro and others worry about. As has been suggested above, government networks can provide the spine of these broader networks in ways that make it easier to distinguish politically accountable actors from "experts and enthusiasts." At the same time, however, the self-conscious creation and support of government networks as global governance mechanisms can help mobilize a whole set of transnational actors around them – to

interact with them, monitor their activities, provide input into their decision making, and receive information from them. Indeed, to the extent that these transnational networks of NGOs, individuals, corporations, international officials, churches, charities, and voluntary associations can use the information provided to advance their own causes and solve their particular problems in the pursuit of a larger conception of global public interest, it is possible to imagine the strengthening of a kind of disaggregated global democracy based on individual and group self-governance.

(e) *A Grab-Bag of Domestic Solutions*

A final set of measures to address perceived or actual problems with the activities of existing government networks should come from domestic polities. The citizens of different countries, and their government officials, are likely to have different degrees of concern about these activities. The U.S. debate over citing foreign judicial decisions has been replicated in some other countries, but by no means all, and it has a different resonance depending on the length and nature of a particular country's legal tradition. Similarly, the citizens of some countries might be content with the role of their regulators in global or regional regulatory networks, whereas the citizens of other countries might seek more monitoring of or direct input into those networks.

In the U.S., the first step should be to collect information. Congressional committees should require all agencies to report their international or foreign activity and contacts – when, where, for what purpose, and with what result. This information should become a matter of routine public record. It would also be valuable to collect information on which interest groups currently gain access to transgovernmental activity and decision-making. Should we find that particular interest groups – such as the securities dealers association rather than various shareholder groups, or mining interests over environmental groups – gain more access than others, we might require

legislative action to right the balance. It might even be desirable to develop a judicial framework for reviewing the process or results of transgovernmental regulatory cooperation. [51]

A number of distinguished legal scholars are beginning to think hard about "global administrative law," specifically about ways to ensure that the same procedural safeguards and guarantees of public participation in administrative rule-making that have been painstakingly worked out at the domestic level will operate at the global level.[52] The American Bar Association has recommended that all federal administrative agencies: 1) "invit[e] the public periodically to comment on new and ongoing significant harmonization activities and to attend public meetings concerning such activities[,]; 2) refer[] significant harmonization issues to advisory committees where appropriate and possible[,]; and 3) establish[] a public docket of documents and studies available under the Freedom of Information Act (FOIA) pertaining to each significant harmonization activity."[53]

An even more complicated question for any domestic polity is to contemplate the balance between national and global interests, on the assumption that all national officials would in fact be accountable not only to their domestic constituents for both domestic and international activity, but also to a hypothetical global constituency. How should individual officials strike this balance? Consider the question from the perspective of an individual regulator. She would have to think both nationally and globally, trying to harmonize laws, solve common problems, develop codes of best practices, assist foreign regulators and receive such assistance in turn in enforcing national regulations, and in various other activities. What would be the actual U.S. interest in each specific substantive issue area, particularly when traded off against other U.S. interests as would naturally happen in a domestic inter-agency process? How should she think about the global public interest, to the extent that the global securities, antitrust, environmental,

or criminal regime must be greater than the sum of its national parts? These are not questions that any regulator can answer alone. It will be ultimately be up to us to devise a domestic and ultimately a transgovernmental process to formulate and address them.

Or consider again the debate over whether U.S. Supreme Court judges should be citing foreign court decisions to illuminate domestic legal issues. This is not a purely domestic debate. It has foreign policy implications – *judicial* foreign policy implications. As a nation that prides itself on its tradition of the rule of law and particularly its history of constitutional jurisprudence, should we not continue to play a leading role in developing a global jurisprudence? Are we prepared to cede that role to the Canadian, German, and South African Supreme Courts, together with the European Court of Human Rights? Global governance includes global judicial governance; U.S. judges have an external as well as an internal role.

Our judges remain American judges, bound by our laws and Constitution; the vast majority of their cases arise on U.S. soil. Yet does knowing how many other countries decided the same issue matter to how a U.S. judge would decide? Should it matter? What if the judge recognizes that her decision citing other foreign courts is likely to be cited by them in turn as part of an emerging global jurisprudence – although not necessarily a consensus, on a particular issue?

For most judges, I suspect, the impact of canvassing foreign decisions on the actual outcome of a case would depend critically on how determinate or open the applicable U.S. law was. Where a judge found herself confronting a new issue, or where the courts below were quite split, then looking to approaches taken by fellow judges across borders could sway the outcome – though probably more due to the soundness of a particular approach itself than any notion of keeping pace with the global community.

Results that are dictated by idiosyncratic or culturally specific lines of decision might well be identifiable as such. For instance, if the judges of the U.S. Supreme Court thought that they were playing to a global as well as a national audience, they might readily acknowledge that U.S. First Amendment jurisprudence is on the extreme end of the global spectrum for protecting speech, an artifact of the particular history of this country and the political value traditionally placed on free speech. At the same time, however, the Court might well try to argue for the U.S. approach as compared to less speech-protective doctrines applied in other countries, to strengthen the impact of the decision in the global judicial human rights dialogue described in Chapter II.

In addition, judges thinking both globally and nationally might be more inclined to try to identify the underlying common principle at work in a range of different doctrinal approaches. They might come to see their national caselaw as only one manifestation of this principle. The result could be a global jurisprudence, at least in some areas, combining universality with pluralism – the liberal ideal. Judges would no longer be divided into "international" and "domestic" judges. They would all be participants simultaneously in national legal systems and the construction of a global legal system.

National polities have to decide for themselves the degree to which they find a problem with the transgovernmental activities of their government officials and the ways in which they choose to regulate those activities. In a full-fledged disaggregated world order, each nation would also have to work out guidelines for how their national officials should balance the national interest with a larger global public interest, given that all national officials would be simultaneously fulfilling a national and a global governance function. But guidelines for defining and implementing the global public interest can never be simply the aggregation of national

decisions. All nations must come together to deliberate over general norms governing the operation of transgovernmental networks as mechanisms of global governance. In the final section of this chapter, I propose a set of norms that could provide a starting point for a larger debate.

3. Global Norms Regulating Government Networks

Here, as in the second half of the last chapter, we turn to what could be if government networks were widely recognized and self-consciously constituted mechanisms of global governance, alongside traditional international organizations. In such a world, it would be important to think through how national officials operating in a world still divided into sovereign states could nevertheless exercise a collective responsibility to advance the global public interest with the input and participation of as many states as possible. This conception of global responsibility turns not only on geography but also psychology; it is not only a question of adding numbers of actors but of changing the thinking of all participants.

Even if participants in government networks around the world were satisfactorily accountable to their domestic constituents, what duty do they owe to other nations? It may seem an odd question, but if these networks were in fact primary structures of global governance, together with more formal international and supranational organizations, then they would have to be subject to global as well as national norms. They would be responsible for collectively formulating and implement policies in the global public interest. Equally important, the participants in these networks would have to develop and implement norms governing their relations with one another. Such norms may seem unnecessary when the principal activity these participants engage in is information exchange; however, harmonization and enforcement

activity requires the development of global ground rules. Finally, these networks should operate on a presumption of inclusivity rather than exclusivity.

What are the potential sources of these norms? First, it is natural to project domestic constitutional principles, developed by visionaries and thinkers from Madison to Monnet. Political philosophers are also relevant, providing first principles that can be adapted to this particular global context. Finally, norms are emerging from contemporary practice that can be generalized, adding an inductive dimension to the project.

It is particularly important to note the informal character of these norms, like the government networks they regulate. Proposals for global constitutions are already on the table, most notably from scholars such as Ernst-Ulrich Petersmann.[54] But an actual global constitution suggests a formal global government, even if in fragmentary form. I seek to develop an informal alternative – a set of principles and norms that can operate independently of formal codification, even as the actors and activities they would regulate form and reform in shifting patterns of governance. Both visions seek to underpin world order, but they diverge with respect to world government.

(a) *Global Deliberative Equality*

The foundational norm of global governance should be global deliberative equality. Michael Ignatieff derives this concept from the basic moral precept that "our species is one, and each of the individuals who compose it is entitled to equal moral consideration.[55] His account of the progress of the human rights movement since 1945 builds from this precept, which lies at the heart of human rights, to the recognition that "we live in a plural world of cultures that have a right to equal consideration in the argument about what we can and cannot, should and should not, do to human beings."[56]

This idea, that "all human beings belong at the table, in the essential conversation about how we should treat each other," does not posit utopian harmony. On the contrary, it assumes a world "of conflict, deliberation, argument, and contention."[57] But to the extent that the process of global governance is, at bottom, a conversation, a collective deliberation about common problems and toward common global objectives, then all affected individuals, or their representatives, are entitled to participate.

This presumption of inclusion lies at the heart of the "Montreal Consensus" that former Canadian Finance Minister Paul Martin has put forward to counter the "Washington Consensus" concerning economic development. The heart of the Montreal consensus is a "more balanced vision of how developing countries and poor countries can share in the benefits of the global economy."[58] It arises from the perception that developing countries are not threatened by globalization *per se* as much as by being left out and left behind. The solution is not to reverse globalization itself, but rather to find ways to share the wealth and integration it brings. That, for Martin and the G-20, is the essence of global accountability.

A principle or even a presumption of inclusion does not mean that government institutions from all countries will become members of all government networks. Many networks will address problems common only to a group of countries, or a region. And even where the problems themselves are global, government networks such as the G-20 reflect a philosophy of representation rather than direct participation.

What such a principle should mean, however, is that all government networks adopt clear criteria for participation that will be fairly applied. These criteria can require a particular degree of economic or political development or a level of performance in terms of compliance with agreed principles. It is also certainly permissible for some nations to move faster or deeper than

others in making particular commitments – just as the EU has multi-speed integration in which some nations adopt a common currency and others do not. As discussed in Chapter IV, the World Intellectual Property Organization has incorporated a network of some advanced industrial countries alongside its traditional global decision-making processes. But countries that want to join such networks and that meet the stated criteria must be allowed in, in some form or other. At the same time, deliberative equality, as an ideal, means that those countries that have decided to join a network receive an equal opportunity to participate in agenda-setting, to advance their position, and to challenge the proposals or positions of others.[59]

More generally, as argued in the last chapter, government networks should be explicitly designed to engage, enmesh, and assist specific government institutions. One of the great values of this form of governance is the ability to bolster the court or regulatory agency or legislature of any country – to offer directly targeted technical assistance, political support where necessary, and an all-important sense of professionalism and belonging in a wider global community. That in itself is a form of global deliberative equality.

(b) *Legitimate Difference*

The second principle of transnational governance should be the principle of legitimate difference. As Justice Cardozo put it while on the Second Circuit:

We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. The courts are not free to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violation some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.[60]

In conflicts of law, the principle of legitimate difference is limited by the public policy exception, whereby a court will not apply a foreign law that would be applicable if it did not violate a fundamental principle of public policy. The principle of legitimate difference assumes that the public policy exception would be applied only rarely, in cases involving the violation of truly fundamental values. In the U.S. context, fundamental equates with constitutional, in the sense that state courts cannot invoke the public policy exception to bar enforcement of another state's act unless that act arguably violates the Constitution itself.[61]

Transposed from the judicial to the regulatory context and from the U.S. to the global context, the principle of legitimate difference should be adopted as a foundational premise of transgovernmental cooperation. All regulators participating in cooperative ventures of various kinds with their foreign counterparts should begin from the premise that "difference" per se reflects a desirable diversity of ideas about how to order an economy or society. "That we deal with it otherwise at home" is not a reason for rejecting a foreign law or regulation or regulatory practice unless it can be shown to violate the rejecting country's constitutional rules and values.

The principle of legitimate difference applies most precisely to foreign laws and regulations. But a corollary of the principle is a presumption that foreign government officials should be accorded the same respect due to national officials unless a specific reason exists to suspect that they will chauvinistically privilege their own citizens. Several examples from the judicial context illustrate the point. In highly publicized anti-trust litigation brought by Sir Freddie Laker against both U.S. and British airways for trying to drive his low-cost airline out of business, U.S. federal district judge Harold Green decided not to restrain the British parties from petitioning the British Government for help.[62] Judge Green was presuming the same good faith on the part of the British executive as he would on the part of the U.S. executive in a parallel circumstance and

assuming that the British executive would not automatically ally with its own citizen in a case involving a foreign citizen in a foreign court.

The Seventh Circuit Court of Appeals has also made this premise explicit in several cases. In the Amoco Cadiz case, it chose to treat the French executive branch exactly as it would treat the U.S. executive branch; it deferred to a French executive ruling by applying a U.S. legal doctrine that requires deference to U.S. agencies.[63] And more recently, in a case arising under federal trademark legislation, Judge Easterbrook argued that foreign courts could interpret such statutes as well as U.S. courts, noting that the entire Mitsubishi line of Supreme Court precedents "depend on the belief that foreign tribunals will interpret U.S. law honestly, just as the federal courts of the United States routinely interpret the laws of the states and other nations."[64]

Note that thus formulated, the principle of legitimate difference lies midway on the spectrum from comity to mutual recognition. Traditional comity prescribes deference to a foreign law or regulation unless a nation's balance of interests tips against deference. Legitimate difference raises the bar for rejecting a foreign law by requiring the balance of interests to include values of constitutional magnitude. "Mutual recognition," on the other hand, has become an organizing principle in regimes of regulatory cooperation, as an alternative to either national treatment or harmonization.[65]

As practiced between member states of the European Union, mutual recognition requires two countries to recognize and accept all of each other's laws and regulations in a specific issue area.[66] This state represents a step toward closer and enduring cooperation by effectively assuming that the constitutional test has been met and passed for an entire corpus of foreign laws and regulations. Thus legitimate difference offers an intermediate position that reflects the intent

of regulatory officials who seek further cooperation with one another to move beyond mere comity, but that does not require them to establish or even to work toward mutual recognition.

In sum, legitimate difference is a principle that preserves diversity within a framework of a specified degree of convergence. It enshrines pluralism as a basis for rather than a bar to regulatory cooperation, leaving open the possibility of further convergence between legal systems in the form of mutual recognition or even harmonization, but not requiring it. At the same time, however, it does not try to stitch together or cover over differences concerning fundamental values, values involving basic human rights and liberties or the organizing principles for a social, political, or economic system. At a more practical level, the principle of legitimate difference would encourage the development of model codes or compilations of "best practices" in particular regulatory issue areas, letting the regulators in different countries figure out for themselves how best to adapt them to local circumstance.

It is also important to be clear on what a principle of legitimate difference will *not* do, however. It does not help individuals or government institutions figure out which nation should be the primary regulator in a particular issue area or with regard to a set of entities or transactions subject to regulation. Thus it cannot answer the question of which nation should be in the position of deciding whether to recognize which other nation's laws, regulations, or decisions based on legitimate difference. But it can nevertheless serve as a *Grundnorm* of global governance for regulators exploring a wide variety of relationship with their transnational counterparts. If regulators are not prepared to go even this far, then they are unlikely to be able to push beyond paper cooperation.

(c) *Positive Comity*

Comity is a long-standing principle of relations between nations. The classic definition for American lawyers is the formulation in Hilton v. Guyot: "neither a matter of obligation on the one hand, nor of mere courtesy and good will on the other . . . comity is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation . . ."[67] "Recognition" is essentially a passive affair, signaling deference to another nation's action.

Positive comity, on the other hand, mandates a move from deference to dialogue. It is a principle of affirmative cooperation between government agencies of different nations. As a principle of governance for transnational regulatory cooperation, it requires regulatory agencies to substitute consultation and active assistance for unilateral action and non - interference.

Positive comity has developed largely in the antitrust community, as an outgrowth of ongoing efforts of EU and U.S. antitrust officials to put their often very rocky relationship on firmer footing. For long decades the U.S. policy of extraterritorial enforcement of U.S. antitrust laws based on the "direct effect" doctrine, even in various modified forms, was met by diplomatic protests, administrative refusals, and a growing number of foreign blocking statutes that restricted access to important evidence located abroad or sought to reverse U.S. judgments.[68] The U.S. government gradually began to change course, espousing principles of comity and restraint in congressional testimony and in its international antitrust guidelines.[69]

In addition, U.S. regulators began relying less on unilateral state action and more on agency cooperation. In the early 1980s, the United States entered into separate cooperation agreements with the Governments of Australia (June 1982) and Canada (March 1984). In both agreements, the parties consented to cooperate in investigations and litigation by the other even when this

enforcement affected its nationals or sought information within its territory. In return, the parties agreed to exercise "negative comity" – to refrain from enforcing competition laws where such enforcement would unduly interfere with the sovereign interests of the other party.[70]

These agreements have led not only to greater cooperation between states,[71] but also to more effective enforcement of the antitrust statutes of both parties.[72] Several other countries, such as Germany and France (1984) as well as Australia and New Zealand (1990), have adopted similar bilateral arrangements addressing mutual assistance, including notification of activities, enforcement cooperation, and information exchange.[73]

In 1991, the United States executed an extensive antitrust cooperation agreement with the European Community.[74] The Agreement contained provisions on notification of enforcement activities, as well as on information sharing and biannual meetings.[75] Most notably, the Agreement was the first to include the principle of positive comity. Article V of the Agreement provides that if Party A believes that its "important interests" are being adversely affected by anticompetitive activities that violate Party A's competition laws but occur within the territory of Party B, Party A may request that Party B initiate enforcement activities.[76] Thus, Government B, in deference to Government A, is expected to consider enforcement steps that it might not otherwise have taken.[77]

This notion of positive comity is the converse of the traditional idea of deference, or "negative comity." Unlike the earlier agreements concluded by the United States with Australia and Canada, the EC agreement focuses less on protecting the sovereign interests of one jurisdiction against the antitrust activities of the other and more on facilitating cooperative and even coordinated enforcement by antitrust authorities.[78] Where deference would tend toward less affirmative enforcement action, positive comity was designed to produce more affirmative

enforcement.[79] While the EC - US Agreement reflects the increasing trend toward transnational cooperation in antitrust enforcement, the extent of enforcement coordination and information sharing contemplated by the agreement was unprecedented.[80]

In practice, the agreement has spurred an increase in the flow of information between the parties.[81] In addition, there has been increased enforcement of antitrust objectives, both quantitatively and qualitatively.[82] In coordinating their activities, the Parties under the Agreement work together to minimize the disruption to international trade that multiple uncoordinated investigations might otherwise cause.[83] Merit Janow, reviewing transatlantic cooperation in competition policy, concludes that "positive comity is an important doctrine and that it can go some way in ameliorating tensions associated with extraterritorial enforcement and in facilitating enforcement cooperation."[84] At the same time, she advocates taking a step further toward enhanced comity through "an integrated or work-sharing approach" between U.S. and EU competition authorities, whereby one or the other would be designated the "de facto lead agency" in any investigation.[85]

Can positive comity be translated from the antitrust context into a more general principle of governance? Two potential objections arise. First is the concern of many within the antitrust community that positive comity is a label with little content. In the words of one critic, "It is not realistic to expect one government to prosecute its citizens solely for the benefit of another."[86] The point here is that positive comity could only work where both governments involved already have a direct interest in prosecuting because the behavior in question directly affects them, in which case cooperation is likely to occur anyway.[87] Further, any desire to undertake an investigation on behalf of a foreign government risks a domestic backlash.[88]

The second objection is a converse concern that to the extent positive comity works, it assumes enormous trust and close continuing relations between particular national regulatory agencies - factors that cannot be generalized. Spencer Waller points out that cooperation among agencies responsible for antitrust policy creates a community of competition officials who have been trained and socialized to speak, write, and think about competition issues in a similar way.[89] Thus if positive comity works anywhere, it should work here, but how can we adopt positive comity as a global principle of transnational regulatory cooperation before a relatively high level of cooperation has already been established?

The response to both these objections is a simplified and less stringent version of positive comity. As a general principle it need mean no more than an obligation to act rather than merely to respond. In any case in which Nation A is contemplating regulatory action and in which Nation B has a significant interest in the activity under scrutiny, either through the involvement of its nationals or through the commission of significant events within its territorial jurisdiction, the regulatory agency of Nation A, consistent with the dual function of regulatory officials developed above, has a duty at the very least to notify and consult with the regulatory agency of Nation B. Nation A's agency must further wait for a response from Nation B before deciding what action to take, and must notify Nation B's agency of any decision taken.

Even the critics of positive comity acknowledge that to the extent a commitment to positive comity facilitates increased communication and exchange of information between governments, it may have an impact at the margin.[90] This communication and exchange of information in turn lays the foundation for more enduring relationships that ultimately ripen into trust. Thus at a global level, a principle of positive comity, combined with the principle of legitimate difference,

creates the basis for a pluralist community of regulators who are actively seeking coordination at least and collaboration at best.

(d) *Checks and Balances*

Fourth, and for many perhaps first, it is necessary to take a leaf from Madison's book. If in fact government networks, or indeed any form of global governance, are indeed to avoid Kant's nightmare of "soulless despotism," the power of every element of the world order system set forth in this book must be checked and balanced. A system of checks and balances is in fact emerging in many areas, from relations between national courts and supranational courts to the executive of one state challenging the regulatory agency of another in national court. But these fragments of evolving experience should be understood and analyzed in the context of an affirmative norm of friction and constructive ambiguity in relations among participants in government networks of every kind. The whole should resemble the U.S. constitution in at least this much – a system of shared and separated powers designed more for liberty than efficiency.

Writing about American federalism, David Shapiro has portrayed it as "a dialogue about government."[91] The federal system set forth in the Constitution frames a perpetual debate in which "neither argument – the case for unrestrained national authority or the case against it – is rhetorically or normatively complete without the other."[92] It is the dialogue itself that is a source both of creative innovation and tempering caution. This description also applies to relations between national courts in EU member countries and the ECJ, a dialogue that lies at the heart of the EU constitutional order. Their debates over both jurisdictional competence and substantive law are matters of pushing and pulling over lines demarcating authority that are constructed and revised by the participants themselves. Each side is checked less by a specific grant of power

intended to act as a check or a balance than by the ability of each side to challenge or refine any assertion of power by the other.

In some sense, the entire concept of the disaggregation of the state makes a global system of checks and balances possible. Given the correct incentive structures, government institutions of the same type in different systems – national and international – and of different types can check each other both vertically and horizontally. National courts can resist the excessive assertion of supranational judicial power; supranational courts can review the performance of national courts. Similar relationships are emerging between regulatory agencies – supranational and national – in the EU and can easily be imagined globally. It is even possible to imagine relations between committees of national legislators from different countries nestled within international or supranational institutions entering into a balancing relationship with national parliamentary committees of similar jurisdiction – such as the NATO parliamentary council interacting with defense and security committees of national parliaments.

It is both likely and desirable, however, that a strong asymmetry of power remain between national and supranational institutions, in the sense that national institutions should remain the rule and supranational institutions the exception. That is the principle of subsidiarity, discussed below. At the same time, national institutions can check each other across borders – either by refusing to cooperate, as when a Japanese court might thwart the judgment or even the jurisdiction of a U.S. court, or by actively working at cross purposes. An example here would be an effort by an executive to use its national courts to block the executive of another country – as the British government apparently tried to do regarding British courts against U.S. courts in the Laker litigation.[93]

Overall, checks and balances must become an accepted part of a global political arrangement among government institutions. Here again, networks of legislators would be a valuable addition to global government networks – to provide a counter-weight, where necessary, to networks of regulators or even judges. Thus, for instance, when a network of securities regulators is promulgating a code of best practices, it is not impossible to imagine a similar code issuing from a network of legislative committees from different nations concerned with the same issues. The determination of what a "best" practice is and whose interests it is most likely to serve would likely be different. Certainly such a possibility would provide a counter-weight to the consensus of professional technocrats.

(e) *Subsidiarity*

The final normative principle necessary to structure a global political process of disaggregated national and supranational institutions is subsidiarity. Subsidiarity is the EU's version of Madisonian checks and balances. The term may be unfamiliar, but the concept is not. It expresses a principle that decisions are to be taken as closely as possible to the citizen.[94] Article 5 of the Consolidated Treaty Establishing the European Community defines the principle of subsidiarity as the criterion for determining the division of powers between the community and the member states.[95]

Projected onto a global screen, the principle of subsidiarity would reinforce the basic axiom of global governance through government networks: even on a global scale, the vast majority of governance tasks should still be taken by national government officials. Within nation-states, of course, subsidiarity may argue for the exercise of power at a lower level still – at the local or provincial level. But once at the national government level, the burden of proof to devolve power up to a regional or global entity will require a demonstration that the specific functions needed

cannot be adequately provided by national government institutions either coordinating their action or actively cooperating.

Finally, within international or supranational institutions themselves, questions of institutional design and allocation of power should depend on a demonstration of the need for personnel and powers in addition to or superior to networks of national government officials. The nesting of such networks can within the institution, as in the EU Council of Ministers, would be entirely consistent with the principle of subsidiarity. The real rub would come with the decision whether and when to create a separate "global" or "regional" bureaucracy."

It is not my purpose to argue that such a bureaucracy should never be created. The world would be a far poorer place without Kofi Annan. And even without his particular charisma, the secretariats of many international institutions, such as the UN, the WTO, and the OSCE, are critical not only to the functioning of those institutions but to the global direction and implementation of security, trade, and human rights policy. Further, institutions such as the IMF and the World Bank depend on a cadre of professionals who perceive their loyalties as flowing to "the Fund" or "the Bank" rather than to specific national governments. Similarly, it is certainly true that supranational judicial institutions, such as the ECJ or the ECHR, or the WTO panels, can often perform functions that networks of national judges could not in fact take on.

The value of subsidiarity is that it institutionalizes a system or a political process of global governance from the bottom up. International lawyers, diplomats, and global dreamers have long pictured a world much more united from the top down. Even as the need for governance goes global, the ideal location of that governance may well remain local. The principle of subsidiarity requires proponents of shifting power away from the citizen at least to make the case.

4. Conclusion

This point of this book has been to identify the phenomenon of the disaggregated state and to explore the resulting possibilities for a disaggregated world order. The tone has been largely optimistic, seeking to focus on what does exist and elaborate what could exist as a solution to the "trilemma of global governance": the need to exercise authority at the global level without centralized power but with government officials feeling a responsibility to multiple constituencies rather than to private pressure groups. But no form of government is perfect, least of all at the global level. And even if, like Winston Churchill's view of democracy, global governance through government networks is the "least worst" alternative, it still poses many problems that must ultimately be addressed.

Indeed, the critics are already lined up, with a range of charges. First is the accusation that networks of government officials – particularly judges and regulators – constitute the triumph of technocracy over democracy. These networks operate in a perfectly depoliticized world, in which like-minded, and like-trained, officials can reinforce their common perceptions and professional norms in reaching a consensus about how to address common problems – from rising interest rates to the enforcement of rights to environmental protection. Within the safe confines of a government network they are never bombarded by competing evidence, uncomfortable normative claims, or even simply additional information that forces them to broaden the analytical framework for decision. This criticism operates both at the global level, coming from international lawyers who seek to ensure an open and just world order, and at the domestic level, coming from consumer groups who claim that they are shut out of the formation of international regulatory standards through harmonization processes.

A typical response to this criticism is to open up the decision-making process of government networks to the many different types of pressure groups that participate in a democratic domestic political process. Yet this solution alarms another set of critics who insist that government authority be clearly exercised by government officials rather than being diffused among a vast array of public, semi-public and private actors in a "global policy network." This problem of an unrepresentative global political process has echoes in a specific debate taking place within a number of countries over the legitimacy of reaching outside a particular national legal system to consult and cite the decisions of foreign judges. A final, unavoidable problem is the way in which power is exercised in government networks by strong countries against weak countries – both through exclusion from certain networks or from powerful groups within them, and through inclusion in networks that serve as conduits for soft power.

A menu of general responses to these charges includes a concept of dual function for all government officials, meaning that their jobs automatically include both domestic and international activity. They must thus be accountable to their national constituents for both categories of activity. In a full-fledged disaggregated world order, they would actually exercise both national and global responsibility, which would require accountability to both national and global norms. Second, any system of responsible government action requires that the action itself be visible; hence government networks must make their activities as visible as possible. One way to do this is to give them virtual reality through the use of readily available websites. Third is to encourage the proliferation of legislative networks, to ensure that the directly elected representatives of various national citizenries are as active in the transgovernmental realm as regulators and judges. Fourth is to use government networks to mobilize a wide range of non-governmental actors, either as parallel networks or as monitors and interlocutors for specific

government networks. Fifth is a grab-bag of domestic policy solutions, whereby each national polity must decide for itself whether different kinds of transgovernmental activity pose a problem and if so, what to do about it.

These problems and solutions largely address government networks as they currently exist. But if we were to establish the disaggregated world order described in the last two chapters – in which government networks are self-consciously constituted as mechanisms both of global governance and of improving the quality and sustainability of national governance, then these networks would also have to operate in accordance with a more general set of global norms.

I suggest five such norms – some to operate primarily in horizontal relations between national government officials and others to operate more generally in vertical relations between national government officials and their supranational counterparts. First is a norm of global deliberative equality, a presumption that all government networks be open to any government officials who meet specified criteria or conditions of membership. Further, once admitted, these officials would be entitled both to listen and be heard. Second is a norm of legitimate difference – the requirement that in their various deliberations, members of government networks understand and act on the principle that "different" does not equal "wrong." Third is positive comity, the substitution of a norm of affirmative cooperation between nations in place of the traditional deference by one state to another state's action. Fourth is the globalization of the American principles of checks and balances: the guarantee of continual limitation of power through competition and overlapping jurisdiction. Fifth, and finally, is a principle borrowed more from Jean Monnet than James Madison: the principle of subsidiarity, or the location of government power at the lowest level practicable among local, regional, national, and supranational authorities.

Members of government networks must interact with their foreign counterparts sufficiently transparently to be monitored by ordinary voters; they must give reasons for their actions in terms intelligible to a larger public; and they must be able to formulate arguments in sufficiently general, principled, "other-regarding" ways to be able to win the day in a process of deliberative decision-making. But operating in a world of generalizable principles requires a baseline of acceptable normative behavior. The norms I have prescribed ensure wide participation in government networks, seek to preserve local, regional, and national autonomy to the extent possible, and guarantee a wide space for local variation, including local variation driven by local and national politics.

At the loftiest level, these principles could be understood as part of a global transgovernmental constitution – overarching values to steer the operation of government networks. But the content of these specific principles is less important in many ways than the simple fact that there be principles – benchmarks of against which accountability can be measured. Understanding government networks as a form of government, and then holding them to the same standards and subject to the same strictures that we hold all government, will do the rest.

[1] "Notes for an address by the Honourable Paul Martin to the Royal Institute of International Affairs," London, UK, 24 January 2001, In Department of Finance Canada homepage [cited June 22, 2003]; available from http://www.fin.gc.ca/news01/01-009e.html.

[2] Judith Shklar, "The Liberalism of Fear," in *Political Thought and Political Thinkers*, ed. Stanley Hoffman (Chicago: University of Chicago Press, 1998). I am indebted to Robert Keohane for helping me see this point and for phrasing it so felicitously in Shklar's language.

[3] Antonio F. Perez, "Who Killed Sovereignty? Or: Changing Norms Concerning Sovereignty In International Law," *Wisconsin International Law Journal* 14 (1996): 463, 476.

[4] Philip Alston, "The Myopia of the Handmaidens: International Lawyers and Globalization," *European Journal of International Law* 8 (1997): 435, 441.

[5] See Sol Picciotto, "Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-liberalism," *Northwestern Journal of International Law and Business* 17 (1997): 1014, 1047.

[6] Ibid., 1049.

[7] Bruce Darringer, "Swaps, Banks, and Capital: an Analysis of Swap Risks and a Critical Assessment of the Basel Accord's Treatment of Swaps," *University of Pennsylvania Journal of International Business Law* 16 (1995): 259; but see Ethan B. Kapstein, "Shockproof," *Foreign Affairs* 74 (1996): 2 (capital adequacy requirements saved financial markets from the potentially disastrous consequences of the Mexican peso crisis and the Barings collapse.)

[8] Jonathan R. Macey, "The 'Demand' for International Regulatory Cooperation: A Public-Choice Perspective," in *Transatlantic Regulatory Co-Operation: Legal Problems and Political Prospects*, eds. George A. Bermann, Matthias Herdegen, and Peter L. Lindseth (Oxford,

England: Oxford University Press, 2000), 147-165, 159, 160.

[9] Joseph H.H. Weiler, "To Be a European Citizen: Eros and Civilization," in *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), 349.

[10] In Public Citizen homepage [cited July 1, 2003]; available from http://www.citizen.org.

[11] "Harmonization," In Public Citizen homepage [cited July 1, 2003]; available from http://www.citizen.org/trade/harmonization.

[12] "What Is Harmonization?" In Public Citizen homepage [cited July 1, 2003]; available from http://www.citizen.org/trade/harmonization/articles.cfm?ID=4390.

[13] Ibid.

[14] Ibid.

[15] "Harmonization Alert," In Public Citizen homepage [cited July 1, 2003]; available from http://www.citizen.org/trade/harmonization/alerts/.

[16] "What is Harmonization?"

[17] Sidney A. Shapiro, "International Trade Agreements, Regulatory Protection, and Public Accountability," *Administrative Law Review* 54 (2002): 435-58.

[18] Harmonization Background Paper, "Accountable Governance in the Era of Globalization: the WTO, NAFTA, and International Harmonization," In Public Citizen homepage [cited July 1, 2003]; available from http://www.citizen.org/publications/release.cfm?ID=5193.

[19] Ibid.

[20] Ibid.

[21] Ibid.

[22] Kofi A. Annan, *We the Peoples: The Role of the United Nations in the 21st Century* (New York: United Nations, Department of Public Information, 2000), 70; Jean-François Rischard, "A

Novel Approach to Problem-Solving," *Global Agenda 2003, World Economic Forum* Issue 1 (2003):30, 31; Wolfgang H. Reinicke, "The Other World Wide Web: Global Public Policy Networks," *Foreign Policy*, (Winter 1999/2000): 44.

[23] Martin Shapiro, "Administrative Law Unbounded: Reflections on Government and Governance," *Indiana Journal of Global Legal Studies* 8 (2001): 369-78, 369.

[24] Ibid., 376.

[25] Charles Fried, "Scholars and Judges: Reason and Power," *Harvard Journal of Law and Public Policy* 23 (2000): 807-32, 818.

[26] Ibid.

[27] Ibid., 820-21.

[28] Ruth Bader Ginsburg and Deborah Jones Merritt, "Affirmative Action: an International Human Rights Dialogue," *Cardozo Law Review* 21 (1999): 253, 273.

[29] Christopher McCrudden, "A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights," *Oxford Journal of Legal Studies* 20 (2000): 499-532, 507-508.

[30] Y. Ghai, "Sentinels of Liberty or Sheep in Wolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights," *Modern Law Review* 60 (1997): 459, 479, quoted in ibid., 507.

[31] Members of the Technical Committee include: Australia, Canada, France, Germany, Hong Kong, Italy, Japan, The Netherlands, Switzerland, the UK, and the USA. In OICU-IOSCO homepage [cited July 1, 2003]; available from http://www.iosco.org/lists/display_committees.cfm?cmtid=3.

[32] David Howell, "The Place of the Commonwealth in the International Order," *Round Table* 345 (1998): 30.

[33] "Notes for an address by the Honourable Paul Martin."

[34] Thomas Risse, "'Let's Argue!': Communicative Action in World Politics," *International Organization* 54 (2000): 31.

[35] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996).

[36] In International Monetary Fund homepage [cited July 1, 2003]; available from http://www.imf.org.

[37] In Government of Canada homepage [cited July 1, 2003]; available from http://canada.gc.ca.

[38] In EUR-Lex, European Union Law homepage [cited July 1, 2003]; available from http://www.europa.eu.int/eur-lex/.

[39] "Rome Statute of the International Criminal Court," In United Nations homepage [cited July 1, 2003]; available from http://www.un.org/law/icc/.

[40] MOUs between the U.S. SEC and its foreign counterparts, for instance, have been directly encouraged and facilitated by several U.S. statutes passed expressly for the purpose. Faith T. Teo, "Memoranda of Understanding among Securities Regulators: Frameworks for Cooperation, Implications for Governance," Harvard Law School (1998): 29-43. [On file with author].

[41] See Globe International homepage [cited July 1, 2003]; available from http://www.globeinternational.org.

[42] Karl Kaiser, "Globalisierung als Problem der Demokratie," *Internationale Politik* (April 1998): 3. See also the EU Institutional Reform Commissioner's website, "Commissioner for Regional Policy and Institutional Reform" In Europa: The European Commission homepage [cited July 1, 2003]; available from http://europa.eu.int/comm/commissioners/barnier/profil/index_en.htm, for proposals regarding

further ties between national parliamentarians among European Union members.

[43] Richard Falk and Andrew Strauss, "Toward a Global Parliament," *Foreign Affairs* 80 (2001): 212 .

[44] Louise Doswald-Beck, "The Influence of National Parliaments on gGlobal Policy-Making," *Berlin*, 26, November 2001, quoted in Steve Charnovitz, "Trans-Parliamentary Associations in Global Functional Agencies," *Transnational Associations* 2 (2002): 88-91, 90, n. 20.

[45] Charnovitz, "Trans-Parliamentary Associations in Global Functional Agencies," 88.

[46] Ibid., 89.

[47] Mike Moore, "Promoting Openness, Fairness and Predictability in International Trade for the Benefit of Humanity," Speech to the Inter-Parliamentary Union meeting on international trade, June 8, 2001, In World Trade Organization homepage [cited July 1, 2003]; available from http://www.wto.org/french/news_f/spmm_f/spmm64_f.htm.

[48] Annan, *We the Peoples*, 70.

[49] Wolfgang H. Reinicke and Francis Deng, *Critical Choices: The United Nations, Networks, and the Future of Global Governance* (Ottawa: International Development Research Centre, 2000).

[50] Reinicke, "The Other World Wide Web."

[51] See Charles H. Koch, Jr., "Judicial Review and Global Federalism," *Administrative Law Review* 54 (2002): 491.

[52] See the "Symposium on Global Administrative Law," *Administrative Law Review* 54 (2002); see also Alfred Aman, "Administrative Law for a New Century," in *The Province of Administrative Law*, ed. Michael Taggart (Oxford: Hart Publishing, 1997), 171-118.

[53] "American Bar Association House of Delegates Recommendation no. 107C, Harmonization Recommendation (August 2001)," In American Bar Association homepage [cited July 1, 2003]; available from http://www.abanet.org/leadership/2001/107c.pdf., para. (2).

[54] Ernst-Ulrich Petersmann, "Constitutionalism and International Organizations," *Northwestern Journal of International Law and Business* 17 (1997): 398; Ernst-Ulrich Petersmann, "Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?," *New York University Journal of International Law and Politics* 31 (1999): 753.

[55] Michael Ignatieff, *Human Rights as Politics and Idolatry*, (Princeton, N.J.: Princeton University Press, 2001), 4.

[56] Ibid., 94.

[57] Ibid., 94-95.

[58] "Notes for an address by the Honourable Paul Martin, to the Royal Institute of International Affairs**,"** Ottawa, 24 January 2001, In G-20 homepage [cited July 1, 2003]; available from http://www.fin.gc.ca/news01/01-008e.html, (July 1, 2003).

[59] Joshua Cohen, "Deliberation and Democratic Legitimacy," in *The Good Polity: Normative Analysis of the State*, eds. Alan Hamlin and Philip Pettit (New York: Blackwell, 1989), 74.

[60] Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918).

[61] The full faith and credit clause of the Constitution requires each state to recognize the acts of another. U.S. CONST. art.4,§1,cl.1. It is a basic instrument of federalism, knitting the states into one larger polity.

[62] Laker Airways Ltd. v. Sabena, Belgian World Airlines 731 F. 2d 909 (D.C. Cir. 1984).

[63] In re Matter of Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978,

954 F.2d 1279, 1312-13 (7th Cir. 1992) (per curiam). The Chevron doctrine was set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 844 (1984) (holding that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . .").

[64] Omron Healthcare, Inc. v. Maclaren Exports Ltd., 28 F.3d 600, 604 (7th Cir. 1994).

[65] Kalypso Nicolaidis, "Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects," (Jean Monnet Working Paper No. 97/7, New York University School of Law, Jean Monnet Center, 1997), In Jean Monnet Program homepage [cited July 1, 2003]; available from http://www.jeanmonnetprogram.org/papers/97/97-07.html.

[66] After the Cassis de Dijon decision of 1979, in which German authorities were forced to respect French liquor standards, the European Commission announced the 'mutual trust' principle: if one State's rules allow a product to be marketed, all other states should have confidence in the first State's judgment and likewise allow the product to be marketed. Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein*, E.C.R. 649 (1979). This concept has contributed significantly to creating an integrated internal market. It has been read to require mutual recognition of educational diplomas, so that professionals from one EU country are now largely free to practice in another without repeating their education. Council Directive 75/362, 1975 O.J. (L 167/1); Council Directive 89/48, 1989 O.J. (L 19/16). Additionally, it has been applied to banking regulation, where branches of foreign banks are now supervised not by the host state, but by the authorities of the state of the head office, or home state. This approach reflects that each EU State accords a high degree of 'mutual trust' to the banking supervisory

capabilities of the others. See Second Council Directive 89/646 on credit institutions, 1989 O.J. (L 386/1).

[67] 159 U.S. 113, 163-164 (1895).

[68] Beginning with *United States v. Aluminum Co. of America (Alcoa)*, the Sherman Act was held applicable to foreign conduct that had a direct, substantial, and foreseeable effect on U.S. trade and commerce. 148 F.2d 416, 440-45 (2d Cir. 1945). This "direct effect" jurisdiction quickly became a source of tension with other states that argued that the United States had no right to assert jurisdiction over persons that were neither present nor acting within United States territory. Governments whose nationals and interests were affected by U.S. antitrust law filed diplomatic protests and amicus briefs, refused requests for assistance, invoked national secrecy laws, and eventually began passing blocking laws specifically aimed at the frustration of U.S. antitrust enforcement. Spencer Weber Waller, "National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law," *Cardozo Law Review* 18 (1999): 1111, 1113-1114; see also Joel R. Paul, "Comity in International Law," *Harvard International Law Journal* 32 (1991): 1, 32 (1991); Joseph P. Griffin, "EC and U.S. Extraterritoriality: Activism and Cooperation," *Fordham International Law Journal* 17 (1994): 353, 377.

[69] Spencer Weber Waller, "The Internationalization of Antitrust Enforcement," *Boston University Law Review* 77 (1997): 343, 375. By 1988 the Department of Justice stated that it would only challenge foreign anticompetitive conduct that directly harmed United States consumers. Robert D. Shank, "The Justice Department's Recent Antitrust Enforcement Policy: Toward A "Positive Comity" Solution to International Competition Problems?," *Vanderbilt Journal of Transnational Law* 29 (1996): 155, 165.

[70] Charles F. Rule, "European Communities-United States Agreement on the Application of their Competition Laws Introductory Note," *International Legal Materials* 30 (1991): 1487, 1488. The U.S. signed a comparable agreement with Germany in 1976. See Steven L. Snell, "Controlling Restrictive Business Practices in Global Markets: Reflections on the Concepts of Sovereignty, Fairness, and Comity," *Stanford Journal of International Law* 33 (1997): 215, 234.

[71] No use of the Canadian federal blocking statute has been reported since the signing of the 1984 Agreement. See Waller, "The Internationalization of Antitrust Enforcement," 368.

[72] In the past five years, cooperation between United States and Canadian antitrust agencies has led to prosecutions in the fax paper and plastic dinnerware industries. See Charles S. Stark, "International Antitrust Cooperation in NAFTA: The International Antitrust Assistance Act of 1994," *U.S.-Mexico Law Journal* 4 (1996): 169, 171-172.

[73] Nina Hachigian, "Essential Mutual Assistance in International Antitrust Enforcement," *International Lawyer* 29 (1995): 117, 138. Antitrust cooperation has also been developing on a multilateral scale. The Organization for Economic Cooperation and Development (OECD) has established regular consultation conferences among national competition officials and has drafted a recommendation on antitrust cooperation, which encourages "notification, exchange of information, coordination of action, consultation and conciliation on a voluntary basis." See Waller, "The Internationalization of Antitrust Enforcement," 362-363 (quoting "Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade," *International Legal Materials* 35 (1996): 1314, 1315-1317. More recently, a group of twelve experts called the International Antitrust Code Working Group proposed an International Antitrust Code to be adopted as a plurilateral trade agreement under the General Agreement on Tariffs and Trade (GATT). Under

the Code, an International Antitrust Authority would be established, consisting of a president and an International Antitrust Council to ensure observance of the Code by contracting parties. See Shank, "The Justice Department's Recent Antitrust Enforcement Policy," 186.

[74] See "Agreement Regarding the Application of their Competition Laws, 23 Sept. 1991, E.C.-U.S.," *International Legal Materials* 30 (1991): 1491.

[75] Ibid., 1056-1059.

[76] See Griffin, "EC and U.S. Extraterritoriality," 376.

[77] James R. Atwood, "Positive Comity—Is It a Positive Step?," in *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute*, ed. Barry Hawk (Irvington-on-Hudson, N.Y.: Transnational Juris Publications, 1993), 79, 84.

[78] See Rule, "European Communities-United States Agreement," 1488.

[79] See Atwood, "Positive Comity—Is It a Positive Step?," 84.

[80] See Rule, "European Communities-United States Agreement," 1487.

[81] Joseph P. Griffin, "EC/U.S. Antitrust Cooperation Agreement: Impact on Transnational Business," *Law and Policy in International Business* 24 (1993): 1051, 1063.

[82] See generally Joel Klein and Preeta Bansal, "International Antitrust Enforcement in the Computer Industry," *Villanova Law Review* 41 (1996): 173, 179.

[83] See Rule, "European Communities-United States Agreement," 1490. This increased efficiency has also proven attractive to businesses themselves. In United States v. Microsoft Corp., after learning that both the Department of Justice and the European Commission were investigating their licensing practices, Microsoft agreed to waive its confidentiality rights under United States antitrust law to permit the two authorities to exchange confidential information. See Shank, "The Justice Department's Recent Antitrust Enforcement Policy," 179.

[84] Merit Janow, "Transatlantic Cooperation on Competition Policy," in *Antitrust Goes Global*, eds. Simon j. Evenett, Alexander Lehmann, and Benn Steil (Washington, D.C.: The Brookings Institution, 2000), 29-56, 51.

[85] Ibid.

[86] See Atwood, "Positive Comity—Is It a Positive Step?," 87.

[87] Ibid.

[88] Ibid., 88.

[89] See Waller, "National Laws and International Markets," 1125.

[90] See Atwood, "Positive Comity—Is It a Positive Step?," 88.

[91] David L. Shapiro, *Federalism: A Dialogue* (Evanston, Ill.: Northwestern University Press, 1995), 108.

[92] Ibid.

[93] In the *Laker Airways* litigation, a complex series of cases involving parallel proceedings between the United States and Great Britain and efforts by litigants on both side to block the suit in the other forum, Lord Scarman argued that individuals have a right to pursue causes of action under foreign law because they have a right to pursue "the process of justice," 1984 WL 281712 (HL), 25.

[94] George A. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States," *Columbia Law Review* 94 (1994): 331.

[95] Consolidated Version of the Treaty Establishing the European Community, Art. 5, *Official Journal C 325 of 24 December 2002,* According to the relevant provisions of this Article:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.