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For purposes of the Colloquium discussion, readers should focus on Part II. Part III provides illustrations of the concepts developed in Part II. The materials in Professor Cassese's September 13 Colloquium presentation, A Global Due Process of Law? Also provide illustrations for testing these concepts.

Accountability and the Discontents of Globalization: US and EU Models for Regulatory Governance

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I INTRODUCTION

This paper has two basic interrelated elements. First, it analyzes the concept of accountability and examines accountability mechanisms relative to other mechanisms and strategies for global regulatory governance. Second, it examines and considers the potential global application of two sharply different American and EU approaches to regulatory governance; US interest representation administrative law and EU consensus-based deliberation by specialized decisional bodies. These two elements are examined in relation to the goal of redressing the deficiencies in accountability, responsiveness, and democracy of global regulatory bodies, deficiencies that result in decisions and policies that disregard important societal interests impacted by their decisions.

Greater accountability has become a rhetorical slogan in the globalization literature. In order to retain its integrity and utility, the concept of accountability must be restricted to mechanisms that entitle and enable identified account holders to demand and receive from identified accountees, who control resources and exercise authority, an account of their performance; to evaluate their performance; and to impose sanctions and obtain other remedies for deficient performance. There are five types of accountability mechanisms: fiscal, electoral hierarchal, supervisory and legal. These mechanisms are distinct from two other basic categories of governance mechanisms: decision making rules and procedures that establish and regulate authority to make decisions; and other mechanisms, such as greater transparency, non-decisional participation, and the giving of reasons, that can also be used to promote greater responsiveness to affected interests.

The different US and EU governance approaches examined herein use different mechanisms that reflect important difference sin legal and political culture.[2] As a crude but useful generalization, Americans tend to be distrustful of administrative government. They

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[2] See Robert A. Kagan, American and EU Ways of Law: Six Entrenched Differences (Paper prepared for First EU Socio-Legal Conference, Onati, Spain, 3 2005)

characteristically seek to check and control the exercise of regulatory power through mechanisms of political and legal accountability that are pluralist, open, and competitive. Europeans on the whole tend to be more trusting of authority and to favor governance mechanisms that are more consensus-oriented, corporatist, and closed. Buoyed by the successes of the Union, they are more optimistic about the ability of reason to transcend power conflicts. To borrow the words of Robert Kagan in a related context, "Americans are from Mars and Europeans are from Venus."[3]

The responses of Americans and Europeans to problems of global administrative governance reflect these differences. The US often tends to relay strongly on external accountability mechanisms, including electorally-based domestic political controls and legal procedures and courts, including administrative law. In the global context, the US (at least in cases where it can not exercise hegemonic dominance) often favors administrative law mechanisms for regulatory governance. The Aarhus Convention is the exemplar. The EU often favors an internal strategy of using a decisional rule and procedure of consensus-based deliberation drawing on established regulatory governance networks. The exemplar is "deliberative supranationalism" as developed through new EU methods for adopting regulatory standards and for policy coordination. This method has been heralded as a model for global regulatory governance. This paper examines the potential of these two different approaches for addressing the discontents of global regulatory governance.

Part II provides an analytic framework for accountability mechanisms and other regulatory governance tools for addressing the discontents of regulatory globalization Part II.A summarizes the problem of disregard and the potential normative frameworks for guiding the choice of appropriate procedural; and institutional tools for securing adequate consideration of societal interests impacted by the decisions of global regulatory bodies. It also examines the relation between these issues and the erosion, as a result of globalization, of traditional domestic and international mechanisms of regulatory accountability, including electorally-based political accountability and legal accountability. It shows how this relation differs in the five different types of global administrative regulatory bodies that have emerged. It observes that the problem is often not that these bodies lack accountability. Rather, they are often all too accountable to the states and other entities that constitute and support them and to powerful economic actors, to the detriment of more diffuse societal interests. It then summarizes the three basic types of governance tools that might be used to promote greater consideration of and responsiveness to general societal interests: external accountability mechanisms, other external measures to enhance responsiveness to affected interests, and changes in internal decision-making rules and procedures. These are the institutional tools for harnessing the familiar troika of governance objectives– efficacy, limitation of power, and responsiveness. The deployment of these tools must ultimately be guided by one or more norms of global governance, such as justice, democracy or problem solving functionality.

Part II.B analyzes accountability and the mechanisms for achieving it. It discusses accountability more extensively than the other two types of tools because of its prominence in global governance discourse. It argues that the concept of accountability is and should continue to be restricted to institutionalized mechanisms, under which an identified account holder has the right to obtain an accounting from an identified accountee for his conduct, evaluate that conduct, and impose a sanction or obtain another appropriate remedy for deficient performance. Such mechanisms are of two basic types. The first is where the account holder delegates or

[3] Robert Kagan, Of Paradise and Power: America and Europe in the New World Order 3 (2005). The Robert Kagan who is the author of this book is different from the Robert A. Kagan cited in footnote 2.

grants authority or resources to the accountee; it includes electoral, fiscal, hierarchical, and supervisory accountability mechanisms. The second is legal accountability, where the account holder seeks redress for infringement by the accountee of his legally protected interests. The discussion rejects suggestions that the concept of accountability should be defined more broadly to include market, peer, public reputational, general political, and social influences, or measures such as transparency, participation, and reason giving.

External governance tools other than accountability mechanisms are examined in Part II.C. It shows that transparency, non-decisional forms of participation, and requirements that global decision makers give public reasons for their decisions are not by themselves accountability mechanisms, but that they promote the effective operation of such mechanisms where they exist. Further, even standing alone these measures may have significant influences in making global regulatory bodies more responsive to disregarded societal interests. In contrast to accountability mechanisms, which may be invoked as of right by accountability holders, these measures and their operation are "soft" in character; they may nonetheless be powerful.

Part II.D turns to a consideration of internal decision making processes, which include a variety of institutional structures and voting and other decision rules. It makes special note of consensus-based deliberative process for regulatory decision making, as exemplified in an EU family of new governance practices, including comitology and the New Approach to standard setting through industry standards bodies.[4] These practices are not accountability mechanisms and do not rely on other external techniques for promoting responsiveness. Rather rely they seek to incorporate relevant interests and norms within a cooperative, dialogic internal decisional process. Invoking Habermasian conceptions of reason-based public discourse, some proponents of such processes view them as democracy-enhancing and a promising model for global regulatory governance.

Part III considers the contrasting US and EU approaches to regulatory governance. In the case of the US, it focuses on administrative law, distinguishing the issues presented by adjudication and those by rulemaking and general norm creation. It examines the US interest representation model of administrative law, its application to global regulatory governance and the problem of disregarded societal interests, and its advantages and disadvantages. The discussion then turns to the EU model of consensus-based deliberation, its global application, and the problems presented in assuring representation of all relevant affected societal interests within the deliberative process. It concludes that each of these models is in important respects well suited for the decentralized, hetrarchical conditions of global regulatory governance and could in principle promote greater responsiveness to disregarded interests, but that each also has appreciable weaknesses. Part III concludes by considers two different strategies for maximizing the advantages of each model in the context of global regulatory governance while minimizing their drawbacks. One option is to develop a hybrid system that attempts to synthesize the US and EU models notwithstanding their fundamental differences. The other option is to distribute the application of each model, using the one or the other for the different global regulatory bodies and issues for which it is best suited. The choice among these and other options for addressing the problem of disregard must be based not only on careful analysis of different institutional tools in relation to the contexts for their application, but also of issues of global democracy, institutional legitimacy, and political economy.

[4] See J. Scott and D. Trubek, Mind the Gap: Law and New Approaches to Governance in the EU Union, 8 Eur. L. J. 1 (2002) and other article in the same journal issue.

II. MEASURES FOR ADDRESSING ACCOUNTABILITY GAPS AND DISREGARD OF AFFECTED SOCIETAL INTERESTS IN GLOBAL GOVERNANCE

A. Introduction: Accountability Gaps, the Problem of Disregard, and Remedial Institutional Tools

It is widely asserted, often with reason, that global regulatory bodies disregard or give inadequate consideration to a range of important social, economic, cultural, environmental and other interests and values (hereinafter to referred to as societal interests) impacted by their decisions.[5] As a result, these interests may suffer unjustified harms, or be denied a just share of the benefits of international economic and other forms of cooperation. As convenient shorthand, this paper refers collectively to these problems as, variously, the problem of disregarded societal interests or simply of disregard.

The diagnosis of disregard may be based directly on institutional and procedural norms. Interests are said to have been disregarded because their representatives did not have an adequate opportunity to participate in the decisions affecting them, and/or to hold the decision makers accountable for such decisions. The results of this institutional and procedural failure are decisions that give insufficient weight to their interests, contrary to principles of equal or appropriate concern and respect for the persons adversely affected. Such procedural-institutional norms may be particular to the a given global regime; relative to other affected interests certain societal interests ("stakeholders"), were not afforded sufficient decisional roles or other or other mechanisms to ensure adequate responsiveness to their interests. Or, the criteria may be based on a more general model of liberal democratic decision making, such as that of Rawls or Habermas, although there may serious problems in applying such models to the context of special-purpose global regime such as the WTO or the International Standards Organization.

Alternatively, the underlying norms may be substantive. Certain interests have been disregarded, in that they have been treated unjustly or inequitably. Here again the criteria may be regime specific or more general. In the context of a particular regime, the harms imposed on displaced indigenous peoples by a World Bank funded development project may be unjust, taking into account the benefits of the project and their distribution. Or, the criteria may be more general, based, for example, on some principle of distributional justice in a democratic polity. Although the underlying criterion is some form or other of distributional justice, the remedy, in the context of highly fragmented global governance regimes without a general global authority with redistributive powers,, may be procedural and institutional, to accord those interests whose have suffered unjust or inequitable treatment greater decisional rights or other institutional protections in order to promote more substantively just or equitable decisions by the global regime in question.

[5] The interests of concern here are not those of governments or international or intergovernmental organizations or global regulatory bodies. They are the interests of individuals, or groups of individuals, that may be represented by civil society organizations including business firms and non-profit NGOs. These societal interests may be variously characterized, for example, as domestic or international, Northern or Southern, economic or social and cultural, local or cosmopolitan, environmental or consumerist.

Thus, the procedural and institutional questions addressed here in the context of disregard may ultimately be grounded in either particularized (regime-specific) or general norms of democratic or fair decision making or substantive justice and rights. The familiar difficulty here is that our developed conceptions of political justice and democratic decision making are rooted in the nation state experience, and it is quite unclear how such conceptions can be transplanted to the very different conditions of global governance, or what alternative conceptions may be appropriate for a global space populated by many different types of special purpose regulatory bodies and networks.[6] Alternatively, procedural and institutional measures to address the problem of disregard may be based on functionalist norms. Thus they may be evaluated in terms of enhancing their ability to enhance the effectiveness of regimes in achieving their transnational regulatory objectives by boosting the perceived legitimacy and acceptance of their decisions or promoting the input and consideration of views and information in order to produce functionally better decisions. Or they may be based on the extent to which they promote the interests of the participating states.[7] These alternative conceptions, on which the legitimacy of global regulatory regimes ultimately rest, have important implications for institutional and procedural design. [8] The purpose of this paper is to analyze the institutional and procedural tools available in making such design choices.

In analyzing the problem of disregard and the institutional and procedural issues presented, it is necessary to distinguish the various different types of global regulatory bodies and the erosion of traditional domestic and international mechanisms of accountability to societal interests associated with their rise. The many different global institutions that make, implement and enforce regulatory norms can be grouped into five basic types: (1) formal treaty-based international or intergovernmental organizations (such as the WTO, the Security Council, the World Bank, the Climate Change regime, etc); (2) informal intergovernmental networks of domestic regulatory officials (such as the Basel Committee of national bank regulators); (3) domestic authorities implementing or subject to global regulatory law (distributed administration of global norms); (4) hybrid public--private regulatory bodies such as the Internet address protocol regulatory regime, which includes the Internet Corporation for Assigned Names and Numbers (ICANN) and WIPO; and (5) private bodies such as the International Standards Organization and the Forestry Stewardship Council.[9] To a significant and growing extent, the regulatory authority of these institutions is exercised by bodies, including councils, committees, boards, and even dispute resolution bodies that are fundamentally administrative in character and operate below or to the side of general decision-making bodies comprised of representatives of the member entities establishing the institutions.[10]

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[6] See Jürgen Habermas, The Postnational Constellation and the Future of Democracy, in Jürgen Habermas, The Postnational Constellation: Political Essays 58 (2001). Because our conceptions of political justice and democracy have been developed in the context of nations with comprehensive governmental institutions and authority, these conceptions must either be somehow translated to the very different context of special-purpose global governance regimes, or new conceptions appropriate to those regimes developed.

[7] For discussion of the alternative conceptions of the purposes of procedural and institutional arrangements in global regulatory regimes, see B. Kingsbury, N. Krisch & R. Stewart, The Emergence of Global Administrative Law, 68 L. & Contemp. Probs. 15, **XX** (2005). This article is part of a Symposium on The Emergence of Global Administrative Law, 68 L. & Contemp. Probs. 15 (2005), which is the product of the Project on Global Administrative Law at NYU School of Law. See http://www.iil.org

[8] See A. Buchanan & R.O. Keohane The Legitimacy of Global Governance Institutions (draft 2006)

[9] Ibid.

[10] Ibid.

The problem of disregard is often attributed to the weakening as a result of globalization of established mechanisms, especially in liberal democratic nation states, of electorally-based political accountability and legal accountability for disciplining regulatory decision making.[11] The weakening of these mechanisms is a matter for concern on other grounds, such as the threat that may be posed by globalization to nation-state conceptions of democratic self-government. Further, as discussed below, some important problems of disregard would continue to exist and indeed would be exacerbated if these mechanisms operated with full vigor. But the erosion of these accountability mechanisms has contributed in some contexts to the problem of disregard and prompted widespread demands for measures to promote greater accountability to affected societal interests on the part of global regulatory bodies.

In globalization debates, much attention has been focused on gaps in the efficacy of electorally-based political accountability and administrative law accountability resulting from shifts of regulatory authority from domestic agencies to treaty-based international organizations (Type 1). These gaps, it has been argued, result in disregard of important affected domestic societal interests. For example, NGOs have claimed that regulatory decisions by the WTO, investment treat arbitral tribunals and other global bodies have undermined environmental, health and safety protection laws and programs in the US, Europe, and other countries. These critiques generally define the problem of disregard in generic procedural and institutional terms. Regulatory globalization has undermined democratic methods of decision making and accountability as embodied in liberal democratic states. Collective societal interests in environmental, health, safety and consumer protection do not enjoy equivalent procedural rights and institutional protections in global decision-making; As a result, they are forced to bear excessive and inequitable risks of harm. .

In the purely domestic context, two basic types of arrangements make decisions by government regulatory bodies accountable to affected societal interests. First, an interlocking set of *supervisory, hierarchical*, and *fiscal* accountability mechanisms renders regulatory officials accountable to legislators and the head of government, while the latter face *electoral* accountability to the voters. This package of four different accountability mechanisms constitutes a complex system of *electorally-based political* accountability. Second, regulatory officials are *legally* accountable to regulated actors or other affected persons through the courts. Accountability through administrative law ensures that officials obey relevant statutes, providing to that extent a transmission belt of electorally-based legitimacy for agency decisions. Both of these sets of accountability mechanisms continue to operate when states join and participate through their government officials in international treaty-based bodies (Type 1) that exercise regulatory powers. Further, states that are members of such bodies can promote consideration of their domestic interests through supervisory and fiscal accountability mechanisms backed up by the possibility of state withdrawal from the regime, and through the extensive general decision making powers that states typically enjoy within such regimes.

In theory, these chains of accountability link the decisions of treaty-based regimes to the domestic societal interests of participating states. In practice, such accountability is undermined by the many, often weak links in the chain. The chain is stretched and weakened further by internal delegation of decisional authority within global regulatory regimes, under which decisions are increasingly made by administrative bodies such as councils, committees, board, and secretariats rather than plenary representatives or member states. Further, withdrawal from the regime is not a realistic option in most cases. Legal accountability to domestic interests may

[11] See, e.g., Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards*, 50 U. KAN. L. REV. 823 (2002)

come into play when global norms are domestically enforced, but most systems of domestic administrative law are inherently ill-equipped to review the global elements in regulatory decisions.[12] At the same time, many treaty-based global regulatory bodies have not developed adequate mechanisms of their own for accountability to societal interests affected by their decisions. As a result, they disregard such interests. Targets of such criticisms include, for example, the WTO, the World Bank, and arbitral tribunals established under bilateral investment treaties. It is hardly feasible, at least at this juncture, to address the resulting accountability deficits by constructing a global system of elctorally-based political accountability analogous to that operating in liberal democratic nation states, although there is the possibility of developing new systems of legal accountability for the decisions of global regulatory bodies.

This situation, however, does not mean that these bodies are not accountable. They are often subject to powerful but in many cases informal mechanisms of supervisory and fiscal accountability to the states that create, fund, and support these global institutions. Behind these states stand the interests and views of the high national government officials who determine government policies regarding them. Further, many thoughtful students have found that these policies are often strongly influenced by well organized financial, business, and other economic actors, which operate more effectively and exert greater sway in the informal, opaque, negotiation-driven networks of national-global regulatory decision making than more weakly organized general societal interests. Thus the problem is often not lack of accountability, but disproportionate accountability to some interests and inadequate accountability to others.[13]

In the case of intergovernmental regulatory networks (Type 2), gaps in domestic nation-state electorally-based political and legal accountability mechanisms are typically even more pronounced. These
Regimes are composed of specialized regulatory officials whose vision is often narrow. Also, they often operate and make decisions in a quite remote and informal manner. In the case of hybrid public-private regulatory bodies (Type 4) or purely private bodies (Type 5) traditional political and legal accountability mechanism may not apply at all, or only to a limited extent. As in the case with treaty-based organizations, these bodies are accountable, but primarily to their Founders – the government officials, business firms, or other entities that establish and support them. As a result, the decisions of these different types of bodies may often disregard important affected societal interests.

In the case of distributed administration of global norms by domestic administrative bodies (Type 3), the accountability problem has a quite different character. Here the problem is disregard of the interests of foreign producers, investors, societal interests, or individuals. Because these foreigners do not vote and typically do not reside in the jurisdiction making decisions that affect them, mechanisms of electorally-based political accountability do little to protect their interests. Here again, problem not total lack of accountability, but rather accountability of the wrong sort. Indeed, the greater the political accountability of domestic administrators responsible for implementing global norms, the worse it will likely be for the foreign interests. As for legal accountability, foreigners may not have the right to invoke domestic legal remedies or an effective set of procedural and remedial protections may not be available for the types of decisions that concern them

[12] See R. Stewart, U.S. Administrative Law: A Model for Global Administrative Law? 68 Law & Contemp. Probs. 63 (2005) [hereinafter R. Stewart, U.S. Model for Global Administrative Law?]; R. Stewart. The Global Challenge to U.S. Administrative Law, NYU Jl Intl L & Policy (forthcoming 2006)
[13] See A. Buchanan & R. Keohane, supra.

What types of steps might be taken to address these accountability gaps and problems of disregard resulting from the globalization of regulatory decisions? Accountability mechanisms are, as Ruth Grant and Robert Keohane point out, but one of a number of different types of practices and institutional mechanisms for constraining, directing, and influencing the exercise of power.[14] In the international context, these mechanisms include force or its threat; informal cooperation for mutual advantage through coordination or collaboration; institutionalized rules for collective decision making that specify the distribution of decisional authority, the requirements for making authoritative decisions, and who plays what role in making them; a variety of accountability mechanisms; and other practices and incentive structures ranging from participation and transparency to peer relations within epistemic communities to international markets.

This paper focuses on three basic types of institutionalized measures to deal with the discontents of regulatory globalization: decision rules, accountability mechanisms, and other measures and practices that promote institutional responsiveness to affected interests, such as transparency, peer reputation, and competition. An actor may be said to be responsive to the interests and values of others when she considers those interests and values into account and gives them weight in his decisions. In addressing these problems of disregard, the question is then how best to make the various different types of global regulatory bodies more responsive to such interests, consistent with other important objectives including the effective discharge by such bodies of their specialized functions and responsibilities.

Decision rules define the entities or persons who have authority to make decisions for an institution and the voting rules or other requirements for making authoritative decisions. Such rules may establish complex authority structures involving several decisional bodies in a system of "checks and balances designed to prevent action that oversteps legitimate boundaries by requiring the cooperation of actors with different institutional interests to produce authoritative decisions."[15] These complex decisional structures may be internal, involving two or more entities within a given global institution. They may also be external, linking decision making by a number of global regulatory bodies in a global regime complex.[16] One potential means of promoting responsiveness by global regulatory bodies to disregarded societal interests **is** to give them some form of decisional authority within the organization, or to link its decisions to those of another body that is more responsive to such interests.

Accountability mechanisms are designed to protect organizational "outsiders" by influencing "inside" decision makers to give regard to their interests. All of the various types of accountability mechanisms, discussed in Part II.B, involve a defined structural relation between "outside" account holders and "inside" accountees, under which the former have the right to hold the latter to account for their conduct and impose sanctions or secure other remedies for deficient performance. Thus, another remedy for the problem of disregarded interests is to create or strengthen mechanisms that entitle representatives of such interests to hold organizational decision makers to account for the consequences of their decisions.

[14] R. Grant & R. Keohane, Accountability and Abuses of Power in World Politics, 99 Am. Pol. Sci. Rev. 1, 2 (2005).
[15] Id. at 2.
[16] For the concept of a global regime complex, see K. Raustiala & D. Victor, The Regime Complex for Plant Genetic Resources, 58 Int'l Org. 277 (2204).

Other responsiveness-promoting measures are institutional measures that are neither decisional rules nor accountability mechanisms. Like accountability mechanisms, they are external in character, but do not involve the particular type of structural relations that defines accountability. Examples include requirements or practices under which regulatory bodies provide information about their activities or enable outsiders to participate in organizational decisions without exercising decisional authority (for example, by submitting comments on proposals); steps to mobilize peer reputational influences on decision makers; or establishing competition among regulatory bodies in a given field..

Decisional rules and accountability mechanisms tend to have a "hard" character, with determinate impacts on institutional decisions or actors, while the influence of other responsiveness-promoting practices tends to be more "soft" and diffuse. In practice, many institutions include or operate in environments that include all three types of measures.

Because problems of disregard are often -- but by no means always -- attributable to accountability gaps created as a result of regulatory globalization, the institutional response most often advocated is to fill these gaps by giving the disregarded the right to hold these bodies to account. But this seemingly logical solution may not be the best one. Accountability mechanisms typically involve various costs and suffer from other limitations. Their efficacy may vary widely depending on the context. As discussed, other types of institutional tools to encourage greater regard for affected societal interests are available. One option is to change the decisional rules of global regulatory bodies to make disregarded "outsiders" into "insiders." Another is to promote practices, such as greater regime transparency or non-decisional participation rights that are not accountability mechanisms but operate in other ways to promote greater consideration of outside affected interests. Depending on the situation, these different types of tools may function either as substitutes or complements. In many cases, some combination of these different types of measures will be superior to relying on one alone. The evaluation and choice among such alternatives must inevitably be context-specific. Ultimately, as discussed above, such choices must also be guided by one or more relevant norms of stable, sound, effective, just, or democratic global regulatory governance.

The remainder of this part considers in turn each of the three basic types of institutional tools addressing accountability gaps and promoting greater consideration by global regulatory bodies of disregarded interests. Part 11.B examines accountability mechanisms, Part II.C deals with other measures for promoting responsiveness to outside interests, and Part II.D deals with internal decisional rules.

B. Accountability Mechanisms

Accountability is all the rage. It is rare indeed to find any writing on global governance – whether by lawyers, political scientists, international relations specialists, political theorists, or NGO advocates – that does not propose measures to meet the need for enhanced accountability for international organizations and other global regulatory regimes.[17] The measures proposed include enhanced transparency, participation, and reason-giving, and deliberation, dialogue, benchmarking, and reporting. Similar measures are also widely discussed at the domestic and supranational levels the US and in Europe to address the limitations of traditional administrative and other public law mechanisms in dealing with new regulatory approaches based on burgeoning network, reflexive, and private governance arrangements.

[17] See, e.g., David Held and Mathias Koenig-Archibugi, Global Governance and Public Accountability (Malden and Oxford, Blackwell 2005)

Notwithstanding all the accountability talk, there has been little careful and sustained analysis of the concept of accountability and its relation to specific governance needs and institutional reform proposals. As Jerry Mashaw has noted, "accountability is a protean concept, a placeholder for multiple contemporary anxieties."[18] In too many instances, accountability is little more than a rhetorical slogan used by advocates to commend the particular measures that they favor.

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

The Five Accountability Mechanisms

In recent work, Ruth Grant and Robert Keohane[19] have systematically examined accountability in the international relations context, and Richard Mulgan,[20] and Jerry Mashaw[21] have done so in the domestic context.[22] As shown by these and other authors, accountability is a relational concept. At a minimum, an accountability mechanism includes a specified accountor, who is subject to being called to account or answer for some specified aspect or range of his conduct, and a specified account holder or accountee who is entitled to demand and receive such an accounting, evaluate the performance of the accountor, and impose sanctions or obtain remedies for conduct that falls short or, in some cases, rewards for superior performance. Beyond this minimum, some accountability regimes may include a specified process for the rendering of account by the accountor and for evaluation of his performance by the account holder or a third party (such as a court). They may also include the giving of reasons or justifications by the accountor for his conduct, the giving of reasons by the account holder for her evaluations, and standards by which the accountor's conduct is to be evaluated. Different accountability regimes provide answers to the basic variables: "who, to whom, about what, through what processes, by what standards, and with what effects."[23]

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

[18] J. Mashaw, Structuring a "Dense Complexity": Accountability and the Project of Administrative Law, Issues in Legal Scholarship: The Reformation of American Administrative Law, 2005 Berkeley Electronic Press No. 4, 15.
[19] R.Grant & R. Keohane., supra.
[20] Richard Mulgan, Holding Power to Account: Accountability in Modern Democracy (Palgrave Macmillan 2003)
[21] J. Mashaw, supra; see also e.g. Colin Scott, Accountability in the Regulatory State 27 Jl Law & Soc 38.
[22] For discussion of accountability in the context of the EU, see Carol Harlow, Accountability in the European Union (2002).
[23] J. Mashaw, supra, at 17.

study of the factors that explain the development, adoption and functioning of different accountability mechanisms in different contexts.

There are five basic types of ex post governance mechanisms that include the minimum accountability elements: a specified accountor who may be obliged by a specified account holder to render account for some specified aspect of his conduct, with a right on the part of the account holder to evaluate the accountor's conduct and impose sanctions or obtain other remedies for deficient performance.. Some of these mechanisms also include, or may include, specified processes for account-rendering, and the giving of reasons and application of standards.

Fiscal accounting practices involves financial accounting and audit procedures by which the recipient or holder of funds accounts for their use to an account holder(s), often the grantor of the funds, in accordance with generally accepted accounting standards and evaluations accompanied by reasons. Consequences for faulty accounting and/or unauthorized or improper use of resources can include legal liability, revocation and return of funds, and denial of future funding grants.[24]

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

Electoral accountability. Here the account holders are those who are entitled to vote for the election of public or private office holders, the accountors. The electoral accountability mechanism comes into play when office holders seek reelection; those whose performance is judged deficient by a sufficient number of voters are not reelected. There is generally no set procedure for rendering account. Also, there are no standards that electors must follow in voting, nor do they have to give any reasons for their votes.

Hierarchical accountability operates in governments, firms, and other organizations or between individuals where superiors (principals/masters) have the right to control and evaluate the performance of subordinates (agents/servants) and impose sanctions including dismissal for inadequate performance or rewards for superior performance.[25] In cases where subordinates have security of tenure --for example, government civil servants or unionized employees -- there are generally regular procedures and standards and reasons for evaluations. Where subordinates hold their position at the pleasure of superiors, these elements are often absent.

Supervisory accountability operates in a variety of settings where authority or resources are conferred by one actor (account holder) to another (accountee) but the relation is not a strict hierarchical one of master-servant. Examples include the relations between principals and independent contractors, between the legislature and administrative agencies, and between states and the international organizations of which they are members. There may or may not be fixed procedures and standards/reasons for evaluation of the accountee's conduct. Sanctions

[24] The concept of accountability originated in rendering account in financial matters.
[25] Hierarchical accountability may also operate between individuals in principal/agent, master/servant relations.

may include revocation or non-renewal of the authority or resources conferred as well as, in some cases, legal liability.

All of these accountability mechanisms deal with relational structures involving a separation between those who have the power of choice and those who bear the consequences of choice. They deal with the resulting problem of decisional externalities by giving a defined package of rights to those affected.

The Two Basic Sources of Accountability Relations

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

The first basic type of accountability relation is exemplified by fiscal, electoral, hierarchical and supervisory mechanisms. In each, the relation is created by a grant, delegation or transfer of authority or resources from one actor or set of actors (account holders) to another actor or actors (accountees), where the accountees are to act in the interest of the grantors or third persons. Fiscal accountability involves a transfer of funds or other resources. Elections involve a grant by voters/electors of authority to hold and exercise the power of office. In hierarchical or supervisory accountability, there is a grant or delegation of authority and/or resources. In all of these cases, the purpose of the holding to account is to ensure that the grantee/accountee has acted consistently with the terms of the grant and appropriately in the interests of the grantor or a third party beneficiary. Where the grantor judges performance deficient, he has the right either to revoke or not renew the grant and in some cases pursue affirmative liability or other legal claims against the grantee.[26]

The second type of situation involves conduct by B that harms an in ways that the law prohibits. A, the account holder, institutes an action in a court or other tribunal against B, the accountee, for an accounting to determine whether A's legal rights have been infringed and, if so, obtain an appropriate remedy. The structures or right and duty involved are quite various, including various types of unlawful administrative action, infringement of rights protected by tort, contract, or property law, violations of regulatory statutes, and breaches of fiduciary duties. Some cases involve preexisting fiscal, hierarchical, or supervisory relations between the parties. But in other cases, including many tort cases, the parties are strangers. This second type of accountability relation is often overlooked by authors focusing on the first type. [27]

Other Asserted Accountability Mechanisms

Grant and Keohane[28] and Mashaw[29] as well as other authors[30] also characterize additional institutional practices and influences as accountability mechanisms. These practices and

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

[27] See e.g. Colin Scott, supra at 39: "{T]here is implicit in the capacity to call to account some element of control capacity.'

[28] Grant and Keohane identify the following accountability mechanisms: Hierarchical; Supervisory; Fiscal; Legal; Market; Peer; Public Reputational. Grant & Keohane supra at 8 Table 2.

influences, however, lack the requisite structure of accountability relations and mechanisms. These candidates for recognition as accountability mechanisms include the following:

Market disciplines on firms and other market actors operate through the freedom of suppliers of capital or goods and services (including labor) or customers to "exit" to competitors. In most cases there are no fixed procedures or standards for evaluation. The sanction for deficient performance is loss of business.

Peer norms and peer reputational incentives operate among members of a profession or discipline with a common methodology or set of standards of appropriate conduct. There may be in some cases be fixed procedures and standards for evaluation and sanctioning or reward, such as professional disciplinary procedures for lawyers and doctors, election to professional societies, or acceptance of papers for publication in peer reviewed journals. These can be regarded as genuine accountability mechanisms, supervisory in character. But more often the evaluation is informal and the "sanction" or "reward" is one's general standing among colleagues.

General political influences on conduct includes a wide variety of mechanisms, other than elections and hierarchical or supervisory relations, through which actors seek to influence government decisions through activities including financial support , cooperation, campaign work,, lobbying, and mobilization of public support for political causes. Typically there are no fixed procedures or standards for evaluation and the sanction is withdrawal of continued support, or support for opponents. These influences interact with the four mechanisms of electorally-based political accountability.

Public reputational influences on conduct operate in a very diffuse manner, through the general opinion held by various publics of the conduct of various actors including firms and other organizations. There are no fixed account holder—accountee relations or evaluation procedures or standards and the "sanction" or "reward" is an actor's general reputation.

Social influences on conduct encompass a wide variety of quite informal processes in which one's behavior is judged by family, friends, and members of various other social communities in relation to norms prevailing in the relevant social community. There are no fixed procedures or standards and "sanctions" and "rewards" take the form of informal social judgments and incentives.

None of these five types of practices and influences satisfy the minimum elements of an accountability mechanism. They typically do not specify accountees who can obtain, as a matter of entitlement, an accounting from defined account holders for their treatment of the accountor's interests and impose a sanction or obtain a remedy for deficient performance. For example, in market disciplines based on exit, there is generally no process of holding to account, merely a switch to other transacting partners; it would also be quite strained to call such a practice a sanction.[31] With regard to general political influences or professional or public reputation, there are no generically defined relationships between actors and those who evaluate

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[29] See Mashaw, supra at 27, Figure 1 (political, administrative, legal, product market, labor market, financial market, family, professional and team accountability)

[30] See Richard Mulgan, supra.

[31] Of course, a market actor that is dissatisfied with a transactional partner's terms or performance may sometimes resort to "voice" mechanisms of complaint and remonstrance before exiting , or resort to legal action.

their conduct nor do the latter enjoy any entitlement to an accounting from the former for their conduct vis-à-vis the account holder. The processes of social norm inculcation, conduct assessment, norm reinforcement are even more diffuse.[32]

In common parlance fiscal, legal, electoral, hierarchical, and supervisory practices are regarded as accountability mechanisms, but not the remaining five. Of course, ordinary linguistic usage is not decisive. As Mulgan observes: "How far 'accountability' extends in meaning is partly a question of linguistic convention but may also involve a judgment of institutional priorities."[33] Yet common linguistic practice often reflects implicit public norms or purposes. Here we are concerned with governance, and more particularly the control of power. What distinguishes the core class of five accountability mechanisms is that they involve certain structures of power relations and techniques for its control that may be invoked as of right by those whose interests have been disregarded. Other means of promoting responsiveness, discussed in Parts II.C and II.D, lack this key feature.

The number of accountability mechanisms is thus limited. This does not mean that the other practices and influences listed above and classified by some authors as accountability mechanisms are unimportant or could not be used to promote greater responsiveness by global regulatory bodies to disregarded interests. But clear analysis and sound policy prescription require that accountability mechanisms be distinguished from other responsiveness-promoting measures that lack their distinctive structure, including the entitlements that they confer on account holders. This necessity is too often disregarded in the globalization literature through loose invocation of accountability rhetoric

Accountability and Principal/Agent Relations

Many authors in the governance/accountability literature employ a non-legal conception of principal/agent relations -- called herein P/A -- to analyze accountability.[34] Under the P/A conception, Ps, which include legislators, superiors in bureaucratic hierarchies, states, and shareholders, delegate authority and/or resources to As, such as administrative agencies, bureaucratic subordinates, international organizations, and corporate management, respectively. Accountability mechanisms are instituted by Ps to limit "agency costs" – the tendency of As to pursue their own interests at the expense of the P's interests. This tendency of As to indulge in various forms of "slack" or "drift" at the P's expense is often exacerbated by information asymmetries between P and A.[35] Slack or drift on the part of As can be reduced through use by Ps of ex post accountability mechanisms as well as other means for controlling As, such as ex

[32] Grant and Keohane recognize that market, peer and public reputational accountability do not fit the delegation model of accountability and term them illustrations of a "participation" model. But they do not satisfactorily how these can be characterized as "participation" or how they meet the characteristics of accountability mechanism that they posit.

[33] See Richard Mulgan, supra at 22

[34] See e.g. Darren Hawkins et al., Delegation and Agency in International Organization (Cambridge, Cambridge Univ. Press, forthcoming 2006); Daniel Nielson and Michael Tierney, Delegation to International Organizations,: Agency Theory and World Bank Environmental Reforms. The legal conception of principal and agent is discussed below. including Grant and Keohane and other international relations theorists, Mashaw, and McCubbbins and others writing in the positive political economy vein,

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

ante authorization procedures. But these mechanisms themselves involve various costs for Ps, including monitoring and sanctioning costs and the danger of chilling beneficial A innovation and risk-taking. The general problem facing Ps is how to optimize the trade offs between agency costs on the one hand and the costs of accountability and other control mechanisms on the other.

The P/A conception it can prove illuminating in analyzing some accountability relations, but it can also seriously mislead. It is simply not applicable to the second basic type of accountability relation, involving harm by A to B's legally protected interests. [36] And, many accountability relations of the first type, involving grants of authority or resources, do not involve a principal-agent relation as the law defines it. In the law, the agency relationship is one where one person (the agent) acts on behalf of and subject to the control of another (the principal). Most cases of hierarchical accountability fit this definition, but many or most instances of fiscal accountability, electoral, and supervisory accountability do not. Thus, in many cases involving financial transfers (including from shareholders and creditors to corporations,) the grantor does not have general authority to control the conduct of the recipient. Voters can not dictate the conduct of elected officials. The same is true in most supervisory accountability relations within government. These accountability relations are established and operate against the background of legal institutional frameworks and decision rules that significantly constrain the ability of the transferor to direct the conduct of the transferee. The controls that may be exercised are legally limited to defined modes. For example in the legislature/agency relation, the legislature may modify an agency's budget or authorizing legislation, but it can not direct its conduct or tell it how to interpret the law.[37] Of course, the legislature's control of agency budgets and its power to enact new legislation enables it to influence agency decisions by more informal means, but such controls and powers are often difficult or costly to use, limiting the corresponding potency of informal influences.[38] The important point is that liberal democratic forms of representative government deliberately separate, in varying degrees and different ways, decisional authority within government and between the government and the electorate in order both to restrain power and promote its wise exercise. Such limits, for example, apply to voters in relation to those whom they elect, legislators in relation to the administrative agencies that they create and fund, and chief executives in relation to high agency officials whom they appoint. Similar background constraints operate in the case of states and international organizations and in the case of shareholders and directors in corporate governance. These limitations are not the contingent function of agent/accountability costs but embody fundamental governance values. Use by analysts of the P/A conception obscures these vital features of the legal institutional structures within which many accountability relations operate. The analysis often proceeds on the premise that Ps have plenary authority to define the terms of the P-A relation, leading to neglect of essential structural conditions and norms.

Accountability, Standards, and Reason Giving

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

[37] See Hazardous Waste Treatment Council v. EPA, F.2d (D.C. Cir)

[38] These legal constraints are reinforced by the development by institutional transferees of decisional structures, specialized knowledge and skills, and supporting client interests that enhance their effective decisional autonomy.

There is a reciprocal relation between the giving of reasons and the use of evaluative standards in accountability mechanisms. Where evaluative standards are established, it is inevitable that reasons will be given, by the accountee in attempting to show that his conduct conforms to those standards, and by the account holder if she believes that the conduct does not measure up and seeks to impose sanctions or other remedies. While fiscal and legal accountability mechanisms invariably include standards and reasons, standards are generally not specified nor reasons required in most instances of electoral accountability, are often absent in supervisory accountability, and are also absent in some settings of hierarchical accountability. At first blush, these absences seem surprising, for one might naturally suppose that standards and accompanying reason giving would promote accountability by providing clearer direction for accountees and promote mutual confidence and cooperation.[39] But these practices of course involve transaction costs. And, the specification of standards, especially if the burden is on an employer or other account holder to show through formal processes that the accountee has failed to conform to them, may actually thwart accountability. But these P/A cost variables are not sufficient to explain the absences of standards and reasons in certain important governance relations, including electoral and certain high-level supervisory and hierarchical relations.

John, Ferejohn argues that reason-giving and accompanying legal accountability operates as a substitute for democratic (electoral) and legislative control.[40] Citizen-voters need not give reasons for their votes and there are no substantive standards for voting in general elections. Elected legislators are not required to give reasons, even if they generally follow a practice of doing so, nor are they subject to standards. Agencies, which are subject to a degree of political accountability, are subject to a moderate reason-giving requirement and are subject to legal standards. Courts, the institutions most removed from the complex of political accountability mechanisms, follow a strong reason-giving practice and are also subject to legal standards. As this pattern suggests, standards and reason-giving operate as a discipline on power that may indeed serve as a functional substitute for electoral accountability. In addition, they provide a foundation for legal accountability and can also promote supervisory accountability on the part of administrative officials to elected officials who are in turn accountable to the voters.

While Ferejohn's analysis is illuminating, still more can be said as to why voters and legislators are not required to give reasons. Requiring voters to give reasons for their votes would effectively require their votes to be known, exposing them to undue influence or intimidation by government or politically powerful groups.[41] Requiring the giving of reasons also supports demands that reason-givers in the future act consistently with the reasons that they have given in the past.[42] A requirement that they follow certain standards in voting would constrain voters' freedom and even more directly. Subjecting legislators to requirements of reason-giving or to standards would similarly constrain them. Such constraints could be exploited by those with political power to entrench themselves. Even if such abuses were absent, such constraints would undermine the dynamic and contestatory character of democratic politics and the free development of new political issues, values, and interests. It would reinforce the political status

[39] The failure to provide for reasons would preclude a dialogic process of decision making, as discussed below.

[40] John Ferejohn, Remarks at Global Administrative Law Conference, New York University School of Law April 2005; forthcoming, NYU Jl. Intl L.& Policy (2006)

[41] Somewhat analogous considerations may help explain why corporate shareholders need not give reasons for their votes.

[42] See Stephen Breyer, Richard Stewart Cass Sunstein, and Matthew Spritzer, Administrative Law and Regulatory Policy Ch. 5 (5th ed. 2003) [hereinafter Breyer and Stewart, Administrative Law].

quo and currently dominant interests. The political virtue of the "public sphere" of discourse and debate is its unrestricted and spontaneous character. "Here new problems can be perceived more sensitively, discourses aimed at achieving self-understanding can be conducted more widely and expressively, collective identifies and need interpretations can be articulated with fewer compulsions than is the case with procedurally regulated public sphere."[43] The linkages between the public sphere of opinion and will formation and law and government measures through the public's voting for elected officials and voting by those officials on legislation should accordingly not be constrained by requirements of reason giving and review, lest the responsiveness of elected officials to current or anticipated shifts in public political issues and values be hobbled.[44] The democratic virtues of political innovation and entrepreneurship also help explain why standards, and accompanying reasons, are not found in some supervisory and hierarchical relations, including those among high government officials those between legislators and their staffs.[45]A In the case of administrative bodies, the need for such flexibility is outweighed by the desirability of reasons and a degree of decisional consistency in order to secure "rule of law" values of impartiality and predictability and promote the accountability of unelected officials. These considerations are even stronger in the case of the courts.[46]

As discussed further below, Jürgen Habermas and many students of global governance who have followed his lead have celebrated open reasons-based discourse and dialogue among all affected as the model of democratic decision making.[47] But democratic practice argues powerfully that, in some contexts, a requirement or standard practice of reason giving would subvert important democratic values.

Institutional complexes of accountability mechanisms and decisional rules

Different accountability mechanisms are often combined in various arrangements, often in conjunction with different rules for decision making within and among different decisional authorities. In liberal democracies, as previously noted, constitutional/ public law provides for electoral accountability for legislators and directly or indirectly, the chief executive officer of government. Elected officials exercise supervisory and fiscal and, in the case of the chief executive, hierarchical accountability over administrative officials. The result is a web of accountability networks that link government decisions to societal interests. This system of electorally-based political accountability is best understood not as a distinct accountability mechanism but rather a complex of such mechanisms. This complex is supplemented and reinforced by legal accountability through constitutional and administrative law, which ensures

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[43] Jürgen Habermas, supra, at 308. See also id. at 171.

[44] A similar desire for flexibility also helps explain the lack of standards in many settings of supervisory accountability, including those in international relations.

[45] The creation of civil service status for lower-level government employees reflects the countervailing value of limiting the scope for political control that inevitably has a partisan element..

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

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

that government officials respect the rights of citizens and obey statutes enacted by elected legislators. These accountability mechanisms operate in conjunction with decisional rules that allocate competence among these various bodies and specify the decisional procedures which they follow. In many cases, valid decisions require the concurrence of two or more bodies. Complex structures of voting rules and accountability mechanisms also determine the governance of business corporations, non-profit organizations, labor unions, etc.

Overall, most global regulatory bodies are less subject to formal accountability mechanisms than domestic or supranational bodies. Relatively informal types of supervisory mechanisms typically have relatively greater importance than electoral or legal ones. Treaty-based regulatory bodies (Type 1) are subject to supervisory and fiscal accountability to their Founders and principal supporters -- member states. Their top management is often subject to electoral accountability to such states. Hierarchical accountability generally operates within such organizations, but is in some cases is undermined by member state influences and in others limited by the independence of regime tribunals or committees composed of member state representatives or independent experts. Legal accountability is rare, because of the general reluctance of member states to establish independent reviewing tribunals and organizational immunities in national courts. Regulatory networks (Type 2) are subject to supervisory accountability to participating government officials and agencies, but such accountability is limited by their relative informality and specialized character. Distributed administration (Type 3) is subject to legal accountability and in some cases liability through review by WTO and other regional or bilateral trade and investment tribunals, and by domestic courts to the extent that they recognize and enforce global norms. As a practical matter, the burdens of legal accountability often fall disproportionately heavily on non-OECD countries. Governments in these countries are also subject to fiscal accountability where they receive funds or other financial support from the World Bank and other multilateral development banks, the IMF, and other international or bilateral donors. Where conditions, such as environmental and social requirements, are imposed on such grants, there is also potential legal accountability as well. Private and hybrid private-public global regulatory bodies (Types 4 and 5) often have rather complexly differentiated internal decisional rules and structures that establish correlative internal accountability mechanisms. External accountability is generally limited to fiscal and supervisory mechanisms that can be invoked by the firms, NGOs or other entities that constitute the body. For reasons previously discussed, these

C. Other Responsiveness-Promoting Measures

This section discusses institutional measures for addressing the problem of disregard that are not decision-making rules but are also not accountability mechanisms because they lack the essential structural features of such mechanisms. There are many measures that might promote responsiveness, including consultation, creation of advisory committees, public dialogues, and the like. The discussion here is limited to three such measures that have received wide attention in the global governance discourse: public provision of information (transparency), participation in decision making through notice of proposed decisions and opportunity for submission of comments, and the giving of reasons for decision. These measures, designed primarily for external constituencies and generally available to the public as a whole, [48] are also important elements of emerging principles of global administrative law,[49] as reflected for example in the

[48] These measures may also affect, in various ways, the operation of decision making rules in which "insiders" play decisional roles.

[49] B. Kingsbury, N. Krisch & R. Stewart, supra; Symposium, The Emergence of Global Administrative Law, supra.

first two pillars of the Aarhus Convention.[50] Although these measures are often characterized and advocated as accountability mechanisms, they are not. However, they can improve the efficacy of accountability mechanisms and help mobilize other social practices and influences in order to promote responsiveness. After reviewing these three measures, the discussion considers whether a package consisting of all three -- information, non-decisional participation, and reason-giving – in the context of regulatory governance might be regarded as a new form of accountability mechanism: a purely procedural system of administrative law without judicial review

These means of promoting responsiveness to disregarded societal interests are especially important in the global regulatory context, because typically such interests can not invoke accountability mechanisms to control or influence the decisions of global regulatory bodies, nor do they enjoy decisional rights within such bodies. The first four types of accountability mechanisms – fiscal, electoral, hierarchical, and supervisory –are generally limited to the states, domestic government agencies, international organizations, or business firms that are members of global regulatory bodies of Types 1-2 and 4. These "Founders" also generally dominate the high-level internal decision making of such bodies. In a few instances, representatives of general societal interests may invoke mechanisms of legal accountability for these regimes but these mechanisms are currently quite limited. Legal accountability to private actors for domestic regulatory agencies operating under global norms (Type 3) generally extends only to commercial and financial interests. Only certain hybrid public-private global regimes (Type 5) have as Founders NGOs that enjoy decision making power and speak for general societal interests.

Information

NGOs and many students of global governance have widely advocated greater transparency and other forms of public information provision in order to promote accountability by global regulatory bodies to societal interests.[51] Many such bodies of all types have taken substantial steps to make information about their decisions, procedures and policies publicly available. In the case of Type 3 domestic agencies, these steps have been mandated by global law such as the WTO TRIPS, TBT and SPS Agreements and the Aarhus Convention. The provision of information, however, is not in itself an accountability mechanism. It lacks the requisite structural features. Even where provision of information to the public is legally required, members of the public generally do not have the right under global law to demand an accounting and secure a remedy for compliance with such procedural requirements.[52] Moreover, what advocates of greater global accountability advocate and envision is

[50] The Convention is applicable to environmentally significant domestic agency decisions by States party to the Convention. In many cases the environmental consequences of these decisions extend to other states or to a global commons. In such cases, these agencies function as Types 3 global regulatory bodies subject to the global administrative law disciplines set forth in the Convention. The Convention provides that it may also be applied to international organizations, functioning as an administrative law for Type 1 and possibly Type 2 global regulatory bodies.

[51] Transparency may include passive information provision (furnishing information in response to specific requests fro outsiders) and "active" provision (routinely and affirmatively making information available to the public through web sites etc.). It may include various categories of information, including decisions, policy statements, reports, various kinds of internal documents, minutes or transcripts of proceedings, organized data, etc.

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

accountability for the substantive policies and decisions of global bodies. Independent review mechanisms that would provide such accountability to members of the public or societal NGOs are quite rare. General requirements or practices of transparency and other forms of information provision can, however, promote responsiveness through their effect on the operation of accountability mechanisms and other responsiveness-promoting practices and arrangements. [53]

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

Notwithstanding that accountability mechanisms include means to provide account holders with information, independent generic requirements or practices of information disclosure provide them with additional information and thereby enhance accountability. They can also strengthen the operation of other responsiveness-promoting practices, including market competition, general political mechanisms, and peer, public reputational and social practices and incentives. Outside affected interests, even if they lack accountability rights, can use information to learn about forthcoming decisions by decisional bodies and the influences on them in order to mobilize and take actions to steer decisions in their favor. They can also use information to evaluate a body's past decisions and practices in order to evaluate its performance and develop appropriate strategies for influencing future decisions. Indeed, the provision of information of information alone may promote responsiveness to disregarded interests because of the anticipation of such effects. The role of public opinion in modern government, recognized by A.V. Dicey well over a century ago, has acquired even greater force in the Twenty-First Century and in the context of global governance.[54]

Merely making publicly available reams of undigested documentary material, however, may do little to promote informed debate and discussion of global regulatory governance decisions. Buchanan and Keohane emphasize that, in order to permit effective public scrutiny of and accountability for its decisions, a global authority must secure an adequate degree "*epistemic deliberative quality*" by making "available "reliable information needed for grappling with normative disagreement and uncertainty regarding its proper functions." Such information must

[53] Transparency for accountability in the regulatory context includes not only transparency in the decision-making process for setting regulatory norms, but also transparency with respect to the norms themselves, the activities of regulated actors in implementing or complying with those norms, the activities of the regulators in ensuring same, and the feedback mechanisms for assessing information on the overall performance of a regulatory program in achieving its goals. The adequacy of information provision in connection with regulatory programs must be evaluated in relation to each of these elements.

[54] A.V. Dicey, Lectures on the Relation Between Law and Public Opinion in England: During the Nineteenth Century.

be accessible at reasonable cost, "properly integrated and interpreted" and directed at the public to allow practical accessibility and evaluation.[55]

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

Non-decisional Participation

There are several basic modes of participation in regulatory governance decisions. First, the submission of evidence and argument to decision-makers in connection with a specific forthcoming decision.[56] Second, attendance at meetings where a pending decision is being considered by decision makers and perhaps some form of participation in the discussion regarding the decision, without the right to vote or otherwise have a role in the making of the actual decision. Third, participation in consultation or other processes initiated by an organization including membership on advisory bodies and other forms of involvement in discussions regarding the policies and practices of an organization. Fourth ,voting or otherwise having a role in the actual decision (for example, participating in a committee where decisions are governed by the principle of consensus). The first three modes involve non-decisional participation, the last provides decisional participation (as discussed below, the line between the second and fourth modes of participation may blur in practice). The considerations involved in deciding whether a party should have the right, under applicable decision rules, to be an "inside" decision maker are distinct from whether it should have some form of opportunity as an "outsider" to persuade the "insiders" who make decisions In much of the governance literature, governance, "participation" generally refers to non-decisional participation, but the distinction between decision and non-decisional participation is not always carefully observed. The discussion in the remainder of this subsection is limited to non-decisional participation. Decisional participation is discussed in Part II.D.

Like information provision, non-decisional participation by the public in global regulatory bodies' decisions is widely advocated as a means of securing accountability to disregarded interests. In the case domestic administrative bodies (Type 3), the Aarhus Convention and certain WTO agreements as well as bilateral and regional investment treaties agencies confer rights (to the public, to foreign countries and private entities engaged in trade, and investors, respectively) to submit views, evidence and analysis in relation to specific pending decisions. Like transparency, non-decisional participation is not an accountability mechanism because, by itself, it does not include the right to hold decision makers to account for their decisions or impose a sanction or remedy for a deficient decision.[57]But, like transparency, it can promote the

[55] See A. Buchanan & R.O. Keohane The Legitimacy of Global Governance Institutions 18, 20 (draft 2006),

[56] In certain adjudicatory proceedings in some legal systems, this form of participation includes the right to present evidence through witnesses and cross-examine the witnesses presented by other parties.

[57] Decisional participation is also not an accountability mechanism, but for a different reasons. Accountability relations involve a separation between the people who makes decisions (the accountor) the

effectiveness of certain accountability mechanisms as well as that of certain other responsiveness-enhancing practices.[58]

Even if disregarded interests can not invoke accountability mechanisms, they can use non-decisional participation to promote organizational responsiveness to those interests. First, the presentation of evidence and argument may by itself persuade decision makers to make different decisions by supplying new information, pinpointing neglected impacts and issues, and marshalling persuasive reasons for a different course. The degree of such consideration is likely to be enhanced to the extent that participants have the right to be physically present when decision makers discuss a proposed decision.[59] Second, such presentations can be a platform for mobilizing general political influences, influences based on peer and general public reputation, and social influences. Third, such presentations provide a benchmark for judging the responsiveness of the resulting decisions, which can be a further basis for mobilizing these non-accountability influences. Finally, participation may have intrinsic value for affected societal constituencies.

Reason Giving

A third measure to promote responsiveness is a purely procedural requirement that global decisionamkers give reasons for their decisions. Such a requirement is, for example, found in the Aarhus Convention and a number of WTO Agreements. As already discussed in the context of transparency and non-decisional participation, such a requirement is not, standing alone, an accountability mechanism. That would require some reviewing authority to examine the substantive validity of the reasons given by the decisional body for decisions adverse to an account holder and provide a remedy for decisions not supported by valid or sufficient reasons.[60] But, requiring a decision maker to state reasons can be an important part of legal, fiscal, hierarchical, and supervisory accountability mechanisms. Reasons are essential if the accountability system provides standards for evaluating conduct. Even if standards are absent, the giving of reasons requires the decision maker to justify its decision with reference to norms

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person whose interests are affected thereby (the account holder). If a person is a decision maker, to that extent he can not demand accountability for such decisions.

[58] This enhancement effect is most obvious in legal accountability, where the right to present evidence and argument to an administrative agency or court to present one's case is essential to securing effective judicial review of the resulting decision. Under requirements for exhaustion of administrative remedies, such presentation may be required as prerequisite to securing judicial review. Presentation of evidence and argument to boards of directors or trustees may likewise be essential to obtaining judicial redress for violation of fiduciary duty. The opportunity to review and comment on draft accounting statements and audits promotes fiscal accountability. The opportunity of superiors or supervisors to consult and comment regarding upcoming decisions by subordinates or supervisees promotes hierarchical and supervisory responsibility. Participation in legislative or administrative decisions can also enhance electoral accountability by enabling participants to evaluate the consequent responsiveness of government decision makers to their views, values and interests.

[59] As discussed below, practice, such as in the committee of the Codex Alimentarius,. Under which observers may attend committee meetings at which decisions are discussed and made may morph into a form of decisional participation by such observers as they become engaged in a deliberative process.

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

that are relevant and appropriate under the accountability mechanism in questions.. This enables those adversely affected to challenge the norms invoked and/ or critique the decision as unsupported by the norms invoked. Reasons also imply a degree of decisional consistency, which can be an additional check against arbitrary decisions. In the absence at the global level of electoral mechanisms to link the public sphere of opinion and will formation with the institutions of governance, the objections to reason giving in connection with voting that apply in the domestic context are inapplicable; indeed, communicative reason-giving becomes an essential link between the global public sphere and decisions by global regulatory bodies. [61]

A requirement of giving reasons can also help promote responsiveness to disregarded interests even in the absence of accountability mechanisms providing substantive review and remedy. Even if they are not subject to review by an independent authority, general political, reputational, social and even market influences and incentives will often lead decision makers to provide reasons for decisions that seek to justify them under public norms recognized as legitimate. Decisions can be critiqued where they are inconsistent with or otherwise not supported by the norms invoked. Or, the norms invoked can be challenged as inappropriate or unsound. Reasons also provides a benchmark for disregarded interests to advocate adoption and proper application by the relevant of norms that take greater account of their interests and mobilize general influences in furtherance of that goal.

A Purely Procedural Global Administrative Law?

Consider a package of rights for affected societal interests combining substantial disclosure of general information about a global body's decisions, policies and activities and specific information on the foundations of a particular proposed decision and alternatives to it; non-decisional participation in the decision through submission of evidence and argument on forthcoming decisions; and the giving of reasons for the decision based on the relevant evidentiary and analytical material. The three elements are strongly complementary Transparency permits more effective participation. Participation allows for presentation of evidence and argument that decision makers must, under prevailing norms, consider in the reasons that they give. The reasons given for decisions can be more effectively evaluated with the benefit of the information obtained through transparency and the benchmark provided by the evidence and argument presented by participants. As discussed below, this procedural package is, to varying degrees, emerging in global administrative law and practice. Reviewing mechanisms, however, are generally absent except in some cases of distributed administration (Type 3). Could such a package, even in the absence of review, represent a form of administrative law -- an administrative law lite? Could it be regarded as an accountability mechanism?

The common law tradition points strongly to the conclusion that there is no administrative law without judicial review. Historically, judicial review of official actions preceded and was often the source of procedural requirements for administrative decision making, including requirements of public information provision, participation, and reason giving, which gradually emerged much later. And, many aspects of these procedural requirements are best explained by the need to ensure effective judicial review. In the U.S. interest representation model of administrative law, discussed below, judicial review plays a vital role in ensuring that the reasons given by agencies for discretionary policy choices take due account of all of the relevant affected interests as well as ensuring fidelity to law. The particular institutional features of global law may, however, call for a different answer to the question of whether or

[61] Cf. Jürgen Habermas, The Post-National Constellation, supra note **XX, at 111-112.**

not independent legal review is essential to a system of administrative law. These include a relative absence of binding dispute settlement or independent reviewing mechanisms and much greater reliance on other mechanisms and incentives to secure sufficient compliance with norms having the force of law. These features, developed in the context of a state-centric conception of international law, characterize many global regulatory regimes. Thus, one can imagine the three elements of the package emerging as binding norms of global law even in the absence of a review mechanism to enforce these procedural norms. From the perspective of domestic or supranational models of administrative law, however, another vital element would still be missing, namely, binding general substantive norms for global regulatory decision making. These, are at best in a nascent state of development. [62] Still, the possibility of a purely procedural global administrative law can perhaps not be dismissed.

Would a package of the three procedural elements, by itself amount to an accountability mechanism? Without a means that enables account holders to obtain, as of right, an accounting and an appropriate remedy, how could it? The argument is that these elements, operating in the context of general political, peer and public reputational, social and market influences, enable affected societal interests to obtain a public accounting from global regulatory bodies by effectively requiring them to justify their decisions by reference to publicly recognized norms, and to sanction decisions that disregard their interests by publicly challenging their performance. The argument is seductive. I believe, however, that for the sake of clear analysis and sound prescription it is better to maintain a firm distinction between accountability mechanisms that create substantive entitlements on the part of account holders and other practices and influences that, however powerful they may be, do not.

D Decisional rules and practices.

A third means of promoting greater responsiveness to disregarded interests by global regulatory bodies is to change such bodies' decisional rules to include representatives of such interests as voting members of one or more of the organization's collegial decision making bodies and thereby make "outsiders" into "insiders." In the strongest form, they would be given the right to sit on and vote in the general decisional authority of a global regulatory body – its governing council or the equivalent. While the exercise of such authority is, as explained above, not itself an accountability mechanism, it generally carries with it substantial influence over an organizations policies and activities and entails the right to exercise supervisory, fiscal and perhaps electoral accountability over subordinate decision makers within the institution.[63]

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

[63] For example, many international organizations constituted and composed of states have a governing body composed of representatives of states. States also contribute funds to the organization (fiscal accountability). Their governing representatives often elect the top management (electoral accountability) and review its policies and practices, with the option for the state that they represent of withdrawing from the organization or reducing compliance or support if dissatisfied (supervisory accountability). Linkages with other organizations may also involve one or more of these forms of accountability. Such accountability mechanisms tend to reinforce the influence of decisional authority in promoting the organization's responsiveness to the account holder states, organizations, or other parties.

Steps to promote internal transparency to organizational decision makers in order to enhance accountability to those decision makers may in some cases conflict with measures to promote external transparency to broader constituencies. This may be the case, for example, with respect to corporate environmental audit and management programs. See Stewart, Second Generation.

Alternatively, representatives of affected interests could be included as decisional participants on boards, committee, and other subsidiary or separate organs responsible for particular types of decisions. These participation rights could involve a variety of different rules for collegial decision making, such as majority vote, supermajority vote, and consensus/unanimity. There are no standard models. The possible configurations are too various for this paper to explore

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

The Doubtful Feasibility of Decisional Rights for Disregarded Interests

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

Global regulatory bodies are constituted by Founders –states, specialized domestic regulatory agencies, international organizations, associations of business firms and/or NGOs --- to help solve coordination and cooperation problems and advance their mutual interests. The Founders/members provide resources and other forms of support to such bodies. They abrogate the most significant internal decisional authority to themselves or their representatives. Founders will be most reluctant to share such decisional authority with non-founder interests, especially self-appointed representatives of general societal interests.[64] In addition to giving such representative a share of decisional power, it may also enable them to invoke internal accountability mechanisms to further their objectives. Such interests, because of their collective character, are generally unable to contribute resources to the organization. Giving them decisional authority will complicate and make it more difficult to reach decisions. They are likely to divert the organization from solving the problems that motivated the Founders' creation of the body, or promote solutions contrary to the Founders' interests. In order to meet criticisms and shore up the legitimacy of the organization, it may be necessary to give greater consideration to disregarded interests and perhaps grant them some rights. But Founders will generally prefer to meet such needs by means short of granting decisional rights or external accountability rights. These means include the procedural rights discussed in Part II.C: enhanced transparency and non-decisional modes of participation, including consultation, membership on advisory committees, and opportunity for comment on proposed measures. Decisional rights are likely to be granted only as a last resort, and then only to the minimal extent.[65]

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

[65] In some cases, however, organizations might choose to grant a decision making role to certain representatives of collective interests, planning to co-opt them.

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

A third obstacle to extending decisional rights to affected societal interests lies in the principle and practical machinery of representation. Founders dominate decision making in such bodies not just because they are Founders but because they are significant institutions representing legitimate interests and are either accountable, however imperfectly, to those interests through domestic or international political processes or subject to market disciplines. There is no comparable institutional machinery or legitimating set of principles for appropriate representation of affected societal interests in the decisional authorities of global regulatory bodies. Ideally, there would be a system of global democratic government to provide such representation, to which global regulatory bodies linked through mechanisms of delegation, supervision, and review. In the absence of any such system, it is necessary to devise, for each global regulatory body on a case-by-case basis, some system to identify the relevant societal interests who should be given decisional rights and select representative of such interests, most likely NGOs who claim to speak for them. The choice would almost inevitably have to be left to the global regulatory body itself, presenting the risks of bias and cooption in the selection of interests and their representatives.

These obstacles can be ameliorated to the extent that certain founder/member entities represent disregarded interests. In that event, greater decisional authority could be accorded to such entities. For example in the case of treaty-based international organizations, it has been proposed to give developing countries greater de jure or de facto decisional authority in bodies such as the World Bank, the IMF, and the WTO in order to promote greater responsiveness to developing country interests. Where such countries are not members of such bodies, they could be admitted. The same strategy could be followed in regulatory networks (Type 2 bodies). However, this approach by no means avoids the problems identified above. Founders who exercise dominant decisional power will be most reluctant to share it. The advantages of efficiency and, in some cases, specialization will be reduced. Finally, there is often controversy over whether at least some governments faithfully represent the interests of their citizens.[66]

[66] Similar criticisms are made of NGOs.

Decision by Deliberative Consensus

The generally pessimistic conclusions of the foregoing might be criticized as implicitly based on a bargaining model of decision making, dominated by powerful states and private economic actors, that ignores the potential of an alternative model of decision making by deliberative consensus, as exemplified in EU family of new governance mechanisms. Advocates of the latter approach contend that it fosters decisions based on reason-giving, dialogue and persuasion rather than power and bargaining. When used to develop product regulatory standards for Europe, such processes appear to have fostered successful collaboration among participants, efficiently producing standards that have enjoyed wide acceptance. Similar decision making procedures are also widely used in many types of global regulatory governance, including in bodies such as the Codex Alimentarius, the OECD, and ISO. It could and almost surely will be used more widely. Could it be used to help solve the problem of disregard?

The analysis in the previous section emphasized the control exercised by Founders over global regulatory bodies through a combination of general decisional authority and internal accountability mechanisms. The implicit background assumptions are realist: Founders horde decisional authority and are reluctant to share it. Decisional power is a zero sum game. Voting rules and voting power, operating against the background balance of power among dominant Founders, largely determine outcomes. The premises of the deliberative, consensus-based model of decision making are quite different. It assumes that many decisions of global regulatory bodies have a problems-solving character, and that in many cases the best way to solve problems is through collegial decision-making processes in which participants argue for their preferred outcomes based on reasons, rather than bargain based on power. Participants are open to persuasion by the reasons given by others, and may though the deliberative process come to accept decisional outcomes that they would not have supported before the deliberation began. This model does not necessarily assume that the participants, whether representatives of states or private entities, are not rational maximizers of their constituents' interests. It holds, however, that participants in such a process may, especially under conditions of uncertainty about the nature of regulatory problems and the best means for addressing them, come to change their views about which outcomes will best serve their interests and adopt an unforeseen alternative that emerges through deliberation.[67] A rule or practice of decision by consensus rather than some majority of votes encourages this deliberative approach. If successful, this decision making process can produce innovative solutions to joint problems and better informed and more advantageous decisions. Rather than being stuck in set bargaining strategies and postures, the participants can actively share experience and ideas learn from one another, clarify and perhaps partially resolve uncertainties, and identify new policy options that better solve the problems that they mutually face. This mode of decision making may be best adapted to issues that are not matters of high politics, especially those that have a technical component requiring the mobilization of specialized knowledge. Powerful states and other powerful actors may therefore be willing to adopt such decisional methods, often through subsidiary global bodies of an administrative character, where they can better solve problems of concern to them. Ad discussed below, these methods may provide an opening for participation by representatives of general societal interests, even if powerful global actors would not be willing to cede them a role in high-level bargaining.

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

Some proponents of consensus-based deliberative processes for regulatory decision making identify them with Habermas's theory of communicative reason, which invokes a conception of discourse among individuals grounded in implicit claims of validity for the truth, moral or ethical, or pragmatic claims advanced, claims that could be backed up by sound reasons recognizable as such by interlocutors.[68] This communicative conception of decision making over matters involving conflicting interests or views offers the participants an alternative means, based on reasons calculated to win general assent among fair and open minded persons, to strategic approaches based on bargaining through threats and promises. Under an alternative version of Under discourse theory, the ground for the validity of arguments, propositions, and decisions is procedural. Legitimate decisions emerge from a public-reason-based deliberative process in which all are equals, under which the public-regarding reasons given by each is entitled to full respect and open-minded consideration by others. [69] The aim of discourse, in the Habermasian view, is to secure rational agreement or consensus on substantive measures. In a less ambitious version of deliberative democracy propounded by Amy Gutmann and Dennis Thompson, the aim is not necessarily consensus but the continued participation of all relevant persons in the dialogue and acceptance of, if not necessarily substantive agreement with, the decisions that emerge from the process.[70]

The two models of decision making sketched above -- bargaining and deliberative consensus -- are of course ideal types; most real world processes of decision by collegial bodies probably involve some mixture of the two. Many students of EU regulation have, however, concluded that the deliberative model has played a dominant and quite successful role in the development of European product regulatory standards through comitiology and the New Method of reliance on industry-based standard setting bodies. As discussed in Part III, these institutions operate with considerable freedom from political and legal mechanisms of accountability, and function in a rather closed manner without much effective transparency or opportunity for participation by "outside" interests. They nonetheless appear to enjoy considerable perceived legitimacy. Some observers are also optimistic about the potential for the rather different system of deliberative decision making used in the OMC with respect to member state policies in fields such as employment, economic policy, and social protection. Further, they believe that the generally successful use of these approaches in supranational/transnational governance in Europe indicates that they would likewise be successful in global regulatory governance

In the US, processes of negotiation/deliberation have been used for, among other matters, the negotiation of new regulations at the federal level ("RegNeg"),[71] and in the resolution of local

[68]See Jürgen Habermas, supra, at 18: "Communicative action, then, depends on the use of language oriented to mutual understanding. This use of language functions in such a way that the participants either agree on the validity claimed for speech acts or identify points of disagreement, which they conjointly take into consideration in the course of further interaction. Every speech act involves the raising of criticizable validity claims aims at intersubjective recognition. A speech-act offer has a coordinating effect because the speaker, by raising a validity claim, concomitantly takes on a sufficiently credible guarantee to vindicate the claim with the right kind of reasons, should this be necessary."

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

[70] See Amy Gutmann and Denis Thompson, Why Deliberative Democracy (2004). See also Neil Craik, Deliberation and Legitimacy in Transnational Environmental Governance: The Case of Environmental Impact Assessment (forthcoming).

[71] See Breyer and Stewart, Administrative Law 737-742.

or regional environmental disputes.[72] Such processes may hold special promise for new systems of network regulatory governance that have emerged at the domestic level in the US and other countries as a result of the adoption of new regulatory strategies in response to the limitations of command and control mechanisms. Established political and legal accountability mechanisms developed in the context of command regulation are not well adapted to these new regulatory approaches. Deliberative decisional processes, rather than administrative law procedures and judicial review, may prove to be better adapted to the characteristics of network regulation. However, there has been little or no consideration of how the domestic experience with deliberative approaches to negotiation and regulation negotiation in the US or other countries might be applied to global regulatory governance.

However successful deliberative approaches to regulatory governance may be in some respects, the ultimate issue for purposes of this paper is whether or how well can overcome the problem of disregarded interests in the global regulatory context. In order to give disregarded interests a decisional role in consensus-based deliberative processes, the same problems of representation discussed above in the context of other decisional rules must be faced: how to identify and determine which societal interests should be represented, and whom to choose as their representatives. Moreover, representation problems may be more difficult to solve in the case of decision by deliberative consensus because successful deliberation requires that the number of participants be limited to a rather small number.[73] Moreover, in deliberative models of decision it may be more difficult to use external measures to promote responsiveness to disregarded interests, including accountability mechanisms, transparency, and non-decisional participation without compromising the successful functioning of the deliberative process. The EU experience, especially in comitology, suggests that in order to be successful deliberation must occur in relatively closed environment, where participants are to a considerable extent free of ongoing outside scrutiny and influences from outside actors and constituencies. Such influences which could well chill participants' full engagement in and openness to the dialogic process and transform decision making into a bargaining mode. Thus, the very conditions for the success of consensus based deliberative decision making may impede adequate regard for the full range of affected societal interests and perpetuate the problem of disregard if this method of decision is used in global regulatory governance. These issues are further examined in Part III.

III Global Regulatory Governance and the Disregarded: American and EU Models

This part examines contrasting American and EU approaches to regulatory governance and their potential for global application, including for addressing the problem of the disregarded. As an oversimplified but nonetheless useful generalization, Americans prefer to use relatively open and contestatory accountability mechanisms for to control and legitimate administrative regulation. These mechanisms have been characterized as "adversary legalism."[74] These weapons of Mars include the political accountability package founded on elections and especially legal accountability through administrative law and liability actions. Europeans often tend to prefer more closed and less legalized processes, relying on corporatist approaches to

[72] Lawrence Susskind, Paul F. Levy, And Jennifer Thomas-Larmer, Negotiating Environmental Agreements : How To Avoid Escalating Confrontation, Needless Costs, And Us (Washington, D.C Island Press, 1999).
[73] Analysis of deliberative decision making in the US indicates that a limitation to 12-15 participants is desirable with a maximum of around 20.
[74] See Robert A. Kagan, supra note 2.

representation of affected interests and informal methods of reaching accommodation – the arts of Venus.[75]

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

A. The US Model: External Accountability Mechanisms

The U.S. has relied strongly on electorally-based political and on legal accountability mechanisms to control and legitimate governmental power, including administrative regulatory power. These external measures are open, participatory, and contestatory. Such characteristics are well suited to the pluralist, dynamic character of American society and Americans' distrust or skepticism regarding government. Americans accordingly have a high regard for accountability mechanisms, especially the vote and the lawsuit that they can invoke and deploy as of right to protect their interests, individual or collective, within a highly diverse and competitive society. In a political and social context, these are weapons of Mars. At the same time Americans lack the Europeans' intimate experience with transnational and supranational governance.[76] It is thus unsurprising that Americans tend to suppose that the accountability mechanisms familiar from their domestic experience are appropriate for the problems of global regulatory governance.

Strengthened Domestic Political Accountability for Global Regulatory Decisions

Some American students of global governance, most notably Anne Marie Slaughter, have argued for strengthening mechanisms of domestic political accountability for global regulatory decisions by treaty-based regimes and intergovernmental networks (Types 1 and 2).[77] The means would include closer oversight by domestic political actors and legislatures over the global regulatory activities of their governments and strengthened mechanisms of electoral, supervisory and perhaps legal accountability over the responsible domestic government officials. These mechanisms would in turn enhance the accountability of global regulatory bodies. Those advocating this approach, however, have not considered its impact on domestic regulation affecting foreign interests (type 3) or on private or hybrid public-private regulatory bodies (types 4 and 5). Even as applied to treaty-based regimes and intergovernmental networks, it is unclear how feasible and effective these measures might be. Further, there has been no sustained consideration of how measures to enhance domestic political accountability

[75] Ibid.
[76] NAFTA represents but a limited venture in transnational market governance.
[77] See Anne-Marie Slaughter, A New World Order (Princeton, Princeton University Press 2004). This strategy is also advocated by scholars elsewhere. E.g., Ngaire Woods, Parliaments and the Accountability of the IMF (forthcoming).

would affect the balance between developed country and developing country interests, or their impact on global social, environmental and economic interests. Examples are quite mixed. Thus, US domestic politics produced the World Bank Inspection panel and the NAFTA environmental and labor side agreements, but also opposition to the Kyoto Protocol and the International Criminal Court.[78]

Legal Accountability for Regulatory Governance: Interest Representation Through Administrative Law

The US government, US NGOs, and many American students of global governance have strongly urged application of domestic models of U.S. models of administrative law to global regulatory governance. The US government has pushed "good government" initiatives for developing countries through in the World Bank, IMF, and US ODA policies. The US government and many US-based NGOs have also exported US administrative law models a variety of global regulatory bodies. The latter efforts have been endorsed by many international NGOs, especially in the environmental field. These efforts have contributed to the emergence, discussed below, of a global administrative law to govern decision making by global regulatory bodies.[79]

At the outset, one must distinguish adjudication affecting rights of specific persons and development and implementation of general norms through rulemaking or otherwise. In adjudication there is a powerful case for legal accountability in order to protect individuals who often lack political influence, promote even handed and impartial administration and ensure the legality of government incursions on private property and liberty. The case for legal accountability is less compelling in cases involving administrative adoption and implementation of general norms. Here the basic objective is not to protect individual rights but to ensure informed and considered decisions that take due account of relevant affected collective interests and values. As discussed in Part II, there are a wide range of accountability mechanisms, decision rules, and other measures to promote these objectives. The case for legal accountability is correspondingly weaker than in adjudicatory decisions aimed at involving individuals. As Justice Holmes stated for the U.S. Supreme Court, rejecting claims by a taxpayer group of a constitutional right to a hearing in administrative rulemaking: "Their rights are protected in the only way they can be in a complex society, by their power, immediate or remote, over those who make the rule. . . . There must be a limit to individual argument in such matters if government is to go on."[80]

Nonetheless, the US has developed an extensive system of administrative law for administrative rulemaking and other decisions involving the development and implementation of general

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

[79]See B. Kingsbury, N. Krisch & R. Stewart, supra.

[80] Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1945)

regulatory norms decisions[81] This system affords a broadly available package of rights for individuals and organizations representing affected social, environmental, and economic interests.[82] These rights include effective and speedy access to government information; notice and non-decisional participation in administrative decisions through submission of comments, evidence and analysis; a requirement that the agency provide reasons for its decision including a full discussion of the evidence and views submitted by commenters and justifications, supported by the administrative record, for rejecting them; and review of the legality of the decision in a court or tribunal. Under the "hard look" approach to judicial review of agencies' exercise of law and policymaking discretion, reviewing courts often demand that agencies give a detailed explanation, supported by evidence in the administrative record, of the reasons for their decisions, including a discussion of the contrary views and proposals submitted in public comments. This interest representation model of administrative law was created to fill the gaps in mechanisms of political accountability resulting from by the broad delegation of law and policymaking discretion to administrative bodies. More specifically, it was designed to meet the wide perception that these bodies were insufficiently responsive to regulatory beneficiaries and other affected social, environmental and economic interests by giving representatives of these interests' legal rights to hold agencies to account for their decisions and thereby promote greater responsiveness to those interests.[83] Many in the U.S. and the international NGO community believe that this interest representation model can and should be applied to global regulatory bodies to address analogous accountability gaps and problems of disregard.

The "hard look" approach to judicial review of agency discretion was developed by judges through partnership conception of the relation between agencies and reviewing, involving a dialogue on the public values involved in the administrative development of regulatory norms. In US administrative law, any individual or entity can submit comments in agency rulemaking or other proceedings. Any individual or entity can obtain judicial review on a showing that it is or would suffer "injury in fact" from an agency decision, and that its interest is recognized as relevant by the statute under which the agency is proceeding. While the party's motivating interest may often be private, it must adduce statutorily-relevant public values in support of its preferred policy outcome. The court reviews the justifications – again in public norms -- given by the agency for its choice and for its rejection of alternatives proposed by commenters. If it finds the reasons given inadequate or insufficiently supported by the administrative record, which includes all relevant agency documents and submissions from the public, it remands the matter to the agency, which may reconsider and make a fresh decision, taking into account the views of the reviewing court as well as the public participants. Like the deliberative processes discussed in Part II.D, this procedure involves discourse among participants in a decisional process involving a reflective examination of relevant public values. It can thus be understood as a particular institutionalized version of Habermas's concept of democratic discourse based on communicative reason. It can also be regarded as a legal construction of a surrogate legislative process. The US procedure, however, has an entirely different structure than the deliberative EU model of regulatory decision exemplified by comitology and the New Approach.. The deliberative process is not a collegial one consisting of face-to-face dialogue among individual participants and final decision by consensus. In the US model, the dialogue is structured through legal procedures and only two institutional actors -- the agency and the court -- have decision making roles. The agency is the ultimate decision maker, but the court plays a key supervisory and regulative role in ensuring the proper functioning of the dialogic process

[81] See R. Stewart, The Reformation of American Administrative Law, 88 Harv. Rev. 1667 (1976) [hereinafter R. Stewart, Reformation].
[82] See Breyer and Stewart, Administrative Law 415-488.
[83] See R. Stewart, Reformation.

and ensuring a reason-based decision. The public sphere is represented through the diverse private actors, including business firms, labor organizations, and NGOs, that submit comments and seek judicial review.

The Shortcomings of Interest Representation Administrative Law

There is resistance in many quarters, especially in Europe, to an interest representation model of administrative law for regulatory governance.[84] In the context of global regulatory governance, this resistance is related to more general issues regarding legalization of international governance.[85] This resistance is based in part on legitimate concern with the costs and other dysfunctions of the interest representation model. It also reflects a strong preference, conditioned by historical practice and reinforced by the recent EU experience with supranational government, for less legalized, more cooperative, and more closed regulatory decision making processes, relying on specialized government officials and corporatist approaches to interest representation through established organizational channels.[86] There may be greater receptivity to the US approach in Eastern and Central Europe, as a result of its transition from Communist rule. But historical practices and perspectives are different in Western Europe. It is notable that Western EU nations as a group were the last to ratify the Aarhus Convention, and that the EU Community also delayed ratification.[87]

There are potentially good reasons for such resistance. Mechanisms of legal accountability have many of the problems associated with legalization and litigation generally. They are costly to deploy. They require resources and often involve significant transaction costs and delay. These costs include not only the direct resource costs involved but transaction costs, opportunity for delay, stifling of initiative and flexibility, and erosion of the advantages of specialized administrative knowledge and operational experience, especially if the reviewing body is a court of general jurisdiction. Many commentators have found that in the US context these costs are exacerbated by the martial character of the US legal culture, with the result that interest representation administrative law has produced an "ossification" of the regulatory process.[88] The administrative record in important and controversial rulemaking proceedings is often massive, running to millions of pages of agency documents and public comments. The agency, conscious of the need to pass "hard look' scrutiny by reviewing courts, must not only prepare a long and elaborate opinion justifying its decision, but often finds that it must gather additional data or conduct new analyses to address problem raised in public comments. The agency may have to expose this new material to an additional round of public comment. It is common for

[84] E.g., Robert A. Kagan, supra note 2; Michelle Everson, the Constitutionalization of EU Administrative Law: Legal Oversight of a Stateless Internal Market, in Christian Joerges and Ellen Vos, EU Committees 281. See also J. Weiler, Epilogue: "Comitology" as Revolution – Internationalism, Constitutionalism, and Democracy in id. At 339 (criticizing "facile" U.S. norms of transparency and procedural fairness based on US Administrative Procedure Act.

[85] See generally Judith Goldstein, Miles H Kahler, Robert Keohane and Anne-Marie Slaughter, Legalization and World Politics (Cambridge, MIT Press 2001)

[86] There are, however, some signs of US-style legalization of the European administrative process. See Robert A. Kagan, supra note 2; Carol Harlow, Accountability in the European Union 159-162 (2002).

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

[88] See T. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 1992 Duke L. J. 1385; R. Pierce, Seven Ways to Deossify Agency Rulemaking, 47 Admin L. Rev. 59 (1995).

such rulemakings to take five years or more, followed by an additional year or two for judicial review, which may in turn be followed by a remand for further administrative proceedings. Some American students of U.S. administrative law believe that parties participating in rulemaking seek to "game" the proceedings by loading their comments with numerous contentions and extensive data and analysis, even on issues which they do not regard as important to their interests, in the hope of being able to persuade a reviewing court that the agency failed to deal appropriately with one or more of these peripheral issues and set aside an agency decision which they oppose for other reasons.[89]

Such practices, to the extent that they exist, not only drive up costs and delay but subvert the interest representation ideal of determining regulatory norms through dialogic deliberation over public values. Some observers believe that such an ideal is in any event hopelessly unrealistic in the context of American adversary legalism and the irreducibly political character of administrative decision making. They view the US rulemaking process as fostering a highly manipulative game, in which commentators invoke whatever arguments and facts are available to vindicate their private interests, and agency lawyers provide elaborate legal and analytical rationalizations for decisions reached on subterranean political grounds.

Severe ossification and manipulative gaming of the regulatory rulemaking process are not, however, an inevitable feature of the interest representation approach. As a number of US scholars have advocated, these problems could be addressed by scaling back the rigor of hard look review, and giving much more deference to agency judgments in review of discretionary policy choices.[90] This step would diminish the extent of judicial protection for affected interests and mute the ideal of dialogic partnership but allow greater administrative flexibility and dispatch. Other, non-legal mechanisms of accountability and responsiveness would remain and could arguably fill some of the gaps created by reducing the extent of legal accountability. In the context of global governance, it would no doubt make sense in most cases to adopt a "soft look" version of an interest representation model in those cases where a reviewing mechanism is provided. This would reduce, if not eliminate, many of the drawbacks associated with US interest representation administrative law. And, there is the option of doing without independent review on substantive matters and applying only a purely procedural version of interest representation. Thus, elements of the US model can and indeed as discussed below are being adopted for global regulatory governance without some of the more serious drawbacks associated with the US domestic version.

A further EU criticism of the pluralist US model is the problem of financing representation of collective social and economic interests and the resulting problem of imbalance in representation. Europeans tend to follow a corporatist approach of representation of such interests through officially recognized consumer, environmental, etc. organizations that often receive state financial support.[91] Representation in the US operates on a private, voluntaristic,

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[89] See T. McGarity, supra.

[90] See, T. McGarity, supra; R. Pierce, supra. But see M. Seidenfeld, Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking (stressing impact of uncertainty in application of "adequate consideration" standards of review in producing highly conservative agency strategies in rulemaking). The question of whether an agency properly interpreted and complied with relevant statutes presents different issues.

[91] See Francesca Bignami, Civil Society and International Organizations: A Liberal Framework for Global Governance (forthcoming)(discussing approaches to administrative law interest representation in the US, Germany and France)

competitive basis.[92] Well organized economic actors, including business firms and labor unions are equipped to participate effectively in the interest representation administrative law system. But the organizational advantage enjoyed by these entities relatively to more diffuse collective interests has been at least partially offset in the US by the rise of public interest law. US civil society traditions and government tax incentives have generated substantial funding for public interest legal advocacy groups representing environmental, consumer, minority, handicapped, animal rights. These groups, whose staff includes economists, scientists, and other professionals in addition to lawyers, have been able to participate quite effectively in the administrative process. While business firms and other organized economic actors may still maintain a relative advantage, public interest groups believe that they are able to enjoy far more influence and greater effectiveness under the interest representation model than under the preexisting traditional model of administrative law. Under that model, standing to secure judicial review was generally limited to regulated economic actors and collective interests could not obtain legal accountability over agencies and were remitted to political processes to advance their causes. Furthermore, the problem of resource imbalance will not disappear if the US model is not followed. Substantial resources, including economic, scientific, and engineering expertise, will inevitably be needed to participate effectively in specialized regulatory decision making, regardless of whether or not it occurs through legalized processes.

B. The Rise of Global Administrative Law

A global administrative law for the five different types of global regulatory bodies is rapidly emerging albeit in a piecemeal fashion. These processes involve two basic mechanisms, bottom up through review by national courts of the domestic reception and implementation of global norms, and top down through the adoption of administrative law procedures and institutional mechanisms by global regulatory bodies.[93] This new body of law and practice addresses both adjudicatory decisions and the adoption and implementation of general norms.

As an example of bottom up initiatives in the adjudicatory context, domestic courts have rejected claims of executive prerogative to review domestic administrative decisions implementing Security Council regulations freezing the assets of asserted terrorist financiers, invoked global norms to overturn deportation orders, and provided remedies to athletes challenging decisions by international sports authorities imposing sanctions for illegal doping.[94] In order to fend off such challenges in domestic courts, global regimes have strong incentives to develop, top down, their own systems of procedure and review, as has already happened for example, in the case of global sports bodies.[95] A different example of the top down approach is provided by arbitral tribunals established under bilateral and regional investment treaties. These tribunals are enforcing procedural as well as substantive global administrative law disciplines on domestic administrative bodies charged with regulatory expropriation of foreign investors' property. There is nothing distinctively American about this aspect of global administrative law. Such rights of defense are widely recognized in Anglo-Commonwealth common law

[92] These differences in approach also characterize regulatory standard-setting by industry-based standards bodies in Europe and the US.

[93] See B. Kingsbury, N. Krisch & R. Stewart, supra; R. Stewart, U.S. Model for Global Administrative Law?, supra.

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

[95] See A. Van Vaerenbergh, supra.

jurisdictions, in continental EU jurisdictions and, somewhat belatedly, by the EU Community.[96] As global regulatory regimes increasingly impact particular non-state actors –whether individuals seeking refugee status or investors financing in Clean Development Mechanism projects under the Kyoto Protocol – these will a corresponding need to develop appropriate mechanisms of legal accountability at the global level.

The emerging global administrative law for the adoption and implementation of general regulatory norms is more strongly reflects the general objectives and includes many but by no means all of the elements of the US interest representation model. For example, under the bottom up approach, US courts have applied administrative law disciplines to some domestic administrative decisions implementing global regulatory norms, notwithstanding agency arguments to the contrary based on the need for deference to the executive in foreign affairs.[97] The Congress and the President have in some cases required domestic government officials participating in global regulatory negotiations to afford public notice and opportunity for comment on the positions that they will take.[98] Under the top down approach, many international regulatory organizations (Type 1) and some intergovernmental regulatory net works (Type 2) have adopted elements of administrative law procedures, including notice and opportunity for comments (including through the submission of amicus briefs), provision of or access to information and documents, and reasoned decision for the adoption of general norms. A number of private and hybrid public private regulatory bodies (Types 4 and 5) have also adopted such measures.[99] The global regulatory bodies that have adopted such measures are as diverse as ISO, the OECD, the World Anti-Doping Agency, the World Bank, the Basel Committee of national bank regulators, and the Forestry Stewardship Council.[100] Further, the WTO and investment treaty arbitral panels are developing and enforcing administrative law requirements for distributed global regulation by national authorities (Type 3), including transparency, opportunity for notice and comment, and reasoned decision. The most notable example is the WTO Appellate Body decision in the US Shrimp Turtle case.[101] The growing numbers of other international tribunals and the potential application of the Aarhus Convention norms to global environmental regulatory bodies are likely to produce more decisions enunciating and enforcing global procedural standards of regulatory due process for various global regulatory bodies.[102] These developments have gone a substantial way towards creating a

[96] See F. Bignami, EU Participation .

[97] For a review of these decisions as well as decisions refusing to impose administrative law disciplines in some cases, see R. Stewart, U.S. Model for Global Administrative Law?

[98] See id. at 85-86. Such measures should serve to strengthen domestic mechanisms of political accountability for the activities of domestic officials in global regulatory decision making.

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

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

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

[102] See S. Cassese, supra; G. della Cananea, supra. These norms are likely to be internalized by domestic courts, and invoked by foreign plaintiffs seeking review of domestic agency decisions adversely affecting them.

purely procedural model of global administrative law, including transparency, participation, and reason-giving. They have thereby promoted the engagement of civil society organizations in global regulatory decision making.[103]. As global regulation increasingly impacts private actors as well as states, these procedural safeguards are extending to private actors.[104]

Instances where global regulatory regimes have established or required the establishment of effective independent reviewing authorities are, however, relatively rare. Examples include the World Bank Inspection Panel and similar institutions in other multilateral global financial institutions,[105] provisions in the WTO TRIPS and GATS agreements requiring independent judicial or administrative review for certain domestic administrative decisions affecting foreign economic interests, and the independent review system for adjudication of anti-doping cases involving athletes established by the World Anti-Doping Agency. The number of international tribunals with competence over the development and administration of global regulatory norms is increasing. This trend, together pressures from international NGOs and from the US and other developed country jurisdictions, the threat of domestic court review, and the potential spread of Aarhus access to justice norms to the global level, may stimulate further development of global-level independent legal review mechanisms for global regulatory decisions. At present, however, review mechanisms – a key element in the US model -- are generally absent in the case of global bodies other than domestic (type 3) agencies. The result is a purely procedural version of administrative law which, as discussed in Part II.B, falls short of constituting an accountability mechanism.

An interest representation model of administrative law is in many respect well adapted to meeting the problem of disregard and fostering elements of democracy in global regulatory governance. Even where review mechanisms are absent, its procedural elements provide important rights to representatives of affected social, environmental and economic represents to learn about proposed decisions, obtain background information, present their views and evidence, and obtain reasons and justifications for decisions. The information obtained through exercise of these rights can be used by NGOs and other entities to promote public awareness of and debate over the policies and decisions of global regulatory bodies, and thereby trigger responsiveness-promoting influences. These various rights, which may be supplemented in time with rights of access to independent review, are important tools for promoting responsiveness. They foster decisional processes that are open, competitive, and contestatory. Standing to obtain

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[103] See R. Nickel, Participatory Transnational Governance (EUI Working Paper Law No. 2005/20)[hereinafter Nickel, Participatory Transnational Governance].

[104] Stefano Battini, International Organizations and Private Subjects: A Move Towards a Global Administrative Law (forthcoming).

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

information, submit views and evidence, demand reasons and, where available, obtain review is broadly available to representatives of almost any affected interest, These characteristics fit the fluid, dynamic character of global regulatory issues and interests. The interest representation model creates a public forum within global regulatory bodies for debate and engagement on regulatory policies and the norms that should appropriately govern them. This forum provides a foundation for stimulating wider public awareness of and debate over the policies and decisions of global regulatory bodies. In the absence of some system of direct or indirect electoral representation, such processes of participatory transnational governance arguably serve as the most feasible proximate means of promoting democratic values in global regulatory governance.[106]

At the same time, this model has potentially significant limitations. Without a right to independent review, the administrative law model falls short of guaranteeing accountability. Its ability to stimulate greater responsiveness to disregarded interests is correspondingly limited. Another problem is providing adequate financial and other resources for effective participation in relatively legalized regulatory processes. As experience with the WTO DSB illustrates, is a problem for many countries, not to mention representatives of social and economic interest's especially Southern interests. Beyond these concrete problems is the lurking fear that use of US models will bring with it the excesses of US adversary legalism.

C. The EU Model: Deliberative Consensus

Beyond their concern with the drawbacks of the US administrative law model, many European observers believe that a deliberative consensus-based model of decision making is well suited for many aspects of global regulatory governance. It is cooperative and pacific rather than adversary. It aims at joint problem solving through reason, not at awarding victory in combat. An optimistic view of deliberative processes is supported by the successful experience in the EU with their use for regulatory decision making. The notion that the positive EU experience with such processes could be successfully transplanted is supported by the similarities between the situation of regulatory decision making in the EU and global contexts. Administrative law is a product of the nation state. It is built on maintaining the correct structure of authority and liberty among the legislature, the administrative, and the citizenry. It depends on an independent judiciary with final authority to determine the law that other actors must obey. These hierarchical structures are quite muted in the supranational/transnational setting of EU regulation, and can barely be found in most instances of global regulation. In both the EU and global contexts, the structure of decision is polycentric, hetrarchical, network- based. Flexible, deliberative consensus-based processes seem well suited for developing norms that bridge and harmonize the disparate centers of power and interest within such institutional environments.

Deliberative Decision Making for EU Product Regulation

A deliberative model of consensus-based decision making has been widely and generally successfully used for setting EU product regulatory standards by two different types of institutions: comitology, and industry-based standard setting bodies operating under the Community's New Approach to regulation. In comitology, member state representatives expert in a given regulatory area meet in a committee with a Commission official as chair and often with the participation of other experts, to decide upon detailed product regulatory standards to

[106] See R. Nickel, Participatory Transnational Governance.

implement Community legislation framed in general terms.[107] Under the New Method, responsibility for developing detailed standards is given to expert representatives of industry-based member state standard setting bodies operating under the aegis of EU federations of such organizations. Both of these innovations were a response to difficulties experienced in setting detailed regulatory standards through the Community legislative process. These difficulties were due in part to inadequate expert knowledge and resources in the Commission, and in part to conflicts among member states over the content of EU standards.[108] Comitology and the New Approach seek to marshal sufficient expert resources while at the same time ensuring consideration of the interests and views of the member states in the context of a more deliberative, less politicized decisional process.[109]

Comitology and the New Approach for setting EU product regulatory standards are well established and widely accepted as generally successful in promoting transnational market integration. The literature finds that Comitology committees and EU/member state standard setting organizations have resolved member state differences, reduced protectionist pressures, and adopted rather quickly and efficiently a large number of product regulatory standards. This success is attributed to the transfer of detailed regulation of decision making decision from Council and Commission to other bodies that have a different structure, operate in a less politicized environment, and use consensus-based deliberative processes for decision. The shift is from political body's subject (indirectly) to electoral accountability, and from administrative processes subject to administrative law, to informal deliberation among experts with shared competences and a problem solving orientation.[110]

The general terms of much of Community regulatory legislation often affords committees and industry-based standard setting body's considerable discretion in the selection of regulatory standards. Both systems operate in a rather closed manner. This is especially true in the case of

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[107] See Christian Joerges & Ellen Vos, eds., EU Committees, Social Regulation, Law and Politics (Oxford and Portland, Hart Publishing 1999) [hereinafter Joerges and Vos, EU Committees]

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

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

[110] See Ch Joerges and J. Neyer, From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology 3 Eur. L.J. 273 (1997); Christian Joerges and Ellen Vos, EU Committees: Social Regulation, Law and Politics (Oxford and Portland, Hart Publishing 1999); Schepel, Constitution of Private Governance 63 ff.

the comitology process, whose lack of transparency has attracted significant criticism from lawyers.[111] The committee process also operates with substantial independence from legal accountability or direct political control. Judicial review of committee decisions is rare, as is intervention by the Council or Parliament. Industry-based standard setting bodies generally operate with an even greater degree of insulation.[112] Although some legal scholars have questioned these arrangements, and Parliament is unhappy with its lack of authority over the comitology process, these standard setting processes do not appear to have provoked widespread criticism or legitimacy concerns from the public generally.

The generally optimistic view in the literature of comitology and the New Approach is, however, largely the product of analysis and evaluation at a high level of generality. More empirical investigation, including case studies, are needed on issues such as the following: the extent to which deliberative versus bargaining approaches to decision making are actually followed, how competitive rivalries among different firms within industries affect standard setting, the types of tradeoffs involved in setting standards, the extent of participation by representatives other than those from industry and governments, and whether there are characteristic differences in the decisional processes or outcomes of comitology and of industry-based standard setting bodies.

Some of the evidence available casts doubt on the generally rosy picture of deliberative decision making that appears in the comitology literature. In a review of approximately 5200 committee actions during 2001-2003, Peter Strauss found that very nearly all Commission proposals were ratified without significant committee opposition or change.[113] On the face of it, this evidence is strikingly inconsistent with the notion that the deliberative nature of the comitology process generates new and superior regulatory outcomes.[114]

Further inquiry is also needed as to why comitology and the New Approach apparently enjoy substantial perceived legitimacy notwithstanding the general absence of accountability mechanisms and the relatively closed character of the processes.[115] Is the general acceptance of

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[111] See Ellen Vos, EU Committees: The Evolution of Unforeseen Institutional Actors in European Product Regulation, in Joerges and Vos, EU Committees 19; Renaud Dehousse, Towards a Regulation of Transnational Governance? Citizen's Rights and Reform of the Comitology Process, id. 109; Carol Harlow, Accountability in the European Union 64-69 (2002).

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

[113] Personal communication. Strauss's findings will be included in a forthcoming article on EU rulemaking. Strauss also found that during this period only seven committee decisions were referred referrals to the Council and that none provoked intervention by the Parliament. These facts are consistent with the view that the comitology process produces broadly acceptable decisions. But the fact that the nearly all Commission proposals ware ratified by committee without significant change undercuts the significance of the committee role in the process and claims of the superior-problem solving performance of committee deliberation.

[114] Alternatively, it may suggest that the matters dealt with by the committees are of little political , with the result that there were only seven importance or difference.

[115] There is no internal accountability mechanism that participants in a deliberative consensus based decisional process. Because all participants are decision makers, there is lacking the separation of decision making (by accountees) and impacts on non-decisonmakers (account holders) that is the foundation of accountability relations. Further, there is no mechanism by which a participant can hold another participant to account for the failure to adhere to deliberative norms (for example, by failing to participate in good faith dialogue based on reasons) and impose a sanction against that participant for such failure. All that the disappointed participant can do is withhold assent to a proposed decision or withdraw.

these processes explained by their superior performance in efficiently producing workable regulatory standards– outcome legitimacy? By peer esteem for their superior expertise? By their informal links with EU and member state government bodies?[116] The sociological embedding of private standard setting in the member states, including "shared cultural understandings and institutions"?[117] The informal political linkages between member state representatives on comitology committees and domestic constituencies, which ensures that their views and interests are adequately considered in the decision process? Or, as some have suggested, is the use of deliberative processes self-legitimating because of their inherent normative virtues?[118]

Representation Problems in the EU Model

As already noted, some of those who endorse deliberative processes for regulatory or other governance context equate them with Harbemas's discourse theory of communicative reason. In Habermas's account, such discourse practices have a democratic, legitimating character where the views and interests of all affected and concerned persons, embodied in the public sphere, are represented in the discourse. There are, however, serious difficulties with applying this concept to specialized regulatory decision making on technically complex issues where specialized knowledge is essential.[119] The concept of reason-based discourse can, of course, apply to deliberation and decision making by specialized bodies or communities and have legitimacy within the confines or a given epistemic or normative framework. To have a democratic character and enjoy democratic legitimacy, however, the discourse processes must in some means be institutionally open to and linked with the public sphere in order to ensure a "constitutionally regulated circulation of power."[120] As exemplified by the EU experience, however, specialized deliberative processes for adopting regulatory standards are not open to decisional participation by all, and probably could not be and still function successfully. Participation is restricted and determined by the entities – such as the Commission or EU and national industry-based standard setting bodies – that constitute these regulatory processes. These Founders will naturally wish to constitute these processes and use criteria for participation that will advance their own interests and goals. These constituting authorities might, however, be charged or persuaded to ensure that the membership of the participants was sufficiently representative of the broader public sphere, and that the deliberative processes were sufficiently open and permeable, so as to secure the democratic legitimacy of the process., considering the context of specialized regulatory decision making. There are, however, two sets of difficulties with such an approach; one is practical, the other is foundational.

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

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

[118] See I-J Sand, Polycontextuality as an Alternative to Constitutionalism, in Christian Joerges, Inger-Johanne Sand and Gunther Teubner, supra, at 41

[119] See Habermas, Between Facts and Norms 430-442 (discussing challenges in ensuring a democratic character for administrative regulation in the context of democratic discourse theory).

[120] Id. at 354.

The practical difficulty is whether it is feasible to expand participation to include not only specialized regulatory experts chosen by the governing entities constituting the regulatory body but representatives of various collective social and economic interests that are affected by or concerned with the body's decisions. The problems include keeping the participants to a manageable number while ensuring broad representation, ensuring that the additional participants have adequate expertise and resources, and the criteria and process for selecting them. Beyond problems of representativeness in participation, there is also serious question whether the deliberative processes can be rendered open and permeable to the general public sphere without compromising its reason-based integrity and its effectiveness in problem solving. These problems may be manageable in cases where the standards at issue have relatively narrow impact and are not highly controversial. But where they affect a wide range of interests and are strongly contested, the problems of ensuring adequate representation while maintaining the integrity and efficacy of the deliberative process become much more difficult.

The foundational problem is epistemological and ontological. Unless participation is open to all who wish to participate, there must be substantive selection criteria to ensure that representation is sufficiently broad to qualify as democratic. But what can the source of these criteria be under a conception of democratic deliberation which holds that substantive norms can only be legitimated as the result of an open deliberative process? To use such norms to constitute the process that must produce and justify them is circular [121] Further, if some other, exogenously derived valid normative standards exist and can be appropriately used to constitute a deliberative process, why can not they be equally used to critique the substance of the decisions reached by that process? [122]

The EU experience with attempts to broaden participation and representation in deliberative regulatory process to include representatives of broad affected social and economic interests is not encouraging. Beyond engaging the social partners (officially-recognized representatives of industry and labor), the efforts of the Commission to promote broader interest representation do not appear to have borne much fruit.[123] Reliance on corporatist approaches to representation blunts the dynamic contestation and innovation of interests and values in the public sphere. Nor do the operational characteristics of the EU standard setting processes ensure responsiveness to

[121] This problem can not be avoided by positing some higher order deliberative process to determine the principles of representation that will govern lower-level deliberative processes. One must determine principles for selecting those who will participate in the higher level process.

[122] At a minimum, exogenous substantive criteria for representation are likely to extend to an evaluation of the deliberative process itself. If such criteria imply a right on the part of certain interests to participate in the deliberation, they may legitimately complain in particular cases that this right was denied because of failures in the dialogic process, for example the convener was biased, some other participants were not participating in good faith, that it did not consent to the decision announced, etc. Applying these criteria may also require examination of the substance of such a decision. Yet, the exercise or threatened exercise of any such external review and remedy, subject to invocation by any participant, could so intrude on the dialogic process itself as to undermine its autonomy and integrity. Rather than engaging in a full, open, and frank exchange with other participants, participants might engage at least in part in the anticipation of external reviewer. Such a practice, or the fear that it might occur, could undermine the quality and success of the dialogic process. See U.S/ Group Loan Services v. U.S. Department of Education, 83 F.3d 708 (7th Cir. 1996)(7th Cir. 1996)(refusing to set aside rulemaking based on regulatory negotiation process; challenger claimed responsible regulatory agency acted in bad faith in the negotiation/rulemaking process).

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

more broadly affected or concerned interests.[124] The comitology process is conspicuous for its lack of transparency and opportunity for public participation or accountability. Meetings are closed and until recently agendas and background documents have rarely been available. Documentation has become more widely available, but often in such an undigested and indiscriminate form as to be of little use except to "insiders."[125] There is no notice or opportunity for public comment before a final decision is made. Thus, the committee system works efficiently but obscurely.[126]

The procedures of industry-based standard setting bodies seem to be somewhat more transparent and accessible. The deliberative processes of standard-setting committees are generally closed, but notice and comment on proposed standards is often afforded, although there is little evidence of effective "outside" engagement in the standard setting process It is claimed that the decisional processes used by those bodies provide for either actual or virtual representation of the interests of consumers and other affected social and economic interests, but concrete evidence to support such claims is hard to find. Thus, the Commission has enunciated a principle of NGO participation in standard-setting bodies, and there are provisions for "balanced interest" representation in some member states.[127] Hans Schepel, the preeminent student of the New Approach, asserts that industry-based standard setting has achieved the same level of regulatory dues process as public authorities. He states that "private standardization has assimilated the acnonos of administrative rulemaking to such an extent that it is hard to find a difference between its procedures and the procedures that sanctions delegations of regulatory power to public agencies"[128] But Schepel does not supply supporting detail, and he provides no evidence of substantial NGO participation in the standard setting processes.

It has also been suggested that industry self-interest, based on the need to ensure the social acceptability of the market and manage the risk of damaging incidents, will ensure adequately protective regulatory standards through deliberative methods that find "a productive pattern of self-stabilizing coordination, generated by emergent efforts at self organization." [129] This argument, however, fails to come to grips with the powerful asymmetries in information between industry and consumers that justify government regulatory programs in the first place, and the asymmetries in information between industry and public authorities that led to the New Approach. Business firms may have several reasons for developing common regulatory standards. Large firms typically want to promote regulatory uniformity across jurisdictions in

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[124] See Nickel, Participatory Transnational Governance.
[125] See footnote 55 and accompanying text.
[126] See id; Renaud Dehousse, Towards a Regulation of Transnational Governance? Citizen's Rights and Reform of Comitology Procedures, in Christian Joerges and Ellen Vos, EU Committees 109;E. Eriksen, Integration and the Quest for Consensus, in Erik Eriksen, Christian Joerges and Jürgen Neyer, supra at 159.
[127] See Schepel, Constitution of Private Governance at 6, 72, 114, 125. Schepel notes, without elaboration, that in the UK there have been criticisms of industry "capture" of the standard-setting process. Id at 125. He also states that the standard setting process has achieved regulatory due process
[128] Schepel at 409 [check]. See also id at 6.
[129] K-H Lauder, Towards a Legal Concept of Network in EU Standard-Setting, in Christian Joerges and Ellen Vos, EU Committees 151, 162. Schepel, Constitution of Private Governance 257; Ch. Joerges, Juridication Patterns for Social Regulation and the WTO: A Theoretical Framework (draft 2004)(stressing interests of industry in self-regulation to ensure social legitimacy of markets); Ch. Joerges, H. Schepel and E. Vos, The Law's Problems with the Involvement of Non-Governmental Actors in Europe's Legislative Process: The Case of Standardization under the "New Approach," 26 (EUI Working Papers Law No. 99/9) (Standards are produced by the consensus of market players . . . Standards operate on the assumption that quality, and high levels of safety,, are a marketing argument . . . .")

order to reduce costs and widen market access. They may wish to set standards so as to obtain a competitive advantage over rivals. And, firms may wish to reassure consumers and public regulatory authorities regarding the quality and safety of their products and prevent reputation-damaging incidents.[130] But, in light of information asymmetries, this last incentive alone by no means ensures that the resulting standards will be adequate.

As an alternative to expanding participation within deliberative processes in order to promote responsiveness to broadly affected social and economic interests, greater use could be made of the external, non-decisional means for promoting responsiveness discussed in Part II. But the EU experience suggests that deliberative processes are resistant to and perhaps inherently incompatible with external strategies for addressing the problem of disregard, including accountability mechanisms and other responsiveness-promoting measures such as transparency and non-decisional participation. Such measures threaten to disrupt and jeopardize the success of the internal dialogic process and the effort to depoliticize the standards setting process by recasting it as technical problem to be solved by experts. Even if comitology and the New Approach meet a high standard of deliberation, they can not be regarded as democratic. This is not to condemn them when they are used in a proper context, for solving technical regulatory problems that do not involve a significant degree of normative contestation.. But it raises serious questions of their ability to meet the problems of disregard in the global regulatory context, where such contestation is often at a high level.

D. Consensus-Based Deliberation in Global Regulatory Governance

Can the particular forms of regulatory governance used with such apparent success in Europe standard setting be successfully transplanted to these to the various forms of global regulatory governance? As noted, there are close parallels between the background institutional structures of "deliberative supranationalism" and those of many global regulatory regimes. Many global regulatory bodies also deal with the task of harmonizing regulatory standards within a free trade regime. Yet, there are also important differences. In Europe, comitology and industry-based standard setting operate against an institutional background of relatively close supervision by the Commission and more distant oversight by other Community bodies and member state authorities that can, if need be, intervene to mandate regulatory standards, change decision making procedures, or take other steps to safeguard affected societal interests. [131] The potential invocation of these "backstopping" checks are likely to promote consideration of such interests in the regulatory decision process. These institutional safety nets are largely lacking in the global context. Deliberative, consensus-based standard setting in Europe also operates against a well-grounded social tradition of private standard setting. And, it is limited to product regulation. The global regulatory agenda is much broader. These factors counsel caution. Nonetheless, the EU regulatory approach seems in important respects well-adapted to many global regulatory decisions.

Indeed, there is already extensive use of such processes in the global context. Consensus-based deliberative processes similar to those used in comitology and the New Approach are widely followed by committees, boards, and other bodies of an administrative character charged with

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

[131] See Carol Harlow, Accountability in the European Union (2002)

developing and implementing regulatory norms in a wide variety of global regulatory bodies. Many Type I treaty-based regimes such as the WTO, the UNFCC and Kyoto Protocol, WIPO, CITES, and the IMF have committee, boards and other subsidiary organs that follow this model. Decisional techniques like those used in EU regulation are also used by specialized committees and boards operating within Type II regulatory networks like the Basel Committee and ISOCO, and in Type IV and V bodies such as the Forest Stewardship Council and ISO. There are, however, few detailed, systemic studies of how these processes actually function, or the extent to which they and their performance differ among different types of global regulatory bodies and subject areas. The available literature suggests that they tend to be used for specialized regulatory issues that are "micro" rather than "macro" in scale and that are not at least perceived as presenting major controversial questions of policy implicating matters of high importance to Founders or broad social and economic interests. Deliberations are generally but not always closed, but in a number of cases the public has access to proposals and background documents and in some cases public opportunity for comment and fairly detailed reasons for decisions are provided.

The most important issue, from the perspective of this paper, is whether the EU regulatory model can deal with the problem of disregard. Some proponents of the EU deliberative model, including Christian Joerges, emphasize its particular problem-solving function of transnational regulatory harmonization in the EU supranational context. But others tend to portray deliberative processes as an inherently model for global governance.. The EU model can be regarded as democratic only to the extent that the decisional participants in the deliberative process are adequately representative of all relevant interests and values and adequately open to the public sphere.[132] The EU experience does not support this optimism. The limited focus, restricted membership, and closed character of EU product regulatory standard setting bodies seem well suited to the task of overcoming national differences and protectionist pressures in order to develop transnational standards that will ensure free movement of goods in the EU market. But these same characteristics pose at least a substantial risk of cartelization by dominant firms and other forms of regulatory "capture to the detriment of other more diffuse social and economic constituencies. [133] Another danger is "tunnel vision"-- the tendency of experts with a specialized decisional mission to focus decision on the scientific and technical issues presented by regulatory issues, to the neglect of broader social and ethical values.[134] The resultant flattening of perspective occurs because the participants tend to be members of the same epistemic community and are therefore most comfortable addressing the issues recognized within that community, and because avoidance of broader questions may facilitate agreement**.** At least in the form in which they have been used in Europe, deliberative processes for regulatory standards setting provide no strong institutional assurances of responsiveness to more broadly affected social and economic interests, or openness to public debate and contestation, and therefore hardly provide a model of democratic global governance.

[132] In principle, the process might be regarded as democratic if there were sufficient institutional assurances, through accountability mechanisms or other responsiveness promoting measures such as transparency and non-decisional participation, to ensure adequate regard for affected societal interests not represented in the deliberative process. But the EU experience indicates that these measures are incompatible with the successful functioning of the deliberative process. This question is further considered below.

[133] See M. Shapiro, "Deliberative," "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the EU?, 68 L. & Contemp. Probs. 357 (2005)

[134] See ibid.

There is no warrant for a laissez faire approach to representation issues in global regulatory governance, based on the view that problems of participation and representation will be solved by the emergence within different social subsystems of spontaneous reflexive processes of decentralized ordering and self-regulation based on rationality and fairness. The potential self-interest of Founders in making such decisions and the risks of domination by well-organized economic actors with superior information and other resources, leaving global regimes free to determine who participates in deliberative decisional process, will by no means assure their democratic character.[135] Even where global bodies purport to provide representation for more broadly affected interest, there is the danger of bias and cooption in the selection process.[136] In the national context, a system of public law is available to address rights and solve problems of participation and representation of societal interests in regulatory decision making. There is no global public law, and no supervisory global authorities to articulate and apply norms for participation and representation to global regulatory bodies.[137]

These problems should not stand in the way of pragmatic efforts to broaden representation within specialized deliberative bodies and studying experience with such efforts in domestic, supranational, and global settings. In the U.S. experience, students of regulatory negotiation for rulemaking and other forms of negotiated dispute resolution are optimistic that is generally possible to assure representation of all material relevant interests while limiting the number of participants to a workable total, including through formation of coalitions of interests with a single representative if necessary.[138] There is undoubtedly much to be learned from similar efforts in Europe, in other nations, and in the various different types of global regulatory bodies in which consensus –based deliberation is being used for regulatory decisions.

E. Strategies for Applying the US and EU Models to Global Regulatory Governance

Echoing James Landis's' view of the administrative process, Christian Joerges has asserted that the task of regulatory governance is problem solving, a task for which legal adjudication is not suited.[139] Yet, as Joerges has also emphasized, regulatory governance is not just problem

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

[136] the critical question of standing Josh Bolton and Mussolini, quoted in Nickel

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

[138] See Lawrence Susskind, Paul F. Levy, And Jennifer Thomas-Larmer, supra. More skeptical assessments are found in W. Funk, When Smoke Get in Your Eyes , Regulation, Negotiation and the public Interest – EPA's Woodstove Standards, 18 Envt'l L 55 (1987); C. Coglianese, Assessing Consensus: The Performance and Promise of Negotiated Rulemaking, 46 Duke L. J. 55 (1997).

[139] Ch. Joerges, Constitutionalism and Transnational Governance: Exploring a Magic Triangle, in Christian Joerges, Inger-Johanne Sand and Gunther Teubner, supra, 339, 347. ; Ch. Joerges, "Good Governance" Through Comitology, in Christian Joerges and Ellen Vos, EU Committees 311 (noting problems of in combining expert problem solving and consideration and engagement of broader social interests in the comitology process).

solving. It often involves normative choices among competing interests and values.[140] Further, the interest of representation model of administrative law is non-adjudicatory in character. It seeks to assure adequate consideration of all relevant values and interests in decisions on general regulatory norms. It can be regarded as one practical approximation of an ideal speech conception. The question is how regulatory governance should best be designed in light of these different facets of the regulatory task and the different institutional tools available.

Hybrid Approaches: Joining Mars and Venus?

One possibility is to attempt to combine the US and EU approaches in a hybrid model of open deliberative participation. At first look, this appears impossible. The two models seem to be oil and water. They seem to rest on very different premises and values. Achieving a deliberative quality in regulatory decision making is at the very least in serious tension with assuring adequate representation of different affected interests and public debate and oversight.[141] Yet pragmatically it may be possible to develop a mixed approach that would involve some mix of the two components: First, an open "outside" process that involves a high measure of transparency, wide public access to information, public comment on proposed decisions, and publicly stated reasons for decisions. Second, a more restricted "inside'' decisional process based on deliberation among a limited number of experts and interest representatives . The two processes would be linked through the public availability of information about the inside decisional agenda and proposed and final decisions, opportunity for public comment, and a statement of reasons for proposed and final decisions. The availability of an open outside process would perhaps alleviate some of the anxieties about ensuring full inside representation of all affected interests. This approach has not been followed in the EU regulatory practice, especially in comitology, in part perhaps out of fear of triggering pressures from protectionist and other parochial national interests that might hinder agreement on common standard. But there appears no reason why it could not attempted in other regulatory settings.

Indeed, practice in a number of global regulatory bodies already resembles such a hybrid. One example is the Codex Alimentarius process for developing sanitary and phytosanitary regulatory standards. Until fairly recently, standards setting was carried out primarily through committees composed of representatives of a limited number of member states and experts selected by them.[142] NGO pressures for broadened participation led to granting NGO representatives the status of non-voting observers at committee meetings. As practice has developed, however, NGO observers have often engaged actively in the deliberation over standards and in some cases had a substantial influence on outcomes (this experience shows that in practice there may in some cases not be a sharp line between decisional and non-decisional participation). Until recently, committee decisions were made by consensus, and this continues to be the case save in highly controversial cases.[143] Along with the consensus-based

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

[141] See Ch. Joerges, H. Schepel and E. Vos, supra, at 40.

[142] There is an elaborate process for committees to report to a governing council composed of all member states, which must eventually approve standards

[143] Such controversies have become more frequent and acute following the adoption of the SPS Agreement, which elevated the significance of Codex standards by providing nations that adopt them with a defense against challenge under the Agreement. This shift has lead to majority voting in some cases and deadlock

deliberative process within committees, there is a fairly extensive system of external transparency and opportunity for public comments. Committees often produce lengthy reports on their decisions. Notwithstanding these elements, however, concerns have been raised about the effectiveness of developing country and NGO participation, in part due to resource constraints, and the dominance of narrow expert perspectives.[144] Thus the Codex experience may be regarded as promising but imperfect version of the hybrid approach.

Another example of a hybrid approach that has been quite successful is found in the OECD Mutual Acceptance of Data program. The program, which issues testing guidelines and promotes mutual recognition arrangements for safety testing of internationally traded chemicals, is being used by over 30 countries to rely on each others' testing results.[145] Guidelines for good laboratory practices are developed by expert committees that include non-state experts overseen by OECD working groups. Representatives of OECD's Trade Union Advisory Committee and Business Industry Advisory Committee have full decisional participation rights. Other civil society NGOs, representing environmental, animal welfare, and other interests, attend as observers. Draft guidelines are publicized and subject to peer review by an extensive network of outside experts. The system has worked successfully in dealing with controversial issues such as animal welfare in chemical testing assessing the risks of GMOs.

Differential application of the US and EU Models

A different strategy is to follow the US model for some global regulatory bodies and decisions, and the EU model for others, depending on the characteristics of the institution and issues in question and the relative suitability of the respective models in different specific circumstances. In order to implement such a strategy, it would be helpful to develop principles or rules of thumb to guide this allocation.

For example, one such principle would be to use the EU model in cases where the issues are predominantly technical, impacts on interests other than those regulated are limited, and the issues do not engage strongly controverted social values. In such cases, there is a high value in deliberation among experts, and less need to ensure wide access to general social interests and values.[146] These may well be the characteristics of many of the regulatory decisions made through the comitology process and the New Approach.[147] For types of matters that turn to a lesser degree on technical issues, involving a wide ranger of affected interests, and implicate

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in others. It has to a considerable extent changed the nature of the decisional process form reason-based argument to power-based bargaining.

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

[145] See Salzman, supra, at 200-205.

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

[147] There has, however, not yet been detailed or systematic study of the extent to which more general social interests and values are implicated in such decisions, and how the deliberative process addresses them.

strongly contested social values, the more open, less deliberative US approach may be preferable. The obvious difficulty with this strategy is that regulatory regimes do not fall neatly and consistently into these two categories. Many regulatory decisions - -nuclear power, GMOs, and intellectual property are examples -- depend centrally on the resolution of highly technical issues where expert judgment is crucial and implicate controversial values of concern to a wide range of interests. The regulatory issues in a given regulatory body, such as Codex, may have been successfully resolved over many years primarily on the basis of expert judgments, only to erupt into matters of rather high politics. Also, to limit deliberative processes to the resolution of issues that are primarily technical in character would forgo their use in controverted decisions involving clashing social values and interests. It is precisely with respect to such decisions that deliberative processes built on Habermasian principles has potentially the most to offer, although it may also face great challenges.

Another, somewhat related basis for allocating use of the EU and US models among different global regulatory bodies and decisions is suggested in recent work n by Buchanan and Keohane on the legitimacy of global institutions. They argue that, in order to be legitimate, such institutions must, among other things, provide the preconditions for a meaningful opportunity for public examination of and debate over their core purposes and their performance in carrying them out. [148] In order to have concreteness and impact, this inquiry must be carried out in the context of particular decisions as well as through a more general review At a minimum, global bodies must assure the availability of reliable and relevant information, produced in an integrated and interpreted form that will foster public understanding and evaluation of the institution. They must engage in open justification of and debate over their missions, guiding norms, and activities. This approach can be understood an institutional means of operationalizing Habermnas's conception of communicative reason, rooted in the public sphere, in order to promote the democratic character of global governance.[149] The need for these "epistemic virtues" will be greatest in those institutions whose legitimacy is most heavily questioned. For such institutions, the US model is more appropriate, as it provides a fuller measure of transparency, participation, and opportunity for open debate. There is a correspondingly greater risk, under the EU approach, that the strongest and most effective critics will be excluded from inside decisional participation. Of course, those institutions that feel themselves most vulnerable to challenge may the most reluctant to embrace a US approach, including the step of establishing an independent reviewing body.

This last point raises the political economy of changing existing global governance arrangements in order to promote responsiveness to disregarded interests. These and other political economy questions have been conveniently ignored in this essay and in much of the global governance literature, but are a vital subject for systematic study.[150] Such inquiry would consider, among other matters, the political economy of using accountability mechanisms, decisional rules, and other responsiveness –prompting practices in the context of different types of global regulatory issues and regimes, depending on the nature and structure of the interests involved. In this connection, it would address the incentives of powerful states and private economic actors to accelerate the institutional changes, already underway, from global approach based on bargaining among dominant entities to approaches that are both more differentiated

[148] See A. Buchanan and R. Keohane, supra. See also Philip Pettit, Two Dimensional Democracy, National and International (Monist 2005)(public contestation of norms and performance of international governance institutions an essential democracy-promoting element).
[149] See Jürgen Habermas, supra note 6.
[150] For an example of such a study, see Eyal Benvenisti, The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International institutions, 68 L & Contemp. Probs. 319 (2005)

and specialized and more democratic. Such an inquiry must also consider how transplants of EU or US models from their native environments to various global regulatory contexts would affect their performance. To give just two examples:. The experience with the EU model may translate fairly successfully to global product regulation because of the interests of the dominant business firms in developing common standards. But can it be used with equal success to develop environmental and other PPM standards? The US model may enjoy interest group support because it addresses with some success problems created by the US system of divided congressional/Presidential government, in the context of a highly active, pluralistic public sphere. Will it enjoy similar success in the global context?

IV CONCLUSION

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