

REMEDYING DISREGARD IN GLOBAL REGULATORY GOVERNANCE: ACCOUNTABILITY, PARTICIPATION, AND RESPONSIVENESS⁺

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A myriad of specialized and fragmented global regulatory bodies wield ever-increasing power and influence. In making decisions, these mission-oriented authorities tend systematically, due to deep-seated structural factors, to give greater regard to the interests and concerns of some actors, especially powerful states and well-organized economic actors, and lesser regard to the often peripheral interests and concerns of more weakly organized and less powerful groups and of vulnerable individuals. The overall pattern of global regulation reflects a similar bias. The most powerful global regulatory regimes promote the objectives of dominant states and economic actors, whereas regimes to protect weaker groups and individuals are often less effective or virtually nonexistent and are thus unable to protect their interests and concerns. As a result of these two types of disregard, the dominant actors in global regulatory governance enjoy disproportionate benefits from international cooperation, while weaker groups and individuals suffer deprivation and often serious harm.

These generalizations are subject to two basic caveats. The powerful do not always prevail; the weak sometimes gain protection and benefit from certain global regulatory regimes. In addition, global regulators pursuing specialized tasks may sometimes legitimately disregard the interests and concerns of some of those affected by their decisions. The focus of this article is on *unjustified* disregard. What constitutes unjustified disregard in particular circumstances is often contestable. Nevertheless, the article argues that, overall, the present structures and practices of global regulatory governance often generate unjustified disregard of and consequent harm to the interests and concerns of weaker groups and targeted individuals—referred to here as the *problem of disregard*.¹ The disregarded include, for example, vulnerable poor communities inundated as a result of climate change, developing-country workers in global supply

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¹ Unless otherwise noted, references to disregard in this article should be understood as referring to unjustified disregard. Normative as well as positive analysis reflecting a concept of disregard occurs in scholarship and discourse in numerous domestic legal contexts, including corporate, constitutional, and administrative law. *Cf.* Daryl J.

chain factories, sick people lacking access to essential medicines because of international patent-protection regimes, refugee claimants, individuals targeted for UN Security Council sanctions, and Haitians stricken by cholera due to UN peacekeepers' negligence.

This article has two related objectives. First, it examines, as a matter of positive analysis, the institutional mechanisms and structures of global regulatory decision making to explain how current global regulation and governance practices operate to create the problem of disregard. The analysis presents a new taxonomy of governance mechanisms, distinguishing three basic types—decision rules, accountability mechanisms, and other regard-promoting measures—that substantially determine whose interests and concerns are given regard by global decision makers. It also unpacks the concepts of accountability and participation, so widely and often indiscriminately invoked as cures for the ills of global governance, and clarifies their roles. Second, it diagnoses the normative failings of the existing governance structures and decisional mechanisms and argues that they should be reconfigured to enable the disregarded to secure greater regard for their interests and concerns and thereby promote a more just system of global regulatory governance. It presents several strategies for achieving this objective, focusing on redeployment and innovation in these three types of governance mechanisms.

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

The institutional circumstances of global regulatory governance create enormous obstacles to realizing this democratic ideal. Authority is dispersed among a myriad of distinct administrative regimes pursuing specialized tasks without any overarching authorities or arrangements for supervision, accountability, coordination, or correction. Like their domestic administrative counterparts, specialized global regulatory bodies seek to promote their mission and the correlative interests of core sponsors and constituencies; in doing so, they tend to disregard other affected interests and concerns. Institutional specialization thereby produces *decisional externalities* in the form of harms to disregarded third-party interests and concerns.

This bias is often reinforced by the consequences of shifting regulatory decision making from the domestic to the global level, which strengthens the power of executives to influence regulatory policy relative to that of legislatures and courts. In the domestic regulatory context, legislatures and courts often serve to protect the interests and concerns of more weakly organized groups and individuals but are far less able to influence global regulatory decision making. As a result, many of the most important global regulatory bodies are dominated by powerful executives, often in alliance with well-organized economic actors, reinforcing problems of disregard and resulting decisional externalities. No global systems of social insurance or redistribution exist to offset the resulting losses suffered by the disregarded.

Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1288–91 (2012) (considering the variety of methods that political institutions use to protect minorities, particularly legally enforceable rights and votes, broadly considered).

These factors have also produced an uneven and inequitable pattern in the character and distribution of global regulatory programs. Many powerful global regulatory regimes promote trade, investment, and production, while regimes to secure social and environmental interests and concerns are often thin and weak, leaving significant regulatory gaps in protection for less well-organized and less politically powerful groups. These gaps themselves operate as a pervasive form of *structural disregard*. This pattern is not uniform. The missions of some global authorities align with the interests and concerns of the disregarded, and the programs of such global authorities often serve to promote their interests and concerns. But the overall structure of global regulation and its governance is biased in the other direction.

One potential response to these circumstances is to establish overarching global institutions that could exert authority over the diverse administrative bodies, fill gaps in regulatory protections, rebalance decision making in favor of currently disregarded interests and concerns, and ensure a fairer overall distribution of the gains from international regulatory cooperation. The challenges to realizing this ambition in the foreseeable future are, however, overwhelming. This article, like the Global Administrative Law Project at New York University² of which it forms a part, focuses instead on reforming and using the institutional mechanisms and arrangements that currently exist or that could be developed at the level of specific global regulatory regimes in order to address the problem of disregard.³ We believe that the strategy for consistently applying this decentralized, incremental, yet realistic approach can achieve in the aggregate very significant progress in bringing about a more just and equitable system of global governance.

Accountability and participation are ever-present mantras in the globalization debates. Global governance critics often claim an “accountability crisis.”⁴ Authorities in global regulatory regimes, however, do not lack accountability. They are, in fact, closely accountable to the most powerful states, economic actors, and other entities that establish and support them. Instead, the fundamental questions to be asked are to whom global decision makers are or should be accountable and by what means. To address these questions, this article unpacks the concept of accountability, identifies and analyzes the several different mechanisms for achieving it, and examines their potential for use by the disregarded to promote greater regard for their interests and concerns.

Another cure invoked by the critics is expanded participation. Here, too, more precise analysis is required. This article distinguishes two basic types of participation: *decisional participation*, which relates to the right to vote or otherwise exercise a role in the making of decisions

² Materials related to the NYU Global Administrative Law Project and other research activities in the field are available on the website of the Global Administrative Law Project, at <http://www.iilj.org/gal> [hereinafter Global Administrative Law Project].

³ For an overview of global administrative law, see Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005); GLOBAL ADMINISTRATIVE LAW: THE CASEBOOK (Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri & Euan MacDonald eds., 3d ed. 2012), at <http://www.irpa.eu/en/gal-section/global-administrative-law-the-casebook-2> (published as an e-book) [hereinafter GAL CASEBOOK].

⁴ See, e.g., Jan Wouters, Bart De Meester & Cedric Ryngaert, *Democracy and International Law*, 2003 NETH. Y.B. INT'L L. 139, 180 (on democracy in international organizations). The problem of disregard is also prevalent in domestic administrations. E.g., Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587 (2010); Anthony Boadle & Tatiana Ramil, *Fresh Protests Under Way in Brazil Despite Government Concessions*, REUTERS, June 26, 2013, at <http://www.reuters.com/article/2013/06/26/brazil-protests-idUSL2N0F20SK20130626> (describing the source of the protests as problems of accountability and transparency in the Brazilian government).

by an organization, and *nondecisional participation*, which relates to the opportunity to make submissions on proposed decisions or otherwise provide input to the decision makers. It then examines how the various versions of these two basic types of participation operate within the three different types of governance mechanisms and the potential for their deployment and effective use by the disregarded.

The myriad global regulatory authorities include two basic types of bodies established by governments: treaty-based international organizations, such as the World Trade Organization (WTO), and intergovernmental networks of domestic regulators, such as the International Organization of Securities Commissions (IOSCO). They also include a growing array of significant private and hybrid public-private regulatory and administrative bodies established and governed by nonstate actors—including nongovernmental organizations (NGOs) and business firms—as well as public authorities in the case of hybrid bodies, ranging from the International Organization for Standardization (ISO) to the Marine Stewardship Council to the Internet Corporation for Assigned Names and Numbers (ICANN). These different institutions have, in most instances, been created to address the shortcomings of state-based regulatory and administrative programs in the face of global economic-integration growth and other forms of interdependency. They implement regulatory and administrative programs to achieve coordination and cooperation on a global scale in furtherance of their founders' objectives.

Hundreds or thousands of these special-purpose global bodies exercise regulatory authority in different fields. They facilitate and regulate trade, investment, and other forms of economic activity; promote law enforcement and security; fund and regulate economic development programs in less developed countries; deliver health, education, and other social services; promote environmental protection; help secure human rights; and regulate the international movement of persons. Overall, they make vast contributions to aggregate human welfare and promote important moral concerns in such fields as human rights and environmental protection. These diverse regimes operate in a global administrative space, substantially free of the legal and political controls that apply to domestic administrative authorities and to the international law norms governing states and treaty-based international organizations.⁵

This article identifies three basic types of institutional mechanisms that govern these bodies: decision rules; accountability mechanisms; and other regard-promoting practices, including transparency, nondecisional participation, reason giving, market competition, and peer and public reputational influences. The article develops and applies this tripartite framework to examine how global administrative decision-making arrangements allocate and regulate power and influence among different actors. In the case of decision rules, influence is wielded by those who share in decisional authority. In the case of accountability mechanisms, it flows to those who have the authority to hold the decision makers to account. The other regard-promoting measures can be accessed by a wide variety of actors and interests.

These several mechanisms operate in concert in different configurations in global regulatory bodies. The efforts of various actors to influence and change these institutional arrangements

⁵ Kingsbury, Krisch & Stewart, *supra* note 3, at 18 (explaining the concept of global administrative space).

must be analyzed through the perspectives of political economy and constructivist understandings of governance.⁶ Powerful states and their interest-group allies often dominate access to and use of these mechanisms, especially decision rules and accountability mechanisms. This article examines corresponding opportunities for the disregarded to use, develop, and reconfigure the several mechanisms to secure greater regard for their interests and concerns.

Equal regard is a regulative ideal. Initiatives to realize that ideal must necessarily involve tactical accommodations with existing power structures. Reformers must also recognize that procedures for redressing disregard—such as the opportunity to submit comments on proposed decisions and obtain review—are, consistent with the rule of law, available to better-organized and better-financed groups that can invest more resources in using them. Nonetheless, the availability of these regular transparent public procedures can, on balance, provide the disregarded with greater influence than wholly informal decision-making processes, so long as the disregarded make use of them.

Part I of this article presents the four basic types of specialized global regulatory bodies—treaty-based, intergovernmental, private, and hybrid—and the distributed administrations that implement their rules and decisions. It explains why these global bodies have assumed a strongly administrative character and exercise substantial decision-making discretion and why pervasive structural factors create problems of disregard.

In part II, the article turns to the structural roots of disregard and to potential remedies, including strengthening domestic governance mechanisms' controls over global administrations, encouraging contestation and resistance at the level of distributed administrations, forming new global regulatory regimes to protect the disregarded, and reforming existing global bodies, with the latter being the focus of the article. It then presents the three basic types of governance mechanisms—decision rules, accountability mechanisms, and other regard-promoting measures—that provide the institutional tools for such reform.

Parts III–V examine these global governance mechanisms and their potential for use by the disregarded to secure greater regard of their interests and concerns by decision makers. Part III addresses the structures and procedures that define and allocate a global body's decisional authority among its members and administrative components and that establish voting and other decision-making procedures. Part IV examines accountability and the institutional arrangements for achieving it, arguing that only five mechanisms—electoral, hierarchical, supervisory, fiscal, and legal—may properly be labeled as accountability mechanisms. Part V examines other mechanisms for influencing decision making: market competition, peer and public reputational influences, transparency, nondecisional participation, and reason giving. It concludes that the last three mechanisms, especially when combined, operate as part of an emerging system of global administrative law and have significant potential to promote greater regard for the disregarded. Part VI presents a short conclusion.

⁶ On considerations of political economy in global regulatory governance, see Kingsbury, Krisch & Stewart, *supra* note 3; Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007). On constructionist influences, see RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013). See generally Emanuel Adler, *Seizing the Middle Ground: Constructivism in World Politics*, 3 EUR. J. INT'L REL. 319 (1997).

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

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

The Proliferation of Specialized Global Administrative Regulatory Bodies

This article, like the companion Global Administrative Law Project at New York University,⁷ defines global regulation broadly as encompassing a wide range of programs and activities that adopt and implement rules and other norms in order to steer and coordinate conduct by numerous actors for achievement of common objectives.⁸ Global regulatory programs are found in many different fields, including the facilitation and management of markets; law enforcement and security; development and other forms of finance; health, education, and human development; environmental protection; human rights; and transborder movement of persons.⁹ Diverse public and private actors have adopted these global regimes to manage the pervasive complex interactions, spillovers, and interdependencies created by globalization.¹⁰ These regimes' objectives fall into three broad categories: (1) security; (2) promotion and regulation of markets; and (3) advancement of human rights, broadly conceived to include development, environmental protection, health and safety, and political, civil, economic, and social rights. These three broad objectives often overlap and conflict in specific decision-making contexts.

In response, governments, international organizations, and various nonstate actors have established numerous transnational regulatory bodies and programs.¹¹ These bodies assume four basic types: (1) formal treaty-based international or intergovernmental organizations (such as the WTO, the Security Council, the World Bank, and the United Nations Framework Convention on Climate Change regime); (2) transnational networks of domestic regulatory officials (such as the Basel Committee on Banking Supervision); (3) private regulatory bodies (such as international sports federations, the Society for Worldwide Interbank Financial Telecommunication, and the Forest Stewardship Council, constituted by nonstate actors, including business firms, trade and professional associations, and NGOs);¹² and (4) hybrid public-private regulatory bodies (such as the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use, the World Anti-Doping Agency, ICANN, and the Global Fund to Fight AIDS, Tuberculosis and Malaria

⁷ Global Administrative Law Project, *supra* note 2.

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

⁹ See Kingsbury, Krisch & Stewart, *supra* note 3.

¹⁰ Stewart, *supra* note 8.

¹¹ SABINO CASSESE, THE GLOBAL POLITY: GLOBAL DIMENSIONS OF POLITY AND THE RULE OF LAW 17–20 (2012); Lorenzo Casini, *Beyond the State: The Emergence of Global Administration*, in GAL CASEBOOK, *supra* note 3, at 1.1; see Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle, Regulatory Standards, Institutions and the Shadow of the State*, in THE POLITICS OF GLOBAL REGULATION 44 n.8, 59 (Walter Mattli & Ngaire Woods eds., 2009) (developing an organizational ecology of the different types of global regulatory bodies that emerged).

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

(Global Fund))—composed of nonstate actors and international organizations and/or governments.

These administrative authorities issue regulatory rules, standards, and decisions. Many of them adjudicate or make other law-based determinations of particular matters. They also gather and disseminate information; engage in consultations and deliberations; promote, monitor, and, in some cases, supervise implementation of their regulatory norms; and take other steps to promote their adoption.

Some global regulators may implement their rules and decisions by actions imposed directly against persons subject to regulation. Examples include the World Bank procedures for black-listing corrupt contractors, as well as the International Olympic Committee disqualification of athletes engaged in doping. More commonly, global regulators rely on distinct institutions and entities that implement their norms, decisions, and policies. These bodies form the *distributed administration* of global regulatory regimes, and they operate within frameworks and pursuant to norms and procedures established by the global body. Treaty-based international bodies and transnational networks of domestic regulators typically rely on the corresponding domestic administrative bodies to implement the networks' norms and decisions. Private global regulatory bodies recruit for-profit firms, nonprofit entities, and NGOs as distributed administrations, often accrediting them to certify compliance with regulatory standards.¹³ Hybrid global regulatory bodies employ various types of distributed administrations, including domestic governmental agencies, private certifying entities, and hybrid public-private bodies established in individual countries that often replicate the compositional structure of the global body.¹⁴

These organizations operate and interact along with a large variety of other public and private actors in a global administrative space that is kaleidoscopic in character.¹⁵ Global regulators operating in the same general field are linked in complex patterns of competition and cooperation. Often, two or more global bodies exercise regulatory authority over the same activities; for example, ten different global bodies regulate Internet infrastructure.¹⁶ Such bodies may sometimes function together as a regulatory regime complex for a given sector.¹⁷ Yet,

¹³ This approach to distributed administration is followed, for example, by the International Organization for Standardization and the Gold Standard for environmentally sustainable carbon offsets. Information about the Gold Standard is available on its website, at <http://www.goldstandard.org>.

¹⁴ Such isomorphism is found, for example, in the practices of the Forest Stewardship Council, at <https://ic.fsc.org>; the Global Fund, at <http://www.theglobalfund.org>; and the Extractive Industry Transparency Initiative, at <http://eiti.org>.

¹⁵ On the concept of global administrative space, see Kingsbury, Krisch & Stewart, *supra* note 3. On the kaleidoscopic character of global regulatory structures, see Edith Brown Weiss, *On Being Accountable in a Kaleidoscopic World*, 104 ASIL PROC. 477 (2010).

¹⁶ Miriam Lips & Bert-Jaap Koops, *Who Regulates and Manages the Internet Infrastructure? Democratic and Legal Risks in Shadow Global Governance*, 10 INFO. POLITY 117, 123–24 (2005) (listing the following ten global bodies that regulate Internet infrastructure: Internet Society (ISOC); Internet Corporation for Assigned Names and Numbers (ICANN); Internet Architecture Board (IAB); Internet Engineering Task Force (IETF); Internet Research Task Force (IRTF); Internet Assigned Numbers Authority (IANA); Protocol Supporting Organization (PSO); Address Supporting Organization (ASO); Domain Name Supporting Organization (DNSO); and Network Solutions).

¹⁷ Kal Raustiala & David Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277 (2004); Robert Keohane & David Victor, *The Regime Complex for Climate Change* (Harvard Project on International Climate Agreements, Discussion Paper No. 10-33, 2010), at http://belfercenter.hks.harvard.edu/files/Keohane_Victor_Final.pdf. Analyses using organizational ecology, which examines how and why institutions evolve and interact in various governance spaces, have sought to trace and explain the development of various types of global bodies in different global policy sectors and their resulting distributions. See Kenneth W. Abbott, Jessica F. Green

notwithstanding the functional interdependencies in specific sectors, the overall pattern of global regulation is highly fragmented, without any overarching system or process for oversight, coordination, or review.

Of course, many disparate specialized regulatory and administrative agencies also operate within nations. These agencies, however, are subject to legislative and executive authorities with broad overarching powers to assign, supervise, orchestrate, and modify their activities; to undertake needed redistributions; or otherwise to deal with either the local or the aggregate consequences of their decisions.¹⁸ The decisions of domestic regulators are also generally subject to judicial review through a system of courts that can be accessed by citizens as a matter of right. There are no counterparts to these institutions in the global administrative space.

Like their domestic counterparts, global regulatory bodies have an administrative character.¹⁹ They are typically managed by full-time officials and staff. Most also include a council or similar body composed of representatives of members. These various actors make and implement regulatory decisions. They generally operate under broad legal charters, although intergovernmental networks often have no charters at all. Global regulators develop and further implement regulatory norms through rulemaking, adjudicating controversies between competing regulatory interests, and making other law-based determinations. They also issue guidance and statements of policies and best practices. Global administrators regularly gather information, monitor the implementation of their regulatory programs, track compliance, and make all manner of informal decisions, in order to direct or influence—in a systematic, coordinated fashion—the conduct of actors subject to regulation. They undertake such activities with the goals of preventing money laundering, staging the Olympic Games, securing the international trading system, funding suitable development projects, ensuring humane treatment of refugees, and so on. These activities are the global version of the functions, recognized by public lawyers as administrative in character, which are discharged by domestic and supranational regulatory bodies.

The institutional structures of some global regulatory bodies have a bureaucratic form similar to that of traditional national administrative agencies.²⁰ Like their domestic counterparts, however, these organizations are not monoliths. They include many specialized components—including bureaus, secretariats, committees, boards, and other entities—that carry out defined tasks and functions. These components often provide for participation by outside experts and representatives of various constituencies in order to engage their knowledge, views, and support. Other global administrative bodies, especially private and hybrid bodies, have a

& Robert O. Keohane, Remarks at the Annual Meeting of the International Studies Association: Organizational Ecology in World Politics: Institutional Density and Organizational Strategies (2013), at <http://www.iilj.org/research/documents/Organizational.Ecology.Abbott.Green.Keohane.pdf>.

¹⁸ Richard L. Revesz, *Federalism and Environmental Regulation: Lessons for the European Union and the International Community*, 83 VA. L. REV. 1331, 1341–45 (1997).

¹⁹ “Conceptually . . . administrative action can be distinguished from legislation in the form of treaties, and from adjudication in the form of episodic dispute settlement between states or other disputing parties Global administrative action is rulemaking, adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties.” Kingsbury, Krisch & Stewart, *supra* note 3, at 17.

²⁰ Examples include the World Bank, the International Monetary Fund, and the World Health Organization. The officials that manage these bodies are supervised and generally selected by a council or other collective group composed of representatives of the body’s members. This arrangement is similar to those in domestic commissions or boards headed by plural authorities.

more strongly horizontal and networked character. Regulatory norms and policies are established through intensive processes of deliberation, exchange, and interaction among representatives of and experts from domestic government agencies, NGOs, business firms and associations, professional groups, academic and research bodies, and international organizations. These constituencies are typically subject to the regulatory norms being generated or otherwise play a significant role in their implementation.²¹ These structures generate various forms of networked governance, including “experimentalist governance,”²² that embody regulatory strategies increasingly being adopted in domestic and supranational regulatory programs.²³

Global regulatory bodies typically exercise significant discretionary decision-making powers. Such discretion is inherent in the creation—whether at the domestic, supranational, or global level—of a special-purpose entity with responsibility for regulating a given sector of activity. In such circumstances, it is not feasible or desirable for the principal establishing the administrative body to lay down detailed instructions for the agent’s decisions in advance. The principal’s ability to monitor and evaluate the agent’s performance and to take necessary corrective action *ex post* is inherently limited because these tasks require detailed, continuously updated knowledge and experience that the principal does not have.²⁴ As a result, the agent enjoys a greater or lesser degree of free reign or “slack,” including discretion to adopt policies contrary to the goals and interests of the principal.

The discretion enjoyed by the agent is generally even greater when the administrative authority has been established by multiple principals, which makes it more difficult to police effectively the agent’s performance. Global regulatory bodies are almost always established by multiple principals, whether states, domestic administrative agencies, or various types of private and public entities. In cases where a few quite powerful founders/members enjoy a dominant position, they may often be able, at least in important matters, to have their way. Nonetheless, the agent will inevitably retain substantial discretion.

Administrative law requirements for decision making, including notice of proposed decisions, opportunity for comment, reason giving, and opportunity for some form of review, also constrain, in different ways, the ability of powerful principals to dictate specific decisions to limit the agent’s freedom of action.²⁵ Among other effects, such procedures will tend to ensure that regulators/agents adhere to the terms of their authorizing charter (which in practice may

²¹ Examples include the International Organization for Standardization, Codex Alimentarius Commission, Greenhouse Gas Protocol, World Anti-Doping Agency, Marine Stewardship Council, Global Hydropower Forum, and International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use.

²² Gráinne de Búrca, Robert O. Keohane & Charles Sabel, *New Modes of Pluralist Global Governance*, 45 N.Y.U. J. INT’L L. & POL. 723, 738–44 (2013) (on experimentalist governance).

²³ See Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, in *THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE* 145 (Jacint Jordana & David Levi-Faur eds., 2004); Julia Black, *Paradoxes and Failures: “New Governance” Techniques and the Financial Crisis*, 75 MOD. L. REV. 1037 (2012); see also Tim Conner & Fiona Haines, *Networked Regulation as a Solution to Human Rights Abuse in Global Supply Chains? The Case of Trade Union Rights Violations by Indonesian Sports Shoe Manufacturers*, 17 THEORETICAL CRIMINOLOGY 197 (2013).

²⁴ Arthur Lupia & Mathew McCubbins, *Designing Bureaucratic Accountability*, 57 L. & CONTEMP. PROBS. 91, 106–07, 110 (1994); Arthur Lupia & Mathew McCubbins, *Learning from Oversight: Fire Alarms and Police Patrol Reconstructed*, 10 J.L. ECON. & ORG. 96 (1994).

²⁵ See generally Mathilde Cohen, *Reason-Giving in Court Practice: Decision-Makers at the Crossroads*, 14 COLUM. J. EUR. L. 257 (2008); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253 (2009).

not be very constraining) and to the rules and procedures previously established, unless and until changed through regular processes. Through the perspective of political economy, administrative law and the availability of independent review of administrative decisions (especially at the behest of those adversely affected by them) can be understood as mechanisms by which principals can indirectly constrain agency discretion.²⁶ These mechanisms can also advance the principals' objectives by enhancing the quality and effectiveness of regulatory outputs. In normative perspective, they operate to limit decisions on the basis of power and expediency and to promote the rule of law. Such techniques for disciplining administrative decision making, familiar in domestic law, have increasingly been adopted among global regulatory bodies, fostering the emergence of a global administrative law.²⁷

The Problem of Disregard

Many global regulatory authorities have been justly criticized for giving inadequate regard to the interests and concerns of vulnerable and politically weak groups, diffuse and less well-organized and resourced societal interests, and vulnerable individuals, which has resulted in decision making that causes unjustified harm or disadvantage. This article refers to these practices and their institutional sources, operating at the global level and in their distributed administrations, collectively as the problem of disregard.

The problem of disregard is implicit in much criticism of global governance. Yet it is rarely articulated or systematically analyzed. It implies normative principles of regard—principles that serve to identify which affected groups, interests, and individuals are entitled to have their interests and concerns considered by particular global regulatory bodies with specialized missions and taken into account in their decisions.²⁸

A further preliminary point: the decisions of a global regulatory body often also disregard the interests and concerns of weaker states, especially developing-country states. In some cases, these states may be members of the body, in others not. This problem and its potential remedies present issues that are significantly different from those presented by disregard of groups and individuals and will not be addressed in this article.

To provide a concrete context, many diverse examples of disregard are considered here. Trade-related aspects of intellectual property rights (TRIPS) and TRIPS-plus regimes have slighted the needs of developing-country populations for access to essential medicines.²⁹ The WTO regime for a long time effectively proscribed environmental regulations aimed at goods produced by environmentally unsound processes in international waters or other

²⁶ See Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); *Boxing Australia v. AIBA*, CAS 2008/O/1455 (Apr. 16, 2008) (Court of Arbitration for Sport invalidating athlete disqualification by Australian Boxing Federation given that decision represented unjustified departure from prior rules) [hereinafter *Boxing Australia*].

²⁷ Kingsbury, Krisch & Stewart, *supra* note 3; Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 L. & CONTEMP. PROBS. 63 (2005); see also Global Administrative Law Project, *supra* note 2.

²⁸ These principles are discussed *infra* in part I.

²⁹ See, e.g., BALANCING WEALTH AND HEALTH (Rochelle Dreyfuss & César Rodríguez-Garavito eds., 2014); Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008).

countries.³⁰ Investment arbitration tribunals have denied recourse to citizens seeking to defend environmental and social regulatory actions claimed by foreign investors to constitute compensable expropriation of their investments.³¹ The World Bank and the International Monetary Fund (IMF) have historically acted to prop up despotic regimes and feed a culture of corruption, sending billions of dollars in development funding to developing countries while ignoring that their officials were pocketing it.³² In unilaterally imposing drastic austerity measures on particular countries, the IMF has often slighted the interests of affected domestic constituencies.³³ The multilateral development banks have regularly funded infrastructure projects such as dams that displaced local populations and destroyed local communities without adequate consideration or recompense.³⁴ The United Nations has systematically disregarded those wrongfully harmed by its operations, including the eight thousand Haitians who died of cholera introduced by UN peacekeepers as a result of failures to ensure proper sanitation.³⁵ These and many other examples involve administrative authorities established by states and domestic agencies to promote trade, investment, economic development, and other financial

³⁰ The WTO's practice is critiqued in Robert Howse, *The New Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environmental Debate*, 27 COLUM. J. ENVTL. L. 491 (2002); Robert Howse & Donald Regan, *The Product/Process Distinction—An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 EUR. J. INT'L L. 249 (2000); see also Jonathan Skinner, *A Green Road to Development: Environmental Regulations and Developing Countries in the WTO*, 20 DUKE ENVTL. L. & POL'Y F. 245, 266 (2010) (noting progress in overcoming disregard in this field).

³¹ Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democracy Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 792–97 (2008); Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, in 50 YEARS OF THE NEW YORK CONVENTION 5, 11 (Albert Jan van den Berg ed., 2009).

³² See, e.g., MICHELA WRONG, IN THE FOOTSTEPS OF MR. KURTZ: LIVING ON THE BRINK OF DISASTER IN MOBUTU'S CONGO (2002) (detailing how the World Bank and IMF supported Mobutu's regime in Congo). The World Bank's programs coincide with government action that harms vulnerable populations, such as the Promoting Basic Services program, which Human Rights Watch has linked to the Ethiopian government's "villagization" regime of sometimes-violent forced relocation. HUMAN RIGHTS WATCH: ABUSE-FREE DEVELOPMENT: HOW THE WORLD BANK SHOULD SAFEGUARD AGAINST HUMAN RIGHTS VIOLATIONS, 36–39 (July 2013), at http://www.hrw.org/sites/default/files/reports/worldbank0713_ForUpload.pdf.

³³ See Ofer Eldar, *Reform of IMF Conditionality: A Proposal for Self-Imposed Conditionality*, 8 J. INT'L ECON. L. 509 (2005) (proposing that the IMF, rather than imposing austerity conditions through negotiation with borrower-country governments, use an open process that allows for public input on the conditions and then give reasons for the conditions ultimately selected).

³⁴ Komala Ramachandra, *Sardar Sarovar: An Experience Retained?*, 19 HARV. HUM. RTS. J. 275, 277 (2006) (on Narmada River dams); Erin K. MacDonald, *Playing by the Rules: The World Bank's Failure to Adhere to Policy in the Funding of Large-Scale Hydropower Projects*, 31 ENVTL. L. 1011, 1034 (2001) (on the World Bank's violations of its own compensation and participation policies). But see John W. Head, *For Richer or for Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks*, 52 U. KAN. L. REV. 241, 288 (2004) (suggesting that multilateral development banks have largely left the dam-building business); HUMAN RIGHTS WATCH, *supra* note 32; Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 HARV. HUM. RTS. J. 205 (2002).

³⁵ Mark Doyle, *UN Sued over Haiti Cholera Epidemic*, BBC NEWS, Oct. 9, 2013, at <http://www.bbc.co.uk/news/world-latin-america-24457195>. The United Nations denied compensation for the resulting harms and has failed to give any serious consideration to establishing a standing administrative system that would provide adequate and assured compensation for wrongful harms that its operations cause. Letter from Patricia O'Brien, Under Secretary-General for Legal Affairs, United Nations, to Brian Concannon, Director, Institute for Justice & Democracy in Haiti (July 5, 2013), at <http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf>. A standing system for compensation would create caretaking incentives for the United Nations. See José E. Alvarez, *The UN in the Time of Cholera*, Address at the Annual Meeting of the American Branch of the International Law Association (Oct. 27, 2013) (on file with author) (criticizing UN stonewalling of the problem).

objectives. In some cases, these bodies have since adopted corrective measures, but, in many other cases, they have not. Disregard also occurs in hybrid public-private regulatory bodies, such as the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH), composed of representatives of the European Union, United States, Japan, and the multinational pharmaceutical industry. For example, the attraction for multinational pharmaceutical companies of lower costs for clinical trials in developing countries, as well as the drive for harmonization of drug testing protocols, has marginalized the ethical concerns of doctors and of some developing countries over the use of placebos in such trials.³⁶ The ICH has broadly authorized the use of placebos, notwithstanding deaths and other abuses that have resulted from this practice in the past.³⁷ In addition, private and hybrid global bodies that establish uniform technical standards for goods and services may disregard the interests of less powerful and less influential firms and adopt standards that disadvantage them in competition.³⁸

As instances of disregard of the interests and concerns of specific individuals, global regulatory bodies can impose serious sanctions and liabilities or make adverse determinations of the legal status of individuals through procedures that are not adequately impartial and reliable. Moreover, actions taken against individuals as a result of these faulty decisional procedures may also harm third parties. Examples have included the UN Security Council listing of asserted terrorist financiers to freeze their assets and restrict their travel; blacklisting by multilateral development banks of project contractors charged with corruption; refugee-status determinations by the UN High Commissioner for Refugees (UNHCR); and disqualification by international sports federations of athletes for doping. When the Security Council lists individuals or entities suspected of financing terrorism in order to freeze their assets and restrict their travel, those listed have no procedural rights and do not know that they are under suspicion until the

³⁶ Michael J. Malinowski & Grant G. Gautreaux, *All That Is Gold Does Not Glitter in Human Clinical Research: A Law-Policy Proposal to Brighten the Global "Gold Standard" for Drug Research and Development*, 45 CORNELL INT'L L.J. 185 (2012) (suggesting scientific objections to the ICH's standards); Howard Wolinsky, *The Battle of Helsinki*, 7 EMBO REP. 670, 671 (2006).

³⁷ In one well-known case, which sparked a decade of debate, an NIH-funded experiment in Thailand gave some participants, pregnant mothers with HIV, placebos instead of drugs that were known to reduce the rate of maternal transmission of the virus. Peter Lurie & Sidney M. Wolfe, *Unethical Trials of Interventions to Reduce Perinatal Transmission of the Human Immunodeficiency Virus in Developing Countries*, 337 NEW ENG. J. MED. 853 (1997). While some bioethicists agree with regulators that their use is acceptable in foreign countries where patients would not otherwise have access to care, the Helsinki Declaration expresses the view of most bioethicists that placebo controls should generally not be used. See World Medical Ass'n, Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects (1964), available at <http://www.wma.net/en/30publications/10policies/b3>; Center for Biologics Evaluation & Research, U.S. Dep't of Health & Hum. Servs., Guidance for Industry and FDA Staff: FDA Acceptance of Foreign Clinical Studies Not Conducted Under an IND—Frequently Asked Questions (Mar. 2012), at <http://www.fda.gov/downloads/RegulatoryInformation/Guidances/UCM294729.pdf>; International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use, ICH Harmonised Tripartite Guideline: Guideline for Good Clinical Practice E6(R1) (June 10, 1996), at http://www.ich.org/fileadmin/Public_Web_Site/ICH_Products/Guidelines/Efficacy/E6_R1/Step4/E6_R1_Guideline.pdf; see also Michael D. E. Goodyear, *Does the FDA Have the Authority to Trump the Declaration of Helsinki?*, 338 BRIT. MED. J. 1157 (2009) (questioning the FDA's use of the ICH standards); Wolinsky, *supra* note 36, at 671 (describing the controversies surrounding the Helsinki Declaration, which was the FDA's former standard).

³⁸ See HARM SCHEPEL, THE CONSTITUTION OF PRIVATE GOVERNANCE; PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS (2005) (discussing legal remedies in tort, contract, and competition law for this form of disregard).

process is over.³⁹ For example, two Swedes and the Somali banking network Al-Barakaat were listed because the network handled money transfers to Somalia.⁴⁰ The blocking of the network's assets had serious adverse effects on tens of thousands of Somali citizens who could not access their funds.⁴¹

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

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

What is disregard? More concretely, by what principles and criteria do we determine when those adversely affected by the decisions of a global regulatory body have been unjustifiably disregarded by that body? This subsection seeks to address these questions, although it is unable to answer them fully.

Global normative theory for radically fragmented decision making. Building a comprehensive normative theory suitable for global governance presents severe theoretical and practical challenges. Most contemporary normative theories of government have been developed in the experience of democratic nation-states that have constitutional systems of representative democracy and rights protection and that are governed by a legislature, an executive, and an independent judiciary, each with robust general authority to govern. Such institutions do not exist at the global level. Instead, we have myriad special-purpose regulatory bodies that pursue different objectives and that are governed by different combinations of various public and private actors. In these circumstances, encompassing conceptions of democracy or justice framed

³⁹ For an overview of the terrorist-listing process and how it has changed over the years, see Craig Forcese & Kent Roach, *Limping into the Future: The U.N. 1267 Terrorism Listing Process at the Crossroads*, 42 GEO. WASH. INT'L L. REV. 217, 221–27 (2010). For recent reforms made in response to litigation, including the requirement that a summary of reasons for listing a person or entity must be provided to the listed person or entity, see *id.* at 243–52.

⁴⁰ Noah Birkhäuser, Address at the European Society of International Law Research Forum: Sanctions of the Security Council Against Individuals—Some Human Rights Problems (May 26, 2005), available at <http://www.esil-sedi.eu/sites/default/files/Birkhauser.PDF>.

⁴¹ Tens of thousands of Somalis dependent on funds from relatives outside the country could not access these funds because of the sanctions, causing great hardship. Small businesses were forced to close. Al-Barakaat was the largest employer in Somalia. See HOUSE OF LORDS, SELECT COMMITTEE ON ECONOMIC AFFAIRS, THE IMPACT OF ECONOMIC SANCTIONS, 2006–07, H.L. Paper No. 96-II, at 128, para. 39(e), at <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldeconaf/96/96ii.pdf>; Hassan Barise, *Somali Economy Hit*, BBC NEWS, Aug. 27, 2002, at http://news.bbc.co.uk/2/hi/in_depth/world/2002/september_11_one_year_on/2219680.stm; Hassan Barise, *US Shuts Down Somalia Internet*, BBC NEWS, Nov. 23, 2001, at <http://news.bbc.co.uk/1/hi/world/africa/1672220.stm>. Sweden petitioned the United States to delist these two Swedish individuals, and the United States and the Security Council eventually acquiesced. *U.S. Drops Names of 2 Swedes from Al Qaeda List at U.N.*, N.Y. TIMES, Aug. 23, 2002, at <http://www.nytimes.com/2002/08/23/world/us-drops-names-of-2-swedes-from-al-qaeda-list-at-un.html>. The company's entry on the UN list was also litigated before the European Court of Justice. Joined Cases C-402/05 & C-415/05, *Kadi v. Council*, [2008] ECR I-6351 [hereinafter *Kadi*].

at the level of the entire global governance complex, like those contemplated by some global constitutionalists,⁴² are simply not persuasive or viable.⁴³

Nevertheless, normative assessment, prescription, and action can and must proceed on a decentralized basis.⁴⁴ Progress in securing greater equity in global administration need not await a comprehensive theory of global justice suitable for the present circumstances. Just as with domestic law and governance reform, taking specific steps to prevent and remedy discrete unjustified harms and deprivations imposed on weak or marginalized groups and vulnerable individuals is a fundamental starting point.⁴⁵ The concept of disregard can serve as a fruitful heuristic for building—contextually and incrementally—viable conceptions of justice in global governance. The further goal of achieving an equitable division of the benefits of global cooperation would be far more challenging to specify and implement.

Elements of disregard and regard. Disregard has both procedural and substantive elements. Procedural disregard is evinced by decision makers' failure or refusal to gather information regarding the interests and concerns of groups and individuals that will be affected by their decisions and the resulting impacts of these decisions on groups and individuals; by refusal or failure to provide groups and individuals with access to relevant information and the opportunity to submit evidence and argument on proposed decisions or to play any other role in the organization's decision-making processes; and by failure to address the interests and concerns of the groups and individuals in explaining or giving reasons for the decisions made.⁴⁶ Disregard is more strongly shown when other groups and individuals are treated more favorably in these regards. Substantive disregard relates to adoption of decisions that unjustifiably harm or disadvantage those whose interests and concerns have been procedurally disregarded, where decisions have been adopted as a consequence of such disregard.⁴⁷ The notions of adequate consideration, significant effect, and unjustifiable harm or deprivation (which requires a baseline reference point) all require elaboration and explication, and their content in particular circumstances may be highly contestable.⁴⁸

Regard is the antonym and remedy for disregard. As an ideal, regard requires that the decision maker review available information about the effects of proposed decisions on the various

⁴² Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51 (2006); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907 (2004); Bardo Fassbender, *The United Nations Charter As Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529 (1998); Ernst-Ulrich Petersmann, *How to Reform the UN System? Constitutionalism, International Law, and International Organizations*, 10 LEIDEN J. INT'L L. 421 (1997).

⁴³ See Jürgen Habermas, *The Postnational Constellation and the Future of Democracy*, in THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 58 (Max Pensky ed. & trans., 2001). It is important to consider how to generate a theory of global justice or democracy suited for such diverse bodies as the Financial Action Task Force, the Global Competition Network, the International Olympic Committee, the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use, the Forest Stewardship Council, Interpol, or the International Organization for Standardization.

⁴⁴ This approach informs AMARTYA SEN, THE IDEA OF JUSTICE (2009).

⁴⁵ For discussion and advocacy of such a strategy in the domestic context, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

⁴⁶ For discussion of the procedural and substantive elements of what constitutes adequate consideration of affected interests by administrative decision makers, see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1712–60 (1975).

⁴⁷ Procedural disregard may occur without necessarily resulting in substantive disregard.

⁴⁸ For discussion of adequate consideration in the analogous context of an interest representation model of administrative law in the domestic context, see Stewart, *supra* note 46, at 1756–60.

groups, individuals, interests, and concerns entitled to consideration; weighs the benefits for and burdens on them of alternatives; and determines that decisions that impose disadvantage or harm on some affected groups and individuals are justified by relevant decisional norms. A regular practice of giving reasons for decisions helps to ensure that these requisites are satisfied. The appropriate extent of the consideration that must be afforded and the form of any regular processes for doing so, however, will vary widely depending on the nature of the regulatory or other administrative program, its objectives, the type of decision in question (for example, is it rulemaking, adjudication, or decision on some other particular matter?), the identities of those affected (are they individuals or groups or other entities?), the vulnerabilities of those affected, the type and intensity of adverse effect, and other contextual factors. The regulatory body's ability to successfully discharge its mission and the risk that more formal and extensive decision-making procedures will impair its ability to do so are also entitled to significant weight. These factors will make the appropriate procedures, if any, for promoting regard for various affected interests highly context specific. The appropriate decision-making procedures will often not approach the ideal outlined above. Further, due regard for the various interests and concerns of those involved almost never points to a single decisional outcome. Decision makers almost always enjoy a range of judgmental discretion. Procedures and practices that enable and promote consideration by decision makers of the concerns of those with a significant stake in agency decisions nonetheless provide important checks on arbitrary or unjust decisions.

Which global regulatory bodies are subject to obligations of regard? In the compass of this article, only a sketch of an answer to this question can be provided. Global regulatory bodies that are constituted in whole or in part by public authorities, including states, domestic administrative agencies, and international organizations, *prima facie* have attributes of publicness that oblige them to give due consideration to all relevant interests with a significant stake in their decisions and to follow, to the extent feasible, procedures and practices to do so.⁴⁹ Yet, depending on the specific regulatory contexts, countervailing institutional considerations may exist whose extent depends on the risks that decisions will result in significant and unjustified harms. Bodies constituted entirely by private actors may also be subject to these obligations, based on the kind and degree of power that they exercise, the impact of their decisions on those adversely affected, and the availability of public authorities to monitor their decisions and take needed corrective action.⁵⁰ But because public supervision and correction are less often available in the context of global regulation, the need to impose obligations of regard on private global regulatory bodies may be greater than in the domestic context.

Who is entitled to regard? Which groups, collective interests, or individuals are entitled to regard in global regulatory decisions and, potentially, to rights to participate in or initiate decisional processes that promote such regard? One possible starting point is the Roman law principle *quod omnes tangit ab omnibus tractari et approbari debet*—all those affected should be heard and agree. Under Roman law, in cases of multiple guardianships of a ward or multiple parties with an ownership interest in a res, all were to be heard and to agree to the resolution of the guardianship or res. In medieval England, the Roman law maxim was invoked in the

⁴⁹ Cf. Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23, 31–33 (2009) (on the concept of publicness).

⁵⁰ SCHEPEL, *supra* note 38, at 292 (discussing the transfer of monitoring power from public authorities to private bodies).

disposition of church offices and the governance of political communities and realms. Notice and the opportunity to participate were necessary for all members of the relevant community, but the further requirement of actual agreement fell away.⁵¹

Applying and implementing the *quod omnes* principle in the context of special-purpose global regulatory bodies present perplexing problems. Typically, no well-defined community includes all those significantly affected by a given body's decisions. For this and other reasons, electoral representation, which can be regarded as a contemporary translation of *quod omnes* in democratic states, is generally infeasible for a global regulatory body and, in any event, would often be undesirable given the nature of the specialized administrative tasks at issue.⁵² Furthermore, the identity of the groups, individuals, and interests that can claim an appreciable stake in regulatory decisions may shift and vary widely from one regulatory body and program to another, as does the character of those decisions' effects on them. We ultimately require normative as well as factual grounds to distinguish those interests and persons that should be accorded regard by regulatory decision makers.

That a specific regulatory decision has adverse effects on identifiable groups or individuals does not, without more, mean that they are entitled to regard. Such entitlement depends on the mission of the specific body in question and context-relevant norms as well as the nature of the effect. Many global administrative regimes are established to promote societal welfare in specific policy fields and sectors where decentralized domestic actions alone cannot. These bodies should be able to carry out their missions effectively without the potentially burdensome obligations of regard extending to all of the groups and individuals affected in some way by their decisions.

As a general matter, neither regard nor process need be provided where the individual or collective "touching" is *de minimis*. Global regimes, such as the International Organization for Standardization and the Greenhouse Gas Protocol, that solve coordination games by setting technical standards for products and services often do not have significant distributional impacts beyond the regime participants. In other global regimes, the consequences of regulatory decisions may be matters of life and death (patent protection for essential medicines) or result in destruction or preservation of one's home community (hydropower project funding by a multilateral development bank) or affect the ability to travel (refugees seeking asylum or individuals listed as terrorist financiers). Where the decisions of administrative authorities target serious harms on discrete groups and individuals, their moral claims for regard, including adequate processes to ensure such regard, are overwhelming. The case for regard may be weaker when adverse effects are greater than *de minimis* but are diffuse and individually small, yet the effects may nonetheless be significant in the aggregate.

⁵¹ See Nicklaus Luhmann, *Quod Omnes Tangit: Remarks on Jurge Habermas's Legal Theory*, 17 CARDOZO L. REV. 883 (1996); GAINES POST JR., *STUDIES IN MEDIEVAL LEGAL THOUGHT: PUBLIC LAW AND THE STATE 1100–1322*, at 163–238 (1964). I am indebted to John Ferejohn for these references. Luhmann suggests that the *quod omnes* principle is "absolutely valid." Luhmann, *supra*, at 884. He adds: "One says that the Owl of Minerva begins its flight at twilight. How high can she fly." *Id.* (explaining that understanding emerges only in retrospect).

⁵² Andrew Moravcsik, *The Myth of Europe's "Democratic Deficit"*, 43 INTERECON. 331 (2008). It might, however, be feasible to provide certain forms of decisional or nondecisional participation to affected groups and interests, including through business and professional associations and through NGOs that speak on behalf of environmental, worker, and social interests. Recent theories of international or global democracy share this common theme. See, e.g., TERRY MACDONALD, *GLOBAL STAKEHOLDER DEMOCRACY* 7 (2008). Certain NGO regulatory bodies, most notably the Forest Stewardship Council, follow such a practice. See Erroll E. Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 EUR. J. INT'L L. 47 (2006).

Even where “touchings” are significant, not all of those harmed or disadvantaged by a decision are necessarily entitled to consideration; it may depend on the charter of the regulatory body in question and other relevant norms. For example, decisions by the WTO may legitimately ignore and, as a result, impose economic ruin on business firms by promoting global market competition. The mission of the WTO is to promote global economic welfare through trade liberalization; the norms governing market relations do not protect firms against expanded competition. In some instances, a specialized global regulator may also appropriately exclude consideration of some of the effects of its decisions as beyond its remit or competence.

Such grounds may, for example, justify WTO refusal to consider the effects of trade liberalization on the demand for natural resources, even though the WTO regularly considers the compatibility of particular environmental regulations adopted by members. The consequence of such refusals may be that the environmental consequences of trade liberalization will fall through the cracks in the fragmented and uneven global regulatory system and not be addressed by any global or domestic authority.⁵³ Yet it may simply not be practicable or desirable to try to remedy such instances of structural disregard by imposing obligations on particular regulatory bodies that already exist but have missions that are not congruent with the needs for protection created by the gaps. Beyond these very general principles, the question of who is entitled to regard and to process must be addressed and resolved case by case through more or less complex institutional, political, and, in some cases, legal processes. This endeavor is quite similar to those that domestic courts take on in determining how far to extend procedural rights in agency decision making and standing to secure judicial review to individuals and groups that assert a stake in administrative decisions.⁵⁴

Decisions as to who is entitled to regard and the extent of that regard—in terms of the weight that should be given to their interests and concerns—must be resolved through practical normative and institutional judgments that take account of experience under other global administrative regimes. These judgments must include prudential considerations, including the need to make some accommodation with configurations of power. There are no general institutional solutions to problems of disregard. Following the approach of the Global Administrative Law Project,⁵⁵ this article proposes an incremental “retail” rather than “wholesale” strategy for global governance diagnosis and reform.

Intrinsic process values. This article approaches procedural and institutional arrangements primarily as means for ensuring that the interests of those affected by global regulatory decisions are given due consideration and sufficient weight in the final decisions made. Problems of disregard are ultimately manifested in decisions and measures that unjustifiably harm or disadvantage certain individuals or interests. Processes, including the opportunity either to submit evidence and argument in adjudications, rulemakings, or other decisions, or to secure judicial review, are ultimately methods to help to ensure that the substantive decisions reached give appropriate regard for the interests and concerns of the relevant groups and individuals. We must, however, also consider that individuals, groups, states, or societal interests might have

⁵³ See Revesz, *supra* note 18.

⁵⁴ *E.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000); *In re* Global Indus. Techs., Inc., 645 F.3d 201 (3d Cir. 2011); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

⁵⁵ Global Administrative Law Project, *supra* note 2.

intrinsic rights—based on process, dignitary, or sovereignty values—to certain procedures or remedies, regardless of their effect on decisional outcomes.

A strong case for recognizing an intrinsic procedural right exists where an individual is singled out for condemnatory sanctioning by a global body, such as the UN Security Council's Al Qaida Sanctions Committee or the World Anti-Doping Agency. In such cases, access to processes may have a dignitary or other intrinsic value, independent of their function as a means to protect an individual's substantive rights or to channel the exercise of power through the rule of law.⁵⁶ The claim to intrinsic procedural rights is far more problematic when global bodies issue general rules or decide particular matters affecting many interests and individuals, such as the location of infrastructure projects or the designation of an Olympic host city. In the domestic context, the opportunity to vote in elections to select high-level government decision makers may be regarded as an intrinsic procedural right. The possibility of analogous procedural rights in the context of fragmented global regulatory decision making cannot be excluded. Yet grave challenges arise in conceptualizing and realizing any such rights given the absence of defined global political communities and the sheer number and variety of global regulatory bodies and of those affected in different ways by their decisions.⁵⁷

II. THE STRUCTURAL ROOTS OF DISREGARD AND STRATEGIES FOR REDRESS

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

The Structural Roots of Disregard

The nature and extent of disregard and its causes vary greatly depending on the type of global regulatory body in question, its mission, and the public or private actors that govern it and that are most significantly affected by its decisions. A systemic source of disregard is the limited, specialized mission of global regulatory bodies, typically focused on a specific sector or subject within the three broad categories of global regulation: markets, security, and human rights as well as other moral goals. Charged by their principals with achieving a given objective—such as preventing money laundering, liberalizing international trade, promoting economic development by funding infrastructure projects, or ensuring protection of intellectual property rights—the officials, including member representatives, and staff that make decisions tend to develop institutional tunnel vision and professional blinders to the interests of those who are

⁵⁶ Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GER. L.J. 1375, 1379–80 (2008); Matthias Goldmann, *A Matter of Perspective: Global Governance and the Distinction Between Public and Private Authority (and Not Law)* 11–12 (Nov. 4, 2013) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2260293.

⁵⁷ The thrust of Justice Oliver Wendell Holmes's remarks in a U.S. Supreme Court case refusing to recognize a constitutional right to be heard in an administrative rulemaking by a group of taxpayers protesting a decision sharply raising their taxes applies with great force in the global context: "Where a rule of conduct applies to more than a few people it is impractical that everyone should have a direct voice in its adoption. . . . Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

not members or instrumental to achievement of the mission as supporters or clients. These officials accordingly lack incentives to generate or consider information regarding the effects of their decisions on the disregarded. These biases are often reinforced by the economic and political interests of their principals and allies, as illustrated by the global trade, investment, intellectual property, security, and development-assistance regimes. Such problems are often far less acute in global regimes with missions such as environmental or health protection but may nonetheless occur.⁵⁸ Global regulatory bodies that establish uniform technical standards to facilitate trade in goods and services, which are often private or hybrid public-private in nature, may disregard the interests of less influential firms and adopt standards that give competitive advantage to dominant members.⁵⁹

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

Disregard operating within global regulatory bodies may be transmitted to their distributed administrations. Thus, the domestic administrations of WTO members are obliged by TRIPS to respect and enforce the intellectual property rights held by citizens of other WTO members. The TRIPS requirements, backed by WTO dispute settlement procedures, are calculated to overcome domestic authorities' disregard of foreign competitors. While addressing this form of disregard, the TRIPS regulatory regime may itself disregard and harm individuals who, as a consequence, can no longer afford essential medicines but whose interests and concerns lie outside its mission and represent "omitted voices."⁶⁰

Applying political-economy analysis, Eyal Benvenisti and George Downs have highlighted two other structural features of global regulatory governance that tend systematically to generate disregard.⁶¹ First, they argue that shifts in regulatory decision making to the global level have increased the power of domestic executives relative to that of legislatures and courts in

⁵⁸ For example, the administrations of the Kyoto Protocol Clean Development Mechanism and the Voluntary Carbon Scheme do not consider the environmental and social impacts of projects such as industrial tree farms in certifying carbon reductions achieved by such projects. Kylie Wilson, *Private Governance of the Voluntary Carbon Offset Market* (2014) (unpublished manuscript) (on file with author).

⁵⁹ SCHEPEL, *supra* note 38, at 285–338.

⁶⁰ See BALANCING WEALTH AND HEALTH, *supra* note 29; Kapczynski, *supra* note 29. For discussion of the concept of omitted voices and decisional externalities generated by mission-focused regulators in the context of risk-risk regulatory tradeoffs, see Jonathan Baert Wiener & John D. Graham, *Resolving Risk Tradeoffs*, in RISK VS. RISK: TRADEOFFS IN PROTECTION HEALTH AND THE ENVIRONMENT 226 (John D. Graham & Jonathan Baert Wiener eds., 1995).

⁶¹ Benvenisti & Downs, *supra* note 6.

making regulatory policies and further explain that an executive's position on regulation is often aligned with that of powerful, well-organized economic interests. The executive negotiates and oversees governmental participation in international treaty-based regimes and transnational regulatory networks as well as in many important hybrid global regulatory regimes. Domestic legislatures are largely fenced out of these decisions, which are also generally not subject to review in domestic courts. As a result, regulatory policymaking is no longer subject to domestic institutional checks on the ability of well-organized economic interest groups to dominate specialized administrative decision making to the disadvantage of diffuse interests. Equivalent checks at the global level are often absent or underdeveloped.⁶²

Their second and related argument is that the phenomenon of fragmentation in global regulatory institutions, with myriad different regulatory regimes with distinct specialized missions, works systematically to the overall advantage and interests of the most powerful developed countries and their business and financial allies.⁶³ Benvenisti and Downs view global regulatory fragmentation as the product of a divide-and-conquer strategy that prevents developing countries from mobilizing across issue areas to present a counterweight to developed-country dominance of the various individual global regimes.

The result is a highly uneven and biased pattern in global regulatory programs. Robust global regulatory regimes exist for achieving security, constituting efficient global markets, and promoting trade, investment, transport, and communications. Regimes for addressing important market failures associated with the powerful growth of the global economy, including protection of health, safety, human rights, and the environment, are weak. Democratic developed countries have adopted strong domestic regulatory measures to provide such protections along with social insurance and service programs. These arrangements, together with the institutions of market capitalism, embody a social compact of "embedded liberalism."⁶⁴ Many developing countries do not have the capacities to provide such protections to their citizens. Further, authoritarian governments often have little regard for the welfare of most of their citizens. As a result, they fail to protect their citizens against market failures and other adverse by-products of globalized economic activity. Global institutional systems also fail to redress many of these harms and deprivations, frustrating realization of an embedded liberal social compact at the global level. The result is to subject many people, especially those in developing countries, to serious risks of insecurity and harm. The most glaring case in point is the lack of an effective global climate treaty. Production and consumption generated by unregulated trade and investment are causing ever-increasing accumulations of greenhouse gases in the atmosphere that will

⁶² This basic argument has also been made by environmental, health, and consumer advocacy groups as well as by scholars, who contend that global regulations reflecting the interests of dominant economic interests have in many cases displaced more stringent domestic regulations, weakening environmental and health protections. See Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 695, 708 (2006) (describing NGO criticisms); David Vogel, *The Private Regulation of Global Corporate Conduct*, in THE POLITICS OF GLOBAL REGULATION 151 (Walter Mattli & Ngaire Woods eds., 2009).

⁶³ Fragmentation of regulatory governance at the domestic level can have similar consequences. See Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335 (1990). Potential remedies for these structural effects of institutional fragmentation are beyond the scope of this article.

⁶⁴ For discussion of the concept of embedded liberalism in both the domestic and global contexts, see John Ruggie, *Trade, Sustainability and Global Governance*, 27 COLUM. J. ENVTL. L. 297 (2002); Evaristus Oshionebo, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities*, 19 FLA. J. INT'L L. 1 (2007); Ursula A. Wynhoven, *The Protect-Respect-Remedy Framework and the United Nations Global Compact*, 9 SANTA CLARA J. INT'L L. 81 (2011).

persist for many decades, causing serious and widespread harms that will be borne primarily by the poor and marginalized in developing countries. Diplomats fiddle while the world burns. In such circumstances of pervasive structural disregard, advocates for the disregarded seek to press global regulators with, for example, trade or other economic missions to enlarge their agendas and take steps to address their interests and concerns. Unsurprisingly, these bodies strongly resist such demands.

Strategies for Addressing Disregard

This subsection summarizes four potential strategies for addressing the problem of disregard in global regulatory governance: enhancing domestic political and legal controls over global decision making; resistance to implementation of global norms and decisions by distributed administrations including domestic administrative agencies; creating new global regulatory regimes to address structural gaps; and reforming the governance of existing global bodies to promote greater regard for the interests and concerns of the disregarded. Global governance reformers have already begun to use each of these strategies to redress problems of disregard and have achieved some successes. The most challenging and persistent problems to be addressed are meeting gaps in global environmental and social regulatory protections and dealing with global administrations dominated by powerful states in the areas of security and market regulation.

Strengthening domestic controls over global regulatory decision making. As discussed, a critical source of the problem of disregard is the shift of regulatory decision making from domestic to global levels, short-circuiting domestic democratic political and legal controls over regulatory decisions. Thus, NGOs argue that regulatory decisions by the WTO, investment-treaty arbitral tribunals, and other global bodies are undermining domestic environmental, health, and safety protection laws and programs.⁶⁵ The correlative remedy that NGOs propose is to assert domestic legislative and judicial controls by, for example, refusing to recognize global regulatory norms in domestic legal systems or limiting the delegation of regulatory authority to global bodies.⁶⁶ This strategy suffers from significant limitations as a general solution for disregard. Global regulatory regimes are often needed to secure welfare and other important goals. The executive must necessarily play a large role in establishing and governing such global regimes. The ability of domestic courts and legislatures to play a significant role is limited by their institutional circumstances and ineluctable principal-agent problems.⁶⁷ Further, only the most powerful nations can assert significant control over global regulatory rules and programs,

⁶⁵ E.g., PUBLIC CITIZEN, GLOBAL STANDARD SETTING IN INTERNATIONAL TRADE 1–3 (2004), available at <http://www.citizen.org/trade/harmonization/harmonization>; Stewart, *supra* note 62, at 712. However, it has been forcibly argued that global regulatory regimes, including in the areas of free trade and human rights, can enhance domestic democracy. See Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1 (2009).

⁶⁶ See, e.g., NRDC v. EPA, 464 F.3d 1, 20–26 (D.C. Cir. 2006); see also John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004); Robert O. Keohane, *Accountability in World Politics*, 29 SCANDINAVIAN POL. STUD. 75, 80–81 (2006); Stewart, *supra* note 62, at 709.

⁶⁷ Stewart, *supra* note 62, at 723.

and some of these nations are authoritarian. Moreover, greater control by powerful states can cause the disregard of the interests of citizens in smaller and weaker countries, including citizens in developing countries whose interests are ignored and disserved by their own governments. Finally, a significant and increasing proportion of global regulatory bodies are private or hybrid in character, limiting the opportunities for domestic political and legal controls.⁶⁸

Contestation and resistance in distributed administrations. A second strategy for the disregarded is to contest and thwart implementation by distributed administrations of global regulatory programs that disregard their interests and concerns.⁶⁹ Where global bodies rely on domestic governments to implement their regulatory rules and decisions, the disregarded may be able to use domestic courts, administrative bodies, and legislatures as fora to voice opposition to and to obstruct implementation of the global body's measures. For example, Latin American NGOs and human-rights advocates for local citizens' rights to essential medicines have successfully lobbied to limit domestic authorities' recognition and enforcement of pharmaceutical companies' intellectual property rights.⁷⁰ Human-rights advocates have secured domestic and European court decisions refusing to enforce both travel restrictions and asset freezes on persons listed as terrorist financiers by the Security Council without affording them any procedural rights.⁷¹ This strategy requires that the disregarded have capacity to effectively organize and advocate and that they have receptive domestic fora.⁷² This strategy may be of little use when the distributed administrations consist of private actors that certify compliance with global standards, unless NGOs or well-disposed international organizations or governments are members or financial supporters of the global standard-setting regime; otherwise private certifying entities will have little incentive to consider those disregarded in the establishment of the standards.

Creating new global regimes to fill regulatory gaps. Rather than seeking to change the procedures and policies of existing regimes, some NGOs that advocate for the disregarded have founded new global regulatory bodies to secure their interests and concerns. These NGOs have often done so in collaboration with multinational firms, governments, and international organizations in order to leverage their resources and support. Examples include global regulatory bodies that regulate the labor, human rights, and environmental practices in global supply chains, confirm the environmental sustainability of carbon-offset projects, promote transparency in payments by extractive industries to host governments, and certify sustainably produced forest products.⁷³ Rather than using "voice" to try to change the practices of existing

⁶⁸ Powerful states may be able, on occasion, to promote adoption by global regulatory bodies of policies more favorable to the disregarded along with institutional mechanisms to ensure those policies are carried out, as exemplified by the U.S. congressional pressures that led the World Bank to establish environmental and social guidelines and the Inspection Panel. Yet, these interventions do not amount to a general strategy. Moreover, authoritarian states may exert influences that are not benign.

⁶⁹ Yet where the global human rights and environmental health and safety regulatory regimes are protective of interests that are disregarded at the domestic level, the disregarded seek to lobby available and responsive domestic fora to promote implementation and enforcement of the global rules and decisions.

⁷⁰ BALANCING WEALTH AND HEALTH, *supra* note 29 (examining the intersection of patent rights and access to medicine).

⁷¹ See, e.g., Ahmed v. H.M. Treasury, [2008] EWCA (Civ) 1187, [2009] 3 WLR 25.

⁷² BALANCING WEALTH AND HEALTH, *supra* note 29.

⁷³ See, e.g., JESSICA F. GREEN, RETHINKING PRIVATE AUTHORITY: AGENTS AND ENTREPRENEURS IN GLOBAL ENVIRONMENTAL GOVERNANCE 132–62 (2013) (Greenhouse Gas Protocol); Patrícia Galvão Ferreira,

regimes, these initiatives reflect an “exit” strategy.⁷⁴ As the examples reflect, this strategy is particularly apt for dealing with structural disregard resulting from gaps in existing global regulatory programs where the other strategies canvassed here are of little avail.

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

Global Regulatory Bodies’ Decision-Making Mechanisms

As Ruth Grant and Robert Keohane point out, many different types of practices exist for generating, constraining, directing, and influencing the exercise of power.⁷⁵ In the context of global governance, these practices include informal cooperation for mutual advantage, the exercise of various forms of compulsion or their threat, “go it alone” power (and the accompanying threat of exit),⁷⁶ negotiation and bargain, competition or cooperation among different global regimes, and peer and public reputational influences. This subsection introduces the three basic types of governance mechanisms—decision rules, accountability mechanisms, and other responsiveness-promoting measures—as potential tools for addressing disregard through the fourth strategy discussed above, reforming the governance of global administrations. These mechanisms are then discussed in detail in parts III–V of this article. These mechanisms are used by many different types of actors, including states, business firms and associations, international organizations, NGOs, and, in some cases, individuals, to secure and promote their interests. Their use for redressing disregard is the focus of this article.

Decision rules. Decision rules define the entities or persons vested with the authority to make decisions for an institution and the structures, voting rules, or other arrangements for making such decisions. Decisional authority is generally exercised by representatives of the body’s members. Members are reluctant to share decisional power with others, especially the disregarded, whose interests often conflict with realization of the organization’s mission. If, however, NGOs or other advocates for the disregarded establish new global regulatory bodies, they will have decision-making power as well as the ability to invoke grant-based accountability mechanisms.

Accountability mechanisms. Accountability mechanisms include five general institutional structure types: electoral, hierarchical, supervisory, fiscal, and legal. Each mechanism involves an account holder who can require administrative decision makers to account for their decisions and who has the ability to impose discipline or sanctions for deficient performance. The prospect of being required to be accountable and of incurring sanctions or discipline gives decision makers the incentive to respond to the interests of the account holders. Electoral, hierarchical, supervisory, and fiscal accountability structures are all grounded on a grant of authority or resources by an account holder to those who can be called to account for their use, whereas

EITI: Using Global Regulation to Address the Domestic Governance Deficit in Resource-Rich Developing Countries (Extractive Industries Transparency Initiative) (2014) (unpublished manuscript) (on file with author); Meindinger, *supra* note 52.

⁷⁴ ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970).

⁷⁵ Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 30 (2005).

⁷⁶ See Abbott & Snidal, *supra* note 11, at 59 n.28.

legal accountability is grounded in systems of legal rights and duties. The first four mechanisms are typically used by a global body's most powerful members or benefactors to control or influence its decisions; they are generally not accessible by the disregarded. In some cases, outsiders can invoke mechanisms of legal accountability by obtaining review of a global body's decisions by a domestic or international court or other independent reviewing body in order to secure regard for their interests and concerns.

Other regard-promoting measures. Other regard-promoting measures are institutional arrangements or practices that are neither decision rules nor accountability mechanisms but provide global bodies with various incentives to give greater regard to disregarded interests. Examples include transparency requirements or practices under which regulatory bodies affirmatively provide information about their activities, incorporate procedures that enable outsiders to participate in organizational decisions without exercising decisional authority (for example, by consultation practices or submitting comments on proposals), and give reasons for their decisions. Other potential mechanisms include initiatives to mobilize peer and public reputational influences, promote competition among global regulatory bodies, and mobilize market forces to secure social and environmental regulation along global commodity chains. Many of these mechanisms can be accessed by the disregarded.

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

Greater Accountability and Participation as General Remedies for the Ills of Global Governance

Many critics regularly claim that the ills of global governance are due to lack of accountability on the part of global regulatory and administrative bodies and inadequate opportunities for participation by those affected by their decisions. All too often, however, these critics fail to validate their diagnoses and prescriptions with careful analysis. The framework of the three governance mechanisms provides the analytic tools to unpack these general invocations.

Greater accountability. Thus, critics calling for greater accountability as a remedy for accountability gaps⁷⁷ often fail to specify either the precise character of accountability failures that they assert or the type of accountability mechanisms that should be adopted in response. As noted earlier, global authorities are typically accountable to the states, powerful economic actors, and other entities that establish and support them. The questions to be asked are to whom global decision makers are or should be accountable and by what means. This article

⁷⁷ See Lauren Groth, *Transforming Accountability: A Proposal for Reconsidering How Human Rights Obligations Are Applied to Private Military Security Firms*, 35 HASTINGS INT'L & COMP. L. REV. 29 (2012); Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 182–84 (2002); Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177 (2005); Ronli Sifris, *Weighing Judicial Independence Against Judicial Accountability: Do the Scales of the International Criminal Court Balance?*, 8 CHI.-KENT J. INT'L COMP. L. 88 (2008); Clark, *supra* note 34.

seeks to provide a framework for understanding accountability and the institutional mechanisms for securing it to furnish the analytic clarity required for sound diagnosis and prescription.

The accountability agenda has a more fundamental flaw. The root problem is not the absence of accountability mechanisms as such, but disregard. The growth of global regulatory governance has, indeed, undermined the efficacy of the political and legal accountability mechanisms operating in the nation-state context. Yet attempting to develop and apply analogous accountability mechanisms to global decision making is not necessarily the appropriate solution. Using the other mechanisms—decision rules and other responsiveness-promoting measures—may often be more productive. Focusing simply on accountability threatens to misdiagnose the fundamental problem and prescribe the wrong remedies.

Greater participation. Many global regulatory critiques and cures are also couched in the language of participation. The weak and marginalized are often said to have been neglected because their representatives did not have an adequate opportunity to participate in decisions by global authorities that affect them in important ways.⁷⁸ The corresponding remedy is creation or expansion of participation rights.

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

Participation does not comprise a single type of governance mechanism. There are two basic types of participation—*decisional* and *nondecisional*—that operate and must be examined within the tripartite framework of governance mechanisms presented in this article. Decision rules may give identified persons the right to vote on or otherwise play a role in the making of authoritative decisions by a body, thereby conferring decisional participation rights, as discussed in part III.⁷⁹ Other participation rights are nondecisional: the participant has no role in actually making a decision but can make submissions or express views to those who do.

Decisional participation is often restricted to organizational “insiders,” including members of the global body and its principal officials. It is often more feasible to extend various forms of nondecisional participation to the disregarded. As discussed in part V, these forms can function as responsiveness-promoting mechanisms by giving “outsiders” varying degrees of access and input to decision-making procedures.⁸⁰

It may be impractical or dysfunctional to extend “strong” forms of participation—such as the right to play a role in making decisions or the right to a hearing through legal accountability mechanisms—to all those materially affected by a global body’s decision. While nondecisional

⁷⁸ Bhupinder S. Chimni, *Co-optation and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 799, 801–06 (2005).

⁷⁹ These rights may, in some cases, be exercised by representatives who are elected by a given group of organizations or persons, creating electoral accountability between the representatives and the electors.

⁸⁰ Certain forms of nondecisional participation may play an important role in accountability mechanisms, most notably those for legal accountability, which typically confer rights to submit evidence and argument to a tribunal or other body reviewing the global body’s decision or order. They may also include the right (in order to generate a record for review) to submit evidence and argument to the global administrative organ making the initial decision on, for example, blacklisting a contractor charged with corruption or granting refugee status to a person seeking asylum.

participation in the form of consultation or submission of comments may have significant value to the disregarded in some contexts, such procedures risk being dominated by well-organized and financed economic interests⁸¹ or may be otherwise ineffective in remedying disregard.⁸² Domestic experience shows that granting rights to participate, whether in the form of decisional participation or otherwise, does not necessarily solve problems of disregard.⁸³

A single-minded focus on participation, like a single-minded focus on accountability, may obscure the underlying problem of disregard in decision making and overlook the potential for using other institutional mechanisms and remedies that may be more effective in promoting regard. There is no single “magic bullet.”

Parts III–V provide material for comprehensive analysis and evaluation of these three options. In assessing them, reformers must pay close heed to insights from political-economy analysis and constructionist theories of interinstitutional influences in order to understand the logic of existing global regulatory institutions and the possibilities for reforming them through a skillful mix of strategies and measures.

III. DECISION RULES

One means of promoting greater regard by global regulatory bodies for the disregarded is to change these bodies’ decision rules to give the disregarded some decisional power. For example, a global regulatory body could include representatives of the disregarded as voting members of one or more of the organization’s decision-making bodies and thereby transform “outsiders” into “insiders.” These representatives might be appointed by an NGO or other entity speaking for the disregarded, or they might be chosen through systems that involve elections.

In the strongest form, representatives of the disregarded would be given the right to sit on and vote in the general decisional body of the organization—its governing council or the equivalent. Alternatively, their representatives could be included as decisional participants on boards, committees, and other subsidiary or related organs that play specified roles in the making of specific decisions without exercising general authority. The power exercised would be

⁸¹ For example, in an effort to provide greater participation to its decision-making process, the Basel Committee on Banking Supervision adopted a notice and comment-type procedure. See Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT’L L. 15, 24–26 (2007) (describing the development of notice and comment-type rulemaking at the Basel Committee). As Barr and Miller note, while some community groups participated in the process, the most common participants were academics and major industry groups. See *id.* The comment letters to the Basel consultative documents may be viewed online and confirm the general observations about the composition of participants. See, e.g., Basel Committee on Banking Supervision, Comments Received on the Consultative Document “Capitalisation of Bank Exposures to Central Counterparties” (2011), at <http://www.bis.org/publ/bcbs190/cacomments.htm>.

⁸² Bhupinder S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT’L L. 1, 19–23 (2004); Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT’L L. 187, 210–11 (2006).

⁸³ Keohane, Macedo & Moravcsik, *supra* note 65; see also *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT’L L. 539, 605 (1992) (arguing that the United Nations’ stance on human rights would be undermined if it gave seats to governments that disregarded the result of a monitored election); Dale Ho, *Minority Vote Dilution in the Age of Obama*, 47 U. RICH. L. REV. 1041 (2013) (arguing for continued protections for minority voters in the face of persistent racial polarization and vote dilution); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997) (arguing that adequate representation in class actions does not sufficiently protect class members who wish to participate actively in the suit).

conditioned by decision-making rules for plural bodies, such as majority vote, supermajority vote, and consensus/unanimity, and by the division of authority among the different internal bodies and their interrelation.

This section will focus on two issues. First, it will explain why giving the disregarded a significant decisional authority is unlikely to be a general solution to the problem of disregard, although specific contexts may provide opportunities for doing so. Second, it will address a particular mode of decision making—deliberative, consensus-based decision making—that might have greater promise in some contexts.

Obstacles to Granting Decisional Authority to the Disregarded

Three serious obstacles stand in the way of granting decisional authority to disregarded societal interests within global regulatory bodies. These obstacles are power realities, functional demands for specialization and efficiency, and difficulties in securing decision-making representation for the disregarded.

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

There are, however, growing exceptions to this generalization. The members and officials of global regulatory bodies, including those with economic, regulatory, and other missions, may admit a broader range of actors into a body's governance if doing so will advance the organization's overall business strategy.⁸⁴ The circumstances of global regulation and administration increasingly encourage such inclusion.

Global bodies depend upon coordination with and support from other bodies to gain adherents, implement their programs, and compete successfully with rival regulatory bodies. This reliance has led them to include representatives of other global and domestic bodies, business firms, NGOs, and expert groups whose input and support are valuable to the organization.⁸⁵ Private and hybrid public-private regulatory regimes characteristically adopt this strategy, often assuming a strongly horizontal structure, but increasingly so do global regulatory bodies and networks constituted by governments. Authorities for economic, environmental, and social regulation, development assistance, and social-services delivery have accorded some form of decisional role to financial supporters, implementation partners, and expert bodies in

⁸⁴ A prominent example of this phenomenon is the permanent membership of the Security Council, which, as scholars have observed, reflects geopolitical calculations of a bygone era. See, e.g., Hilary K. Josephs, *Learning from the Developing World*, 14 KAN. J.L. & PUB. POL'Y 231, 233 (2005); Tony Karon, *India's Security Council Seat: Don't Hold Your Breath*, TIME, Nov. 10, 2010, at <http://www.time.com/time/world/article/0,8599,2030504,00.html>.

⁸⁵ See Lorenzo Casini, "Down the Rabbit Hole": *The Projection of the Public-Private Distinction Beyond the State* (N.Y.U. Jean Monnet Working Paper No. 8, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2349841; Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 CHI. J. INT'L L. 513, 522 (2008).

order to enhance the authorities' ability to execute their missions.⁸⁶ This role typically consists of membership on advisory and consultative panels that provide input to the ultimate decision makers⁸⁷ or that play a defined, limited role in a multistep decision process without exercising final authority. In some circumstances, representatives of various outside constituencies may share plenary decision-making power or participate directly in formulating and establishing regulatory rules.⁸⁸

These complex decision-making arrangements often extend to the structures of the distributed administrations of global regulatory bodies.⁸⁹ Distributed administrations may include as participants particular representatives of other global or domestic organizations, business firms, NGOs, and expert groups whose input and support are valuable to the organization.⁹⁰ They also often include formal as well as informal linkages with other global regulatory bodies operating in the same general field.⁹¹ Such linkages are an important element of the inter-institutional dynamics within a global administrative space that has become ever more densely populated. Governance structures may provide for several decisional bodies interlocking in a system of checks and balances that are "designed to prevent action that oversteps legitimate boundaries by requiring the cooperation of actors with different institutional interests to produce an authoritative decision."⁹²

Some of these arrangements provide for representation of the disregarded on advisory and consulting bodies, more rarely in plenary decision making. But such arrangements hardly offer any significant decisional role for the disregarded in most treaty-based organizations or in inter-governmental networks, especially those dealing with economic and security issues; it is precisely these organizations where problems of disregard are often most acute.⁹³ Granting decisional powers to NGOs or to other representatives of the disregarded threatens contestation

⁸⁶ For example, the World Heritage Convention, adopted by UNESCO in 1972 and administered by the World Heritage Committee, establishes the criteria that qualify a site for designation and protection as a World Heritage site. Such sites are designated by the World Heritage Committee, composed of representatives of twenty-one states that are parties to the Convention. Three international expert bodies—the International Union for Conservation of Nature, the International Council on Monuments and Sites, and the International Centre for the Study of the Preservation and Restoration of Cultural Property—must provide advice to the Committee on the suitability of candidate sites before designations are made. Although not bound by the advisory bodies' recommendations, the Committee benefits from their expertise as well as their legitimacy. However, since all states are represented in the advisory bodies, this arrangement may not prevent possible Committee favoritism for well-known sites and more powerful states. See UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 UST 37, 1037 UNTS 151, at <http://whc.unesco.org/en/convention>.

⁸⁷ Eleonora Cavalieri, *The Role of Advisory Bodies in the World Heritage Convention*, in GAL CASEBOOK, *supra* note 3, at I.E.15.

⁸⁸ See GREEN, *supra* note 73.

⁸⁹ There is scant prospect that disregarded interests could gain a decisional role in the case of distributed administration by domestic regulatory agencies that implement global regulatory norms and decisions. Many such bodies are headed by a single responsible official, leaving no basis for representation of diverse interests in decision making. Even in those agencies with a collegial decisional body, it would be politically unthinkable for domestic legislators to give foreign nations and firms a decisional role. One exception to this generalization is where foreign multinationals pay local army units or police to protect their investments. For an example of resulting tension, see Drew Hinshaw & Chuin-Wei Yap, *Arrests in Ghana Stoke Tensions*, WALL ST. J., June 7, 2013, at <http://online.wsj.com/article/SB10001424127887324069104578531183642717120.html>.

⁹⁰ See Casini, *supra* note 85; Meidinger, *supra* note 85, at 522.

⁹¹ For example, the WTO and Codex Alimentarius Commission.

⁹² Grant & Keohane, *supra* note 75, at 30.

⁹³ See, e.g., World Trade Organization, The Committee on Trade and Environment ('Regular' CTE) (2014), at http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm; Rahim Moloo, *The Quest for Legitimacy in the United Nations: A Role for NGOs?*, 16 UCLA J. INT'L L. & FOREIGN AFF. 1 (2011).

and conflict that would divert the organization from its core mission and would promote policies contrary to members' interests. To meet criticisms and shore up its reputation with the various "legitimacy audiences,"⁹⁴ the organization may afford NGOs and other representatives of the disregarded a nondecisional role, such as membership on advisory or consultative bodies.⁹⁵ These representatives are generally able to have only very limited influence through these forms of participation, which have been criticized as window dressing that provides only the appearance of engagement.⁹⁶

Global bodies involved in environmental and social standard-setting and regulation and in delivery of health and social services—especially those constituted by NGOs and international organizations—may provide a sometimes significant decisional role for organizations that represent the interests and concerns of beneficiary constituencies. For example, global regulatory bodies for social and environmental regulation of global supply chains founded by NGOs, often in partnership with representatives of multinational business and sometimes international organizations, have sought to give decisional roles to representatives of labor, environmental, and local interests in developing countries. These efforts typically confront thorny problems of how best to ensure effective and responsive representation of weakly organized interests and groups, including those that are poor and marginalized,⁹⁷ and have had mixed success.⁹⁸ In some instances, the role accorded to representatives of disregarded interests may be superficial.⁹⁹

Organizational mission effectiveness. A second obstacle to according disregarded interests with decisional rights is the need for organizational effectiveness. Realizing the benefits of specialization may require that decisional authority in global regulatory bodies be restricted to a core constituency invested in promoting its specific mission—whether it be to liberalize trade, secure robust and efficient financial markets, reduce greenhouse gas emissions, ensure the safety of pharmaceuticals, or deliver healthcare—and not be extended to representatives of other constituencies that are affected by the body's decisions but have different objectives. Including such constituencies in decision making would make reaching agreement more difficult, threaten the advantages of specialization, increase transaction costs, undercut efficiency, and impair the accountability of the organization's officials and staff to the members.¹⁰⁰ The

⁹⁴ The concept of "legitimacy audiences" is discussed in Eran Shamir-Borer, *Legitimacy Without Authority in Global Standardization Governance: The Case of the International Organization for Standardization (ISO)*, in GAL CASEBOOK, *supra* note 3, at I.C.1.

⁹⁵ Seema Sapra, *The WTO System of Trade Governance: The Stale NGO Debate and the Appropriate Role for Non-state Actors*, 11 OR. REV. INT'L L. 71, 88 (2009) (describing three instances where the WTO has established consultative schemes for NGOs); *see also* Peter J. Spiro, *Accounting for NGOs*, 3 CHI. J. INT'L L. 161, 167 (2002) (noting that major NGOs "already effectively have a seat at the table"). *Cf.* Sophie Smyth, *NGOs and Legitimacy in International Development*, 61 U. KAN. L. REV. 377, 434–36 (2012) (on the "exclusion norm" that NGOs face, inhibiting participation).

⁹⁶ Rafael Leal-Arcas, *The EU Institutions and Their Modus Operandi in the World Trading System*, 12 COLUM. J. EUR. L. 125, 141–44 (2005) (on attempts to improve civil society engagement).

⁹⁷ *See* Sungjoon Cho & Claire R. Kelly, *Are World Trading Rules Passé?*, 53 VA. J. INT'L L. 623, 664–65 (2013) (on the complexity of today's global supply chains and the marginalization of nonstate actors in the system).

⁹⁸ *See* Meidinger, *supra* note 85, at 530–31.

⁹⁹ Li-Wen Lin, *Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China*, 15 CARDOZO J. INT'L & COMP. L. 321, 346–47 (2007) (reviewing criticisms of global supply chain reforms).

¹⁰⁰ "Relatively neutral government officials who are aware of the larger social trade-offs surrounding decision making on a particular issue will produce more democratic outcomes than decisions shaped primarily by deeply

risks of diverting the organization from its core task and dissipating its energies may be especially significant when global regulatory bodies are asked to deal with structural disregard created by gaps in global regulation. According the disregarded with the decisional authority or access to accountability mechanisms may cause significant reductions in the global benefits from institutional specialization that could justify refusal to take such steps, notwithstanding the disadvantages or harms suffered by the disregarded.¹⁰¹ Such problems are far less serious in the case of nondecisional participation. For example, a regulatory authority may extend to the general public, including representatives of interests and groups outside its core constituencies, the opportunity to submit comments on proposed rules and decisions but not risk major dysfunctions.

Problems in securing effective representation of the disregarded. A third obstacle is the difficulty of developing principled and practicable means for representing the disregarded in decision making. Founders—including states, international organizations, business firms, and, in some cases, NGOs—dominate decision making in such bodies not just because they are founders but because they are established, resourced, and effective institutions representing important interests. They are accountable, however imperfectly, to those interests through domestic or international political processes or are subject to market or market-type disciplines that promote appropriate regard. The disregarded are at best loosely and weakly organized, creating serious difficulties in vesting them with decisional authority in global bodies.¹⁰²

In extending decisional authority beyond its members and core organized constituencies, an organization must specify the groups and societal interests that should be at the table and then identify representatives to occupy those seats.¹⁰³ Where a decision directly affects a discrete group, such as a local community impacted by a development project, this task may be comparatively easy. It is much more difficult when the effects of regulatory decisions are more diffuse and widespread. The choices as to which interests are to be represented and by which representatives would, to a substantial extent, have to be left to the global authority itself, presenting risks of bias and co-optation in the selections.¹⁰⁴

interested private citizens—even those acting with substantial knowledge of the issue and the best of intentions.” ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 224 (2004).

¹⁰¹ The lack of global redistributive mechanisms may, however, require global regulatory bodies to give greater weight to the distributional impacts of their decisions than similar domestic regulatory bodies. Moreover, welfare-maximizing considerations may well not justify the imposition of foreseeable and targeted harms on particular persons and discrete groups, such as asserted terrorist financiers denied the right to travel or indigenous communities wiped out by internationally funded development projects.

¹⁰² The Forest Stewardship Council (FSC) does not allow government agencies or officials to become members, though governments can participate in standard-setting and observe in the FSC General Assembly. Each stakeholder, when applying for membership, selects either the environmental, social, or economic chamber, and the sub-chamber depends on whether legal registration is in a high-income country (North) or low-income country (South), per World Bank definitions. Individual members comprise 10% of the vote in each chamber, and organizations comprise the remaining 90%. The subchamber divisions into North and South are intended “to guarantee equal weight of vote and influence among the various countries and economic powers represented,” FSC, *Frequently Asked Questions* (2014), at <https://us.fsc.org/download.membership-faqs.130.pdf>.

¹⁰³ Some proponents of global constitutionalism suggest that emerging, generally applicable substantive and procedural norms for governance exist that might assure proper representation—or other means for adequate consideration—of affected societal interests, but thus far these suggestions remain highly abstract and fail to provide helpful guidance on redesign of global institutions.

¹⁰⁴ Administrative and regulatory authorities in European countries and the European Union operate within neo-corporatist traditions and practices that enable them to recruit labor unions, trade associations, professional groups, environmental and consumer NGOs, and other groups that governments have recognized as authoritative

NGO-initiated environmental and social regulatory regimes, such as the Forest Stewardship Council,¹⁰⁵ have made progress in solving these problems, although disparities in organization, resources, and other factors have created difficulties in ensuring effective representation for social or environmental interests in developing countries.¹⁰⁶ Even if a group has a vote or seat at the table, its ability to influence decision making depends on its ability to master the often complex and technical issues involved, which requires experience and resources. And, however successful these efforts may prove in the regulatory sectors in which they operate, enormous difficulties may arise in transposing them to many other fields of global regulation, including security, global economic regulation, and development finance.

Similar if less acute problems are presented in nondecisional forms of participation, such as membership on advisory groups. They can be avoided altogether by extending rights of nondecisional participation, such as the opportunity for the general public to submit comments on proposed decisions, although the problem of ensuring effective voice for the disregarded remains.

Deliberative Decision Making: A Promising Pathway to Overcoming Disregard?

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

The growing interest in deliberative approaches to global governance stems in part from practices in European governance, such as the comitology process for harmonizing regulatory

representatives of the interests in question. This practice is neither generally feasible nor likely desirable in the emergent and fluid circumstances of global regulation.

¹⁰⁵ Meidinger, *supra* note 52; Meidinger, *supra* note 85, at 530–31.

¹⁰⁶ Klaus Dingwerth, *North-South Parity in Global Governance: The Affirmative Procedures of the Forest Stewardship Council*, 14 GLOBAL GOVERNANCE 53, 61–64 (2008). In his study of the FSC, Dingwerth found that procedures adopted to promote greater regard for Southern interests did not close the gap in effective influence between the global North and South. Standards disproportionately favored Northern interests. Furthermore, although some areas in the global South were well represented, their representation might lack the resources or ability to influence decisions. He concludes that a broader array of governance arrangements is needed to solve the problem of disregard. *Id.* at 61–64, 66–67.

standards for goods and services and the Open Method of Coordination for cooperative development by member states of certain social and economic programs; some scholars view these practices as successful instances of deliberative decision making.¹⁰⁷ Yet agreement lacks on the extent to which the actual decisional processes approximate the deliberative ideal, include and consider all relevant interests, or otherwise operate effectively.¹⁰⁸

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

Even where they work successfully, however, deliberative processes take substantial time and are therefore unsuitable for making decisions where speed and expedient flexibility are demanded. Deliberative processes are practicable and work best where the participants share common professional experience and outlook and have adequate resources to participate effectively and where the distributional consequences of the alternatives are small. Global bodies have adopted deliberative procedures in a variety of fields given their problem-solving utility and ability to achieve “buy-in” by the participating constituencies for the standards that emerge. Nonetheless, decision making is rarely purely deliberative; some greater or lesser admixture of interest, power, and implicit bargaining is often involved.¹⁰⁹ In most instances, environmental, consumer, and social interests, including those of developing-country workers

¹⁰⁷ Comitology is a process of the European Union for developing harmonized regulatory standards for specific sectors in order to implement EU legislation. Participants include the European Commission, which chairs the process, and representatives of the member states and experts. See Christian Joerges, *Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, 3 EUR. L.J. 273 (1997); Christian Joerges, “Good Governance” Through Comitology?, in EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS 311 (Christian Joerges & Ellen Vos eds., 1999); Jürgen Neyer, *Discourse and Order in the EU*, 41 J. COMMON MKT. STUD. 687 (2003). On experimentalist governance, see Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271, 274 (2008) (arguing that the Open Method of Coordination “give[s] precise definition” to deliberation); Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 313 (1997); Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U. J. INT’L L. & POL. 763 (2005).

¹⁰⁸ See Mark A. Pollack, *Control Mechanism or Deliberative Democracy? Two Images of Comitology*, 36 COMP. POL. STUD. 125 (2003); Bart M. J. Szewczyk, *European Citizenship and National Democracy: Contemporary Sources of Legitimacy of the European Union*, 17 COLUM. J. EUR. L. 151, 184 (2011). See generally Chen-Bo Zhong, *The Ethical Dangers of Deliberative Decision Making*, 56 ADMIN. SCI. Q. 1 (2011); Michael E. Morrell, *Deliberation, Democratic Decision-Making and Internal Political Efficiency*, 27 POL. BEHAV. 49 (2005); Timur Kuran, *Insincere Deliberation and Democratic Failures*, 12 CRITICAL REV. 529 (1998). Kenneth Armstrong & Claire Kilpatrick, *Law, Governance, or New Governance? The Changing Open Method of Coordination*, 13 COLUM. J. EUR. L. 649, 658–61 (2007) (noting the difference between the ideal of the Open Method of Coordination (OMC) and its practice); Timo Idema & R. Daniel Keleman, *New Modes of Governance, the Open Method of Co-ordination and Other Fashionable Red Herring*, 7 PERSP. EUR. POL. & SOC’Y 108, 110 (2006) (questioning the ideal of the OMC and its ability to enhance the legitimacy of EU policy making, and questioning the OMC’s ability to promote deliberation).

¹⁰⁹ See Neil Craik, *Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments*, 38 VICTORIA U. WELLINGTON L. REV. 381, 386, 390 (2007) (distinguishing deliberation as less

and citizens, are generally either not represented at all or only marginally represented.¹¹⁰ This circumstance, however, may not be of great concern with many specialized regimes that set technical standards having only very modest and peripheral distributional implications for broader social interests.

NGO-led global regulatory programs, ranging from the Greenhouse Gas Protocol¹¹¹ to the Extractive Industries Transparency Initiative¹¹² to various global supply chain social and environmental regulatory programs,¹¹³ present rather encouraging examples of a more inclusive approach to deliberative decisional processes. Global regimes constituted by governments and international organizations are increasingly using consultative bodies representing a broader range of constituencies that follow some version of deliberative processes. These bodies might gradually assume some decisional role, transforming nondecisional participation into decisional participation.¹¹⁴

Notwithstanding these encouraging developments, efforts to promote broad use of more-inclusive deliberative processes for global regulatory decision making confront the same three basic obstacles discussed above: the reluctance by dominant members, especially powerful governments, to share authority; the need for efficient specialization; and the problems in providing effective representation for disregarded interests. Some progress has been made in addressing these obstacles, as the examples above illustrate; global regulatory bodies, especially private and hybrid bodies, increasingly embrace a broad range of “stakeholders” in their governance, including in deliberative decision-making processes. They do so to enhance the quality and uptake of their regulatory products. Particularly in the context of networked regulatory strategies and organizations, decisional participation through deliberative modes has in many instances been successful in promoting these objectives. But even in these circumstances, the stubborn problem of securing effective representation for poorly organized and under-resourced groups and interests persists. A high degree of technical capacity and knowledge and the ability to participate fully and regularly are often essential. Moreover, it is inconceivable that multistakeholder processes, in some cases involving deliberative decision making, will be

vulnerable to differences in bargaining power than aggregative models, and suggesting that using deliberative processes in science-based decisions may address power differentials between experts and nonexperts).

¹¹⁰ See Ayelet Berman, *The Role of Domestic Administrative Law in the Transnational Regulatory Networks* (Centre for Trade and Economic Integration Working Paper No. CTEI-2011-08, 2011), available at http://graduate.institute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/working_papers/CTEI-2011-08.pdf (discussing the International Conference on Harmonisation (ICH) standards for pharmaceutical safety testing, set by representatives of EU, U.S., and Japanese regulators and major pharmaceutical companies, which author considers inadequate for consumer and developing-country interests); see also Sarah Molinoff, *Shifting Standards in FDA Regulation of Foreign Clinical Trials* (2012) (unpublished manuscript) (on file with author) (finding that ICH standards allowing use of placebos in clinical trials reflects dominant influence of interests of the pharmaceutical manufacturers and EU, U.S., and Japanese regulators, disregarding ethical concerns of global medical and medical research bodies and some developing countries).

¹¹¹ At <http://www.ghgprotocol.org>; see also JESSICA F. GREEN, *RETHINKING PRIVATE AUTHORITY: AGENTS AND ENTREPRENEURS IN GLOBAL ENVIRONMENTAL GOVERNANCE* (2013).

¹¹² At <http://eiti.org>.

¹¹³ Meidinger, *supra* note 85.

¹¹⁴ An analogous development has occurred in the Codex Alimentarius Commission where civil society organization representatives, including business representatives and NGOs, must obtain the right to attend and speak at meetings where government representatives decide on Codex standards. Some observers, however, find that Codex decisions on standards still unduly favor producer interests. See Michael Livermore, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 N.Y.U. L. REV. 766, 784–86 (2006).

adopted for significant decisions in the more important and powerful economic global regulatory bodies. And they may be unsuited for use due to the character of regulatory tasks at hand, for example in the field of security.

IV. ACCOUNTABILITY MECHANISMS

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

Accountability is all the rage. Accountability is “an ever-expanding concept”¹¹⁵ that “crops up everywhere performing all manners of analytical and rhetorical tasks and carrying most of the burdens of democratic ‘governance.’”¹¹⁶ The term functions as “a placeholder for multiple contemporary anxieties.”¹¹⁷ It is rare, indeed, to find any writing on global governance—whether by lawyers, political scientists, international relations specialists, political theorists, or NGO advocates—that does not cry out for enhanced accountability of international organizations and other global institutions. All manner of measures are advocated to secure accountability, including enhanced transparency, participation, rulemaking, reason giving, deliberation, dialogue, benchmarking, and reporting.

Accountability mechanisms are important institutional tools that can improve governance in many contexts, but they are not cure-alls for the ills of global governance. There has been relatively little careful and sustained analysis of the concept of accountability and its relation to specific global governance problems and possibilities for institutional reform.¹¹⁸ This part seeks to augment and enrich that corpus. It explicates the structural features and functions of accountability mechanisms in order to clarify their role in governance. It first offers a generic account of accountability, which is applicable to any realm of governance. It takes a positive

¹¹⁵ Richard Mulgan, “Accountability”: *An-Ever-Expanding Concept?*, 78 PUB. ADMIN. REV. 555 (2000), quoted in CAROL HARLOW, ACCOUNTABILITY IN THE EUROPEAN UNION 1 (2002).

¹¹⁶ *Id.*

¹¹⁷ Jerry L. Mashaw, *Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law*, 5(1) ISSUES IN LEGAL SCHOLARSHIP Art. 4 (Mar. 2005), available at <http://iilj.org/courses/documents/Mashaw.IssuesinLegalScholarship.pdf>.

¹¹⁸ Jonathan Koppell posits that disagreement about the meaning of accountability is “masked by consensus on its importance and desirability.” Jonathan Koppell, *Pathologies of Accountability: ICANN and the Challenge of “Multiple Accountability Disorder.”* 65 PUB. ADMIN. REV. 94, 94 (2005). Nevertheless, analysis of the concept of accountability within public administration is important because “conflicting expectations borne of disparate conceptions of accountability undermine organizational effectiveness.” *Id.* For a dissection of the concept of accountability based on the actors involved and the way in which they interact, see Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L.J. 447 (2007); see also Susan Rose-Ackerman, *Regulation and Public Law in Comparative Perspective*, 60 U. TORONTO L.J. 519, 523 (2010) (arguing for three kinds of accountability that support legitimacy: effective performance of government programs, protection of human rights, and creation of democratically supported policies); Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMP. L. 859, 872 n.32 (2011) (finding four kinds of accountability relations in domestic public administration: relations with elected politicians, organized interests, courts, and the public; and arguing that the transnational dimension operates in the same way); JONATHAN G. S. KOPPELL, *WORLD RULE: ACCOUNTABILITY, LEGITIMACY, AND THE DESIGN OF GLOBAL GOVERNANCE* 31 (2010) (arguing for five kinds of accountability: transparency, liability, controllability, responsibility, and responsiveness).

rather than a normative approach to analyzing accountability. It treats accountability not as a hallmark of legitimacy but as a family of specific institutional arrangements for conferring and controlling the use of power. These instruments can be used to advance various ends, including advancing the interests of the powerful or redressing disregard. The discussion then considers the role of accountability mechanisms in global administrative regulation and their potential for fostering greater regard for the disregarded.

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

The Five Accountability Mechanisms

The five basic types of institutional accountability mechanisms are electoral, hierarchical, supervisory, fiscal, and legal. Each satisfies three fundamental requirements: (1) a specified accounteer, who is subject to being called to provide account, including, as appropriate, explanation and justification for his conduct; (2) a specified account holder who can require that the accounteer render account for his performance; and (3) the ability and authority of the account holder to impose sanctions or mobilize other remedies for deficient performance by the accounteer and perhaps also to confer rewards for a superior performance by the accounteer.¹¹⁹

Grant and Keohane have systematically examined accountability in the global governance context,¹²⁰ while Richard Mulgan,¹²¹ Mark Bovens,¹²² and Jerry Mashaw¹²³ have done so in the domestic context.¹²⁴ Others have studied accountability in the context of international organizations¹²⁵ and regulatory administration.¹²⁶ As shown by these and other authors, accountability is a relational concept. Some accountability regimes may include elements beyond these three essential requirements, for example a specified process for the rendering of account by the accounteer and for evaluation of his performance by the account holder or a third

¹¹⁹ These essential elements are broadly consistent with those identified by Grant and Keohane and by Mashaw, although these authors characterize a much broader range of measures as involving accountability. I argue below that this broader application is inconsistent with the core definition of accountability that they embrace. Bovens defines accountability more narrowly as a relationship between an actor and a forum in which the actor must explain and justify his conduct, in which the forum can ask questions and judge the conduct, and in which the actor may face consequences. Bovens, *supra* note 118, at 447. Bovens’s taxonomy of accountability relations stems from three questions: who is giving account, to whom the actor is giving account, and what kind of conduct is in question. *Id.* at 450.

¹²⁰ Grant & Keohane, *supra* note 75.

¹²¹ RICHARD MULGAN, HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACY (2003).

¹²² Bovens, *supra* note 118, at 448.

¹²³ Mashaw, *supra* note 117; see also, e.g., Colin Scott, *Accountability in the Regulatory State*, 27 J.L. & SOC’Y 38 (2000).

¹²⁴ For discussion of accountability in the context of the European Union, see Mulgan, *supra* note 115.

¹²⁵ INT’L L. ASS’N, ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS, FINAL REPORT (2004), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/9> [hereinafter ILA FINAL REPORT]; *Symposium on Accountability in the International Legal Order*, 2005 NETH. Y.B. INT’L L 1; Deirdre Curtin & André Nollkaemper, *Conceptualizing Accountability in International and European Law*, 2005 NETH. Y.B. INT’L L 3; Ige F. Dekker, *Making Sense of Accountability in International Institutional Law*, 2005 NETH. Y.B. INT’L L 83.

¹²⁶ E.g., Black, *supra* note 23; Scott, *supra* note 23.

party (such as a court). Some regimes may also include the giving of reasons or justifications by the accountant for his conduct, the giving of reasons by the account holder for her evaluations, and the standards by which the accountant's conduct is to be evaluated.¹²⁷ These additional elements are not essential requirements of accountability and can, as discussed in part V, function independently to address the problem of disregard.

All five accountability mechanisms have a common structure: the ex post calling by an account holder of an accountant to justify his prior conduct, and the authority and ability of the account holder to provide some form of sanction or other remedy for deficient performance.¹²⁸ The prospect of having to provide such accounting and the potential consequences of a negative evaluation provide ex ante incentives for the accountant to give appropriate consideration to the interests of the account holder in making decisions.

There are, however, two fundamentally different types of accountant–account–holder relationships that arise through two quite different means. The first category, which relates to electoral, hierarchical, supervisory, and fiscal accountability mechanisms, involves a delegation or transfer of authority or resources from one actor or set of actors (account holders) to another actor or set of actors (accountants) where the accountants are to act in the interest of the grantors/account holders or designated third persons. This process creates a principal–agent relation between grantor and grantee. The second category consists of legal accountability mechanisms dealing with conduct by the accountant that the law prohibits or invalidates or for which it requires payment of compensation or other redress. The account holder has the authority to bring a legal action against the accountant in a court or other tribunal or reviewing body to determine whether the account holder's legal rights have been infringed and, if so, to obtain an appropriate remedy. No principal–agent relation is inherently involved in this second category.

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

Electoral accountability exists when account holders are entitled to vote for the election of public or private officeholders, the accountants. Elections involve a grant by voters/electors of authority to those elected to hold and exercise the power of office.¹²⁹ The electoral accountability mechanism comes into play when officeholders seek reelection; those whose

¹²⁷ While examining the accountability of International Election Monitors, Anne van Aaken and Richard Chambers describe an accountability process that hinges on reason giving. Anne van Aaken & Richard Chambers, *The Accountability and Independence of International Election Observers*, 6 INT'L ORG. L. REV. 541 (2009).

¹²⁸ See Andreas Schedler, *Conceptualizing Accountability*, in THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES 14 (Andreas Schedler, Larry Diamond & Marc F. Plattner eds., 1999) (“[T]he notion of political accountability carries two basic connotations: answerability, the obligation of public officials to inform about and to explain what they are doing; and enforcement, the capacity of accounting agencies to impose sanctions on powerholders who have violated their public duties.”).

¹²⁹ In proposing a strictly hierarchical view of accountability, Edward Rubin argues that elections are not accountability mechanisms. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2075 (2005). Concededly, elections are at best imperfect and at worst actually diminish democratic accountability. That an accountability mechanism is failing or is inefficient does not, however, signify that it is no longer an accountability mechanism.

performance is judged deficient by a sufficient number of voters are not reelected.¹³⁰ Although incumbents invariably render account for their performance in office, no set procedure generally exists for doing so. Moreover, in general, electors need not follow any specific standards in voting and do not have to give any reasons or otherwise account for their votes.¹³¹

Hierarchical accountability operates in governments, firms, and other organizations or between individuals where superiors have the right to control and evaluate the performance of subordinates. In cases of inadequate performance, superiors can either impose various sanctions, such as pay cuts, demotion, or termination, or adopt other remedies, such as reassignment, retraining, or changes in organizational policies and structures. They can also reward superior performance. The relation involves some greater or lesser grant or delegation of authority or resources to subordinates. In cases where subordinates have the security of tenure—for example, government civil servants or unionized employees—regular procedures and standards and reasons for evaluations and sanctions usually exist. Where subordinates hold their position at the pleasure of superiors, these elements are often absent.

Supervisory accountability is a catchall category for relationships in which a delegation of authority or resources has occurred but in which the grantor does not have the right to control directly the grantee's conduct. Examples include the relations between clients and independent contractors or professionals, between the legislature and administrative agencies, and between states and the international organizations of which they are members. There may or may not be established standards and procedures and giving of reasons for evaluation of the grantee's conduct. Sanctions and other remedies include revocation or nonrenewal of the delegated authority or resources conferred, or other corrective measures such as organizational and policy changes.

Fiscal accountability involves financial accounting and audit procedures by which the grantee of funds or other resources accounts for their use to an account holder, often the grantor, in accordance with generally accepted accounting standards and practices. Sanctions can include revocation of the grant and return of funds, denial of future grants, or imposition of more restrictive conditions on the activities of the grantee.¹³²

Under all of these four mechanisms, the purpose of the holding to account is to ensure that the grantee/accounter has given appropriate regard to the interests and concerns of the grantor/

¹³⁰ "Every citizen shall have the right and the opportunity . . . to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." International Covenant on Civil and Political Rights, Art. 25, Dec. 16, 1966, 999 UNTS 171; see Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869 (1995); Samuel Issacharoff, *Polarized Voting and the Political Process*, 90 MICH. L. REV. 1833 (1992).

¹³¹ The right of voters to register their preferences without having to reveal or account for them may be important. John Ferejohn, *Incumbent Performance and Electoral Control*, 50 PUB. CHOICE 5 (1986). Historically, electoral mechanisms can be coupled with other forms of accountability, particularly legal accountability, which is described in further detail *infra*. For example, in ancient Athens, certain public offices were required to submit to an end-term audit for how they performed in public office and were subject to impeachment while in office, both before public tribunals. See R. K. SINCLAIR, *DEMOCRACY AND PARTICIPATION IN ATHENS* 78–80 (1988). It should be noted that the selection of magistrates in ancient Athens was partially done by lottery, and thus the system bears marked differences to modern systems of government. See *id.* at 17–18.

¹³² Fiscal accountability often operates in conjunction with hierarchical, supervisory, or legal accountability. But because the concept of accountability originated in rendering account in financial matters, fiscal accountability has distinct and specialized traditions, standards, and procedures and accordingly is retained in this analysis as a separate category.

principal who is the account holder. Where the grantor/principal judges a performance as deficient, the grantor/principal has the right to either revoke or not renew the grant; this power is the ultimate source of the authority of the grantor/principal to take less drastic corrective measures and to expect that the grantee/accounter will adhere to them.¹³³

Legal accountability involves conduct by the accounter contrary to what the law prescribes and for which it provides a remedy. The account holder obtains accountability by instituting an action against the accounter in a court or other adjudicatory forum to determine whether the account holder's rights have been infringed and, if so, to obtain an appropriate remedy. The proceedings require the defendant, respondent, or body whose decisions are being reviewed to account for its conduct. The remedy may be the imposition of money damages or specific relief such as an injunction. But it may also consist of a declaration that the accounter has (or has not) acted contrary to governing legal norms. Institutional machinery may exist to enforce such remedies. As experience under international law reveals, an authoritative legal determination that one party has acted contrary to the rights of another may have significant practical effects, including benefits for the prevailing party, even in the absence of enforcement machinery, due to the normative force of such a judgment, to reputational influences, and to other factors.

Legal accountability is often overlooked by authors focusing on grant-based accountability mechanisms.¹³⁴ It does not depend on any prior delegation of resources or authority from a principal to an agent. Rights and mechanisms of legal accountability for their vindication are created by law, including the municipal public and private law of nations, by international law, and by the internal law of organizations. Some cases involve prior delegations of resources and authority from a principal to an agent, but, in such cases, the legal rights and obligations are created by law and not by the delegation. In most cases, for example in tort or contracts or administrative law, there is no principal-agent relation between the parties. In all these cases, the prospect of legal accountability gives incentives to the accounter to give regard to and respect the rights of right-bearing account holders.

With the growth of global administrative law, including the greater availability of review of global administrative decisions by regime-specific tribunals, by international and domestic courts and tribunals, and by other global administrative bodies, legal accountability is becoming a more important factor in global administrative governance.¹³⁵ Review can be direct, by a tribunal with jurisdiction to determine the legal validity of an administrative decision and, in some instances—for example in the case of the global Court of Arbitration for Sport—to render it null and void. In other instances, review may be indirect, for example where a party to a case before a domestic court invokes as relevant a global standard or decision, and the court is called upon to determine its legal significance.¹³⁶

¹³³ In some cases, the grantor may also invoke legal accountability mechanisms to obtain additional redress against the grantee. Grantees may also in some cases be able to assert legal claims against the grantor for breach of contract.

¹³⁴ See, e.g., Scott, *supra* note 123, at 40–41 (noting that the concept of accountability must address the increasing number of tribunals).

¹³⁵ Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L. & POL. 663, 669 (2005) (noting the relative importance of independent decision-making committees in global administrative law compared to domestic administrative law); Bogdandy, Dann & Goldmann, *supra* note 56, at 1385–86 (arguing that when institutions make determinations, they are exercising public authority).

¹³⁶ See Benedict Kingsbury, *Weighing Global Regulatory Rules and Decisions in National Courts*, 2009 ACTA JURIDICA 90, 99.

Legal accountability for global regulatory administrative actions can be obtained through liability actions for compensation as well as through direct review of decisions by a court, tribunal, or other reviewing body. Judicial review of official conduct through civil-liability actions has historically been an important element of Anglo-American administrative law.¹³⁷ International law principles of responsibility and liability for wrongful actions by states have been extended to international organizations, but not to the other three basic types of global regulatory bodies—intergovernmental networks, private regulatory bodies, and hybrid public-private bodies. Moreover, liability extends only to acts that are wrongful under international law, and international organizations typically assert immunity from suit in national courts.¹³⁸ Private regulatory bodies, however, are subject to liability in damages for conduct that is wrongful under contract, tort, and competition law.¹³⁹

Accountability is a concept and practice distinct from but often overlapping with the distinct concept of compliance by the regulated—the addressees of regulatory norms. Compliance arrangements may include accountability mechanisms, such as the WTO dispute settlement mechanism for securing compliance by members with WTO disciplines, or the UN Appeals Tribunal for ensuring that personnel decisions by UN staff comply with applicable procedures and standards. But compliance arrangements also include education, financial and technical assistance, peer review, and “managerial” approaches.¹⁴⁰ Accountability mechanisms in global regulation are often aimed at the regulatory body and its staff, not the regulated, and exist for purposes other than compliance, for example to influence the policies of decision makers, determine funding levels and priorities, or direct and discipline staff.

Using Accountability Mechanisms to Promote Regard

The ultimate function of accountability mechanisms is to promote due regard by the accounter for the interests, concerns, and rights of the account holder. All five accountability mechanisms operate in decision making by governments and public authorities, by private actors including corporations and nonprofit organizations, and by the various types of global administrative bodies. All are grounded in relational structures involving a separation between those who have the power of choice and those who bear the consequences of that choice. The mechanisms seek to ensure that those who decide will give regard to the interests and concerns of those affected by giving account holders the right to invoke accountability mechanisms. Several different types of accountability mechanisms operate in most decision-making institutions, and, in many cases, all five may function in complex interrelations. In practice, the ability of the disregarded to use accountability mechanisms to redress disregard by global administrative authorities is often quite restricted. Apart from cases where they are founders/members or financial supporters of global regulatory bodies including NGOs or international organizations—such as the United Nations International Children’s Emergency Fund (UNICEF)

¹³⁷ LOUIS JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 235–40 (1965).

¹³⁸ See Jutta Brunnée, *International Legal Accountability Through the Lens of Law of State Responsibility*, 2005 NETH. Y.B. INT’L L. 3, 21 (discussing limitations of international law principles regarding the responsibility and liability in securing accountability for international organizations).

¹³⁹ SCHEPEL, *supra* note 38.

¹⁴⁰ See Ronald B. Mitchell, *Compliance Theory: Compliance, Effectiveness, and Behavior Change in International Environmental Law*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* 893, 900, 910 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2008).

and the World Health Organization (WHO)—that represent or advocate for the disregarded, disregarded groups generally cannot access the four grant-based accountability mechanisms to influence the decisions of global regulatory bodies or their distributed administrations. Disregarded individuals are even less capable of accessing these mechanisms.

Increasingly, however, individuals and representatives of disregarded interests can invoke legal accountability mechanisms with regard to decisions of global regulatory bodies. International and domestic courts have shown a growing willingness to exercise such review, for example in refusing or restricting enforcement of the UN Security Council's Al Qaida Sanctions Committee regime.¹⁴¹ Such review is generally episodic and not consistently available to those seeking remedy for disregard. Yet, even episodic court decisions finding global regulatory bodies' decision-making procedures deficient can stimulate adoption of changes that will promote greater regard for the disregarded.¹⁴²

Furthermore, a growing number of specialized tribunals have been established within global regulatory regimes that provide review as a matter of course. Notable examples are the World Bank Inspection Panel and similar arrangements established by other international financial institutions to ensure compliance with social and environmental standards in funding infrastructure projects in developing countries. Local citizens threatened with harm by such projects can attain review of project-funding decisions for conformance with the standards.¹⁴³ Among other examples of regime-specific reviewing bodies are the Court of Arbitration for Sport (established by a Swiss foundation and itself subject to review by the Swiss Federal Supreme Court) and the Aarhus Convention Compliance Committee; private parties can obtain review by both bodies. New forms of review are also emerging under NGOs and business regimes for regulating compliance by multinational firms and their downstream contractors in developing countries with environmental and worker-protection standards for production operations in developing countries.¹⁴⁴

As these examples illustrate, the bodies whose decisions are subject to review can include an internal decision-making component of a global regulatory body, such as World Bank or UNHCR staff, or decisions by the global body itself, such as the UN Security Council or the Fédération Internationale de Football (FIFA). Review may be direct, by a tribunal like the World Bank Sanctions Board or the Court of Arbitration for Sport that is part of the same regime complex as the decisional body, or indirect, through review by a domestic court of a

¹⁴¹ *R. v. Horncastle*, [2009] UKSC 14, [2010] 2 A.C. 373 (UK), at http://www.supremecourt.uk/decided-cases/docs/UKSC_2009_0073_Judgment.pdf; *Abdelrazik v. Canada* (Minister of Foreign Affairs) (2009), [2010] 1 F.C.R. 267; *Kadi*, *supra* note 41.

¹⁴² See Anna-Maria Taliärm, *Human Rights and Counterterrorism*, in CAPACITY BUILDING IN THE FIGHT AGAINST TERRORISM 18, 25 (Uğur Gürbüz ed., 2013) (noting that since 2011 the UN Security Council's Al Qaida Sanctions Committee publishes narratives explaining why individuals or entities have been listed, increasing transparency—a result of the *Kadi* decision and similar cases); Lorenzo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, 12 GERMAN L.J. 1317, 1319 (2011) (defining *lex sportiva* as the judge-made principles and rules of sport law).

¹⁴³ See Dana Clark, *Understanding the World Bank Inspection Panel*, in DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL 1, 1 (Dana Clark, Jonathan Fox & Kay Treakle eds., 2003); THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOs AND GRASSROOTS MOVEMENTS (Jonathan Fox & L. David Brown eds., 2000).

¹⁴⁴ David Vogel, *Private Regulation of Global Corporate Conduct*, in THE POLITICS OF GLOBAL REGULATION 151 (Walter Mattli & Ngaire Woods eds., 2009); Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J.L. SOC'Y 20, 38 (2011); Michael Carney, *Globalization and the Renewal of Asian Business Networks*, 22 ASIA PAC. J. MGMT. 337, 344 (2005) (discussing social responsibility statements and compliance monitors).

domestic agency's implementation of global rules and decisions such as listings by the UN Security Council's Al Qaida Sanctions Committee.

Review bodies such as the World Bank Inspection Panel illustrate how organizational principals may establish mechanisms for review in order to more effectively supervise and secure compliance by their agents with the directions and requirements laid down by the principals. The arrangements under multilateral treaties for review of members' compliance, including the WTO dispute settlement measures, are a variant on this notion. Domestic systems of administrative law have been analyzed in precisely these terms. The legislature establishes review by independent courts of an administrative agency's decisions to ensure their compliance with governing statutes. In this conception, the legislature grants private actors the ability to secure review by courts in order to mobilize the private actors' energies as "fire alarm" mechanisms to seek out agency derelictions and redress them.¹⁴⁵ In the early development of review of administrative action by the royal courts in England, suits by aggrieved citizens against lower-level officials, including local officials, helped to ensure that they complied with the law of the realm.¹⁴⁶ Under principal-agent analysis, those seeking review act as instruments to make certain that agents are (indirectly) accountable to their principals; those seeking review are accordingly given accountability rights primarily not to vindicate their own interests and concerns but those of the principal. But review also enables those who are entitled to invoke it have rights of legal accountability to vindicate their own interests and concerns. Further, the principal-agent analysis blinks the reality that reviewing courts and other bodies, like the WTO Appellate Body, enjoy a measure of discretion to resolve cases in ways at variance with the interests of their principals and may choose to do so.¹⁴⁷ Finally, the conception of review by third parties as an instrument for securing accountability to principals does not explain review by international and domestic courts of global bodies' decisions because those courts cannot be regarded as instruments of the global bodies.

Although the growth of independent review is a welcome development, significant limits exist to mobilizing legal accountability mechanisms for addressing disregard by global regulatory bodies. A global regulatory body's more powerful members may sometimes favor establishing specialized reviewing bodies to maintain the regime's integrity by securing compliance by its components and staff with the regime's governing norms, as exemplified by the creation of the World Bank Inspection Panel and the WTO Appellate Body. But more often, they may oppose creation of independent review bodies as ceding too much power to such bodies and outsiders and as impairing flexibility and expediency in decision making. Legal accountability mechanisms also involve significant costs in terms of resources and decisional delay. Multiplying accountability mechanisms may so diffuse responsibility as to undermine accountability to any particular account holder and impair organizational effectiveness in other ways, provoking growing concern with "multiple accountability disorder."¹⁴⁸

¹⁴⁵ See Lupia & McCubbins, *Learning from Oversight: Fire Alarms and Police Patrol Reconstructed*, *supra* note 24.

¹⁴⁶ See JAFFE, *supra* note 137, at 329–34; EDITH HENDERSON, *FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW; CERTIORARI AND MANDAMUS IN THE SEVENTEENTH CENTURY* (1963).

¹⁴⁷ See Judith Goldstein & Richard Steinberg, *Regulatory Shift: The Rise of Judicial Liberalization at the WTO*, in *THE POLITICS OF GLOBAL REGULATION* 211 (Walter Mattli & Ngaire Woods eds., 2009).

¹⁴⁸ Koppell, *supra* note 118.

Why Broader Definitions of Accountability Should Be Rejected

Many other scholars as well as official bodies and global governance reformers have invoked much broader conceptions of accountability mechanisms than those embraced in this article,¹⁴⁹ although a handful of scholars have followed a narrower approach.¹⁵⁰ Those following a broader approach have characterized one or more of the following measures as accountability mechanisms:

- *Competition in markets for goods, services, and investment* is viewed as a mechanism by which firms are accountable to customers and investors.¹⁵¹
- *Competition in markets for regulation* can be regarded as a form of market accountability in which public or private entities that generate regulatory norms are rendered accountable to norm “consumers” deciding whether to adopt them.¹⁵²
- *Peer reputational influences and incentives* are said to function as mechanisms whereby actors are accountable to peers for their performance.¹⁵³
- *Public reputational influences and incentives* have likewise been characterized as means by which organizations are accountable for their performance to the public generally.¹⁵⁴
- *Transparency*, meaning open decision making and information disclosure, is regarded as “a continual process of ‘giving an account’ to an informed and active civil society.”¹⁵⁵
- *Participation* has been characterized as a form of accountability through which “the performance of power holders is evaluated by those affected by their actions.”¹⁵⁶
- *Reason giving* is viewed as a process through which decision makers account for their decisions.¹⁵⁷

¹⁴⁹ Grant and Keohane, for example, identify the following accountability mechanisms: hierarchical, supervisory, fiscal, legal, market, peer reputational, and public reputational. Grant & Keohane, *supra* note 75, at 36, Tbl.2; Mashaw, *supra* note 117, at 27, Fig. 1 (identifying political, administrative, legal, product market, labor market, financial market, family, professional, and team accountability). Similar to that of Grant and Keohane, Mashaw’s framework divides human relations and their corresponding accountability mechanisms into three categories: state governance, private markets, and social networks. However, the analysis in this paper focuses on the governance of regulatory authorities.

¹⁵⁰ Mulgan and Rubin restrict accountability to hierarchical relations. Mulgan, *supra* note 116, at 571; Rubin, *supra* note 129, at 2074.

¹⁵¹ Grant & Keohane *supra* note 75, at 35–40.

¹⁵² MARKET-BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE (John D. Donahue & Joseph S. Nye Jr. eds., 2002) (arguing for a market-based approach for pursuing the goals of governance).

¹⁵³ Grant & Keohane, *supra* note 75, at 37.

¹⁵⁴ *Id.* at 36.

¹⁵⁵ See, e.g., HARLOW, *supra* note 115, at 10, 12 (open decision making and freedom of information practices represent “a continual process of ‘giving an account’ to an informed and active civil society”); HIGH-LEVEL PANEL ON IMF BOARD ACCOUNTABILITY, KEY FINDINGS AND RECOMMENDATIONS (2007), available at <http://www.new-rules.org/about-new-rules/publications/37-key-findings-and-recommendations-of-the-high-level-panel-on-imf-board-accountability>; see also David Gartner, *Uncovering Bretton Woods: Conditional Transparency, the World Bank, and the International Monetary Fund*, 45 GEO. WASH. INT’L L. REV. 121 (2013); Bronwen Morgan, *Technocratic v. Convivial Accountability*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 243 (Michael W. Dowdle ed., 2006).

¹⁵⁶ See, e.g., Grant & Keohane, *supra* note 75, at 31 (participation being a form of accountability through which “the performance of power wielders is evaluated by those affected by their actions”); *id.* at 37 (noting that the World Bank extols “participatory accountability”); ILA FINAL REPORT, *supra* note 125, at 9.

¹⁵⁷ ILA FINAL REPORT, *supra* note 125, at 13.

All seven of these practices and influences have great importance in global regulatory governance. They all can potentially be harnessed to redress disregard. Yet none is appropriately characterized as an accountability mechanism. None involves one of the foundations of accountability relations, in that there is no delegation of resources or authority or a system of legal rights and duties. None exhibits the three structural elements of accountability mechanisms: (1) a specified accounteer, who is subject to being called to provide account for his conduct; (2) a specified account holder who can require the accounteer to render account; and (3) the ability and authority of the account holder to impose sanctions or other remedies for deficient performance.

Practices for transparency and (nondecisional) participation¹⁵⁸ do not involve any rendering of account to designated account holders. These practices may play a role in the operation of certain accountability mechanisms¹⁵⁹ but in themselves are not accountability mechanisms. Similarly, competition in markets for goods, services, and investment—as well in markets for regulation—has certain features that resemble some of the features of accountability mechanisms.¹⁶⁰ These markets involve evaluation by current or potential consumers of goods, services, investment opportunities, and regulatory standards. Negative evaluations may have adverse consequences. For example, consumers may refrain from involvement with or buying from suppliers of goods whose performance is judged inferior, giving strong incentives for suppliers to design their offerings to meet consumer preferences. Markets, however, contain no structured process whereby suppliers render account for their conduct to consumers. As Mashaw points out, accountability is described as “liab[ility] to be called to account; answerable.”¹⁶¹ Consumers and suppliers have no authority to require answers, and firms are not obliged to provide them. The market remedy for dissatisfied consumers is simply to “exit” and to cease buying deficient wares or never to buy them in the first place. The dialogic “voice” element of accountability is absent.¹⁶² Likewise, peer and public reputational influences and pressures may reflect evaluation of conduct, carry negative consequences for conduct judged

¹⁵⁸ Decisional participation is involved in the exercise of decisional authority, as contrasted with rendering account for decisions previously made.

¹⁵⁹ For example, in legal accountability mechanisms, such as reviews of administrative decisions, those securing review enjoy the right to participate in hearings before the reviewing body, such as the ILO Administrative Tribunal, the World Bank Inspection Panel, and the Aarhus Compliance Committee. Also, the opportunity to build a record by submitting evidence and argument to the administrative decision-making body may be critical in securing effective review by a tribunal of its decision.

¹⁶⁰ In this regard, it is important to distinguish between the rules and institutions that form and constitute markets, such as contract law, the law of business associations, and competition law, and the ability for market competition to effect change in market participants. The constitutive rules of marketplaces may well use accountability mechanisms (alongside decisional rules and other mechanisms) to set the rules of the game. But this question is separate from whether a consumer’s choice between different brands of shoes, for example, forms an accountability relationship between the consumer and supplier.

¹⁶¹ Mashaw, *supra* note 117, at 16 (quoting WEBSTER’S NEW COLLEGIATE DICTIONARY (1959)).

¹⁶² ALBERT HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970). Thus, market actors are literally *not accountable* either to their existing contractual partners unless the latter can assert tort or contract claims against them (legal accountability) or to their potential customers. Of course the relevant contractual relationships may give rise to legal accountability. And markets may spawn governance structures, such as corporations or trust indentures, that enable some market partners, such as shareholders or bondholders, to exercise supervisory or fiscal accountability mechanisms. But these structures are distinct from market disciplines based on market choice.

deficient, and lead actors to pay heed to the interests and concerns of peers or the public, but they do not require a rendering of account by accounters to designated account holders.¹⁶³

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

These assessments, however, pose the question of why we should limit the accountability label to mechanisms with the three structural accouter–account–holder elements and not adopt a broader approach like that embraced by some other scholars and by many practitioners. Ultimately, accountability can be defined in different ways.¹⁶⁴ Nonetheless, we should insist on the three structural elements and restrict the accountability label to the five types of arrangements set forth above for the sake of clearheaded analysis and sound prescription. Doing so enables us to distinguish the characteristics and operation of accountability mechanisms from those of the other governance arrangements and thereby to make more informed choices among the several types of institutional tools that might be used to enhance responsiveness to the disregarded. What distinguishes the five accountability mechanisms from the other responsiveness-enhancing practices is that these five enable identifiable account holders to invoke such mechanisms as a right against identifiable decision makers in order to protect the account holders’ interests and concerns. Through these mechanisms, the exercise of power by accounters is subject to enforceable conditions for the benefit of the account holders. These mechanisms enable account holders to enforce the obligation of accounters “to reveal, to explain, and to justify what one does,”¹⁶⁵ and to obtain remedies for deficient performance.

The distinction between having a right to demand an accounting and to invoke a remedy and the potential availability of more indeterminate forms of influence are especially significant for the weak and vulnerable who suffer most from disregard. This distinction is too important,

¹⁶³ Global regulatory bodies increasingly enlist representatives of their members for review and evaluation by members of other members’ compliance or performance, a practice followed, for example, by the International Atomic Energy Agency, Financial Action Task Force, Organisation for Economic Co-operation and Development, and WTO. This process represents an important and growing practice of supervisory accountability. Professional organizations may, in some cases, have fixed procedures and standards for evaluation and sanctioning or reward, such as professional disciplinary procedures for lawyers and doctors, election to professional societies, or acceptance of papers for publication in peer-reviewed journals.

¹⁶⁴ I am indebted to Bob Keohane for reminding me of the passage on the meaning of words in *Alice in Wonderland*:

“I don’t know what you mean by ‘glory,’” Alice said.

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

“But ‘glory’ doesn’t mean ‘a nice knock-down argument,’” Alice objected.

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

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

¹⁶⁵ Scott, *supra* note 123, at 40.

both in principle and in practice, to be glossed over by embracing broader conceptions of accountability.¹⁶⁶ As Carol Harlow observes, extending the notion of accountability to a wide variety of loosely structured practices can involve such a diffusion of decisional responsibility that no one can be held responsible.¹⁶⁷ The laxity of the current accountability rhetoric should accordingly be resisted, not accommodated.

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

V. OTHER REGARD-PROMOTING GOVERNANCE MECHANISMS

In addition to seeking decision-making power and access to accountability mechanisms, what other measures might be available to the disregarded to influence global regulatory decision making? This part discusses seven such mechanisms, as identified in part IV: (1) competition in markets for goods, services, and investment; (2) competition in markets for regulation; (3) peer reputational influences; (4) public reputational influences; (5) transparency; (6) non-decisional participation; and (7) reason giving. These measures—which this article categorizes as other regard-promoting mechanisms—differ in important ways from decision rules and accountability mechanisms. Their structure and operation are typically more diffuse. They do not confer authority on identifiable persons. They can be accessed by a very wide array of outside actors and interests, including the disregarded, to influence regulators' decisions.

This part briefly summarizes the market and reputational mechanisms and then focuses discussion on transparency, nondecisional participation (especially the right to make submissions on proposed decisions), and reason giving. These latter three procedures for decision making are core components of global administrative law, as exemplified by the first two pillars of the

¹⁶⁶ One could attempt to maintain the distinction by having two or more different concepts of accountability, but in practice this option risks blurring the distinction. It is far more clear and straightforward to restrict the accountability label in the first instance.

¹⁶⁷ HARLOW, *supra* note 115, at 27, 184. As Bovens states, the concept of accountability needs saving from those who promote it. Bovens, *supra* note 118, at 449 (citing Melvin J. Dubnick, Seeking Salvation for Accountability, Remarks at the Annual Meeting of the American Political Science Association (2002), available at <http://mjdubnick.dubnick.net/papers/2002/salv2002.pdf>).

Aarhus Convention.¹⁶⁸ After considering each of the mechanisms separately, the discussion concludes by addressing the question whether, in the absence of independent review (the third pillar of the Aarhus Convention), a combination of transparency, nondecisional participation, and reason giving could be sufficient to constitute a system of administrative law.

Market and Reputational Mechanisms

Competition in markets for goods, services, and investment. Market incentives are assuming an important role in protecting disregarded interests and in filling global regulatory gaps through private global regulatory programs developed by NGOs that represent environmental, worker, and social interests and that work in cooperation with business firms. These programs mobilize developed-country consumer interests and concerns regarding environmental sustainability, worker safety, and fair labor practices in order to regulate timber harvesting, agricultural and mining practices, and factory working conditions in developing countries, and fish harvesting practices on the high seas; all of these regulatory programs operate through global supply chains managed by multinational companies for consumers in developed countries.¹⁶⁹ In some cases, these regimes include participation by host domestic governments and international organizations. Other global regulatory bodies promote socially responsible investment. Participating firms seek to gain competitively valuable reputational advantage among socially minded consumers and investors. These regulatory systems include monitoring and certification arrangements through distributed administrations to secure compliance with regulatory standards by participating firms and their contractual partners up the supply chain. They exemplify how market competition can be harnessed by groups acting in the interests of the disregarded in order to fill gaps in the structures of global regulation for protecting the interests and concerns of the disregarded.¹⁷⁰ They do so by devising global supply chain regulatory programs and by using the threat of adverse publicity to induce multinational firms to join the programs to avoid loss of business and to gain favorable public reputations.

Competition in markets for regulation. Public and private global regulatory bodies often face competition from rival regulatory bodies in “markets” for regulation. Global regulatory bodies, including private standard-setting bodies such as the International Organization for Standardization (ISO) and its rivals, often compete in providing regulatory standards to firms, governmental bodies, and other global regulatory bodies.¹⁷¹ Such competition can generate powerful incentives to respond to the interests and concerns of consumers of regulatory standards.

¹⁶⁸ The three pillars of the Aarhus Convention are (1) public access to information, (2) public participation in decision making, and (3) availability to the public of administrative or legal review procedures. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Art. 1, July 25, 1998, 38 ILM 517 (1999) [hereinafter Aarhus Convention]. The Aarhus Convention is applicable to environmentally significant domestic agency decisions by states party to the Convention. In many cases, the environmental consequences of these decisions extend to other states or to a global commons. The Convention provides that it may also be applied to international organizations that function as administrative bodies. *Id.*, Art. 9. On global administrative law generally, see Kingsbury, Krisch & Stewart, *supra* note 3.

¹⁶⁹ See generally Meidinger, *supra* note 85.

¹⁷⁰ One can view multinational firms, operating through contractual networks in global supply chains, as private regulators. The global regulatory bodies discussed in the text effectively recruit these private regulators to advance their social and environmental goals.

¹⁷¹ Abbot & Snidal, *supra* note 11, at 47, 58 (outlining a “decentralized process of competition for influence” and arguing that firms enjoy leverage over regulators because of the ease of relocation across states).

For example, ISO streamlined its elaborate standard-setting process to meet competition from rival organizations in the highly dynamic field of software standards. Private and hybrid global standard-setting bodies are increasingly adopting mechanisms for transparency, participation, and reason giving as a business strategy to promote acceptance of and support for their standards.¹⁷² Monitoring and other steps to ensure that distributed administrations comply with regulatory standards are important components in such programs.¹⁷³

Peer reputational influences and incentives. Peer reputational influences and incentives operate among members of a profession, discipline, or other community that is based on specialized knowledge or activity and performance norms. High performance is a source of esteem and is also instrumentally advantageous in securing needed cooperation from others. Ryan Goodman and Christopher Jinks have shown that the conceptions held by members and officials of global regulatory bodies regarding their institutions' roles, responsibilities, and governance arrangements are very substantially influenced and shaped by the conceptions and practices of peer organizations.¹⁷⁴ Grant and Keohane point out that peer influences are especially important in global institutions that operate in a nonhierarchical environment (as most global institutions do): "Organizations that are poorly rated by their peers are likely to have difficulty in persuading them to cooperate and, therefore, to have trouble achieving their own purposes."¹⁷⁵ Peer reputational influences and incentives may operate to promote adoption by global regulatory bodies of governance practices to promote greater regard for the disregarded. These practices include transparency, broadened decisional or nondecisional participation, and multistakeholder governance arrangements, including deliberative decision making, reason giving, and independent review of decisions. Peer influences may lead business firms to join private or hybrid global regulatory regimes for protecting environmental, worker, and social interests.

Public reputational influences and incentives. Public reputational influences and incentives are, as Grant and Keohane point out, another and more pervasive form of "soft power," which operates through the general opinions held by various publics of the conduct of prominent public and private actors including global regulatory bodies.¹⁷⁶ The reputational audience does not consist of peer organizations and officials but, instead, of broader constituencies and the diffuse public upon whose support or positive estimation the organization depends. Many global regulatory bodies ultimately require favorable reputations among relevant publics in

¹⁷² Meidinger, *supra* note 52, at 86; Errol Meidinger, *Multi-Interest Self-Governance Through Global Product Certification Programmes*, in RESPONSIBLE BUSINESS: SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS 259, 262 (Olaf Dilling, Martin Herberg & Gerd Winter eds., 2008) (noting that, in the forestry sector, different certification programs "observe, mimic, compete, communicate, negotiate, and adapt to each other").

¹⁷³ The Fair Labor Association, at <http://www.fairlabor.org> (certifying and monitoring apparel industry supply chains to alleviate concerns about sweatshop practices); The Forest Stewardship Council (FSC), at <https://us.fsc.org>. Tracy M. Roberts, *The Rise of Rule Four Institutions: Voluntary Standards, Certification and Labeling Systems*, 40 ECOLOGY L.Q. 107, 147–48 (2013) (on the FSC and the Fair Labor Association and its industry-funded competition).

¹⁷⁴ GOODMAN & JINKS, *supra* note 6; MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (1996); UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS (Derek Jinks & Andrew K. Woods eds., 2012); see also John Gerard Ruggie, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge*, 52 INT'L. ORG. 855 (1998).

¹⁷⁵ Grant & Keohane, *supra* note 75, at 37.

¹⁷⁶ *Id.* at 36.

order to enjoy the support and authority that such bodies need to function effectively.¹⁷⁷ Accordingly, public reputational incentives may exert significant influence not only on the substantive policies of global regulators but also on the governance arrangements that they adopt. NGOs devote considerable effort to influence these reputational incentives, using the media, the Internet, and various institutional and communications networks. They seek, among other objectives, to induce global authorities to adopt arrangements for transparency, for broader decisional and nondecisional participation, and for other practices that will enable them to exert greater influence on the decision making of global authorities. Practices such as transparency and nondecisional participation can, in turn, as discussed below, be used by NGOs to stimulate public attention to problems of disregard, reinforcing public reputational incentives for global authorities to address those problems.

Transparency

NGOs as well as many students of global governance have widely advocated greater public access to information to promote accountability by global regulatory bodies to affected societal interests.¹⁷⁸ Global bodies of many types have taken steps to enhance the transparency of their programs, policies, and decisions. Public availability of information may include “passive” information provision (such as furnishing information in response to specific requests from outsiders) and “active” provision (such as routinely and affirmatively making information available to the public through websites). Arrangements for transparency vary significantly in terms of their coverage and the types of information provided, such as agendas, minutes or proceedings transcripts, proposed and final decisions, rules, standards, guidance documents, policy statements, reports, and internal documents and data collected by the organization. In the case of domestic agencies and other bodies that function as distributed components of global regulatory regimes, transparency practices have been mandated by those regimes, as exemplified by the WTO and the Aarhus Convention.

Information is a critical element of accountability mechanisms where they exist. Without information regarding an accounteer’s conduct and its consequences, account holders cannot effectively track and evaluate an accounteer’s performance and take appropriate remedial actions. Lack of information will correspondingly undermine the *ex ante* incentives for regard generated by *ex post* accountability mechanisms. Accordingly, each of the core accountability mechanisms typically includes arrangements or incentives for an accounteer to provide information about his conduct to account holders. In the context of elections, competition among candidates and media scrutiny ensures that candidates disclose information to voters about their records and views. In the case of hierarchical, supervisory, or fiscal accountability, both the right of the account holder to receive information from the accounteer and the specific obligation of the accounteer to offer information are often provided by law. Compulsory discovery is often available to plaintiffs in related legal proceedings.

Even in the absence of accountability mechanisms, public information disclosure can strengthen the operation of other responsiveness-promoting practices, including market competition for socially concerned consumers and investors, general political mechanisms, and

¹⁷⁷ See, e.g., GREEN, *supra* note 111.

¹⁷⁸ It may include various categories of information, including decisions, policy statements, reports, internal documents, minutes, proceedings transcripts, and organized data.

peer and public reputational mechanisms and incentives. Where a global authority provides relevant information, organizational outsiders, even if they lack decisional authority or accountability rights, can use it to learn about forthcoming decisions by the body and take actions to influence decisions in their favor. Information is also vital for the effective exercise of decisional participation rights by those who have some role in the internal decisional process but are not powerful founders or members. The public availability of pertinent information about the decisions of global administrators and their consequences fosters public discussion and debate about a body's policies and performance. These mechanisms can highlight problems of disregard and engage the attention and involvement of NGOs or other groups that have the resources to run a publicity campaign, marshal market pressures, or challenge decisions through review mechanisms.¹⁷⁹ Anticipation of such consequences may lead global administrators to modify the policies that they would otherwise adopt.¹⁸⁰ The power of public opinion in modern government, recognized by A. V. Dicey well over a century ago,¹⁸¹ has acquired even greater force in the twenty-first century, including in the context of global governance. Information can also affect the reputation enjoyed by global bodies with peer organizations, experts, and other groups whose support or at least tolerance they need.

Merely making reams of undigested documentary material available to the public, however, may do little to promote informed criticism and debate and consequential changes in policies. Allen Buchanan and Robert Keohane emphasize that to permit effective public scrutiny of and accountability for their decisions, global authorities must secure an adequate degree of “*epistemic-deliberative* quality” by making available “reliable information needed for grappling with normative disagreement and uncertainty concerning its proper functions.”¹⁸² Such information must be “(a) accessible at reasonable cost, (b) properly integrated and interpreted, and (c) directed to the accountability holders.”¹⁸³

Transparency, however, is not usually costless or easily secured. It is often resisted by global authorities. As Max Weber noted long ago, bureaucracies have strong incentives to avoid transparency in order to hoard the power that specialized knowledge and experience confer.¹⁸⁴ Moreover, substantial resources must be expended in collecting, organizing, and providing information. Confidentiality is often essential in matters of security and law enforcement and may also be necessary where negotiated compromises through bargaining are required to reach

¹⁷⁹ See Thomas N. Hale, *Transparency, Accountability, and Global Governance*, 14 GLOBAL GOVERNANCE 73, 74, 77–81, 84 (2008).

¹⁸⁰ This effect can be strengthened when an accountability mechanism also exists. For example, World Bank managers have altered development projects once an Inspection Panel complaint is brought without going through the hearing process when the information disclosed indicates a problem. *Id.* at 84 (noting that “in over half the cases brought before the panel, the mere release of information has actually changed Bank behavior”).

¹⁸¹ ALBERT VENN DICEY, *LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND: DURING THE NINETEENTH CENTURY* (2d ed. 1962).

¹⁸² Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405, 425–26 (2006).

¹⁸³ *Id.* at 427.

¹⁸⁴ See Louis M. Imbeau, *Transparency in the Budget Process of a Bureaucratic Organisation: A Principal-Agent Model of Budgeting*, in *THE ECONOMICS OF TRANSPARENCY IN POLITICS* 189, 189–90 (Albert Breton, Gianluigi Galeotti, Pierre Salmon & Ronald Wintrobe eds., 2007) (discussing Weber's work).

decisional closure.¹⁸⁵ Transparency may have other counterproductive effects. For example, transparency in internal decisional deliberation in the WTO context may serve to alert and mobilize protectionist interests and thereby undermine trade liberalization.¹⁸⁶ As another example, the World Health Organization followed a practice of not disclosing the identities of the experts that it enlisted to help it address the H1N1 pandemic in order to insulate the experts from outside pressures, especially those that might be exerted by pharmaceutical companies. Yet, this practice attracted criticism on the ground that it undermined public confidence in the WHO's decisions in handling the crisis.¹⁸⁷ These examples illustrate some of the difficult competing considerations involved in transparency issues.

In the context of environmental audit and management systems, broad external transparency may inhibit the free flow of information within the organization to management, thereby undermining internal transparency and producing inferior decisions. External transparency may also undermine the ability of consensus-based deliberative processes for decision, as noted by some students of the Open Method of Coordination process, to reach necessary compromises.¹⁸⁸ These various dynamics assume increasing importance as global regulatory bodies develop more complex decisional structures.

Nonetheless, global regulatory bodies have increasingly adopted formal transparency policies and systems that are gradually making inroads on secrecy practices inherited from interstate diplomacy, although significant gaps and omissions remain.¹⁸⁹ Global regulators have done so in response to criticisms and pressures by NGOs, the media, and powerful democratic member states, to the influence of domestic transparency laws and practices, and to the need to generate engagement, participation (both decisional and nondecisional), and support among necessary constituencies. This last factor is especially important in the case of private and hybrid public-private global bodies, which often have very extensive transparency programs. Furthermore, global regulatory regimes ranging from the WTO to the World

¹⁸⁵ Jon Elster, *Introduction, in DELIBERATIVE DEMOCRACY 6* (Jon Elster ed., 1998) (defining pure bargaining as a system that results in outcomes determined by the "resources [of the parties] that enable them to make credible threats and promises").

¹⁸⁶ Katharina Gnath, Stormy-Annika Mildner & Claudia Schmucker, *G20, IMF, and WTO in Turbulent Times: Legitimacy and Effectiveness Put to the Test 28* (SWP Research Paper No. 10, 2012), available at http://www.swp-berlin.org/fileadmin/contents/products/research_papers/2012_RP10_Gnath_mdn_Schmucker.pdf ("[N]egotiations between WTO members take place behind closed doors. The scope for difficult compromises between negotiating partners has already shrunk under the watchful eye of the public. If negotiations were opened up still further, compromise would be all but impossible.").

¹⁸⁷ See World Health Organization, *Implementation of the International Health Regulations, Report of the Review Committee on the Functioning of the International Health Regulations (2005) in Relation to Pandemic (H1N1) 2009, A64/10*, at 16–18, 78 (May 5, 2011), at http://apps.who.int/gb/ebwha/pdf_files/WHA64/A64_10-en.pdf. I am grateful to Megan Donaldson and Benedict Kingsbury for this example.

¹⁸⁸ Patrick Birkinshaw, *Freedom of Information and Openness: Fundamental Human Rights?*, 58 ADMIN. L. REV. 177, 192 (2006) ("Efficient government means that government needs space to formulate its policies in private and to consider alternatives; publicity may inhibit that process."); Mark Dawson, *Transforming into What? New Governance in the EU and the "Managerial Sensibility" in Modern Law*, 2010 WIS. L. REV. 389, 428 (arguing that the benefit of increased legitimacy outweighs the efficiency costs of transparency for the Open Method of Coordination process).

¹⁸⁹ See Megan Donaldson & Benedict Kingsbury, *The Adoption of Transparency Policies in Global Governance Institutions: Justifications, Effects, and Implications*, 9 ANN. REV. L. & SOC. SCI. 119 (2013) (examining the influences that have led to wider adoption of transparency measures by global regimes and their effects on states, nonstate actors, and global governance institutions, and the global structures of global power and authority and global administrative law).

Anti-Doping Agency to the Extractive Industries Transparency Initiative require their distributed administrations to adopt transparency measures to further their regulatory programs.

Nondecisional Participation

In addition to decisional participation as discussed in part III—where participants have a role in making decisions—global regulatory bodies often afford organizational outsiders opportunities for nondecisional participation. These opportunities may include attendance at meetings where upcoming decisions or general policy issues are discussed, consultation processes initiated by the organization, membership on advisory or expert bodies, or other possibilities to offer input to the organization's programs and decisions. Among the various forms of nondecisional participation, global administrative law accords particular significance to opportunities to submit evidence and argument to organizational decision makers on specific forthcoming decisions, such as adoption of general rules and standards; adjudication of the rights and liabilities of specific persons, including through the submission of amicus briefs; and determinations of other particular matters like the funding of a development project or award of a franchise.¹⁹⁰ Such procedures are critical in the production by global regulatory bodies of rules, standards, and decisions that are transmitted throughout the global administrative space. These normative products may be received, recognized, and adopted or otherwise used by other bodies and decision makers in that space, including distributed administrations, regulated entities, and global or domestic public or private organizations. Receiving bodies may in turn endorse, modify, or augment the norms that they receive and retransmit the products. In this way, submissions made to a given regulatory authority form a part of and can contribute, through mechanisms of an administrative law character, to a broader jurisprudential process that continuously knits and reworks the fabric of global regulatory law and practice.

Procedures for nondecisional participation provide organizational outsiders with various opportunities to persuade and influence the insiders who make decisions. In much governance literature, "participation" generally refers to nondecisional participation, but the decisional and nondecisional distinction is often not observed.¹⁹¹ Like transparency, nondecisional public participation is widely invoked as a mechanism for securing greater accountability and

¹⁹⁰ In certain adjudicatory proceedings in some legal systems, this form of participation includes the right to present evidence through witnesses and cross-examine the witnesses presented by other parties. It may also include the opportunity for affected third-party interests, such as disregarded interests, to submit amicus briefs. See, e.g., Robert Howse, *Membership and Its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy*, 9 EUR. L.J. 496 (2003). In adjudications, review is generally available; in such cases, participation rights form part of a legal accountability mechanism.

¹⁹¹ In legal accountability, the right to present evidence and argument to an administrative agency or court in one's own case is essential to securing effective judicial review of the resulting decision. Under requirements for exhaustion of administrative remedies, such presentation may be required as a prerequisite to securing judicial review. Presentation of evidence and argument to boards of directors or trustees may likewise be essential to obtaining judicial redress for violation of fiduciary duty. The opportunity to review and comment on draft accounting statements and audits promotes fiscal accountability. The opportunity of superiors or supervisors to consult and comment on 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.

regard for disregarded interests.¹⁹² Like public-information provision, nondecisional 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 the right to impose sanctions or other remedies for deficiencies.¹⁹³ Nonetheless, it may enable outsiders to influence an organization's decisions and can, like transparency, promote the effectiveness of other responsiveness-enhancing practices.

The presentation of evidence and argument on behalf of otherwise omitted voices may, by itself, influence decision makers by giving them new information, pinpointing neglected effects and issues, and marshaling reasons for outcomes favored by presenters. Such influences, which can help correct institutional tunnel vision, may be enhanced if the participants have the right to be physically present when decision makers discuss a proposed decision.¹⁹⁴ Presenting evidence and argument through public procedures can also provide a means for exposing and contesting an organization's prevailing policies and create a platform for media attention, Internet campaigns, and broader public awareness of the issues, which reformers can use to mobilize public and political pressures as well as reputational influences to effect change. Submissions also provide a benchmark for judging and publicizing the responsiveness (or lack thereof) in the decisions subsequently made. Beyond these instrumental goals, participation may have intrinsic value for affected societal constituencies and vulnerable individuals, especially in cases where they are the targets of serious harms or deprivations, for example denial of refugee status or destruction of these individuals' homes and communities by internationally funded development projects.

Like the other governance mechanisms, procedures for nondecisional participation can be used by business and other economic interests as well as by groups representing social, environmental, and other less well-organized and resourced groups and individuals. This disparity in resources may serve to some extent to skew decisional outcomes in favor of business and financial interests. It may also affect the relative influence exerted by different groups representing social and environmental interests and concerns. Notwithstanding such disparities, domestic experience with public interest law and the emerging experience with global administrative law show that marginalized groups are generally better off having these tools available than leaving decisions to informal processes that are often more completely dominated by well-organized and powerful interests.¹⁹⁵ If public-interest advocates can reach a basic threshold of

¹⁹² Magdalena Bexell, Jonas Tallberg & Anders Uhlin, *Democracy in Global Governance: The Promises and Pitfalls of Transnational Actors*, 16 GLOBAL GOVERNANCE 81 (2010); Steve Charnovitz, *The Illegitimacy of Preventing NGO Participation*, 36 BROOK. J. INT'L L. 891 (2011); David Gartner, *Beyond the Monopoly of States*, 32 U. PA. J. INT'L L. 595 (2010); Smyth, *supra* note 95.

¹⁹³ Decisional participation is also not an accountability mechanism, but for a different reason. Accountability relations involve a separation between the person or entity who makes decisions (the accounter) and the person whose interests are affected thereby (the account holder). If a person is a decision maker, to that extent he cannot demand accountability for such decisions.

¹⁹⁴ The discussion of the deliberative, consensus-based process in part III notes that this practice—allowing observers to attend committee meetings at which decisions are discussed and made, such as in the committee of the Codex Alimentarius Commission—may morph into a form of decisional participation by such observers as they become engaged in the deliberative process. Therefore the line between decisional and nondecisional participation may blur in practice. For discussion of the role of industry representatives and of environmental health and safety NGOs in the decisional processes of Codex, see Livermore, *supra* note 114.

¹⁹⁵ See Charnovitz, *supra* note 192; Dragan Golubovic, *An Enabling Framework for Citizen Participation in Public Policy: An Outline of Some of the Major Issues Involved*, 12 INT'L J. NOT-FOR-PROFIT L. 38 (2010); Stewart, *supra* note 46.

organization, resources, and expertise that enables them to track an organization's decision making and to make effective submissions on key proposed decisions, these advocates can have a substantial influence, even if outspent by others.¹⁹⁶

Disregarded interests often face challenges in meeting the threshold of effective influence. Funding may be random and episodic.¹⁹⁷ Better-organized Northern NGOs with greater resources typically participate more frequently and effectively in global regulatory decisional processes than representatives of Southern interests and concerns, threatening the (at least relative) disregard of such interest and concerns. In the distributed administration of development projects and regulatory programs in developing countries, effective participation and engagement by affected communities and groups on the ground are critical but often difficult to achieve. Moreover, even where NGOs have substantial capacities, they must choose to exert them in the interests of the disregarded. For example, NGOs have devoted enormous resources and effort to opposing genetically modified foods and crops, but such opposition often works to the detriment of farmers in developing countries who seek export markets in developed countries that have adopted bans on genetically modified food products.¹⁹⁸ Furthermore, NGOs have rarely participated in proceedings of global financial regulatory bodies, notwithstanding the enormous collective economic stake of consumers in all countries in the policies adopted. The Basel Committee on Banking Supervision has made public very extensive information and instituted notice and comment procedures for its adoption of bank regulatory standards. Large banks submitted most of the comments; NGOs did not participate in any substantial way.

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

Transparency and nondecisional participation are closely linked because information about an organization's ongoing and proposed decisions and policies is essential for outsiders to know when and where to make submissions on proposed decisions and how to make such submissions effective. As global administrative-law norms gain greater acceptance, global and domestic authorities and actors that receive rules, decisions, and other normative products from global regulatory bodies increasingly look to the procedures that these bodies follow in adopting those products. Growing indications suggest that these receiving bodies are more disposed to recognize and support those products adopted through transparent procedures affording outside constituencies the opportunity to make submissions on proposed decisions regarding such procedures as hallmarks of decisional quality and legitimacy.¹⁹⁹ Global regulatory bodies increasingly call on domestic administrative agencies or other distributed administrations to follow such procedures in implementing their programs. Examples include the WTO, the

¹⁹⁶ See Stewart, *supra* note 46; Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of Federal Environmental Controls*, 86 YALE L.J. 1196 (1977).

¹⁹⁷ See BALANCING WEALTH AND HEALTH, *supra* note 29.

¹⁹⁸ Richard B. Stewart, *GMO Trade Regulation and Developing Countries*, 2009 ACTA JURIDICA 320.

¹⁹⁹ See Richard B. Stewart & Michelle Rattton-Sanchez, *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, 9 INT'L J. CONST. L. 556, 585–86 (2011).

World Anti-Doping Agency, the Forest Stewardship Council, the Extractive Industries Transparency Initiative, and the Global Fund. The distributed administrations of the Forest Stewardship Council, the Extractive Industries Transparency Initiative, and the Global Fund replicate the multistakeholder hybrid public-private composition and inclusive approach to decision making of their respective global umbrella organizations, furthering the influence of this decision-making model.

Reason Giving

A third mechanism that can help to redress disregard is for decision makers to give public reasons for their decisions. Although reason giving by itself is not an accountability mechanism, it can play an important role in legal and other accountability mechanisms by enhancing the ability of account holders to understand and evaluate the decisions made by accounters and to take corrective action when decisions are not justified by valid or sufficient reasons.²⁰⁰ In the case of legal accountability, reason giving by decision makers is necessary for courts or tribunals to subsequently exercise effective review of administrative decisions.

Even if accountability mechanisms are absent, influences like those previously discussed in connection with transparency and nondecisional participation have encouraged global regulatory bodies to provide reasons for their decisions. In some fields, global administrative decision makers are beginning to adopt a practice of giving reasons. In doing so, they must justify decisions in accordance with the stated norms of the regime and address other norms adduced as relevant and appropriate by those making submissions on proposed decisions. Influential “legitimacy audiences” may include global and domestic regulatory authorities. Giving reasons can enhance the legibility and quality of rules and decisions and help secure their recognition and endorsement by global and domestic regulatory authorities and gain approbation and support by such audiences.²⁰¹ At present, however, reason giving is by no means practiced everywhere and, in some fields, is virtually absent altogether. Often global regimes, for example in the security field, avoid reason giving in the interests of speed, confidentiality, flexibility, costs, and expediency. In law enforcement and in some forms of financial regulation, reason giving may undermine the effectiveness of regulatory programs. Reason giving may not be feasible or needed in setting technical standards; deliberative consensus among representative experts

²⁰⁰ Tom Tyler provides the following explanation:

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

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

²⁰¹ For discussion of the concept of legitimacy audiences, see Shamir-Borer, *supra* note 94; Euan MacDonald & Eran Shamir-Borer, Remarks at the NYU Hauser Colloquium: Meeting the Challenges of Global Governance: Administrative and Constitutional Approaches (Oct. 1, 2008), at http://iilj.org/courses/documents/MacDonald_Shamir-Borer.92508.pdf. These audiences may include regime members; influential constituencies that can support the regime and its decisions; domestic and global authorities including courts and regulatory bodies whose cooperation is needed for their effective implementation of decisions; other affected interests; the media; and the public generally.

generally serves as a sufficient touchstone of quality and legitimacy. Resource constraints and considerations of administrative efficiency may inhibit reason giving; in some programs, decisions may appropriately be routinized.

Nonetheless, global regulatory bodies increasingly require their staff and distributed administrations to give reasons for decisions. For example, the staff of most international financial institutions must give reasons for justifying development projects as compliant with applicable environmental and social guidelines, domestic regulatory authorities must give reasons for decisions subject to WTO disciplines, and global and domestic sports authorities must give reasons in imposing sanctions on athletes for doping and in disqualifying them from participation in sporting events.²⁰² Global bodies undertake these practices to overcome principal-agent problems and to secure effective implementation and support by others for their regulatory rules and decisions. Constructivist norms and peer and public reputational influences are also at work. Rule of law principles and human-rights concepts, which are most powerful when global regulatory authorities adjudicate individual cases and impose serious sanctions or deprivations on specific persons, are gaining footholds in various global regimes.

The process of giving reasons that will be scrutinized by others, including peer institutions, serves to discipline decision making and the exercise of administrative discretion.²⁰³ Reason giving may help to ensure that decisions are justified by the body's stated norms and objectives rather than simply serving the interests of powerful members or officials. The practice may also promote regard by decision makers for other relevant norms and affected outsider interests. Reason giving obliges officials to justify their decisions on the basis of public-regarding considerations that are relevant in the context of the body's specialized mission and goals. It requires decision makers to face the question of whose interests and concerns are entitled to regard. It enables those adversely affected to criticize and contest decisions as unsupported by the reasons adduced and to contend that other norms and considerations should be taken into account. Requiring decision makers to give reasons for departing from prior decisions can promote a degree of decisional consistency, which serves as a further check on arbitrary decisions. As an example, the Court of Arbitration for Sport invalidated a decision by the Australian Boxing Federation disqualifying an athlete from participation in the Olympics as contrary to the rule of law; given the athlete's legitimate expectations, the Federation had not provided a reasoned basis for departing from previously established rules.²⁰⁴

In these several ways, the practice of giving reasons serves to discipline and channel decision making by limiting the influence of raw power, bargain, and ad hoc expediency. Requiring decision makers to justify their decisions on the basis of reasons open to public scrutiny, combined with the opportunity to make submissions on proposed decisions, enables the disregarded to advance reasons why decision makers must give regard to their interests and concerns and obliges the decision makers to address them, thereby helping to overcome disregard.²⁰⁵

²⁰² See Stewart & Ratton-Sanchez, *supra* note 199, at 579–80.

²⁰³ Stewart, *supra* note 46, at 1676.

²⁰⁴ See *Boxing Australia*, *supra* note 26; see also Watt v. Australian Cycling Fed'n, CAS 96/153 (July 22, 1996) (Court of Arbitration for Sport reinstating appellant as cyclist to represent Australia in 1996 Olympic Games).

²⁰⁵ The relation between reason giving and other rule-of-law practices and substantial justice is, of course, a difficult and contested issue in legal theory and in constitutional and administrative law. I address these questions in a separate forthcoming article on global administrative law and the rule of law.

A Global Administrative Law Without Review?

Combining transparency, nondecisional participation, and reason giving in a single procedural package greatly enhances their contributions to more responsive administrative decision making. Transparency enables outsiders to learn about the current and forthcoming policies and decisions of a body and to access relevant information and records. Participation allows for submission of evidence and argument on proposed decisions. Decision makers that give reasons for their decisions must often address submissions, especially those presenting arguments and facts in favor of a contrary decision, to persuasively justify their contrary choice. The information obtained through public-information measures and the evidence and argument presented by participants, as well as the stated norms of the decision-making body and the reasons given for past decisions, enable organizational outsiders, including those making submissions on forthcoming decisions, to challenge and influence the organization's policies. In addition to responding to reputational incentives and constructivist influences, regulatory regimes may adopt these practices to improve the quality of regulatory outputs by tapping broader sources of information and experience. Requiring decision makers to accompany their rules and decisions with publicly stated reasons that will be scrutinized by peers and regulatory partners may help secure their acceptance and support. On the one hand, giving reasons can provide useful guidance to those responsible for implementing and enforcing rules and decisions. It can also enhance their normativity, furthering the cooperation and compliance of the regulated. On the other hand, giving reasons consumes resources and may impede the needed dispatch and flexibility in making decisions. More informal methods of collaborative networked decision making may achieve the same basic objectives.

The combination of transparency, nondecisional participation, and reason giving is gradually becoming more prevalent in the decisional practices of global regulatory bodies and their distributed administrations, not only in their subsequent adjudications of individual rights and liabilities (when available) but also in their decisions of particular matters and their rulemakings. The pattern, however, is uneven. These mechanisms are less prevalent or absent altogether in sectors such as security, development finance, social services delivery, and harmonization of technical standards. They are often more likely to be followed in regimes for economic and environmental health, safety regulation, and human rights, albeit with considerable variation.

Even in combination, these three elements do not amount to an accountability mechanism because they lack the requisite counter-account-holder structure and because the other accountability elements are also absent. The addition of review by an independent court or tribunal would constitute a robust system of administrative legal accountability. Review would ensure the availability and enhance the effectiveness of these three decision-making procedures, which would, in turn, strengthen the effectiveness of review. Such arrangements could go far in fostering greater regard by global decision makers to the disregarded.²⁰⁶

Specialized regime-specific reviewing bodies that afford review as a right are slowly growing in number but are far from ubiquitous.²⁰⁷ Review by domestic and international courts of the

²⁰⁶ Daniel Bradlow, *Private Complainants and International Organizations*, 36 GEO. J. INT'L L. 403, 468–76 (2005).

²⁰⁷ Examples include the WTO Dispute Settlement Body, the International Tribunal for the Law of the Sea, the Aarhus Compliance Committee, the World Bank Inspection Panel, the Court of Arbitration for Sport, the World

rules and decisions of global regulatory bodies is only occasionally available, although domestic courts regularly review decisions of domestic administrative agencies, including their implementation of global rules and decisions of global bodies when acting as their distributed administration.²⁰⁸ Nonetheless, members and officials of many global administrations, including the most powerful state-governed bodies, will generally oppose arrangements to expand independent review when they are potentially costly, burdensome, and dilatory; when they impair needed flexibility and efficiency; or when they contribute little to the overall performance of the regime. These contentions may often have substantial merit, especially in particular fields of global regulation such as security, delivery of development finance, social services, and harmonization of technical standards.

Even without independent review, the combination of transparency, nondecisional participation through submissions on proposed decisions, and reason giving may be regarded as sufficient to constitute a system of administrative law in the context of global regulation. Such a constellation of procedures would tend to promote decisions that comport with governing law, that give adequate regard to relevant affected interests and concerns, and that are not ad hoc or otherwise arbitrary. It has long been accepted that there is far more to administrative law than judicial review. The constitution, management, and decisional procedures of administrative authorities form an integral and, often in practice, essential part of the law and practices that shape their decision making and normative output.²⁰⁹

The vital and, in some contexts, predominant role of administrative procedures in securing impartial, evenhanded, and public-regarding administration does not, of course, establish that judicial review is an unnecessary component of an administrative law system. Suggesting the contrary will strike many domestic administrative lawyers as heretical. Judicial review has played a central role in the conception and development of administrative law in both the common-law and the civil-law traditions.²¹⁰ At common law, judicial review of official actions preceded the development of any regular procedural requirements for administrative decision making, such as transparency, nondecisional participation, and reason giving, which gradually emerged much later. In many respects, these procedural norms were developed to ensure effective judicial review. In the representation model of administrative law that prevails in the

Bank Sanctions Board, and the UN Appeals Tribunal. In addition, the traditional international administrative tribunals of international organizations address internal personnel matters.

²⁰⁸ Domestic courts, however, face institutional and other limitations that impair their ability to review the decision making by global regulatory bodies that generate the norms being implemented by domestic administrative agencies. See Stewart, *supra* note 62, at 722 (noting that in the common situation where the decisions of global regulatory regimes are adopted by domestic administrative decisions, domestic courts are unlikely to review directly the procedures and decisions of global regulatory bodies).

²⁰⁹ Mashaw's history of American administrative law during the nineteenth century shows how administrative officials developed procedures and remedies that afforded citizens with regularized and responsive rules and decisions in an environment where judicial review was, at best, episodic and in many cases not available at all as a practical matter. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012). He has also shown the importance of the internal administrative law in the contemporary welfare state, which also operates with substantial autonomy from reviewing courts. JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983).

²¹⁰ Bignami, *supra* note 118, at 866 ("When all was said and done, administrative law boiled down to two components: administrative organization and judicial review."); see JAFFE, *supra* note 137, at 320 ("The availability of judicial review is the necessary condition, psychologically if not logically, or a system of administrative power which purports to be legitimate, or legally valid.").

United States, judicial review plays a vital role in ensuring not only that agencies adhere to governing law but also that they give adequate reasons for discretionary policy choices and, in doing so, accord due regard to all relevant affected interests.²¹¹ Although administrative law in civil-law jurisdictions followed a somewhat different path, judicial review has been a central feature ever since the establishment by Napoleon of the French Conseil d'État, and procedural requirements for administration were also developed only later. Thus, to suggest that administrative decision-making procedures alone, without judicial review, could constitute a system of administrative law would seem to turn the concept of administrative law and its history upside down.

Nonetheless, in the global-governance context, one might properly regard the combination of these three decision-making practices—transparency, nondecisional participation, and reason giving—as a sufficient system of administrative law, a normative order that global authorities are presumptively obliged to respect, notwithstanding the absence in many quarters of an independent reviewing authority analogous to a domestic court or tribunal.²¹² This hypothesis finds support in the development of other forms of review within the global regulatory space that are growing in importance. As previously discussed, global regulatory bodies depend on other global or domestic administrative authorities as well as private actors to recognize, adopt, or implement their rules, standards, and decisions. The practices followed by these and other actors in deciding whether to accord such recognition and support amount to a form of (often informal) review that is of growing significance even though such practices are far less formal, visible, and legally structured than review by courts or other independent reviewing bodies.²¹³ Transparency, nondecisional participation, and reason giving in the production of rules and decisions assist other actors in the global administrative space in recognizing the originating body's normative products, in assessing their relevance and quality, and in securing a positive response. At the same time, these receiving bodies transmit their rules, decisions, and other normative products to others. The processes of mutual review form pathways for broad circulation and uptake of regulatory norms, including through mutual recognition or convergence. Such reciprocal practices are of growing importance in the systems of global regulation. They generate incentives and influences that promote adoption of transparency, nondecisional participation, and reason giving, and they encourage global authorities to give regard to norms, considerations, and interests beyond their specific missions and their members' immediate objectives, including, in many instances, the interests and concerns of the disregarded. Further, these processes promote recognition of both the decision-making procedures and the various forms of review not merely as good practices but as a system of administrative law for global regulation and administration.

²¹¹ Stewart, *supra* note 46.

²¹² See Kingsbury, *supra* note 49.

²¹³ See Abigail C. Deshman, *Horizontal Review Between International Organizations: Why, How, and Who Cares About Corporate Regulatory Capture*, 22 EUR. J. INT'L L. 1089 (2011) (case study of review by the Parliamentary Assembly of the Council of Europe of World Health Organization's handling of 2009 H1N1 pandemic); Stewart & Rattón-Sánchez, *supra* note 199, at 23 (discussing horizontal review by one global regulatory body's norms by another).

VI. CONCLUSION

This article has examined global regulatory governance through two perspectives, one normative and the other positive, to analyze its institutional mechanisms, diagnose its injustices, and provide conceptual purchase for thinking about its reform. The article's normative framework is based on the concept of disregard. In part, disregard is a product of the structure of global regulation, which is made up of fragmented special-purpose bodies operating in a global administrative space without overarching supervisory and redistributive capacities. This structure has resulted in systematic disregard of the interests and concerns of numerous but politically weak groups and individuals—the disregarded—causing them unjustified deprivations and harms. The article identifies two structural sources of systematic disregard: (1) decisional externalities resulting from global decision makers' focus on specialized missions and the interests of dominant members; and (2) structural disregard resulting from the uneven pattern of global regulation that leaves gaps in protections for the disregarded. The corresponding remedies for these two sources of injustice in global governance are to modify the mechanisms of global regulatory governance and to fill, by one means or another, gaps in regulatory protections so as to ensure proper regard for the disregarded.

The article's positive analysis complements its normative stance and agenda by providing a new framework for conceptualizing governance mechanisms that can be used to diagnose and develop strategies for redressing disregard. The framework distinguishes three basic types of governance mechanisms: decision rules, accountability mechanisms, and other regard-promoting measures. The article examines the role of these mechanisms in the governance of the various types of global regulatory bodies and their distributed administrations and considers the potential for using them to redress disregard.

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

The article's analytic framework also facilitates study of how and why different regulatory regimes have evolved to their present forms and the more general dynamics of the global institutional ecosystem. To what extent can the adoption (or absence) of measures such as independent reviewing bodies, consensus-based deliberative models of decision making, transparency, nondecisional participation through submissions on proposed decisions, or reason giving be explained by considerations of political economy, including the interests of dominant members, competition from other organizations, or the initiatives and agendas of NGOs? To what extent can the patterns of governance mechanisms in the evolution of global regulatory governance be explained by circulating conceptions of institutional identity and appropriate governance modalities that may vary depending on the type of body and the regulatory field? In

addition, the framework and analysis presented in this article can illuminate the character and functions of global administrative law, help to explain its development, and assess its future prospects and normative contributions.

Finally, the institutional framework presented here can assist reformers in identifying promising strategies and means to secure greater regard for the interests and concerns of the disregarded in global regulatory decision making. While reformers have already undertaken many such initiatives, the framework presented here can promote systematic analysis and provide a fruitful heuristic for identifying new ones. A potentially important tactic is to use institutional judo to redirect global administrations governance and policies. By combining hardheaded analysis and creativity, reformers may find points of leverage within existing institutions that enable the reformers to orchestrate market and reputational influences to promote governance changes that speak to the interests and self-conceptions of the institutions and that also serve to enhance the influence of the disregarded. Another option is to identify opportunities and partners for creating new global regulatory bodies to fill gaps and address the interests and concerns of the disregarded. Through the operation of regulatory competition and constructivist emulation, such initiatives may well have broad effect.

Disregard is still deeply embedded in current global regulatory structures and practices. The tasks of securing proper regard for the disregarded and of building a more just and equitable system of global regulation are daunting. This article marks a path forward, which combines pragmatism with normative ambition. We must heed Justice Louis D. Brandeis's summons: "If we would guide by the light of reason, we must let our minds be bold."²¹⁴

²¹⁴ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting).