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## Overcoming NGO Accountability Concerns in International Governance

Erik B. Bluemel

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# OVERCOMING NGO ACCOUNTABILITY CONCERNS IN INTERNATIONAL GOVERNANCE

*Erik B. Bluemel\**

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## I. INTRODUCTION

Accountability is the “new black” of international governance.<sup>1</sup> Fears of cooptation of governance by non-state, and therefore in some scholars’ minds, non-legitimate, actors pervades the literature on accountability.<sup>2</sup> This critique of non-governmental organizations’ (NGOs) participation in international governance regimes generally starts with the question: “Who elected the NGOs?”<sup>3</sup> This is a fair question to raise, but one which does not address the whole picture or normatively invalidate NGO participation in all circumstances.

The current debate and literature over-emphasizes democratic accountability to the possible detriment of other available means of ensuring accountability in governance regimes.<sup>4</sup> This Article posits the emphasis on elements such as elections and representativeness of governance actors as lone indicators of accountability is insufficient to justify participation

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1. Governance is used throughout this Article in the narrow sense of governance with governmental involvement. *See generally* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (Ernst-Otto Czempiel & James Rosenau eds., 1992) (discussing the broadening concept of governance beyond governments). It is therefore “a mode of governing that is distinct from the hierarchical control model characterizing the interventionist state. Governance is the type of regulation typical of the cooperative state, where state and non-state actors participate in mixed public/private policy networks.” Renate Mayntz, *Common Goods and Governance*, in COMMON GOODS: REINVENTING EUROPEAN AND INTERNATIONAL GOVERNANCE 15, 21 (Adrienne Heritier ed., 2002). This is sometimes referred to as a public-private partnership arrangement, or “the formation of cooperative relationships between government, profit-making firms, and non-profit private organizations to fulfill a policy function.” Stephen H. Linder & Pauline Vaillancourt Rosenau, *Mapping the Terrain of the Public-Private Policy Partnership*, in PUBLIC-PRIVATE POLICY PARTNERSHIPS 1, 5 (Pauline Vaillancourt Rosenau ed., 2000). As a result, global governance is “rule making and power exercise at a global scale . . . [and] can be exercised by states, religious organizations, and business corporations, as well as by intergovernmental and non-governmental organizations.” Robert O. Keohane, *Global Governance and Democratic Accountability*, in TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE 130, 132 (David Held & Mathias Koenig-Archibugi eds., 2003).

2. For the purposes of this Article, an NGO shall be defined in accordance with the United Nations’ definition which notes an NGO as “any non-profit voluntary citizens’ group which is organized on a local, national or international level.” United Nations, <http://www.un.org/dpi/ngosection/brochure.htm> (last visited Aug. 9, 2005).

3. Kenneth Anderson, *The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations with International Nongovernmental Organizations*, 2 CHI. J. INT’L L. 371, 379 (2001).

4. *See* Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, AM. POL. SCI. REV., Feb. 2005, at 1.

in international governance and fails to recognize the importance of delegation as another legitimate source of authority.<sup>5</sup>

Most scholars treat NGOs as a homogenous group and base their theoretical and normative arguments around such a generalization, even when recognizing NGOs vary significantly on a number of levels.<sup>6</sup> This Article seeks to advance the literature on NGO accountability by unpacking NGOs by functional role in international governance and relating these roles to accountability theory. Failing to recognize these functional distinctions, many theories of NGO participation in international govern-

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5. Robert O. Keohane, Political Accountability 14–17 (paper presented to Conference on Delegation to International Organizations, Park City, Utah, May 3–4, 2002); Robert O. Keohane & Joseph S. Nye, *Democracy, Accountability and Global Governance* 1 (Harvard Univ. Politics Research Group, Working Paper No. 01-4, 2001), available at <http://www.ksg.harvard.edu/prg/nye/ggajune.pdf>; Robert E. Goodin, *Democratic Accountability: The Third Sector and All* 12 (John F. Kennedy Sch. of Gov't, Working Paper No. 19, 2003); Miles Kahler, Defining Accountability Up: The Global Economic Multilaterals (May 17–18, 2002) (working paper, presented at Miliband Conference on Global Governance and Public Accountability, London School of Economics) (arguing national governments have adequate institutional control over international institutions to which power is delegated).

6. Wide variations in NGOs' purposes, sizes, competencies, functions, membership structures, and funding sources, for example, impact the effectiveness of accountability mechanisms and counsel for greater specificity in establishing accountability mechanisms. For a discussion of some of these wide NGO variations, see, for example, Benedict Kingsbury, *First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society*, 3 CHI. J. INT'L L. 183, 186 (2002); S. Tarrow, *Transnational Politics: Contention and Institutions in International Politics*, 4 ANN. REV. POL. SCI. 1 (2001) (noting sometimes NGOs are really state bodies in disguise to gain increased political influence); J.A. Scholte, *Civil Society and Democracy in Global Governance*, 8 GOVERNANCE 281, 295–99 (2002); Ngaire Woods, *Global Governance and the Role of Institutions*, in GOVERNING GLOBALIZATION 25, 28 (David Held & Anthony McGrew eds., 2002); John Micklethwait & Adrian Wooldridge, *The Globalization Backlash*, FOREIGN POL'Y, Sept.–Oct. 2001, at 16 (“NGOs claim to represent global civil society. But nobody elects them.”); David B. Rivkin, Jr. & Lee A. Casey, *The Rocky Shoals of International Law*, 62 NAT'L INTEREST 35, 37 (2001) (“NGOs are not elected, not accountable to any body politic.”); Jeremy Rabkin, *International Law vs. the American Constitution—Something's Got to Give*, 55 NAT'L INTEREST 30, 37 (1999) (“NGOs never have to face voters or bear any sort of accountability.”). The variations are important because, for example, increasing the openness or representativeness of governance structures may undermine accountability for nondecisions when deadlocks or “joint decision traps” occur (made more likely by the increased breadth of participation). See Fritz W. Scharpf, *Coordination in Hierarchies and Networks*, in GAMES IN HIERARCHIES AND NETWORKS: ANALYTICAL AND EMPIRICAL APPROACHES TO THE STUDY OF GOVERNANCE INSTITUTIONS (Fritz W. Scharpf ed., 1993).

ance have missed the mark, focusing primarily on ensuring greater accountability of NGOs generally. This Article seeks to remove the debate regarding the provision of accountability from the level of the actor to that of function.<sup>7</sup> This Article proposes the participation of NGOs in international governance should not always depend upon democratic accountability. Instead, the accountability required of these NGOs should depend upon the particular governance function they perform. As a result, the mechanisms used to achieve such accountability will necessarily vary by function.

Part II begins with a discussion of accountability in international governance, establishing a general typology of accountability mechanisms.<sup>8</sup> Part III then describes some of the different functions performed by NGOs in international governance, providing examples of how such systems are arranged under existing frameworks and illustrating the relationship between the function performed and the accountability needed. Part IV seeks to refine NGO accountability theory by proposing a new model to guide NGO participation: one linking accountability to function. Part IV also identifies some concerns in implementing the theory. The Article concludes by calling for further research into the potential drawbacks of implementing this new framework so an appropriate balance between fairness, operability, and accountability may be reached in international governance.

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7. While it may be argued the underlying assumption behind this framework is that it does not matter who governs, so long as appropriate accountability controls are enforced, this argument would be an over-extension of this Article's proposal. This Article does not seek to undermine the authority of State actors in international governance, nor does it suggest States are losing power in international governance. Rather, it questions the assumption that accountability mechanisms must be differentiated between authority delegated to administrative government agencies and authority delegated to non-state actors with sufficient controls to assure adequate accountability to the delegator. It is beyond the scope of this Article to evaluate whether, after establishing a baseline accountability requirement for a particular function, particular actors must be held to different standards based upon different levels of legitimacy as international governance actors. Normatively, such a differentiation seems questionable, since accountability mechanisms are designed to constrain power, whatever its form. These actor-based legitimacy concerns may better be dealt with through other forms of legitimization, rather than through accountability controls, but this Article does not take a position on this issue.

8. This categorization is based largely upon the work of Keohane, Grant, and Nye. *See generally* Grant & Keohane, *supra* note 4; Keohane & Nye, *supra* note 5.

## II. ACCOUNTABILITY IN INTERNATIONAL REGIMES

Although accountability is “an under-explored concept whose meaning remains evasive,”<sup>9</sup> the purpose of this Article is not to define the concept with any more lucidity than theorists who have come before; instead, it is to explore a new mode of analysis for how accountability mechanisms should be structured. Generally, an “accountability system is the set of accountability mechanisms, and their interactions, that characterize a given governance system.”<sup>10</sup> Accountability implies information and the ability to sanction power-wielders for misbehavior: “[a]ccountability refers to relationships in which principals have the ability to demand answers from agents to questions about their proposed or past behavior, to discern that behavior, and to impose sanctions on agents in the event that they regard the behavior as unsatisfactory.”<sup>11</sup> Accountability is important in international governance because “to a greater degree than domestic lawmaking, the international process suffers from an accountability deficit.”<sup>12</sup>

A. *Democratic Accountability*

Most theorists have defined and operationalized accountability by reference to democratic legitimacy, elections, and the sanction of removal as yardsticks of accountability and legitimacy.<sup>13</sup> Democratic accountability presumes the existence of a *demos*<sup>14</sup> whose will can be measured.

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9. Andreas Schedler, *Conceptualizing Accountability, in THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* 13, 13 (Andreas Schedler et al. eds., 1999) [hereinafter *THE SELF-RESTRAINING STATE*].

10. Keohane, *Political Accountability*, *supra* note 5, at 9.

11. *Id.* at 3. See also John Dunn, *Situating Democratic Political Accountability, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* 329, 335 (Adam Przeworski et al. eds., 1999). It is important to note the principals, or accountability holders, need not be the beneficiaries of the agents' actions.

12. Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 *COLO. L. REV.* 1555, 1562 (1999).

13. This Article does not presume democratic legitimacy is the only or necessarily the appropriate form of legitimacy to which regimes and organizations should aspire. However, it is one of the norms discussed in this Article and representative accountability (often referred to as democratic accountability) is assumed throughout many of the discussions in this Article.

14. A *demos* is considered “a polity with members by . . . whom and for whom democratic discourse with its many variants takes place.” J. H. H. Weiler, *European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order*, 44 *POL. STUD.* 517, 523 (1996). It has been referred to as “a sovereign authority that decides important political matters either directly in popular assemblies or indirectly through its

While the existence of an international *demos* is a matter of significant contention,<sup>15</sup> some authors have suggested cross-border and international issue- and function-specific *demoi* do exist.<sup>16</sup> Whether an international *demos* exists remains a debate. However, civil society registered its view on the matter in Seattle, proclaiming loudly through protests at the World Trade Organization meeting in 1999 that without abilities to relate civil society's views to the governing bodies of international legal regimes, those regimes may become less legitimate.<sup>17</sup> This has led some to conclude a "democracy deficit" exists, necessitating greater accountability.<sup>18</sup> This Article agrees democratic accountability may be important and necessary to ensure the legitimacy of governance regimes, but believes the uniform requirement of democratic accountability to be excessive. Instead, this mode of accountability should be required only when functions performed by NGOs relate to the representation of a particular populace.

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representatives." Robert A. Dahl, *Can International Organizations be Democratic? A Skeptic's View*, in *DEMOCRACY'S EDGES* 20 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).

15. Compare PIPPA NORRIS, *A VIRTUOUS CIRCLE: POLITICAL COMMUNICATIONS IN POSTINDUSTRIAL SOCIETIES* (2000) (generally arguing national identities are not sufficiently global to support a representative global *demos*) with DAVID BEETHAM, *DEMOCRACY AND HUMAN RIGHTS* 137 (1999) ("[T]he *demos* that is democracy's subject has come to be defined almost exclusively in national terms, and the scope of democratic rights has been limited to the bounds of the nation-state.").

16. See Tanja Brühl, *The Privatisation of International Environmental Governance*, in *PROCEEDINGS OF THE 2001 BERLIN CONFERENCE ON THE HUMAN DIMENSIONS OF GLOBAL ENVIRONMENTAL CHANGE: GLOBAL ENVIRONMENTAL CHANGE AND THE NATION STATE* 371, 376–77 (Frank Biermann et al. eds., 2002), available at <http://www.glogov.org/upload/public%20files/pdf/publications/bc%20proceedings/bc2001/bruhl.pdf>. This is because a *demos* is defined by populations which, having a sense of trust and public spirit, engage in public discourse to recognize the existence of mutual rights and obligations of its members, reinforcing feelings of solidarity within the population. See Michael Zürn, *Democratic Governance Beyond the Nation-State: The EU and Other International Institutions*, 6 *EUR. J. INT'L REL.* 183, 195–200 (2000).

17. Keohane & Nye, *supra* note 5, at 22.

18. E.g., Alfred C. Aman, Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 *IND. J. GLOBAL LEGAL STUD.* 379 (2001). Other authors have argued even democratic decisions at the State level are often no longer "democratic" in so far as they create externalities on neighboring States' citizens who had no opportunity to participate in the decision-making. See Daniele Archibugi, *Principles of Cosmopolitan Democracy*, in *RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY* 198, 204 (Daniele Archibugi et al. eds., 1998) [hereinafter *RE-IMAGINING POLITICAL COMMUNITY*]; David Held, *Democracy and Globalisation*, in *RE-IMAGINING POLITICAL COMMUNITY*, *supra* at 11, 14.



Levels of internal democratic accountability vary significantly between NGOs,<sup>19</sup> and some have argued “the role of NGOs is not to be representative but to raise awareness.”<sup>20</sup> However, the vast majority of NGO accountability scholars dealing with this issue evaluate NGO accountability based solely upon these internal controls.<sup>21</sup> Their claim is NGO representatives generally are not elected by their memberships, and members typically are passive contributors who do not review or direct the NGOs’ actions.<sup>22</sup>

However, this criticism of NGO democratic accountability tends to conflate internal and external accountability.<sup>23</sup> The external democratic accountability charge is NGOs are only accountable to their membership, without allowing the beneficiaries a right to determine the NGO actions affecting them.<sup>24</sup> However, both of these criticisms depend upon the norm of democracy to legitimate NGO involvement in international governance. This Article posits legitimate governance need not always be based upon the norm of democracy, especially of elections, but recognizes it may be an appropriate focus for certain functions.<sup>25</sup>

The external democratic accountability critique faces an additional problem: it does not justify requiring NGOs to represent the beneficiaries of its actions. Should a corporation be held accountable primarily by its shareholders or its consumers? The same issue applies here: members are the primary determinants of internal NGO accountability, while beneficiaries are rightly viewed as external accountability holders who at all times possess reputational controls, but who may possess greater rights to hold NGOs accountable depending upon the function performed by

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19. See David Chandler, *New Rights for the Old? Cosmopolitan Citizenship and the Critique of State Sovereignty*, 51 POL. STUD. 332, 336 (2003).

20. *Id.* at 340 (internal quotation omitted). See also Johan Galtung, *Alternative Models for Global Democracy*, in GLOBAL DEMOCRACY: KEY DEBATES 143, 155 (Barry Holden ed., 2000).

21. See Peter J. Spiro, *The Democratic Accountability of Non-Governmental Organizations*, 3 CHI. J. INT'L L. 161, 163 (2002).

22. *Id.*

23. See *id.*

24. A. Claire Cutler et al., *The Contours and Significance of Private Authority in International Affairs*, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS 333, 369 (A. Claire Cutler et al. eds., 1999).

25. Therefore, this Article does not go so far as some scholars as to suggest NGOs can claim legitimate representative rights over beneficiaries without being democratic or accountable to such beneficiaries. See Klaus Dieter Wolf, *Private Actors and the Legitimacy of Governance Beyond the State*, paper presented at ECPR Joint Session Workshop, Grenoble (2001), <http://www.ifs.tu-darmstadt.de/fileadmin/pg/media/papers/civil.pdf>.

the organization. For instance, where the NGO claims to represent the beneficiaries in a lobbying activity, beneficiaries should have a stronger right to constrain NGO actions than where NGOs are merely establishing standards they believe will help certain populations.<sup>26</sup>

Although democratic accountability can be important, a leading democratic political theorist, Robert Dahl, noted, “international organizations are not and are not likely to be democratic.”<sup>27</sup> Dahl suggests international institutions be analyzed as bureaucratic bargaining systems, not as democratic governance regimes.<sup>28</sup> This view has begun to take hold, as the traditional *demos* theory of legitimacy has largely been replaced by international relations theorists who break legitimacy into two basic components: input or institutional legitimacy, which is derived from democratic expressions of the affected public’s will,<sup>29</sup> and output or task-specific legitimacy, which is based upon the effectiveness of actions taken to achieve normatively salient goals.<sup>30</sup> This Article posits accountability, recognized to contribute to legitimacy,<sup>31</sup> should undergo a similar dual analysis.<sup>32</sup>

Although traditional task-specific accountability analyses have focused on the effectiveness of governance outcomes,<sup>33</sup> this Article seeks to rede-

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26. *See id.*

27. Dahl, *supra* note 14, at 32.

28. *Id.*

29. Institutional legitimacy can also be found through tradition and symbols. *See* Keohane & Nye, *supra* note 5. Since these forms of legitimacy are not readily encompassed within accountability structures or applicable to international institutions, they are not discussed in this Article. *See id.*

30. *See* Fritz W. Scharpf, *Interdependence and Democratic Legitimation 2* (Max Planck Inst., Working Paper No. 98/2, 1998), available at <http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp98-2/wp98-2.html>; FRITZ W. SCHARPF, GAMES REAL ACTORS PLAY: ACTOR-CENTERED INSTITUTIONALISM IN POLICY RESEARCH 153 (1997); PENTTI SADENIEMI, PRINCIPLES OF LEGITIMACY AND INTERNATIONAL RELATIONS (1995); *see also* Alan F. Fowler, *Assessing NGO Performance: Difficulties, Dilemmas, and a Way Ahead*, in BEYOND THE MAGIC BULLET: NGO PERFORMANCE AND ACCOUNTABILITY IN THE POST-COLD WAR WORLD 169 (Michael Edwards & David Hulme eds., 1996) [hereinafter BEYOND THE MAGIC BULLET] (arguing for performance-based analysis of NGOs to include output, outcome, and impact related measures); Debora Spar & James Dail, *Of Measurement and Mission: Accounting for Performance in Non-Governmental Organizations*, 3 CHL J. INT’L L. 171, 177–78 (2002) (discussing Fowler’s performance analysis framework).

31. Grant & Keohane, *supra* note 4.

32. This follows Grant and Keohane’s analysis of democratic and non-democratic forms of accountability. *See id.*

33. *See, e.g.*, Ngaire Woods, *Who Should Govern the World Economy: The Challenges of Globalization and Governance*, 9 RENEWAL 73, 78 (2001) (“The democratic

fine the analysis to legitimize the performance of the tasks themselves through procedural mechanisms which promote both greater internal and external accountability.<sup>34</sup> A task-specific approach makes clear not all tasks or functions need to be legitimized by governance outcomes even at the international level where the existence of a *demos* is heavily questioned. Varying combinations of input and output controls can promote legitimacy in different functional circumstances and, depending upon the mechanisms required, can promote democratic accountability.<sup>35</sup> This Article does not propose a democracy- or delegatory-based accountability control system is appropriate in all cases,<sup>36</sup> but rather legitimizing controls will depend upon the functions performed. Accordingly, this Article posits the traditional emphasis on democratic principles to guide accountability controls is misplaced.<sup>37</sup>

### *B. Moving Beyond Democratic Accountability*

Although there has been a historic over-reliance on democratic controls, alternative measures to hold non-state actors accountable, such as profitability, are not necessarily appropriate or valuable yardsticks for determining NGO performance.<sup>38</sup> Basing their typology on a delegatory model of international governance, Keohane, Grant and Nye demonstrate the existence of multiple forms of internal and external accountability, though they question the ability of some of the mechanisms they describe to adequately hold some international governance actors accountable in

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legitimacy of 'network governance' relies on a new way of conceiving of democracy which . . . shifts the focus from the 'inputs' of the decision-making system (i.e. elections and representative government) to the quality of the 'outputs' of the system.").

34. While authors have discussed procedural mechanisms in terms of internal accountability constraints, it may be equally applicable to external accountability, where stakeholders are not members of NGOs, but rather beneficiaries. See U.N. Dev. Programme, Human Dev. Report Office, *Civil Society and Accountability 2* (2002), available at [http://hdr.undp.org/docs/publications/background\\_papers/2002/Kaldor\\_2002.pdf](http://hdr.undp.org/docs/publications/background_papers/2002/Kaldor_2002.pdf) (prepared by Mary Kaldor).

35. This combination of input- and output-based accountability controls exists even in the United States, widely hailed as a country with strong democratic accountability controls. See Keohane & Nye, *supra* note 5, at 6-7, 26 (noting legal accountability might promote both input- and output-based legitimacy).

36. For a discussion of the need for an international *demos* to support democratic governance, see Zürn, *supra* note 16.

37. Grant & Keohane, *supra* note 4.

38. Spar & Dail, *supra* note 30, at 176. For different approaches to assessing NGO performance, see *id.* at 176 n.12.

certain circumstances.<sup>39</sup> The grab bag of control mechanisms derived from the delegatory system of governance referenced by Keohane, Grant and Nye include fiscal, market, supervisory, legal, peer, market, reputational, and hierarchical accountability mechanisms.<sup>40</sup>

Fiscal accountability, also known as financial conditionality, refers to the external controls which the individual or institution holding the purse string can exert over the governance actor.<sup>41</sup> These controls include not only conditions a financier may impose upon an NGO, but also may include, *inter alia*, national regulations preventing an NGO from engaging in for-profit activities or decisions made by individuals with conflicts of interests. Keohane and Grant suggest this form of accountability is particularly strong for NGOs which are highly dependent upon external grants and funding.<sup>42</sup> The necessity of financing for sustainability creates a competitive financing market, with NGOs seeking to carve out market niches and branding.<sup>43</sup> This competitive effect may cause NGOs to act like for-profit actors—similar to the situation in which NGOs compete for government contracts—and therefore may cause NGOs to act contrary to the interests of their memberships, their funders' interests, or their beneficiaries.<sup>44</sup>

Similar to fiscal accountability, market accountability, or the means by which NGOs obtain financing or membership in a competitive NGO environment, can also be a powerful external method to control runaway NGO behavior.<sup>45</sup> This form of accountability in the NGO context, however, is less compelling, as most NGOs create particular niche markets or brands, making their services less substitutable and thereby decreasing the likelihood perfect NGO markets for financing, services, or memberships exist.

Supervisory accountability is another form of external accountability whereby those who have delegated authority to the NGOs may withdraw such authority or censure the NGOs for failing to follow instructions. In

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39. Keohane & Nye, *supra* note 5, at 1–5; see also Grant & Keohane, *supra* note 4; Alfred C. Aman, Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 49 UCLA L. REV. 1687, 1692 (2003) (arguing market accountability mechanisms may not be sufficient to ensure proper provision of some social services by non-state actors).

40. Keohane & Nye, *supra* note 5, at 4–5; Grant & Keohane, *supra* note 4, at 8.

41. Grant & Keohane, *supra* note 4, at 8.

42. *Id.*

43. Kaldor, *supra* note 34, at 24.

44. See DAVID LEWIS, *THE MANAGEMENT OF NON-GOVERNMENTAL DEVELOPMENT ORGANISATIONS: AN INTRODUCTION* 199–200 (2001).

45. See Grant & Keohane, *supra* note 4, at 9–10.

international governance this is a particularly powerful type of accountability mechanism, as evidenced by the adherence of the World Bank and IMF to the standards demanded by the Member States overseeing (and funding) their operation.<sup>46</sup> This form of accountability control is even more powerful for NGOs dependent upon government contracts and relationships for viability and financing.

Another external constraint upon NGO behavior is legal accountability. Although this form of accountability has potency at the domestic level to prevent private inurement or other self-serving behavior of officers, at the international level, without greater harmonization, it will likely be fairly weak at ensuring accountability.<sup>47</sup> Additionally, no international law governs the operation of NGOs. Rather, legal accountability in international governance might be considered contract accountability, whereby NGOs are required to follow the terms of a contract signed with other governance actors. Failure to abide by those terms could have the same individual and organizational consequences as those imposed by legal sanctions or penalties. This revised view of legal accountability in the international governance context indicates such constraints might be important for NGOs acting in a governance capacity.

Peer accountability is how actors in a horizontal relationship with the NGO performing a governance function hold the NGO to certain standards of accountability. NGOs often act as coalitions to coalesce the necessary resources, expertise, and relationships to achieve particular functions;<sup>48</sup> peer accountability regulates the relationship between these partnerships to a certain extent. However, as discussed below, this form of accountability is questionable as a source of normatively justified constraints on actor behavior.

Concerns of exacerbating representational imbalances through participation of unaccountable NGOs have caused some scholars to suggest the greater use of peer accountability mechanisms to ensure the appropriate representativeness of NGOs.<sup>49</sup> This argument suggests, however, it might be limited to a situation of network governance.<sup>50</sup> To the author's mind,

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46. *See id.* at 8–9.

47. *See id.* at 9–12.

48. *Id.*

49. *See Goodin, supra* note 5, at 29–30.

50. Partnerships and linkages, especially with local groups, are crucial for the success of many international NGOs. *See* MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* 23–29 (1998); Grant & Keohane, *supra* note 4. In such situations, the partnership has a normative right to hold members of the partnership (externally) accountable with respect to actions taken affecting the partnership. *See* Paul Wapner, *De-*

peer review is rarely, if ever, a normatively satisfactory means by which to hold actors accountable, but is only a second- or third-best solution. Since peer organizations are only very indirectly affected by the actions of other similarly situated NGOs,<sup>51</sup> their normative right to hold other NGOs accountable is limited at best (when not a partner in a particular governance function) and may be limited further based on the particular functions performed by NGOs.

Additionally, little normative support is provided for the concept of using peer accountability mechanisms instead of other accountability controls in non-network governance structures. This is important because where NGOs perform actions similar to government entities, or replace what might otherwise be government activities, requiring less accountability assurances of NGOs than of government actors may present opportunities for game-playing and other self-serving activities. This Article does not directly oppose such theories, although it seemingly conflicts with existing theories of accountability which suggest different actors should not be required to meet the same accountability controls, relying upon (unequal) checks and balances as accountability controls.<sup>52</sup> Rather, this theory suggests function, rather than actor, is how accountability controls should be established.<sup>53</sup>

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*fending Accountability in NGOs*, 3 CHI. J. INT'L L. 197, 202 (2002) ("Whenever an NGO links or otherwise collaborates with another, it opens itself up to scrutiny and evaluation. To the degree that NGOs find strength in doing so, however, accountability becomes part of the price of increased transnational effectiveness."). However, the right to hold actors accountable or impose sanctions upon those other organizations is normatively suspect. Funding competition may promote such self-serving behavior, but the right of these peer organizations to hold each other accountable is limited, since they do not purport to act on each other's behalf.

51. Other NGOs might be affected by the actions of a particular NGO through reputational effects on the NGO sector or as a result of information failures attributing improper NGO actions not exclusively to the offending NGO. See EUGENE BARDACH, *GETTING AGENCIES TO WORK TOGETHER: THE PRACTICE AND THEORY OF MANAGERIAL CRAFTSMANSHIP* 144–46 (1998). Sole reliance on peer accountability mechanisms may, in fact, promote the creation of collusive networks. See Goodin, *supra* note 5, at 45.

52. See, e.g., Goodin, *supra* note 5, at 37–38. Goodin's analysis, however, often conflates internal and external accountability, making theoretical extrapolations from his argument difficult. See *id.* at 42.

53. This Article is open to the possibility the theory it propounds might require incorporation of the two theories insofar as actors performing a particular function would require particular accountability controls, though the exact form or extent of those controls might vary depending upon the actor. Practically, the form of accountability must necessarily vary by actor, as different procedural mechanisms are necessary to implement intended accountability controls. However, this Article considers the constraining effect on

Reputational accountability is the least well-defined of the various accountability mechanisms laid out in Keohane, Grant, and Nye's typology. They recognize this form of accountability is often dependent upon, or even coterminous with, other forms of accountability, especially market accountability, though it is possible reputational effects may exist outside those of other accountability constraints.<sup>54</sup>

The argument goes: reputational forces regulate the extent to which NGOs must address internal accountability, since no exit barriers exist for members, and the NGO "markets" for membership are generally competitive.<sup>55</sup> Albert Hirschman, however, has shown the dangers of this reasoning. He notes where individuals can exit an organization's membership easily and join another organization; there is little incentive for the individual to use her voice to improve the organization.<sup>56</sup> Given the sheer number of NGOs, even in a particular issue area, competition between NGOs is not likely to significantly contribute to greater internal accountability. So long as a particular NGO captures the majority of an individual's preferences, the NGO may make a number of minor policy choices without membership support or fear of significant reprisal.<sup>57</sup>

Additionally, where members seek to hold their representative organizations accountable, there are significant barriers to entry, which come in the form of information costs.<sup>58</sup> An individual may have invested a sig-

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actor behavior to be theoretically equivalent for all actors performing a particular function. Differential treatment based on type of organization, then, is justified only to the extent such treatment can equalize the ultimate level of accountability achieved across organizations performing the same governance function. This, however, would not justify, from a normative perspective, the use of different types of accountability controls to equalize total accountability; it would only justify a greater level of the same controls used to ensure accountability of other actors.

54. Keohane & Nye, *supra* note 5, at 17; Grant & Keohane, *supra* note 4, at 9.

55. See Spiro, *supra* note 21, at 163–64, 166–67 (also noting some concerns regarding monopoly power may exist in certain circumstances).

56. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSE TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 84 (1970).

57. See generally Jonathan R. Macey, *Packaged Preferences and the Institutional Transformation of Interests*, 61 U. CHI. L. REV. 1443 (1994).

58. Scholars on this topic have typically assumed basic, media-related monitoring is sufficient to achieve internal accountability, but this again conflates the issue of internal and external sovereignty to the extent it is assumed media-related monitoring is accurate and wholly accepted by the membership. See, e.g., Moisés Naim, *Lori's War*, FOREIGN POL'Y, Spring 2000, at 28, 39. Spiro analogized NGO membership to corporate shareholder management (who can similarly enter and exit with relative ease) which Spiro claims is formally clear, but practically limited due to the high costs of monitoring and collective action problems. Spiro, *supra* note 21, at 165. But see Goodin, *supra* note 5, at

nificant amount of energy into learning about an organization's activities, and after review of those activities, suggested new directions for the organization. If those suggestions fall on deaf ears, she may choose to leave. However, prior to joining an organization, she does not necessarily know whether it is highly representative without a significant amount of research.

Additionally, in order for any organization to be held truly accountable by its internal membership through reputational mechanisms, the individual members must also incur significant information-gathering costs to learn about the organization's activities and then incur moderate participation costs. It therefore may be unrealistic to expect NGO competition alone would achieve greater internal accountability and representativeness.<sup>59</sup> This is borne out in practice, where such competition exists, but few organizations are held accountable to their memberships directly, especially in lower-order decisions.

While the competition issue is usually buttressed by assertions NGOs' claims to legitimacy depend upon self-regulation, or the creation of internal accountability mechanisms,<sup>60</sup> this approach falls short as a framework for establishing accountability. As an accountability control, competition establishes a reliance upon other, (generally) non-regime-related organizations to hold the participating NGOs to account.<sup>61</sup> From both systemic and normative perspectives, this seems as undesirable as peer accountability mechanisms.

Finally, NGOs might regulate themselves through the internal accountability mechanism of hierarchy. Individual officers and agents of an NGO are held accountable to standards established by the NGO's management and organizational structure. Failure to abide by the NGO's own standards may result in salary cuts or firing and therefore can act as significant deterrents to impropriety.<sup>62</sup> For instance, incorporation creates hierarchical internal accountability within the organization.<sup>63</sup> However,

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7 ("[I]n the non-profit sector there is simply no equivalent to 'voters' in the state sector or 'shareholders' in the market sector."). The likelihood of media-related monitoring is perhaps even greater in the corporate context than in NGO context, so this argument seems to lack much merit. At best, Spiro's argument counsels for greater monitoring of corporate accountability when corporations are acting in democratic international governance schemes.

59. See Spiro, *supra* note 21, at 163.

60. See L. David Brown et al., *Globalization, NGOs and Multi-Sectoral Relations 27* (Hauser Ctr. For Nonprofit Orgs., Harvard Univ., Working Paper No. 1, 2000).

61. *Id.*

62. See Goodin, *supra* note 5, at 5-7.

63. *Id.* at 6-7.



while incorporation may control some rent-seeking behavior by individual officers, it does little to influence the behavior of a fly-by-night or otherwise wholly corrupt NGO. It does, however, create transparency and reporting obligations which may increase the cost of being corrupt and thereby increase accountability.

As this cursory discussion illustrates, non-democratic accountability mechanisms exist. However, each method of control has its own unique strengths and weaknesses and range of applicability, all of which is often highly context- and function-dependent. Often, however, a particular action may be held to account by a number of different mechanisms. The task of the accountability holder is then to determine both the type and extent of the particular mechanism to be applied. This is no easy task. This Article seeks to begin this process by aligning particular governance functions to the type of accountability controls most appropriate from a normative standpoint. Although not definitive in its approach, the Article does suggest a prototypical framework which the author expects will require further refinement and development to make it fully operational.

Although this Article breaks new ground in establishing a function-based approach to accountability controls, some scholars have already illustrated some of the context-dependency of delegatory or non-democratic accountability controls, noting, for instance, market and reputational accountability depend upon transparency for effectiveness.<sup>64</sup> Despite these contextual concerns and prerequisites to effectiveness, many authors have seemed to assume the mere existence of these accountability mechanisms somehow means such mechanisms are sufficient to hold actors accountable.<sup>65</sup> For instance, even Keohane has suggested NGOs

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64. See Thomas Hale, *Managing the Disaggregation of Development: How the Johannesburg "Type II" Partnerships can be Made Effective* 23–26 (2003), [http://www.wws.princeton.edu/mauzerall/wws402f\\_s03/JP.ThomasHale.pdf](http://www.wws.princeton.edu/mauzerall/wws402f_s03/JP.ThomasHale.pdf).

65. See Thomas Hale & Denise L. Mauzerall, *Thinking Globally and Acting Locally: Can the Johannesburg Partnerships Coordinate Action on Sustainable Development?*, 13 J. ENVTL. DEV. 220, 226–29, available at <http://www.wws.princeton.edu/mauzerall/papers/Hale.Mauzerall.JED.final.pdf>. Hale and Mauzerall argue reputational, market and, indirectly, financial accountability, can hold private partnerships accountable to a broad-based constituency of affected stakeholders. *Id.* See also Hale, *supra* note 64, at 22. However, they do not identify which stakeholders should have a right to hold the actors accountable or how they are affected or even relate to the accountability mechanisms assumed to be effective. Additionally, they undermine their own argument by recognizing “reputational and market accountability . . . does not work equally well on all types of actors. ‘Brand-less’ corporations, non-democratic governments, and projects with guaranteed funding sources are resistant to the kind of reputational and market enforcement powers the proposed regulatory regime would apply.” Hale & Mauzerall, *supra* at 19;

“are highly vulnerable to threats to their reputations.”<sup>66</sup> This Article argues even where contextual prerequisites can be met, accountability mechanisms are not necessarily appropriate or effective constraints on actor behavior when performing different functions. This is particularly important since “[a]ccountability is not a pure good” where more is necessarily better,<sup>67</sup> and “the total possibilities for participation are inescapably constrained by the need to accomplish the institution’s tasks.”<sup>68</sup> NGO involvement in global governance must be limited both by number and type of organizations in order to ensure governance occurs.

While contextualizing these issues is difficult and should necessarily be beyond the scope of academic work such as this, the importance of this analysis is to reveal the level of generality and false grouping is standard practice in NGO scholarship and the need for a more function-based analysis of accountability. The amount of allowable government support, for instance, should depend upon the particular functions performed by the NGO. Some political groups may receive government

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Hale, *supra* note 64, at 26. Hale and Mauzerall incorrectly understand Keohane and Nye’s reputational and market accountability issues by linking them with funding, and also consider many of the accountability mechanisms discussed by Keohane and Nye to be “horizontal” forms of accountability. Hale & Mauzerall, *supra*, at 14–15, 19; Hale, *supra* note 64, at 22. However, despite Schmitter’s definition of horizontal accountability as “the existence of permanently constituted, mutually recognized collective actors at multiple levels of aggregation within a policy that have equivalent capacities to monitor each other’s behavior and to react to each other’s initiatives,” Philippe C. Schmitter, *The Limits of Horizontal Accountability*, in *THE SELF-RESTRAINING STATE*, *supra* note 9, at 59, 61, this view of accountability is more akin to “checks and balances,” see Guillermo O’Donnell, *Horizontal Accountability in New Democracies*, in *THE SELF-RESTRAINING STATE*, *supra* note 9, at 29, 39 (stating effective horizontal accountability requires state agencies with authority and autonomy, as well as a willingness to oversee, remedy, and sanction other agencies’ unlawful actions), which are not technically accountability controls. See Grant & Keohane, *supra* note 4, at 7–9. Instead, horizontal accountability truly implies peer accountability, not accountability through the participation of multiple levels of affected stakeholders who may not be social equals. See Keohane, *Political Accountability*, *supra* note 5, at 20. In fact, “NGOs are weak compared to governments.” Keohane, *Global Governance and Democratic Accountability*, *supra* note 1, at 145. Although this Article does not discount the importance of transparency generally for ensuring accountability, it nevertheless does not support the exclusively project-based view of Hale and Mauzerall. Rather, this Article believes that both internal and external accountability concerns must be addressed equally for accountability and legitimacy to be ensured.

66. Keohane, *Global Governance and Democratic Accountability*, *supra* note 1, at 148.

67. See Robert O. Keohane, *Commentary on the Democratic Accountability of Non-Governmental Organizations*, 3 *CHI. J. INT’L L.* 477, 477 (2002).

68. Kingsbury, *supra* note 6, at 186 (citation omitted).

funds while others do not; if an NGO is to lobby an international organization for a particular policy, is it appropriate to include political groups funded by States? Or should only fully independent groups be allowed to participate? The answers to these questions and others can and should vary based upon the function the NGO seeks to perform and the international regime's normative values. This Article seeks to establish a basic functional typology for establishing accountability controls for NGOs participating in international governance.

Most prominent NGO scholars, including those demanding greater internal and external accountability controls, consider NGOs to be relatively weak institutional players. For instance, Keohane does not recommend strong accountability controls of "relatively weak NGOs," but notes "as a particular NGO gains influence, it can exert effects, for good or ill, on people not its members. At this point, it can be legitimately held externally accountable as other powerful entities operate in world politics."<sup>69</sup> Keohane suggests such limited controls because he considers NGOs to be mere lobbyists.<sup>70</sup> This Article agrees with Keohane's passing comment regarding the increasing power of external accountability controls as an NGO gains influence, but takes a slightly different approach: as NGOs perform different functions, the level of power they wield over an international governance system changes, and therefore the strength of controls based on internal accountability and external accountability to the regime itself should vary according to the importance of its function and level of control over outcomes. External accountability to beneficiaries, on the other hand, should only be implicated where there is a possible impact upon the choice or rights of beneficiaries.<sup>71</sup> Departing from most scholarship on NGO accountability, this Article seeks to determine which forms of accountability are appropriate when. As Keohane explains, "[T]o establish that some accountability exists is not to reach a normatively significant conclusion. From a normative standpoint, the relevant question is whether a given set of accountability relationships is appropriate with respect to their type and extent."<sup>72</sup> This theory extends the normative debate to the function of the actor as well, recognizing

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69. Keohane, *Global Governance and Democratic Accountability*, *supra* note 1, at 148.

70. *Id.*

71. See THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASS-ROOTS MOVEMENTS 12-17 (Jonathan A. Fox & L. David Brown eds., 1998).

72. Keohane, *Political Accountability*, *supra* note 5, at 9.

“the particular configuration of accountability mechanisms in individual institutions matters.”<sup>73</sup>

Though accountability controls are necessary, both the form and strength of the controls should be, in the first instance, dependent upon the function which the NGO intends to perform, as opposed to analyzing the NGO itself (whether based upon a comparative power analysis or otherwise). NGO legitimacy in international governance is largely derived from claims of representation of under-served, disenfranchised, or otherwise disempowered populations.<sup>74</sup>

[NGO’s] claims to a legitimate voice over policy are based on the disadvantaged people for whom they claim to speak, and on the abstract principles they espouse. But they are internally accountable to wealthy, relatively public-spirited people in the United States and other rich countries, who do not experience the results of their actions. Hence there is a danger that they will engage in symbolic politics, satisfying to their internal constituencies but unresponsive to the real needs of the people whom they claim to serve.<sup>75</sup>

This is especially acute since the United Nations (UN) defines NGOs as not-for-profit entities.<sup>76</sup>

From a normative standpoint, however, NGOs need not be externally accountable to the beneficiaries of NGO action, but rather only to its members (funders, etc.), unless the NGO is acting as a “public” operative arm of a governance regime or affects the rights or choices of its beneficiaries.<sup>77</sup> This helps to resolve the problems arising when NGOs become

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73. See Arthur Benz & Yannis Papadopoulos, *Is Network Governance Democratic? Different Assessments for the National and International Level* (Center for Democratic Governance, first draft, 2003), <http://www.demnetgov.ruc.dk/conference/papers/HelsingoerAB-YP1.pdf>.

74. See Anderson, *supra* note 3, at 378. Since the beginning of NGO involvement in international governance, however, NGOs have gained significant policy expertise and have gained a new source of legitimacy for involvement in international governance.

75. Keohane, *Global Governance and Democratic Accountability*, *supra* note 1, at 148.

76. See *supra* note 2.

77. See Brühl, *supra* note 16, at 378 (“As long as private actors do not decide authoritatively on public policy, they neither have to have a democratic structure nor do they have to be elected by (sectoral) *demoi*.”) (internal citation omitted). Although the definition of “authoritatively” is not clear, this Article agrees with Brühl’s proposition insofar as NGOs are not decision-makers. Where NGOs are decision-makers, even if part of a larger group of decision-makers, then NGOs should be held accountable under democratic accountability mechanisms. However, this Article does not argue such accountability should necessarily extend beyond its membership.

service providers on behalf of governance regimes but apply incorrect strategies, undermining the effectiveness of other approaches, or diverting funds away from other, more successful ones.<sup>78</sup> In such circumstances, the regime must be accountable to the beneficiaries to some extent, and output-based legitimacy concerns contain some validity. However, the NGO's function, rather than its participation, is what determines the choices available to beneficiaries.<sup>79</sup> Therefore, it does not matter for the beneficiaries who provides the service, but only the manner in which it is provided.

*Table 1* provides a basic overview of the typology established by this Article, which shall be developed in greater detail in Part IV.A.<sup>80</sup> Political functions are those functions which generally involve some level of representation, and therefore require some modicum of democratic accountability to those represented, the level of which depends upon the level of representation needed and the influence over the process exerted by the NGO. Administrative functions, on the other hand, do not require democratic representation, as such actions are related to performing governance functions designed to improve the management of the governance regime. Representation of internal member interests is therefore correlated to that function, but can be achieved without necessitating democratic accountability; fiscal and hierarchical controls may achieve the needed efficiencies and spending controls to ensure good governance. At all times, however, NGOs are acting as delegated authorities, performing governance functions in lieu of the regime and are therefore primarily responsible to the governments sanctioning the NGO administrative actions. NGOs performing enforcement functions, depending upon the NGO's role in the enforcement process, must ensure accountability both to their memberships and possibly their beneficiaries, as well as to the regime generally. Authority under such a governance arrangement is less one of delegation, however, as NGOs are generally involved in an enforcement role to ensure independence and regime accountability to the global *demos*. The next Parts will discuss the relationship between

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78. See Sonia Arllano-Lopez & James F. Petras, *Non-Governmental Organisations and Poverty Alleviation in Bolivia*, 25 DEV. & CHANGE 555 (1994).

79. See David Held, *Law of States, Law of Peoples: Three Models of Sovereignty*, 8 LEGAL THEORY 1, 26 (2002).

80. See Grant & Keohane, *supra* note 4; Keohane & Nye, *supra* note 5. This table excludes market and reputational controls, since they are not imposed by the listed actors. Additionally, "hierarchical" subsumes all principal-agent relationships, including those of member or beneficiary representation.

**Table 1: Mapping Accountability Controls to NGO Governance Functions**

FUNCTIONS	ACCOUNTABILITY HOLDERS		
	Internal-Membership	External-Beneficiaries	External-Regime
<b>Political Activities</b>			
Agenda-setting	High: hierarchical, fiscal	Maybe: hierarchical	None to Limited: peer
Norm and Rule Formation	High: hierarchical, fiscal	Maybe: hierarchical	None to Limited: peer
General Participation	High: hierarchical, fiscal	Maybe: hierarchical	None to Limited: peer
<b>Administrative Duties</b>			
Certification	Limited: hierarchical, fiscal	None to Limited	High: legal, fiscal, supervisory
Standard Setting	Limited to High: hierarchical, fiscal	Maybe: hierarchical	High: legal, fiscal, supervisory, peer
Training and Information	Limited: hierarchical, fiscal	None to Limited	High: legal, fiscal, supervisory, peer
Service Provision	Limited to High: hierarchical, fiscal	High: hierarchical	High: legal, fiscal, supervisory, hierarchical
Other Administrative Functions	Limited: hierarchical, fiscal	None to Limited	High
<b>Enforcement</b>			
Arbitration	Limited: hierarchical, fiscal	None to Limited	High: legal, fiscal, supervisory, hierarchical
Monitoring	High: hierarchical, fiscal	Maybe: hierarchical	None to Moderate: supervisory

the accountability needed, normatively appropriate accountability mechanisms, and the functions performed by NGOs in greater detail.

### III. THE VARIED FUNCTIONS OF NGOs IN INTERNATIONAL GOVERNANCE

The deconstruction of accountability theory as applied to NGOs in the previous Part suggests accountability controls depend upon the functions undertaken by NGOs in international governance. Absent such a functional approach, NGOs participate in various governance functions without having duties to participate appropriately.<sup>81</sup> This Part discusses the varied functions NGOs perform in international governance to illustrate the complexity of the issue and the need for more nuanced accountability theories regarding NGO participation.<sup>82</sup>

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81. Richard Devetak & Richard Higgott, *Saving the Social Bond and Recovering the Public Domain*, in *THE MARKET OR THE PUBLIC DOMAIN, GLOBAL GOVERNANCE & THE ASSYMETRY OF POWER* 20 (Daniel Drache ed., 2001), available at [http://www.yorku.ca/robarts/archives/pub\\_domain/pdf/apd\\_higgottfin.pdf](http://www.yorku.ca/robarts/archives/pub_domain/pdf/apd_higgottfin.pdf).

82. NGO participation in international governance has blossomed in recent years and has taken many different avenues. See Kal Raustiala, *The "Participatory Revolution" in International Environmental Law*, 21 *HARV. ENVTL. L. REV.* 537, 538–39 (1997); Jonathan P. Doh & H. Teegen, *Nongovernmental Organizations as Institutional Actors in International Business: Theory and Implications*, 11 *INT'L BUS. REV.* 665 (2002). See generally A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 *CHI. KENT L. REV.* 61 (1992). While some have distinguished between various different civil society actors based on purpose, function, and funding, limiting evaluation of NGOs to service provision and advocacy, this Article expands the analysis of NGOs to whenever they perform any of the functions associated primarily with non-NGO groups, including social movements, social organizations, and religious groups. See Kaldor, *supra* note 34, at 12 tbls. 1, 17, 19 (noting although distinct, social movements and social organizations may be considered NGOs). Additionally, the analysis set forth by Kaldor and others is an actor-based model, as opposed to a function-based model, and does not attempt to map different accountability controls to the different actors or functions performed. Similarly, other authors have discussed the role of NGOs in partnership arrangements with companies and in the creation of corporate codes of conduct or privately-created standards. See, e.g., Jonathan P. Doh & Terrence R. Guay, *Globalization and Corporate Social Responsibility: How Nongovernmental Organizations Influence Labor and Environmental Codes of Conduct* (manuscript on file with *Brooklyn Journal of International Law*); Bas Arts, "Green Alliances" of Business and NGOs: New Styles of Self-Regulation or "Dead-End Roads?", 9 *CORP. SOCIAL RESP. & ENVTL. MGMT.* 26 (2002); Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 *IND. J. GLOB. LEGAL STUD.* 401 (2001). See also U.S. DEP'T OF LABOR, *THE APPAREL INDUSTRY AND CODES OF CONDUCT: A SOLUTION TO THE INTERNATIONAL CHILD LABOR PROBLEM?* 124–207 (1996), available at <http://www.dol.gov/ILAB/media/reports/>

“[Public-private partnerships] can . . . be classified according to their purposes and function into one of three categories,” either rule and standard setting, rule implementation, or service provision.<sup>83</sup> This model, established by Börzel and Risse, is a very useful start to this Article’s analysis, despite excluding an examination of NGO participation when performing political or lobbying functions.<sup>84</sup> This Article follows the same basic process in categorizing NGOs by function, with some slight variations and greater detail. Despite this greater detail, of course, the following categorization by no means provides an exhaustive list of functions NGOs may perform in governance regimes, but it does provide a basic categorization and framework of NGO functions, thereby establishing a starting point for more nuanced discussions of NGO participation in international governance.

#### *A. Policy Formulation*

Traditional scholarship on NGO participation in international governance has focused on NGO involvement in the creation of norms and policies. Thus begins this Article’s function-based analysis. Although direct NGO involvement is “less frequent in the areas of international rule setting and implementation,”<sup>85</sup> it nevertheless exists and is likely to increase in the future.<sup>86</sup> NGOs performing these functions are often likened to Kaldor’s analysis of social movements, which depend upon the ability to

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iiiclp/apparel/overview.htm; ENVTL. PROT. AGENCY, STATUS REPORT ON THE USE OF ENVIRONMENTAL LABELS WORLDWIDE (1993); Tanja A. Börzel & Thomas Risse, *Public-Private Partnerships: Effective and Legitimate Tools of Transnational Governance?*, in COMPLEX SOVEREIGNTY: RECONSTITUTING POLITICAL AUTHORITY IN THE TWENTY-FIRST CENTURY 195, 203–06 (Edgar Grande & Louis W. Pauly eds., 2004) (noting NGO involvement in the broad definition of governance through self-regulation in the shadow of hierarchy or regime-imposed rules and through independent self-regulation adopted by regimes). Privately-created standards later adopted by a governance regime are also beyond the scope of this Article, as NGOs creating such private standards were not part of what might be termed a public-private partnership in the formulation of those standards. See Börzel & Risse, *supra*, at 204. I do not address these arrangements which, under a broad definition of governance, might be considered such. Rather, I restrict my analysis to NGO roles in formulating policies adopted by international governments and in international governance as it relates to government-sanctioned and authorized action intended to replace or assist a function otherwise performed by a government institution or its agent. See *supra* note 1.

83. Börzel & Risse, *supra* note 82, at 199 (noting public-private partnerships might be categorized by ways in which they regulate behavior).

84. See *id.* at 198.

85. Börzel & Risse, *supra* note 82, at 204.

86. See *id.* at 204–06.



mobilize members into action.<sup>87</sup> This, in a sense, is a reliance upon the “market accountability” mechanism.<sup>88</sup> As will be shown in the following sections, there are a number of different functions falling within the broad category of policy formulation relying upon the purpose and representativeness of the NGOs seeking to perform those actions.

### 1. Agenda-Setting

Agenda-setting is one of the most important governance functions an organization can perform, as it places items onto the table for discussion and analysis, initiating the possibility of governance changes.<sup>89</sup> Generally, agenda-setting functions are limited to State actors in international governance regimes. However, where NGOs are instrumental in the formulation of the overarching policy framework or where they are incorporated into a state’s delegation directly, NGOs may have the ability to set the agenda for discussion. The World Conservation Union (IUCN) is the proto-typical example of this. The IUCN drafted the first version of the Convention of Biological Diversity and then was successful in setting the agenda of the Convention’s negotiations.<sup>90</sup>

Agenda-setting is important for accountability purposes since whoever controls the agenda has control over the scope of the governance system and its ability to change over time. Self-interest may dominate such agenda-setting formulations, as actors with an interest in the status quo may reject change through the formulation of the agenda.

### 2. Norm and Rule Formulation

Norm and rule formation, or rule-setting, is the most contentious role NGOs play in international governance. Some suggest such a role implies a loss of State sovereignty.<sup>91</sup> While this Article does not tackle this

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87. See Kaldor, *supra* note 34, at 22.

88. Keohane & Nye, *supra* note 5, at 5.

89. Although awareness building is generally considered an agenda-setting function, this aspect of agenda-setting is evaluated in the general participation section below. For the purposes of this section, agenda-setting is limited to formalized processes by which participants in a governance regime place issues on the table for negotiation and action. See P.J. Simmons & Chantal de Jonge Oudraat, *Managing Global Issues: An Introduction*, in *MANAGING GLOBAL ISSUES: LESSONS LEARNED* 3, 12 (P.J. Simmons & Chantal de Jonge Oudraat eds., 2001).

90. See Brühl, *supra* note 16, at 373.

91. See generally Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the “Unregulated” Marketplace*, 18 *CARDOZO L. REV.* 957, 958 (1996) (sug-

issue, it does recognize NGO involvement in rule-setting can be legitimized. NGOs have successfully participated in rule-setting nationally,<sup>92</sup> as well as in intergovernmental organizations and through independent initiatives.<sup>93</sup>

The extent of NGO involvement in rule-setting, like any other functional role an NGO might take, varies significantly. NGOs are primarily involved as rule setters through incorporation into official delegations, which has occurred in the nuclear non-proliferation treaty regime, for instance.<sup>94</sup> However, NGOs might also be involved in rule-setting in their own right. Amnesty International was crucial in shaping the Convention Against Torture and in establishing the International Criminal Court.<sup>95</sup> Similarly, the International Campaign to Ban Landmines had the right to make statements and table treaty language (though not to vote) during negotiations of the Convention on the Prohibition of Anti-Personnel Landmines.<sup>96</sup> To a lesser extent, NGOs are involved in the World Trade Organization and help to shape its outcomes.<sup>97</sup>

A shining example of the role of NGOs in rule-setting is found in the World Commission on Dams (WCD).<sup>98</sup> WCD consists of the World

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gesting that nations cede some sovereignty to non-governmental organizations such as the WTO).

92. See generally Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2000); Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386 (2001); Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000); Siobhan Mee, Comment, *Negotiated Rulemaking and Combined Sewer Overflows (CSOS): Consensus Saves Ossification?*, 25 B.C. ENVTL. AFF. L. REV. 213 (1997).

93. See Brühl, *supra* note 16, at 373–74.

94. See Börzel & Risse, *supra* note 82, at 199.

95. See WILLIAM KOREY, *NGOs AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: "A CURIOUS GRAPEVINE"* (1998).

96. See Motoko Mekata, *Building Partnerships Toward a Common Goal: Experiences of the International Campaign to Ban Landmines*, in *THE THIRD FORCE: THE RISE OF TRANSNATIONAL CIVIL SOCIETY* 143 (Ann M. Florini ed., 2000).

97. See generally Daniel C. Esty, *Why the World Trade Organization Needs Environmental NGOs*, INT'L CTR. FOR TRADE & SUSTAINABLE DEV., available at <http://www.ictsd.org/English/esty.pdf> (last visited Aug. 29, 2005) (discussing the role of NGOs in the WTO, and arguing for expanded formal involvement). See also Peter Sutherland, *The Doha Development Agenda: Political Challenges to the World Trading System—A Cosmopolitan Perspective*, 8 J. INT'L ECON. L. 363, 374 (2005) (discussing the WTO Secretariat's interest in creating a low-level partnership between the WTO and NGOs).

98. See Sanjeev Khagram, *Toward Democratic Governance for Sustainable Development: Transnational Civil Society Organizing Around Big Dams*, in *THE THIRD FORCE:*

Bank, national governments, private industry, and NGOs.<sup>99</sup> Although the WCD's work is advisory, it is a powerful source of international "soft law."<sup>100</sup> Indeed, WCD has been nearly universally lauded as a successful experiment to involve NGOs in rule-setting without undermining the authority of the regime or stymieing negotiations and has led to high quality outcomes considered unattainable under different circumstances.<sup>101</sup>

Norm and rule formation begs slightly different questions regarding NGO accountability than does agenda-setting. Here, representation of issues and interests is important to ensure organizational accountability to its membership, and in some cases, its beneficiaries.

### 3. General Participation and Lobbying

The most widely recognized role of NGO participation in international governance is one of lobbyist.<sup>102</sup> NGOs are renowned for their ability to mobilize public awareness and opinion and catalyze action on particular issues.<sup>103</sup> This differs from the agenda-setting function insofar as NGOs do not have the right to set the agenda, but due to the force of NGO lobbying, issues are placed upon the agenda by other governance actors.

Examples of NGO influence, both positive and negative, in international governance abound. NGO pressure is widely recognized as catalyzing the formation of the North American Commission on Environmental Cooperation (NACEC) under the North American Free Trade

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THE RISE OF TRANSNATIONAL CIVIL SOCIETY 83 (Ann M. Florini ed., 2000); see WORLD COMM'N ON DAMS (WCD), PROJECT AND FINANCIAL REPORT (2001), available at <http://www.damsreport.org/docs/wcdfinrpt.pdf>. The WCD was replaced by the Dams and Development Program in September 2001.

99. Khagram, *supra* note 98, at 83. The WCD was established in 1998 under the sponsorship of the World Bank and the IUCN. WCD, Outline of the WCD: Introduction, <http://www.dams.org/commission/intro.htm> (last visited Aug. 20, 2005).

100. See generally Kader Asmal, *Introduction: World Commission on Dams Report, Dams and Development*, 16 AM. U. INT'L L. REV. 1411 (2001).

101. See WCD, *supra* note 98, at 2 ("Many felt that the contested nature of the dams debate would pull the Commission apart."); *id.* at 26 ("The multi-stakeholder process followed by the Commission led to recommendations for a new way forward that no single perspective could advocate on its own.").

102. Simon Zadek and Murdoch Gatward, *Transforming the Transnational NGOs: Social Auditing or Bust?*, in BEYOND THE MAGIC BULLET, *supra* note 30, at 227.

103. Ann Marie Clark, *Non-Governmental Organizations and their Influence on International Society*, 48 J. INT'L AFF. 507, 510 (1995); Nancy Lindborg, *Nongovernmental Organizations: Their Past, Present, and Future Role in International Environmental Negotiations*, in INTERNATIONAL ENVIRONMENTAL TREATY MAKING 5 (Lawrence Susskind et al. eds., 1992).

Agreement (NAFTA),<sup>104</sup> for dismantling negotiations of the Multilateral Agreement on Investment,<sup>105</sup> and for assisting in the creation of the Convention on the Prohibition of Anti-Personnel Landmines.<sup>106</sup> Like the Kosovo Transition Council, which was comprised of political parties, religious leaders, and representatives of ethnic minorities, these international governance discussions afforded NGOs the opportunity to influence State action, without providing any real political power to the NGOs.<sup>107</sup> The impact of NGO involvement in such lobbying situations depends upon the willingness of both the governance regime and the governance actors within the regime to listen to and adopt NGO positions.

Lobbying activities are another political governance function which counsels unique accountability controls. Lobbying may or may not imply a sense of representation of affected persons, which may counsel external accountability to NGO beneficiaries, may only require internal accountability to ensure adequate member interest representation, or may require no representativeness, depending upon the issue and the purpose with which the NGO claims to act. There is little need, however, for external accountability to the regime, apart from perhaps ensuring participating NGOs do not knowingly provide false information or omit information, as the organization can dismiss NGO arguments quite readily.<sup>108</sup>

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104. PIERRE MARC JOHNSON & ANDRÉ BEAULIEU, *THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW* 2 (1996); Fredric Menz, *An Environmental Policy for North America Post-NAFTA*, NO. AM. OUTLOOK, Mar. 1994, at 11.

105. See generally Rodney Bruce Hall, *Private Authority: Non-State Actors and Global Governance*, 27 HARV. INTL. REV. 2 (2005).

106. Jost Delbrück, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies*, 10 IND. J. GLOBAL LEGAL STUD. 29, 41 (2003); Steve Charnovitz, *The Emergence of Democratic Participation in Global Governance (Paris, 1919)*, 10 IND. J. GLOBAL LEGAL STUD. 45, 54 n.30 (2003).

107. See INT'L CRISIS GROUP, ICG BALKANS REPORT NO. 100: KOSOVO REPORT CARD 28 (2000); INT'L CRISIS GROUP, ICG BALKANS REPORT NO. 97, ELECTIONS IN KOSOVO: MOVING TOWARD DEMOCRACY? 2 (2000).

108. The circumstances surrounding the dismissal of NGO arguments may affect, either positively or negatively, the perceived legitimacy of the governance regime. Therefore, dismissal may not be so readily done for political reasons. However, the power to dismiss arguments does exist and can be exercised, especially if the regime's legitimacy is high.

### B. Administrative Duties

Administrative duties differ from political activities because rule-implementation is the function, rather than rule-setting. As noted above, NGO participation in rule-implementation is somewhat minimal, though less so than in rule-setting activities.<sup>109</sup> These governance functions have come to being as international organizations and networks have sought to regulate behavior, rather than simply establish norms to be implemented at the national level. This specificity has necessitated a more complex governance structure, and as a result of institutional or systemic capacities, has sometimes involved NGOs in the implementation of such regimes.

The literature on NGO participation in international governance has focused little on NGOs acting in an administrative capacity. It is appropriate, however, to distinguish democratic and delegatory models of governance.<sup>110</sup> NGOs performing the functions of a typical administrative agency in the domestic context have authority delegated to them by the international regime and therefore must be accountable to the regime. Questions regarding democratic representativeness of the NGOs themselves are less important, as proceduralizing the actions of agencies is the dominant accountability control applied in such circumstances, not the assurance of direct representation. However, greater representation is increasingly sought in administrative actions, though typically limited to the role of lobbyists or Advisory Councils, so concerns regarding representation may surface to a greater extent in the future.

#### 1. Certification

A powerful role NGOs may play in the administration of international governance is certification of actors for participation in the regime itself. The power to enable participation is significant.<sup>111</sup> While this Article suggests a shared role in such an accreditation process between the regime, the State hosting the applicant organization, and an independent NGO dedicated to certification issues,<sup>112</sup> such a system is not always existent.

For instance, the Framework Convention on Climate Change, under which the Kyoto Protocol on climate change operates, provides the op-

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109. See discussion *supra* Part III.A.2.

110. See generally Grant & Keohane, *supra* note 4.

111. See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 283 (1997).

112. See *infra* Part IV.C.5.

portunity for NGO participation as a certification body, without significant co-regulation by the regime, though delegation authority is retained by the regime. Article 7.2(a) of the Convention provides the possibility NGOs may contract with the Conference of the Parties, where appropriate, to supervise and implement the Convention.<sup>113</sup> Article 12.4 provides the Conference of Parties with a clear mandate to establish guidelines for the certification of carbon sequestration and other projects under the Clean Development Mechanisms (CDM).<sup>114</sup> Article 12.9 gives the Executive Board authority to provide guidance on participation of various stakeholders, both governmental and non-governmental, in that certification process.<sup>115</sup> The Board, as well as its “operational entities,” which may include NGOs, could become a further compliance enforcement mechanism under the CDM.<sup>116</sup> As a result, Article 7.2(a) may provide NGOs the opportunity to act in an implementing role in the CDM.<sup>117</sup>

Here, the accountability issues relating to NGO involvement as certification entities are complex. External accountability to the regime is important, but excessive accountability to the regime might undermine the expression of, or adherence to, stakeholder interests which the CDM

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113. United Nations Framework Convention on Climate Change art. 7.2(a), May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC]. Additional opportunities for non-State participation in the Kyoto Protocol were also suggested for consideration, but have not yet come to fruition. See Chiara Giorgetti, *From Rio to Kyoto: A Study of the Involvement of Non-Governmental Organizations in the Negotiations on Climate Change*, 7 N.Y.U. ENVTL. L.J. 201, 213 (1999). See also *Report of the Subsidiary Body for Scientific and Technological Advice*, UNFCCC, 2d Sess., Provisional Agenda Item 7, at 11, U.N. Doc. FCCC/SBSTA/1996/4 (Feb. 2, 1996) [hereinafter *Subsidiary Body Report*] (pushing the consideration of greater NGO participation). Since most of the proposed requirements depend upon host country implementation, as opposed to the CDM administrative structure, they are not addressed in this Article. *Id.* at 6. See also Peggy Rodgers Kalas & Alexia Herwig, *Dispute Resolution Under the Kyoto Protocol*, 27 ECOLOGY L.Q. 53, 128 (2000) (“Where dispute settlement regimes and international tribunals deny access to non-State actors, the ability of domestic courts to decide disputes under international law and to enforce their decisions domestically is particularly salient.”).

114. Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 12.4, Dec. 11, 1997, 37 I.L.M. 22, 38 (1998) [hereinafter *Kyoto Protocol*]. The CDM authorizes developed countries to purchase carbon sinks and other nature-preserving or enhancing projects in order to decrease their total greenhouse gas emissions and achieve their greenhouse gas reduction targets.

115. *Id.* art. 12.9.

116. See Catherine Regdwell, *Non-Compliance Procedures and the Climate Change Convention*, in GLOBAL ENV'T INFO. CTR., GLOBAL CLIMATE GOVERNANCE: INTER-LINKAGES BETWEEN THE KYOTO PROTOCOL AND OTHER MULTILATERAL REGIMES ch. 3, at 22 (1998), available at <http://www.geic.or.jp/climgov/03.pdf>.

117. See *supra* text accompanying note 113.

seeks to support.<sup>118</sup> Despite this, internal representation seems of little importance, as does external accountability to beneficiaries, since such representation would disfavor other relevant interests.

## 2. Standard Setting

NGOs are involved on a somewhat limited basis in actual standard setting in the administrative context. However, where NGOs do have such authority, the power they wield is tremendous. While the majority of scholars treating this subject focus on private standards (adopted later by international regimes, domestic governments, or industry),<sup>119</sup> this Article deals only with those standards established by NGOs through a public international governance system. While limited in its analysis, this Article does not agree with most scholars who posit that the International Organization for Standardization's (ISO) standards are completely informal and private. Instead, this Article views ISO as somewhere between wholly informal and formal, since its members come from national standards bodies,<sup>120</sup> but are not exclusively comprised of government entities.<sup>121</sup> For instance, the American National Standards Institute, a member of ISO, is comprised of government and non-governmental

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118. UNFCCC, *supra* note 113, art. 4.1(i).

119. See, e.g., Colin Scott, *Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance*, 29 J. LAW & SOC'Y 56, 74 (2002) ("[Many] non-statutory private regulators operate complete regimes in the sense of having the capacity to set standards, to monitor and enforce without the intervention of other organizations. Where this is the case, they wield more power than those public regulators which are constrained by the need to follow standards set by legislatures or government departments and to pursue litigation in order to apply legal sanctions. There is thus a remarkable concentration of private power over public organizations. This is perhaps most striking with those private regulators operating internationally whose judgments on such matters as financial or fiscal credibility, probity or greenness significantly affect decisions of notionally democratic governments."). See also Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. NO. 1, at 1 (1992). Such regulation may be desirable to promote international harmonization, make transactions more secure, avoid harsher command-and-control type regulation, or to respond to market accountability forces. See Virginia Haufler, *Private Sector International Regimes*, in NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM 121, 127 (Richard A. Higgott et al. eds., 2000).

120. See JAMES R. EVANS & WILLIAM M. LINDSAY, *THE MANAGEMENT AND CONTROL OF QUALITY* 488 (3d ed. 1996). See also Karstin Ronit & Volker Schneider, *Global Governance Through Private Organizations*, 12 GOVERNANCE 243 (1999).

121. Haufler, *supra* note 119, at 127.

organizations.<sup>122</sup> Therefore, this Article views the ISO standards as non-binding standards created through public-private partnerships and therefore within the purview of this Article.

A more powerful example of NGO involvement in standard-setting, however, is the International Labour Organization (ILO). The ILO, an inter-governmental organization designed to protect workers from exploitation and poor working conditions, provides a role for NGOs, primarily trade unions, in standard-setting.<sup>123</sup> For example, NGOs worked as members of the ILO to pass the ILO Minimum Age Convention No. 138 regarding child labor.<sup>124</sup> This Convention has been ratified by approximately 141 countries, some of which have a history of using very young child labor.<sup>125</sup> The actual impact NGOs have on the content of these standards is uncertain.<sup>126</sup> However, State delegations include four members: two representatives from government, one representative of employer interests, and one representative of worker interests.<sup>127</sup> Each delegate is provided an individual right to vote, so NGO votes do matter.<sup>128</sup>

While many of the ILO's standards are non-binding recommendations, including codes of conduct, resolutions, and declarations, these standards

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122. Lee A. Tavis, *Corporate Governance and the Global Social Void*, 35 VAND. J. TRANSNAT'L L. 487, 506–07 (2002).

123. See About the ILO, <http://www.ilo.org/public/english/about/index.htm> (last visited Aug. 29, 2005).

124. ILO Convention Concerning Minimum Age for Admission to Employment (C138), June 26, 1973, 1015 U.N.T.S. 297. See also ILO, Subregional Office for Southern Africa: SRO-Harare, Child Labour: Background Paper, <http://www.ilo.org/public/english/region/afpro/mdtharare/about/childlabour.htm> (last visited Aug. 20, 2005) (“As is the case with all ILO standards, Convention No. 138 is the outcome of a tripartite standard setting procedure, involving Governments, as well as Employers’ and Workers’ Organizations.”).

125. See ILO: ILOLEX Database on International Labour Standards, <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C138> (last visited Aug. 20, 2005); Frank René López, *Corporate Social Responsibility in a Global Economy After September 11: Profits, Freedom, and Human Rights*, 55 MERCER L. REV. 739, 774 (2004) (noting how many countries have ratified various ILO conventions); BUREAU OF INT’L LABOR AFF., U.S. DEP’T OF LABOR, BY THE SWEAT AND TOIL OF CHILDREN: EFFORTS TO ELIMINATE CHILD LABOR, ch. III, tbl. III-1 (1998), <http://www.dol.gov/ilab/media/reports/iclp/sweat5/toc.htm> (last visited Sept. 3, 2005).

126. See Börzel & Risse, *supra* note 82, at 202–03; Charnovitz, *supra* note 111, at 216–19.

127. Constitution of the International Labour Organization art. 3, para. 1, June 28, 1919, available at <http://www.ilo.org/public/english/about/iloconst.htm>.

128. See *id.* art. 4, para. 1.



do have the weight of “soft law.”<sup>129</sup> Disputes regarding the definition of many of these voluntary standards are interpreted by the ILO.<sup>130</sup> The ILO is also involved in the creation of treaties, which establish binding labor and workplace standards, though its role is largely limited to lobbying and agenda-setting in treaty formulation.<sup>131</sup>

While the ILO is not the only body establishing international corporate codes of conduct, it is the most influential source of “soft law” regarding labor and workplace standards and has the unique ability to enforce its codes.<sup>132</sup> As a result, accountability is important to ensure proper NGO participation in the ILO standard-setting. While the level of external accountability to the regime is less important when the regime can ensure countervailing interests are represented in the standard-setting process, external accountability to beneficiaries and internal accountability to members may be important to ensure a fair and balanced standard-setting process.

### 3. Training and Information Provision

Training administrators and others is a well-known role of NGOs in international governance. Capacity-building organizations working with the UN Development Programme, for instance, focus on inter-organizational learning and training,<sup>133</sup> serve as experts to governance actors,<sup>134</sup> and gather information. These NGOs often act in an advisory capacity for international governance regimes, serving as “epistemic

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129. See, e.g., Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted by Governing Body of the International Labour Office, International Labour Organization, 204th Sess. (1977), <http://www.ilo.org/public/english/standards/norm/sources/mne.htm#added>, revised, Codes of Practice, International Labour Organization (2002), <http://www.ilo.org/public/english/standards/norm/sources/codes.htm>. See generally Mary Ellen O’Connell, *The Role of Soft Law in a Global Order*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 100, 100–14 (Dinah Shelton ed., 2000).

130. See Doh & Guay, *supra* note 82, at 11.

131. See About the ILO, *supra* note 123.

132. See Doh & Guay, *supra* note 82, at 11–12, 18 (discussing the OECD 1976 Guidelines for Multinational Enterprises, which was revised in 2000 to allow NGO consultation, and the Global Compact, which provides an NGO role in monitoring compliance).

133. See Brown et al., *supra* note 60, at 18.

134. L.E. SUSSKIND, ENVIRONMENTAL DIPLOMACY: NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS 49–53 (1994); Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PENN. J. INT’L ECON. L. 331, 335–39 (1996).

communities” in policy formulation.<sup>135</sup> In fact, “[s]ince 1993, the number of states that have appealed to NGOs as ad hoc experts in procedures and development of international agreements has increased tremendously.”<sup>136</sup> The United States, for instance, incorporates NGOs into international policy making through the Federal Advisory Committee Act (FACA), which provides a role for NGOs to advise United States representatives on international policy issues and ensure appointments to federal committees are “fairly balanced in terms of the points of view represented.”<sup>137</sup> While the participation of NGOs as members of a policy Advisory Council is limited and controlled by other governance actors, usually State delegations,<sup>138</sup> such participation, when it does occur, can be quite influential.<sup>139</sup> Indeed, these committees have often engaged in important international regulatory negotiations, also known as “reg-neg.” It has even been claimed NGO advisors determine much of World Bank policy.<sup>140</sup>

The UN system of Working Groups is probably the best example of the involvement of NGOs in Advisory Councils. Working Groups are commissioned to review technical details of a proposal or provide information and guidance in relationships with particular groups, including indigenous communities, women, children, and others.<sup>141</sup> While these

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135. See generally Haas, *supra* note 119.

136. Mariella Pandolfi, *Contract of Mutual (In)Difference: Governance and the Humanitarian Apparatus in Contemporary Albania and Kosovo*, 10 IND. J. GLOBAL LEGAL STUD. 369, 372 (2003).

137. 5 U.S.C. app. 2 §§ 5, 10 (1972). See, e.g., 7 U.S.C. § 5843 (2001). See also *Cargill, Inc. v. United States*, 173 F.3d 323 (5th Cir. 1999); Press Release, Earthjustice, Federal Court Orders Bush Administration to Add Environmental Representative to Chemical Trade Advisory Panel (Jan. 21, 2003), <http://www.earthjustice.org/news/display.html?ID=531>.

138. For instance, the chair of any advisory committee is usually a government representative who has the authority to choose representatives. See, e.g., 7 U.S.C. § 5843 (2001). Further, all interests need not be represented equally to meet the FACA. 60 Comp. Gen. 386, 387 (1981).

139. See Charles C. Caldart & Nicholas A. Ashford, *Negotiation as a Means of Developing and Implementing Environmental and Occupational Health and Safety Policy*, 23 HARV. ENVTL. L. REV. 141, 143–44, 164 (1999) (discussing an OSHA advisory committee’s negotiated rulemaking for coke oven emissions and noting that often such negotiated rulemaking occurred under the auspices of the FACA).

140. See *Citizen’s Groups: The Non-governmental Order*, ECONOMIST, Dec. 11, 1999, at 20, 21 (“From environmental policy to debt relief, NGOs are at the centre of World Bank policy. Often they determine it.”).

141. See Office of the United Nations High Commissioner for Human Rights Homepage, <http://www.ohchr.org/english/issues.index.htm> (last visited Aug. 25, 2005); Office

Working Groups operate outside the purview of official UN policy making circles, they report to various UN committees and have substantial legitimacy.<sup>142</sup> Membership on these Working Groups is therefore highly prestigious, especially since Working Groups are treated as insiders in the UN system, are accorded significant access privileges, and may wield significant power as expert bodies. The level of Working Group influence varies by committee and issue, but can be quite powerful and frame entire negotiation processes, formulate draft texts, or even reject negotiated solutions.<sup>143</sup>

In the case of Advisory Councils or training activities, the accountability question is about who has the right to provide information or be treated as experts. There are also questions related to the quality of the information provided. All of these concerns tend toward issues of competence, rather than issues of representation. Accordingly, participation in Advisory Councils represents a functionalist approach to international governance and must be cordoned through delegatory models of accountability.

For accountability purposes, this is the least problematic of the administrative functions an NGO may perform. Accountability concerns focus mainly around the production and content of information, ensuring the information is full, fair, and accurate.<sup>144</sup> As such, training and information is supposed to be largely objective, and concerns about representativeness are limited. More important is external accountability to the organization to ensure it is not misled by the NGO providing the information.

#### 4. Service Provision

Some authors have categorized NGOs partially by function, classifying them as operational- or advocacy-oriented.<sup>145</sup> However, the classification

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of the United Nations High Commissioner for Human Rights, *Fact Sheet No. 27: Seventeen Frequently Asked Questions about United Nations Special Rapporteurs*, available at <http://www.hri.ca/fortherecordCanada/documentation/other/ftsheets27.htm> (last visited Oct. 12, 2005); Working Group on Indigenous Populations Homepage, <http://www.unhchr.ch/indigenous/mandate.htm> (last visited Aug. 25, 2005).

142. See *Fact Sheet No. 27*, *supra* note 141.

143. See, e.g., Lori A. Nessel, "Willful Blindness" to Gender-Based Violence Abroad: *United States' Implementation of Article Three of the United Nations Convention Against Torture*, 89 MINN. L. REV. 71, 90 n.72 (2004) (noting the involvement of a Working Group in the formulation of the Convention Against Torture).

144. See Wapner, *supra* note 50, at 203.

145. Leon Gordenecker & Thomas G. Weiss, *Pluralizing Global Governance: Analytical Approaches and Dimensions*, in *NGOs, THE UN, AND GLOBAL GOVERNANCE* 36-40

of NGOs as operational is limited primarily to the deployment of services.<sup>146</sup> While the preceding sections have illustrated how NGO involvement in the enforcement of international governance systems extends beyond the simple deployment of services, service provision by far constitutes the main avenue of NGO participation in the enforcement and furtherance of international governance systems.<sup>147</sup>

NGOs are good actors in this capacity as they are generally more responsive to beneficiary needs than government institutions. However, they may be less accountable than government institutions in the delivery of those services.<sup>148</sup> In fact,

[i]t's not as if there is a long list of parties able to deliver medical aid in Chechnya, or run refugee camps in Congo, or vaccinate children in southern Sudan. Whatever the rest of their political agendas, international NGOs are often not only the best positioned to do these jobs, they are the only organizations with any possibility of doing them.<sup>149</sup>

It is often argued NGOs are best able to provide development assistance and non-profit services such as community health care and the management of natural resources<sup>150</sup>—especially for populations unable to pay since they do not fall neatly within any particular category ser-

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(Leon Gordeneker & Thomas G. Weiss eds., 1996); P. van Tuijl, *NGOs and Human Rights: Sources of Justice and Democracy*, 5 J. INT'L AFF. 493 (1999).

146. See Doh & Guay, *supra* note 82, at 3.

147. In fact, sixty-seven percent of European Union (EU) aid and five percent of Organization of Economic Cooperation and Development (OECD) development aid goes directly to NGOs for the provision of services. See *NGOs: Sins of the Secular Missionaries*, ECONOMIST, Jan. 29, 2000, at 25 (noting the EU's development aid figures); Edwards & David Hulme, *Introduction: NGO Performance and Accountability*, in BEYOND THE MAGIC BULLET, *supra* note 30, at 3. See also Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813 (2000); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000). NGOs assuming public functions through contract have received significant attention from scholars, who fear the blurring of lines between the public and the private. See, e.g., Anthony Bebbington & John Farrington, *Governments, NGOs and Agricultural Development: Perspectives on Changing Inter-Organisational Relationships*, 29 J. DEV. STUD. 199, 212–14 (1993) (Eng.) (discussing the potentially problematic consequences of NGOs' expanding roles within private and public institutions). See also Aman, *supra* note 39, at 1704–08.

148. See generally STEVEN RATHGEB SMITH & MICHAEL LIPSKY, *NON-PROFITS FOR HIRE: THE WELFARE STATE IN AN AGE OF CONTRACTING* (1993).

149. Anderson, *supra* note 3, at 375.

150. See, e.g., Zadek & Gatward, *supra* note 102, at 229–39; Goodin, *supra* note 5, at 3–4; J. Fisher, *Is the Iron Law of Oligarchy Rusting Away in the Third World?*, 22 WORLD DEV. 129 (1994) (Can.).

viceable by the government.<sup>151</sup> This view is generally held because self-selection of personnel and NGO purpose statements serve to create organizations with officers having altruistic motivations, giving greater assurance they will carry out the provision of public goods and other public interested actions with less rent-seeking relative to other organizations.<sup>152</sup>

However, when non-profits compete for public contracts with for-profit entities, the competitive process may cause non-profits to act similarly to for-profit entities.<sup>153</sup> Despite this concern, “[s]ervice providers accrue government funding largely on the basis of client choices rather than on the basis of competitive tendering for contracts providing blocks of funding from government.”<sup>154</sup> Additionally, when acting as contract agents, NGOs generally have performance requirements built into the public service contracts.<sup>155</sup> This illustrates a distinct subject of accountability: results- or outcome-based accountability. Principal-agent accountability issues are also raised when NGOs provide services. In such arrangements, NGOs are held externally accountable by the governments or international governmental organizations with whom they contract,<sup>156</sup> and by the beneficiaries who seek to ensure the services fulfill their needs, and internally accountable by their members, who determine the manner through which the services are provided.

### 5. Other Administrative Functions

NGOs might also perform other, more difficult to categorize, administrative functions. For instance, the World Conservation Monitoring Unit compiled State data on trade in endangered species and prepared reports regarding such data, implementing the Convention on International

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151. See SMITH & LIPSKY, *supra* note 148, ch. 6.

152. See Goodin, *supra* note 5, at 21–22.

153. See *id.* at 3. See also Brown et al., *supra* note 60, at 16–17.

154. Goodin, *supra* note 5, at 42. However, competitive bidding processes do exist in a number of circumstances. See *id.*

155. *Id.* at 31.

156. See generally Richard Mulgan, *Contracting Out and Accountability*, 56 AUSTL. J. PUB. ADMIN. 106 (1997); Elizabeth Palmer, *Should Public Health Be a Private Concern? Developing a Public Service Paradigm in English Law*, 22 OXFORD J. LEGAL STUD. 663 (2002); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003); Paul L. Posner, *Accountability Challenges of Third-Party Government*, in THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 523 (Lester M. Salmon & Odus V. Elliott eds., 2002).

Trade in Endangered Species (CITES).<sup>157</sup> Though taking a more involved administrative role, the Internet Corporation for Assigned Names and Numbers (ICANN) has taken on similar duties. ICANN allocates and assigns internet space, manages top-level domain names (e.g., .com, .org, and other generic and country-code top level domains), and manages root servers. Although ICANN is largely considered the provision of private standards, domestic governments are involved in the process of establishing the standards, thereby making the process a quasi-public-private partnership.<sup>158</sup> Accountability for these administrative activities will depend upon the functions performed, but is expected to be primarily based on external accountability controls to the regime, with minimal representational concerns or internal mechanisms needed.

### C. Enforcement

While the involvement of NGOs in standard setting and general administrative duties of international organizations is currently relatively low (though likely to increase in the future), NGO involvement in the enforcement of established codes has been characterized as moderate in scope and nature.<sup>159</sup>

#### 1. Arbitration and Mediation

Private arbitration is a major way international regimes are enforced. Many international treaties and regimes provide the opportunity for litigants to pursue arbitration as either the sole remedy or one of a litany of potential remedies for violation of provisions of those instruments.<sup>160</sup> The leading international arbitration organization providing for the settlement of these disputes is the International Centre for the Settlement of Investment Disputes (ICSID),<sup>161</sup> which is an “autonomous international organi-

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157. See Edith Brown Weiss, *The Five International Treaties: A Living History*, in ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 89, 109–11 (Edith Brown Weiss & Harold K. Jacobson eds., 1998).

158. See Goodin, *supra* note 5, at 4.

159. See Doh & Guay, *supra* note 82, at 10 tbl.1.

160. See Joanne K. Leweler, *International Commercial Arbitration as a Model for Resolving Treaty Disputes*, 21 N.Y.U. J. INT'L L. & POL. 379 (1989).

161. See generally Amazu A. Asouzu, *African States and the Enforcement of Arbitral Awards: Some Key Issues*, 15 ARB. INT'L 1 (1999); Thomas L. Brewer, *International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment*, 26 L. & POL'Y INT'L BUS. 633 (1995); A. Giardina, *ICSID: A Self-Contained, Non-National Review System*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY? 199 (R.B. Lillich & C.N. Brower eds.,

zation" established by the World Bank through an international convention and comprised of World Bank Member States.<sup>162</sup> However, other arbitral NGOs also serve to enforce international regimes. For instance, the International Chamber of Commerce's International Court of Arbitration hears more than 500 new cases each year. Having heard over 12,000 cases since its inception in 1923,<sup>163</sup> the Court is responsible for hearing many of the arbitrations arising under the UN Commission on International Trade Law (UNCITRAL).<sup>164</sup> Similarly, the American Arbitration Association, operating under the International Dispute Resolution Procedures, also hears cases dealing with international governance issues.<sup>165</sup>

Questions about accountability are particularly poignant when NGOs take on the role of mediating or arbitrating disputes. External accountability to the governance regime and NGO independence are important. Internal accountability or external accountability to its beneficiaries may be seen as biased and would be largely undesirable.<sup>166</sup> However, some measure of external accountability to beneficiaries (and the regime itself) may be important in certain contexts where the governing rules require consideration of civil society's participatory needs in dispute resolution.

## 2. Monitoring

Although untested,<sup>167</sup> some claim under specific conditions, NGO lobbying and information provision can pressure norm-violating govern-

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1994); Carolyn B. Lamm, *Jurisdiction of the International Centre for Settlement of Investment Disputes*, 6 ICSID REV. FOREIGN INVESTMENT L.J. 462 (1991); G.R. Delaume, *ICSID Arbitration*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 23 (Julian D. M. Lew ed., 1987); C.F. Amerasinghe, *The Jurisdiction of the International Centre for the Settlement of Investment Disputes*, 19 INDIAN J. INT'L L. 166 (1979).

162. About ICSID, <http://www.worldbank.org/icsid/about/about.htm> (last visited July 29, 2005). See also Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1996, 17 U.S.T. 1270, 575 U.N.T.S. 159.

163. See What is ICC?, [http://www.iccwbo.org/home/menu\\_what\\_is\\_icc.asp](http://www.iccwbo.org/home/menu_what_is_icc.asp) (last visited July 29, 2005); Introducing ICC Dispute Resolution Services, [http://www.iccwbo.org/court/english/intro\\_court/introduction.asp](http://www.iccwbo.org/court/english/intro_court/introduction.asp) (last visited July 29, 2005).

164. For some of the various arbitral rules adopted by UNCITRAL, see the Report of the Working Group on Arbitration on the work of its thirty-sixth session, U.N. Doc. A/CN.9/508, available at <http://daccessdds.un.org/doc/UNDOC/GEN/V02/533/86/PDF/V0253386.pdf?OpenElement> (last visited Aug. 19, 2005).

165. See also About Us, <http://www.adr.org/About>, *International Dispute Resolution Procedures (2003)*, available at <http://www.adr.org/sp.asp?id=22090> (last visited Oct. 13, 2005).

166. However, some concerns may be addressed if the impropriety of NGO actions affects its status in future dealings.

167. See Brühl, *supra* note 16, at 378–79.

ments into compliance.<sup>168</sup> However, it is not clear whether NGOs undertaking these approaches actually influence State behavior.<sup>169</sup> While it has been noted most NGOs are not well-suited to serve as comprehensive and exclusive enforcement agents,<sup>170</sup> NGOs have nevertheless been provided the authority in some regimes to act as enforcement agents where States are believed to have violated international rules.<sup>171</sup>

For instance, under the Montreal Protocol, NGOs may act as enforcement agents by notifying the Secretariat of non-conforming States, who in turn may sanction the non-conforming States.<sup>172</sup> Although NGOs need not show injury to enforce the regime, they do not have substantive rights under the Montreal Protocol, and Parties must consent to NGO participation, limiting the effectiveness of NGO enforcement significantly.<sup>173</sup> Conversely, under a number of human rights regimes, NGOs are granted *locus standi* to enforce human rights instruments.<sup>174</sup> As a result, “the regular provision of information by the [international NGO] community to various UN human rights committees and national governments has not only greatly improved our knowledge about human rights violations, but also increased compliance with international human rights norms.”<sup>175</sup>

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168. See generally THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse et al. eds., 1999).

169. See Chandler, *supra* note 19, at 335–36.

170. See Ruth Mayne, *Regulating TNCs: The Role of Voluntary and Governmental Approaches*, in REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALIZATION 235 (Sol Picciotto & Ruth Mayne eds., 1999).

171. See generally Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics*, 47 WORLD POL. 311 (1995).

172. See Brühl, *supra* note 16, at 373. See also Montreal Protocol on Substances that Deplete the Ozone Layer art. 11(5), Annex III, para. 1, Annex IV(10), Sept. 16, 1987, 1522 U.N.T.S. 3, 26 I.L.M. 1541, *adjusted by* London Amendments, June 29, 1990, 20 I.L.M. 537, Nairobi Amendments, June 21, 1991, and Copenhagen Amendments, Nov. 23–25, 1993, 32 I.L.M. 874; *Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, U.N. Env'tl. Programme, U.N. Doc. EP/OzL.Pro. 2/3 (1990), available at [http://www.unep.org/ozone/Meeting\\_Document/mop/02mop/MOP\\_2.asp\\_cph.htm](http://www.unep.org/ozone/Meeting_Document/mop/02mop/MOP_2.asp_cph.htm).

173. See Kalas & Herwig, *supra* note 113, at 132; Elizabeth P. Barratt-Brown, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 YALE J. INT'L L. 519, 564 (1991).

174. See, e.g., Rules of Procedure of the Inter-American Court of Human Rights, art. 23, <http://www.cidh.org/Basicos/basic18.htm> (last visited Oct. 12, 2005). See also William J. Aceves, *Actio Popularis? The Class Action in International Law*, 2003 U. CHI. LEGAL F. 353 (2003).

175. Börzel & Risse, *supra* note 82, at 209, *citing* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse et al. eds., 1999).



Other, weaker versions of NGO participation as monitoring and enforcement agents also exist. For instance, NGOs can participate in the WTO dispute settlement system through submission of *amicus curiae* briefs.<sup>176</sup> Though this is a relatively weak method of enforcement, what is important about the WTO example is, in order to submit a brief, the organization must make clear its objectives, affiliations, funding sources, and plan for uniquely contributing to the resolution of the dispute.<sup>177</sup>

Allowing NGOs to participate in the monitoring and enforcement of international regimes raises different accountability concerns than does the situation where an NGO acts as the mediator or arbitrator in a dispute concerning such violations. Similar to the previous discussion, NGOs must remain accountable to the regime itself, ensuring NGOs constrain their charges of States violating international norms to instances where the NGOs actually believe such violations to exist. More significant however, is the importance of NGOs to adequately represent those interests for which they claim to stand. If the enforcement scheme is designed to leave vindication of the rights of unrepresented or disempowered groups to NGOs, then it is essential NGOs be accountable to their beneficiaries. Internal accountability in this circumstance is only marginally important to the proper functioning of the regime.

The question then remains as it began: are NGOs sufficiently accountable to the appropriate entities or populations? The following Part answers this question generally in the negative and seeks to apply a function-based analysis to NGO accountability theory.

#### IV. REFINING THE CRITIQUE: GUIDING NGO INVOLVEMENT

The previous Part illustrated some of the distinct accountability concerns related to particular functions performed by NGOs in international governance. This function-based approach to categorizing NGOs is not unique to this Article. Börzel and Risse categorize NGOs by function and their source of authority in international governance systems, noting NGOs can perform various functions within governance systems based upon cooptation, delegation, co-regulation, or self-regulation in the

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176. Esty, *supra* note 97, at 11. This has been discussed in significant detail by other scholars and will not be reiterated here. See, e.g., Jacqueline Peel, *Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 47, 63-64 (2001).

177. See World Trade Organization, *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, WTO/L/162 (July 18, 1996), available at [http://www.wto.org/english/forums\\_e/ngo\\_e/guide\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/guide_e.htm).

shadow of hierarchy.<sup>178</sup> This authority-based analysis is useful in understanding the context within which NGO governance functions occur. However, it is only useful in establishing accountability controls insofar as they assist policy makers in determining the needs and purposes of the organization itself.

Although recognition of the source of authority may legitimate NGO involvement under some governance systems and not others, such a framework does not suggest differentiated accountability controls when the same function is performed across different governance systems. Rather, differentiation is a function of the overall regime needs and purposes with respect to NGO participation and may significantly vary by type of governance regime. As a result, the authority-based analysis performed by Börzel and Risse is part of a separate accountability analysis and should be treated as an addendum to, but not a replacement of, the framework established by this Article. This Part seeks to define some of the major issues and parameters involved in establishing a function-based accountability control system.

The UN system has the clearest and most direct method of ensuring the accountability of NGOs seeking to participate in governance activities.<sup>179</sup> The 1996 policy established under the Economic and Social Council (ECOSOC) grants “consultative status” to NGOs upon a demonstration of purpose and accountability.<sup>180</sup> While this “consultative status” does not grant NGOs the right to participate in all functions of governance described above in Part III, the procedure used by ECOSOC to accredit participation is a useful starting point for a discussion of NGO accountability requirements. The ECOSOC procedures require NGOs to provide their charters, bylaws, financial statements, annual reports, sample publications, and explain how their participation will contribute to the goals of the UN.<sup>181</sup> These requirements are needed to evaluate NGOs’ structure, internal (public) accountability, and external accountability through funding sources.<sup>182</sup> From the application, ECOSOC determines which NGOs may participate, limiting involvement to those having expertise in

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178. Börzel & Risse, *supra* note 82, at 200.

179. Consultative Relationship Between the United Nations and Non-Governmental Organizations, ECOSOC Res. 1996/31, U.N. Doc E/RES/1996/31 (June 25, 1996), *available at* <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm> [hereinafter ECOSOC Procedures].

180. *Id.*

181. *Id.* ¶¶ 10–13, 21.

182. *Id.*

the particular matter.<sup>183</sup> Once accredited, NGOs can maintain their “consultative status” by submitting a four-page, double-sided report every four years.<sup>184</sup> Though this requirement may be criticized as insufficient to ensure accountability, the consultative process generally enables international organizations to assert external accountability controls on NGOs, thereby minimizing “non-cooperative behavior.”<sup>185</sup>

While the UN procedures signify a step in the right direction, there are over 6,400 intergovernmental organizations with which NGOs might engage and very few of them have similar accountability procedures.<sup>186</sup> Additionally, the ECOSOC requirements “need to be reconsidered in light of the increasing number of NGOs.”<sup>187</sup> While providing a good starting framework, the ECOSOC procedures do not deal with the many variations of international governance activities in which an NGO might participate and are limited to the very narrow “consultative status” akin to participation on the Advisory Councils discussed above in Part III.B.3. Furthermore, the ECOSOC procedures conflate internal accountability with external accountability to the beneficiaries of the NGO.<sup>188</sup> While this creates a significant concern for some governance functions, it clearly demonstrates a failing of the ECOSOC procedures to separate their requirements based upon the functions performed by the NGO. For example, Advisory Councils are highly technocratic epistemic communities designed around expertise.<sup>189</sup> It is therefore not clear why internal accountability or external accountability to beneficiaries is particularly important to performing the governance function. On the other hand, where “consultative status” implies the right to act as an observer and participant in UN policy making procedures, the necessity and appropriateness of such representation is far greater. The ECOSOC procedures do not distinguish between these two types of NGOs in terms of qualifications to perform various governance functions, illustrating how accountability controls not tailored to function are simultaneously both over- and under-inclusive.

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183. *Id.* ¶ 9.

184. *Id.* ¶¶ 55, 61(c).

185. Börzel & Risse, *supra* note 82, at 201.

186. *See* 2004/2005 5 Y.B. INT'L ORGS. 3 (Union of Int'l Assocs. ed., 41st ed.).

187. Edith Brown Weiss, *The Rise or the Fall of International Law?*, 69 *FORDHAM L. REV.* 345, 358 (2000) (arguing for application of the Sullivan Principles for accountability); Sullivan Principles for U.S. Corporations Operating in South Africa, 24 *I.L.M.* 1464, 1496 (1985).

188. *See* ECOSOC Procedures, *supra* note 179, ¶ 12.

189. *See* Haas, *supra* note 119, at 3.

Although this Article proceeds primarily from an institutional perspective, similar issues are raised in network governance structures, since “network governance representation is at least partly defined in functional terms.”<sup>190</sup> Additionally, even in a network situation,

the relationship between representatives and represented has to conform to norms that usually are established in an institutional framework . . . establish[ing] rules which determine the selection of representatives, and [those institutions] have to create formal structures of communication and control, in which rulers can be effectively hold [sic] accountable for their decisions.<sup>191</sup>

As a result, this Article agrees although the process may be somewhat distinct and the accountability needs of network governance structures somewhat different than traditional institutional governance structures, “from a normative point of view, institutional structures of governance are decisive for democratic legitimacy, and this holds true for network governance, too.”<sup>192</sup> In fact, given “[g]overnance networks . . . serve as a corrective for deficits of the institutions,”<sup>193</sup> creating distinctions in accountability requirements for networks as opposed to institutions seems normatively suspect.<sup>194</sup>

This Part seeks to assist international governance regimes in defining the universe of NGOs eligible to perform a particular governance function. It is not, however, intended to determine whether NGOs *should* perform a function or which particular NGO or NGOs should be selected to perform particular functions. “[T]he essential differences between various types of NGO activity seem to warrant some kind of typology, some way of grouping NGOs by the functions they perform.”<sup>195</sup> Grouping organizations by function “would, at a minimum, allow us to approach an individual NGO on its own terms, evaluating the particular organization

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190. See Benz & Papadopoulos, *supra* note 73, at 2.

191. *Id.*

192. *Id.*

193. *Id.* at 3.

194. This issue has significant nuances, including considerations of whether networks increase or decrease institutional ability to perform and maintain its own accountability. *See id.* at 4–5. These relational issues have not been analyzed to an extent sufficient for the author to conclude whether networks should be held to significantly different forms or extents of accountability control than traditional institutions.

195. Spar & Dail, *supra* note 30, at 173 (suggesting classifying NGO activities similar to the Standard Industrial Trade Classification system).

with regard to its specific purpose.”<sup>196</sup> In evaluating NGOs for base accountability purposes, three major types of accountability exist: (1) intentions or purposes; (2) actions or competence; and (3) outcomes.<sup>197</sup> Given the resource constraints and distance of international regimes from NGOs, this Article suggests accountability controls be established at both the international and national levels.

*A. Standardizing Procedures by Function*

At the national level, function-based accountability controls are especially crucial to achieving the appropriate level of NGO accountability. At the international level, this need is accentuated by the lack of institutional regime capacity or experience in providing the ever-expanding range of international governance functions, necessitating the inclusion of NGOs and other non-State actors in international governance—a need less significant at the national level. As a result, there is no significant normative difference (putting aside the democratic deficit debate) between international and domestic governance to warrant different approaches to determining when accountability mechanisms should be applied. However, NGO participation in domestic governance may be far more limited in the scope of roles performed, making a function-based approach not economically feasible.<sup>198</sup>

A function-based approach is particularly important for NGOs because, although it is assumed NGO officials are typically more altruistic than other governance actors (with the possible exception of government officials), “[domestic] non-profit corporate law is in any event unlikely in any jurisdiction to constrain NGO executives to the extent that public officials routinely are constrained by ethics legislation and regulations.”<sup>199</sup> While NGOs may have a lower starting baseline of accountability (given existing frameworks), this does not mean we should demand greater total accountability of NGOs than of other governance actors.

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196. *Id.* at 174. The classification system proposed by Spar and Dail would include outcome-based accountability mechanisms involving cross-comparisons. *Id.* This would enhance competition between NGOs and speaks to the competence issue, but is overly broad in its analysis. Such outcome-based accountability mechanisms are not appropriate in every situation where NGOs perform some governance function.

197. See Goodin, *supra* note 5, at 10–11.

198. See Benz & Papadopolous, *supra* note 73, at 10–11.

199. Spiro, *supra* note 21, at 963.

As noted above, traditional theory relates the strength of accountability relationships to “the power of the entity being held accountable.”<sup>200</sup> While significantly different from the view of accountability in this Article, its basic premise is implicitly applicable to the project set out here. In fact, “with respect to legitimacy, the nature of the issue may be an important factor in determining whether we care about procedures for accountability.”<sup>201</sup> If power is determined in part by function, as this Article posits, then accountability controls and their strengths should be mapped to those functions. This section seeks to undertake such an effort, moving away from the mainstream literature which aligns accountability mechanisms with type of governance actor or regime.<sup>202</sup> The following sections attempt to map broadly political-, administrative-, and enforcement-related functions to accountability controls analyzed by others. While greater specificity of the functions performed is likely necessary to achieve a truly normatively justified accountability system, this Article seeks to serve as a starting point for such an analysis, leaving further nuances and discussion for another time.<sup>203</sup>

While this Article believes it exponentially preferable for domestic governments to undertake a harmonization process similar to the one described below in Part IV.B, where domestic governments do not utilize procedures sufficiently similar to those described, international governance regimes must do so in order to properly certify NGO participation and prevent favoritism to NGOs located in countries where such procedures are followed.

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200. Keohane, *Commentary on the Democratic Accountability of Non-Governmental Organizations*, *supra* note 67, at 479.

201. Keohane & Nye, *supra* note 5, at 18.

202. *See generally* Kaldor, *supra* note 34; Keohane & Nye, *supra* note 5.

203. *See supra* Table 1. One danger in the approach of applying function-based accountability controls at the micro-function level is someone must determine what controls are appropriate for which functions. The greater the number of functions to which accountability controls are applied, the greater the power held by the individual(s) or entity making such determinations. Therefore, it might be best to utilize a second-best approach to function-based application of accountability controls, opting for categories of broadly defined governance functions. As a preliminary view on this topic, this Article would see the importance of such broad definition dependent upon whether an independent accreditation organization to perform such determinations similar in nature to the process described in Part IV.C.5 is available to perform such determinations and whether NGO participation is intended to hold the governance regime accountable or whether the regime seeks to hold the NGO accountable, or both.

## 1. Political Functions

As described above in Part III.A, NGOs have a very important role to play in policy formulation. It has been claimed “[t]ransnational actors who are not active participants in governance arrangements or negotiating systems [but merely lobby or perform advocacy functions] pose few challenges to existing concepts and theories in political science and international relations.”<sup>204</sup> Despite this claim, “policy-making accountability” is still very important in international governance.<sup>205</sup> As mentioned above, representation issues rightfully dominate the discussion concerning NGO accountability in performing political activities.<sup>206</sup>

Democratic accountability is important when NGOs perform political functions because they are acting in a representative function. Authority for NGO participation in policy formulation is often justified in terms of intrinsic rights to political participation.<sup>207</sup> Although not all political functions are necessarily representative in nature, the overwhelming majority of NGOs involved in policy formulation claim to represent some interest, providing them with the legitimacy sufficient to justify participatory rights.<sup>208</sup> However, where such representation is crucial to achieve this legitimacy, assurance must be made the NGOs are properly representative. This is important because if an NGO falsely claims to represent a group and is allowed to participate, the NGO may serve to delegitimize or otherwise thwart the true representation of the group.<sup>209</sup> Although such representation need not be necessarily democratic in nature—especially since democracy is not a universally accepted form of

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204. Börzel & Risse, *supra* note 82, at 198.

205. See generally Susan Rose-Ackerman, *Public Participation in Consolidating Democracies: Hungary and Poland*, in BUILDING A TRUSTWORTHY STATE IN POST-SOCIALIST TRANSITION 9 (János Kornai & Susan Rose-Ackerman eds., 2004). See generally SUSAN ROSE-ACKERMAN, *CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE UNITED STATES* (1995).

206. See Charnovitz, *supra* note 106, at 56.

207. See generally Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, *supra* note 111.

208. Michael Edwards, *NGO Legitimacy—Voice or Vote?*, Feb. 2003, <http://www.globalpolicy.org/ngos/credib/2003/0202rep.htm>. See also David H. Moore, *Agency Costs in International Human Rights*, 42 COLUM. J. TRANSNAT'L L. 491, 503–04 (2004).

209. See generally Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261 (2004); Edwards, *supra* note 208.

governance—many international regimes do base their authority and participatory requirements upon some modicum of democratic legitimacy.<sup>210</sup>

The literature on democratic, or representational, accountability focuses on NGO representation of beneficiary interests, rather than upon member interests.<sup>211</sup> While this Article acknowledges external accountability to beneficiaries is important where NGOs claim to represent beneficiary interests, not all NGOs which provide services to beneficiary groups or act altruistically on behalf of third-parties claim to speak on behalf of those groups.<sup>212</sup> Therefore, accountability controls related to the performance of political functions should be determined primarily by representation of the NGO's internal membership. Representation of beneficiary groups is necessary when an NGO claims to represent the views of its beneficiaries; otherwise, representation requirements merely serve to decrease the participatory opportunities of otherwise qualified NGOs.<sup>213</sup> As a result, under the democratic or representative model of governance authority, representational, hierarchical, and fiscal accountability controls are important to constrain NGO behavior in the performance of political functions.<sup>214</sup>

Additionally, peer accountability mechanisms are fairly appropriate under situations where NGOs perform what might be considered political functions, since negotiated outcomes depend upon the willingness of participants to enter into a meaningful negotiation process.<sup>215</sup> These functions are also most closely aligned with traditional state-state relations, which operate based upon balance of power constraints and are most related to peer accountability constraints in accountability theory. This is therefore relevant under theories considering "accountability as . . . responsiveness, obligation and willingness to communicate with others across the various agencies (the various government departments, quasi-

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210. While this Article conflates representative and democratic accountability for simplicity's sake and to align it more squarely with the existing literature on democratic accountability, adequate representation of some form is crucial for most NGO participation in policy formulation.

211. See generally Wapner, *supra* note 50; Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, *supra* note 111.

212. NGO Monitor, Different Types of NGOs, <http://www.ngo-monitor.org/ngo/types.htm> (last visited Aug. 28, 2005).

213. See generally Blitt, *supra* note 209.

214. As noted above in Table 1, hierarchical controls are considered to include democratic or other representative accountability to members or beneficiaries (where explicitly stated).

215. See Wapner, *supra* note 50, at 202 (discussing the effects of NGO cooperation and coalitions on accountability).



governmental organizations and private contractors) constituting the relevant policy community responsible for the 'joined-up government' of, and service delivery in, that sphere."<sup>216</sup> However, peer accountability controls are only valid to the extent they identify failures to adequately represent member or beneficiary interests, and when peer organizations identifying such failures have the authority to present the regime with such information.<sup>217</sup> Since peer accountability controls are typically outcome-based, this type of control for the most part will be unacceptable to resolve issues of effective representation.

From a regime perspective, then, NGO intentions should be the primary determinant of accountability controls which should be designed by reference to the NGO's structure and ability to uphold its intentions. NGO intentions relate to the motives or purposes with which NGOs act.<sup>218</sup> NGOs representing or claiming to represent particular interests must actually attempt to do so. Whether the NGO is able to fully represent the interests of its membership or beneficiary populations is another matter, though it certainly should be an ultimate goal. However, representation need not be perfect in order to be legitimate.<sup>219</sup> To determine an organization's representativeness, then, the actual level of representativeness should be gauged against the NGO's stated intentions to determine the veracity of their claims.

## 2. Administrative Functions

While intentions dominate accountability controls of NGOs performing political functions, actions (or competence) are most important for determining accountability of NGOs undertaking administrative functions. The role of NGOs in performing administrative duties in international

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216. Goodin, *supra* note 5, at 27 (quoting Mark Considine, *The End of the Line? Accountable Governments in the Age of Networks, Partnerships and Joined-Up Services*, 15 GOVERNANCE 21, 21 (2002)).

217. See Wapner, *supra* note 50, at 201.

218. Goodin, *supra* note 5, at 11.

219. A simple example from the United States political system demonstrates this: under the "two-party system," the United States' political system is divided into two major groups based upon differing purposes of the two parties. It is axiomatic each member of each party does not adhere to every tenet of his or her party of choice. Instead, members align themselves with groups most closely resembling their own views or representing the interests which are of greatest importance to the members. Indeed, absolute representation of each member's views would preclude effective organization. As a matter of pragmatism, therefore, imperfect representation must be sufficient to justify representation. The trickier question is determining when representation is not sufficiently representative of member or beneficiary interests or views.

governance is one primarily of functionality for the organization. Generally, a high level of technocratic expertise is required for such activities, and therefore, issues of representation are less significant.<sup>220</sup> Instead, external accountability to the regime is most important from a regime perspective.

NGO authority to participate as administrative governance actors is derived from the privileges granted by the regime.<sup>221</sup> NGOs and their represented memberships have no intrinsic rights to participate as administrative actors. Rather, their participation serves instrumental purposes for the regime. As a result, NGO authority and legitimacy are derived from and delegated by the regime and can therefore be proscribed and withdrawn by the regime.<sup>222</sup> Adequate representation of members or beneficiary groups is therefore not a normative prerequisite to properly serving as an administrative agent of an international regime (assuming authority to perform such a function).

Supervisory and legal accountability controls, derived from the power of delegation, are therefore the primary mechanisms used in ensuring accountability. Secondary means of ensuring external accountability to the regime are enforced through budgetary and other fiscal controls, hierarchical controls for managers in their individual capacities, and to a certain extent, peer accountability controls where other NGOs are also involved in the provision of particular administrative duties.<sup>223</sup> Internal accountability (necessary to ensure membership fees and other base revenue and organizational sources of power are not mismanaged or abused) to members is achieved not through representational accountability mechanisms, but through procedural controls to ensure fiscal (through membership exit and loss of membership fees) and hierarchical accountability.<sup>224</sup>

Action-related accountability concerns dominate administrative actions.<sup>225</sup> NGO actions are evaluated to ensure they do not exceed the scope of the mandate provided by the delegating authority.<sup>226</sup> Outcome-related concerns also exist, but are less significant in the performance of administrative functions, since action-related accountability concerns

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220. See generally Goodin, *supra* note 5, at 23–30 (suggesting homogeneity is not necessary because the desire to achieve a negotiated outcome is enough to succeed).

221. *Id.* at 1.

222. *Id.* at 3.

223. *Id.* at 3–4.

224. Keohane, Political Accountability, *supra* note 5, at 15.

225. Keohane & Nye, *supra* note 5, at 27.

226. See Goodin, *supra* note 5, at 11.

determine which qualified NGOs participate and require those NGOs to perform their assigned duties. Therefore, if the NGO is to produce documentation or training programs, outcome-oriented accountability mechanisms provide little additional guidance, since NGO authority is derivative and delegated and can be withdrawn if the NGO fails to meet the quality expectations of the regime. Nevertheless, a minimal level of outcome-related constraints should also be imposed to ensure NGOs produce *well-researched* neutral information, for instance.

### 3. Enforcement Functions

Different from both political and administrative functions, NGOs' performance as enforcers of the rules of an international regime is derived both from intrinsic rights and instrumental privileges.<sup>227</sup> NGO participatory rights may be delegated to NGOs by the international regime based upon reasons of expertise or such rights may be intrinsic to ensure regime adherence to the rules established by the regime and its Member States.<sup>228</sup> As a result of this bifurcated source of authority, NGOs may be held to account by multiple groups: the regime (including the regime's beneficiaries if the regime acts outside its scope of authority), the beneficiaries of the NGO, and, to a lesser extent, the internal membership of the NGO.<sup>229</sup>

NGOs performing enforcement functions must maintain accountability to the regime and its purposes to ensure the regime is held to account and for the regime to ensure the NGOs act within the authority properly delegated to them, depending upon the particular enforcement function. NGOs must also ensure accountability to the regime's beneficiaries and the beneficiaries of the NGO, whether internal or external. Generally, however, external beneficiary interests will dominate, and therefore adequate representation of such interests must be assured.<sup>230</sup> External accountability to beneficiaries, while predominantly achieved through the regime's policies and supervisory mandates, must also be ensured through a modicum of hierarchical accountability to the beneficiaries directly, where such enforcement functions directly affect them.

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227. For a discussion of how these rights and privileges interact, see Erik B. Bluemel, *Separating Instrumental from Intrinsic Rights: Toward an Understanding of Indigenous Participation in International Rule-Making* (forthcoming 30 AM. INDIAN L. REV. (Fall 2005)).

228. See Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, *supra* note 111, at 276–77; Grant & Keohane, *supra* note 4, at 8.

229. Charnovitz, *supra* note 111, at 277–78.

230. *Id.* at 278–79.

While beneficiary accountability is primarily determined by intentions and actions, external accountability to the regime is determined mostly by reference to actions and performance outcomes, especially in the provision of services.<sup>231</sup> Effectiveness, expertise, and experience are crucial determinants for outcome-based accountability controls. For delegated non-public service provision NGO functions, external accountability to the regime generally is ensured through outcome-oriented supervisory, legal, and fiscal controls.<sup>232</sup> The basic internal accountability necessary to ensure managerial compliance is achieved through fiscal and hierarchical requirements established (in the framework of this Article) under domestic law, as will be discussed in the next section.

### *B. Harmonizing Domestic Procedures*

National governments often have processes by which NGOs are established and verified under domestic law. Recognizing this, it would be inefficient to require international governance regimes to duplicate domestic requirements. Implicit legitimacy is often established through domestic government recognition of NGOs as legal entities.<sup>233</sup> This legitimacy, however, should not be taken for granted, since the international regime may have interests which are not purely based upon the aggregation of interests of its member States.<sup>234</sup> As a result, international regimes must validate the rigor with which the national governments apply their accreditation procedures, much as the NACEC evaluates the enforcement of national environmental laws under NAFTA, and apply more stringent requirements where necessary and appropriate.<sup>235</sup> As a result, domestic procedures should be viewed as baseline requirements for participation in international governance, but should be appended with international requirements where necessary to ensure accountability appropriate to the governance function involved.

The view of this Article is efficiency requires domestic governments to certify NGOs as legitimate actors with the international system focusing on legitimizing NGO involvement in particular international governance functions. However, where domestic governments do not have procedures or an effective process of legitimizing NGOs, the international sys-

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231. See generally Charnovitz, *supra* note 106 (discussing examples of NGOs, issues arising from their involvement, and their functions).

232. See generally Grant & Keohane, *supra* note 4.

233. See Ann M. Florini, *Lessons Learned*, in *THE THIRD FORCE: THE RISE OF TRANS-NATIONAL CIVIL SOCIETY* 211, 233 (Ann M. Florini ed., 2000).

234. See Aman, *supra* note 39, at 1705.

235. *Id.* at 1712–14.

tem must do so to prevent unfairness between countries' NGOs. This Article considers it highly desirable to harmonize the domestic NGO legitimizing processes to both improve the effectiveness of the process itself and to conserve resources. This Article also considers domestic governments far superior in the basic legitimizing process given their proximity to the NGOs and their (typically) preexisting information collection processes. Domestic governments are also most capable of understanding the variety of local organizational structures and purposes and therefore should play a central role in certifying NGOs as eligible for participation in international governance.

However, establishing domestic accountability mechanisms for NGOs is no easy task considering the great variety in NGO organizational forms:

[T]here are wide difference [sic] among NGOs concerning their forms of organisation—formal versus informal, hierarchy versus participation, networks versus federations, centralised versus decentralisation, not to mention differences in organisational culture. Some NGOs are membership organisations; others are governed by boards or trustees. Moreover, the meaning of membership varies.<sup>236</sup>

Nevertheless, most national governments have, and continue to establish, requirements NGOs must meet to earn a particular, usually special, legal status.<sup>237</sup> Of particular difficulty is the issue of distinguishing between local and international NGOs and determining what role national governments might play in certifying such organizations.<sup>238</sup> There are over 200,000 local NGOs in the developing world alone.<sup>239</sup> In addition, there are approximately 29,000 international NGOs.<sup>240</sup> International NGOs often seek beneficiary legitimacy by allying with local NGOs and are

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236. Kaldor, *supra* note 34, at 24.

237. Requiring national governments to impose some requirements on NGOs prior to allowing their participation in international governance is not new to this Article, as the UN defines NGOs as non-profit organizations, implying those NGOs are established under some domestic legal structure as non-profit entities. *See supra* text accompanying note 2.

238. Tavis, *supra* note 122, at 510.

239. *See* JULIE FISHER, NONGOVERNMENTS: NGOs AND THE POLITICAL DEVELOPMENT OF THE THIRD WORLD 6 (1998).

240. NGOs with operations in more than three countries are generally considered "international NGOs." COMM'N ON GLOBAL GOVERNANCE, OUR GLOBAL NEIGHBORHOOD: THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE 32 (1995); *NGOs: Sins of the Secular Missionaries*, *supra* note 147, at 25 (referring to the Commission on Global Governance's report).

frequent sources of funds for their local partners.<sup>241</sup> Thus, while international NGOs may have greater legitimacy as actors at the international governance level, domestic NGOs have a significant role to play as well. Limiting participation to international NGOs may seriously undermine the funding and effectiveness of domestic NGOs, ultimately to the detriment of local beneficiaries.<sup>242</sup> Additionally, many, if not all, of the governance functions described above in Part III could be performed by local NGOs having the proper level of competence to perform such functions. Therefore, this Article does not discount the participation of local NGOs in international governance as do the ECOSOC procedures.<sup>243</sup> However, this Article does recognize the difficulty in relying upon domestic governments to certify international NGOs as potential participants in international governance.<sup>244</sup> This Article favors (though by no means requires) an alliance between international NGOs and local NGOs to alleviate the disadvantages of limiting participation to either local or international NGOs, especially where beneficiary interests are represented and experience or expertise are important (as in the provision of services).

In countries certifying NGOs, domestic accountability requirements generally require NGOs: (1) serve disempowered or underserved populations; (2) are established to promote the public interest; (3) are fiscally responsible so monies do not inure to private individuals; and (4) have an organizational structure holding its managers and directors accountable to its membership through some means.<sup>245</sup> These basic requirements cre-

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241. See Tavis, *supra* note 122, at 510; Tarlock, *supra* note 82, at 65–66.

242. For a discussion of the interaction between international and domestic NGOs, see Shelley Inglis, *Re/Constructing Right(s): The Dayton Peace Agreement, International Civil Society Development, and Gender in Postwar Bosnia-Herzegovina*, 30 COLUM. HUM. RTS. L. REV. 65, 107–13 (1998).

243. See ECOSOC Procedures, *supra* note 179.

244. See *infra* Part IV.A for a discussion of how this difficulty might be resolved.

245. In the United States, Internal Revenue Code § 501(c)(3) provides the test for organizations not organized for profit, but operated solely for the advancement of social welfare. Of course, for-profit entities can still perform services and other international governance functions. This Article, however, is intended as a direct response to the wealth of literature on NGO accountability.

Although this Article only analyzes NGO accountability, its analysis may be portable to other actors performing similar functions for the reasons described above. This Article does not believe NGOs should have a right to participate while other for-profit associations do not. However, the latter may require different accountability controls, an issue not directly addressed by this Article. See Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, *supra* note 111, at 276; Peel *supra* note 176, at 73–74; see also *supra* notes 53, 65. While it is possible different concerns exist regard-

ate a good base for establishing mechanisms to hold NGOs internally accountable when performing functions associated with international governance. However, “the absence of standard public law safeguards concentrates significant power in NGO secretariats” and may encourage forum shopping or a race-to-the-bottom in NGO domestic regulation.<sup>246</sup> Therefore, the following sections call for harmonization of domestic regulation of NGOs to ensure a minimum level of accountability. This minimum level of accountability is based upon the process of legitimizing NGOs as valid actors in any sphere of governance and includes the four accountability controls discussed above.

### 1. Representation

While domestic regimes generally require NGO service-orientation toward underserved or disempowered populations, this requirement is to ensure the NGO operates for a “public purpose,” rather than representation of beneficiary interests. Representation controls in this context should ensure members have some hold over policy decisions or agency leadership, such as occurs in a principal-agent relationship.<sup>247</sup> Therefore, for harmonization purposes, accountability mechanisms should ensure only representation of member interests. External accountability to beneficiaries is not necessary for all governance functions. Therefore, analysis of accountability to beneficiaries, while best done at the domestic level, should not be a requirement harmonized prior to participation, but should be evaluated (by the domestic government) based upon the particular function the NGO seeks to perform.

One criticism to this approach is rules governing NGO interactions with local communities can have significant positive consequences on

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ing NGOs as compared to other actors, counseling for different or fewer accountability controls, this Article suggests these concerns may be neither rational nor supportable distinctions when NGOs perform governance functions capable of being performed by other entities (even if not equally well). In fact, “it is important for global institutions, international institutions and governments, not to privilege NGOs in debates about social justice.” Kaldor, *supra* note 34, at 27.

Additionally, some have suggested government agencies do not have the same “ethos of mutuality” as NGOs (though officials would) and therefore should not be full participants in network governance structures. *See* Goodin, *supra* note 5, at 43–44. Of course, interest polarization may occur with or without government involvement and is usually a more likely outcome than cooperation-based approaches in international governance. *See* Brown et al., *supra* note 60, at 28–32.

246. *See* Brown et al., *supra* note 60, at 23–32.

247. *See* Keohane, Political Accountability, *supra* note 5, at 8.

NGO relations with its beneficiaries.<sup>248</sup> As NGO memberships are not usually comprised of NGO beneficiaries, it is important to differentiate NGO representativeness from NGO adherence to its intended beneficent goals as well as from representativeness of beneficiary views/desires, all of which may differ significantly. The disjuncture between the views and interests of intended beneficiaries and members can significantly impede the effectiveness of NGOs. While this is a sound criticism, it is valid only in relation to the organization's purpose, claims to representativeness, or situations where NGO effectiveness can be decreased by the membership/beneficiary disjuncture. Therefore, it shall be discussed along with other NGO purposes below in Part IV.B.3.

Although traditionally considered in the context of democratic accountability akin to states, NGOs need not be highly representative of beneficiary interests to perform governance actions.<sup>249</sup> Some have argued outcome-based measures should be more important than the representativeness of the NGO.<sup>250</sup> However, this Article does not believe such generalizations are appropriate, and argues different accountability measures must be evaluated in light of the function the NGO seeks to perform, as discussed in greater detail in Part IV.A.

While the requirement NGOs be non-profit entities helps ensure actions in the "public interest" to a certain extent, it has been recognized that NGOs still operate under a profit motive, despite being non-profit, and therefore may not be entirely representative of member views.<sup>251</sup> It is improper to assume NGOs are no more than a mere aggregation of their memberships' interests. Rather, bureaucratic theory suggests NGOs may

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248. Craig Johnson, *Toward Accountability: Narrowing the Gap Between NGO Priorities and Local Realities in Thailand* 5 (Overseas Dev. Inst., Working Paper No. 149, 2001) (arguing internal accountability mechanisms are stronger than many scholars acknowledge).

249. Wapner, *supra* note 50, at 199; *see also* Tarlock, *supra* note 82, at 75.

250. *See* Delbrück, *supra* note 106, at 41–42 (recognizing "providing a stringent legal framework . . . that NGOs would have to abide by in order to be admitted as participants in the international system could enhance their legitimacy").

251. *See* Bjørn Møller, "Civil Society Romanticism": A Sceptical [sic] View: Reflections on Håkan Thörn's Solidarity Across Borders (unpublished paper), available at <http://www.ihis.aau.dk/~bm/NGOs-SA.doc> (last visited Aug. 19, 2005). While this Article considers NGO actors distinct from other potential civil society and economic actors in global governance, a regime may not consider such a distinction important, or, as a second-best alternative, verifying the "public interest" nature of the organization might prove exceedingly difficult. *See* Peel, *supra* note 176, at 73–74. In such a case, however, the regime would still need to filter out organizations with improper or falsified purposes, making this analysis mostly pertinent, though with a slightly different focus.



have public-interest values not derived from any interest-aggregation theory of representation.<sup>252</sup> As a result, adequate member representation must be viewed in part in terms of process, and not wholly in terms of results, and must ensure the results are not contrary to the purpose of the NGO.

Representativeness is difficult to verify,<sup>253</sup> but local variations demand it be addressed at the local or national level as opposed to the international level. Three indicators, however, may be a useful starting point in determining NGO representativeness: “the institutional ability of [members] to sanction leaders, the de facto capacity of [members] to sanction leaders, and the [organization’s] responsiveness to the expressed will of the [members].”<sup>254</sup>

## 2. Accountability

At the international level, accountability of NGOs generally focuses on analyzing the democratic accountability of NGOs.<sup>255</sup> However, other accountability issues exist and are the dominant forms of control imposed at the domestic level. Because NGO self management and internal accountability procedures are insufficient to guarantee NGO accountability,<sup>256</sup> various mechanisms to improve internal NGO management have been proposed.<sup>257</sup> Therefore, despite the fact NGOs can be held accountable to their members through member exit, financial conditionality re-

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252. *Id.* at 5–6.

253. Brown et al., *supra* note 60, at 25. The actual representativeness of NGOs has also been questioned recently. See ROBERT O’BRIEN ET AL., *CONTESTING GLOBAL GOVERNANCE: MULTILATERAL ECONOMIC INSTITUTIONS AND GLOBAL SOCIAL MOVEMENTS* 200–01 (2000); Martin Wolf, *What the World Needs from the Multilateral Trading System, in THE ROLE OF THE WORLD TRADE ORGANIZATION IN GLOBAL GOVERNANCE* 183, 197–98 (Gary P. Samson ed., 2001).

254. See Brown et al., *supra* note 60, at 24–27.

255. See Grant & Keohane, *supra* note 4, at 13.

256. See generally LEWIS, *supra* note 44. See also ALAN FOWLER, *STRIKING A BALANCE: A GUIDE TO ENHANCING THE EFFECTIVENESS OF NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL DEVELOPMENT* (1997); Helmut K. Anheier, *Managing Non-Profit Organizations: Toward a New Approach* (Center for Civil Society, Civil Society Working Paper No. 1, 2000), available at [http://www.lse.ac.uk/collections/CCS/publications/cswp/civil\\_society\\_wp.htm](http://www.lse.ac.uk/collections/CCS/publications/cswp/civil_society_wp.htm).

257. See MICHAEL EDWARDS, *NGO RIGHTS AND RESPONSIBILITIES: A NEW DEAL FOR GLOBAL GOVERNANCE* 28–37 (2000) (noting a vote alone is no substitute for a voice, and suggesting independent regulation by an external agency, for example, as a means to improve NGO accountability).

quirements, advisory boards,<sup>258</sup> and other externally-imposed accountability requirements are often deemed desirable from a national policy perspective.

Specifically, financial accountability controls are used to ensure fiscal responsibility of the organization so self-serving “for-profit” personal motives do not exist.<sup>259</sup> Hierarchical accountability controls are used to further constrain NGO managers and employees from inappropriate actions and rent-seeking behavior. For this reason, the method of board selection is important to NGO accountability.<sup>260</sup> Both fiscal and hierarchical controls are more readily obtained and verified at the national level as opposed to the international level. Therefore, requiring controls at the national level in the first instance may make economic sense.

### 3. Validity of Proffered Goals

Another issue best harmonized at the domestic level is the requirement that NGOs serve the “public interest.” Definitions regarding the “public interest” will certainly vary by state. In fact, not all States define NGOs as non-profit entities.<sup>261</sup> Since “moral accountability arises from the mission of the civil society actor,”<sup>262</sup> it is important to ensure the legitimacy derived from an organization’s NGO status is justified. The requirement NGOs be non-profit entities serves in part to ensure NGOs serve, or in some cases represent, marginalized interests imperfectly serviced or represented by the State. In this sense, some NGOs serve a “second-best”

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258. Wapner, *supra* note 50, at 201–02 (“Many professional institutions use outside experts or boards of directors that watch out for the organization’s long-term well-being. These boards are usually comprised of people who are uninvolved in day-to-day operations and therefore possess a broader perspective on the issue area and the organization’s political role. Boards can have authority to depose NGO leaders and shape the broad outlines of campaign work. While board members implicitly share the overall normative orientation of the organization and its officials, they come to the group as outsiders. In fact, they are invited onto the board precisely because they have some distance from the organization.”).

259. See Brown et al., *supra* note 60, at 24–27.

260. See *Country Plan Presentations: The Philippine Group*, in CSRO ACCOUNTABILITY & SUSTAINABILITY: CRITICAL LESSONS FROM BEST PRACTICES 73–74 (SE Asia Reg’l Conf., Feb. 18–20, 2002), available at <http://www.synergos.org/globalphilanthropy/02/csroproceedings.pdf> [hereinafter CSRO ACCOUNTABILITY].

261. See, e.g., Felicidad Soledad, *Accountability as a Sector: The PCNC Experience*, in CSRO ACCOUNTABILITY, *supra* note 260, at 9 (noting the Philippines did not certify NGOs for tax deduction purposes until recently).

262. Kaldor, *supra* note 34, at 21.

function of representation or service-provision.<sup>263</sup> However, the legitimacy of distinguishing between NGOs serving underserved populations and NGOs serving more politically powerful associations is normatively suspect. Failure to limit the participation of these more powerful NGOs, however, means increasing NGO participation generally may in fact further disempower underrepresented groups as they must then battle against potential capture of organizations by more powerful NGOs.<sup>264</sup>

As a result, it is important to link the international regime's goals of NGO participation to the purpose with which the NGO is formulated. The purpose of the NGO is important not only to determine which NGOs are actually serving the public interest but also to ensure NGO institutional competence in particular fields.<sup>265</sup> Relationships with marginalized populations on specific issues creates a measure of competence important to proper international governance. Although one society may be comprised of marginalized populations which are politically powerful in other societies, this variation does not overcome the significant need to establish a harmonized approach to tackling the issue of NGO purpose to determine whether organizations act for the public-interest or private profit.<sup>266</sup>

#### 4. Veracity of Proffered Goals

Harmonizing domestic requirements for initial NGO certification is insufficient, however, to ensure NGOs are appropriately accountable and formulated at the domestic level. Without a requirement NGOs be evaluated for the veracity of their goals and the imposition of other accountability controls, it will be difficult to weed out NGOs which serve as mere fronts for states seeking increased political power or organizations misrepresenting their purposes or engaging in other fraudulent rent-seeking behavior.

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263. See Ngaire Woods, *Good Governance in International Organizations*, GLOBAL GOVERNANCE, Jan.–Mar. 1999, at 39, 45.

264. See Robert O. Keohane & Joseph S. Nye, *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD 219, 236, 239 (Robert O. Keohane ed., 2002); Kahler, *supra* note 5, at 14 (citing Bernard Manin et al., *Introduction*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION (Adam Przeworski et al. eds., 1999)); Woods, *supra* note 263.

265. Goodin, *supra* note 5, at 25. This, of course, assumes application of the UN's definition of NGO. See *supra* note 2.

266. This is not to say that industry or for-profit associations have no right to participate in international governance. However, this Article is limited to an analysis of NGOs, as defined by the UN.

It has been argued, relative to other actors, intentions play a much greater role in ensuring accountability of the non-profit sector and regimes should continue to focus on the intentions of NGO actors, monitoring NGO intentions undertaken through peer accountability mechanisms.<sup>267</sup> Despite these claims for the greater use of peer accountability in holding NGOs to account to their purposes,<sup>268</sup> fly-by-night NGOs have not been successfully regulated through internal codes of conduct or peer accountability controls.<sup>269</sup>

Instead, requirements at the national level help validate NGO actions against the purposes with which they are established and are therefore important to ensure long-term NGO accountability and public-interest oriented behavior. As noted above, NGOs in international governance often do not disclose or are not required to disclose their funding sources.<sup>270</sup> International validation of domestic data is therefore necessary to ensure the veracity of the data collected and NGOs are not merely State funded or controlled organizations. The continued requirement of financial accountability is also important to ensure the organization does not engage in for-profit activities. However, determining whether an NGO has faithfully adhered to its mission and vision can be a difficult task.<sup>271</sup>

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267. See generally Goodin, *supra* note 5; Grant & Keohane, *supra* note 4.

268. Goodin, *supra* note 5, at 26.

269. See Soledad, *supra* note 261, at 9.

270. Maura Blue Jeffords, *Turning the Protestor into a Partner for Development: The Need for Effective Consultation between the WTO and NGOs*, 28 BROOK. J. INT'L L. 937, 982 (2003).

271. See, e.g., Abdi Suryaningati, *The YAPPIKA Experience*, in CSRO ACCOUNTABILITY, *supra* note 260, at 12. This Article does not necessarily advocate the use of effectiveness measurements as means to determine the adherence to an organizational mission and vision, both for normative reasons and because of the difficulty of attributing outcomes with NGO actions. See *id.*; Eugenio M. Caccam, Jr., *Measuring Results and Impact*, in CSRO ACCOUNTABILITY, *supra* note 260, at 14. Nevertheless, it recognizes such outcome-based measurements may be useful, and therefore applies the three subjects of accountability described by Goodin (intentions, actions, results) to NGO participation in international governance. See Goodin, *supra* note 5, at 10–11 (noting although the three subjects are not necessarily exhaustive, they do relate to the three main ethical forms of virtue: ethics, deontology, and consequentialism). Although “[n]o non-profit is sensitive *only* to intentions and wholly insensitive to results,” for participation purposes, it is not clear a results-orientation is appropriate, since a consideration of results may occur when seeking funding, as donors look both at qualitative and quantitative financial accountability. See *id.* at 16, 25 n.32; Nipa Banerjee, *Donor Sharing*, in CSRO ACCOUNTABILITY, *supra* note 260, at 65; Brown et al., *supra* note 60, at 16–17.

Often, formal means are lacking to ensure organizations are meeting their stated objectives.<sup>272</sup> This issue may also be exacerbated by financial conditionality, which may not perfectly align with stated objectives and goals.<sup>273</sup> In fact, issues of multiple accountability often make coherent management difficult.<sup>274</sup> Establishing accreditation procedures at the international governance level may serve to streamline multiple accountability concerns into a single accountability source. This may occur as donors adopt the accreditation procedures used by international regimes, thereby minimizing conflicting accountability concerns and loyalties significantly. While loyalty issues surrounding financing will likely inevitably occur given donor financing preferences, accreditation procedures may be used to ensure only those organizations with goals appropriately aligned with such donor preferences will be financed, rather than allowing NGOs to constantly redefine their priorities to meet donor demands.

One concern with such an arrangement, however, is donor financing may be given even greater power under such an arrangement. Only those NGOs whose goals are aligned with donor preferences will receive funding for participation in international governance activities.<sup>275</sup> NGOs which could normally receive financing upon a redefinition of their goals may be left without funds, causing some populations or issues to go unserved. Whereas these NGOs might have been able to incorporate some of their preferences into a donor-driven project previously and at least to some extent servicing those populations or issues, now those NGOs would be precluded from doing so in the international governance context. Although not precluded from doing so in an informal, non-governance context, international donors may adopt the accreditation procedures of international regimes throughout all of their financing arrangements, thereby running the risk such a policy might result in sub-

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272. See Johnson, *supra* note 248.

273. See *id.* at 5.

274. See *id.* See also EDWARDS & HULME, *supra* note 147; David Stark, *Ambiguous Assets for Uncertain Environments: Heterarchy in Postsocialist Firms*, in THE TWENTY-FIRST-CENTURY FIRM: CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPECTIVE 69, 101 (Paul DiMaggio ed., 2001) ("To be accountable to many different principles becomes a means to be accountable to none."); Goodin, *supra* note 5, at 6–8 (noting generally different accountability mechanisms operating upon NGO actions); Keohane & Nye, *supra* note 5; E.A. Brett, *Voluntary Agencies as Development Organizations: Theorizing the Problem of Efficiency and Accountability*, 24 DEV. & CHANGE 269 (1993).

275. This is not far from what happens currently, as there "has been a proliferation of NGOs that are organized more to take advantage of [donor] resources than to accomplish their nominally value-based missions." Brown et al., *supra* note 60, at 12.

optimal financing of various populations' needs. The danger accreditation procedures will limit the servicing of various issues, however, seems overstated, as many NGOs pursue multiple objectives simultaneously and even under very strict donor financing arrangements and still find means to adapt the donor requirements to meet the needs of both the NGO and the intended beneficiaries.<sup>276</sup>

In the end, for NGOs to be held accountable in a coherent and consistent manner at the international governance level, some harmonization in definition and regulation at the national level is required. NGOs have a sense of moral legitimacy due to their focus on public interest or non-profit issues. It is therefore important for national governments to ensure an organization seeking NGO certification meet some requirements to be labeled a non-profit organization, including purpose- and population-based requirements, financial and hierarchical accountability controls, and controls ensuring alignment between the purposes and actions of the organization. These mechanisms together establish the minimum requirements necessary to create some coherency to NGOs in the international sphere, thereby reducing the costs and improving the correctness of international governance systems' certification of NGO participants.

### *C. Implementation Issues*

This is a theory-based Article, leaving most of the details of implementation to further study. However, some general implementation concerns should be noted.

#### 1. Cost

The ability to implement a unified system of NGO certification unique to each regime's mandates and purposes will inevitably impose a number of significant costs. While some of these costs may be minimized through economies of scale if performed by a single certification organization,<sup>277</sup> they will nevertheless be significant for international regimes. These costs may be borne by applicant NGOs, depending upon the regime mandate, making distributional inequities a danger. Despite this potential pitfall, these concerns do not appear particularly worrisome since significant funding is available from various organizations to support NGO capacity-building and participation in international govern-

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276. See Johnson, *supra* note 248, at 14–15 (noting such flexibility is enhanced by requirements seeking greater incorporation of intended beneficiaries in the decisionmaking processes but some ambiguity is still necessary to allow such flexibility).

277. See *infra* Part IV.C.5 for a discussion of this type of arrangement.

ance.<sup>278</sup> Additionally, this Article seeks to place some of the costs of implementing this framework upon national governments, which typically have greater resources for certification than international regimes.<sup>279</sup>

## 2. Feasibility

### *a. Regime Perspective*

From a regime perspective, implementing the framework laid out might not only impose costs, but might be difficult to achieve even absent financial constraints. Lack of adequate data or resources to verify the veracity of organizations may present significant challenges in implementation. Recognition of these problems is the primary reason why this Article suggests a two-tiered approach to certification: domestic- and international-level procedures. However, despite these data gaps, it is important to provide the indicators by which future studies may be conducted and to identify areas of further research.

Additionally, international regimes may not be particularly competent in certifying NGOs to participate, as most have not undertaken such certification requirements. As a result, a significant learning curve and proceduralization of the certification process will be required to guide regime behavior. While a dedicated, independent certification agency may significantly assist regimes in this process,<sup>280</sup> this learning curve will nevertheless exist and may present significant short-term equity and justice concerns.

Finally, significant concerns exist regarding the ability of international organizations to pierce through domestic regulations serving as mere window dressing. This Article assumes such a process is possible, as it has faith in the approach undertaken by NACEC in the NAFTA regime.

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278. For example, the United Nations Development Programme and Global Environment Facility Small Grants Programme provides up to \$50,000 for NGOs seeking to build their capacity in international governance as it relates to environmental protection. See The Global Environment Facility Small Grants Programme 1992–2002, Hands-on Actions for Sustainable Development (2002), <http://sgp.undp.org/download/SGP10yearReport.pdf>.

279. Cf. Peel, *supra* note 176, at 74 (“Greater institutional constraints in the international setting may mean that tribunals do not have the resources to devote to screening individual applications and submissions by NGOs. However, such considerations do not dictate the exclusion of NGOs from the international environmental dispute resolution processes altogether. Rather, they suggest the need for development of a process of accrediting NGOs in the international environmental arena to ensure an empirical basis for determining their claimed representativeness and expertise.”).

280. See *infra* Part IV.C.5.

This Article counsels for freedom of information laws to the extent they provide information regarding government funding and NGO purposes, structures, and funding sources. Nevertheless, the difficulty of determining whether an organization is a mere political arm of a state where such laws do not exist will be immense, and without greater standardization, including the use of standard accounting procedures, data gathered from national governments or independently may require significant analysis to decipher their importance.

*b. NGO Perspective*

From the NGO perspective, the requirements imposed by this Article will likely undermine organizational efficiency to a certain extent. While this Article does not advocate significantly different accountability mechanisms than current literature, it does call for particular arrangements of accountability mechanisms, the strength of which may vary depending upon the functions performed (or the type of organization performing them). As a result, certain combinations of accountability mechanisms may prove to be more stringent and hinder organizational efficiency to a greater extent than existing requirements or theories. As a result, such requirements might limit the number of NGOs capable of performing governance activities to the larger NGOs capable of absorbing such additional costs.<sup>281</sup> In the view of this Article, these concerns do not seem particularly compelling as an argument to reject a function-based approach to accountability, but certainly must be considered in determining the strengths of accountability mechanisms applied to particular governance functions.

### 3. Western Bias

A significant concern for this framework is its potential to favor Western forms of organization. While the departure from democratic accountability theory opens the door for participation by non-Western NGOs possibly left out of other accountability theories, the certification process established by this Article's framework nevertheless may create a potential bias against non-Western organizational forms which are not established according to the typically Western corporate model. Additionally, this Article continues to rely on representation as being a normative basis

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281. See, e.g., Hale, *supra* note 64, at 16, 20 (noting worries "the costs of compliance will detract from the partners' ability to carry out their project, an issue of special concern to small-scale partnerships and developing country partnerships," but arguing "innovative policy tools can avoid this danger").



for internal, and to some extent, external accountability to beneficiaries. While less concerning than mainstream accountability theory, which primarily relies upon democratic representation models and elections, this Article's reliance on representation might be seen to imply a democratic model—an issue of concern since only approximately sixty percent of global society is democratically governed through elections.<sup>282</sup> However, this analysis does not assume such a requirement unless one is established at the regime level.

As noted in the previous section, the certification requirements imposed by this framework might also favor wealthier NGOs, typically from Western or Northern countries.<sup>283</sup> Even more disconcerting to some might be the departure from typical accountability critiques of NGOs, which disclaim NGOs' failure to adequately represent their beneficiaries' interests. Focus on internal accountability as accountability to members, who are typically wealthy Northern individuals and organizations, might advantage Northern policies. Southern countries may therefore oppose general increases in NGO power,<sup>284</sup> out of fear Northern NGOs' policy goals will not sync with local developing country realities, and may be coterminous with Northern governments' policy platforms.<sup>285</sup> Additionally, Southern countries may fear allowing NGO participation will favor Northern NGOs due to inequities in power, access to technology and resources, and the predominance of the English language in international

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282. See Adrian Karatnycky, *The 2000–2001 Freedom House Survey of Freedom*, in *FREEDOM IN THE WORLD: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES 2000–2001*, at 9 (Linda Stern ed., 2001).

283. See *CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875* (John Boli & George M. Thomas eds., 1999).

284. See Daniel C. Esty, *Linkages and Governance: NGOs at the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 709, 725 (1998) (“Other observers argue that a greater role for NGOs at the WTO might exacerbate the existing bias toward Northern viewpoints and further weaken the voice of those advancing the needs of the developing world.”); Philip M. Nichols, *Participation of Nongovernmental Parties in the World Trade Organization: Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295, 318–19 (1996) (explaining the inequity that exists in advocating in an international forum because of the benefits to well-monied interest groups).

285. See Rona Nardone, *Like Oil and Water: The WTO and the World's Water Resources*, 19 CONN. J. INT'L L. 183, 194 (2003) (noting that Northern NGOs prioritize natural resource and biological diversity protections, while Southern NGOs prioritize human development); Maki Tanaka, *Bridging the Gap Between Northern NGOs and Southern Sovereigns in the Trade-Environment Debate: The Pursuit of Democratic Dispute Settlements in the WTO Under the Rio Principles*, 30 *ECOLOGY L.Q.* 113, 120–21 (2003).

governance.<sup>286</sup> This fear, however, is not particularly significant, as the theoretical framework established by the Article would actually reduce the number of Northern NGOs claiming to represent Southern beneficiary interests where such beneficiaries are not properly represented in NGO policymaking,<sup>287</sup> spurring the formation of Southern NGOs or Northern NGOs truly representative of Southern interests. Additionally, this Article posits it is the responsibility of the regime itself to ensure full and fair representation of all affected interests, so failure to ensure fairness in representation would be a shortfall of the regime, not of the NGOs.

Finally, the certification requirements established under this Article run the risk of privileging particular organizational forms. Requiring NGOs to conform to a particular organizational structure, while perhaps making them more easily verified and held to account, risks undermining cultural forms of organization and hierarchy, as well as the overall effectiveness of various organizations.<sup>288</sup> Internal accountability structures vary significantly by culture and must be weighed against local custom. International regimes seeking to validate domestic non-profit legal structures should not demand particular organizational forms, but should evaluate the appropriateness of domestic legal non-profit structures against the reasoning used by domestic governments. Therefore, while harmonization of domestic procedures is important in this context, it is also important to allow for local variation.<sup>289</sup> In applying context-dependent accountability controls, therefore, formalism can be the enemy of the good.<sup>290</sup>

One major obstacle is the requirement that NGOs be non-profit, which may require some states to redefine their tax codes, thereby contravening the will of the populace. Since the UN requires participating NGOs to be non-profit, this Article assumes this issue has not presented significant distributional equity problems, though it recognizes such concerns can

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286. Riva Krut, *Globalization and Civil Society: NGO Influence in International Decision-making* 18–22 (United Nations Research Inst. for Soc. Dev., Discussion Paper No. 83, 1997), available at <http://www.unrisd.org> (follow “site search” hyperlink; then search “Riva Krut”; then follow hyperlink to article).

287. This is the case because international NGOs can claim any beneficiary constituency and act on their behalf without accountability to the beneficiaries. This Article suggests a modification to this approach under certain circumstances, thereby either mandating greater direct representation of beneficiary interests or limiting NGO participation to those organizations sufficiently representative of beneficiary interests.

288. See Kingsbury, *supra* note 6, at 188–93.

289. See *id.*

290. See *id.* at 189.

exist and should be dealt with on a case-by-case basis to ensure fair treatment across national borders.

#### 4. Moral Hazard

There is potential concern the proceduralization of NGO participation in international governance might create a presumption of NGO accountability. This presumption, in turn, might lead some actors to give more credence to NGO positions than to other governance actors, such as states or other less procedurally governed entities. This concern is especially acute in enforcement situations where NGOs hold international governance regimes accountable. These NGOs might be less inclined to evaluate the regimes' performance (in holding the regime accountable) if NGOs are participating in the structure, even when the NGO is not acting as an accountability control to unwieldy regime power. This is a potential concern, but one easily avoided through clear and simple certification procedures which outline the exact reasons and functions the NGO is allowed to perform.

Another moral hazard concern might present itself with respect to domestic certification requirements, whereby international regimes might presume domestically certified NGOs are proper participants in international governance and therefore over-include NGOs in the governance regime. These dangers, however, appear to be insignificant where proceduralization is designed to ensure greater accountability. Although formalization may increase legitimacy without increasing accountability, the system proposed by this Article is intended to ensure accountability and thereby avoid this problem.

#### 5. Regime Accountability

Finally, significant concerns exist regarding overall regime accountability. Allowing the international regime to hold the NGO accountable or require particular mechanisms places strong power in the hands of the regime to dispel criticism by not accrediting NGOs with views critical of the regime. As has been noted before, real power is held by those who accredit the participating NGOs.<sup>291</sup> Some have taken the position greater inclusion is better, and therefore providing certification power to international regimes might increase their ability to restrict NGO participation to only weak or already co-opted organizations: "[i]f NGOs are to be held accountable to intergovernmental organizations, controlled ulti-

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291. See Charnovitz, *supra* note 111.

mately by governments, their most outstanding virtue—independence from governmental authority—would be threatened.”<sup>292</sup> However, I do not share the conclusion this danger is so large as to warrant the application of external accountability only through peer and reputational accountability mechanisms.<sup>293</sup>

While many NGOs do act through NGO networks, this is an issue separate from governance; peer accountability mechanisms are subject to failure through collusion, and normatively, NGOs not involved in governance have no or limited normative right to hold other NGOs accountable.<sup>294</sup> Additionally, reputational mechanisms, highly dependent upon the provision of perfect information, are likely to be more effective in ensuring internal NGO accountability to members than external accountability to beneficiaries, who are in a dependent situation. That is, donors may cease or reduce their donations to organizations, but so long as the organizations still have funding, it is likely the assistance such organizations seek to provide will not be significantly rejected by beneficiaries.

In the governance context, however, this is a non-issue, since NGOs would be authorized to act under a contract to provide services on behalf of the regime, so controls other than reputational mechanisms would be applicable to hold NGOs accountable to beneficiaries under such circumstances. In a governance setting, NGOs are not necessarily weak actors and therefore accountability controls previously asserted as sufficient in the private NGO context are no longer so.<sup>295</sup>

As a result of this Article’s reluctance to rely upon peer accountability controls, the framework proposed suggests the international regime be involved in ensuring NGO accountability to the regime. These concerns are significant in the context of holding the regime to account for its actions, but less so where the NGO is performing governance functions on behalf of the regime. Nevertheless, the concern of cooptation, although not significantly increased by this Article’s framework over the status quo method of including NGOs, does counsel for the creation of an independent accreditation organization. This reviewing body would be based upon a pool of actors and should include, at a minimum, one standing,

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292. Keohane, *Commentary on the Democratic Accountability of Non-Governmental Organizations*, *supra* note 67, at 478.

293. *See id.*

294. *See* Tanaka, *supra* note 285, at 120–35.

295. *See* Keohane, *Commentary on the Democratic Accountability of Non-Governmental Organizations*, *supra* note 67, at 479 (“[S]ince NGOs are themselves relatively weak, their external accountability deficits are not as severe as the accountability deficits for other organizations in world politics.”).

independent member of the accreditation organization, one member of the international regime to which the NGO applied for participation in its governance activities, and an official from the country where the NGO's headquarters or field office is located, whichever is most pertinent to the particular issue and international organizational mission. This reviewing body should dispel most of the concerns associated with NGO cooptation and regime rent-seeking behavior.

#### V. CONCLUSION

This Article has reviewed accountability theories related to NGO involvement in international governance and found such theories lack precision and clarity and have proven to be overly general. NGOs may perform two major roles in governance: serving to act as accountability checks on international governance regimes or performing governance functions on behalf of those regimes. This Article focused primarily on the latter of the two roles, describing in detail in Part III some of the varied functions NGOs have performed in international governance regimes. Deconstructing NGO participation in international governance reveals different accountability concerns are raised by the different functions performed by NGOs. As a result, accountability theory must recognize these differences and seek to apply controls based on the particular functions performed by NGOs. Part IV provides a starting point for such a function-based accountability theory. While a function-based framework may present some significant implementation challenges for international and domestic regimes, from both a normative and efficiency perspective, such an approach is highly desirable because it avoids over- and under-inclusion of NGOs in governance and ensures greater competition between NGOs for the performance of particular functions, allowing international regimes to select the NGO best fit to perform the particular function. These implementation challenges warrant further study to detail the contours of a function-based accountability theory and to illustrate methods of determining the optimal balance between organizational and institutional costs and ensuring suitable levels of accountability to the appropriate individuals or entities.