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Participatory Transnational Governance

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## **ABSTRACT**

In textbooks and in theory, law is a product of democratic procedures. In reality, however, the place of law production has moved to a significant degree from the domestic sphere into an emerging domain of supranational and international institutions, bodies, and organizations, public or private, which constitute and enforce “global law without a state” (G. Teubner). These developments appear to undermine the very foundations of democratic theory and practice.

A global democracy is not in sight. But if we still take the concept of law seriously, and, with it, the normative assumption that norms need to be legitimised in order to be called ‘law’, then it is worth examining the possible functional equivalents to the norm-generating setting of the nation-state: participatory arrangements ensuring the involvement of civil society actors, stakeholders, and the public, in the arguing, bargaining, and reasoning processes of transnational regulation, procedural rights safeguarding these procedural positions, and courts or court-like institutions that flank these arrangements. These potential functional equivalents – as elements of a deliberative constitutionalism - do not replace the democratic process necessary for a production of legitimate law, but they might narrow the legitimacy gap between the ongoing process of transnational social regulation and democratic constituencies. This essay focuses on legal patterns of civil society participation in transnational regulation and asks whether the EU, as the most advanced supranational entity with an evolving legal framework in the fields of transparency, accountability, and participation, can be taken as a positive model for global law production.

## **KEYWORDS**

Participation; governance; accountability; legitimacy; transparency; access to documents; European law; international regimes; supranationalism; networks; regulation; NGOs; civil society; democracy

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# PARTICIPATORY TRANSNATIONAL GOVERNANCE

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“The upshot of the activities of international organisations is that today most citizens greatly underestimate the extent to which most nations’ shipping laws are written at the IMO in London, air safety laws at the ICAO in Montreal, food standards at the FAO in Rome, intellectual property laws in Geneva at the WTO/WIPO, banking laws by the G-10 in Basle, chemical regulations by the OECD in Paris, nuclear safety standards by IAEA in Vienna, telecommunications laws by the ITU in Geneva and motor vehicle standards by the ECE in Geneva.”<sup>1</sup>

## I. DEMOCRACY AND TRANSNATIONAL REGULATION

In modern democracies, legal norms are products of parliaments - at least, that is what most citizens think and take for granted. However, this is not an adequate description of today’s reality: it is widely acknowledged and well documented that supranational and international entities or arrangements play an increasing role in the shaping of national law. If a significant portion of law is ‘written’ elsewhere, instead of by the elected national parliaments, as the above quoted authors of a voluminous study on global business regulation suggest, there is either a problem with the use of the term ‘law’, or with the concept of democracy that underlies our self-description as citizens of democratic states (and a democratic European Union). The latter problem of democratic rule is the focus of an intense debate about

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<sup>1</sup> J. Braithwaite & P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000), 488.

democracy beyond the nation state, and is fuelled by the perception that the gap between normative models of democratic rule and the findings of many studies about the increasing amount of rule-making outside the nation states is reaching a critical point. The common description of this development is that there is a crisis of democracy which is caused by the quasi-natural forces of globalisation: namely, that the growing need for transnational regulation is served by governments and private-party networks, and not by parliaments.

An alternative description of these developments could focus on law instead of democracy. The starting point could be that our notion of ‘law’ is an old European one, an outdated version of an even more outdated Kantian or Rousseauian model of self-rule and self-government: law is not necessarily the product of procedures within parliaments, and of governments enforcing it and courts applying it, but can also be produced within networks of governments and/or private parties, outside the nation state and in many variations. Proponents of a post-modern theory of law have repeatedly made this point. The novelty of this idea, compared to very early concepts of law outside or independent of the state,<sup>2</sup> is that the dissolution of territorially bound democracy and the production of binding rules outside the institutional design of national parliaments is no longer an exception but is actually becoming the norm.<sup>3</sup> In a similar vein, advocates of societal constitutionalism or a concept of ‘private transnationalism’ argue that the nation state itself has only limited capabilities to regulate both the markets and the social sphere within its own borders. Consequently, the emerging system of conflict resolution and market regulation at international level does not need a statal corset, but guiding procedures and norms which structure the norm-generating processes.<sup>4</sup>

However, the terminology used to name and describe the legal system emerging beyond the nation state clearly suggests that there is uneasiness with this shift in the rule-making process: the production and enforcement of law beyond the nation state has cautiously been labelled governance,<sup>5</sup> not government, and the binding rules of the EC/EU are still not called ‘law’, but regulations or directives. One of the most interesting details of the new Draft Constitutional Treaty of the EU is that it replaces the old EC terminology: regulations become

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<sup>2</sup> See Eugen Ehrlich’s sociological concept of a ‘living law’: E. Ehrlich, *Gesetz und lebendes Recht*, (Berlin: Dunckler & Humblot, 1986). This book includes a reprint of the original article from 1915. Ehrlich’s idea of living law as a product of society (as opposed to the state-centred approach of the traditional theory of law and sociology of law) treated non-statal sources of law as equally legitimate sources as state law, or even as the ‘original’ sources of law, and this idea implied the assertion that norms set by non-state actors are part of the legal order even if these parts are not officially approved of by the state. The Austrian-German legal profession highly contested this view, and Ehrlich’s theory of living law subsequently became the center of a fierce controversy between him and Hans Kelsen, see the reprint of the 1915/17 discussion in: H. Kelsen/E. Ehrlich, *Rechtssoziologie und Rechtswissenschaft: eine Kontroverse* (Baden-Baden: Nomos, 2003).

<sup>3</sup> J. Braithwaite and P. Drahos (supra n. 2) provide the most comprehensive overview of global business regulations that come into being mainly as self-regulations. For rule-making processes in global regulatory networks, see A.-M. Slaughter, *A New World Order* (Princeton, N.J./Oxford: Princeton University Press, 2004).

<sup>4</sup> See Ch. Joerges, “Juridification Patterns for Social Regulation and the WTO: A Theoretical Framework”, in Ch. Joerges/E.-U. Petersmann (eds.), *Transnational Trade Governance and Social Regulation: Tensions and Interdependencies* (Oxford: Hart Publishing, forthcoming 2006); H. Schepel, *The Constitution of Private Governance -- Product Standards in the Regulation of Integrating Markets* (Oxford: Hart Publishing, 2005).

<sup>5</sup> On the interdisciplinary concept of governance, see G.-F. Schuppert, “Governance im Spiegel der Wissenschaftsdisziplinen”, in: G.-F. Schuppert (ed.), *Governance-Forschung* (Baden-Baden: Nomos, 2005).

European laws, and directives become European framework laws.<sup>6</sup> Thus, it seems as if rules and regulations deserve to be called ‘laws’ only after a constitutionalisation process has taken place.

The uneasiness with supranational and international rule-making processes found its clearest expression in Europe in the 1990’s debates on the democratic legitimacy of the EU/EC. Fuelled by decisions of several constitutional courts, the infamous Maastricht decision in Germany,<sup>7</sup> as well as the respective decisions of the Corte Costituzionale and the Conseil Constitutionnel of Italy and France, a wide discussion started about the possibilities and the limits of European integration<sup>8</sup> and its genuine version of social regulation.<sup>9</sup> This discussion has produced some new and interesting insights into the possibilities of a legitimate law-generating process which is not identical with the familiar structure of our nation state model: EU governance is a distinct mode of social regulation that cannot be compared to nation-state government arrangements, and should not be measured against nation-state standards.

The starting point here is that the discussion about democratic rule above or beyond the nation-state level is often dominated by a number of misleading clichés. The first stereotype concerns the law-making process *within the nation state itself*. Democratic rule is portrayed as parliamentary rule, but a closer look at contemporary rule-making processes reveals a different picture. Governments and non-state actors play a significant role in the pre-formation of legal rules. In particular, governments represent highly aggregated entities with an enormous potential of resources, manpower, knowledge assessment, and experience. It is them – and not the parliaments – which are the primary source and filter for legislative proposals. Thus, it is “gubernative structures”, as von Bogdandy calls them,<sup>10</sup> that widely dominate the law-making process, and not parliamentarians.

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<sup>6</sup> See Article I-33 of the Draft Treaty. Article I-6, ‘Union law’, defines the legal rank of EU laws: “The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.” Draft Treaty as amended by the IGC, 6 August 2004, document no. CIG 87/04.

<sup>7</sup> BVerfGE 89, 155-213. - The decision has been criticised as promoting “Der Staat über alles”; see J.H.H. Weiler, “The state ‘über alles’: Demos, Telos and the German Maastricht decision”, in: O. Due *et al.* (eds), *Festschrift für Ulrich Everling Band 2* (Baden-Baden: Nomos, 1995), p. 1651–1688. This characterisation, however, misses the complexity of the FCC’s reasoning; for a more relaxed interpretation of the Maastricht decision, see A. v Bogdandy, “Das Leitbild der dualistischen Legitimation für die europäische Verfassungsentwicklung: gängige Missverständnisse des Maastricht-Urteils und deren Gründe (BVerfGE 89, 155 ff.)” in 83 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* (2000) at 284-297.

<sup>8</sup> See Dieter Grimm’s famous intervention against a European constitution: “Does Europe need a constitution”, 1 *ELJ* (1995) at 282, and the criticism of Jürgen Habermas, “Remarks on Dieter Grimm’s ‘Does Europe need a constitution?’”, in 1 *ELJ* (1995) at 303-307 and in his seminal work *Between Facts and Norms* (Cambridge/Mass.: MIT Press, 1996). Giandomenico Majone has taken a different stance: for him, the EU regulatory system has a positive and effective regulatory function, but beyond this function there is no room and no legitimacy for any distributive politics, G. Majone, Europe’s ‘Democratic Deficit’: The Question of Standards, 4 *ELJ* (1998) at 5. This view, however, ignores the redistributive effects of every form of regulation: even if a norm appears to be ‘purely technical’ on the surface, it still affects actors in a different manner.

<sup>9</sup> Ch. Joerges/E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Oxford/Portland OR: Hart, 1999); F.W. Scharpf, *Governing in Europe – Effective and Democratic?* (Oxford: Oxford University Press, 1998); G. Majone, *Regulating Europe* (London: Routledge, 1996).

<sup>10</sup> A. v. Bogdandy, *Gubernative Rechtssetzung* (Tübingen: Mohr, 2000); see, also, R. Dehousse, “Misfits: EU Law and the Transformation of European Governance”, in: Ch. Joerges/R. Dehousse (eds.), *Good Governance in Europe’s Integrated Market* (Oxford: Oxford University Press, 2002), 207.



Secondly, parliaments do not act in a social vacuum, but within a societal sphere that is influenced, and partially even dominated, by aggregated interests and conflicting positions. A patchwork of unions, employer associations, political parties, NGOs, religious groups, and many other actors do not merely complement the law-generating political process, but basically constitute this process by participating in public debates about, amongst others, market regulation and social regulation. Here lies the core of what is widely identified as the democratic problem of supranational and international regulation/governance: at global level, the lack of parliamentarianism is accompanied by the lack of a strong global civil society, global political parties, and a global socio-political sphere in which conflict about social regulation can be played out in the open. In other words, it seems that the social *humus* necessary for a democratic process worthy of the name does not exist at global level. Deliberative democracy<sup>11</sup> ends at the national borders.<sup>12</sup>

This does not mean that democracy above or beyond the nation state is actually impossible or theoretically unthinkable, it is just not in sight. But if we still take the concept of law seriously, and, with it, the normative assumption that norms need to be legitimised in order to be called ‘law’, then it is worth examining the possible functional equivalents to the norm-generating setting of the nation-state: participatory arrangements ensuring the involvement of civil society actors, stakeholders, and the public, in the arguing, bargaining, and reasoning processes of transnational regulation, procedural rights safeguarding these procedural positions, and courts or court-like institutions that flank these arrangements. These potential functional equivalents – as elements of a deliberative constitutionalism<sup>13</sup> - do not replace the democratic process necessary for a production of legitimate law, but they might narrow the legitimacy gap between the ongoing process of transnational social regulation and democratic constituencies.

Clearly, it is the EU that represents the most advanced supranational entity that generates binding norms, without simultaneously being a state in the classical sense. The regulatory system of the EU is, therefore, a prime candidate for additional value potentials: Can the EU thus be taken as ‘role model’ for a general legal framework of transnational governance (see below Section III)? In order to answer this question, though, criteria for an assessment are needed. A look at legal philosophy and sociology of law approaches towards the problem of transnational governance without parliament may provide such a perspective.

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<sup>11</sup> Here I refer to the notion of deliberative democracy as unfolded by J. Habermas in his book *Between Facts and Norms* (Cambridge/Mass.: MIT Press, 1996) and in his later work *The Inclusion of the Other* (Cambridge/Mass.: MIT Press, 1998), with an additional reference to G. Frankenberg’s concept of republicanism; see G. Frankenberg, *Die Verfassung der Republik* (Frankfurt am Main: Suhrkamp, 1997), and the theory of civil society, see U. Rödel/G. Frankenberg/H. Dubiel, *Die demokratische Frage* (Frankfurt am Main, Suhrkamp, 1989). Frankenberg, Rödel and Dubiel correctly stress the idea that social integration is the result of societal conflicts; as a consequence, there is a need for elaborate frameworks in which conflicts are staged. This issue cannot be broadened here.

<sup>12</sup> On the challenges of a trans- or supranational constellation for the concept of deliberative democracy, see D. Curtin, *Postnational Democracy. The EU in Search of a Political Philosophy* (Amsterdam: Kluwer, 1997).

<sup>13</sup> For the concept of Deliberative Constitutionalism, see P. Nanz, “Democratic Legitimacy of Transnational Trade Governance: A View from Political Theory”, in Ch. Joerges/E.-U. Petersmann (eds.), *Transnational Trade Governance and Social Regulation: Tensions and Interdependencies* (Oxford, Hart Publishing, forthcoming 2006).

## II. JUSTIFYING GLOBAL ‘LAW’ WITHOUT CONSTITUENCIES

Global governance generally lacks any *legal* patterns of public or democratic participation. Thus, as stated above, the growing exercise of regulatory authority by international or supranational governmental decision-makers in a wide variety of fields and in a wide variety of forms raises serious legitimacy problems. Institutionalised entities, such as the EC Council or more loosely connected networks of government officials, constantly make decisions in a no-man’s land between politics and law. Additionally, statements or decisions stemming from global arrangements in which governments are involved convey – especially if compared to actions of non-governmental actors - an additional claim for legitimacy because they are constituted by public authorities.

On the other hand, there is at least some kind of legitimising chain which links supranational and international actors to constituencies. International treaties, for example, regularly have to be approved in one way or another by the national parliament before they become domestic law, and treaty-derived institutions such as the parliamentary assembly of the European Convention on Human Rights guarantee at least a certain degree of reference to national constituencies. The representatives of national bureaucracies sent out to take part in international governmental networks and *fora* are at least formally linked to the national governments and are, at least theoretically, controlled by national parliaments.

Nevertheless, democracy and the rule of law are at stake if the executive branch of government is released from the chains of *intense* parliamentary/public control and of judicial review. Additionally, empirical research on the patterns of globalisation draws our attention to the enormous amount of non-state (‘private’) regulations that shape and rule transnational business relations and international trade. Private standard-setting bodies, agreements on technical norms, and other forms of regulative activities suggest that we are observing a major shift, if not a change of paradigm, from state regulation and international law regulations to private international regulations.<sup>14</sup> At the same time, we are experiencing a major increase in ‘hybrid’ activities, namely, in co-operative international activities of national governments and private actors.<sup>15</sup> Both the tendencies of extended private governance activities and the hybridisation of international actors can be integrated in the compromise formula that “the new legal order is working significant transformations in governance arrangements, both locally and globally, suggesting that the distinction between the public and the private realms is becoming increasingly difficult to sustain” (Claire Cutler).<sup>16</sup>

Beyond popular slogans warning us against the end of the nation state or even welcoming this trend, the factual developments towards international regulatory regimes can

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<sup>14</sup> Private Governance regimes as described and examined, for example, by C. Cutler, J. Braithwaite/P. Drahos, or H. Schepel, play a significant role in the global political economy: see C. Cutler, *Private Power and Global Authority* (Oxford: Oxford University Press, 2003), J. Braithwaite & P. Drahos, *Global Business Regulation* (Cambridge, Cambridge University Press, 2000), H. Schepel, *The Constitution of Private Governance -- Product Standards in the Regulation of Integrating Markets* (Oxford: Hart Publishing, 2005).- It is, however, justified to set the main focus here on global arrangements in which governments are somehow involved: these arrangements convey an additional claim for legitimacy as they are constituted by public authorities.

<sup>15</sup> As a striking example, the activities of standard-setting bodies such as the International Organisation of Standardisation (ISO) could be mentioned here. ISO standards are often used in national courts as *legal* benchmarks, for example, in tort cases,. Another well-know example is the function of the private organisation ICANN as world administrator of web site addresses.

<sup>16</sup> C. Cutler, *Private Power and Global Authority* (Oxford: Oxford University Press, 2003), p. 2.

be labelled as a trend towards ‘legal globalisation’. Although a vague concept, ‘globalisation’ clearly reflects the loss of control over a growing number of transnational issues, *e.g.*, environmental protection, regulation of international trade and international financial markets for national parliaments and national administrations.<sup>17</sup> Accordingly, national governments try to regain control over the issues that cannot be dealt with at national level by increasing their efforts at international level. As a consequence, the production of law – or regulations – shifts from nation state level to international level. In the end, governmental actors create regulations without the direct involvement of constituencies, and without complementary courts that control the exercise of authority.

A number of theoretical attempts have been made in recent years to face the challenges of a transnational legal order that significantly lacks both democratic legitimacy and transparency. Four distinct concepts and models of a more legitimate exercise of international authority can be distinguished: a plea for global democracy and/or a global state; the designation of governmental or private networks as co-ordinating instruments; the identification of global societal constitutionalism; and a normative, process-based conflict of laws concept which is based on transnational comity.

## 1. GLOBAL DEMOCRACY AND WORLD STATISM

A first approach towards a more legitimate rule beyond the nation state (with the potential of generating more legitimate ‘global law’) can be characterised by the support for ‘world statism’ and by the invocation of global democracy. Proponents such as D. Held and O. Höffe see the need for an institutional design that safeguards the democratic input at global level. O. Höffe, in particular, has argued that we have to adhere to the Kantian premise of self-government by building a world parliament and world government out of the existing raw material, *i.e.*, the UN charter and its institutions.<sup>18</sup> It is, indeed, tempting to use the existing UN institutions as a starting point for the creation of global democracy: the fact that all independent states are members of the General Assembly conveys a certain legitimising moment to this institution. There are, however, serious obstacles for such a project, both from an empirical perspective and from a conceptual viewpoint: the existing ‘one-state-one-vote’ approach clearly violates the fundamental idea of democratic representation, whereas equal representation could mean that half of the members of the parliament would have to be from (non-democratic) China. Of similar importance is the fact that there is no social humus for a democratic process on a global scale yet in sight. Finally, the prospect of a world state could pose an even greater threat to the - more or less, but still - functioning democratic systems that are *embedded* in the societies of the UN member states.<sup>19</sup>

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<sup>17</sup> Globalisation’ is an umbrella term, covering a wide variety of linkages between countries that extend beyond economic interdependence, see M. Kahler and D.A. Lake, “Globalisation and Governance”, in: M. Kahler and D.A. Lake (eds.), *Governance in a Global Economy* (Princeton and Oxford: Princeton University Press, 2003), 1, 3.

<sup>18</sup> O. Höffe, *Demokratie im Zeitalter der Globalisierung* (München: Beck, 1999), especially 267-314.

<sup>19</sup> Immanuel Kant, in his famous work ‘*Zum Ewigen Frieden*’ [‘*Perpetual Peace*’], introduced the concept of a ‘*Weltbürgerrecht*’, a cosmopolitan citizenship right, but stopped short of proposing a ‘world republic’. Instead, he painted a negative picture of such a world republic as a state: “If all is not to be lost, there can be, then, in place of the positive idea of a world republic, only the negative surrogate of an alliance which averts war, endures, spreads, and holds back the stream of those hostile passions which fear the law...” I. Kant, *Perpetual Peace*, (Boston: American Peace Society, 1897). For a comment and critique of this realist turn in Kant’s concept, see J. Habermas, “Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?” in: J. Habermas, *Der gespaltene Westen* (Frankfurt am Main: Suhrkamp, 2004), 113-193, especially 125-131.

Other authors claim that there is already a global statism in the making, with or without democracy. For example, M. Albert, member of the Bielefeld-based Institute for Global Society, literally states that the earth is “on its way to global statehood” (“*Die Erde auf dem Weg zur Weltstaatlichkeit*”). He sums up developments towards an ever tighter net of international regulations and arrangements in a most fitting manner:

“The exuberant quantitative growth of legal norms in the world society could be dismissed as a relatively unspectacular and – in the sense of global dynamics of modernization – expectable process of global juridification which, due to the absence of executive power, remains without consequences. But precisely here the new quality these processes of juridification have gained in recent years catches the eye: whether private arbitration panels such as the one at the International Chamber of Commerce (ICC), or state-bound arbitration panels such as the one of the World Trade Organisation (WTO), or the International Criminal Court (ICC): all of them stand for a growing formation of secondary norms in the law of world society, *i.e.*, norms that do not only set rules but also constitute procedures in cases of a breach of the rules, or that contain provisions dealing with the handling of conflicting rules (*‘Kollisionsnormen’*, norms guiding the solution of conflicts of norms). This reveals a sustainable maturing of the law beyond the nation state”.<sup>20</sup>

Albert argues that these additional, procedural patterns of global law represent a new qualitative step in the development of world society. In his definition, ‘world statism’ does not mean that a sovereign world state emerges, but that global law (without a state) and global politics (without a state) merge into “world statism without a world state”.<sup>21</sup> This opaque merger, however, represents nothing else but an alternative description of exactly the paradox that we are trying to resolve.

If comprehensive concepts of global statism and global democracy are too broad and unrealistic, then an evolutionary model may be an attractive alternative. Such a vision of a dynamic global constitutionalism, with the legal framework of the WTO as a focus point, is supported by Ernst-Ulrich Petersmann in his contribution to this volume<sup>22</sup> as well as in a number of earlier writings.<sup>23</sup> Petersmann holds that the constitutionalisation of the WTO is a

<sup>20</sup> M. Albert, “Die Erde auf dem Weg zur Weltstaatlichkeit”, in: *Aus Politik und Zeitgeschichte* Nr. 31/32 (26 July 2004), <http://www.das-parlament.de/2004/31-32/Thema/031.html> [translation:RN].

<sup>21</sup> M. Albert, *supra*. This observation is widely shared; see M Albrow, *The Global Age* (1996), who argues of an already existing world state that materialises “in joint endeavours to control the consequences of technical advance for the environment, in shared interests in human rights and in a common fear of a nuclear catastrophe”, p. 173. see, also, M. Shaw’s portrait in his “Theory of the Global State” of an emerging world statism, albeit with a more critical tendency. Shaw holds that the emergent global state is constituted “by the complex articulation of the globalised Western state with the global layer of state power”. But he foresees a “lengthy period of struggle” fought between global democracy and anti-globalist nationalism until what he calls the “global-democratic revolution” can be completed; in: M Shaw, *Theory of the Global State* (New York: Cambridge University Press, 2001), 269.

<sup>22</sup> See E.-U. Petersmann, “Constitutionalising the WTO? Problems and Perspectives”, in Ch. Joerges/E.-U. Petersmann (eds.), *supra* note 4, chapter III.

<sup>23</sup> See, for example, E.-U. Petersmann, “Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organisations: Lessons from European Integration”, 13 *European Journal of International Law* (2002), 621-650, and “Constitutional Economics, Human Rights and the Future of the WTO”, “Aussenwirtschaft”, *Swiss Review of International Economic Relations* (2003), p. 49-91.

positive process that serves to protect “human rights and democratic governance more effectively”.<sup>24</sup> His vision, however, represents a somehow reduced idea of a constitution: human rights and “the constitutional functions of open markets and WTO rules for enabling mutually beneficial co-operation among individuals across discriminatory state barriers” stand at the core of his idea of a constitution of the WTO. Open markets and free trade become institutional expressions of individual human rights to ‘economic freedom’, while public goods such as environmental protection are scaled down to mere soft goals in a constitutional balancing process. Thus, under the supervision of this kind of global minimal state, regulatory preferences, such as strong labour laws, appear more as ‘discriminatory practices’ than as the legitimate expression of a certain national economic constitution. Embedded in an intergovernmental framework of international law and disembedded from national and global civil societies, a WTO constitutionalism may, therefore, only intensify the legitimacy crisis of transnational social regulation, or constrain appropriate responses to it.<sup>25</sup>

What all these approaches have in common is that they perceive the dwindling of self-rule powers of nation-states in a growing number of regulatory fields as an incentive for the creation of international institutions which somehow fill the gap between constituencies and transnational governance. They use the classical nation-state model, with its features of democratic representation, constitutional rights, accountable administration and independent courts, all embedded in a constitutional framework, as a blueprint and a normative reference point. What is striking, though, is the fact that many proponents of global democracy and world statism, either explicitly or implicitly, take it for granted that only parliamentarianism can represent the core of the nation state model of democracy, or they state the necessity of ‘more democracy’ without seriously addressing the obvious conceptual and practical questions arising from such an approach: who is the electorate?, or: what are the foundations and the competences of a global state?, and so on.

## 2. THE NETWORK METAPHOR

The failure of positions supporting world statism and global democracy to deliver a convincing answer to the complex problem posed by the lack of a clearly-defined global public sphere, or a global electorate, has fuelled attempts to describe global authority not in statal terms, but with the metaphor of a network. The most recent example is A.-M. Slaughter’s book “A New World Order”, in which she emphasises the advantages of decentralised government networks at international level in contrast to the unitary world state vision.<sup>26</sup> Her approach praises the flexibility, problem-solving capacity, and efficiency of governmental networks: normative voluntarism is replaced here by a functionalist concept. The stabilising effect on world peace and the actual success of governmental networks in addressing urgent transnational issues such as the weakening of the ozone layer, or the spread of nuclear raw material and nuclear technology create an efficient global order that is justified by its own success:

“Global governance through government networks is good public policy for the world and good national foreign policy for the United States, the European

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<sup>24</sup> Petersmann, *supra* note 22, chapter III.5.a.

<sup>25</sup> R. Howse/K. Nicolaidis, “Legitimacy and Global Governance: Why Constitutionalising the WTO is a Step too Far”, in: R.B. Porter *et al.* (eds), *Efficiency, Equity, Legitimacy: The Multi-lateral Trading System at the Millenium*, (Washington/DC: Brookings Institution Press, 2001), p. 227, at 230.

<sup>26</sup> A.-M. Slaughter, *A New World Order* (Princeton and Oxford: Princeton University Press, 2004).

Union, APEC members, and all developing countries seeking to participate in global regulatory processes and needing to strengthen their capacity for domestic governance. Even in their current form, government networks promote convergence, compliance with international agreements, and improved co-operation among nations on a wide range of regulatory and judicial issues. A world order self-consciously created out of horizontal and vertical government networks could go much further. It could create a genuine global rule of law without centralised global institutions and could engage, socialise, support, and constrain government officials of every type in every nation. In this future, we could see disaggregated government institutions – the members of government networks – as actual bearers of a measure of sovereignty, strengthening them still further but also subjecting them to specific legal obligations. This would be a genuinely different world, with its own challenges and its own promise.”<sup>27</sup>

It is certainly inappropriate to mock this approach as an educational concept which aims at a global reformatory where the bureaucracies of the world learn from the most advanced how to govern the world.<sup>28</sup> On the contrary, there is, indeed, an intrinsic value in advanced forms of bureaucratic co-operative experimentalism that may lead to creative solutions for pressing transnational problems.<sup>29</sup> Problem solving, on the other hand, is not a purely technical or scientific process, it also demands the definition of a problem and the selection of an adequate solution. Output-oriented approaches tend to suppress this aspect of

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<sup>27</sup> A.-M. Slaughter, *A New World Order*, 261-62.

<sup>28</sup> Another reading of Slaughter’s approach could be that its tendency to functional realism has to be understood in the present political environment of a more and more unilaterally acting US government (see, for example, the article ‘Washington is criticised for Growing Reluctance to Sign Treaties’, *New York Times*, 4 April 2002, on two reports of the Institute for Energy and Environmental Research and the Lawyer’s Committee on Nuclear Policy about the United States’ rejection or disregard of a range of international treaties). In this reading, Slaughter may also try to justify international law and international treaties (and international lawyers) as an important element of the legal order of the United States. Her reluctance to support a more institutionalised form of global governance, thus, may be motivated by and directed against US unilateralism. She does not, however, challenge the danger of an instrumental use of international law as a means for an ‘imperial’ or hegemonic world order, an outspoken tendency within the Bush administration and academia alike. For a critique of hegemonic tendencies; see, for example, M. Koskeniemi’s article ‘Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought’, typescript Harvard University 2005, available at <http://www.valt.helsinki.fi/blogs/eci/PluralismHarvard.pdf>, or N. Krisch, ‘More Equal Than the Rest? Hierarchy, Equality and U.S. Predominance in International Law’, in: M. Byers and G. Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003), 135-175.

<sup>29</sup> See the seminal article by Ch. Joerges/J. Neyer on the unique structure of the EU committees system: ‘From intergovernmental bargaining to deliberative political processes : the constitutionalisation of comitology’, 3 *ELJ* (1997) 273-299; another practical example of a problem-solving and issue-oriented international regulatory system is the ‘Basel Convention on the control of transboundary movements of hazardous wastes and their disposal’ from 22 March 1989 ([www.basel.int](http://www.basel.int)), which introduced an effective system for controlling the exportation, importation and disposal of hazardous wastes, and has been ratified by about 160 UN member states so far (with the notable exception of the US). Finally, the European Union’s ‘Open Method of Co-ordination’ (OMC) could be mentioned here as a new and potentially creative (but also potentially ineffective or counter-productive) political-legal strategy of social regulation; for an extensive overview, see J. Zeitlin/Ph. Pochet (eds.), *The Open Method of Co-ordination in Action - The European Employment and Social Inclusion Strategies* (Frankfurt am Main: Peter Lang, 2005).

agenda-setting as well as the problem of choices,<sup>30</sup> for example, the critical evaluation of ‘technical’ solutions in contested areas such as genetically modified organisms (GMOs) or embryonic stem cell research. The fact that transnational policies inevitably have distributive effects additionally underlines the importance of a legal and political embedding of transnational regulatory regimes into societal structures.

While Slaughter rejects any attempts to set up a written global constitutional order, she claims that government networks are bound (or should be bound) to a set of unwritten and ‘informal principles’.<sup>31</sup> However, she fails to show why the acting governments should be bound by vaguely defined principles of ‘global deliberative equality’ or ‘checks and balances’,<sup>32</sup> instead of being bound by the solid principles of national or economic and political interests. It does not take spectacular incidents like the recent allegations of a ‘torture network’ between the US and some Middle Eastern countries to detect that governments need other restrictions than just informal principles of a non-binding character. Everyday practices of negotiation imbalances, for example, in the context of the WTO Treaty rounds, already show that appeals to fairness and equality are futile if they are not supported by some kind of procedural hard law.<sup>33</sup>

Additionally, this kind of functional realism seems to suggest that ‘rule of law’ merely means that government networks are entitled to create international regulations and to call the result ‘law’. However, in the Anglo-American legal tradition as well as in continental legal traditions such as German constitutionalism, ‘rule of law’ or ‘Rechtsstaat’ convey a whole set of normative aspirations and ‘quality benchmarks’. By levelling the difference between regulations and law, and by ignoring the difference between a factual creation and the enforcement of international regulations and a legitimate legal order based on principles such as justice and fairness, A.-M. Slaughter’s re-labelling of government network regulations as the ‘rule of law’ seems to miss the very singularity of the category of law.

### **3. SOCIETAL CONSTITUTIONALISM: THE EXAMPLE OF THE INTERNATIONAL ORGANISATION OF STANDARDISATION (ISO)**

If the network metaphor stands for top-down networks of a functional global legal order that is detached from the ‘local level’ and its citizens, then a change of perspective may reveal new possible ways for a more inclusive order. Gunter Teubner’s systems theory approach may provide for such a change of perspective: by emphasising the self-reflexive powers of emerging transnational social spheres, Teubner avoids the top-down perspective of world statism and world constitutionalism. Instead of being inspired by ‘governmentality’ (M. Foucault), his approach supports a perspective in which a process of ‘bootstrapping’ within social spheres replaces the grand legal framework.

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<sup>30</sup> A prominent example is the clash between the EU’s application of the precautionary principle in its own legal order and the US and other members’ interpretation of WTO regulations, especially in the context of protective measures under Article 5.1 of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement); see J. Scott, “European Regulation of GMOs: Thinking about ‘Judicial Review’ in the WTO”, *Jean Monnet Working Paper 04/04* (New York: NYU, [www.jeanmonnet.org](http://www.jeanmonnet.org), 2004).

<sup>31</sup> A.-M. Slaughter, *A New World Order* (Princeton and Oxford: Princeton University Press, 2004), 245.

<sup>32</sup> A.-M. Slaughter, *A New World Order* (Princeton and Oxford: Princeton University Press, 2004), 245, 253.

<sup>33</sup> See the report by W. Bello on the first Doha round, “Learning from Doha: A Civil Society Perspective from the South”, *Global Governance* 8 (2002), 273-279, especially 275-278 on factual imbalances and procedural shortcomings during the Doha round 2001.

Teubner<sup>34</sup> has pushed the insight that we can observe an emerging global legal order without a sovereign world state one step further. He argues that a single (constitutional) fundament or framework for the production of legitimate international law is a myth, and that there cannot be a constitutional global framework similar to the hierarchical legal order that we know from nation state level. Based on systems theory, he claims that the internal differentiation of societies produces sub-systems with their own code and their own rationality, and that this has happened in the process of globalisation on a global scale, too. Precisely as in the traditional nation state, at international level, there is no way back to a unifying rationality guiding of the law-making process. Instead of a global constitutionalism “from above”, we observe trends towards a societal constitutionalism “from below”, in which social actors, traditionally not viewed as subjects of international law, are transformed into “constitutional subjects”. Their actions are based on strategies that use fundamental rights not only on a vertical level, against state power, but also – and more importantly – activate these rights “against social institutions, in particular *vis-à-vis* centres of economic power”.<sup>35</sup>

Societal actors not only complement the process of governmental governance, they also constitute themselves particular spheres of legality. A constitution of world society, thus, “does not come about exclusively in the representative institutions of international politics, nor can it take place in a unitary global constitution which overlies all areas of society, but, instead, emerges incrementally in the constitutionalisation of a multiplicity of autonomous sub-systems of world society”.<sup>36</sup> Constitutionalisation processes, he claims, are nowadays much more dynamic within the (private) social sub-systems of society than in the sphere of statal actors. The creeping constitutionalisation of these social sub-systems generates, among others, a juridification that includes a fundamental rights discourse: This discourse supports the binding force of fundamental rights within the global social sub-systems and among societal actors on a horizontal level.

For a constitutional lawyer, as Teubner himself correctly observes, this concept of societal constitutionalism goes way beyond traditional understandings of constitutional law, and if taken as a normative claim it may go several steps too far. One first objection could be based upon the empirical premises of this approach: one may well contest his factual assessments, as deep analyses such as the study by Braithwaite and Drahos draw a more complex picture of the enormous diversity within global business regulations, ranging from far-reaching self-organisation to mere factual power relations without any comprehensive or fair structure.<sup>37</sup>

It is, however, neither this element nor the absence of a single, overarching, binding ‘constitutional’ document that irritates so much; instead, it is the fact that Teubner relies very much on the rationality and fairness of self-regulating processes in the societal spheres themselves. In his concept, the global social spheres, or its sub-systems, such as the Internet as the symbol for the global communication community, seem, on the one hand, to generate,

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<sup>34</sup> G. Teubner, in: Ch. Joerges/I.-J. Sand/G. Teubner (eds.), *Transnational Governance and Constitutionalism* (Oxford and Portland/Oregon: Hart Publishing, 2004), 3. Teubner refers extensively to D. Scully, *Theory of Societal Constitutionalism* (Cambridge: Cambridge University Press, 1992), and further articles by Scully; see the reference in Teubner (2004), 10 at note 24.

<sup>35</sup> Teubner (note above), 7; see, also, I-J Sand’s contribution in the same volume.

<sup>36</sup> Teubner (2004), 8. For a pluralist view on constitutionalism, see N. Walker, “The Idea of Constitutional Pluralism”, 65 *Modern Law Review* (2002), 317.

<sup>37</sup> J. Braithwaite/P. Drahos, *supra* note 2.



with almost natural force, a set of second-order rules (secondary norms, a constitution). On the other hand, it is the set of fundamental rights that safeguards the voice and the standing of societal actors, an assumption that points somewhat to courts (national courts?) as the guardians of the private transnational law regimes, with the inherent risk that courts monopolise the open process of interpreting fundamental rights. What the concept of societal constitutionalism seems to underestimate here is the intuition that it is neither courts nor the specific societal spheres but the global community as a whole that is both the author and the addressee of fundamental rights, if understood as fundamentally as the concept of human rights. The judicial discourse in courts and societal sub-spheres takes place in proxy discourse arenas (as *Stellvertreterdiskurse*).<sup>38</sup> Neither can these proxy discourses represent the global public discourse on the actual contents of human rights in context *as a whole* (including strong voices of dissent), nor can they sufficiently reflect or reproduce the diverse and plural voices and interests within world society.

One outstanding example for the problematical results of societal constitutionalism may be the recent turn of the International Organisation of Standardisation (ISO)<sup>39</sup> towards social issues. Originally, the ISO seemingly focused on only technical matters: what the measurements of a container were, what and how many sizes of wrenches there should be and what the definition of a wrench is, and so on. Step by step, however, ISO has moved towards social regulation, with the ISO 9000 family of norms providing a framework for *quality* management throughout the processes of producing and delivering products and services for the customer, and the ISO 14000 family covering a wide-ranging portfolio of standards for sampling and testing methods in order to deal with specific environmental challenges and monitoring standards for the management of environmental issues.<sup>40</sup> Right now ISO is preparing another wave of norms, the ISO 26000 standards. What is striking here is the fact

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<sup>38</sup> An additional aspect that cannot be discussed in full detail here is that national and international legal *fora* usually follow different rules of standing and procedure: clearly individuals or individual companies have access to the courts in the domestic sphere; once a legal conflict has found its way to international courts or tribunals, however, they lose standing and become bystanders who can only appeal to their national government to initiate court proceedings. A striking example of this incongruity of the stakeholders and parties of court proceedings is the ‘*Caroline*’ case: In a landmark decision, the German publisher of a number of articles and photographs about Princess Caroline of Monaco had won its constitutional complaint lodged with the German Federal Constitutional Court (*Bundesverfassungsgericht*) against a partial ban on the publication of certain photographs, see judgment of 15 December 1999 in the Case 1 BvR 653/96, BVerfGE 101, 361-396. Against this decision, Caroline lodged a complaint with the European Court of Human Rights (ECHR). A chamber of the Court declared that the basic assumptions of the *Bundesverfassungsgericht* about the content and range of the freedom of the press violated the European Convention on Human Rights, and reserved a decision to grant her compensation (ECHR, judgment of 24 June 2004, case of *von Hannover v. Germany*, Application no. 59320/00, [www.echr.coe.int](http://www.echr.coe.int)). Although publishers, journalists, photographers, and editors pressed the German government to appeal the decision (with the effect that the case would have been transferred to the Grand Chamber of the ECHR), the government decided not to lodge an appeal, and the judgment of the ECHR became final.

<sup>39</sup> For more information, see [www.iso.org](http://www.iso.org). The ISO is a network of the national standards institutes of 146 countries, on the basis of one member per country, with a Central Secretariat in Geneva, Switzerland, which co-ordinates the system. It is a non-governmental organisation; nevertheless, the ISO occupies a special position between the public and private sectors. This is because, on the one hand, many of its member institutes are part of the governmental structure of their countries, or are mandated by their government. On the other hand, other members have their roots uniquely in the private sector, having been set up by national partnerships of industry associations.

<sup>40</sup> See the ISO’s self-description of the ISO 14000 family at <http://www.iso.org/iso/en/prods-services/otherpubs/iso14000/environment.pdf>.

that the ISO 26000 standards are supposed to integrate something like social policy standards into the norm system: they will deal with the “social responsibility” of companies. The details of these regulations are still unclear, as the process of establishing the proposals has only just begun. But one can speculate that some of the norms may include ILO standards, with the result that a product bearing the seal ISO 26001 may indicate that it was produced without child labour and under humane work conditions.

The ISO example illustrates that Teubner has a point with his assumption that the actors within sector-specific global legal regimes re-introduce segments of other legal orders. But it also shows that his concept of societal constitutionalism is too narrow, as it refers too much on what he calls “fundamental rights”: by taking up issues such as good corporate governance, environmental protection and labour conditions, the ISO has integrated something else, namely, ideas of “good production”, “good capitalism” or “social market economy”. The integration of standards that are derived from other global legal regimes also challenges the assumption that each “global village” only acts according to its own rationality: what we can observe here is more a process of establishing the voluntary links between different social spheres than just the activation of core human rights. If these processes are multiplied in other social spheres/“global villages”, the legal web becomes more and more dense, with private actors claiming the authority both to set and to interpret global law.

If we cannot rely on democratic processes that guide and control the results of such emerging structures, and if, at global level, we lack a judiciary that may provide for at least a minimum of consistency within the emerging global law structure, then large fields of social regulation fall into the hands of what are innocently called private actors (by means of a creeping privatisation of public law). It is obvious that social stratifications – such as the North-South incline, or multi-nationals vs. locally bound industries – will have an effect on the outcome of regulatory processes in social spheres such as the ISO. In the case of the ISO, the organisation is aware of this problem, and there are efforts to strengthen the position of developing countries within the organisation, for example, by providing special funds or other technical assistance. In the WTO, we can find similar attempts to somehow deal with obvious imbalances with regard to institutional settings and rule-making processes.<sup>41</sup> These efforts, however, are punctual and voluntarily, instead of being systematic and mandatory.

If Teubner took constitutionalism more seriously as a concept, he would have to introduce some “constitutional” principles and benchmarks that help to judge whether a constitutionalisation process has failed, or whether the processes of rule-making and rule-application were fair, legitimate and balanced. But the place of politics is empty (there is no global constituency, no parliament, and so on), and the judiciary is absent or weak. Who

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<sup>41</sup> The WTO has set up a technical assistance service for developing countries that are members of the WTO, see [http://www.wto.org/english/tratop\\_e/devel\\_e/teccop\\_e/tct\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm). The Petersmann-Alston debate (see E.-U. Petersmann, “Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organisations: Lessons from European Integration”, 13 *European Journal of International Law* (2002), 621-650; Ph. Alston, “Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann”, *EJIL* 13 (2002), 815-844; and Petersmann responding, “Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston”, 13 *EJIL* (2002), 845-851), however, highlights deeper dimensions of the problem: Is an ‘integration’ of human rights law in to WTO law possible, or desirable? What is meant by human rights law in this context – rights safeguarding economic performance, or labour rights, or social rights, or ...? A widening of the scope of WTO law would have serious consequences, well beyond the already ongoing debate on ‘trade and...’ questions, as it might entail an elaborated constitutionalisation of the WTO as a world constitution. Mere technical assistance for a number of poorly prepared (‘underdeveloped’) countries in the framework of an expert dialogue cannot make up with a genuine political debate about the contents and foundation of a world constitution.

cares, then, about the enforcement of “fundamental rights”, or the structures of processes that really can be labelled as being open, participatory and deliberative? Who shields the infamous “autonomous sub-systems” from empire or other forms of power corruption?

Additionally, it is litigation which finally leads to some form of judicial scrutiny and legal standards.<sup>42</sup> As Harm Schepel has shown for the field of private standardisation, private transnational governance is linked to the law via national courts: law ‘constitutes’ private governance through an *ex-post* process of measuring the regulatory processes on standards borrowed from concepts of due process of law and *Rechtsstaatlichkeit*. Regulations issued by private parties may deserve recognition as constitutionally legitimate ‘law’ under much the same conditions “under which the American Law Institute is prepared to have common law claims to be pre-empted by statute: when the court is confident that the deliberative process by which the safety standard was established was full, fair and thorough and reflected substantial expertise”.<sup>43</sup> When litigation starts, however, the damage has already been done. Seveso and Bhopal may have served as *ex-post* reasons to upgrade international standards of chemical production, or to integrate ‘critical’ expertise into the standard-setting process, but the social costs of such a trial-and-error procedure remain too high.

The real essence of Teubner’s systems theory approach lies elsewhere: it shows the virtues and the weaknesses of a rights-based approach to global law that relies heavily on good-will actors (judges, panellists, societal actors, *etc.*). One of the virtues certainly lies in the observation that regulatory processes beyond the nation-state reflect the legal culture(s) they are embedded in, or even confronted with: in a similar way as in the national sphere, as D. Sciully and H. Schepel have shown, in the international sphere, too, the participants in regulatory processes expect, both from each other and from the regulatory framework which they create or are confronted with, that these processes meet minimum standards of fairness.

The blind spot of this approach concerns the value and mechanism of participation within the processes that result in more or less binding global law: mutual observation of possibly conflicting regimes (the WTO and ILO, for example) is only one facet of the multi-dimensional problem that global law without a constituency produces. If WTO norms or Appellate Body decisions override national norms, they have to produce more legitimacy than just the fact that, at one point in the past, a nation state has entered into an international treaty. A substantive international legal order in the making needs to be connected to the political constituencies that represent the primary source for legitimacy, not necessarily through direct elections, but at least by ways of a re-integration of public policy interests. And if we are facing not only punctual interventions but also a very comprehensive global regulatory machine “in the shadow of the law” (Christian Joerges) and under the control of (semi-) autonomous private regimes, we have to seek for more than just a vague form of mutual observation of global law regimes and *ex-post* litigation. Procedural safeguards which bring civil society back in – not only as outside protesters, but as legitimate voices – may not be last word, but may be an essential beginning.

Such a normative concept of transnational procedural law – or global administrative law, or constitutional administrative law – may even be compatible with Teubner’s approach,

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<sup>42</sup> For the function of international private law litigation as a tool, see R. Wai, “Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational Social Regulation through Plural Legal Regimes”, in Ch. Joerges/E.-U. Petersmann (eds.), *supra* note 4.

<sup>43</sup> H. Schepel, *The Constitution of Private Governance – Product Standards in the Regulation of Integrating Markets* (Oxford: Hart Publishing, 2005), 446 *et seq.* with further references.

if his societal constitutionalism is read as political legal philosophy: the basis of societal constitutionalism lies in the good intention of mobilising the constitutional concept for the institutionalisation of self-enlightening potential within the semi-autonomous global regimes. The ISO example shows that there is even empirical proof of the assumption that global regimes somehow tend to re-integrate public law issues (*e.g.*, social topics such as problems of equality and the distribution of wealth and political influence) into their own legal structure. It is, however, not enough to appeal to global regimes for such a re-integration of social or political issues – we need a systematic approach in order to make sure that the self-enlightening potential of non-instrumental discourses can be exploited. In essence, the proponents of societal constitutionalism have not realised how they could conceptualise this relationship between societal norm production and public law.

#### 4. INTERNATIONAL COMITY INSTEAD OF DELIBERATIVE TRANSNATIONALISM?

In his contribution to this volume, Christian Joerges has taken a cautious stance towards transnational legal governance, especially with regard to a further constitutionalisation of the WTO system. His approach<sup>44</sup> favours a *comity* solution that rests on reciprocity of respect for national legal orders that are constitutionally legitimised: The thin democratic foundation of the WTO's Dispute Settlement Panels and Appellate Bodies does not allow for a deepening of its inherent regulatory force – the WTO should not cross the borderlines of “judicialisation”.<sup>45</sup> *Comitas*, a sensitive humility towards constituted legal orders (although one must add, legal orders that are not necessarily always democratically constituted), could enhance the legitimacy of the rulings of the Panels and Appellate Body. Such sensitivity could – and indeed should – reflect the fact that, in WTO cases, we are not only confronted with a conflict or clash of legal norms, but also with a conflict of the legal and social philosophies underlying these legal orders, with a multitude of models for structuring societies and markets. Thus, mutual respect is a better foundation for conflict solutions.

A recent decision of the US Supreme Court about the interpretation of the Alien Torts Statute (ATS), an interesting relict from revolutionary times, echoes this claim. In his concurring opinion, Justice Brennan relates to the concept of *comitas*: “Since enforcement of an international norm by one nation's courts implies that other nations' courts may do the same, I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement. In applying those principles, courts help assure that “the potentially conflicting laws of different nations” will “work together in harmony”, a matter of increasing importance in an ever more interdependent world. [...]”. Justice Breyer adds: “Such consideration is necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote.”<sup>46</sup>

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<sup>44</sup> For a detailed analysis and critique of Ch. Joerges' approach, see the comments of D. Chalmers, R. Nickel, F. Rödl and R. Wai on Ch. Joerges' paper “Rethinking European Law's Supremacy”, EUI Working Paper Law No. 2005/12, <http://www.iue.it/PUB/law05-12.pdf>; see also - from the perspective of private international law - R. Wai, “Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational Social Regulation through Plural Legal Regimes”, in Ch. Joerges/E.U. Petersmann (eds.), *supra* note 4.

<sup>45</sup> Ch. Joerges, *Juridification Patterns for Social Regulation and the WTO: A Theoretical Framework*, in Ch. Joerges/E.U. Petersmann (eds.), *supra* note 4.

<sup>46</sup> Concurring opinion of Justice Breyer, Cases 03-339 (*Sosa v. Alvarez-Machain*) and 03-485 (*U.S. v. Alvarez-Machain*), 542 U.S. (2004).

Although not identical, the ATS litigation problem, in some respects, clearly reflects the paradox of a comity approach: its success rests mainly on a certain process of judicial self-restraint, and an openness towards harmonic solutions. It is inevitable, though, that court-like international institutions such as the WTO Panels and Appellate Bodies will be confronted with hard cases that resist harmonic solutions.<sup>47</sup> Additionally, the Panels and Appellate Bodies have the task of protecting the very aims of the WTO agreements and of international *ius cogens* alike, so that national laws may represent only one balancing factor among others. Finally, recent experiences with the – institutionally more advanced – European Court of Human Rights are not encouraging: the Court’s judgments tend to become more and more dense, with detailed corrections of rather well-discussed and elaborate national legal solutions.<sup>48</sup> A tendency towards the materialisation of the ‘soft law’ vested in flexible international treaties into hard international law seems to be inherent in such court-based arrangements.<sup>49</sup> It is precisely this tendency that demands creative solutions for a more inclusive – and less government-based – approach towards transnational law production.

### III. THE EU AS A POSITIVE MODEL FOR GLOBAL LAW PRODUCTION?

It is not surprising that the European Union, as the most advanced supranational entity, is more and more frequently taken as a reference point for the development of a legitimised framework for transnational social regulation.<sup>50</sup> Indeed, for the sake of the argument, it is useful to imagine the EU as a ‘normal’ international organisation (which it is clearly not), and to scrutinise how the law-generating process is structured in this entity.

#### 1. DEMOCRACY AND PARTICIPATION IN THE EU

On paper, the EU is well-suited for a democratic process; Article 6 TEU states that the EU is founded on the principle of democracy. The institution of the European Parliament is proof enough that there is a certain degree of legitimacy from below in the law-making process.<sup>51</sup> The EU, however, found itself for reasons which were well apparent in the late 1990’s, in the

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<sup>47</sup> See R. Wai’s analysis of Joerges’ approach: R Wai, “Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational Social Regulation through Plural Legal Regimes”, in Ch. Joerges/E.U. Petersmann (eds.), *supra* note 4.

<sup>48</sup> In the ‘Caroline of Monaco’ case, as laid out *supra* note 38, the ECHR clearly did not follow the principle of comity, but pushed its own agenda; it replaced a filigree judgment of the German Federal Constitutional Court on the freedom of press with its own vision of a balance between this right and the personality rights of celebrities – by limiting the freedom of press even further.

<sup>49</sup> This claim is supported by the findings of an empirical research by Karen Alter, *Agents or Trustees? International Courts in their Political Context*, *TransState working papers* no. 8, SFB Staatlichkeit im Wandel, Bremen 2004, <http://www.staatlichkeit.uni-bremen.de>. She observes that, even if decisions of international courts are contested, “[I]t is significant that the legal principles stay on the books because they may well be used in the future as authoritative sources of precedent,” p. 18. The quotation contains a Freudian misspelling: She writes “principals” instead of “principles”.

<sup>50</sup> Most recently, in A.-M. Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

<sup>51</sup> Low voter turnouts and other circumstances additionally weaken the – already limited – legitimising force of EU elections: The outcome of the 2004 elections for the European Parliament – as with the elections before – clearly demonstrated that the EU citizens still orientate themselves not only according to their nation state preferences, but also on domestic issues, instead of on European issues. Election analysts unanimously stated that, throughout the EU, there was a trend to punish the ruling parties, and the governments they form, for domestic policies. This outcome stresses the importance of alternative ways of participation in the European law-making processes.

focus of criticism because of its lack of democratic legitimacy: not only were the lack of full (or half-full) parliamentary sovereignty and the lack of an overarching European public sphere seen as symptoms of a regulatory structure that had reached its limits, but so were the regulatory structures with their opaqueness and lack of transparency. In particular, the prospect of ten or more new Member States and the fact that the regulatory activity of the EU had not only increased quantitatively but also qualitatively, with major fields of rule-making shifting into the core Community sphere following the Amsterdam and Nice Treaties, had caused a widely stated sense of uneasiness with the regulatory mechanisms as a whole. Article 257 EC, which foresees a certain form of functional participation of the Economic and Social Committee in some areas, only provides for a corporatist top-down approach to civil society, with rather limited potentials for the production of a significant legitimacy surplus.<sup>52</sup>

The European Commission reacted to this crisis with its famous White Paper on European Governance.<sup>53</sup> Instead of taking up the popular slogan of a strengthening of the European Parliament, the Commission mainly focused on its own position within the institutional framework of the EU. It identified five principles of “good governance”, three of which were directly related to the legitimacy issue: 1) *openness*: “The Institutions should work in a more open manner. Together with the Member States, they should actively communicate about what the EU does and the decisions it takes.(...)”; 2) *participation*, with the need to ensure wide participation of interested actors “throughout the policy chain – from conception to implementation”, because “improved participation is likely [to] create more confidence in the end result and in the Institutions which deliver policies”; and 3) *accountability*: “Roles in the legislative and executive processes need to be clearer. Each of the EU Institutions must explain and take responsibility for what it does in Europe.”<sup>54</sup>

By stressing the issues of participation, openness and accountability, the Commission reacted to popular criticism about its own performance as a non-transparent regulatory machine that seemingly runs on itself. In this regard, it was an intelligent move to use the concept of “governance” instead of “government” as a reference point; this shift in the nomenclature lowers the expectations to a significant degree:

“Governance is not political rule through responsible institutions, such as parliament and democracy – which amounts to government – but innovative practices of networks, or horizontal forms of interaction. It is a method for dealing with political controversies in which actors, political and non-political, arrive at mutually acceptable decisions by deliberating and negotiating with each other.”<sup>55</sup>

In order to prove that the commitment to participation, transparency, and openness is not merely lip service, the Commission later published a code of conduct for its interaction with civil society actors. This document contained the promise that civil society would be included in deliberations on legislative acts as soon as possible and as comprehensively as

<sup>52</sup> See S. Smismans, *Law, Legitimacy and European Governance: Functional Participation in Social Regulation* (Oxford: Oxford University Press, 2004).

<sup>53</sup> COM (2001) 428, July 2001.

<sup>54</sup> COM (2001) 428, 10. The other two principles – effectiveness and coherence – are related to functional aspects of output-oriented legitimacy; for lack of space they cannot be dealt with here in more detail.

<sup>55</sup> E.O. Eriksen, J.E. Fossum, “Europe at crossroads: Government or Transnational Governance?”, in: Ch. Joerges/I.-J. Sand/G. Teubner (supra note 34), at 120.

possible.<sup>56</sup> Additionally, in 2001, a new regulation on access to EU documents came into effect, significantly raising the level of effectiveness of transparency rights.<sup>57</sup>

While the White Paper issues of openness and transparency were dealt with in a more thorough way through the introduction of a clearer legal basis for the access to documents, the it's commitment to participation did not bring about any satisfactory results in the following years. The Council and its Secretariat, which had, in the course of five decades, evolved into a second major administrative-legislative institution parallel to the Commission, was left completely out of the discussions about enhanced public participation. The above-mentioned code of conduct of the Commission, laid out in December 2002 in a "Communication of the Commission", does not have any legally-binding force and cannot be used by third parties in court: the mere self-binding force of an internal Commission regulation does not entitle citizens to gain access to committees or other *fora*, nor does it contain other possible participatory rights such as the right to be consulted, or the duty to take contributions of participants into account when delivering the grounds for a decision. Additionally, the document expressly exempts crucial areas of decision-making processes from the consultation process, especially "Decisions taken in a formal process of consulting Member States ('comitology' procedure)".<sup>58</sup>

In this respect, the Commission remains firmly within the 'Community method' of practising consultation *according to its preferences and under its conditions*. Under this classical method of decision-making, wide consultation is not a completely new phenomenon, on the contrary: as its Communication on Consultations correctly points out, the Commission has a long tradition of consulting interested parties from outside when formulating its policies. It incorporates external consultation into the development of almost all its policy areas.<sup>59</sup> The underlying philosophy of this consultation policy – that consultation processes are initiated by the institution, participation is limited to non-decision, and only directed towards selected actors – did not change after the publication of the White Paper. Calling the White Paper approach to public participation and the subsequent policy as laid out in the Commission's "Communication" a substantively new approach would, thus, be a misnomer.<sup>60</sup>

In summary, in the light of the principle of participatory democracy, notwithstanding the first steps of the Commission towards a more inclusive legal structure, the current level of public participation in the norm-generating processes of the EU is still not satisfying: the basic assumption that all those affected by legal norms should have the chance to participate

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<sup>56</sup> For further details, see the "Communication from the Commission: towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation on interested parties by the Commission" from 11 December 2002, COM(2002) 704 final.

<sup>57</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001, L 145/43.

<sup>58</sup> "Communication from the Commission: Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation on interested parties by the Commission" from 11 December 2002, COM(2002) 704 final, p. 16.

<sup>59</sup> See note above, p. 3.

<sup>60</sup> For an evaluation of the White Paper approach before the publication of the Communication, see P. Magnette, "European Governance and Civic Participation: Beyond Elitist Citizenship?", 51 *Political Studies* (2003), p. 144-160, especially 148-150.

in the deliberation and decision making process regarding the said norms<sup>61</sup> has clearly not been met by the current institutional and legal design of the EU. The 2001 Laeken Declaration of the IGC also underlined the fact that the legitimacy gap is still a serious issue, and the seemingly failed attempt to establish a formal European Constitution, with the referenda in France and the Netherlands turning out a vote against the Draft Constitution, has deepened the legitimacy crisis of the EU even more.

## 2. NEW MODES OF GOVERNANCE

However, instead of insisting on a clear-cut separation between national democracies and supranational government networks, it may be worth visiting the transition zone between governance and government that was established through the so-called New Modes of European Governance. The most prominent modes of a specific European governance setting are the committee system, also called Comitology, and the Open Method of Co-ordination.

The numerous EU committees, legally anchored in a rather opaque reference in Article 202 TEC, and in the 1999 Council decision “laying down the procedures for the exercise of implementing powers conferred on the Commission”,<sup>62</sup> play an outstanding role in the law-making process of the EU. They gather expertise and discuss solutions; for this purpose, hundreds of representatives of the Member States, usually, but not necessarily, members of national administrations, congregate on a regular basis. Chaired by a Commission representative, the Committees formulate and adopt measures of various kinds.<sup>63</sup> While Comitology is viewed by many with suspicion, mainly due to the character of the system as “technocratic structures behind closed doors”,<sup>64</sup> Joerges and Neyer, in their famous 1997 contribution, have suggested a radical new vision of Comitology as a forum for deliberative supranationalism in which all participants engage in the search for the common good.<sup>65</sup> Viewed from this angle, Comitology is a borderline case<sup>66</sup> that seems to resist a clear characterisation as governance or government. Others have interpreted the Open Method of Co-ordination,<sup>67</sup> a soft approach towards co-ordinated policies in areas where the EU has no

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<sup>61</sup> See, for the concept of deliberative democracy, J. Habermas, *Between Facts and Norms*, supra note 11; see also A. Menendez’ definition of the democratic principle: A. Menendez, “No Legitimacy Without Politics – Comments on Jens Steffek”, in: Ch. Joerges/I.-J. Sand/G. Teubner (supra note 34), 109.

<sup>62</sup> Council Decision 1999/468 of 28 June 1999, OJ 1999 L 184/23.

<sup>63</sup> For further details, see Ch. Joerges/E. Vos *et al.* (eds), *EU Committees: Social Regulation, Law and Politics* (Oxford, Portland/Oregon, Hart Publishing, 1999); Ch. Joerges/J. Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology”, 3 *ELJ* (1997), 273.

<sup>64</sup> R. Dehousse, “Misfits: EU Law and the Transformation of European Governance”, in: Ch. Joerges/R. Dehousse, *Good Governance in Europe’s Integrated Market* (Oxford: Oxford University Press, 2002), 207, 214.

<sup>65</sup> Joerges/Neyer, *supra* note 63.

<sup>66</sup> Ch. Joerges, in Joerges/Sand/Teubner, *supra* note 34, p 358.

<sup>67</sup> For details, see the report of C. de la Porte & P. Pochet, “The OMC Intertwined with the Debates on Governance, Democracy and Social Europe: Research on the Open Method of Co-ordination and European Integration”, Report prepared for Frank Vandenbroucke, Belgian Minister for Social Affairs and Pensions, Observatoire social européen, Brussels, April 2003.



regulatory competences, as a desirable and even more advanced instrument of deliberative policy-co-ordination on the supranational level,<sup>68</sup> a clearly contestable view.<sup>69</sup>

With reference to theories dealing with deliberative structures, one can distinguish between the tenants of “expert deliberation” and the tenants of “public deliberation.”<sup>70</sup> In its White Paper, the Commission acknowledged the importance of deliberative structures within the EU framework; on the former, the White Paper on Governance points to the role of expert advice in EU policy-making: “Scientific and other experts play an increasingly significant role in preparing and monitoring decisions”, and in the area of “...social legislation, the Institutions rely on specialist expertise to anticipate and identify the nature of the problems and uncertainties that the Union faces, to take decisions and to ensure that risks can be explained clearly and simply to the public”.<sup>71</sup>

While the Comitology system does represent a mode of deliberative governance, its mechanisms should not be confused with the characteristics of deliberative *democracy*. As pointed out by Cohen and Sabel, “Deliberation, understood as reasoning about how to best address a practical problem, is not intrinsically democratic: it can be conducted within cloistered bodies that make fateful choices, but are inattentive to the views or the interests of large numbers of affected parties”.<sup>72</sup> Deliberative democracy fundamentally relies on participatory conditions for policy-making; these conditions are not met by the Comitology procedures: although national administrations are not forced to send only one representative and only public officials into the committees, a comprehensive representation of national or EU civil society actors is neither mandatory nor the practice.

### 3. PARTICIPATORY GOVERNANCE IN THE EU: AN EMERGING CONCEPT?

Beyond the rather limited, unstructured, and quite unsystematic influences of civil society actors on the Comitology procedures and European agency actions, there are currently no *general* laws or legally-binding provisions in effect that could safeguard the participation of interest groups, NGOs, or other social actors in the law-generating processes under the supervision of the Commission.

Only in the field of environmental law has a move towards enhanced civic participation been made. This movement towards broad-based participation was fostered by the Aarhus Convention of the UN, which was signed by all EU Member States.<sup>73</sup> It led to

<sup>68</sup> See, especially, J. Cohen/C. Sabel, “Directly-Deliberative Polyarchy”, 3 *European Law Journal* (1997), 313-342 and “Sovereignty and solidarity: EU and US”, in: J. Zeitlin & D. Trubek (eds), *Governing Work and Welfare in a New Economy: European and American Experiments* (Oxford: Oxford University Press, 2003).

<sup>69</sup> See the criticism of C. Joerges in his contribution to this volume.

<sup>70</sup> For an overview over approaches relating to the theory of deliberative democracy, see C. de la Porte/P. Nanz (2004), “OMC – A Deliberative-Democratic Mode of Governance? The Cases of Employment and Pensions”, 11 *Journal of European Public Policy* (2004), pp. 267-288, especially pp. 269-272; C. de la Porte/P. Pochet (supra note 67).

<sup>71</sup> COM (2001) 428, 19.

<sup>72</sup> J. Cohen/C. Sabel, “Sovereignty and solidarity: EU and US”, in: J. Zeitlin and D. Trubek (eds), *Governing Work and Welfare in a New Economy: European and American Experiments* (Oxford: Oxford University Press, 2003), 366-367.

<sup>73</sup> The “Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters”, done at Aarhus/Denmark on 25 June 1998 and available at <http://www.unece.org/env/pp/treatytext.htm>, results from Principle 10 of the 1992 Rio Declaration on Environment and Development. Principle 10 states that “Environmental issues are best handled with the

“Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information”<sup>74</sup> which transformed the demands of the Aarhus Convention into binding EU law. However, Directive 2003/4/EC does not constitute a form of general administrative law; the directive is confined to a clearly defined area of EU environmental law.

There are signs, however, that broader defined participative *rights* may find their way, step by step, into the fibre of EU law and regulatory procedures, creating a general framework for participatory governance. The Draft Constitutional Treaty, notwithstanding its unclear political and legal future, provides its own subtitle (Title VI) dealing with “The Democratic Life of the Union”, with separate articles defining the scope of representative democracy (Article 46) and participatory democracy (Article 47). Article 47 reads as follows:

“Article I-47:

The principle of participatory democracy

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. European laws shall determine the provisions for the procedures and conditions required for such a citizens' initiative, including the minimum number of Member States from which such citizens must come.”

The scope of these provisions is clearly limited, and the underlying concept of participatory democracy is admittedly rather thin: participation is more than just the opportunity to express an opinion (paragraph 1), or the opportunity to enter into a dialogue whose conditions and consequences are unclear (paragraph 2). In contrast to these provisions,

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participation of all concerned citizens” and demands that at the national level, “each individual shall have appropriate access to information concerning the environment that is held by public authorities [...] and the opportunity to participate in decision-making processes”; see UN Doc. A/Conf.151/26 (vol. 1, 1992). The Convention text has recently been published also in the OJ: OJ L 124 17. 05. 2005 p. 4.

<sup>74</sup> OJ L 041 14. 02. 2003 p. 26.

the consultations mentioned in paragraph 3 sound more serious, but only in cases where they take place in a real space with discussants and an auditorium present, and not merely in cyberspace: written statements cannot replace the exchange of ideas and views in real time, in person, and before a forum. Unfortunately, paragraph 3 falls short of a clearer definition of consultations. Most importantly, Article 47 completely fails to mention any kind of procedural right to participation, nor does it foresee any legal remedy in case of conflict over the conditions of a consultation process. In this regard, the Draft Constitutional Treaty does not break away from the thin concept of participation the Commission proposed in its White Paper.

These conceptual shortcomings notwithstanding, Article 47 constitutes the first window of opportunity for a more comprehensive involvement of civil society in the law-making process of the EU. It also underlines that participatory democracy is – or will be – a genuine legal principle of EU law.

#### 4. THE ECJ: THE GUARDIAN OF “GOOD GOVERNANCE” IN THE EU?

One of the major preconditions of substantive participation in a deliberative process – such as the regulatory *fora* of Comitology – is the access to comprehensive information about the process itself: who discusses what, and when, what the positions of the participants are before they enter the process, and so on. These issues are essential for any active involvement. A landmark case of the European Court of Justice (ECJ) highlights the problems and pitfalls of the existing legal framework for access to information: the *Rothmans case* illustrates the oscillating character of the EC/EU between intergovernmental governance and a rights-based community of European citizens.

By letter of 23 January 1997, the Rothmans company, a famous cigarette manufacturer, had requested access to a number of documents which included the minutes of the Customs Code Committee from 4 April 1995 onwards.<sup>75</sup> Rothmans probably had heard that the Commission planned to take actions against illegal imports of cigarettes through third countries such as Romania or Bulgaria into the European Union. Many indicators pointed to the active involvement of cigarette manufacturers in these illegal activities. The reasons why Rothmans had approached the Commission (and not the Customs Code Committee directly) were simple: like all committees assisting and counselling the Commission, this one did not have its own administration, budget, archive or premises, nor an address of its own.

The Commission’s Directorate-General for Customs and Indirect Taxation forwarded a number of Commission documents, but refused to hand over the minutes of the Committee on the ground that the Commission was not their author.<sup>76</sup> It pointed out that, while the minutes are drawn up by the Commission in its secretarial capacity, they “are adopted by the Committee, which is therefore their author”. The Commission also refused to hand over the Committee’s internal regulation on the ground that the Commission was not the author of that document, either. Finally, it stated that, under that regulation, the Committee’s proceedings are confidential. In June 1997, Rothmans brought an action against the Commission before

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<sup>75</sup> The request was based on Decision 94/90 granting access to certain documents of the Commission under certain conditions. This Decision has been replaced by the already mentioned Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission. The new regulation provides for a much higher degree of transparency and easier access to documents of the Council, the Commission, and the Parliament.

<sup>76</sup> Decision 94/90 provided that applications must be sent “directly to the author”.

the Court of First Instance, and requested the annulment of the Commission's decisions denying access to the minutes and the internal regulation of the Committee.

This case was a landmark case in three respects: firstly, it challenged the practice of the Commission to retreat behind some form of intergovernmental confidentiality; secondly, it brought up the question of what the real mechanisms behind the Commission's regulatory actions are: how does the EU bureaucracy actually work, and what is the role of the Committees?; and finally, the case demanded a clarification of the openness, transparency, and accessibility of the EU bureaucracy: are citizens entitled to control the administrative process, and to what extent?

Rothmans demanded less than participation, but a minimum amount of openness and transparency in the Committee structure. The important role of Comitology in the law-making process of the EU – as briefly outlined above – underlines that the Commission and “its” committees have left the originally intended function of the committees as intergovernmental control mechanism far behind. They have turned into a unique, “freewheeling transnational structure”,<sup>77</sup> with its own merits as deliberative forums, but also without a clear legal structure or form. In particular, the poor transparency of the committee procedures “makes it difficult to discern the part played by the committees in the formulation and eventual adoption of measures”.<sup>78</sup>

The *Rothmans case* shows that the fact that the committees do not formally possess decision-making powers of their own tends to complicate judicial review of committees' work. Additionally, as R. Dehousse describes it, the “indirect character of the review process, compounded by the more general difficulty experienced by private parties seeking annulment of community decisions, reduces incentives to rely on litigation to ensure the proper functioning of committees.”<sup>79</sup> Indeed, the structure of judicial review, as laid out in Articles 220-245 TEC, strongly supports this observation: while the reference procedure of Article 234 TEC represents the “normal” procedure in which a national court refers a case to the ECJ in the event of doubts about the interpretation and implementation of EU law, individual access to the Court of First Instance is granted only under strict conditions.<sup>80</sup>

Because Rothmans had been denied access to the minutes individually, the conditions for individual access had been met. As to the material question concerning Rothmans' right to access to the minutes, the position of the Commission amounted to a paradoxical – and embarrassing – situation: committees are supposed to be an emanation of the Council, they inform and control the measures of the Commission. But the Council does not hold copies of

<sup>77</sup> R. Dehousse, “Misfits: EU Law and the Transformation of European Governance”, in Ch. Joerges/R. Dehousse, *Good Governance in Europe's Integrated Market* (Oxford: Oxford University Press, 2002), 207, 214.

<sup>78</sup> G. de Búrca, “The Institutional Development of the EU: A Constitutional Analysis”, in: P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (1999), 55, at 77.

<sup>79</sup> R. Dehousse, *supra* p. 215.

<sup>80</sup> See the recent ‘judicial dialogue’ between the CFI and the ECJ about the interpretation of Article 230 IV TEC: In its judgment of 3 May 2002 in the case *Jégo-Quééré et Cie v. Commission of the European Communities*, the Court of First Instance used judicial interpretation in order to loosen the conditions under which individual access to the Community courts for judicial review of Community acts is granted. The ECJ, however, rejected this attempt, first indirectly in its judgment of 25 July 2002 in Case C-50/00 P: *Unión de Pequeños Agricultores v. Council of the European Union*, where it confirmed its strict interpretation of the standing rules, and later by reversing the *Jégo-Quééré* decision of the CFI (judgment of the ECJ of 1 April 2004 in the Case C-263/02 P: *Commission of the European Communities v. Jégo-Quééré & Cie SA*).

committee documents. Thus, the argument of the Commission that it held the pen for the committee but was not the author of the documents amounted to an exclusion of Comitology from the scope of the rules granting access to Community documents.<sup>81</sup>

In its judgment, the Court of First Instance (CFI) resolved the case in favour of the right to access and stressed the importance of the principle of transparency. It held that “for the purposes of the Community rules on access to documents, ‘Comitology’ committees come under the Commission itself, ... which is responsible for rulings on the applications for access to documents of those committees”.<sup>82</sup> With its decision, the CFI paid tribute to the new governance amalgam of Commission and committees that is called “Comitology”.

While the ECJ decision can be seen as a major step towards a more transparent Comitology procedure, transparency itself is not sufficient for the effective control of Comitology from outside of the governance network. It may grant access to information, but it does not lend a more active role to individuals or to the civil society sector in the decision-making process. A starting point for a procedural approach to social regulation in the committee framework can be found in a second decision of the European Court of Justice relating to Comitology procedures. In the *Germany vs. Commission* case, the ECJ declared a regulation on construction materials void on the grounds that *procedural rules* had been violated; allegedly, the draft for a decision had not been sent within a certain time-frame to the Member State, and not in the right language.<sup>83</sup> In a number of other decisions, the ECJ has further shaped procedural aspects of European administrative law,<sup>84</sup> albeit without spelling out clear general rules for all fields of EU law with regard to legal consequences of violations of procedural law.

If civil society actors were entitled to the same procedural position as the Member States possess in the Comitology procedures, and the Commission were responsible for the dissemination of draft regulations (and accountable for infringements of those procedural rights), the Comitology system would lose a good part of its secretive character. This may lessen the effectiveness of the European rule-making governmental network to a certain degree, but it may strengthen the system in the long run, and it will certainly enhance the legitimacy of EU law. The emerging concept of participatory governance points into this direction, but it must also be accompanied by an EU administrative law that explicitly defines the scope of civil society participation; it is not the task of the ECJ to invent such a procedural framework.

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<sup>81</sup> R. Dehousse, *supra* p. 215.

<sup>82</sup> CFI, judgment of 19 July 1999, Case T-188/97, *Rothmans International BV v. Commission*, n. 62.

<sup>83</sup> ECJ, decision of 10 February 1998, Case C-263/95, *Germany v. Commission*.

<sup>84</sup> See, for example, the *Eyckeler & Malt* case, where the Court of First Instance held that an affected party has a right to be heard directly by the Commission in case the Commission’s decision may affect this party negatively even if the party had the opportunity to a prior hearing by the respective member state, see CFI, judgment of 19 February 1998, Case T-42/96, *Eyckeler & Malt AG vs Commission*, confirmed in CFI, judgment of 11 July 2002, Case T-205/99, *Hyper v. Commission*, both available on the Court’s website <http://curia.eu.int>.

#### IV. A LOOK FORWARD: CONSTITUTING PARTICIPATORY TRANSNATIONAL GOVERNANCE

Is transnational law possible, or to be more precise, under which conditions does the growing amount of transnational regulation through transnational governance, public or private, deserve recognition? This riddle of transnational law/‘law’ apparently cannot be solved once and for all in a neat manner by zooming nation state institutions up to global level. The tentative answer supported here stresses the importance of civic participation: transnational ‘law’, produced outside a classical constitutional framework, and without genuine democratic institutions, needs additional sources of justification with legitimacy force.

Concepts of world statism or of a global minimal state do not provide for these additional sources. On the contrary, these abstract visions disregard not only the factual preconditions for a functioning democratic process of law-production, they also do not sufficiently take into account that only a law-generating process where those subjugated to the regulations (the ‘law’) can - at least potentially - view themselves at the same time also as their authors may provide the essential element of legitimacy; this separates such regulations from mere power structures. The wide gap between abstract visions and the concrete regulations which affect real people in their everyday lives can hardly be bridged by an abstract constitutionalisation of international law. Even if the project is disconnected from a world-state vision, as Jürgen Habermas has recently proposed,<sup>85</sup> the core problem of a constitutionalisation process remains: how is constitutionalisation without a strong (global) civil society and without the inclusion of local civil societies possible?

In this regard, the evolution of the EU may provide some preliminary answers: Its tendencies towards a better and broader inclusion of citizens and civil society, notwithstanding the existing shortcomings, reflect the attempt to bridge the legitimacy gap between transnational law and local constituencies. A similar approach towards transnational law on a global scale would call for some form of juridification of participatory governance, not necessarily as another form of an overarching ‘constitution’ in a single text, but as a juridification of deliberative structures *within* the regulatory islands of international law and international regulation.

Procedural rules, and, in particular, participatory rights in the domain of transnational social regulation, decide about agenda-setting and co-decision positions to a much higher degree than within the national constitutional framework, where decision-making procedures in governmental regulatory regimes or in private societal spheres are still controlled by both parliaments and by a genuine democratic process, and are embedded in a constitutional setting of administrative rules and judicial control. The less direct the democratic input in transnational social regulation is, however, the more direct the participatory influence of the social actors, or even of an emerging global civil society, has to be. A mere superstructural network of governments and powerful private players amounts more to a return to some form of benevolent and enlightened absolutism rather than to “good” transnational governance.

This correlation between the loss of democratic power in the national arenas and the growing material regulation in the transnational sphere has to be reflected and confronted within the existing global legal structures. As transnational processes are dominated by public or private administrators, the law of the transnational regulation co-ordinating these processes has to integrate the possible functional equivalents of national legitimacy processes. One

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<sup>85</sup> J. Habermas, *Der gespaltene Westen* (Frankfurt am Main: Suhrkamp, 2004), 113-193.

element of such a juridification of transnational regulation may consist of the procedural right of affected interest groups and civic associations to participate comprehensively in regulatory processes, following the existing concepts of interest representation<sup>86</sup> that already form an integral part of some domestic administrative laws throughout the world, and the deepening participatory patterns which the international community has already agreed upon in the past.<sup>87</sup> Civil society organisations participating in transnational regulatory structures enlarge the range of viewpoints and arguments present in deliberative decision-making processes.<sup>88</sup> This may not solve all the problems of *democratic* legitimacy above the nation-state level, but it will certainly lead to a more inclusive – and possibly more legitimate – global legal community.

## 1. TRANSNATIONAL CIVIC PARTICIPATION

General demands for better participation, clearer decision-making structures and transparency, and for rules and procedures for accountability have been raised in the context of global public governance for years. Events such as the massive protests at the G7/G8 summits in Seattle 1999 and Genova 2001 against the present state and development of globalisation<sup>89</sup> have shed light on the opaque character of global governance in general.

Some global institutions and regimes have reacted to this criticism, others have not.<sup>90</sup> The World Bank is a striking example of a radical change: under its president James Wolfensohn, it has launched several initiatives to counter the secretive character of the bank's policy-planning and decision-making procedures. By decentralising the Bank, by working more closely with other development partners, such as NGOs, and placing greater emphasis on home-grown development planning, the World Bank claims that, under Wolfensohn's presidency, it has tried to move closer to its client governments "than ever before".<sup>91</sup> With additional efforts to reach out more to other international organisations, to the private sector and to civil society (the Bank states that NGOs now participate in a significant number of its projects, and that Wolfensohn has also made partnership with the private sector a central part of the activities<sup>92</sup>) the World Bank has tried hard to become the *Musterknabe* of global institutions.

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<sup>86</sup> One prominent example is the US Administrative Procedure Act (APA). For a comprehensive overview over its development, see R Stewart, *Administrative Law in the Twenty-First Century*, 78 *N.Y.U.L.Rev* 437 (2003), esp. 441 *et seq.*, on the evolution of the interest representation model within the institutional framework of administrative agencies. Stewart also proposes to take the APA as a blueprint for global administrative structures, see R. Stewart, "US Administrative Law: A Model for Global Administrative Law?", forthcoming in: 68 *Law and Contemporary Problems* 7 (2005), and available at <http://www.iilj.org/papers/documents/2005.7Stewart.pdf>.

<sup>87</sup> See, especially, the Aarhus "Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters", <http://www.unece.org/env/pp/treatytext.htm>, supra note 73.

<sup>88</sup> See P. Nanz, contribution entitled "Democratic Legitimacy of Transnational Trade Governance: A View from Political Theory", in this volume.

<sup>89</sup> For a sociological account of the new movement against the present form of globalisation, see M. Andretta/D. della Porta/L. Mosca/H. Reiter, *No Global – New Global, Identität und Strategien der Antiglobalisierungsbewegung* (Frankfurt am Main: Campus, 2003).

<sup>90</sup> For an overview and further details, see the contribution of J. Steffek/C. Kissling, "Why Co-operate? Civil Society Participation at the WTO", in Ch. Joerges/E.U. Petersmann (eds.), supra note 4.

<sup>91</sup> See [www.worldbank.org](http://www.worldbank.org) for a self-description of Wolfensohn's 1995-2005 presidency at the World Bank.

<sup>92</sup> Self-description of Wolfensohn's 1995-2005 presidency at [www.worldbank.org](http://www.worldbank.org).

Other institutions, in particular the WTO, have strongly opposed such an opening towards civil society. Even rather limited forms of outside interference such as *amicus curiae* briefs were - and still are – the subject of enduring controversies: the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and the Working Procedures for Appellate Review (WPAR) do not contain clear rules on the admissibility of unsolicited *amicus curiae* statements handed in by outsiders such as NGO's or individuals, nor do they contain an explicit exclusion of such statements, either.<sup>93</sup> In a pragmatic move, the Appellate Body stated in the *Shrimp-Turtles* case, that it has the *authority* to accept *amicus curiae* briefs,<sup>94</sup> a position the Body has since affirmed in subsequent decisions.<sup>95</sup>

This small amount of progress notwithstanding, the WTO is still – and still perceives itself to be – a club with exclusive ‘membership privileges’ (Robert Howse). A 2004 report by an advisory committee to the Directorate General of the WTO on “The Future of the WTO” dedicates 8 of its 80 pages to “Transparency and dialogue with civil society”. It describes the relationship between global civil society and international institutions such as the WTO as a “new partnership” with “tensions”, but also as a “welcome and beneficial experience”.<sup>96</sup> The report justifies this extremely cautious approach towards the inclusion of civil society with the limited capacity of the WTO Secretariat. Additionally, it states that the WTO member governments are themselves the ones that must shoulder most of the responsibility for developing the relationships between civil society and state actors. In the end, the report only acknowledges that “the WTO needs to keep the options of transparency and dialogue with civil society under regular review”.<sup>97</sup>

The latter characterisation of the inclusion of civil society in decision-making processes as mere ‘dialogue’ comes very close to the attitude of the European Commission towards civil society participation: in its White Paper, the Commission’s bow to civil society did not go much further than the proposal of regular ‘consultations’. The much-praised convention method that was first used for the EU Charter of Fundamental Rights, and later for the Draft Treaty on the European Constitution, turned out to be a practical example of the deficiencies of mere consultations. Civil society organisations were given only very limited space and time for the presentation of their viewpoints, and the website that was meant to be a place where citizens’ concerns could be voiced did not have any traceable effect: nobody knows if or who ever read the contributions that were posted there. In the end, there was only room for a symbolic role of civil society in the constitution making process.

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<sup>93</sup> R Howse, “Membership and its Privileges: The WTO, Civil Society, and the Amicus Curiae? Brief Controversy”, 9 *European Law Journal* (2003) 496.

<sup>94</sup> United States-Import prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, T/DS58/AB/R, October 12, 1998 (*Shrimp-Turtles*).

<sup>95</sup> Expressly in the Carbon Steel case: United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Appellate Body, WT/DS138/AB/R, 7 June 2000, paras 39–42.

<sup>96</sup> The Future of the WTO - Addressing institutional challenges in the new millennium, Report by the Consultative Board to the Director-General Supachai Panitchpakdi, Geneva 2004, p. 41, paras 177-178, [http://www.wto.org/english/thewto\\_e/10anniv\\_e/10anniv\\_e.htm#future](http://www.wto.org/english/thewto_e/10anniv_e/10anniv_e.htm#future).

<sup>97</sup> The Future of the WTO, p. 41-42, para. 182.



## 2. A CONCEPT OF PARTICIPATION IN SUPRANATIONAL RULE-MAKING

The WTO report on its future shape and development deals extensively with the questions of how best to engage with non-governmental organisations (NGOs), and how to raise its own transparency and negotiate with non-state actors, while, at the same time, dealing with their criticisms. This shows that the authors could not ignore the changes in world society during the decade following the establishment of the WTO: in the post-Seattle and post-Genova era, civil society<sup>98</sup> “is here to stay” as one of the global forces that have to be taken into account.<sup>99</sup> This ‘official’ establishment of civil society as a global force, however, also marks the end of an unconditional welcome of civil society into global politics and law: as Neera Chandhoke puts it, “it has ceased to be a ‘hurrah’-concept”.<sup>100</sup> The North-South divide, an institutional and financial superiority of NGO’s and civil society actors from the most advanced ‘Western’ countries, and the, sometimes, problematical internal structures of the decision-making and funding of NGOs are some of the factors that demand a closer look at the specific conditions of civil society participation.

A popular argument against a stronger role of civil society in transnational regulatory structures goes much further: The wider and deeper participation of NGOs and other parts of civil society is doomed to foster neo-feudal structures or neo-corporatism. John Bolton, the new US ambassador at the UN, has argued that “it is precisely the detachment from governments that makes international civil society so troubling, at least for democracies”. He does not even shy away from a comparison with fascism: as “the civil society idea actually suggests a ‘corporatist’ approach to international decision-making”, it is “dramatically troubling for democratic theory because it posits ‘interests’ (whether NGOs or business) as legitimate actors along with popularly elected governments”. As corporatism, according to Bolton, was at the heart of Italian fascism, “Mussolini would smile on the Forum of Civil Society. Americanists do not.”<sup>101</sup>

In a less polemic reading, this intervention, may, indeed, point towards a strong argument against the establishment of civil society participation *beyond protest and comment*. However, it misses the point in several ways. It firstly envisions a concept of civil society that reflects a market-place model of competing organised interests, thus rejecting the notion of deliberative decision-making within public spheres; it secondly presupposes that “international decision-making” is exclusively managed by governments alone and not by a joint co-operation with certain business interests, and thirdly, it tries to shield a process of vastly executive decision-making that is only remotely connected to democratic self-government.

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<sup>98</sup> For a working definition, I refer here to J. Habermas’ concept of civil society as ‘non-governmental and non-economic connections and voluntary associations’ in his work *Between Facts and Norms* (Cambridge/Mass.: MIT Press, 1996), p. 366-367: “Civil society is composed of those more or less spontaneously emergent associations, organisations, and movements that, attuned to how societal problems resonate in private life spheres, distil and transmit such reactions to the public sphere. The core of civil society comprises a network of associations that institutionalises problem-solving discourses of general interest inside the framework of organised public spheres”.

<sup>99</sup> N Chandhoke, “What the hell is Civil Society?”, contribution on the *Open Democracy website*, [www.openDemocracy.net](http://www.openDemocracy.net), dated 17 March 2005, p. 1.

<sup>100</sup> N. Chandhoke (supra), p. 1.

<sup>101</sup> J. Bolton, “Should we take Global Governance seriously?”, 1 *Chicago Journal of International Law* (2000), 205 (206). It is not known whether Bolton thinks that Mussolini would also smile on the US Administrative Procedures Act with its outspoken concept of interest representation in regulation.

The topic of participation and its conflict with (democratic) representation is familiar from the nation state discussions about concepts of democratic rule. As Carol Pateman has shown, ‘realist’ and functionalist concepts of democracy have dominated the discourse on democracy and representation since the 1940s and 1950’s, shaping a view of democracy as a political method (as opposed to a normative concept of self-government) through which the active élites of a society take the decisions for the passive and disinterested citizens.<sup>102</sup> Since then, the emergence of an active citizenship outside channeled ways of political will-formation (political parties, unions) has eroded the empirical foundation of such a concept. Modern democracies are characterised by a huge diversity of public interest groups and voluntary associations that voice concerns and debate public-policy issues beyond narrowly defined economic interests.

These concerns, issues and perspectives (such as environmental protection, or poverty) voiced by civil society are hardly represented within global regulatory networks – a single government representative per country in such a regulatory network simply cannot be understood as an agent of a whole constituency and its internal diversity. The fact that global governance is widely shielded from dissent and opposition has clearly fuelled the emergence of a global civil society,<sup>103</sup> especially because nationally rooted civil society actors see the need to create global networks in order to increase the chances of getting their voices heard.<sup>104</sup>

In this regard, a wider inclusion of civil society actors in transnational regulation should instead be viewed as an antidote to ‘corporatist’ influences on regulatory processes, and not as a way of fostering it. This holds true especially in the area of transnational economic regulation: as in the Grimm Brothers’ tale of the hare and the hedgehog, certain business interest are always there and present, anyway. Gregory C. Shaffer has described this reality in the following words:

“The growing interaction between private enterprises and US and EC public representatives in most trade claims reflects a trend from predominantly intergovernmental decision making toward multi-level private litigation strategies involving direct public-private exchange at the national and supranational levels. Given the trade-liberalising rules of the World Trade Organisation (WTO), this trend has an outward-looking, export-promoting orientation composed of more systematic challenges, in particular by large and well-organized commercial interests, to foreign regulatory barriers to trade. International trade disputes are, in consequence, not purely public or intergovernmental. Nor do they reflect a simple cooptation by businesses, particularly large and well-organised businesses, of government officials. Rather, they invoke the formation of public-private partnerships to pursue varying but complementary goals. The development of these public-private

<sup>102</sup> C. Pateman, *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1970), esp p. 1-8 with a critique of the works of Dahl and Schumpeter.

<sup>103</sup> On the emergence of a global legal community (‘*globale Rechtsgenossenschaft*’) and a – weak – global public sphere, see H. Brunkhorst, *Solidarität. Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft* (Frankfurt am Main: Suhrkamp, 2002), especially pp 139-236.

<sup>104</sup> See M. Kaldor, *Global Civil Society* (Oxford: Blackwell Publishing, 2003). - On the – misguided – reduction of civil society actors on the alternative of being “‘organized’ but privileged or compliant insider or ‘disorganized’ and autonomous but marginalized outsider”, see G. de Búrca/N. Walker, *Law and Transnational Civil Society: Upsetting the Agenda?*, 9 *ELJ* (2003), pp 387-400, 389.

partnerships is seen in the actual handling (the “law in action”) of most commercial trade disputes, as opposed to the law in the books reflected in the relevant provisions of WTO agreements, US statutes, EC regulations, and the EC’s founding treaty.”<sup>105</sup>

This finding underlines that the problem of representativeness has to be viewed from a different angle: if certain interests are already present in the agenda-setting and decision-making processes, then civic participation means opening up these structures to non-represented groups and interests, thus broadening the agenda and safeguarding a more inclusive representation of societal interests and viewpoints. The problem of representation certainly remains and cannot be solved in a perfectly consistent manner: participatory governance is not meant to replace *democratic* representation. Increasing research by political and social scientists about interest representation in the EU,<sup>106</sup> however, supports the conclusion that some relevant criteria may be found, criteria which can safeguard a maybe not perfect, but somehow proper, representation of civil society through organised interests and voluntary associations. These criteria, once spelled out in legal documents with binding force, will open *fora* for contestation and dissent within transnational regulatory institutions and networks.

Situated between co-decision powers and mere consultations, the principle of participatory governance can be filled with context-sensitive contents, reaching from notice and comment provisions and transparency regulations, through rights to a hearing by regulatory institutions and networks, up to procedural involvement that stops short of a veto position. As long as visions of a global democracy remain a distant hope, a concept of participatory transnational governance is the second best solution for integrating societal diversity into the ‘law of law-production’ (R. Wiethölter). And it can also tackle the other side of the coin, the nightmare visions of a global super-state: participatory transnational governance is a crucial element for a redirection of ‘intergovernmentality’ and its regulatory networks towards a more inclusive law/‘law’-production.

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<sup>105</sup> Gregory C. Schaffer, “The Blurring of the Intergovernmental: Public-Private Partnerships behind US and EC Trade Claims”, in: M.A. Pollack & G.C. Shaffer (eds.), *Transatlantic Governance in the Global Economy* (Lanhan: Rowman & Littlefield, 2001), p. 97.

<sup>106</sup> See, for example, the 2004 Report of the Active Citizens Network, “Participation in Policy Making: Criteria for the Selection of Civic NGOs”, available at the website of the organization: [http://www.activecitizenship.net/projects/project\\_assessing.htm](http://www.activecitizenship.net/projects/project_assessing.htm).