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# LINKING NGO ACCOUNTABILITY AND THE LEGITIMACY OF GLOBAL GOVERNANCE

*Dana Brakman Reiser and Claire R. Kelly\**

Commentators often express concern over whether global regulators suffer from a democracy deficit and sometimes offer nongovernmental organizations (“NGOs”) participation in these entities as a cure for this ill. To serve such an ameliorative role and to be legitimate actors in international civil society more generally, though, the internal accountability of participating NGOs matters. NGOs need to be composed and governed accountably in order to legitimate their role in global governance. Current domestic nonprofit law, which forms the basis for how NGOs are governed internally, attempts to create an effective and enforceable regime of nonprofit accountability. These governance and accountability frameworks offered by domestic law, however, provide insufficient content to appropriately regulate and incentivize NGOs working internationally. This Article demonstrates how global regulators can help fill this gap, thereby improving NGO accountability and the legitimacy of global regulation.

Part I reviews the roles that NGOs play in global governance. NGOs regulate third party conduct themselves and also influence the regulatory efforts of other global governance entities. Part I also examines how scholars typically assess the legitimacy of global regulators. Part II then reviews the basic accountability regimes applied to NGOs by domestic nonprofit law, primarily using U.S. law as an example. It describes how domestic enforcement mechanisms affect NGO accountability, highlighting the differential emphasis these mechanisms place on NGOs’ mission, organizational, and financial accountability. We argue that while domestic nonprofit law provides some measure of legitimacy to NGO regulatory efforts internationally, it falls short in several ways that matter. The gaps in nonprofit mission, organizational, and financial accountability enforcement call into question the ability of NGOs to pursue normative goals; the value of NGOs’ participation in the global regulatory process; and the suitability of NGOs as a proper site for regulation. International organizations can serve as gatekeepers that ameliorate these accountability gaps.

Part III looks both at how global regulators can serve as gatekeepers and how they can better utilize NGOs as part of their legitimacy strategies. Some global regulators have established accreditation, monitoring,

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and enforcement systems for their participating NGOs. However, not all global regulators that capitalize on NGO participation have such mechanisms in place, or have mechanisms that are suited to the task. These systems can be improved by structuring them to reflect the role of NGOs in each regulator's legitimacy strategy and to complement domestic non-profit accountability regimes. If the NGOs that participate in global regulation are themselves not sufficiently accountable, they may undermine, rather than bolster, the legitimacy of global regulation. Finally, this Part makes suggestions on how to safeguard NGOs' role in global regulators' legitimacy strategies. Part IV briefly concludes.

## I. REGULATORS, LEGITIMACY, AND ACCOUNTABILITY

### *A. NGOs as Regulators in Global Governance*

NGOs contribute to global governance in two ways that implicate their legitimacy. First, they act as non-State regulators ("NSRs"). They influence behavior by setting standards, establishing best practices, and campaigning for particular actions.<sup>1</sup> Second, they influence the regulatory efforts of other NSRs, such as international organizations and transgovernmental networks.<sup>2</sup> All NSRs need legitimacy to different degrees, and NGO participation is often used to enhance legitimacy.

NGOs regulate. Regulation involves the attempt to alter the behavior of actors through various means.<sup>3</sup> Regulators may attempt to impose norms through hard law (statutes, treaties, regulations) or through soft law (norms, guides, best practices, and voluntary codes of conduct). Internationally, a host of NSRs seek to modify conduct including international organizations, transgovernmental networks, and NGOs. NGOs may act independently as NSRs or contribute to the efforts of other NSRs.<sup>4</sup>

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1. Colin Scott, *Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance*, 29 J.L. & SOC'Y 56, 60 (2002) (giving as an example Amnesty International, Transparency International, and Greenpeace International as "private overseers of national governments").

2. Indeed Ahmed and Potter document how some NGOs view themselves as not only "creating their own networks across national boundaries but [] assuming international roles historically the preserve of the states." SHAMIMA AHMED & DAVID M. POTTER, *NGOs in International Politics* 69 (2006).

3. Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REG. & GOVERNANCE 137, 139 (2008) [hereinafter Black, *Constructing and Contesting Legitimacy*].

4. See Julia Black, *Legitimacy and the Competition for Regulatory Share* 10–11 (Lon. Sch. Econ. Legal Studies, Working Paper No. 14/2009, 2009) [hereinafter Black,

NGOs cannot create hard law, but they may create soft law through campaigns, codes, or standards.<sup>5</sup> For example, the International Standards Organization (“ISO”), an international NGO, devises standards that States or private actors may choose to employ.<sup>6</sup> The standards propagated by NGOs, while not hard law, may influence conduct nonetheless and contribute to polycentric regulatory regimes.<sup>7</sup> Thus, for example, in 1992 a coalition of NGOs<sup>8</sup> formed to begin the International Campaign to Ban Landmines (“ICBL”). This effort eventually led to the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,<sup>9</sup> banning landmines.<sup>10</sup> Subsequently, the ICBL became a steering member of the Cluster Munitions Coalition which promotes the Cluster Munitions Convention.<sup>11</sup> Thus, even though NGOs cannot make law they can contribute in important ways to the development and implementation of law.

NGOs also contribute to the regulatory efforts of other NSRs.<sup>12</sup> NGOs lobby and influence national, international, and transgovernmental bod-

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*Competition for Regulatory Share*], available at [http://www.lse.ac.uk/collections/law/wps/WPS2009-14\\_Black.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2009-14_Black.pdf).

5. See AHMED & POTTER, *supra* note 2, at 15 (arguing that NGOs do have the power to persuade and although communicating without coercion NGOs build upon and change international and interstate relations); see also Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 544 (2009) (discussing bottom up regulation by NGOs); Scott, *supra* note 1, at 60–68.

6. See *About ISO*, INT'L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/about.htm> (last visited Mar. 7, 2011).

7. See Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 146 (NGOs generate awareness amongst consumers which results in economic pressure on market actors to conform to norms of all or a selected group of legitimacy communities.); see also Abbott & Snidal, *supra* note 5, at 505–07 (discussing regulatory standard setting and transnational new governance).

8. These NGOs include Human Rights Watch, Medico International, Handicap International, Physicians for Human Rights, Vietnam Veterans of America Foundation, and the Mines Advisory Group. *Campaign History*, INT'L CAMPAIGN TO BAN LANDMINES, <http://www.icbl.org/index.php/icbl/About-Us/History> (last visited Apr. 12, 2011) [hereinafter *Campaign History*].

9. *Mine Ban Treaty*, INT'L CAMPAIGN TO BAN LANDMINES, <http://www.icbl.org/index.php/icbl/Universal/MBT/States-Parties> (last visited Mar. 18, 2011).

10. *Campaign History*, *supra* note 8.

11. *Governance Bodies*, CLUSTER MUNITION COAL., <http://www.stopclustermunitions.org/the-coalition/steering-committee/> (last visited Mar. 18, 2011).

12. NGOs also often seek to influence national governments through domestic political processes.

ies.<sup>13</sup> Many, if not most, international bodies also have some mechanism to allow for participation by civil society.<sup>14</sup> In fact, some international bodies welcome NGO participation as part of their own legitimacy strategies.<sup>15</sup> The United Nations 2004 Cardoso Report, recognizing the importance of embracing civil society participation, noted that “[t]he growing participation and influence of non-State actors is enhancing democracy and reshaping multilateralism. Civil society organizations are also the prime movers of some of the most innovative initiatives to deal with emerging global threats.”<sup>16</sup>

NSRs need legitimacy to garner compliance with their norms.<sup>17</sup> They need legitimacy to enlist support for their efforts.<sup>18</sup> NSRs sometimes seek NGO participation as part of their legitimacy strategies, both because NGOs may enhance input legitimacy through increased participation and output legitimacy because they have the credentials to speak to the normative issues at stake. Of course, when NGOs act as NSRs, they also want to improve both their input and output legitimacy. These important concepts and the role of NGOs in creating input and output legitimacy are discussed below.

### *B. Assessing Legitimacy and Accountability*

Although legitimacy can be discussed as either a descriptive<sup>19</sup> or sociological matter,<sup>20</sup> we approach it here from the latter perspective, i.e., as

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13. See AHMED & POTTER, *supra* note 2, at 44–53. NGO participation in international organizations and transgovernmental networks has not gone unchallenged. In particular, such participation raises questions about state sovereignty, the equality of the states, and democratic accountability of these global regulators. NGOs have answered these claims in part with reference to their own legitimacy. *Id.* at 245–50.

14. See UN Charter art. 71: “The Economic and Social Council may make suitable arrangements for consultation with nongovernmental organizations which are concerned with matters in its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.”

15. See Black, *Constructing and Contesting Legitimacy*, *supra* note 3.

16. U.N. Secretary-General, *We the Peoples: Civil Society, the United Nations and Global Governance: Rep. of the Panel of Eminent Persons on United Nations–Civil Society Relations*, at 3, U.N. Doc. A/58/817 (June 11, 2004) [hereinafter *Cardoso Report*].

17. See AHMED & POTTER, *supra* note 2, at 14–15, 241–44; see also Steve Charnovitz, *Accountability of Nongovernmental Organizations (NGOs) in Global Governance* 30–31 (Geo. Wash. Law Sch. Pub. Law Research Paper No. 145, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=716381&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=716381&download=yes) (explaining that NGOs care about their influence and would be eager to improve accountability).

18. Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 154.

19. By descriptive we mean that as a matter of objective fact something is legitimate. Describing something as legitimate requires a normative baseline. Thus, descriptive legit-

socially constructed. Something is legitimate because people perceive it as legitimate.<sup>21</sup> Although it is impossible to assess a perception, one can still assess what perceptions should, or will likely, be by looking at legitimacy criteria. Moreover, we believe NSRs will consider legitimacy criteria in order to improve perceptions of themselves as legitimate.

Generally speaking, commentators have identified two types of legitimacy criteria worth considering. Normative (output) legitimacy criteria focuses on whether an institution effectively promotes what is right, acceptable, desired, or just.<sup>22</sup> Will the product of the global regulator be a good one?<sup>23</sup> Will it be effective, fair, well-ordered, universally accepted, morally defensible, or supportive of a particular goal such as human rights or trade liberalization?<sup>24</sup> Thus, output legitimacy assumes a normative prescription of what is a good outcome.<sup>25</sup> One might assume, for example, that to be legitimate an institution must respect human rights,<sup>26</sup> or at minimum, institutions “are legitimate only if they do not persist in

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imacy is sometimes referred to as normative legitimacy because the description reflects the notion that the thing is normatively desirable. First, an institution is descriptively legitimate if, after one accepts a normative premise of what is right, good, acceptable, desired, or appropriate, one determines as an objective fact that an institution meets these criteria. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFFAIRS 405, 406 (2006).

20. Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 144; *see also* Buchanan & Keohane, *supra* note 19, at 406. Other commentators have identified regulatory legitimacy as a separate concept pertaining to the legitimacy of NGOs within international governance institutions such as the UN or the World Bank. *See* Anton Vedder, *Questioning the Legitimacy of Non-Governmental Organizations*, in NGO INVOLVEMENT IN INTERNATIONAL GOVERNANCE AND POLICY: SOURCES OF LEGITIMACY 1, 5 (Anton Vedder ed., 2007) [hereinafter NGO INVOLVEMENT].

21. *See* Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 144 (internal citation omitted); *see also* Buchanan & Keohane, *supra* note 19, at 406. Either approach requires that we assess the underlying criteria; either we must agree on what the normative baseline is to argue that something either is or is not descriptively legitimate, or we must identify criteria that people consider when they develop their perceptions.

22. *See* Claire R. Kelly, *The Politics of Legitimacy in the UNCITRAL Working Methods*, in THE POLITICS OF INTERNATIONAL ECONOMIC LAW 106, 124 (Tomer Broude, Marc L. Busch & Amelia Porges eds., 2010) [hereinafter Kelly, *UNCITRAL*].

23. *See id.*

24. Legitimacy and effectiveness are linked. *See id.* Likewise, international and national legitimacy are linked. As countries become more democratic the calls for legitimacy become more pronounced. *See* Jeffrey Atik, *Democratizing the WTO*, 33 GEO. WASH. INT’L L. REV. 451, 460 (2001).

25. Buchanan & Keohane, *supra* note 19, at 418 (discussing the persistent disagreement over the norms underlying legitimacy).

26. *Id.*

violations of the least controversial human rights.<sup>27</sup> Alternatively, one might require that an institution be effective.<sup>28</sup> Of course, observers contextualize “effectiveness” in a way that requires a normative position. The trade regime is effective if it liberalizes trade.<sup>29</sup> The child labor regime is effective if it eliminates the worst forms of child labor.<sup>30</sup> One must start with a normative prescription of what it is that one wants to accomplish.<sup>31</sup>

Once an NSR has a normative prescription, its legitimacy might benefit from NGO participation. NGOs may have invested in the normative goals that the NSR seeks to regulate. They might be experts in the policy or technical matters that the NSR addresses. They may have engaged in significant deliberation that lends credibility to their views. An NSR may benefit from NGO participation, not only from greater input legitimacy, but also because the NGO can help the NSR achieve a good outcome according to its own defined prescription of the good.

The second criteria, procedural (input) legitimacy criteria, assess the participation in, and the process of, decision making. Administrative law devices such as transparency,<sup>32</sup> opportunities for comment,<sup>33</sup> power sharing,<sup>34</sup> and review,<sup>35</sup> improve the functioning of organizations.<sup>36</sup> These devices may promote better decisions by creating more deliberation,

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27. *Id.* at 420. The authors explain that it is difficult to categorize human rights because what many commonly refer to as “rights,” are actually protective mechanisms for “basic human interests.” *Id.* at 419.

28. COMMONWEALTH SECRETARIAT, ECONOMIC PAPER SERIES NO. 85, REFORM OF INTERNATIONAL INSTITUTIONS: TOWARDS A COMMONWEALTH AGENDA 1–5 (2009).

29. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, pmbl., 61 Stat. A-11, 55 U.N.T.S. 194.

30. *See* ILO Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, June 17, 1999, 2133 U.N.T.S.161; *see also* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

31. Claire R. Kelly, *Financial Crisis and Civil Society*, 11 CHI. J. OF INT'L L. 505, 536 (2011).

32. Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1530 (2006).

33. *Id.* at 1527–28.

34. *Id.* at 1534–36.

35. *Id.* at 1535–36.

36. *Id.* at 1534–37 (discussing how horizontal and vertical power-sharing mechanisms can increase the legitimacy of international rulemaking); *see also* Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1, 4 (2006) (noting the tendency of IOs to improve participation and accountability by incorporating various administrative law mechanisms into their decision-making, including procedures for notice-and-comment).

more reasoned decision making, and more accountability.<sup>37</sup> NSRs may seek NGO participation because such participation facilitates better procedures. NGOs may foster transparency and opportunity for comment. Additionally, decisions are more legitimate when those affected by the decision are included in the process of making it.<sup>38</sup> It would be difficult, if not impossible, for international organizations and transgovernmental networks to be democratic,<sup>39</sup> but they can broaden participation by engaging NGOs as well as private parties.<sup>40</sup> Greater participation hopefully leads to better deliberation. NGOs, for example, often raise issues that would otherwise not be considered,<sup>41</sup> either directly or by lobbying national governments to broach new issues in international fora. Thus, the Basel Committee on Banking Supervision might provide notice and comment procedures for its proposals to which NGOs might respond.<sup>42</sup> The United Nations Commission on International Trade Law (“UNCITRAL”) might invite NGO experts to participate in its working groups.<sup>43</sup>

Legitimacy relates to but should not be confused with accountability.<sup>44</sup> As discussed below, scholars differ over NGO accountability. Accountability can mean that the organization has a responsibility to a certain

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37. See Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 163–78 (2005).

38. See Yves Bonzon, *Institutionalizing Public Participation in WTO Decision Making: Some Conceptual Hurdles and Avenues*, 11 J. INT’L ECON. L. 751, 753–56 (2008).

39. Esty, *supra* note 32, at 1515–16.

40. See Henry W. McGee, Jr. & Timothy W. Woolsey, *Transboundary Dispute Resolution as a Process and Access to Justice for Private Litigants: Commentaries on Cesare Romano’s the Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach (2000)*, 20 UCLA J. ENVTL. L. & POL’Y 109, 116 (2002).

41. AHMED & POTTER, *supra* note 2, at 82.

42. See Stephany Griffith-Jones & Kevin Young, *Reforming Governance of International Financial Regulation; Have the G20 Done Enough?*, (Initiative for Pol’y Dialogue, Policy Brief, 2009), available at [http://policydialogue.org/files/publications/Griffith-Jones\\_Young\\_Policy\\_Brief.pdf](http://policydialogue.org/files/publications/Griffith-Jones_Young_Policy_Brief.pdf).

43. David Satola & W.J. Luddy, Jr., *The Potential for an International Legal Approach to Critical Information Infrastructure Protection*, 47 JURIMETRICS J. 315, 326 (2007).

44. Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 138. The question of legality is another separate issue. Anton Vedder, *Questioning the Legitimacy of Non-Governmental Organizations*, in NGO INVOLVEMENT, *supra* note 20, at 9 [hereinafter Vedder, *Questioning the Legitimacy*]. Like accountability it can be considered a necessary though not sufficient factor. *Id.*



stakeholder or stakeholders.<sup>45</sup> These stakeholders may be governments, donors, boards, members, employees, or people affected by the NGO's actions.<sup>46</sup> NGOs may be accountable to these stakeholders for their finances, their policies, and their effectiveness.<sup>47</sup>

Accountability matters because it fosters the perception of legitimacy.<sup>48</sup> It involves a "discourse of accountability."<sup>49</sup> As Julia Black argues:

Auditing, for example, is not simply an accountability tool which can be used to give an account of financial expenditure, or indeed increasing performance in achieving a wide range of social objective, such as sustainable development, ethical labour practices, and so on, as the growing practices of social auditing illustrate. Judicial review is not simply the application of a set of legal norms to the behaviour of public actors. Deliberative polyarchies which engage regulators in democratic deliberation and in which regulators are called to give account are not simply the engagement of the public in reviewing actions of regulators. Rather, each is an interpretive and discursive schema through which participants in the accountability relationship make sense of their own and each others' roles, which is constitutive of their relationship and which is fundamentally shaped by it.<sup>50</sup>

Thus the process of accounting can foster the perception of legitimacy.

### *C. Problems Assessing Legitimacy and Accountability*

Assessing global regulators' legitimacy raises a number of problems. First, NSRs will seek NGO participation as a strategy to improve both output and input legitimacy criteria.<sup>51</sup> These efforts should be closely

45. AHMED & POTTER, *supra* note 2, at 126; *see also* L. DAVID BROWN, CREATING CREDIBILITY: LEGITIMACY AND ACCOUNTABILITY FOR TRANSNATIONAL CIVIL SOCIETY 3, 36 (2008) [hereinafter BROWN, CREATING CREDIBILITY].

46. *See* AHMED & POTTER, *supra* note 2, at 126–27; *see also* BROWN, CREATING CREDIBILITY, *supra* note 45, at 3, 36.

47. *See* L. DAVID BROWN & JAGADANANDA, CIVICUS, CIVIL SOCIETY LEGITIMACY AND ACCOUNTABILITY: ISSUES AND CHALLENGES 9 (2007), *available at* [http://www.civicus.org/new/media/LTA\\_ScopingPaper.pdf](http://www.civicus.org/new/media/LTA_ScopingPaper.pdf); *see also* AHMED & POTTER, *supra* note 2, at 126–27 (Questions of accountability often leave out NGO responsibility to their clients. Instead, concerns are raised about caving to donor demands and responsiveness to multiple stakeholders.).

48. Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 148–49.

49. *Id.* at 152.

50. *Id.*

51. *See* Kenneth Anderson & David Rieff, 'Global Civil Society': A Sceptical View, *in* GLOBAL CIVIL SOCIETY 26, 26 (Helmut Anheier, Marlies Glasius, & Mary Kaldor, eds., 2005) (noting the "intertwined quests of legitimacy" of NGOs and international organizations that results in an undemocratic system and "drives the severe inflation of ideological rhetoric surrounding claims about 'global civil society'").

scrutinized because they may not improve legitimacy. Second, NSRs, as regulators, as well as the subjects they regulate, are constantly changing in response to each other as well as other forces. Any measure of legitimacy must take into account that dynamic process and the effect that it has on the desirable balance of output and input criteria.<sup>52</sup> Finally, the relationship between legitimacy and accountability is muddy. Accountability promotes legitimacy, but in some ways accountability is self-defining and therefore difficult to assess objectively.

First, NSRs pursue strategies to improve their legitimacy criteria including promoting NGO participation as a legitimacy enhancer.<sup>53</sup> The value of NGO participation in global governance, either as a regulator or as a participant in the efforts of another regulator, cannot be taken as a given.<sup>54</sup> NGO participation may successfully help an NSR build legitimacy if it in fact contributes to the efficacy of the NSR and thus improves its output legitimacy, or if it participates in a meaningful way and thereby improves its input legitimacy.<sup>55</sup> Whether it will succeed at either depends not only on whether the NSR allows for real participation (rather than just the veneer of NGO participation),<sup>56</sup> but also on the *bona*

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52. Kelly, *UNCITRAL*, *supra* note 22, at 124–25.

53. Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 146–47. Seeking NGO participation is part of attempting to build legitimacy. As Julia Black notes:

Managing [] legitimacy encompasses building legitimacy, maintaining it, and repairing it once lost. Organizations can manage their legitimacy by attempting to conform to the legitimacy claims that are made on them; they can seek to manipulate them; or they can select from among their environments audiences (legitimacy communities) that will support them. The form that the strategy takes will vary with the type of legitimacy that is in issue: pragmatic legitimacy (based on self interested claims of legitimacy communities); moral or normative legitimacy (based on assessments that this is the ‘right thing to do’); or cognitive legitimacy (based on assumptions that things could not be any other way); and on whether the organization is seeking to build, maintain or repair legitimacy.

*Id.*

54. See, e.g., *Cardoso Report*, *supra* note 16, ¶ 140.

55. But see Anderson & Rieff, *supra* note 51, at 29–30 (specifically rejecting the argument that NGOs can help improve democratic legitimacy).

56. Assessing legitimacy requires that observers consider the means by which an organization pursues legitimacy. An organization may manage the perception that it is or is not legitimate without addressing that legitimacy as a normative matter. An organization might take superficial steps to appear more legitimate than it is. Thus, some companies for example make unjustified environmental claims in order to better their image (i.e., green-washing). Greenpeace defines “green washing” as “the cynical use of environmental themes to whitewash corporate misbehavior.” *Introduction to StopGreenwash.org*, GREENPEACE, <http://www.stopgreenwash.org/introduction> (last visited Mar. 18,

*fides* of the NGO itself. An NGO without a clearly defined mission is not in a good position to improve the output legitimacy of an NSR. As discussed below, an NGO that is poorly governed, opaque, or being used for the financial benefit of its managers is not in a good position to improve the input legitimacy of an NSR. In fact, these and other lapses in participating NGO accountability could harm an NSR's legitimacy.

Second, any assessment of legitimacy must be dynamic because institutions and the measures by which we judge them are constantly changing. International organizations address a range of different issues over time. These organizations respond to world events.<sup>57</sup> The key players in the organizations change. The organizations compete with each other for legitimacy and therefore develop strategies to improve their own legitimacy.<sup>58</sup> NGOs respond to these changes because they themselves evolve, compete, and seek legitimacy from their participation in global governance.<sup>59</sup> As NGOs evolve, the international organizations and transgovernmental networks respond in kind. The dynamic evolution of NSRs means that the normative baseline for both NSRs and NGOs are, in important ways, always subject to change. Both NSRs and NGOs must constantly assess their own missions and whether they align with each other.

The struggle to identify a stable normative baseline in a constantly shifting world is compounded by the fact that there is an ongoing debate concerning the appropriate balance of output and input legitimacy. Buchanan and Keohane, for example, make the case that organizations should possess "minimal moral acceptability, comparative benefit and

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2011). An organization may adopt procedures that appear to make it more procedurally legitimate but in fact have no effect on how the organization operates. The Basel Committee on Banking Supervision sought public comments on its work—it received not comments from the public generally, but rather predominantly received comments from members of the banking industry. Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15, 26 (2006). It may be that an organization masks its lack of legitimacy by association with another organization or group that has legitimacy. Claire R. Kelly, *Institutional Alliances and Derivative Legitimacy*, 29 MICH. J. INT'L L. 605, 646 (2008).

57. See *Financial Crisis: What the World Bank is Doing*, WORLD BANK, <http://www.worldbank.org/financialcrisis/> (last visited Feb. 25, 2011); see also Int'l Monetary Fund [IMF], *World Economic Outlook: Financial Stress, Downturns, and Recoveries* (Oct. 17, 2008). For the Basel Committee's response to the financial crisis, see *Monetary & Financial Stability*, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/bcbs/fincriscomp.htm> (last visited Mar. 6, 2011).

58. Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 154.

59. For example, Professors Ahmed and Potter note that "being awarded consultative status [in the UN] gives NGOs a legitimate place within the political system. This means that the NGO activist is seen as having a right to be involved in the process." AHMED & POTTER, *supra* note 2, at 53.

institutional integrity.”<sup>60</sup> Simon Caney argues that international economic institutions should be judged by a hybrid standard that accounts for persons’ “most fundamental rights” and provides a “fair political framework in which to determine which principles of justice should be adopted to regulate the global political economy.”<sup>61</sup> Daniel Esty suggests adoption of a host of administrative law tools allowing procedural rigor to support “supranational policy making.”<sup>62</sup> It is impossible to say with certainty where the line should be drawn. At best, we can assess whether various groups perceive a particular mix as appropriate. Unfortunately, different audiences may vary in their perceptions<sup>63</sup> as a result of both different measures of whether an organization has met its stated goal (has it been effective) and also different views about the goal itself (what is a worthy goal). World pluralism makes the hope for an objective normative standard impossible.<sup>64</sup>

Third, legitimacy depends in part on accountability, but accountability is an elusive criterion itself. Stakeholders perceive an organization as legitimate when that organization is accountable.<sup>65</sup> Accountability may be to a person (a stakeholder) or an idea (a mission).<sup>66</sup> Accountability to a person is problematic because accountability is audience-dependent

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60. Buchanan & Keohane, *supra* note 19, at 419. Additionally, they would require as necessary conditions that the organizations have the “ongoing consent of democratic states” as well as epistemic virtues to make credible judgments about the needed criteria and the ability to reassess the criteria and “to achieve the ongoing contestation and critical revision of their goals, their terms of accountability, and ultimately their role in a division of labor for the pursuit of global justice, through their interaction with effective epistemic agents.” *Id.* at 432–33; see also Vedder, *Questioning the Legitimacy*, *supra* note 44, at 7.

61. Simon Caney, *The Responsibilities and Legitimacy of Economic International Institutions*, in LEGITIMACY, JUSTICE & PUBLIC INTERNATIONAL LAW 117 (Lukas Meyer ed., 2009).

62. Esty, *supra* note 32, at 1537–42.

63. Vedder, *Questioning the Legitimacy*, *supra* note 44, at 14 (discussing inevitable normative conflict with respect to NGOs).

64. Buchanan & Keohane, *supra* note 19, at 418–22. Buchanan and Keohane identify the problem as the persistence of normative disagreement about “first, what the proper goals of the institution are (given the limitations imposed by state sovereignty properly conceived), second, what global justice requires, and third, what role if any the institution should play in the pursuit of global justice.” *Id.* at 418.

65. Vedder, *Questioning the Legitimacy*, *supra* note 44, at 6–10.

66. BROWN, CREATING CREDIBILITY, *supra* note 45, at 36; Alnoor Ebrahim, *Towards a Reflective Accountability in NGOs*, in GLOBAL ACCOUNTABILITIES: PARTICIPATION, PLURALISM AND PUBLIC ETHICS 193, 195–98 (Alnoor Ebrahim & Edward Weisband eds., 2007); BROWN & JAGADANANDA, *supra* note 47, at 5, 9.

and ever changing.<sup>67</sup> NGOs may also be accountable to a mission, however, missions may sometimes evolve. Although an NGO's mission can be legitimately transformed over time, doing so requires using governance mechanisms that enable a dialogue among stakeholders.<sup>68</sup>

In the NGO context, though, there are almost always multiple parties from whom legitimacy is sought and accountability to all of them will likely be impossible.<sup>69</sup> For this reason, we prefer to assess accountability to mission, rather than accountability to a particular stakeholder.<sup>70</sup> In this sense, accountability means that the organization owes fealty to achieving its particular goals or purpose, i.e., its mission.<sup>71</sup> An organization may have a mission to promote higher education, aid the poor, or provide for the sick. This mission is an abstract principle, informed by, but independent of, who founded the organization, who funds it, who regulates it, and who benefits from it. Indeed if any of those parties change or cease to exist, the mission remains to guide the organization in its decisions. As is discussed more in Part II, domestic nonprofit law regulates this type of accountability.

## II. DOMESTIC NONPROFIT LAW AND NGOS

NGOs have likely been founded in every nation that encourages or tolerates the organized existence of nonprofits.<sup>72</sup> For purposes of this Arti-

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67. Vedder, *Questioning the Legitimacy*, *supra* note 44, at 8 (noting the difficulty of identifying all the stakeholders); *see also* Thomas L. Greaney & Kathleen Boozang, *Mission, Margin and Trust in the Nonprofit Health Care Enterprise*, 5 YALE J. HEALTH POL'Y L. & ETHICS 1, 82 (2005) (noting the multiple stakeholders at issue in nonprofits); Evelyn Brody, *Agents Without Principals: The Economic Convergence Of The Nonprofit And For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457, 465 (1996) (noting that "most state nonprofit laws, perhaps without intending to, create agents without principals").

68. *See* Dana Brakman Reiser, *Filling the Gaps in Nonprofit Accountability: Applying the Club Perspective in the U.S. Legal System*, in VOLUNTARY REGULATION OF NGOS AND NONPROFITS (Aseem Prakash & Mary Kay Gugerty eds., 2010).

69. Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 153.

70. BROWN, CREATING CREDIBILITY, *supra* note 45, at 36 ("Accountability is usually defined in terms of performance for a particular stakeholder . . . . But CSOs have multiple competing stakeholders, so accountability to missions may have to balance against or align the multiple claims of diverse stakeholders.").

71. *See* Dana Brakman Reiser, *Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 U.C. DAVIS L. REV. 205, 212–15 (2004) [hereinafter Brakman Reiser, *Enron.org*].

72. NGOs are nonprofit organizations, but the nonprofit concept embraces a broader range of entities, including everything from private clubs to hospitals to domestic advocacy groups.

cle, however, we narrow this global field to those NGOs that either operate as NSRs themselves, or engage with NSRs in an effort to impact global governance. As Part I explains, NGO accountability is a key factor in understanding how NGO participation can enhance the legitimacy of global regulators. Yet, NGO accountability is regulated, in the first place, on the domestic level by domestic nonprofit law.<sup>73</sup> Many NGOs are formed in North American and European nations,<sup>74</sup> and this Article

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Jurisdictions vary greatly in the extent to which they support and welcome nonprofits. In states like the U.S., NGOs are offered legal personhood, granted rights to association, and provided various tax benefits. See REVISED MODEL NONPROFIT CORPORATION ACT (RMNCA) § 3.02 (1987) (“Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs . . .”); see also *Roberts v. United States Jaycees*, 468 U.S. 609, pt. II (1984) (describing the right of individuals to come together in groups to engage in constitutionally protected expression); I.R.C. §§ 170(c), 501(c)(3) (providing for deductibility of charitable contributions and income tax exemption for organizations with “religious, charitable, scientific, testing for public safety, literary, [ ] educational [and a few other] purposes”).

In other states, NGOs are often seen as suspect, rights to associate suggest potential threats to a ruling regime, and tax benefits may be unavailable. See, e.g., Anil Kumar Sinha & Sapana Pradhan Malla, *Nepal*, in PHILANTHROPY AND LAW IN SOUTH ASIA 45, 50–54 (Univ. of Iowa Legal Studies Research Paper No. 08-13, Mark Sidel et al., May 2008), available at <http://ssrn.com/abstract=1126337> (describing the pattern of restrictions imposed on Nepalese NGOs and their leaders, seemingly intended to discourage their formation and continuation); Kareem Elbayar, *NGO Laws in Selected Arab States*, 7 INT’L J. OF NOT-FOR-PROFIT L. 3, 6 (2005) (noting that Algerian “law does not encourage the formation of NGOs by providing any direct or indirect financial benefits, such as tax exemptions or public utility discounts”); Rebecca Lee, *Modernizing Charity Law in China*, 18 PAC. RIM L. & POL’Y J. 347, 355 (2009) (explaining that China’s government has “welcomed charitable organizations (including international charitable organizations) if they worked with it on issues such as education, health, environment, and culture” but “saw those organizations [involved in political or religious issues] as a source of political instability and suppressed them”) (internal citations omitted).

For a review of the dimensions of the nonprofit sector in various jurisdictions, see 1 GLOBAL CIVIL SOCIETY: DIMENSIONS OF THE NONPROFIT SECTOR (Lester M. Salamon et al. eds., 1999) and 2 GLOBAL CIVIL SOCIETY: DIMENSIONS OF THE NONPROFIT SECTOR (Lester M. Salamon ed., 2006).

73. See Menno T. Kamminga, *What Makes an NGO “Legitimate” in the Eyes of States?*, in NGO INVOLVEMENT, *supra* note 20, at 179.

74. According to The World Association of Non-Governmental Organizations (“WANGO”), there are 22,787 non-governmental organizations listed in North America and 17,630 in the four European regions (including Russia). The number of NGOs recorded in the directory for the rest of the world totals 10,465. *Worldwide NGO Directory*, THE WORLD ASS’N OF NON-GOVERNMENTAL ORGS., <http://www.wango.org/resources.aspx?section=ngodir> (last visited Mar. 18, 2011).

Of course, NGOs formed in one jurisdiction will often have affiliates or branches in others, and particular issues of interest arise when NGOs form related organizations in de-

focuses primarily on nonprofit law in those jurisdictions, especially the U.S. This Part evaluates the content and achievements of domestic nonprofit law enforcement. In doing so, it identifies predictable accountability gaps that threaten the ability of NGOs to play the legitimacy-enhancing role contemplated by NSRs.

*A. Internal Structures for NGO Accountability*

Regardless of their jurisdictional home, all NGOs take some organizational form to provide for decision-making and accountability. Key to all of these structures is some governing organ that is authorized to make decisions on the NGO's behalf. Practically, this governing organ is the ultimate decision-maker for NGOs on most questions. Its accountability is thus pivotal in evaluating the accountability of the organization, and the governing organ is, above all, accountable to the constituency empowered to compose it.

Of course, other constituencies may make or affect important decisions for NGOs. Managers and front-line staff make many day-to-day decisions about how to execute an NGO's purposes and programs. In some forms of organization, members have the right to approve or veto major decisions, and additional rights can be guaranteed to them at the NGO's election. Donors may restrict the funds they contribute to certain uses, thereby significantly influencing an NGO's programmatic decisions. Partner organizations may induce an NGO to move in a particular direction, in order to gain the advantages of affiliation and collaboration—a point that Part III explores in further detail, when considering the complementary role NSRs can play in enforcing NGO accountability. Beneficiaries, clients, and even the public may influence an NGO's actions. Nonprofit law requirements for NGOs' internal governance, however, primarily concentrate on composing and regulating governing organs.

Under various domestic regimes, governing organs may be composed in one of three ways: through election, self-perpetuation, or authorization of some outside appointing authority. Elected governing organs are elected by some constituency of an NGO. Self-perpetuating governing organs may originally be composed through selection by a donor or a founder. Once vacancies arise, however, the self-perpetuating organ itself selects new members. In the third case, an individual or an entity outside the formal confines of the NGO selects members of the governing organ, either in certain situations or always.

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veloping countries in which they operate. The legal impacts of the law of these jurisdictions are in part addressed by other papers in this Symposium.

These governance structures provide for internal enforcement of accountability within an NGO, but are often quite weak. For example, U.S. law requires NGOs forming as nonprofit corporations to seat a board of directors, but NGOs may choose to make this governing organ either elected or self-perpetuating.<sup>75</sup> Self-perpetuating boards, however, are the default.<sup>76</sup> Directors in a self-perpetuating nonprofit corporate board are bound by their fiduciary obligations of care and loyalty in all of their directorial actions, including nominating and selecting replacement directors.<sup>77</sup> These decisions, however, are virtually unreviewable.<sup>78</sup> Alternatively, an NGO may form as a U.S. nonprofit corporation and expressly opt to create a voting membership empowered to vote for directors.<sup>79</sup> The level of accountability enforcement by a voting membership depends on how it is constituted. When institutional membership is used to connect nonprofits in a system or federation,<sup>80</sup> a voting membership structure is

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75. See, e.g., RMNCA § 8.04 (allowing for an alternative “method of election” or appointment).

76. See, e.g., RMNCA § 8.04(b).

77. See, e.g., RMNCA § 8.30(a); see also PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS § 300 (Tentative Draft No. 1, 2007) [hereinafter PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS] (identifying nonprofit fiduciaries’ duties of care and loyalty).

78. Only gross negligence or naked self-interest infecting the nomination and appointment process would likely disturb these personnel decisions. See Michael W. Peregrine & James R. Schwartz, *The Business Judgment Rule and Other Protections for the Conduct of Not-for-Profit Directors*, 33 J. HEALTH L. 455, 456 (2000). Standing to challenge them is limited. See Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655, 657–58 (1998).

79. The NGO must draft bylaws identifying the criteria by which membership will be determined. See, e.g., RMNCA § 6.01. Members may be individual natural persons or institutions. See, e.g., RMNCA §1.40 (21), (25).

80. For example, a voting membership structure may be used to make a parent nonprofit the sole member of a subsidiary nonprofit or nonprofits, consolidating the parent’s authority and empowering it to appoint the subsidiary’s board. See Dana Brakman Reiser, *Decision-Makers Without Duties: Defining the Duties of Parent Corporations Acting as Sole Corporate Members in Nonprofit Health Care Systems*, 53 RUTGERS L. REV. 979, 988–94 (2001) (describing this structure); see also Robert P. Borsody, *Parent-Subsidiary Relationship of Not-for-Profit Corporations Raises Official Oversight Issues*, N.Y. ST. BAR J. 20, 20 (2004) (similarly describing this structure). Alternatively, national, regional, or local chapters of a nonprofit might be made institutional members of an international umbrella nonprofit, providing them with a means to voice concerns and impact the umbrella organization’s policy choices. See, e.g., Amended and Restated Bylaws of United Way Worldwide, approved May 13, 2009, available at [http://liveunited.org/page/-/UWWbylaws\\_Approved-2009.pdf](http://liveunited.org/page/-/UWWbylaws_Approved-2009.pdf) (providing for institutional members that elect the entity’s governing organ).



more likely to be a significant force in maintaining the NGO's accountability.

In contrast, if an NGO empowers natural persons as voting members, it usually designates nominal financial or voluntary labor contributions as membership criteria. Concerned members could expend resources investigating how an NGO's board is pursuing and evolving organizational mission, following the strictures of organizational form, and stewarding the NGO's resources. If dissatisfied, these same members could turn out or threaten to turn out a board of directors as a result of its failures. In return for a member's efforts in monitoring and governing an NGO, she receives only the psychic benefits of seeing the NGO make some headway towards its goals. For a rational member to expend the real resources of time and money in obtaining and digesting information needed to diagnose potential accountability failures and advocating for organizational change informally or through a formal director election or removal process, this benefit would have to be substantial.<sup>81</sup> Rational apathy makes it unlikely that individual members will play an active role in policing and disciplining the board.

Furthermore, individual members are also subject to serious and substantial collective action problems. A single member's action is likely ineffective; she must motivate her fellow members to join her to effect a real difference on the board. A member must be well-resourced, extremely committed, charismatic, and perhaps lucky to make this work. Defecting to another organization that is better managed or more closely aligned with the member's vision of the good, or settling for somewhat less than optimal accountability are both likely more attractive courses, as is free-ridership. Although members may also be empowered to pursue accountability of their directors through litigation, this route imposes even greater costs. In the U.S. context, members simply cannot be relied upon to take the initiative in policing accountability—even if the organizational structure provides for members. It must always be borne in mind that in the U.S., an elected board is the exception, not the rule. In other jurisdictions, for NGOs structured as organizations with a required voting membership, perhaps members could play a more consistent monitoring and enforcing role.<sup>82</sup>

The governing organ of a charitable trust, a single trustee or group of trustees, also may be empowered to self-perpetuate. The charitable trust

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81. See Dana Brakman Reiser, *Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits*, 82 OR. L. REV. 829, 859–62 (2003).

82. For a discussion of European NGO form, see *supra* notes 88–94 and accompanying text.

form is available to NGOs that are organized in the U.S., United Kingdom, and other common law jurisdictions.<sup>83</sup> In the U.S., the trust form is more commonly used by grant-making, rather than operating charities,<sup>84</sup> but NGOs organized primarily to disburse funds to service-providers in international settings may well take this form.<sup>85</sup> The document creating a charitable trust will often name the initial trustee or trustees and provide a line of succession, process for filling vacancies, or both. If the trust document empowers incumbent trustees to name their successors, internal governance adds little to the enforcement of NGO accountability. That said, when planned techniques for filling trustee roles run out or fail, courts are empowered to select new trustees for charitable trusts.<sup>86</sup> The outside chance that a government official may, at some future time, appoint new trustees is likewise unlikely to be a powerful force in enforcing NGO accountability.

The two main nonprofit forms of organization for NGOs in European nations with a civil law tradition differ primarily along the fault lines of internal governance structure. NGOs organized in these states may utilize the association or the foundation form.<sup>87</sup> Both contemplate a board of directors as a governing organ,<sup>88</sup> but in an association, members elect directors and make other major decisions for the nonprofit, while in a foundation, there are no members.<sup>89</sup> The foundation's founder is empow-

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83. See RESTATEMENT (THIRD) OF TRUSTS § 27 (2007); see also Hubert Picarda, *Harmonizing Nonprofit Law in the European Union: An English Perspective and Digest*, in COMPARATIVE CORPORATE GOVERNANCE OF NON-PROFIT ORGANIZATIONS 170, 184 (Klaus J. Hopt & Thomas von Hippel eds., 2010) [hereinafter COMPARATIVE CORPORATE GOVERNANCE]; *Choosing and Preparing a Governing Document*, UK CHARITY COMM'N (Apr. 2008), <http://www.charity-commission.gov.uk/Publications/cc22.aspx#5> (describing the charitable trust as one form of organization available to those forming charities).

84. See JACK B. SIEGEL, A DESKTOP GUIDE FOR NONPROFIT DIRECTORS, OFFICERS AND ADVISORS 25 (2006).

85. See KERRY O'HALLORAN, CHARITY LAW AND SOCIAL INCLUSION: AN INTERNATIONAL STUDY 59–60 (2007).

86. See RESTATEMENT (THIRD) OF TRUSTS § 34(2).

87. See Klaus J. Hopt, *The Board of Nonprofit Organizations: Some Corporate Governance Thoughts from Europe* 5 (Eur. Corp. Governance Inst., Working Paper No. 125/2009, 2009), available at <http://ssrn.com/abstract=1425670>.

88. This board can go by varying names by jurisdiction; indeed, in some civil law countries, dual boards may be an option, with a board of directors and a supervisory board. See, e.g., Katrin Deckert, *Nonprofit Organizations in France*, in COMPARATIVE CORPORATE GOVERNANCE, *supra* note 83, at 303–07; Tymen J. Van der Ploeg, *Nonprofit Organizations in the Netherlands*, in COMPARATIVE CORPORATE GOVERNANCE, *supra* note 83, at 245. Still, however many boards there are, boards will be the governing organ to consider. See *id.* at 244.

89. Association law actually frequently points to the membership, acting together in a general meeting or general assembly, as the ultimate authority for the nonprofit. See

ered to select from various options for constituting the board going forward.<sup>90</sup> For example, the founder of a German foundation may set the number of directors and the process for their appointment, which may include self-perpetuation.<sup>91</sup> Alternatively, the founder may opt to retain power over appointment of board members.<sup>92</sup> Notably, in the Netherlands, the founder is permitted to empower some group or body to appoint members of the board, though this group cannot be made the ultimate authority of the organization, as in an association.<sup>93</sup>

Whether the association/foundation distinction makes a real difference for the internal enforcement of accountability is debatable. Association law frequently points to the membership, acting together in a general meeting or general assembly, as the ultimate authority for the nonprofit.<sup>94</sup> In addition, it is the membership who must elect, and can therefore unseat, the governing organ. That said, a general meeting made up of natural persons with only a psychic or nominal connection to the NGO unlikely operates as a consistent and substantial internal check on accountability. Likewise, when a foundation board self-perpetuates, they appear accountable only to themselves, and when a founder retains appointment power, she may be more likely to enforce accountability, but may do so with a decided bias toward her own view of the foundation's proper course or even in her own financial favor.

Finally, it is important to note that even governing organs that appear to be elected may actually be self-perpetuating. This occurs if a nonprofit takes a form of organization requiring members to elect the governing organ, but in fact defines the directors or others composing the governing organ as the only membership constituency.<sup>95</sup> When the members then

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Thomas von Hippel, *Nonprofit Organizations in Germany*, in *COMPARATIVE CORPORATE GOVERNANCE*, *supra* note 83, at 214 [hereinafter Thomas von Hippel, *Nonprofits in Germany*]. As the general meeting is hardly ongoing, though, the board will be the place where the practical "buck stops" for most decisions.

90. These options vary by jurisdiction, but all states require the selected option to be clearly stated in the foundation's constitution or charter. *See, e.g., id.* at 215; Kateřina Ronovská, *Nonprofit Organizations in the Czech Republic*, in *COMPARATIVE CORPORATE GOVERNANCE*, *supra* note 83, at 402.

91. *See* Thomas von Hippel, *Nonprofits in Germany*, *supra* note 89, at 215.

92. *Id.*

93. *See* Van der Ploeg, *supra* note 88, at 234.

94. *See* Thomas von Hippel, *Nonprofits in Germany*, *supra* note 89, at 214.

95. *See* MARION FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS* 159 (2004); *see also* Greyham Dawes, *Charity Commission Regulation of the Charity Sector in England and Wales*, in *COMPARATIVE CORPORATE GOVERNANCE*, *supra* note 83, at 890 (noting this situation in "many charitable companies").

vote for directors, they vote in their membership capacity, but in fact vote for themselves or their own successors.

Across these organizational forms, internal governance structures speak to the question of accountability of a governing organ. None of them, however, provide for very strong internal enforcement of NGO accountability. The next Section considers the additional accountability enforcement provided by various external actors in the domestic context.

### *B. External Enforcement of NGO Accountability under Domestic Non-profit Law*

Various external actors are also empowered to enforce NGO accountability under domestic nonprofit law. Domestic nonprofit law focuses on how an NGO's governing organ is pursuing its mission,<sup>96</sup> whether it is doing so by efficiently deploying its assets and resources, and if it is a legitimately and effectively managed organization.<sup>97</sup> These responsibilities are fundamental to running a legitimate and successful NGO.<sup>98</sup> They also can be traced to a variety of legal doctrines and requirements. Yet, the ability of external actors to enforce these expectations of governing organs varies considerably. Mission, financial, and organizational accountability will not be equally enforced by external actors in a single jurisdiction, and the strength and focus of nonprofit enforcement also may vary across jurisdictions. This Subpart takes the U.S. as its primary example, explaining how external regulators variably enforce these different elements of NGOs' obligations.

#### 1. Mission Accountability

The ultimate responsibility of nonprofits and their leaders is to achieve their missions. As an obligation to an abstract ideal, rather than a set of particular individuals, though, mission accountability is difficult to track and enforce. To do so, one first needs to know how and where a nonprofit's mission is articulated. Nonprofit law can be of some assistance here, as it generally requires the formulation of a statement of purpose in the organization's formative documents.<sup>99</sup> This purpose statement, however,

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96. See Dana Brakman Reiser, *Charity Law's Essentials*, 86 NOTRE DAME L. REV. 1, 2 (2011) [hereinafter Brakman Reiser, *Charity Law's Essentials*]; see also Greaney & Boozang, *supra* note 67, at 80–87 (articulating a view of nonprofit law based on “mission primacy”).

97. See Brakman Reiser, *Enron.org*, *supra* note 71, at 209–10.

98. See BROWN & JAGADANANDA, *supra* note 47, at 5–6, 9, 39.

99. See, e.g., RMNCA § 2.02(b)(1); RESTATEMENT (THIRD) OF TRUSTS §§ 27, 28; GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT & AMY MORRIS HESS, *THE LAW OF TRUSTS AND TRUSTEES* § 323 (3d ed. 2000).

may be quite general, such as an organization formed for “religious” or “educational” purposes. When little is documented, the mission of a nonprofit is articulated over time, as the nonprofit makes statements to donors, regulators, beneficiaries, and the public, and as it undertakes programs and activities that speak to its purposes.<sup>100</sup> In the NGO context, consider a nonprofit incorporated in the U.S., formed to secure a fair, safe, and sustainable future for consumers. The purpose clause in its articles might state that it is formed to “protect consumers from deceptive practices.” This purpose clause is narrower than the mission described above, but is far from unambiguous. Governing organ approved appeals to donors, describing its work as focused on deceptive and fraudulent practices in the U.S. food industry, provides further clarification.

The task of tracking mission accountability is made even more difficult by the fact that the missions of nonprofits, including NGOs, can legitimately evolve over time. These entities are often given perpetual life, among other benefits, in return for the perceived good they generate for society. So, nonprofits must continue to change over time to better address the issues they were formed to resolve, or move on to new issues as times and circumstances change to make them more salient. This ability to change course and innovate is, in fact, one of the strengths of the nonprofit sector.<sup>101</sup> Recall our consumer protection NGO. Perhaps it begins its work in the U.S. food industry, focusing its efforts there for fifteen years. If it is successful with these efforts, the NGO’s governing organ might consider beginning an advocacy effort to national governments and even international organizations, to rid the world of deceptive practices that defraud consumers. This might be an addition to its work in the food industry or in the United States. Alternatively, it might be a complete change of course from exposing fraud to rooting out corruption or setting standards. If the governing organ undertakes any of these courses, who will evaluate their decision for faithfulness to the nonprofit’s mission? And, using what baseline?

These are challenging issues, and unfortunately, the obligations and enforcement architecture imposed by domestic nonprofit law is likely to

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100. See PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS, *supra* note 77, at 126 (describing the gap between mission and purposes).

101. See *id.* at 126 (noting the need for charitable mission to evolve over time); see also FREMONT-SMITH, *supra* note 95, at 225–26 (asserting that charitable trust fiduciaries also have obligations to ensure mission continues to address “contemporaneous needs”). See generally Dana Brakman Reiser, *Nonprofit Takeovers: Regulating the Market for Mission Control*, 2006 BYU L. REV. 1181, 1240–41 and accompanying notes (describing the value of nonprofits in providing innovation and transforming to address new issues and concerns).

be of little assistance. For example, in the U.S., where the key regulators are state attorneys general (“AGs”) and the federal Internal Revenue Service, public enforcement of mission accountability is likely to be low. First, the authority and tools with which these regulators are equipped are ill-suited to enforcing mission accountability. State AGs have the closest to plenary power to regulate nonprofits organized in their jurisdictions, but their mandates generally speak in terms of safeguarding charitable assets.<sup>102</sup> Further, while AGs typically have at their disposal a wider range of enforcement tools, they work primarily through litigation and its attendant processes of investigation, along with imposing disclosure requirements, the results of which they have limited resources to mine.<sup>103</sup>

Limited legal, financial, and human resources and practical concerns about their political futures lead U.S. state AGs to limit their involvement in enforcing mission accountability. They are most likely to raise or respond to mission accountability challenges when they become extreme, such as when the doctrine of *cy pres* must be invoked in court to permit the change of purpose to which a charitable trust’s assets have been dedicated.<sup>104</sup> This doctrine applies by its terms only to assets impressed with a charitable trust, though it has been applied to incorporated nonprofits looking to change the use of restricted gifts<sup>105</sup> and analogically to address more general issues of mission change.<sup>106</sup> The apocryphal example here is a home for abandoned animals morphing into a vivisectionist socie-

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102. See Brakman Reiser, *Enron.org*, *supra* note 71, at 219–20 & n.49.

103. See *id.* at 227.

104. See RESTATEMENT (THIRD) OF TRUSTS § 67 (explaining that a court may apply *cy pres* where property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose, or to the extent it is or becomes wasteful to apply all of the property to the designated purpose); see also John Eason, *Motive, Duty, And The Management Of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123, 128–38 (2010) (explaining current *cy pres* doctrine as a preface to advocating its reform in the context of restricted gifts).

105. See, e.g., UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT (UPMIFA) § 6(c) (applying *cy pres* concept to restricted funds held by incorporated nonprofits); RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. A. See generally Evelyn Brody, *From The Dead Hand To The Living Dead: The Conundrum Of Charitable Donor Standing*, 41 GA. L. REV. 1183, 1206–12 (2007) [hereinafter Brody, *Dead Hand or Living Dead*] (discussing the confused nature of case law addressing standing and the merits in cases involving change of use for restricted gifts to incorporated charities); Eason, *supra* note 104 (criticizing this maneuver and advocating reform).

106. For a review of state court cases using trust law concepts to address mission change by nonprofit healthcare corporations, see Greaney & Boozang, *supra* note 67, at 54–72.

ty.<sup>107</sup> Less extreme changes of purpose are unlikely to be targeted by AGs, wary of wasting their enforcement resources or engaging in a battle with well-heeled nonprofit boosters who may be attractive donors to a race for the governorship.<sup>108</sup>

Moreover, with any public regulator enforcing mission accountability, there are potential overtones of unconstitutional state action. If public regulators become overly involved in interpreting and managing the evolution of an NGO's mission, they might well impose upon the associational or expressive rights of these organizations. No less troubling, public regulators aggressively enforcing mission accountability might directly, or through a chilling effect, push NGOs to pursue only those courses that are in line with some government administration's views on appropriate development, trade, or other policies.<sup>109</sup> In some other jurisdictions, domestic nonprofit law provides public regulators a greater role in policing mission accountability. For example, the UK Charity Commission was recently empowered to focus more deeply and closely on the purpose and public benefits provided by UK charities.<sup>110</sup> After undertaking assessments at a number of charities, the Commission found that several did not adequately pursue public benefits and worked with the charities to restructure their activities to comply with the public benefit requirement.<sup>111</sup> Of course, governmental authorities inclined to use nonprofit regulation to further political agendas and dampen opposition could also deploy the power to approve and review the purpose of nonprofits to these ends.<sup>112</sup>

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107. See *Attorney General v. Hahnemann Hosp.*, 397 Mass. 820, 836 n.18 (1986) (hypothesizing such an example in a case regarding change in use of donated funds).

108. See Evelyn Brody, *Whose Public? Parochialism And Paternalism In State Charity Law Enforcement*, 79 IND. L.J. 937, 946 (2004) (Political cynics believe that "A.G." stands not for "attorney general" but for "aspiring governor.").

109. Shades of such argument have arisen in claims by Z Street, a pro-Israel group that is suing the IRS, claiming its exemption application is being delayed to determine the alignment of its mission with administration policies in the Middle East. See Grant Williams, *Pro-Israel Group Says IRS Plays Politics*, CHRON. PHILANTHROPY, Sept. 6, 2010. The IRS declined to comment on the issue, noting only that it must subject applications by groups with overseas activities to special review. See *id.*

110. See UK CHARITIES ACT 2006 §§ 1–3 (providing that all UK charities must pursue charitable purposes, defined in the statute, and public benefit, on which the Charities Commission is directed to issue guidance).

111. *The Public Benefit Assessment Reports*, CHARITY COMM'N (July 2010), [http://www.charitycommission.gov.uk/Charity\\_requirements\\_guidance/Charity\\_essential\\_s/Public\\_benefit/pbassesreports.aspx](http://www.charitycommission.gov.uk/Charity_requirements_guidance/Charity_essential_s/Public_benefit/pbassesreports.aspx).

112. See, e.g., Mark Sidel, *Maintaining Firm Control: Recent Developments in Nonprofit Law and Regulation in Vietnam*, 12 INT'L J. NOT-FOR-PROFIT L. 52 (2010). Note that some critics of the new "public benefit" test applied under the UK Charities Law of

Regulators are certainly not the only avenue for external enforcement of an NGO's mission accountability. Private parties, such as donors, employees, partner organizations, beneficiaries, and citizens more broadly may care deeply about the accountability of an NGO to its mission. None of these potential groups of private enforcers, however, can effectively police NGOs' mission accountability alone.

Donors might be especially motivated to police the mission accountability of NGOs' governing organs. They have, after all, staked not only their hopes, but their fortunes on a recipient NGO's mission. Perhaps this would give them a greater incentive to monitor and enforce mission accountability. For small donors, similar collective action problems to those plaguing individual members are likely to limit mission accountability enforcement. But large, repeat, or institutional donors might overcome these problems because they are more heavily invested in the NGO's mission and have greater resources to allocate to accountability enforcement, or both. Under U.S. law, however, donors are not granted significant legal authority to enforce nonprofit accountability, to mission or otherwise. Other than what they negotiate by contract, which again suggests that large, repeat, or institutional donors are the key players here, donors do not have rights to access donee information, or to participate in selecting a donee's governing organ, or standing to sue members of that governing organ for fiduciary breach.<sup>113</sup> This is not to suggest that donors are impotent to impact and monitor NGOs' mission. In fact, the potential for donors' outsized influence over NGOs is noted in the literature.<sup>114</sup> But this influence is of practical, not legal, origin. Just two of many examples of this are when a large donor becomes a board member as a result of her donation or when a historically large donor pressures directors to pursue her unique vision or risk losing access to anticipated future contributions. The role for donors can differ across jurisdictions of course; as noted earlier, some European regimes bestow significant legal authority on founders of foundations. In the U.S. model, though, donors have little, if any, legal authority to enforce mission accountability.

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2006 worry that this test might be just so inappropriately used. *See, e.g.,* Picarda, *supra* note 83, at 180–81.

113. *See* FREMONT-SMITH, *supra* note 95, at 324–42 (2004) (noting general restrictions on standing outside of the attorney general, but sometimes successful suits by donors alleging breaches of gift terms); *see also* Brody, *Dead Hand or Living Dead*, *supra* note 105, at 1187–88.

114. *See, e.g.,* L. David Brown & Mark H. Moore, *Accountability, Strategy, and International Nongovernmental Organizations*, 30 *NONPROFIT & VOLUNTARY SECTOR Q.* 569, 576 (2001) (noting that “[d]ependence for financial support on contributors creates some important accountability dilemmas for INGOs”).



Likewise, while the legal enforcement resources of employees and partner organizations are extremely limited, their practical influence can be significant, even problematically so. For example, the executive director and other top level managers of a nonprofit often provide the governing organ with its only source of information on the problems it seeks to ameliorate, the progress of the organization on the ground, the activities of other organizations in the field, etc. In addition, powerful nonprofit CEOs often research and suggest candidates for the governing body.<sup>115</sup> This power to manage the information a governing organ receives as well as its personnel can give high level employees significant power to frame a governing organ's agenda and influence its decisions. The power of staff can be so overwhelming as to up-end the conceptual ideal of the governing organ as a nonprofit's ultimate decision-maker.<sup>116</sup> These are serious problems that should not be underestimated and should be targeted, but they are not based on employees' legal authority. In fact, the only authority that employees may have to influence a nonprofit's governing organ under U.S. law is access to the rarely granted category of "special interest" standing to allege fiduciary breach.<sup>117</sup> The legal influence of partner organizations is likewise limited, though they may have significant practical sway that might be bolstered, as suggested in Part III, in an NGO's boardroom.

NGOs' beneficiaries or the average citizen tend to engage in even less enforcement of mission accountability. They have occasionally been granted special interest standing to challenge actions by a governing organ.<sup>118</sup> As noted above, however, the use of this doctrine is very rare. Individuals from either group could also choose to fund public regulatory

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115. "[S]trong or long-serving CEOs may gain significant influence in the selection of board members, in effect choosing their own bosses." MICHAEL J. WORTH, *NONPROFIT MANAGEMENT: PRINCIPLES AND PRACTICES* 64 (2009).

116. See Evelyn Brody, *Accountability and the Public Trust*, in *THE STATE OF NONPROFIT AMERICA* 471, 486 (Lester M. Salamon ed., 2002) [hereinafter Brody, *Accountability and the Public Trust*] (citing and quoting Peter Dobkin Hall's concern about "professionalization of nonprofit managers as 'a sort of Trojan horse' [] tending to shift policymaking from the governing board to the staff").

117. See FREMONT-SMITH, *supra* note 95, at 328–29 (2004); see also Mary Grace Blasko, Curt S. Crossley, & David Lloyd, *Standing To Sue In The Charitable Sector*, 28 U.S.F. L. REV. 37 61–78 (1993) (describing the elements courts consider in granting or denying special interest standing).

118. See FREMONT-SMITH, *supra* note 95, at 329–34 (reviewing various cases, though noting the greater number of cases where claims were denied for lack of standing).

action as a relator<sup>119</sup> in those states where this status is available.<sup>120</sup> Of course, they could attempt to influence an NGO by informal or media pressure. But these groups suffer even more acutely the same collective action problems described with respect to members and donors above.

Aside from the lack of legal enforcement tools and practical resources needed for private external enforcers to police nonprofit mission accountability under U.S. law, each identified group suffers from a more fundamental problem in playing this role: bias. Donors, employees, partner organizations, beneficiaries, and the public (as well as members, where they exist) are all potentially legitimate stakeholders of an NGO. In order to responsibly steward its mission, a nonprofit's governing organ must consider and balance the concerns of its various constituencies, rather than favoring the desires of one individual or group.<sup>121</sup> This problem is not unique to the U.S. legal system, and is fundamental to creating a real response to mission accountability.

Thus, for an NGO to be truly accountable to mission, it must provide for a dialogue on that mission among an array of stakeholders. This dialogue is important in making various levels of decisions for the NGO, but is most vital if considering mission change. As noted earlier, nonprofits are deemed deserving of many of the special benefits they receive in large part because they can evolve over time to address changing needs. So, mission can and should legitimately be transformed over time. To transform mission legitimately, an NGO must activate the internal governance structures supplied by its organizational form, as well as other means, to enable a dialogue among stakeholders.<sup>122</sup> Looking to only one set of important NGO constituencies to make these decisions, just as looking to it to enforce mission accountability, is inherently biased and insufficient.

To summarize, mission accountability is fundamental to an NGO's legitimacy as an entity, but domestic nonprofit law provides relatively little content and external enforcement of this vital attribute. In the U.S., relatively weak public enforcement is, in part, an unintended consequence of the shape of regulators' authority and, in part, a deliberate attempt to separate the government and the nonprofit sector for constitutional and policy reasons. Some other nations are more willing to address mission accountability directly, but still cannot fully enforce mission accountabil-

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119. *See id.* at 325 (explaining that a relator is a member of the public who may be "authorized by the attorney general to bring [] suit" to enforce the obligations of a charity or its fiduciaries).

120. *See id.*; Blasko et al., *supra* note 117, at 49–50.

121. *See* Brakman Reiser, *Charity Law's Essentials*, *supra* note 96, at 11.

122. *See id.*

ity in a vibrant nonprofit sector. Monitoring mission at every turn would require regulators to devote vast resources and would diminish NGOs' ability to innovate in a sphere separate from government influence.<sup>123</sup> Some governments might effectively constrain deviation from mission by carving out only an extremely narrow space for NGOs to operate. This approach, however, undermines the ability of these organizations to achieve development, human rights, and harmonization goals. Furthermore, as just one stakeholder, regulators cannot be the sole voice in judging mission accountability.

Private enforcers are likewise unequipped by nonprofit law to police mission accountability from the outside. Many important nonprofit constituencies lack legal authority over an NGO's governing organ, suffer severe collective action problems, or both. Finally, again, a single empowered stakeholder group can never be a complete solution; authorizing any group to demand priority in accountability necessarily undermines other constituencies. A dialogue among stakeholders is necessary.

## 2. Organizational Accountability

The dialogue over mission accountability is partly structured by reference to the governance architecture an organizational form puts in place. Governance arrangements, of course, do more than provide a means to mission accountability. They are also instruments useful for maintaining financial accountability.<sup>124</sup> Moreover, close observation of governance structures has inherent value, by reinforcing an NGO's position as a legitimate organization, not merely some personal fiefdom of a donor or leader. Organizational accountability measures how fully an NGO utilizes its governance and operational structures and is of particular importance to NGOs seeking legitimacy as actors or representatives on the world stage.

Domestic nonprofit law provides significant guidance here. As discussed above, each organizational form offered to nonprofit organizations by a particular jurisdiction puts in place default structures for governance. For example, in the U.S., an incorporated NGO must have a board of directors, though it may and likely will be self-perpetuating.<sup>125</sup> The board must hold meetings composed of a quorum and vote on its

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123. Cf., Lloyd Hitoshi Mayer, *The "Independent" Sector: Fee-For-Service Charity And The Limits Of Autonomy* 18–20 (Notre Dame L. Sch., Legal Studies Research Paper No. 10–21, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1666421](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666421) (describing the importance of charitable autonomy to performing its valuable roles in the economy and society).

124. See *infra* Part II.B.3.

125. See, e.g., RMNCA §§ 6.03, 8.04.

decisions.<sup>126</sup> In their votes as in all other directorial actions, directors are bound by their fiduciary obligations.<sup>127</sup> Boards are also authorized to form committees, and to delegate certain matters to them.<sup>128</sup> In an NGO formed using one of the European associational forms, general meetings of members must be held, and certain decisions, including director elections, are made by these members.<sup>129</sup>

Of course, there are numerous rules and proposals that would make these structures more demanding. A few U.S. jurisdictions impose not only the requirement of a board for incorporated nonprofits, but that a majority of the directors serving on that board be “independent.”<sup>130</sup> A U.S. Senate committee’s staff recently proposed capping the number of directors, and commentators and best practice guides cite the need for an independent board of a workable size.<sup>131</sup> Critics also argue against control of a nonprofit by a single-member governing organ.<sup>132</sup> Several scholars warn against borrowing of fiduciary standards from the for-profit realm for nonprofit directors, regardless of whether those directors are independent. In one recent example, Professor Leslie argues that a nonprofit director should be allowed to deal with her organization only when the deal she provides is better, and not just equal, to what the nonprofit could obtain on the open market.<sup>133</sup> Some regulators press for greater

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126. See, e.g., RMNCA § 8.24.

127. See, e.g., RMNCA § 8.30.

128. See, e.g., RMNCA § 8.25.

129. See, e.g., Van der Ploeg, *Nonprofit organizations in the Netherlands*, in *COMPARATIVE CORPORATE GOVERNANCE*, *supra* note 83 at 244–45.

130. See, e.g., ME. REV. STAT. ANN. Tit. 13-B, § 713A(2) (2005) (allowing only forty-nine percent of a public benefit corporation’s board to be “financially interested persons”); N.H. REV. STAT. ANN. § 292:6a (requiring a minimum of a five-member board, none of which are related to each other); RMNCA § 8.13 (optional section, similar to Maine’s). For critiques of the independent director imperative, see Kathleen Boozang, *Does An Independent Board Improve Nonprofit Corporate Governance?*, 75 TENN. L. REV. 83 (2007); Dana Brakman Reiser, *Director Independence in the Independent Sector*, 76 FORDHAM L. REV. 795 (2007).

131. STAFF OF S. FIN. COMM., 108TH CONG., STAFF DISCUSSION DRAFT 13, available at <http://finance.senate.gov/imo/media/doc/062204stfdis.pdf>; PANEL ON THE NONPROFIT SECTOR, STRENGTHENING TRANSPARENCY GOVERNANCE ACCOUNTABILITY OF CHARITABLE ORGANIZATIONS 75–77 (2005) [hereinafter PANEL ON THE NONPROFIT SECTOR].

132. See PANEL ON THE NONPROFIT SECTOR, *supra* note 131, at 75–77; see also Evelyn Brody, *Charity Governance: What’s Trust Law Got To Do With It?*, 80 CHI.-KENT L. REV. 641, 672 (noting that “single-director and single-trusteed charities seem to invite failures of proper independence and protection of the public interest”).

133. Melanie B. Leslie, *The Wisdom Of Crowds? Groupthink and Nonprofit Governance*, 62 FLA. L. REV. 1179, 1224 (2010).

disclosure by nonprofits.<sup>134</sup> There is certainly room to argue about the proper content of governance requirements imposed on nonprofits. Indeed, the simple diversity of structures and standards applied across forms and jurisdictions suggests the variety of opinions on this matter, or perhaps the idea that the sector is too heterogeneous for a single form. That debate is beyond the scope of this Article. For present purposes, the fact remains that domestic nonprofit law has much to say about how an NGO should be governed and operated, and these organizations can and should be judged by their fidelity to those rules and standards.

This judgment may take place, however, only to a limited degree. Again, external enforcement is the key question, and enforcement of organizational accountability on its own is often limited. Consider again the U.S. example where public regulators have the authority to police organizational accountability. If an NGO's governing organ does not follow the structures of governance provided by state law, state AGs may sue for failure to obey the law, for breach of the fiduciary duty of care, or both.<sup>135</sup> Of course, state AGs have inadequate resources to pursue every nonprofit accountability lapse.<sup>136</sup> AGs must prioritize and do so in cases where failures to follow governance requirements leads to misuse of nonprofit funds or misleading donors. Remedying gaps in governance alone is like preventive medicine—important in the long run, but difficult to devote scant resources to in the short run. A few state AGs have taken laudable steps to train members of the nonprofit sector about the need for governance and other operational controls.<sup>137</sup> Still, public enforcement action for failure to observe these controls is rare when no charitable funds have been lost or donors disappointed.<sup>138</sup> The recent governance initiative by federal tax regulators could be a step in the di-

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134. See, e.g., Dana Brakman Reiser, *There Ought to Be a Law: The Disclosure Focus of Recent Legislative Proposals for Nonprofit Reform*, 80 CHI.-KENT L. REV. 559, 568–80 (2005) (reviewing disclosure focus of post-Sarbanes-Oxley nonprofit reform proposals).

135. See, e.g., RMNCA § 8.30.

136. See FREMONT-SMITH, *supra* note 95, at 352 (noting this lack of resources and collecting sources); see also Brody, *Accountability and the Public Trust*, *supra* note 116, at 479 (similarly noting this lack of resources and collecting sources); Lloyd Hitoshi Mayer & Brendan M. Wilson, *Regulating Charities in the 21st Century*, 85 CHI.-KENT L. REV. 479, 494–95 (describing lack of resources and other factors that motivate under-enforcement of charity governance regulations).

137. See FREMONT-SMITH, *supra* note 95, at 448.

138. See Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1440–42 (1998) (asserting that AGs infrequently prosecute lapses of care in cases without simultaneous lapses of loyalty).

rection of more organizational accountability enforcement for its own value;<sup>139</sup> time will tell.

Public regulators of other types in different jurisdictions may engage in more organizational accountability enforcement. The UK Charity Commission has the authority to remove members of the governing organ, to direct application of charity property, and to make inquiries regarding whether a nonprofit is meeting the public benefit requirement.<sup>140</sup> It also engages in substantial guidance, including publication of model documents, posting of outcomes in regulatory interventions, and answering questions for nonprofit fiduciaries and employees.<sup>141</sup> The Commission often takes a collaborative, rather than adversarial, tone toward its regulatory projects.<sup>142</sup> All of these efforts could lead to greater pure organizational accountability enforcement and provide guidance for nonprofit leaders on how to self-enforce in this area. Resources, though, remain limited. If pressed to choose between undertaking regulatory action against a charity whose organizational accountability lapses lead to losses of financial resources or donor confidence, or against a charity with disorganized operations but no current lapses in outcomes, even a regula-

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139. See James J. Fishman, *Stealth Preemption: The IRS' Corporate Governance Initiative*, 29 VA. TAX REV. 545, 558–78 (2010) [hereinafter Fishman, *Stealth Preemption*] (describing the various IRS initiatives aimed at improving exempt entities' corporate governance). Although beyond the scope of this Article, it is worthy of note that Professor Fishman subjects this initiative to serious criticism on federalism grounds, and the debate over its propriety is ongoing. See *id.*

140. See UK CHARITIES ACT 2006 §§ 2(1), 19–21; *Charities and Public Benefit*, UK CHARITIES COMM'N (Jan. 2008), [http://www.charitycommission.gov.uk/Charity\\_requirements\\_guidance/Charity\\_essentials/Public\\_benefit/public\\_benefit.aspx#h](http://www.charitycommission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/public_benefit.aspx#h) (describing the Commission's enforcement of the public benefit requirement on new and existing charities); see also Picarda, *supra* note 83, at 194; Richard Fries, *The Charity Commission for England and Wales in COMPARATIVE CORPORATE GOVERNANCE*, *supra* note 83, at 908.

141. See *Providing Information, Advice and Legal Consent*, UK CHARITIES COMM'N, [http://www.charitycommission.gov.uk/About\\_us/Regulation/Providing\\_information\\_index.aspx](http://www.charitycommission.gov.uk/About_us/Regulation/Providing_information_index.aspx) (last visited Mar. 18, 2011) (“One of the key ways we [help charities function well] is by publishing general resources and guidance for charities, their advisers and the public in a variety of different formats.”); see also Fries, *supra* note 140, at 907–08 (noting the Commission's role in producing risk assessments, advice, and guidance material).

142. See THE CHARITY COMMISSION AND REGULATION, UK CHARITIES COMM'N (Jan. 2010), available at <http://www.charity-commission.gov.uk/Library/regstance.pdf> (explaining regulatory approach with substantial emphasis on educating charities and their leaders, providing guidance, and assisting them in compliance); Fries, *supra* note 140, at 907–08 (describing this advisory approach, but noting “the Commission's advice has considerable authority!”). But see Dawes, *supra* note 95, at 857 (noting Commission's use of “name and shame” tactics to ensure compliance).

tor dedicated to organizational accountability's preventive value will be hard pressed to choose the latter.<sup>143</sup>

When it comes to enforcing organizational accountability, private external enforcers again suffer from a lack of resources and authority, as well as collective action problems discussed above. There is at least, though, significant clarity of the substance of an NGO's obligations in the organizational accountability context, in contrast to the situation in mission accountability. If some NGO stakeholders can be activated to engage in enforcement here, their enforcement can substitute for that of others without the resources, authority, or collective will to do so. Donors, employees, and partner organizations are the most likely groups to do so. Beneficiaries and members of the public have little access to information suggesting governance and operational requirements have gone unfulfilled and, even with such information, have little authority to challenge such failures.

Donors, particularly large, repeat, or institutional donors, may understand or be educated to see the importance of organizational accountability to achieving mission, financial integrity, and legitimacy on the world stage. In the U.S., donors still do not have standing to bring a suit challenging organizational accountability failures as breaches of the fiduciary duty of care.<sup>144</sup> If they understand its importance, however, donors could add required procedures or milestones by contract, which could create enforceable contract obligations for an NGO to be organizationally accountable.<sup>145</sup> Practically, too, donors have obvious influence. If donors see an NGO failing to follow the governance roles or procedures required, they can curtail future contributions. Large contributions may secure a donor a board seat, which she can then use to ensure these roles and procedures are observed. In other jurisdictions, donors may have additional legal authority. For example, the founder of a German foundation is permitted to reserve rights in the organization's formative documents, allowing him to serve as a director or to appoint or discharge other directors, which secures additional enforcement authority over organi-

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143. See, e.g., Kaye Wiggins, *Charity Commission Shelves Public Benefit Assessments for Hospitals and Health Charities*, THIRD SECTOR (Aug. 31, 2010), <http://www.thirdsector.co.uk/News/DailyBulletin/1024971/Charity-Commission-shelves-public-benefit-assessments-hospitals-health-charities/5BACAA35E2B4AF66383C61BCBFBCEC5B/?DCMP=EMC-DailyBulletin> (reporting that continued public benefit assessments would be cancelled due to resource constraints).

144. See Mayer & Wilson, *supra* note 136, at 494.

145. Cf. Brody, *Dead Hand or Living Dead*, *supra* note 105, at 1225 (noting courts traditionally, though not universally, hold that the terms of a restricted gift itself are not themselves a matter of contract law).

zational as well as other accountability failures.<sup>146</sup> Likewise, German donors may have contractual rights because gifts can at times be treated and remedied as contracts.<sup>147</sup>

An NGO's employees or partner organizations might also police organizational accountability. In the U.S., these groups generally lack special legal authority to challenge an entity's failure to follow the governance and operational structures that it has adopted. Yet, employees may be best able to perceive such failures and can act informally to pursue remedies. For example, an NGO's CFO would likely be aware if meetings of the Board's Finance Committee have not been held, and could call upon the relevant directors to revive it.<sup>148</sup> Partner organizations can also have significant practical influence. Consider an NGO pursuing accounting standard setting for developing countries, which partners with an NGO pursuing training in using business software for inhabitants of those same jurisdictions. The accounting standards NGO could refuse to continue the partnership unless the software group provided it with conflict of interest disclosures from its board members. Of course, employees and partnerships will not always be able to see organizational accountability failures or have the clout to demand remediation. It is also possible that these groups could be a source of organizational accountability failures. The NGO CFO described above could block meetings of the Finance Committee or fail to provide them with necessary information. The accounting standards NGO could encourage the software NGO's executive director to make major commitments without board approval. Thus, employees and partners are a potential enforcement resource, but standing alone, will not be sufficiently reliable and consistent monitors. Their potentially complementary role here is addressed in greater detail in Part III.

Domestic nonprofit law provides significant content regarding what an NGO must do to be organizationally accountable. It offers routes for setting up organizations with varying governance structures and roles and calls on individual entities to layer on additional content through their founding and operating documents.<sup>149</sup> Faithfully following these pre-

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146. See Thomas von Hippel, *Nonprofits in Germany*, *supra* note 89, at 218.

147. See *id.* at 219 (explaining this approach, though noting that claims under it are rarely brought).

148. See, e.g., *Stern v. Lucy Webb Hayes Sch. for Deaconesses & Missionaries*, 381 F. Supp. 1003, 1015–16 (D.C.D.C. 1974) (failure to hold finance committee meetings was one of the fiduciary violations found by the court).

149. See James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 635–37 (1985) (discussing laws on nonprofit structure and governance); RMNCA §§ 2.05, 2.06, 8.30 (1988).



scriptions is necessary for an organization to be able to articulate, track, and transform its mission legitimately. Likewise, as discussed below, these procedures are useful instruments for tracking, investing, and effectively deploying an NGO's financial assets.<sup>150</sup> Further, when the structures and processes demanded by domestic nonprofit law provide a legitimate process for collecting and representing the views of its various stakeholders, following them will have inherent value for an NGO. Providing a framework to demonstrate that an NGO is responsive to and representative of its relevant constituencies increases its legitimacy as a force in global regulation.

Neither public nor private regulators, however, have the incentives and resources to sufficiently enforce domestic law's organizational accountability mandates. In the U.S., litigation-focused and resource-constrained public regulators focused on preventing fraud and waste of nonprofit resources most often pursue organizational accountability failures when linked to these other substantive wrongs. They rarely enforce organizational accountability as a preventative measure. Jurisdictions with a more collaborative public enforcement regime may engage in more training and enforcement regarding organizational accountability, but public resources are nowhere sufficient to do this job alone. Private external enforcers like large, repeat, or institutional donors will at times contract for improvements of organizational accountability, or might be able to secure them through their formal or informal influence over an NGO's governance. Employees and partner organizations may make similar contributions, though not reliably and consistently. In fact, the problem of employee-capture in the nonprofit sector raises serious questions about the benefit of their influence here. Perhaps NGOs' global regulatory partners can complement the partial enforcement likely in the domestic nonprofit law context, a point to which we shall return in Part III. Doing so is key to preserving the legitimacy of NGOs as nonprofits and as participants in global regulation.

### 3. Financial Accountability

The final aspect of NGO accountability to be addressed here, financial accountability, is the strain on which domestic nonprofit law concentrates most of its attention.<sup>151</sup> Financial accountability looks to how an NGO handles its resources. An NGO must deploy its assets responsibly to achieve its mission, spending efficiently and for optimal impact, as

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150. See *infra* Part II.B.3.

151. See Brakman Reiser, *Enron.org*, *supra* note 71, at 207.

well as avoiding conferral of private benefits and diversion of assets.<sup>152</sup> It must develop financial resources effectively, soliciting donors genuinely, keeping its promises to them, and investing those assets it holds for future use in a portfolio designed to achieve appropriate income and growth goals over time.

The common and statutory law addressing organizational forms, as well as charitable solicitation and tax law, are replete with rules addressing the deployment, development, and investment of NGO assets. Again, looking to the U.S. example, trust and corporate law clearly place obligations on NGO fiduciaries, *inter alia*, to avoid unfair self-dealing<sup>153</sup> and to prudently invest assets.<sup>154</sup> In addition to the annual reports that nonprofits must submit to state AGs, state regulation of charitable solicitations almost always requires reporting on NGOs' assets and disbursements.<sup>155</sup> U.S. federal tax law imposes various penalties for an exempt NGO's payment of excessive benefits to its leaders, major donors, or their relatives<sup>156</sup> and limits an exempt NGO's ability to dedicate its funds to unrelated business activities.<sup>157</sup> It is impossible to generalize domestic nonprofit law across jurisdictions; however, the law regarding nonprofit forms elsewhere also requires care when NGO leaders manage their organizations' finances and often precludes or limits transactions between them.<sup>158</sup> Charitable solicitation may be publicly- or self-regulated,<sup>159</sup> and

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152. A nonprofit director or officer is held to a duty of care which includes avoiding "[f]raud, self dealing, misappropriation of corporate opportunities, improper diversions of corporate assets, and similar matters . . ." Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers*, 23 J. CORP. L. 631, 646 (1998); see also Brakman Reiser, *Enron.org*, *supra* note 71, at 216–17.

153. See, e.g., RMNCA § 8.31; PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS, *supra* note 77, § 330 (outlining conflict-of-interest transactions subject to good faith board approval).

154. See, e.g., UPMIFA § 3; RESTATEMENT (THIRD) OF TRUSTS § 77; PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS, *supra* note 77, § 335.

155. See FREMONT-SMITH, *supra* note 95, at 315–17 (describing the breadth of laws requiring registration and financial reporting to attorneys general, as well as additional financial reports required to be made by those entities engaged in charitable solicitation); see also Brakman Reiser, *Enron.org*, *supra* note 71, at 235–37 & nn.97–104 (collecting statutory citations on charitable solicitor reporting requirements).

156. See I.R.C. § 4958; see also FREMONT-SMITH, *supra* note 95, at 252–64 (reviewing I.R.C. restrictions on excess benefit transactions).

157. See I.R.C. §§ 511–13; see also FREMONT-SMITH, *supra* note 95, at 289–95 (reviewing federal taxation of unrelated business income).

158. See THE EUROPEAN FOUNDATION: A NEW LEGAL APPROACH 91 (Klaus J. Hopt, W. Rainer Walz, Thomas Von Hippel, & Volker Then eds., 2006) [hereinafter THE EUROPEAN FOUNDATION] (describing duties of foundation governing organ members under the law of various European jurisdictions and finding "[t]he duty of care and (to a lesser extent) the duty of loyalty are recognized in all countries . . .").

compensation and unrelated business activity may or may not be restricted.<sup>160</sup>

In addition to setting strong financial accountability norms, domestic nonprofit law tends to focus its public enforcement resources in the financial area. Disclosure requirements focus on what is reportable and comparable across organizations, which often comes down to financial data. In the U.S, public regulators also emphasize financial accountability for various other reasons. The mandates of state AGs, as noted above, generally speak in terms of safeguarding charitable assets and donors, rather than more generally to steward the health and reputation of the nonprofit sector. When they seek remedies through litigation, they sue fiduciaries whose failures of care, loyalty, or both, have drained the nonprofit's assets, which the damages obtained through the litigation will repay.<sup>161</sup> Their litigation skills bias them toward enforcing financial failures.<sup>162</sup> Moreover, nothing plays in the press like a charity leader "stealing from orphans" and elected AGs, perhaps with their eyes on higher office, understandably will prioritize such splashy enforcement efforts.

Tax regulators are focused on remedying tax abuses, and the information and concerns they have will therefore often emphasize financial elements of an NGO's activity. Tax authorities police NGO accountability in order to avoid abuses of tax exemption, where entities or individuals obtaining tax benefits are, in fact, unworthy of them. Such abuses could occur because an NGO offers excessively beneficial financial

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159. See, e.g., CHARITIES AND FUNDRAISING, UK CHARITIES COMM'N 20–24 (June 2010), available at <http://www.charity-commission.gov.uk/Publications/cc20.aspx> (explaining the limited role of the Commission in regulating charitable solicitation, relying instead on self-regulation); Rene Bekkers, *Trust, Accreditation and Philanthropy in the Netherlands*, 32 NONPROFIT & VOLUNTARY SECTOR Q. 596, 600–02 (2003) (describing self-regulation of charitable solicitation in the Netherlands); See generally Peter Luxton, *The Regulation of Fund-Raising by Charities and Voluntary Organizations in England and Wales*, in COMPARATIVE CORPORATE GOVERNANCE, *supra* note 83, at 637–61 (analyzing England and Wales systems); Wino J.M. Van Veen, *Comparing Regulation of Fundraising: Self-Regulation or Governmental Regulation?*, in COMPARATIVE CORPORATE GOVERNANCE, *supra* note 83 (analyzing UK and Netherlands systems and comparing them with that of the U.S.).

160. See THE EUROPEAN FOUNDATION, *supra* note 158, at 146–48 (comparing European positions on remuneration of foundation directors); see also Thomas von Hippel, *Nonprofits in Germany*, *supra* note 89, at 222–24 (addressing German restrictions on unrelated business activity); Zoltán Csehi, *Nonprofit Organizations in Hungary*, in COMPARATIVE CORPORATE GOVERNANCE, *supra* note 83, 374–75 (addressing the Hungarian approach to restrictions on unrelated business activity).

161. Of course, other remedies such as structural changes can and do happen, but are unlikely without the catalyst of financial losses to spur an AG enforcement action.

162. See Brakman Reiser, *Enron.org*, *supra* note 71, at 221–22.

transactions to its insiders, thereby skimming off funds that could be used for pursuit of its mission.<sup>163</sup> They may also occur if an NGO provides benefits to donors in return for their “contributions,” the cost of which donors attempt to deduct when calculating their individual income tax liability.<sup>164</sup> In each case, policing a potential tax abuse will also show failures in how an NGO attends to its financial responsibilities. Of course, tax enforcement is not always perfectly aligned with policing financial accountability, but many tax enforcement priorities will simultaneously address an NGO’s financial failures.

There are also significant incentives for private parties to enforce NGOs’ financial accountability. Donors are understandably incensed by siphoning or waste of an NGO’s assets, as they may see those lost assets as precisely the funds that they donated. Likewise, employees and partner organizations should worry about failures of financial accountability, as these failures can threaten the existence of the NGO and thereby their positions and partnerships. Beneficiaries and the public in general also can easily understand the impact of financial losses to an NGO. For all of these parties, too, financial accountability failures can be relatively transparent from the disclosures that nonprofits must make to regulators, which in the U.S. are publicly available.<sup>165</sup> Information suggesting failures of mission or organizational accountability, while extremely serious and dangerous to an NGO’s success and survival, are less easily accessible and comprehensible even by sophisticated private external regulators.

For all of these reasons, financial accountability is the focus of external enforcement, though it still may not be optimally policed under domestic nonprofit law. Public regulators, despite their emphasis on financial issues, are chronically under-resourced and understaffed.<sup>166</sup> As such, not nearly every failure will be investigated or litigated. Donors, employees, and partner organizations have informal access to remedy these failures, and can make significant gains in this area. In the U.S., though, donors have only limited legal authority. Although donors do not have broad standing rights to police nonprofit fiduciaries, they are occasionally granted standing to challenge the misapplication of funds contributed to a

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163. See I.R.C. § 4958 (imposing penalty taxes on nonprofit insiders engaged in excess benefit transactions).

164. See I.R.C. § 170(f)(8) (imposing substantiation requirements for deductible charitable contributions).

165. See GUIDESTAR, [www.guidestar.org](http://www.guidestar.org) (last visited Mar. 6, 2011) (providing a searchable database of information on over 1.8 million U.S. nonprofits).

166. See *supra* note 136 and accompanying text (addressing lack of resources in AG offices).

charitable trust or as part of a restricted gift.<sup>167</sup> Employees may be protected by whistle-blowing statutes if they take their concerns to regulators,<sup>168</sup> but employees cannot take legal action on their own. Beneficiaries and the public lack even these enforcement resources, and, as discussed above, each of these external stakeholder groups will rarely have standing to mount a generic challenge to an NGO's financial practices.

Financial accountability is crucial for NGOs. To be effective, they will need funds to dedicate to their purpose now and in the future. A sham organization funneling donated funds to its leaders cannot make any legitimate claim to represent a cause or a set of beneficiaries. Domestic nonprofit law is an important tool for maintaining and improving this vital aspect of NGO accountability. Public external regulators can be counted upon to dedicate their, albeit limited, resources here, and other external stakeholders also have significant motivation and limited authority to remedy NGOs' financial failures. Of course, optimal enforcement is still only an aspiration. Perhaps international law, norms, and organizations can play a supplementary role in even further improving NGOs' financial accountability.

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NGOs are organized using a nonprofit legal form recognized by a domestic legal system. This system provides NGOs with an internal governance system and external resources for enforcing their accountability. However constructed, the internal governance structures tend to provide weak accountability enforcement. External enforcement by public regulators and private stakeholders is most effective to police financial accountability, a first step to ensuring an NGO's viability and thus its ability to impact international civil society. They provide less robust enforcement of organizational accountability, which will often be difficult to perceive or seem an unworthy use of limited enforcement resources. Mission accountability, though fundamental to an NGO's legitimacy, will rarely be enforced by domestic nonprofit law. Part III considers how

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167. See Brody, *Dead Hand or Living Dead*, *supra* note 105, at 1209–22; see also UNIFORM TRUST CODE § X (2005) (providing, in its most recent amendment, standing for the settler of a charitable trust to “maintain a proceeding to enforce the trust”); Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1143–44 (2005) (although noting some inroads on this position, recognizing that “[a]t common law, a donor who has made a completed charitable contribution has no standing to bring an action to enforce the terms of her gift unless she has expressly reserved the right to do so”).

168. See Fishman, *Stealth Preemption*, *supra* note 139, at 572 (noting the theoretical, but unlikely, application to nonprofit employees of federal whistleblower protections enacted under the Sarbanes-Oxley Act).

global regulators may complement this predictably limited accountability enforcement apparatus.

### III. NGOS AND GLOBAL REGULATORS

#### *A. Why NGO Accountability Gaps Matter to Global Regulators*

The gaps in nonprofit mission, organizational, and financial accountability enforcement by public regulators and private stakeholders affect the legitimacy of NGOs as NSRs and as contributors to other regulators in global governance. First, mission accountability failures call into question an NGO's ability to pursue normative goals as an NSR and undermine the ability of NGO participation to improve the output legitimacy of the global regulatory process. Second, organizational accountability failures suggest that an NGO may itself have insufficient input legitimacy to be a proper site for regulation as an NSR, or an effective way to boost the legitimacy of other regulators by contributing to global governance debates and processes. Lastly, although financial accountability will be better enforced at the domestic level as a relative matter, resource constraints will often mean that gaps in enforcement remain. Without adequate financial accountability, NGOs risk becoming ineffective or even sham organizations, which are inadequate to regulate or contribute to the work of other global regulators.

Mission accountability matters to NGO legitimacy in global governance both where NGOs act as regulators themselves and when they contribute to the efforts of other global regulators. In order for an NGO to appropriately undertake regulatory activity in either fashion, regulatory activities or contributions should relate to and further the organization's mission. For an NGO involvement to enhance the legitimacy of global governance, its mission must align with the global governance goals of an international regulator or the international community. Pursuing the NGOs' mission must also further the regulatory project. In many cases, these mission goals will align. In the case of an NGO, whose sole activity is acting as an NSR, evolution of the NGO's mission to better achieve regulatory goals is likely appropriate. For example, Transparency International fights global corruption through various initiatives.<sup>169</sup> Its work might evolve as corruption does. When NGOs contribute to the work of other NSRs, mission alignment may also be quite close. For example, Consumer International is a federation of consumer groups that seeks to

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169. See TRANSPARENCY INT'L, <http://www.transparency.org/> (last visited Mar. 6, 2011).

protect consumers.<sup>170</sup> It participated in the drafting of the *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders* without any concern over a mission conflict.<sup>171</sup>

There are cases, however, where the goals of an NGO may diverge from those of an international regulatory project, or vice versa. For example, the Civil Society Mechanism (“CSM”) is a coalition of civil society organizations representing NGO constituencies concerned with food insecurity.<sup>172</sup> While the CSM represents a range of civil society organizations, the principles espoused by some members of the coalition include a moratorium on genetically modified foods,<sup>173</sup> the rejection of agricultural intellectual property rights,<sup>174</sup> and restrictions on large agricultural foreign investment.<sup>175</sup> The CSM recently attained the right to facilitate NGO consultation and participation in the UN FAO Committee on World Food Security (“CFS”).<sup>176</sup> The G8 and the G20 have endorsed the CFS’ work while at the same time generally promoting trade liberalization that would conflict with some of the very principles espoused by various food security NGOs.<sup>177</sup> In such situations, to remain mission-

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170. See *About Us*, CONSUMERS INT’L, <http://www.consumersinternational.org/who-we-are/about-us> (last visited Mar. 6, 2011).

171. Org. for Econ. Dev. & Cooperation [OECD], *Consumer Dispute Resolution and Redress in the Global Marketplace* 18 (2006), available at <http://www.oecd.org/dataoecd/26/61/36456184.pdf>.

172. See *Civil Society Mechanism*, CIVIL SOC’Y FOR THE COMM. ON WORLD FOOD SEC., <http://cso4cfs.org/who-we-are/civil-society-mechanism/> (last visited Mar. 18, 2011).

173. See Action Aid Int’l, *Power Hungry: Six Reasons to Regulate Global Food Corporations* 59 (2005) [hereinafter *Power Hungry*], available at [http://www.actionaid.org.uk/\\_content/documents/power\\_hungry.pdf](http://www.actionaid.org.uk/_content/documents/power_hungry.pdf); see also World Rural Forum, *WRF’s Stance—Seminar on Biodiversity and the Right to Food* 1 (Mar. 2007) [hereinafter *WRF Seminar*], available at <http://www.ruralforum.net/documentos/ficha.asp?id=en&Ndocumen=230220375&Ncategory=10303&pag=1&Nfrm=1>.

174. See *WRF Seminar*, *supra* note 173, at 2.

175. See FoodFirst Information & Action Network [FIAN Int’l], *The World Doesn’t Need More of the Same Medicine: Joint Declaration Addressed to Governments on World Food Crisis* 2 (2008), available at <http://www.fian.org/resources/documents/others/the-world-doesnt-need-more-of-the-same-medicine/pdf>; see also *Power Hungry*, *supra* note 173, at 59.

176. Governance Working Group, Int’l Planning Comm. for Food Sovereignty, Oxfam Int’l, & Action Aid Int’l, *Proposal for an International Food Security and Nutrition Civil Society Mechanism for Relations with the CFS Committee on World Food 2* (2010), available at <http://cso4cfs.files.wordpress.com/2010/06/cso-mechanism-zero-draft.pdf>.

177. See G8, *L’Aquila Joint Statement on Global Food Security, L’Aquila Food Security Initiative (AFSI)* 4 (2009), available at [http://www.g8italia2009.it/static/G8\\_Allegato/LAquila\\_Joint\\_Statement\\_on\\_Global\\_Foo](http://www.g8italia2009.it/static/G8_Allegato/LAquila_Joint_Statement_on_Global_Foo)

accountable, each NGO involved must have a process to consider whether participation in the international regulatory project is consistent with its mission.<sup>178</sup> A global regulator also must be able to rely on such a process, to identify the mission that the NGO pursues, whether the regulator's legitimacy strategy in drawing in NGO participants is to gain expertise or to expand the diversity of viewpoints it considers.

Notably, too, when an NGO contributes to the regulatory projects of another NSR, the NGO may need to withstand pressure from the regulatory environment in order to stay mission-accountable. For example, Defence for Children International ("DCI") promotes children's rights<sup>179</sup> and closely aligns itself with the Convention on the Rights of the Child ("CRC").<sup>180</sup> Although the DCI supported ILO Convention No. 182 (1999) on the Worst Forms of Child Labour,<sup>181</sup> it felt that the Convention was too rigid in the categories of intolerable child labor and failed to emphasize a child's right to development, a tenet that the organization finds fundamental.<sup>182</sup> Faced with this situation, many outcomes are possible, but all require some mechanism for DCI to interrogate, reinforce, and potentially transform its mission. Perhaps continued involvement with the regulator would align with the NGO's mission, such as if DCI continued participation in the ILO to steer it toward a differing vision on child labor. Alternatively, an NGO might need to remove itself from the regulatory process to best pursue its mission, such as if DCI thought it best to turn to one of the ILO's regulatory competitors to secure a regula-

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d\_Security[1],0.pdf; G20, *The G20 Toronto Summit Declaration* 6, 24 (2010), available at [http://www.g20.utoronto.ca/2010/g20\\_declaration\\_en.pdf](http://www.g20.utoronto.ca/2010/g20_declaration_en.pdf); see also CHARLES E. HANRAHAN & MELISSA D. HO, CONG. RESEARCH SERV., THE U.S. GLOBAL FOOD SECURITY INITIATIVE: ISSUES FOR CONGRESS 5 (2009), available at <http://www.nationalaglawcenter.org/assets/crs/R40945.pdf>.

178. Cf. Robert Blitt, *Who Will Watch the Watchdogs? Human Rights and Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 322–24 (2005) (suggesting the failure of one human rights organizations to maintain or legitimately evolve its human rights missions when it became involved in facilitating surrender negotiations).

179. *The DCI Movement*, DEFENCE FOR CHILDREN INT'L, <http://www.defenceforchildren.org/about-us.html> (last visited May 16, 2011).

180. See *Reports from the Sessions of the Committee on the Rights of the Child on Juvenile Justice Issues*, DEFENCE FOR CHILDREN INT'L, <http://www.defenceforchildren.org/resources/crc-reports.html> (last visited May 16, 2011).

181. Defence for Children Int'l, *Position on Child Labour: A Contribution to Debate and Practice* 2 (2002), available at <http://www.crin.org/docs/resources/publications/NGOCRC/subgroup-childlabour/DCI-position.pdf>.

182. *Id.*



tory product more in line with DCI's goals.<sup>183</sup> Yet, another way mission conflict might develop is if the ILO broke off its relationship with DCI, finding its partnership with DCI no longer matched its regulatory goals. None of these paths are clear without DCI's ability to articulate and understand its children's rights mission and to evaluate its alignment with the mission of the ILO.

Of course, an NGO's stakeholders often differ with respect to the appropriate normative understanding of the group's mission and its legitimate evolution. This conflict mirrors that among international actors over the appropriate normative standards in global governance. In both contexts, however, debate and dialogue can help reconcile this conflict. Within an NGO, a deliberative and participatory process should be used to consider how best to pursue mission and when and how it should be altered. The dialogue should include various stakeholders, such as donors, employees, partner organizations, and beneficiaries. When this kind of inclusive dialogue is embedded in an NGO's structure or culture, it has created a method to track and enforce mission accountability. Then, the NGO can bring its considered and deliberated vision on normative matters to the global governance arena. Such mission-accountable NGOs can help improve global regulators' ability to work through normative conflict because their vision and contribution has garnered support in part through deliberation, debate, and persuasion. In contrast, if an NGO departs from or fails to carefully consider and reform its mission, or becomes co-opted by its involvement in a regulatory process, it abandons the fruit of that deliberation and is able to add much less to the legitimacy of global regulation.

Thus, for NGOs to enhance the legitimacy of global regulation meaningfully, mission accountability matters. Yet, enforcement of domestic nonprofit law will not sufficiently guard NGOs' mission accountability. If there is a desire to use NGOs to prop up the legitimacy of global governance, global regulators need to address this gap.

As the discussion of mission accountability already foreshadows, organizational accountability will also matter in enabling NGOs to improve the legitimacy of global governance. As a preliminary matter, organizational accountability is instrumental. Organizational integrity guards mission (and financial soundness). Thus, to the extent that mission (and financial) accountability matters to the legitimacy of global governance, so

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183. Laurence Helfer has identified and discussed examples where both NGOs as well as States shift their focus and efforts from one regime to another. Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 *YALE J. INT'L L.* 1, 26-53 (2004).

will organizational accountability. Moreover, organizational accountability matters independently. The integrity of the participants in a global governance process matters greatly. If a global governance regulator bases its claim to legitimacy on the input of a variety of views, the origin of those views plays into whether they actually enhance the diversity of voices and may also impact whether those views can be trusted. If a global governance regulator relies on an NGO that is understood to be little more than a front for a single faction that is already represented in the governance process, this participation does not add to the perceived legitimacy of the international regulation the body creates. In fact, it may actually undermine this legitimacy. The 2004 Cardoso Report notes criticisms of just this type when government NGOs, which merely parrot the desires of a particular government, are drawn into global governance processes.<sup>184</sup>

Although domestic laws provide governance structures that can promote organizational accountability, enforcement of these provisions is likely weak. Donors often lack information to identify organizational accountability problems, and employees may lack the incentive to do so. NGOs' partners are sometimes able to identify organizational failures, but many lack the clout to rectify them.<sup>185</sup> Gaps in organizational accountability, however, seriously undermine the ability of NGOs to help legitimate global governance. To be legitimate global regulators, NGOs operating as NSRs must be held to rigorous organizational accountability standards, which international law must find some way to enforce. In order for other global governance regulators to utilize NGO participation to enhance their own legitimacy, they must guard against inclusion of NGOs that lack sufficient organizational accountability.

Like organizational accountability, financial accountability is important in understanding NGO participation in global governance for instrumental and inherent reasons. To the extent that failures in financial accountability make an NGO incapable or ineffective in achieving its mission, this failure will likewise undermine the NGO's ability to contribute to global governance. But again, financial accountability also impacts the legitimacy of NGOs' involvement in global governance directly. The legitimacy of global governance relies vitally on perceptions. Thus, corruption or self-dealing within an NGO acting as an NSR or contributing importantly to the work of other regulators can undermine the perceived legitimacy of these global governance efforts. This problem of

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184. *Cardoso Report*, *supra* note 16, at 7.

185. As noted *supra* Part III.A., global regulators may be one category of NGO partners with sufficient clout to monitor and enforce organizational accountability.

perception can arise even if the financial harm resulting from abuses would not have been substantial enough to prevent the NGO from achieving its mission.

Domestic regulators and private stakeholders have more powerful tools and incentives to enforce financial accountability than the other strands discussed here. Thus, domestic law can be a useful tool for global regulators seeking to secure NGOs' roles in legitimating global governance. Due to resource constraints, though, even financial accountability will not be fully enforced in the domestic context. To safeguard the contributions of NGOs to global governance, international regulators and the international community may profitably take steps to monitor and enforce financial accountability as well.

#### *B. The Tools Global Regulators Use to Police NGO Accountability*

NGO accountability ensures NGO participation will enhance the legitimacy of global governance; but, domestic regulation of NGOs as non-profits will not sufficiently guard NGO accountability. Thus, it falls to global regulators to monitor and enforce the accountability of NGOs with whom they interact and upon whom they rely. The techniques for monitoring and enforcing NGO accountability will differ, importantly, depending upon whether the NGO is acting as a NSR itself, or if the NGO is participating in the process of some other NSR. This Subpart explores the range of tools currently in use by global regulators to police NGO accountability; the next Subpart addresses how these tools might be enhanced.

When an NGO serves as an NSR, internal governance structures keyed to accountability can be placed into the NGO itself, and mechanisms for accountability enforcement beyond domestic regulators and stakeholders can be devised. Founders of an NSR NGO can consider whether to use a self-perpetuating or elected governing organ and may provide for periodic mission statement review and revision, standing committees, or internal financial controls. For example, the ISO develops standards for use by businesses and other actors worldwide.<sup>186</sup> Its role in devising standards with such broad adoption makes the ISO an NSR. Its structure and organization suggests numerous attempts to safeguard its accountability, which in turn bolsters its legitimacy as an NSR. ISO is incorporated as a nonprofit in Switzerland<sup>187</sup> and has a member-elected governing organ.<sup>188</sup>

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186. See *ISO Standards*, INT'L ORG. FOR STANDARDIZATION, [http://www.iso.org/iso/iso\\_catalogue.htm](http://www.iso.org/iso/iso_catalogue.htm) (last visited Mar. 6, 2011).

187. See *About ISO*, INT'L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/about.htm> (last visited Mar. 6, 2011).

Membership is composed of national standard-setting bodies, which together compose the general assembly, the ISO's ultimate authority.<sup>189</sup> Members are themselves often nonprofit organizations in their own jurisdictions, and they are entitled to vote on the ISO's 5-year strategic plan, and positions on the executive Council rotate among them.<sup>190</sup> The ISO also has adopted standing committees on finance and strategy.<sup>191</sup>

As internal governance structures will not be self-enforcing and public regulators and private stakeholders may insufficiently enforce them, accountability and, thereby, legitimacy of an NGO NSR can be enhanced by providing for additional enforcement resources. These might include state monitoring, self-regulatory certification,<sup>192</sup> the creation of internal or external ombudsmen,<sup>193</sup> or other mechanisms. For example, Julia Black cites Transparency International as an example of a NSR.<sup>194</sup> It sets standards regarding corruption and then assesses governments using those standards. Although it lacks coercive power over governments, its power to "name and shame" in effect regulates conduct.<sup>195</sup> Transparency International is also one of a handful of International NGOs that have signed the INGO Accountability Charter, committing them to good governance, transparency, and accountability.<sup>196</sup>

When NGOs do not operate as NSRs themselves, but rather participate in the work of other global governance regulators, NGO accountability

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188. See *Governance and Operations*, INT'L ORG. FOR STANDARDIZATION, [http://www.iso.org/iso/about/governance\\_and\\_operations.htm](http://www.iso.org/iso/about/governance_and_operations.htm) (last visited Mar. 6, 2011).

189. See *id.*

190. See *id.*

191. See *id.*

192. Cf., MICHAEL EDWARDS, NGO RIGHTS AND RESPONSIBILITIES 30–31 (2000) (advocating self-regulatory certification of NGOs working with international regulators); International NGO Accountability Charter [hereinafter INGO Accountability Charter], available at [http://www.ingoaccountabilitycharter.org/wp-content/uploads/INGO-Accountability-Charter\\_logo1.pdf](http://www.ingoaccountabilitycharter.org/wp-content/uploads/INGO-Accountability-Charter_logo1.pdf) (establishing a self-regulatory framework for reviewing accountability of international NGOs).

193. See, e.g., EDWARDS, *supra* note 192, at 30–31 (2000) (noting possible use of an ombudsman as part of proposed NGO certification scheme).

194. Black, *Competition for Regulatory Share*, *supra* note 5, at 7 (citing C. Scott, 'Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance' 29 J. L. & Soc'y 56 (2002)).

195. Black, *Competition for Regulatory Share*, *supra* note 4, at 7 (noting that Transparency International is a good example of an organization that assesses governments' compliance with norms).

196. *NGOs Lead by Example: World's International NGOs Endorse Accountability Charter*, OXFAM INT'L (June 7, 2006), [http://www.oxfam.org/en/news/pressreleases2006/pr060606\\_ngo\\_charter](http://www.oxfam.org/en/news/pressreleases2006/pr060606_ngo_charter); INGO Accountability Charter, *supra* note 192.

still matters, but the routes to accomplishing it are necessarily indirect. Since global governance regulators cannot rely on the domestic context to comprehensively enforce NGO accountability, they should consider creating mechanisms that provide accountability assurances for those NGOs that they involve in their regulatory efforts.<sup>197</sup> Some NSRs have already adopted complex credentialing or accreditation mechanisms to pursue this task, though the content of these mechanisms could be improved to more carefully complement domestic enforcement and reinforce each NSR's particular legitimacy strategy. Unfortunately, many other global governance regulators who rely on NGO participation to enhance their legitimacy have not sufficiently attended to accountability issues. In these cases, weak application processes admit NGOs to the global governance process or no limits are placed on their involvement. This Subpart reviews the range of tools NSRs use to monitor and enforce the accountability of the NGOs they embrace.

The United Nations has been at the forefront in establishing NGO accreditation. In 1996, the UN Economic and Social Council ("ECOSOC"), pursuant to its authority under Article 71 of the UN Charter, adopted *Resolution 1996/31 on the Consultative Relationship between the United Nations and Non-Governmental Organizations*.<sup>198</sup> This Resolution establishes three types of relationships that NGOs may have with ECOSOC: general consultative status, special consultative status, and inclusion on the Roster.<sup>199</sup> Organizations granted general consultative status have the greatest rights to involvement with ECOSOC, including rights to propose issues to the Council on their own motion.<sup>200</sup> NGOs with general or special consultative status may also make written statements to the Council, subject to significant requirements of form and, for special consultative NGOs, only on the topic of their special competency.<sup>201</sup> NGOs on the "Roster" receive information about ECOSOC's activities and may attend

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197. Other commentators have suggested that NGOs themselves should pursue greater NGO accountability through self-regulation. See, e.g., EDWARDS, *supra* note 192, at 30–31 (advocating self-regulatory certification of NGOs working with international regulators); Blitt, *supra* note 178, at 390–97 (arguing that a self-regulatory system is necessary for NGOs to be perceived as legitimate actors in international law).

198. U.N. Econ. & Soc. Council [ESOSOC], *Consultative Relationship Between the United Nations and Nongovernmental Organizations*, Res. E/1996/31 (July 25, 1996) [hereinafter *Consultative Relationship*], available at <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm>.

199. *Id.* Also, the 2004 Cardoso Report has suggested expanding these categories to include network partners, consultative partners, and programme support partners. See *Cardoso Report*, *supra* note 16, ¶ 138.

200. *Consultative Relationship*, *supra* note 198.

201. *Id.*

meetings, though their involvement is subject to greater Council discretion.<sup>202</sup> To obtain any of these relationships with the UN, however, an NGO must satisfy some basic criteria. They are worth quoting extensively here:

2. The aims and purposes of the organization shall be in conformity with the spirit, purposes and principles of the Charter of the United Nations . . . .

9. The organization shall be of recognized standing within the particular field of its competence or of a representative character. Where there exist a number of organizations with similar objectives, interests and basic views in a given field, they may, for the purposes of consultation with the Council, form a joint committee or other body authorized to carry on such consultation for the group as a whole.

10. The organization shall have an established headquarters, with an executive officer. It shall have a democratically adopted constitution, a copy of which shall be deposited with the Secretary-General of the United Nations, and which shall provide for the determination of policy by a conference, congress or other representative body, and for an executive organ responsible to the policy-making body.

11. The organization shall have authority to speak for its members through its authorized representatives. Evidence of this authority shall be presented, if requested.

12. The organization shall have a representative structure and possess appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting rights or other appropriate democratic and transparent decision-making processes. Any such organization that is not established by a governmental entity or intergovernmental agreement shall be considered a non-governmental organization for the purpose of these arrangements, including organizations that accept members designated by governmental authorities, provided that such membership does not interfere with the free expression of views of the organization.

13. The basic resources of the organization shall be derived in the main part from contributions of the national affiliates or other components or from individual members. Where voluntary contributions have been received, their amounts and donors shall be faithfully revealed to the Council Committee on Non-Governmental Organizations. Where, however, the above criterion is not fulfilled and an organization is financed from other sources, it must explain to the satisfaction of the Committee its reasons for not meeting the requirements laid down in

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202. *Id.*

this paragraph. Any financial contribution or other support, direct or indirect, from a Government to the organization shall be openly declared to the Committee through the Secretary-General and fully recorded in the financial and other records of the organization and shall be devoted to purposes in accordance with the aims of the United Nations.

14. In considering the establishment of consultative relations with a non-governmental organization, the Council will take into account whether the field of activity of the organization is wholly or mainly within the field of a specialized agency, and whether or not it could be admitted when it has, or may have, a consultative arrangement with a specialized agency.<sup>203</sup>

ECOSOC's accreditation criteria reflect their dual purposes. On one level, these criteria seek to determine how well a particular NGO applicant matches with the needs, goals, and ethic of ECOSOC and the United Nations. The requirements that UN and NGO mission be aligned, that the NGO possesses relevant and useful expertise, and that the NGO be authorized to speak for its members look to justify reliance on the NGO's substantive expertise and most basic bona fides. The criteria considering the NGO's relationship with other UN bodies and allowing NGOs to pursue accreditation collaboratively are aimed at making NGO involvement with the UN more efficient.

In part, for the reasons explained in this Article, the ECOSOC requirements also explore the mission, organizational, and financial accountability of the applicant NGO. Mission accountability is clearly implicated by the consideration of an NGO's "aims and purposes" and by requiring the involvement of a representative body for determination of policy.<sup>204</sup> The criteria could be read to require applicant NGOs to use an organizational form with an elected governing organ, though they only specifically mandate that the governing organ remain responsible to some "representative body," and the use of voting or "other appropriate democratic and transparent decision-making processes."<sup>205</sup> These ideas of responsibility and transparency reflect organizational accountability concerns, as do the requirements of a written constitution, headquarters, executive officer, and executive organ. Even financial accountability is touched on by the criteria, as they require disclosures of sources of support, with a particular focus on support from government.

Of course, some of these requirements serve double duty, as the UN is concerned about preserving independent and sometimes legitimacy-

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203. *Consultative Relationship*, *supra* note 198, ¶ 14.

204. *Id.* ¶¶ 26, 29.

205. *Id.* ¶¶ 10, 12.

centered goals of its own through many of these requirements. The idea of consulting with NGOs is to bring in voices beyond those of the UN member states; thus, there is a justifiable concern that government involvement in NGOs will fail to increase the diversity of voices or over-represent already powerful actors. The lukewarm openness to government appointees and extensive demands around government donor disclosure reflect this concern. Similarly, the UN's ethic of representation may filter down into its focus on representativeness within consulting NGOs.

As written, the UN ECOSOC accreditation process exemplifies a quite comprehensive process currently used by a global governance regulator. Notably, however, commentary on these criteria suggests they may not be enforced as scrupulously as they are written. The United Nations 2004 Cardoso Report notes criticisms of the ECOSOC criteria as: driven by political concerns; too varied, confusing, and time-consuming; costly; fragmented, non-transparent, and non-responsive.<sup>206</sup> The Cardoso Report also notes the presence of government-sponsored NGOs as a particular problem.<sup>207</sup> The Cardoso Report makes a proposal for streamlining the accreditation process:

Proposal 19

The United Nations should realign accreditation with its original purpose namely, it should be an agreement between civil society actors and Member States based on the applicants' expertise, competence and skills. To achieve this, and to widen the access of civil society organizations beyond Economic and Social Council forums, Member States should agree to merge the current procedures at United Nations Headquarters for the Council, the Department of Public Information and conferences and their follow-up into a single United Nations accreditation process, with responsibility for accreditation assumed by an existing committee of the General Assembly.<sup>208</sup>

The Cardoso Report also recommends that the Secretariat take additional steps to "help it with selection and quality assurance" of civil society partners.<sup>209</sup> In particular, the Report suggests that networks of NGOs might provide additional "codes of conduct and self-policing mechanisms to heighten disciplines of quality, governance and balance."<sup>210</sup> In its response to the Report's recommendations, the Secretary General ex-

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206. *Cardoso Report*, *supra* note 16, ¶ 124.

207. *Id.* ¶ 127.

208. *Id.* ¶ 128.

209. *Id.* ¶ 142 (Proposal 23).

210. *Id.*



pands on these problems, noting that “there are currently large numbers of NGOs in consultative status with the United Nations that are not complying with the requirement to submit quadrennial reports on their activities and how they relate to the overall goals and objectives of the global community” and suggests that Member States engage in additional monitoring and enforcement.<sup>211</sup> The Report also proposes streamlining the application process through, *inter alia*, better use of technology and more coordinated efforts among UN bodies and members.<sup>212</sup>

Of course, accreditation is only a snapshot and accountability is dynamic. The ECOSOC approach to monitoring and enforcement of ongoing NGO accountability relies primarily on disclosure.

NGOs in general or special consultative status must submit quadrennial reports on their activities to a standing Committee on Nongovernmental Organizations.<sup>213</sup> Focusing little on the internal governance or functioning of the NGO, these reports are required to address “the [NGO’s] activities, specifically as regards the support they have given to the work of the United Nations.”<sup>214</sup> NGOs must provide the Committee with a structured disclosure. One field asks NGOs to report their “aims and purposes” and another asks for changes in an “organization’s orientation, programme, or scope of work,” which would include amendments to foundational documents or changes in funding.<sup>215</sup> The disclosure, however, has much more of a “what have you done for me lately” character. Other fields prompt responses regarding NGOs’ work with UN fora, bodies, and actions in line with the Millennium Development goals. Based on these reports, the Committee may recommend that an NGO’s consultative status or Roster listing be removed,<sup>216</sup> though critics argue that this

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211. U.N. Secretary-General, *Report of the Secretary-General in Response to the Report of the Panel of Eminent Persons on United Nations—Civil Society Relations*, ¶ 34, U.N. Doc. A/59/354 (Sept. 13, 2004).

212. See *Cardoso Report*, *supra* note 16, ¶ 133.

213. *Consultative Relationship*, *supra* note 198. These reports are due every four years. Peter van den Bossche, *Regulatory Legitimacy of the Role of NGOs in Global Governance: Legal Status and Accreditation*, in *NGO INVOLVEMENT IN INTERNATIONAL GOVERNANCE AND POLICY: SOURCES OF LEGITIMACY* 135, 163; *Consultative Relationship*, *supra* note 198, ¶ 61(c).

214. *Consultative Relationship*, *supra* note 198, ¶ 61(c).

215. *Quadrennial Reports: Guidelines for NGOs in General and Special Consultative Status with ECOSOC*, NGO BRANCH, U.N. DEP’T OF ECON. & SOC. AFFAIRS, <http://esango.un.org/paperless/Web?page=static&content=quads#4> (last visited May 16, 2011).

216. *Consultative Relationship*, *supra* note 198, ¶ 61.

rarely happens<sup>217</sup> or has become a disturbingly politicized process.<sup>218</sup> For example, Peter van den Bossche notes that “between 2000 and 2005 [there were] . . . five suspensions recommended to the Council by the NGO Committee.”<sup>219</sup> Thus, ongoing monitoring, while it exists, appears to do little to enforce NGO accountability.

Other UN bodies have similar provisions regarding NGO accreditation.<sup>220</sup> The United Nations Commission on Trade and Development (“UNCTAD”) adopted *Arrangements for the Participation of Non-governmental Organizations in the activities of the United Nations Conference on Trade and Development*.<sup>221</sup> It requires that NGOs shall be representative; shall articulate minority views if there are any; shall have an executive officer as well as a policy making body; shall be authorized to speak for their members; and shall be international and accord their members voting rights. Organizations must complete an application providing the required information along with a copy of its charter or constitution.<sup>222</sup> Once authorized through this process to participate as an UNCTAD observer, there is no provision for monitoring of the NGO’s ongoing compliance with these requirements or removal of its special status.<sup>223</sup>

The World Health Organization (“WHO”) allows observer NGOs to attend meetings, receive non-confidential documentation, and submit memoranda. It has regulated its interaction with NGOs through various resolutions.<sup>224</sup> Resolution WHA40.25, known as the *Principles Govern-*

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217. Peter van den Bossche, *supra* note 213, at 146, 163. There is also the possibility of automatic withdrawal. However, the reasons for such withdrawal appear unrelated to reviewing the continuing existence of the bases for initial accreditation. *Consultative Relationship*, *supra* note 216, ¶ 61.

218. See Kamminga, *supra* note 73, at 191–93.

219. Peter van den Bossche, *supra* note 213, at 146, 164.

220. For a very helpful discussion of the various UN organs and their relationships with NGOs, see Peter van der Bossche, *supra* note 213, at 138–52.

221. U. N. Conference on Trade & Dev. [UNCTAD], *Arrangements for the Participation of Non-Governmental Organizations in the Activities of the United Nations Conference on Trade and Development, Board Decision 43 (VII)* (Sept. 20, 1968 ) [hereinafter *Arrangements for NGO Participation*], available at [http://www.unctad.org/sections/about/docs/dom\\_iaos\\_cso\\_decision43\\_vii\\_en.pdf](http://www.unctad.org/sections/about/docs/dom_iaos_cso_decision43_vii_en.pdf).

222. See UNCTAD, *Application for Observer Status with UNCTAD: NGO Application Questionnaire*, available at [http://www.unctad.org/sections/about/docs/dom\\_iaos\\_cso\\_application\\_en.pdf](http://www.unctad.org/sections/about/docs/dom_iaos_cso_application_en.pdf).

223. *Arrangements for NGO Participation*, *supra* note 221; see also Peter van den Bossche, *supra* note 213, at 166. Peter van den Bossche notes, however, that UNCTAD interacts with civil society in instances not accounted for by these criteria, such as in Civil Society Forums and Civil Society Hearings. See *id.* at 143.

224. Peter van den Bossche, *supra* note 213, at 146.

ing *Relations between WHO and Nongovernmental Organizations*, provides for “formal” relations between NGOs and the WHO.<sup>225</sup> NGOs seeking formal relations must not only focus on health, they must be free from “concerns which are primarily of a commercial or profit-making nature.”<sup>226</sup> They should be international and represent a “substantial proportion of the persons globally organized for the purpose of participating in the particular field of interest in which it operates.”<sup>227</sup> They should have a “constitution or other basic document” an established headquarters, a directing or governing body, an administrative structure at various levels of action, and authority to speak for members through authorized representatives.<sup>228</sup> An NGO’s members “shall exercise voting rights in relation to its policies or action.”<sup>229</sup> In addition, prior to obtaining “official relations,” an NGO must have had “working relations”<sup>230</sup> status with the WHO for two years.<sup>231</sup> The process of obtaining official relations takes time, typically three to four years.<sup>232</sup> In 2004, after a period of study of its relations with NGOs, the WHO considered a proposal for a new policy to guide its relationship with NGOs.<sup>233</sup> The proposal would have required more stringent accreditation requirements, but its adoption was postponed.<sup>234</sup>

The WHO also provides for some monitoring and enforcement of accountability of its participating NGOs over time. NGOs are required to submit a “plan for collaboration” with the WHO as the basis for relations between it and the WHO.<sup>235</sup> The WHO Board of Directors maintains a Standing Committee on Nongovernmental Organizations, which reviews collaboration with NGOs every three years “and shall determine the de-

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225. 40th World Health Assembly [WHA], *Principles Governing Relations with Nongovernmental Organizations*, Res. WHA40.25 (1987) [hereinafter WHA, *Principles Governing Relations with NGOs*], available at [http://apps.who.int/gb/bd/PDF/bd46/e-bd46\\_p5.pdf](http://apps.who.int/gb/bd/PDF/bd46/e-bd46_p5.pdf).

226. *Id.*

227. *Id.* ¶ 3.2.

228. *Id.* ¶ 6.

229. *Id.*

230. See WHO, *Review Report: WHO's Interactions with Civil Society and Nongovernmental Organizations* 10, WHO/CSI/2002/WP6 (2002) [hereinafter WHO, *Review Report*], available at <http://www.who.int/civilsociety/documents/en/RevreportE.pdf>.

231. WHO, *Governing Relations with NGOs*, *supra* note 225, ¶ 3.6.

232. Peter van der Bossche, *supra* note 213, at 169.

233. *Civil Society Initiative: Status of Proposal for a New Policy to Guide WHO's Relations with NGOs*, WORLD HEALTH ORG., [http://www.who.int/civilsociety/relations/new\\_policy/en/index.html](http://www.who.int/civilsociety/relations/new_policy/en/index.html) (last visited May 16, 2011).

234. *Id.*

235. WHO, *Governing Relations with NGOs*, *supra* note 225, ¶ 4.5.

sirability of maintaining official relations.”<sup>236</sup> Relations may be discontinued if circumstance warrants or if the NGO no longer meets the requisite criteria.<sup>237</sup>

The Codex Alimentarius Commission is a standard-setting body established under the Joint Food Standards Program of the Food and Agricultural Organization of the United Nations and the WHO.<sup>238</sup> It sets standards regarding food safety<sup>239</sup> and its norms are widely adopted by States.<sup>240</sup> It allows NGOs to participate as observers.<sup>241</sup> The privileges of observer status include being able to attend proceedings, receive documents, and submit views and written comments.<sup>242</sup> An NGO that already has a status with the FAO, or WHO, may obtain status with the Codex Commission.<sup>243</sup> Other NGOs must be international (in structure and activity), representative, concerned with matters falling under the Codex’s field of activity, “have a permanent directing body and Secretariat, authorized representatives and systematic procedures and machinery for communicating with [their] membership in various countries.”<sup>244</sup> They must also allow members to express their views either through voting or some other mechanism.<sup>245</sup> Finally, an NGO must be established for at least three years before it can apply to the Codex for observer status.<sup>246</sup>

The Codex does not have specific protocols for review of observer status, however, the Director General may terminate observer status any time it finds that the NGO no longer meets the requisite criteria.<sup>247</sup> Observer status is automatically forfeited if an NGO fails to participate over a four year period.<sup>248</sup> This provision suggests that there may be NGOs who establish observer status without participating in a meaningful way.

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236. *Id.* ¶ 4.6.

237. *Id.* ¶ 4.7.

238. *Welcome,* CODEX ALIMENTARIUS (2011), [http://www.codexalimentarius.net/web/index\\_en.jsp](http://www.codexalimentarius.net/web/index_en.jsp).

239. *Id.*

240. In fact, the Codex standards, while soft law, have been hardened by their inclusion as safe harbors in the World Trade Organization’s Sanitary and Phytosanitary Agreement.

241. *See NGO Participation: Principles Concerning the Participation of International Non-Governmental Organizations in the Work of the Codex Alimentarius Commission*, CODEX ALIMENTARIUS, [http://www.codexalimentarius.net/web/ngo\\_participation.jsp](http://www.codexalimentarius.net/web/ngo_participation.jsp) (last visited May 16, 2011) [hereinafter *NGOs and Codex Alimentarius*].

242. *See id.*

243. *See id.*

244. *See id.* ¶ 3(iii)(d).

245. *See NGOs and Codex Alimentarius*, *supra* note 241.

246. *See id.*

247. *See id.*

248. *See id.*

One could imagine why an NGO might want to claim observer status to boost its own legitimacy with various communities, but might not expend the additional resources to engage in ongoing participation.

Both the World Bank and the International Monetary Fund ("IMF") have also developed principles for interacting with NGOs, but to date they do not have accreditation standards or monitoring or enforcement mechanisms in place.<sup>249</sup> The IMF Staff Guidelines say very little about which NGOs should be part of the IMF outreach, only that the Staff should consider a range of factors.<sup>250</sup> These factors focus not on the accountability of NGOs themselves, but seek to ensure the appropriateness and representativeness of the range of organizations with which the IMF works. The IMF and the Bank also host Civil Society Policy Forums together to facilitate dialogue with civil society on a broad range of topics.<sup>251</sup> Civil society organizations must be accredited by the Forum prior

249. See, e.g., *The World Bank and Civil Society*, THE WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,pagePK:220469~theSitePK:228717,00.html> (last visited May 16, 2011); *IMF and Civil Society Organizations*, INT'L MONETARY FUND, <http://www.imf.org/external/np/exr/facts/civ.htm>; see also Peter van der Bossche, *supra* note 213, at 146 (noting that the lack of any accreditation standards at both the World Bank and the IMF is problematic).

250. "(a) Engage with diverse sectors of civil society.

(b) Aim to alternate the Fund's contacts between different CSOs, rather than always and only meeting the same organizations and individuals.

(c) Contact locally based associations as well as the local offices of transnational CSOs—the former are often less assertive in approaching the Fund. In particular, staff should not rely on North-based groups to speak on behalf of South-based stakeholders.

(d) Extend the Fund's dialogue with CSOs beyond elite circles. Contact small enterprise as well as big business, peasants as well as commercial farmers, poor people as well as the affluent, etc.

(e) Meet with CSOs across the political spectrum. Include critics as well as supporters of the IMF. Consider meeting opponents as well as backers of the current government of a country.

(f) Reach out beyond civil society circles that look familiar. Formally organized, western-type associations are not always representative of the mainstream in some cultural contexts. In any event, avoid inadvertent favoritism to English speakers in places where English is not the principal language."

IMF, *Guide for Staff Relations with Civil Society Organizations*, pt. IV.C.2 (Oct. 10, 2003), available at <http://www.imf.org/external/np/cso/eng/2003/101003.htm>.

251. See *Civil Society: Annual and Spring Meetings*, THE WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20094168~menuPK:220438~pagePK:220503~piPK:220476~theSitePK:228717,00.html> (last visited May 16, 2011).

to participation, but there are no published criteria on the basis for accreditation. According to the Bank officials, virtually any NGO that applies is accredited.<sup>252</sup>

The WTO, not a UN body, provides for interaction with NGOs in its *1994 Marrakesh Agreement Establishing the World Trade Organization*, allowing the General Council to make “appropriate arrangements” for “[c]onsultations and cooperation” with NGOs. But, as others have documented, the degree of NGO participation has been modest and this low level of NGO involvement is intentional and relatively transparent.<sup>253</sup> In its *Guidelines for Arrangements On Relations with Non-Governmental Organizations*,<sup>254</sup> the WTO calls for interaction with NGOs to be developed through various means, such as “symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO.”<sup>255</sup> The WTO has no accreditation procedure for NGOs that wish to participate in these events. Indeed, it specifically states that NGOs should not work directly with the WTO, but rather through their national governments.<sup>256</sup> The WTO did issue guidelines for more specific NGO engagement in its dialogues, briefings, technical seminars, and workshops.<sup>257</sup> The organization provides few criteria for NGO participation, it notes only that the lunch time briefings should be open to NGOs that have published trade-related studies or reports,<sup>258</sup> and that outreach should be undertaken to include non-Geneva

252. “The requests from individual CSO representatives are firstly reviewed by the External Affairs Department of the World Bank (“EXT”) and the External Relations Department of the IMF (“EXR”), and will then be submitted for approval by the office of the Executive Director (“ED”) of the World Bank or IMF representing the country from which the CSO request originates. There are hardly any rejections of accreditation requests except on the few occasion where we are unable to get complete information about the requester like email, telephone numbers, etc.” Correspondence with Bank officials (Aug. 6, 2010) (on file with authors).

253. Peter van der Bossche, *supra* note 213, at 153–54 (noting that the lack of any accreditation standards at both the World Bank and the IMF is problematic).

254. WTO Secretariat, *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, WT/L/162, (adopted July 23, 1996) [hereinafter *Guidelines for Relations with NGOs*], available at [http://www.wto.org/english/forums\\_e/ngo\\_e/guide\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/guide_e.htm).

255. *Id.* ¶ IV.

256. *Id.* ¶ VI.

257. See WTO Secretariat, *WTO Secretariat Activities with NGOs*, WT/INF/30 (Apr. 12, 2001), available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/min01\\_ngo\\_activ\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_ngo_activ_e.htm).

258. See *id.*

based NGOs.<sup>259</sup> There is no means for ongoing monitoring or enforcement by the WTO of the accountability of the NGOs with whom it works.

The Basel Committee on Banking Supervision (“Basel”) and the International Organization of Securities Commissions (“IOSCO”) are trans-governmental networks that set international financial standards.<sup>260</sup> Although their standards are soft law, they are widely adopted by national regulators.<sup>261</sup> Neither has a mechanism to include NGOs in their standard-setting efforts.<sup>262</sup> They do, however, accept comments from the public, including NGOs, on their proposals.<sup>263</sup> They have no limiting criteria

259. See *id.* In one dispute, *Shrimp Turtle*, the United States submitted amicus briefs of NGOs along with their own papers. Subsequently, in *EC-Asbestos* the Appellate Body adopted additional criteria for submissions fearing the high number of amicus briefs that would be submitted. Non-parties were required to apply for leave to file a submission. Upon review of the applications however, the Appellate Body denied all applicants leave. See Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 52–55, WT/DS135/AB/R (Mar. 12, 2001). At the next general council of the WTO the members discussed and decided it was unacceptable for the Appellate Body to consider amicus briefs. Then in *EC-Sardines* the Appellate Body said it had the authority to accept non-party briefs (whether from organizations or a WTO member) but was not required to consider them. See Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶¶ 164, 167, WT/DS231/AB/R (Sept. 26, 2002). According to the dispute settlement system training module, “the AB has never considered any unsolicited submission to be pertinent or useful, and thus, has never considered any that have been submitted.” *Amicus Curiae Submissions*, in DISPUTE SETTLEMENT SYSTEM TRAINING MODULE: PARTICIPATION IN DISPUTE SETTLEMENT PROCEEDINGS ch. 9.3, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c9s3p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm) (last visited May 16, 2011).

260. See generally *About the Basel Committee*, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/bcbs/> (last visited May 16, 2011) (Basel provides a forum for regular cooperation on banking supervisory matters); INT'L ORG. OF SECURITIES COMM'NS, <http://www.iosco.org> (last visited May 16, 2011) (IOSCO is recognized as an authority on international standards for securities markets).

261. See Roberta Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOK. J. INT'L L. 883, 907 (2009) (“In adopting IOSCO’s disclosure standards for foreign private issuers, the SEC significantly changed the form, although not the content, of previous disclosure standards.”).

262. See generally *Organisation and Governance*, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/about/orggov.htm> (last visited May 16, 2011); *Structure of the Organization*, INT'L ORG. OF SEC. COMM'NS, <http://www.iosco.org/about/index.cfm?section=structure> (last visited May 16, 2011).

263. See DANIEL K. TARULLO, BANKING ON BASEL: THE FUTURE OF INTERNATIONAL FINANCIAL REGULATION 99 (2008) (noting that, while anyone can comment, Basel seeks comments primarily from banks, which are eager to participate in the notice and comment process to protect their interests).

regarding who may submit comments and, therefore, no mechanisms for ongoing monitoring or enforcement.<sup>264</sup>

Historically, the OECD involved NGOs in its work through its relationships with the Business and Industry Advisory Committee to the OECD (“BIAC”), which consists of the industrial and employers’ associations of the OECD member countries and the Trade Union Advisory Committee to the OECD (“TUAC”), which consists of national trade union organizations from OECD countries.<sup>265</sup> These groups have acted as intermediaries for a portion of civil society for some time.<sup>266</sup>

The OECD has begun to reach out to civil society more broadly, concluding a number of projects using civil society input.<sup>267</sup> The level of civil society input varies from informal, periodic consultations to observer status and full participation in meetings.<sup>268</sup> The OECD has no accreditation criteria for civil society participation in any of these roles. It also lacks any monitoring or enforcement provisions with respect to participating NGOs.

As this summary of approaches demonstrates, the range of tools global regulators use to police NGO accountability varies greatly. Different

264. *See id.*

265. *On-Line Guide to OECD Intergovernmental Activity*, ORG. FOR ECON. CO-OPERATION & DEV., <http://webnet.oecd.org/OECDGROUPS/Bodies/ListByNameView.aspx> (last visited May 16, 2011) [hereinafter *OECD On-Line Guide*] (navigate the comprehensive database for the specific committees, members, actors, and their mandates).

266. The BIAC’s 37 policy groups participate in meetings, forums, and consultations with the OECD. The BIAC leadership structure includes a Chairman, Secretary General, and 11 Executive Board Vice Chairs. The BIAC Secretariat includes a 6 member policy and managerial staff and a 3 person administrative department (who are actually full time BIAC employees). Major business organizations in 32 OECD member countries are the BIAC. TUAC’s affiliates include some 58 national trade union centers which together represent approximately 66 million workers—it is they who finance TUAC activities, decide policy priorities, and elect the TUAC officers. The TUAC has a secretariat of 5 policy staff and 3 administrative staff. The formal decision making body, the Plenary Session, meets twice a year and all TUAC affiliates and representatives of the international trade union organizations are in attendance. *OECD On-Line Guide*, *supra* note 265.

267. The OECD cooperates with civil society through consultations with committee members, workshops, and forums in such areas as the multilateral trading system, the OECD Guidelines for Multinational Enterprises, corporate governance, fighting corruption, the environment, development, biotechnology, food and agriculture, information and communications, and territorial development. *Civil Society: About*, ORG. FOR ECON. CO-OPERATION & DEV., [http://www.oecd.org/about/0,3347,en\\_2649\\_34495\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/about/0,3347,en_2649_34495_1_1_1_1_1,00.html) (last visited May 16, 2011).

268. OECD, *Policy Brief: Civil Society and the OECD* 3 (Nov. 2005), available at <http://www.oecd.org/dataoecd/1/3/35744346.pdf>.



NSRs apply different criteria, to differing degrees, and some have no criteria at all. Generally speaking, UN organizations have gone the furthest in adopting minimum criteria for NGO accreditation, with only ECOSOC, the WHO, and the Codex engaging in any level of ongoing monitoring and enforcement. Other organizations and networks have yet to adopt accreditation mechanisms and thus have no means to monitor or enforce NGO accountability on an ongoing basis.

*C. Enhancing NSRs' Legitimacy by Improving their NGO Accountability Mechanisms*

NSRs have adopted accreditation, monitoring, and other nonprofit accountability mechanisms to varying degrees. To an important extent, these programs vary due to the roles that NGOs play in particular global regulatory contexts. When an NGO operates as an NSR itself, accreditation is not appropriate. Rather, accountability mechanisms must be built into the NGO's governance structure, perhaps with additional monitoring and enforcement capacity built up in the global regulatory community relying on the NSR. As discussed above, some NGOs have signed the NGO Accountability Charter, which is one route to such external enforcement of NGO NSRs.<sup>269</sup> When an NGO instead participates in the work of another NSR, accreditation, monitoring, and enforcement mechanisms become viable and potentially crucial. NSRs considering adopting such mechanisms or reforming existing ones should consider three important factors: (1) the role, if any, envisioned for NGOs in the NSR's legitimacy strategy, (2) the complementary enforcement mechanisms available under domestic nonprofit law, (3) and the ever-present considerations of cost.

1. The Role of NGOs in an NSR's Legitimacy Strategy

In cases of NGO participation in another NSR, the role of NGO involvement the regulator desires or permits is pivotal in designing appropriate accreditation, monitoring, and enforcement mechanisms. Increased reliance on the participation of NGOs as part of an NSR's own legitimacy strategy should compel it to consider and often to adopt these mechanisms for its participating NGOs. Without these mechanisms in place, an NSR risks self-sabotage. Of course, there are global regulators that have declined to cast NGOs as key players in their legitimacy strategies. For example, the WTO makes little use of NGOs to prop up its own legitimacy. This type of regulator, which makes no claim that it will truly en-

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269. *Charter Members*, INGO ACCOUNTABILITY CHARTER ORG., <http://www.ingoaccountabilitycharter.org/list-of-signatories/> (last visited May 16, 2011).

gauge NGOs in its regulatory project, may quite properly deem NGO accreditation, monitoring, and enforcement mechanisms unnecessary, if not a waste of valuable resources.

When an NSR does deploy NGO participation as a significant element of its legitimacy strategy, however, the manner in which it does so is also important. NSRs sometimes draw in NGO participants to boost output legitimacy by obtaining needed expertise. Other times, NSRs desire NGO participation to bolster input legitimacy, by increasing the diversity of voices contributing to their regulatory project. When enhanced output legitimacy is the goal, accreditation, monitoring, and enforcement mechanisms should focus more on mission alignment than when input legitimacy is sought. NSRs seeking expertise primarily seek information and technical assistance from their consulting and partner NGOs, rather than insights into differing views on the normative goals of regulation. Thus, for example, the WHO's accreditation requirements that provide that NGOs must be free from "concerns which are primarily of a commercial or profit-making nature"<sup>270</sup> screens out a number NGOs whose non-health interests might lead to a lack of mission alignment with the WHO.

If a desire for increased input legitimacy predominates, significant mission alignment becomes less important, even counterproductive. Confirming the representativeness and transparency of participating NGOs, however, is crucial. Currently, criteria for NGOs participating in the activities of the World Bank and IMF focus solely on the alignment of a given NGO's mission with that of the regulator. Furthermore, even these criteria appear to be quite loosely applied. Yet, both the World Bank and the IMF have recently touted the engagement of civil society in support of the input legitimacy of their regulatory projects. The IMF Civil Society web page touts its reliance on civil society for, *inter alia*, "the voice and representation of developing countries in the IMF and World Bank."<sup>271</sup> Likewise, the World Bank boasts a special website dedicated to civil society, and touts its active outreach "to civil society to share and discuss its policies, programs, studies, and projects."<sup>272</sup>

This level of engagement of NGOs in the work of the IMF and World Bank appears part of their legitimacy strategy to gain not only expertise, but also diversity of voice in their work, particularly when working with

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270. WHA, *Principles Governing Relations with NGOs*, *supra* note 225.

271. *Fact Sheet: The IMF and Civil Society Organizations*, INT'L MONETARY FUND (Mar. 31, 2011), <http://www.imf.org/external/np/exr/facts/civ.htm>.

272. *Civil Society: Frequently Asked Questions*, THE WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20093224~menuPK:225318~pagePK:220503~piPK:220476~theSitePK:228717,00.html> (last visited May, 16 2011).

developing countries. Accountability failures by the NGOs upon which the IMF and World Bank rely, however, would threaten the success of this legitimacy strategy. Rather than looking solely to mission alignment and accrediting virtually any organization mouthing the proper virtues, the IMF and World Bank should seriously consider a more robust accreditation process, particularly to review the internal organizational and mission accountability of consulting NGOs. Providing for some ongoing monitoring and enforcement of these issues, as well as financial accountability of consulting NGOs, would impart even greater protection for its legitimacy strategy.

Of course, global regulators may seek both input and output legitimacy from NGOs. The UN ECOSOC accreditation standards and ongoing monitoring of NGOs awarded general consultative status reinforce both types of legitimacy strategy. This system demands expertise, but requires a modest level of mission alignment, by seeking assurances that NGOs truly represent the particular fields in which they claim competence. Yet, they require only that an NGO's aims and purposes be in general conformity with those of the UN. In fact, the system encourages NGO participants to contribute to a normative dialogue, and to engage in such a dialogue internally, by obliging them to transmit minority views. Interestingly, however, in the context of ECOSOC's ongoing monitoring of NGOs in consultative status, mission alignment becomes more prominent. NGO quadrennial reports must catalogue their interactions with the UN and justify the UN's continued reliance on them as partners in a shared mission.

Whenever involving NGOs in global regulation is part of the legitimacy strategy of a global regulator, NGO accountability is important. Understanding how NGOs are deployed in a given NSR's legitimacy strategy can help create more effective accountability mechanisms.

## 2. The Complementary Role of Domestic Nonprofit Law

NSRs creating or revising their accreditation, monitoring, and enforcement mechanisms also should tailor them to complement domestic nonprofit regulatory environments. When accreditation criteria are serious and complementary, and monitoring and enforcement are genuine, NGO participation in NSRs can help fill domestic accountability gaps. As discussed above, NGOs need mission accountability to safeguard their own legitimacy, but domestic nonprofit law provides little enforcement of mission accountability.<sup>273</sup> Ideally, an ongoing dialogue among NGO stakeholders regarding mission will provide mission accountabil-

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273. See discussion *supra* Part II.B.1.

ity. NSR accreditation processes can spur just such a dialogue. For example, the WHO accreditation criteria focus on NGOs' development work in "health or health-related fields."<sup>274</sup> The requirement that the NGO submit a plan for collaboration focuses the NGO on mission as it relates to the WHO.<sup>275</sup> Thus, the NGO must consider what its mission is, to then answer the question whether its mission aligns with WHO's. This mission alignment exercise causes the NGO to discuss, consider, and reevaluate its mission. Even greater mission accountability could be gained if the WHO required this exercise to be done with input from the various stakeholders.

In this respect, the focus of the ECOSOC accreditation criteria on organizational accountability is instructive. Domestic nonprofit law provides relatively little enforcement of organizational accountability. But if an NGO wants to be recognized by the United Nations, and if it wants the legitimacy boost that comes from such an acknowledgement, it will need to demonstrate that it has achieved at least nominal organizational accountability. This emphasis is not only in line with the overall goals and ethic of the UN, but also allows NSR accreditation to serve a useful complementary role to domestic enforcement, which will typically focus to a greater degree on NGOs' financial accountability. The fact that the ECOSOC accreditation requirements say relatively little about financial accountability issues may not be damning, as it is here that domestic nonprofit regulation is most able and likely to enforce NGO accountability.

Other global regulatory systems for NGOs could be improved to focus more on this complementary role. When it comes to monitoring and enforcement of previously accredited NGOs, ECOSOC's focus on NGO accountability becomes weaker and less complementary to domestic regulation. The quadrennial reporting requirements do not consider with much depth how a reporting NGO is internally handling the challenges of mission, organizational, and financial accountability. As noted above, these reports strongly emphasize mission alignment. In addition, though the Council Committee on Nongovernmental Organizations is empowered to recommend removal of consultative status, it does not appear to be an aggressive enforcer.

Of course, it might be onerous for some NGOs to provide financial disclosures like an annual report or financial statement, and it might be reasonable for NSRs to rely on domestic enforcement to ensure the financial accountability of consulting NGOs. Thus, the ECOSOC process

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274. WHA, *Principles Governing Relations with NGOs*, *supra* note 225, ¶ 3.1.

275. *See id.* ¶ 4.

demands for quadrennial reports focused on funding changes, rather than the overall financial health of the reporting NGO, might be justified. With regard to organizational and mission accountability disclosures, though, the ECOSOC monitoring process could certainly be improved. Currently, NGOs' structures and governance are established as sufficient and *bona fide* in the accreditation process, and the quadrennial report must address changes to governance documents. Organizational accountability failures result, though, not from failure to enact governance structures, but from failure to use them. Without greatly expanding the required disclosures, the ECOSOC monitoring regime could ask how reporting NGOs have utilized their governance structures over the past four years, particularly with regard to policy initiatives or changes. Doing so would help educate NGOs about the importance of following the strictures of their organizational forms. So too would requiring the NGOs to report on how they engaged a process for reviewing mission and the steps they take to pursue it on a quadrennial basis. Careful scrutiny of reports on these measures, especially if there were real sanctions like loss of consultative status, would represent a significant enforcement gain over domestic nonprofit regulation and would better ensure the internal legitimacy of the NGOs on which the UN relies.

The WHO's monitoring and enforcement is in some respects more rigorous than ECOSOC's. The Standing Committee reviews collaboration every three years, forcing the WHO to focus on the relationship and on whether the criteria continue to be met, and whether the NGO has fulfilled its promises of collaboration.<sup>276</sup> Still, the stalled call for reform of the WHO accreditation procedures suggests that there might still be room for improvement.<sup>277</sup> The proposed reforms would have required biennial reporting<sup>278</sup> as well as automatic termination for the abuse of formal relations status.<sup>279</sup> A review of the WHO relations with civil society also suggests reform of the accreditation procedures to better distinguish public interest NGOs from those linked to commercial interest.<sup>280</sup>

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276. Peter van der Bossche, *supra* note 213, at 170.

277. See WHO, Note by the Director-General, *Policy for Relations with Nongovernmental Organizations*, A57/32 (Apr. 1, 2004) [hereinafter Note by the Director-General], available at [http://apps.who.int/gb/ebwha/pdf\\_files/WHA57/A57\\_32-en.pdf](http://apps.who.int/gb/ebwha/pdf_files/WHA57/A57_32-en.pdf); see also WHO, *A Study of WHO's Official Relations System with Nongovernmental Organizations*, CSI/2002/WP4 (June 2002) (by Christophe Lanord).

278. See Note by the Director-General, *supra* note 277, ¶ 7.

279. See *id.* ¶ 13 (defined as "engaging in a pattern of acts that are not consistent with the Constitution or the policies of the Organization").

280. See WHO, *Review Report*, *supra* note 230, at 14.

### 3. The Ever-Present Question of Cost

Finally, it bears noting that we do not recommend that every global regulator adopt its own comprehensive accreditation, monitoring, and enforcement apparatus to apply to the NGOs with which it works. Accreditation, monitoring, and enforcement mechanisms can be costly. Any responsible NSR must weigh the costs of these strategies against the value they provide in safeguarding its legitimacy strategy and make a considered decision about design and implementation. This is not to say that there is nothing a resource-strapped NSR can do. The Codex has adopted an intriguing review provision from this perspective. Although Codex does not mandate review or provide any protocol for regular review, it does automatically terminate observer status any time it finds that the NGO fails to participate in person or by written comments over a four year period. Provision for automatic culling of the NGO rolls on grounds of nonparticipation may be a way to pursue both output and input legitimacy at little cost. NGOs that do not participate in the workings of a global regulator add little to its store of expertise. Likewise, any claims that their involvement with the global regulator enhances its input legitimacy ring hollow. Yet, removing long inactive NGOs from a list of observers takes much less effort than would a substantive monitoring and enforcement process. Perhaps this type of prophylactic measure could be used more broadly by global regulators without the resources to devote to significant NGO policing mechanisms.

Another means to curtail cost is the development of universal accountability standards. Harmonizing accountability standards would produce savings for NGOs and NSRs alike. As discussed above, the INGO Accountability Charter establishes some fundamental accountability provisions that could be used as the basis for a harmonized procedure.<sup>281</sup> The Charter requires that NGOs be accountable to their missions, have “clear processes for adopting public policy positions,” be transparent, and observe principles of good governance.<sup>282</sup> NSRs could require NGOs to

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281. For a review of the Charter and its founding, see Diana Hortsch, *Case Study: Defining Responsible Advocacy: The International NGO Accountability Charter* (Robert F. Wagner Sch. of Pub. Serv., Working Paper) (unpublished manuscript on file with author); see also Diana E. Hortsch, *The Paradox of Partnership: Amnesty International, Responsible Advocacy, and NGO Accountability*, 42 COLUM. HUM. RTS. L. REV. 119 (2010) (analyzing nonprofit accountability mechanisms including the charter in the context of human rights lawyering).

282. INGO Accountability Charter, *supra* note 192. The Charter is relatively specific. For example in terms of good governance it requires: “Each organisation will have at least: A governing body which supervises and evaluates the chief executive, and oversee programme and budgetary matters. It will define overall strategy, consistent with the

sign and abide by the Accountability Charter as part of, or as a substitute for, individualized accreditation procedures.

In addition, the Charter Company has plans to undertake substantial monitoring and enforcement procedures, from which NSRs could also greatly benefit. Signatories must comprehensively report annually to the Charter Company through the INGO Secretariat<sup>283</sup> on their practices and structures using the Global Reporting Initiative's ("GRI") NGO Sector Supplement Framework.<sup>284</sup> The GRI's NGO Sector Supplement requires reporting on NGOs' compliance with stated values, governance, and effectiveness.<sup>285</sup> The Charter Company will review the reports annually.<sup>286</sup> The Accountability Charter is still in its infancy. In-depth review of its content and efficacy is an important project for future research. The value of an effective harmonized mechanism for certification, monitoring, and enforcement of NGO accountability is obvious and significant for NGOs themselves and for the global regulatory community.

The optimal level of investment in NGO accountability will vary by global regulatory institution and perhaps over time.<sup>287</sup> What is important, and the lesson of this Article, is that these costs must be considered by NSRs when they adopt legitimacy strategies relying on NGOs to increase their output, and especially input, legitimacy. Some of the costs of policing NGO accountability will be borne by domestic regulators and private stakeholders, but clearly not all. If some of this cost is not borne by the

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organisational mission, ensure that resources are used efficiently and appropriately, that performance is measured, that financial integrity is assured and that public trust is maintained; [w]ritten procedures covering the appointment, responsibilities and terms of members of the governing body, and preventing and managing conflicts of interest; [a] regular general meeting with authority to appoint and replace members of the governing body." *Id.*

283. The INGO Secretariat is housed in the Berlin Civil Society Center. *See* BERLIN CIVIL SOCIETY CENTER, <http://www.berlin-civil-society-center.org/>. The INGO Accountability Charter states that members are to report annually to the Charter (Secretariat). *See* INGO Accountability Charter, *supra* note 192.

284. SUSTAINABILITY REPORTING GUIDELINES & NGO SECTOR SUPPLEMENT (2001–2010), *available at* <http://www.globalreporting.org/NR/rdonlyres/19B9E00D-299D-4F3C-A5A7-6B9650EDC532/4263/ReportingGuidelinesNGOSectorSupplement1.pdf>.

285. *Id.* at 7.

286. In 2011 the Charter will also use an "Independent Review Panel, which consists of four independent personalities with experience from the civil society sector but also from the corporate and governmental sector. This group's task will be to review the members reports so that the right measures can be taken, should the reports be incomplete or not in line with the Charter." Correspondence with Berlin Civil Society Center (on file with authors).

287. As Steve Charnovitz notes, it will also depend on NGO functions. *See* Charnovitz, *supra* note 17, at 32.

NSRs that draft NGOs into their legitimacy strategies, the efforts to utilize NGOs to boost the legitimacy of global regulation will be undermined.

#### CONCLUSION

As the participation of civil society and NGOs in international affairs has increased in recent years, much of the ensuing debate has focused on questioning why these NGOs should be allowed special influence. The concerns over NGO participation also raise a separate question of the appropriate criteria needed for NGO participation in global governance. This question is best answered with a view to NGO accountability as core to global regulators' legitimacy strategies and as complementary to domestic regulation of NGOs as nonprofits. Some global regulators have already made significant steps in this direction; these efforts can be further improved by keying accountability enforcement regimes to the legitimacy enhancement goals of a particular NSR and by focusing on the complementary role that NSR enforcement can play in domestic regulation of NGOs. Global regulators that currently rely on NGO participation to prop up their own legitimacy but have not yet adopted these or other measures to track and ensure the accountability of the NGOs on which they rely, should act swiftly to remedy this considerable oversight.