The Pluralism of Global Administrative Law

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Abstract

As public power is increasingly exercised in structures of global governance, principles of domestic law and politics are extended to the global level, with serious repercussions for the structure of international law. Yet, as this article seeks to show for the emerging global administrative law, this extension is often problematic. Using administrative law mechanisms to enhance the accountability of global regulation faces the problem of fundamental contestation over the question of to whom global governance should be accountable. National, international and cosmopolitan constituencies are competing for primacy, and this results in an often disorderly interplay of accountability mechanisms at different levels and in different regimes. This pluralist structure, based on pragmatic accommodation rather than clear decisions, strongly contrasts with the ideals of coherence and unity in modern constitutionalism and domestic administrative law. However, given the structure of global society, it is likely to endure and it is also normatively preferable to alternative, constitutionalist approaches. It helps avoid the friction that may result from a federal-type distribution of powers and the practical problems of a consociational order, and by denying all constituencies primacy it reflects the legitimacy deficits of each of them. Mirroring divergent views on the right scope of the political order, it also respects everybody's equal right to political participation. A pluralist global administrative law thus presents an alternative to problematic domestic models for ensuring accountability in the circumstances of global governance.

1 Introduction

As more and more state functions are performed on the global level, the concepts that have guided politics and law are increasingly under pressure. International law's self-understanding as an order that organizes commonality among grossly different value

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systems is questioned by those who refuse to give up democracy and constitutionalism merely because the exercise of public power has now moved to the international level. Likewise, the extension of the guiding ideas of domestic law and politics to global governance faces serious problems; these ideas often lose their normative force under the different political and social circumstances that prevail in the global realm.

Global administrative law seeks to explore these questions from the angle of accountability; it asks whether and to what extent ideas from domestic administrative law can help us solve accountability problems in global governance.[1] In this article, I seek to take this enterprise further by focusing on one central challenge to the use of administrative law concepts for global regulation, namely the fundamental contestation over the question of *to whom* global governance should be accountable. As I will argue, the strength of this contestation contrasts with the unitary, hierarchical basis on which domestic administrative law rests, and it leads to a peculiarly rugged landscape of accountability mechanisms on the global level. In many instances, these mechanisms are disorderly and highly unstructured; they operate in different regimes and are driven by oppositional dynamics. Global regulation faces challenges by domestic courts, by international civil society, and by competing international regimes, yet all of them function relatively independently – through mutual challenge rather than through fulfilling assigned roles in a coherent overall system.

I call this often unstructured interaction a 'pluralist administrative law', and I will argue that it is unlikely to be a passing phenomenon that will wither away in the process of building more robust mechanisms of accountability. It results from fundamental and durable contestation over the right constituency of global governance, and there are many reasons to regard it also as a normatively adequate response to this contestation. In the circumstances of global governance, attempts at 'constitutionalizing' the political order by forcing it into a coherent, unified framework are problematic as they tend to downplay the extent of legitimate diversity in the global polity; and this has important consequences for the structure of accountability mechanisms. If I am right, the shape of global administrative law is likely to be, and should be, essentially different from that of domestic administrative law.

I try to make my point in five steps. In Section 2, I set the stage for the argument by clarifying the importance of constituency questions for accountability in general and by discerning the central, though often neglected role of such questions in domestic administrative law settings. I also try to sketch the three main archetypes in the contest around the right constituency of global governance: the national, international and cosmopolitan constituencies. In Section 3, I use this framework to analyse in greater depth one area of global regulation in which this contest, and the resulting pluralist order, is particularly apparent: the regulation of transboundary trade with genetically modified organisms (GMOs). Here, WTO regulation faces challenges from domestic courts, especially in the European Union (EU), but also from the competing regime of the Biosafety Protocol, and we can understand the resulting fragmented

[1] See Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005) 15.

picture as a response to the open question of which constituency should control this type of regulation. In Section 4, I then ask whether such pluralist accountability mechanisms are merely an unwelcome step on the way to a global administrative law along well-ordered domestic lines, or whether they are themselves normatively defensible. I begin with a prudential argument, based on the limits of competing approaches of a more constitutionalist character in dealing with the constituency contest. A federal model of assigning defined powers to different constituencies would have to take sides rather than remain neutral in this contest; and a consociational model, relying on power-sharing and veto rights of the various constituencies, would likely prove impractical given the number of actors and the resulting risk of blockade. A pluralist approach, granting the different constituencies the possibility to challenge but not formally veto a decision, would reflect the essential contestation and also achieve a sufficient degree of practicality. It would respond to the claims of the constituencies not through their full co-decision, but through their distance from the decision: none of them would be entitled to fully control the outcome, but each of them could equally contest it. In Section 5, I seek to develop elements of a principled defence of such a pluralist order. One pillar of this defence is based on the normative deficits of all constituencies: since none of them can claim full legitimacy for global regulatory decisions, they need to complement one another; and since co-decision is largely barred for practical reasons, such complementarity should result in a pluralist order. Another, normatively more demanding pillar of a principled defence rests on the individual right to participate in the determination of the scope of the polity. If this right is exercised in diverging ways, all choices can (in certain boundaries) claim respect and need to be reflected in the institutional order. Granting one of them primacy over the others would then be normatively problematic. In Section 6, I briefly address some of the central problems of a pluralist order. Many challenges remain, especially as regards the role of power in a pluralist approach, but in many respects, alternative conceptions do not seem to provide better solutions. In a global setting devoid of the certainties of the nation state, a pluralist global administrative law might be the best option we have.

2 Accountability, Administrative Law, and Its Many Constituencies

A *Accountability: To Whom?*

If '[t]o be accountable means to have to answer for one's action or inaction, and depending on the answer, to be exposed to potential sanctions, both positive and negative'[2], most institutions are accountable. This is most obviously true for a government that has to leave office when it loses elections, but it extends to such bodies as courts that face reputational sanctions if their judgments do not find favour among

[2] Oakerson, 'Governance Structures for Enhancing Accountability and Responsiveness', in J.L. Perry (ed.), *Handbook of Public Administration* (1989), 114, at 114.

their peers and the public, and also to private entities. The board of a corporation is accountable to the shareholders, and any company to the market, in the most exacting case to the stock market. Likewise, most institutions of global governance are accountable in this sense. The World Bank has to respond to the will of its member states, and in particular to those with strong voting rights. The Financial Action Task Force (FATF) is closely tied to the limited circle of its member entities, just as the United Nations Security Council is highly accountable to its members, and in a more diffuse way to the broader membership of the UN. And also a private body like the International Organization for Standardization (ISO) is accountable to all its member organizations as well as to the market that has to accept its standards.[3]

To speak of an 'accountability deficit' in global governance is therefore somewhat misleading. Many regulatory institutions on the global level are in fact highly accountable – up to the point that they often enjoy little freedom of independent action and are closely tied to the wishes of their constituents. This is particularly true for intergovernmental organizations.[4] The problem with these institutions is, then, not an absolute accountability 'deficit', to be overcome by improving or strengthening accountability mechanisms in a technical exercise. Rather, the problem is that these institutions are often accountable in the wrong way: in part, they are accountable to the wrong constituencies.[5] The World Bank, it is often claimed, should respond to the people affected by its decisions, rather than primarily to the (mostly developed) countries that fund it. The FATF should be accountable to those states subject to its measures, not just to its members. Or the Security Council should have to answer to the individuals it targets directly with its sanctions, not only to its member governments or the broader membership of the UN.

Claims for stronger accountability of global governance thus involve not only the fairly uncontroversial argument that any public power should be accountable as such, but also much more contested normative positions on who should control public power – since, after all, accountability is about control.[6] Central to arguments about accountability is then the question: 'to whom' should a given institution be accountable?[7] In the growing field of global administrative law, it is on this issue that the stakes are highest for the distribution of power: if an institution becomes accountable to a wider group, those that previously controlled it become less influential. If, for example, the World Bank allowed for stronger representation and participation of

[3] On the different forms of accountability mechanisms, see Fisher, 'The European Union in the Age of Accountability', 24 *Oxford J Legal Studies* (2004) 495, at 501–508; Grant and Keohane, 'Accountability and Abuses of Power in World Politics', 99 *American Political Science Review* (2005) 29, at 35–37.

[4] See also *ibid.*, at 37.

[5] See Keohane, 'Global Governance and Democratic Accountability', in D. Held and M. Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (2003), 130, at 145.

[6] See Scott, 'Accountability in the Regulatory State', 27 *J Law and Society* (2000) 38, at 39. It should be noted, though, that accountability (which operates mostly *ex post*) is not the only form of control but operates alongside various forms of potential *ex ante* control. See *ibid.*; also H.F. Pitkin, *The Concept of Representation* (1967), at ch. 3; T. Macdonald, *'We the Peoples': NGOs and Democratic Representation in Global Politics*, D.Phil. Dissertation, Oxford (2005), at ch. 8.

[7] See also Scott, *supra* note 6, at 41; Grant and Keohane, *supra* note 3, at 42.

developing countries and their citizens, the funders that so far dominate the Bank would lose influence. Accountability is not necessarily zero-sum, but in many cases, more accountability to one actor means less to another.

This article seeks to explore the question 'accountable to whom?' – the question of the constituencies of global governance. Its claim is that the structure of global accountability mechanisms and of global administrative law, especially its current irregular shape, is best understood as a product of deep-seated disputes over the right constituencies of global regulatory action. Yet the question of the right constituency is not limited to the global level: it is also a central (though often less visible) element of domestic administrative law systems.

B *The Constituencies of Domestic Administrative Law*

In domestic administrative law, the constituency question is usually not addressed as such, and this is probably because the answer appears to be obvious, and constitutionally mandated. The two primary constituencies seem indisputable: on the one hand, the individual (or individual entities like companies) insofar as their rights or interests are affected; and on the other hand, 'the people' insofar as administrative action is supposed to serve democratic purposes, or more broadly the common good. Yet especially with respect to the latter category, this clarity is only superficial, and constituency questions resurface in a number of areas of administrative law, of which I will only mention two central ones here.

The first, and structurally most important, area is the balance between the national community ('the people') and smaller parts of it in the organization of accountability mechanisms. This balance is crucial in all orders in which sub-entities possess their own normative weight, as is often the case for local self-government; but it finds its clearest expression in federal systems. In the case of Germany, where the constitution prescribes that 'all state authority is derived from the people',[8] this includes both the people of the whole of Germany and the several peoples of the *Länder*. The duality of constituencies leads to a complex system of interlinkages in administrative organization, procedure and judicial review.[9] In general, administration is a domain of the *Länder*, with the effect that organizationally, administrative officials answer to the elected government on this level and thus eventually to the people of the *Land*.[10] Insofar as they execute federal law, however, they are subject to supervision by the federal government[11] as well as to judicial review not only by *Länder* courts (which mixes accountability to the federal level through the content of

[8] Art. 20(2) of the Grundgesetz für die Bundesrepublik Deutschland; for an English version, see www.oefre.unibe.ch/law/lit/the_basic_law.pdf.

[9] I can sketch only some principal traits here. For more detail, see Rudolf, 'Kooperation im Bundesstaat', in J. Isensee and P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (1990), iv, at 1091; Blümel, 'Verwaltungszuständigkeit', in *ibid.*, at 857. On the tension of these interlinkages with the general constitutional prohibition of a common administration (*Mischverwaltung*), see Hermes, 'Art. 83', in H. Dreier (ed.), *Grundgesetz: Kommentar* (2000), iii, at 1, 24–27.

[10] Art. 84(1) Grundgesetz.

[11] Art. 84(3) of the Grundgesetz. This supervision is limited to the conformity with federal law.

the legislation with that to the *Länder* level through the composition of the courts) but ultimately also by federal courts. In contrast, regulation by the federal government is often tied back to the *Länder*: in all areas in which federal legislation requires the consent of the *Bundesrat* (the Upper House representing the *Länder*) or is to be executed by the *Länder*, administrative rule-making also requires *Bundesrat* consent unless federal law provides otherwise.[12] Interlinkages between the different constituencies are even stronger in the case of the European Union, where regulation in the Comitology framework accounts, by virtue of its participants, to both the Union and the Member State levels.[13] But this approach contrasts starkly with that of the US, in which the two levels of administration are in principle separate (yet state administration is subject to judicial review by federal courts when compliance with federal law is at issue).[14] In all multi-level systems, though, the multiplicity of constituencies is a central factor for the shape of accountability mechanisms.

The constituency question has been the focus of more explicit attention in the literature as regards the participation of private actors in governmental agencies' administrative decision-making. In the US, this has been theorized as pluralist interest representation, seeking to strengthen regulatory accountability directly to the people. It represents a response to the increasingly limited capability of legislation to steer regulatory outcomes and the resulting limits of substantive judicial review in tying regulation back to electoral processes. Yet such interest representation has provoked serious concerns that accountability is not to 'the people' but to particularly well-organized and powerful interest groups.[15] In Germany, the idea that accountability to the people should be organized through responsibility to an elected government as well as the 'transmission belt' of legislation is still dominant and enjoys even constitutional status. Although the inclusion of affected interests in decision-making bodies was initially seen with great scepticism, recent constitutional jurisprudence envisages circumstances in which accountability to affected actors can complement that to the people as a whole, e.g. in cases of functional self-government or representation of particularly affected groups in collegial administrative bodies. Yet here, too, there are concerns about potentially excessive influence of these new constituencies, and the organizational structure must in any event be decided by parliament, so as to ensure the ultimate dominance of the constituency of the people as a whole.[16]

In domestic administrative law, mechanisms to involve federal, state and local constituencies as well as general and particular publics operate within a framework in

[12] Art. 80(2) of the Grundgesetz. In practice, 40% of these regulations require *Bundesrat* consent: see Bauer, 'Art. 80', in Dreier, *supra* note 9, (1998), ii, at 1526, 1534.

[13] See C. Joerges and E. Vos (eds), *EU Committees: Social Regulation, Law and Politics* (1999). On the cooperative structure of European administration more generally, see E. Schmidt-Aßmann and B. Schöndorf-Haubold (eds), *Der Europäische Verwaltungsverbund* (2005).

[14] But see Stewart, 'Federalism and Rights', 19 *Georgia L Rev* (1985) 917, on important deviations from this principle in practice.

[15] See Stewart, 'The Reformation of American Administrative Law', 88 *Harvard L Rev* (1975) 1667.

[16] See Bundesverfassungsgericht, 2 BvL 5/98 and 2 BvL 6/98, 5 Dec. 2002, 107 BVerfGE 59; E. Schmidt-Aßmann, *Das Allgemeine Verwaltungsrecht als Ordnungsidee* (2nd edn., 2004), at 87–101, 262–266.

which 'the people' (however understood) enjoys a paramount place; it remains the ultimately decisive constituency. This structure reflects the aspiration to coherence, unity and normative hierarchy characteristic of modern constitutionalism.[17] On the global level, not only does the number of important constituencies rise; but also none of them enjoys clear primacy. Thus, if the question of the right constituencies is important for the shape of domestic administrative law, it is likely to be central to the structure of global administrative law.

C *Three Competing Constituencies in Global Administrative Law*

The question to whom global administration is, and should be, accountable is heavily contested.[18] Several constituencies compete for primacy, with different patterns emerging in different institutional settings, and although the resulting picture is highly varied and inconsistent, we can identify three dominant approaches.

The *nationalist approach* is the classical and probably still the dominant among the three; it claims that control over regulatory decisions should lie with the national constituency.[19] This approach has for a long time been central to the international legal system: since the rise of voluntarist positivism in the 19th century, international law derives its legitimacy and binding force mainly from the consent (or at least the acquiescence) of states, and each state is in theory free to decide whether to be bound or not. In the realm of administration, the dominant role of the national constituency is reinforced by the need for domestic implementation: it is through domestic administrative actors, accountable to a national public, that international norms are concretized and applied. The requirement of domestic ratification and implementation shields and separates the national level from the international one, allowing the former to retain full control. The resulting dominance of the national constituency has a strong normative basis: it respects political and cultural pluralism by allowing each society to bring its own values to bear in regulatory decision-making.[20] And in the views of many, it is the only approach capable of realizing democratic aspirations: cultural homogeneity, communicative coherence, or a strong sense of solidarity, which are often seen as preconditions for strong democracy, are usually present only in national communities. It is therefore the national constituency that needs to have

[17] On the ideal of unity in modern constitutionalism, see J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995). For attempts at reconceptualizing this model within states (though from a different perspective from the one I focus on here), see also Ladeur, 'Towards a Legal Theory of Supranationality: The Viability of the Network Concept', 3 *European LJ* (1997) 33, at 43–46; Dorf and Sabel, 'A Constitution of Democratic Experimentalism', 98 *Columbia L Rev* (1998) 267. For a related attempt with a primary focus on the European Union, see Walker, 'The Idea of Constitutional Pluralism', 65 *MLR* (2002) 317, and the references *infra* in note 84.

[18] I do not deal here with accountability to individuals with respect to their affected rights; on this, see Kingsbury, Krisch, and Stewart, *supra* note 1, especially at 45–48.

[19] I simplify here by treating nation and state as coextensive; especially in recent years, the issue of substate nations has (rightly) attracted much attention; see W. Kymlicka, *Contemporary Political Philosophy* (2nd edn., 2002), at ch. 8. I do not take this up here for reasons of clarity alone.

[20] See Kingsbury, 'Sovereignty and Inequality', 9 *EJIL* (1998) 599, at 623–625.

the right to take all important decisions, even in international contexts.[21] This constitutes, in essence, the approach of the German Constitutional Court towards the European Union,[22] and it seems to be increasingly influential in attitudes towards international law in the US.[23] It is also reflected in arguments for a strong role of regulatory networks in global administration. In those networks, it is claimed, domestic accountability mechanisms with a high democratic pedigree are more effective than in classical international organizations: they can influence the national regulators that participate in decision-making in those networks, and they can later review the decisions, as these are usually non-binding.[24]

The *internationalist approach*, in contrast, regards the international community of states as the main constituency. In this view, on such issues as human rights or the environment, international law has already moved beyond the narrow confines of the state-voluntarist perspective and is increasingly shaped by concerns common to all states.[25] In global administration, this is reflected in the rise of international bodies for rule-making, decision-making and review: international organizations, as far as possible independent from member states, are seen as guardians of a broader, impartial international interest, and they keep national administrators in check. The UN or the World Health Organization are examples, just as human rights institutions or the WTO Dispute Settlement Body. The internationalist approach is also supported by strong normative reasons: on many issues, regulation produces effects well beyond national boundaries and thus cannot be left to national constituencies if all affected interests are to be dealt with in a fair way.[26] In democratic terms, too, this is a powerful argument: insofar as democracy is regarded as self-government, the scope of the polity has to reflect the range of affected individuals.[27] For internationalists, though, this does not imply a move towards a single global community: for them, the diversity of political orders deserves recognition and is best protected through states in which different political visions – liberal, collectivist, etc. – can find expression. Global governance should thus be accountable to the national constituencies together, not to each of them individually or to a single global body of citizens.

[21] See E.-W. Böckenförde, *Staat, Nation, Europa* (1999), at 103–126; Grimm, 'Does Europe Need a Constitution?', 1 *European LJ* (1995) 282, at 292–297; also J. Habermas, *Die postnationale Konstellation* (1998), at 91–169. For a broader defence of nationalism, see D. Miller, *On Nationality* (1995), and for an overview of nationalist arguments, see Kymlicka and Straehle, 'Cosmopolitanism, Nation-States, and Minority Nationalism', 7 *European Journal of Philosophy* (1999) 65, at 68–72.

[22] See Bundesverfassungsgericht (1993) 89 BVerfGE 155.

[23] See Goldsmith, 'Liberal Democracy and Cosmopolitan Duty', 55 *Stanford L Rev* (2003) 1667; Rubenfeld, 'The Two World Orders', 27 *Wilson Quarterly* (Autumn 2003) 22. See also Dahl, 'Can International Organizations be Democratic? A Skeptic's View', in I. Shapiro and C. Hacker-Cordón (eds), *Democracy's Edges* (1999), at 19.

[24] See A.-M. Slaughter, *A New World Order* (2004), at 230–244.

[25] See, e.g., Simma, 'From Bilateralism to Community Interest in International Law', 250 *Recueil des Cours* (1994-VI) 217.

[26] See, e.g., D. Held, *Democracy and the Global Order* (1995), at 236; I.M. Young, *Inclusion and Democracy* (2000), at 246–251; Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *EJIL* (2004) 907, at 922–924.

[27] See Pogge, 'Cosmopolitanism and Sovereignty', 103 *Ethics* (1992) 48, at 63–69.

The *cosmopolitan* approach goes even further in that it insists on a genuinely global constituency for issues of global governance. It shares with the international approach the view that accountability to national constituencies is insufficient, but it is based firmly on a liberal individualism according to which states are not valuable as expressions of fundamental diversity but only as (albeit important) organizational tools to ensure a division of labour and check the dangers of a world state. For cosmopolitans, the right constituency would not consist in the community of states, but in the global community of individuals, in a truly global public.[28] They disagree on how to institutionalize accountability to that constituency, with proposals ranging from representative options such as a world parliament to more deliberative proposals.[29] Most common, though, is an emphasis on NGOs as representatives of 'global civil society' alongside state representation. Efforts to involve NGOs in the global administrative space have indeed succeeded in a number of areas, from active engagement in environmental contexts, for example in proceedings of the World Bank Inspection Panel, to observer participation in standard-setting bodies such as the Codex Alimentarius Commission or representation in forms of private regulation, as for example in the Forest Stewardship Council. Cosmopolitans are certainly aware of the problems of relying on NGOs, and they would not see them as sufficient to satisfy their vision of global democracy but as a first step in the organization of a transnational global public.

These three constituencies – the several states, the community of states, the global public – certainly represent only rough approximations of the main strands in the debate on accountability in global governance, and many more approaches could be identified: for example, the accountability to funders as in the international financial institutions, or that to particular stakeholders, as in some forms of standard-setting.[30] Moreover, in the way I have sketched the three constituencies here, they represent archetypes or structures rather than 'real' constituencies:[31] by speaking of an 'international constituency', for instance, I merely point to the level of community to which accountability is due, not the precise shape of the accountability holder. This abstracts from the particular reasons for regarding this constituency as relevant: international control over environmental issues, for instance, might be preferred to national control because it helps limit negative externalities, because it protects state sovereignty against encroachments, or because in democratic terms it ensures that all affected individuals can participate. Whichever approach one chooses will determine the precise shape of the accountability holder: from a democratic perspective, this might be the peoples of the several states affected, while from a sovereignty perspective,

[28] At least alongside constituencies on other levels; see Held, *supra* note 26, at 226–238; Pogge, *supra* note 27, at 57–69; Young, *supra* note 26, at 265–271.

[29] See Falk and Strauss, 'Toward Global Parliament', 80 *Foreign Affairs* (Jan./Feb. 2001) 212. See also the useful survey in Howse, 'Transatlantic Regulatory Cooperation and the Problem of Democracy', in G.A. Bermann, M. Herdegen, and P.L. Lindseth (eds), *Transatlantic Regulatory Cooperation* (2000), at 469.

[30] See Woods, 'Making the IMF and the World Bank More Accountable', 77 *Int'l Affairs* (2001) 83, at 85–87; Mattli and Büthe, 'Global Private Governance: Lessons from a National Model of Setting Standards in Accounting', 68 *Law and Contemporary Problems* (2005) 225, at 250–259.

[31] I am grateful to Gráinne de Búrca and Benedict Kingsbury for insisting that I clarify this point.

it might be the sum of national governments. My account brackets this problem and seeks to highlight only the three abstract archetypical groups within which, despite all differences in detail, various normative approaches as well as strands in international society converge as primary candidates for holding global governance accountable.

The main point of this section was to show the fundamentally contested nature of the constituency of global administrative law: the competition of normatively attractive and practically influential positions for primacy in the accountability mechanisms of global governance. While in domestic administrative law multiple constituencies coexist in an order that, as a matter of constitutional principle, has at its top 'the people', in global administrative law no such order prevails.[32] Instead, it is the contest between different constituencies that shapes the 'constitutional' framework of the global polity as well as global administrative law and its institutions.

3 Contested Constituencies in Global Risk Regulation: The Case of GMOs

Contestation over the right constituency of global governance is written into the institutional structures of global governance and global administrative law, and it is the shape of these structures that this section seeks to analyse further. For this purpose, I will focus on one particular case – the regulation of genetically modified organisms (GMOs) – which provides an example of how accountability mechanisms in global regulatory structures differ from those in typical domestic settings.[33]

As the previous section has indicated, in domestic settings we typically find unitary, hierarchical structures of regulation and administrative law in which multiple constituencies are accommodated through participation and review mechanisms as well as checks and balances and a distribution of competences among different levels of decision-making. In global regulation, such clearly ordered structures are unusual; here, we find a much more disorderly institutional landscape, with decision-making, participatory procedures, and review often taking place in different sites at the same time and with no formal connection among them. This institutional 'disorder' makes final decisions often difficult to reach, yet it also allows for an institutional expression of the views of different constituencies, for mutual influences and gradual approximation, while permitting the operation of buffers that prevent full control of one over the others.

[32] But see on similar conflicts in early federal states and in the EU, Oeter, 'Souveränität und Demokratie als Problem in der "Verfassungsentwicklung" der Europäischen Union', 55 *ZaöRV* (1995) 659, at 664–687; Goldsworthy, 'The Debate About Sovereignty in the United States: A Historical and Comparative Perspective', in N. Walker (ed.), *Sovereignty in Transition* (2003), at 423; MacCormick, 'The Maastricht Urteil: Sovereignty Now', 1 *European LJ* (1995) 259.

[33] I am grateful to Richard Stewart for many insights into GMO regulation and for allowing me to use his unpublished draft on 'The GMO Challenge to Global Governance of Risk' (on file with the author).

A *The Substantive Dispute over GMOs*

On the issue of GMOs, two fundamentally opposed approaches confront each other, and both respond to deeply held convictions about risk, nature and scientific progress. I can only sketch them here and have to leave out many nuances.

On the one hand, the 'permissive' approach that is today dominant in the United States sees restrictions on the production, sale and use of foodstuffs as justified only when there are scientifically proven risks for human health, the environment, or other important goods. Absent such proof, the production, sale and use of food and feed is free, and since for many products that contain GMOs or have been produced on the basis of GMOs risk assessments have not revealed ascertainably higher risks than for other products, restrictions are not warranted under this approach.

On the other hand, the 'precautionary' approach that is favoured in Europe emphasizes the scientific uncertainty that even thorough risk assessments leave and insists that in situations of uncertainty and potentially serious risks, one should err on the side of caution. Since the consequences for public health and the environment for products containing or based on GMOs cannot be fully determined – in part because of the short time that has so far been available for testing and in part because testing is usually limited to small contexts rather than extending to entire ecosystems – the precautionary approach tends to restrict the production, sale and use of such products significantly.

On a more general level, these approaches reflect attitudes to risk in scientific progress and in particular to alterations of nature and its potential consequences. But in the case of the EU, the more cautious approach also stems from recent experiences in the area of food safety, in particular the BSE scandal, as well as concerns about the effect of a shift towards GMO food and feed for the agricultural landscape. In this way, it may also be connected with a desire to shield the relatively small European agricultural businesses from the pressures towards stronger industrialization that GMO agriculture and competition with large-scale American farms would bring.[34]

These two approaches, usually coexisting peacefully, clash over questions of global trade. US exports of agricultural products containing or based on GMOs to Europe are severely limited by stringent EU rules, and exports to developing countries are often hampered because of the wish of these countries to export agricultural products to Europe, which is more difficult with GMOs in the food chain. Accordingly, the contest between the two approaches takes place mostly in trade-related institutions.

[34] On the two general approaches, see *ibid.*, at 11–16, 22–32; Vogel, 'The Politics of Risk Regulation in Europe and the United States', 3 *Yearbook of European Environmental Law* (2003) 1; for a cautionary note on the differences between the US and Europe, see Wiener and Rogers, 'Comparing Precaution in the United States and Europe', 5 *J Risk Research* (2002) 317. On the development of European GMO regulation, including important differences between EU Member States, see Shaffer and Pollack, 'Regulating Between National Fears and Global Disciplines: Agricultural Biotechnology in the EU', *Jean Monnet Working Paper* 10/04, available at www.jeanmonnetprogram.org/papers/04/041001.html.

B *The Institutional Contest*

Institutionally, the conflict is situated mainly between the EU and the WTO, with two other institutions – the Codex Alimentarius Commission and the Cartagena Protocol on Biosafety – also playing a significant role.

Europeans understand the WTO as a threat to their approach to GMOs mainly because the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) emphasizes the role of a scientific risk assessment when trade restrictions for human or animal health are at issue.[35] The SPS Agreement is widely regarded as seriously limiting precautionary considerations; and the WTO Appellate Body has in a number of cases found it to be violated by measures based on such considerations.[36] One of these cases concerned politically highly sensitive restrictions by the EU on hormones in beef[37] and has certainly contributed to European concern that WTO rules challenge its own food safety regulation. Yet, on the other hand, the Appellate Body has often left considerable scope for national regulation in public health and environmental matters, and it has indicated that a precautionary approach may find wider application than just for the provisional measures for which it is explicitly admitted in the SPS Agreement.[38]

As a result, the legal issues under the SPS Agreement are far from clear-cut and a good case can be made for the conformity of European measures with it;[39] thus, the central issue is about the decision-making body and in particular about the level on which decision-making should take place. While from an American perspective this decision is best taken on an international level and with regard mainly to an international (trade) constituency, Europeans insist that the dispute is about values and policies and that it is primarily for the European polity to determine: to simplify and put it in the terms of the previous section, Europeans insist on the superiority of the national over the international constituency in this regard.[40] Accordingly, they have

[35] On the dominant role of science in the SPS Agreement and WTO decisions, see Peel, 'Risk Regulation under the WTO SPS Agreement: Science as an International Normative Yardstick?', *Jean Monnet Working Paper* 02/04, available at www.jeanmonnetprogram.org/papers/04/040201.html.

[36] Precautionary considerations are explicitly allowed only with respect to provisional measures in situations of insufficient scientific evidence: see Art. 5(7) of the SPS Agreement. For the cases, see *EC Measures Concerning Meat and Meat Products*, Report of the Appellate Body, WTO Docs. WT/DS26/AB/R & WT/DS48/AB/R (16 Jan. 1998) (hereinafter: *EC Beef Hormones*); *Australia – Measures Affecting Importation of Salmon*, Report of the Appellate Body, WTO Docs. WT/DS18/AB/R (20 Oct. 1998); *Japan – Measures Affecting Agricultural Products*, Report of the Appellate Body, WTO Docs. WT/DS76/AB/R (22 Feb. 1999); *Japan – Measures Affecting the Importation of Apples*, WTO Docs. WT/DS245/AB/R (26 Nov. 2003). For an overview of the first three cases, see Victor, 'The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years', 32 *NYU J Int'l L and Politics* (2000) 865, at 895–913.

[37] *EC Beef Hormones*, *supra* note 36.

[38] See Howse, 'The WHO/WTO Study on Trade and Public Health: A Critical Assessment', 24 *Risk Analysis* (2004) 501.

[39] See Howse and Mavroidis, 'Europe's Evolving Regulatory Strategy for GMOs – The Issue of Consistency with WTO Law: Of Kine and Brine', 24 *Fordham Int'l LJ* (2000) 317.

[40] I simplify here also by treating the European constituency as 'national' for the purpose of this article. Given the tensions between the European and Member State levels within the EU, interesting constituency contests can also be observed in that framework; see, e.g., Shaffer and Pollack, *supra* note 34. For reasons of clarity, though, I leave them out here and focus on the central commonalities of the approaches in Europe.

challenged the complaint brought in 2003 by the US, Canada and Argentina against EU restrictions on GMOs as denying states their right to a sovereign decision and placing the issue in the wrong forum:

> [I]t is not the function of the WTO Agreement to allow one group of countries to impose its values on another group. … There is a serious question as to whether the WTO is the appropriate international forum for resolving all the GMO issues that the Complainants have raised in these cases.[41]

The dispute before the WTO can thus be interpreted as a contest of constituencies, with both international and European constituencies claiming a right to determine the limits of trade with GMOs. From this perspective, we can also understand the different, and competing, accountability mechanisms that are at play here as expressions of this same contest. The WTO dispute settlement regime, in reviewing European regulatory decisions and thus providing a mechanism of judicial review of administrative action,[42] seeks to tie domestic administration back to an international constituency: it serves, in Robert Keohane's words, to mitigate the 'external accountability gaps' of national regulation that produces external effects.[43] From an opposite perspective, the European mechanism that determines the status of WTO law in European Union law ties global regulatory action back to the European, national constituency. This mechanism is very political in nature: although in principle, international treaties enjoy direct effect in EU law, European courts have denied this effect to WTO law, arguing that otherwise the political organs of the EU would be severely limited in their negotiations over trade disputes.[44] Therefore, WTO law is only considered by the courts if EU legislation intends to implement it domestically or if it expressly refers to it. The EU judiciary has created a buffer: if a WTO decision does not find favour with the European constituency as expressed through political channels, the courts will disregard it. In many ways, this buffer re-enacts a dualist system, but because of its specificity in the context of WTO regulation, it might well be seen as a mechanism for ensuring that a particularly intrusive form of international regulatory action is accountable to a European, a 'national', constituency.[45]

[41] European Communities, First Written Submission in *EC – Measures Affecting the Approval and Marketing of Biotech Products*, 17 May 2004, para. 10, available at http://trade-info.cec.eu.int/doclib/docs/2004/june/tradoc_117687.pdf. See also the Press Release of 17 June 2003, available at http://trade-info.cec.eu.int/doclib/docs/2003/november/tradoc_114665.pdf.

[42] For such an interpretation see Kingsbury, Krisch, and Stewart, *supra* note 1, at 36–37; Cassese, 'Global Standards for National Administrative Procedure', 68 *Law and Contemporary Problems* (2005) 109.

[43] See Keohane, *supra* note 5, at 146–152. For a similar account, see Scott, 'European Regulation of GMOs: Thinking about "Judicial Review" in the WTO', *Jean Monnet Working Paper* 04/04, available at www.jeanmonnetprogram.org/papers/04/040401.html, at 12–13.

[44] European Court of Justice, Judgment of 23 Nov. 1999 in Case C–149/96, *Portugal v. Council* [1999] ECR I–08395, at paras 34–49; Judgment of 1 Mar. 2005 in Case C–377/02, *Van Parys v. Belgische Interventie-en Restitutiebureau*, available at http://curia.eu.int/en/content/juris/index_form.htm at paras 38–54.

[45] This approach is not confined to Europe: see Cottier and Nadakavukaren Schefer, 'The Relationship between World Trade Organization Law, National and Regional Law', 1 *J Int'l Economic L* (1998) 83, at 106–110.

These mechanisms balance each other to some extent. They reject claims to hierarchical superiority by the other order, but do not exclude mutual influences and approximation over time. Tracing the precise operation of such influences is difficult, but one might interpret WTO Appellate Body attempts to – at least verbally[46] – leave the door open to precautionary approaches as an attempt to gain broader acceptance and also to retain a *marge de manoeuvre* for future conflicts. Likewise, European courts have given the 'precautionary principle' in EU law a restrictive interpretation that is close to WTO rules, and WTO disciplines have had a major impact on recent EU legislation and regulatory reform in the area.[47] The competing accountability mechanisms and superiority claims of the different constituencies may thus not result in antagonism, but rather in mutual observation and gradual and pragmatic approximation.[48]

Likewise, interactions with other institutions can also be understood as driven by claims to make the global regulation of GMOs accountable to further constituencies. As mentioned above, the two additional institutions with a significant role in the dispute are the Codex Alimentarius Commission (CAC) and the Biosafety Protocol. The CAC[49] is closely linked with the WTO as it is presumed that trade measures in conformity with Codex Alimentarius standards are in compliance with the SPS Agreement (even though here, too, there may exist a degree of flexibility for WTO bodies as to the status they accord a given standard[50]). This brings a broader international constituency into WTO regulation: not only does the CAC strengthen the influence of public health rather than trade expert communities, but it also represents a significantly broader, almost universal membership and includes NGO observers (even if the influence of developing countries and NGOs on CAC decision-making is weak).[51] The broader membership, however, has so far prevented a clear stance on GMOs: since its membership is divided, it has only been able to adopt procedural rules on the performance of risk assessment, while leaving the substantive questions open.[52] Yet the open expression of this division, coupled with some pragmatic steps for narrowing the dispute, might already provide an important signal for regulation in other fora, especially in the WTO.[53]

[46] The outcomes of actual cases indicate a more restrictive approach: see Peel, *supra* note 35, at 53–86.

[47] See Scott, 'European Regulation of GMOs and the WTO', 9 *Columbia J European L* (2003) 213, at 228–229, 232–233; Skogstad, 'The WTO and Food Safety Regulatory Policy Innovation in the European Union', 39 *J Common Market Studies* (2001) 485, at 497–500.

[48] For a similar assessment, see Shaffer and Pollack, *supra* note 34, at 41–45.

[49] For a brief overview of the work of the CAC, see Victor, *supra* note 36, at 885–892.

[50] See Scott, 'International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO', 15 *EJIL* (2004) 307, at 331–333.

[51] In Sept. 2005, the CAC had 171 member states: see http://www.codexalimentarius.net. On the limited role of developing countries, see Chimni, 'Cooption and Resistance: Two Faces of Global Administrative Law', *IILJ Working Paper* 2005/16, available at www.iilj.org/papers/2005.16Chimni.htm, at 12–17.

[52] See Ostrovsky, 'The New Codex Alimentarius Commission Standards for Food Created with Modern Biotechnology: Implications for the EC GMO Framework's Compliance with the SPS Agreement', 25 *Michigan J Int'l L* (2004) 813, at 818–821; Poli, 'The European Union and the Adoption of International Food Standards within the Codex Alimentarius Commission', 10 *European LJ* (2004) 613, at 626–629.

[53] See also the positive evaluation by *ibid.*, at 629–630.

The Biosafety Protocol,[54] in contrast, has been established in part as a counterweight to WTO rules. Negotiated in the framework of the Biodiversity Convention and thus a part of the Rio Process on environmental protection, it goes back to an initiative to provide a stronger regulatory regime for trade with GMO products and was driven by constituencies with little influence on WTO law-making. Especially developing countries and environmental NGOs played a stronger role in the process leading up to the Protocol, and the resulting rules reflect their views (and those of Europeans) more strongly than the other international instruments.[55] In this sense, the Protocol can be seen as reflecting the views of a broader, more 'cosmopolitan' constituency, to stay within the terminology introduced above.[56] It places emphasis on the 'Advance Informed Agreement' of importing countries of GMO products that are to be released into the environment[57] and, besides its requirement of a scientific risk assessment as a basis for the importing decision, the Protocol makes several references to precautionary measures.[58] It states in particular that a lack of scientific certainty shall not prevent a party from taking measures to avoid or minimize potential adverse effects of GMOs to be imported as food or feed.[59] It is thus relatively close to European approaches to GMOs and, as an 'international standard', it may have a similar impact on decision-making under the SPS Agreement as Codex Alimentarius standards would have.[60] Yet the ultimate relationship with WTO law is unclear: after long negotiations, the Biosafety Protocol contains two preambular clauses that emphasize that the Protocol is not intended to change rights and obligations under other agreements, while also insisting that this proviso is not meant to subordinate the Protocol to other agreements.[61] In the WTO dispute, the EU exploits the resulting indeterminacy and insists that the Biosafety Protocol should heavily influence the interpretation of WTO law on GMO issues.[62]

[54] Cartagena Protocol on Biosafety, available at http://www.biodiv.org/biosafety/. On the protocol and its negotiation, see M. Böckenförde, *Grüne Gentechnik und Welthandel: Das Biosafety-Protokoll und seine Auswirkungen auf das Regime der WTO* (2004), at 118–240; C. Bail, R. Falkner, and H. Marquard (eds), *The Cartagena Protocol on Biosafety: Reconciling Trade and Biotechnology with Environment and Development* (2002).

[55] See Stewart, *supra* note 33, at 56–57; Falkner, 'Regulating Biotech Trade: the Cartagena Protocol on Biosafety', 76 *Int'l Affairs* (2000) 299, at 301–302, 313; Böckenförde, *supra* note 54, at 140–144.

[56] The importance of the forum and its composition was highlighted, e.g., by the vigorous opposition of developing countries and the EU to the creation of a WTO Working Group on biotechnology parallel to the negotiations on the Biosafety Protocol; see Falkner, *supra* note 55, at 305.

[57] Art. 7 of the Biosafety Protocol.

[58] See especially the Preamble to and Art. 1 of the Biosafety Protocol.

[59] Art. 11(8) of the Biosafety Protocol.

[60] See Howse and Mavroidis, *supra* note 39, at 354–370; see also Boisson de Chazournes and Mbengue, 'GMOs and Trade: Issues at Stake in the EC Biotech Dispute', 13 *Review of EC and Int'l Environmental Law* (2004) 289, at 297–303; Böckenförde, *supra* note 54, at 333–336.

[61] See Safrin, 'Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements', 96 *AJIL* (2002) 606, at 614–628; also Falkner, *supra* note 55, at 309–310.

[62] See EC, First Written Submission, *supra* note 41, at paras 453–459.

C *Why Competing Accountability Mechanisms?*

The CAC and the Biosafety Protocol as counters to WTO dynamics, and the EU limitations on direct applicability of WTO norms and decisions in EU law, all have accountability functions *vis-à-vis* the WTO. They are not, of course, classical accountability mechanisms as we know them from domestic administrative law; they do not operate inside a given regime, as participation or review mechanisms, but outside, trying to influence the regime through different, partly political means. Yet they fulfil functions very similar to those classical mechanisms, as they make regulatory processes respond to particular concerns and constituencies and provide checks against regulatory excesses; we might thus classify them as 'non-institutionalized' accountability mechanisms.[63]

To some extent, these mechanisms help to give a voice to constituencies that are under-represented in formal procedures, as for example developing countries and NGOs in the WTO. By creating an alternative regulatory site, the Biosafety Protocol provides an external challenge to such exclusion, which may over time lead to changes in WTO mechanisms and a reinterpretation of WTO norms, but which even so may persist as the institutionalized expression of a particular, more environmentally-minded approach to GMOs that would be diluted in fora that give trade-oriented perspectives a greater role. In a 'regime complex',[64] rather than in a single regime, a multiplicity of voices can find institutional homes.[65]

Yet in other respects, these irregular accountability mechanisms give voice to constituencies that are well represented in formal mechanisms. The EU was a central player in negotiating the WTO agreements,[66] continues to play a central role in WTO committees and reform negotiations,[67] is increasingly active in the CAC,[68] and does, of course, also enjoy participation rights in disputes before WTO bodies. Here, it can express its views through its submissions as well as review a panel decision by taking the case to the Appellate Body. Yet these formal, classical accountability mechanisms must appear insufficient if, from an EU perspective, it is the European polity, not an international constituency, that ought to decide on GMO regulation in Europe. In fact, every participation right short of a right to veto would be insufficient, and veto rights are increasingly impractical in global regulatory structures that are intended to work quickly and effectively. In this case, 'irregular' mechanisms serve to express the views of the European polity and limit the effect of decisions that are mainly

[63] See Keohane, *supra* note 5, 139–140.

[64] See Raustiala and Victor, 'The Regime Complex for Plant Genetic Resources', 58 *Int'l Org* (2004) 277, at 279, on the concept of 'regime complex'.

[65] For a similar argument, see Koskenniemi and Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden J Int'l L* (2002) 553; and, in the trade/environment context, O. Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Complex* (2004), at 259–262.

[66] On EU involvement in the negotiation of the SPS Agreement, see Skogstad, *supra* note 47, at 492–494.

[67] See Vogel, 'Trade and the Environment in the Global Economy: Contrasting European and American Perspectives', in N. Vig and M. Faure (eds), *Green Giants? Environmental Policies of the United States and the European Union* (2004), at 231.

[68] See Poli, *supra* note 52.

accountable to an international constituency. The buffers the EU has erected against the direct impact of WTO rules and decisions in its own legal order are one such mechanism.

Thus, from one perspective, the EU stance may look very much like standard non-compliance with international law, but from another, it appears as part of a contest of different constituencies in global regulatory governance. Through the different, not formally connected and thus 'irregular' mechanisms sketched here, national and cosmopolitan views check a regulatory process through which an international community seeks to hold national regulatory action accountable. All of them enter this process as irritation: from each regime's perspective, the others are formally at best of limited relevance.[69] This process has the advantage of giving voice to different constituencies, none of which accepts the others as fully determining the issue; and as we have seen, it leads to mutual influences and pragmatic approximation and might thus help keep regulatory outcomes in a balance between several constituencies. But it has, of course, the disadvantage that it may often not reach stable results; that regulatory outcomes are fluid and provisional rather than embodied in one final and clear decision. I will return to these and other problems later. We should note, however, that such instability will not reflect the normal, day-to-day operation of a regime complex such as this one: in most situations, coordinated and smooth action will be much more prominent.[70] Decisions will become unclear and unstable once they concern issues of high salience. Yet in a highly contested environment, this might be better than pressing for a final decision for which the decision-making body lacks full legitimacy in the eyes of central addressees.[71]

4 Accommodating Multiple Constituencies: A Pluralist Approach

In the eyes of many, a pluralist order like the one just sketched with respect to the GMO dispute will appear highly unsatisfactory. The unclear distribution of competences, the instability of decisions and the highly political nature of accountability mechanisms will be seen as lacking in many respects, and not only because they promise serious difficulties for quick and reliable decision-making procedures. Also from a normative standpoint, such an order will seem problematic since it is unable to reflect a normatively justified distribution of powers among the different levels. If one believes, for example, that the size of the polity and the shape of public institutions should be determined by the extent of obligations of justice,[72] then one might want a

[69] For a fruitful (yet exaggerated) description of such mechanisms in terms of Luhmannian systems theory, see Fischer-Lescano and Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan J Int'l L* (2004) 999.

[70] On the relatively standard implementation of CAC standards by the EU, e.g., see Poli, *supra* note 52, at 616–617. On the oscillation between smooth and fracturous operation of the regime complex on plant genetic resources, see Raustiala and Victor, *supra* note 64.

[71] See also Stewart, *supra* note 33, at 66–67, 108–110.

[72] See, e.g., Young, *supra* note 26, at 250.

cosmopolitan constituency to *prevail* on issues of global environmental impact; a pluralist order that keeps hierarchies in the balance will then seem hardly attractive.

From such a perspective, it would thus appear preferable to organize accountability in global governance according to clearer and normatively defensible principles and thus, following constitutionalist lines, with an aspiration to coherence and unity. The most obvious institutional model would then be a federal order in which particular powers would be assigned to the different levels. Each constituency would then control decisions on the matters assigned to it, subject to some hearing and participation rights of other constituencies.[73]

The viability of such a solution, however, would be highly doubtful. In a situation of fundamental contestation over who should have the final say, any institutional order that responds primarily to one of the different constituencies is likely to lack legitimacy and will thus be unable to produce lasting and stable decisions. As long as the contestation persists, alternative institutional mechanisms will therefore be necessary.[74] This situation is similar to that of plural, divided societies in which decisions by a majority group are likely to destabilize the polity and undermine the authority of the institutions. For such societies, 'consociational' models have often been found to yield superior results; and they might also help devise strategies to accommodate multiple constituencies in global regulatory governance.[75]

A *The Consociationalist Road and Its Problems*

Consociationalist approaches, unlike majoritarian democracy, are characterized by an insistence on accommodation: prominent in a number of smaller European countries, especially in the post-war period, they seek to manage deep disagreement by grand coalitions and the creation of veto positions that force all actors to reach common solutions rather than imposing their views on the others; none of the constituencies enjoys primacy. According to its defenders, in particular Arend Lijphart, consociationalism is much more likely than majoritarian systems to create a stable political order under conditions of diversity.[76] Whether or not this view is based on sound empirical evidence is contested,[77] but many indicators do indeed point to stabilizing results, and the main thrust of the argument bears sufficient plausibility. And in

[73] See Held, *supra* note 26, at 235–237; Young, *supra* note 26, at 267; Kumm, *supra* note 26, at 920–924; O. Höffe, *Demokratie im Zeitalter der Globalisierung* (1999), ch. 10; see similarly J. Habermas, *Der gespaltene Westen* (2004), at 131–145.

[74] Historically, such contestation (of national-level authority) has often been overcome through 'nation-building' and nationalist ideologies, but at a high cost. See Connor, 'Nation-Building or Nation-Destroying?', 24 *World Politics* (1972) 319.

[75] Federal and consociational models are not necessarily opposed; in fact, they are often linked: see A. Lijphart, *Democracy in Plural Societies* (1977), at 42. As will become clearer below, I distinguish here between federal orders in which powers are assigned to specific levels, and consociational orders in which they are shared.

[76] See *ibid.*, *passim*.

[77] See Barry, 'Political Accommodation and Consociational Democracy', 5 *British J Political Science* (1975) 477; Lusztick, 'Lijphart, Lakatos, and Consociationalism', 50 *World Politics* (1997) 88.

fact, the international order in its classical mould deals with diversity in a very similar way[78]: decisions are usually taken by unanimity, and every state enjoys not only strong autonomy rights but also a veto position with respect to international obligations.[79]

For our purposes, however, consociationalism is inapplicable in this classical mode: dealing mostly with differences on a horizontal level – between different groups in society – it cannot be applied immediately to the vertical frictions between different levels that are the focus of our attention. Classical international law is based on the primacy of the national constituency, which, as we have seen, is increasingly the object of dispute. Yet the central consociationalist idea, namely the importance of a co-decision of the different constituencies involved, is useful for our vertical constellation, too; and it is also reflected in those strands of the theory and practice of federalism that stress vertical interlinkages between the federal and state levels, such as in Germany.[80] Thus, adapted to the circumstances of global governance, a consociationalist approach would insist on the co-decision of the different constituencies involved: all of them – the national, international and cosmopolitan constituencies – would have to have a voice, and a right to veto, in global regulation.

Such an approach, however, would have obvious limits. First, like any consociational setting, it would face serious problems of practicability in quick and effective decision-making. Veto positions for the different constituencies may work reasonably well for small numbers; with higher numbers, the problems of negotiation and the risk of blockade rise rapidly, and dangers of a 'joint-decision trap' emerge.[81] The efficiency problems that plague consociational approaches on the domestic level would be exacerbated in a global context. This, in turn, would likely cause a serious normative bias: either in favour of non-regulation (if this were the default rule governing cases in which a consensual decision cannot be reached) or in favour of national regulation (if this remained the default rule of global affairs, as it is mostly now, with some – increasingly important – exceptions as can be found in WTO law[82]). Either way, the result would probably be undesirable.

Secondly, co-decision in a consociational vein would only be of limited use for ensuring stronger accountability not only to governments but also to publics. One of

[78] Lijphart, *supra* note 75, at 45. See also the important critique by Donald Horowitz, e.g. in 'Constitutional Design: Proposals Versus Processes', in A. Reynolds (ed.), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (2002), at 15, 19–25, as well as Lijphart's rejoinder in 'The Wave of Power-Sharing Democracy', in *ibid.*, at 37, 43–44, 47–49.

[79] This holds true even for most newer forms of secondary law-making, at least from a formal perspective. See Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements', 15 *Leiden J Int'l L* (2002) 1, at 15–32.

[80] See Scharpf, 'Die Politikverflechtungsfalle: Europäische Integration und deutscher Föderalismus im Vergleich', 26 *Politische Vierteljahresschrift* (1985) 323, at 324–331; S. Oeter, *Integration und Subsidiarität im deutschen Bundesstaatsrecht* (1998).

[81] Scharpf, *supra* note 80, at 346–350. Accordingly, also for Lijphart consociational orders ideally operate with no more than four main groups: see Lijphart, *supra* note 75, at 56.

[82] As we have seen in the GMO example, in some areas the WTO severely limits national regulation in the absence of a corresponding international standard.

the central elements of consociationalism is its reliance on the cooperation of *elites*: because on many issues genuine consensus among the different groups will be elusive, problem-solving requires bargaining, package-deals, logrolling. This, however, can only be achieved by elites that stand in constant contact with each other and are socialized into cooperation. Stronger participation of the general public in the various groups renders this cooperation difficult because it is usually focused only on a particular decision, not the whole of the deal struck. Accordingly, as Lijphart stresses himself, 'it is … helpful if [leaders] possess considerable independent power and a secure position of leadership'.[83] Even though this is not incompatible with public participation in general, it considerably limits its scope. Moreover, the introduction of further accountability mechanisms into the already difficult framework of negotiations on the global level would only aggravate the risk of a complete blockade of decision-making.

B *From Co-Decision to Mutual Challenge*

Co-decision will thus often not be a preferable option, and it also seems to fall short of accommodating the different views on the right constituency. Yet, given the inherent tensions between these views, it is probably impossible to achieve their full integration in any institutional structure. In order to nonetheless respect them all, we might thus choose a path that aims not so much at integration but at dissociation: one that keeps a distance from the ideals of all of them.

Any such path will, in order to avoid the problems outlined above, refrain from according full control over decisions – through veto rights or otherwise – to either of the competing constituencies, and it will recognize that each of the constituencies will have to be involved in decision-making processes through multiple accountability mechanisms rather than merely through one precisely defined procedure. At the same time, it will not be sufficient to allow for their participation just through hearings and submissions. Such procedural participation is important in order to canalize and publicize the standpoints of the different constituencies, but it is too weak to balance the influence of the constituency to which the decision-maker is most directly accountable. Merely allowing statements by NGOs, for instance, will hardly recalibrate a decision-making process centred on state representatives.

Steering a path between co-decision and the deficiencies of mere hearings thus seems to call for participation of each constituency in the form of some, but not full, decision-making powers: to a pluralization rather than concentration of authority. If all constituencies are to have decision-making powers beyond merely being listened to, but shall not be able to dictate or veto a particular decision, then no decision can fully bind them all, and each constituency has to retain the right to challenge (though not to veto) it. The resulting picture of global governance would then be one of a constant potential for mutual challenge: of decisions with limited authority that may be contested through diverse channels until some (perhaps provisional) closure

[83] Lijphart, *supra* note 75, at 50.

might be achieved. The GMO case described above provides an example of how such a regime complex can work in practice. But it also shows that in such a pluralist order contestation does not necessarily form the normal mode of operation: as indicated above, challenges are likely to be the exception in particularly salient cases, whereas the day-to-day functioning will be dominated by smooth cooperation, compromise and mutual accommodation.

Such a pluralist picture would be quite far from a classical, constitutionalist approach to legal and political ordering, but it is in fact relatively close to current realities of global governance well beyond the food safety regime complex exemplified by the GMO case. The model example is certainly the interplay between national constitutional courts and the European Court of Justice (ECJ).[84] Beginning in the 1970s, the highest courts of several Member States of the European Communities questioned the competence of the ECJ to ultimately decide on contested issues. Their focus first concerned human rights, and in response to their assertion of final authority on human rights protection, the ECJ readjusted its jurisprudence on that matter, without, however, ceding ground on the more fundamental question of final authority. Likewise, in the 1990s, Member State courts reclaimed the authority to decide on issues of the delimitation of powers between the national and the European levels, thereby again forcing the ECJ to take this issue more seriously.[85] As mentioned above, the German Constitutional Court based its challenge explicitly on considerations of democracy, insisting on the superiority of the national over the European constituency.[86] None of these cases, though, eventually produced serious friction: national courts mostly signalled potential non-compliance in the future but did not follow through with it, due largely to the pragmatic steps of European authorities to accommodate their concerns. Thus, the fundamental contestation in this case helped recalibrate the overall system, leaving open the question of ultimate authority and thus balancing accountability to the different constituencies[87] while allowing for smooth functioning most of the time.[88]

On the global level, we can see parallels, for instance, in the use of national courts to hold Security Council sanctions decisions accountable to individuals.[89] Since the late

[84] For an analysis from the perspective of a changed understanding of constitutionalism (or an alternative to it), see Walker, *supra* note 17; Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*', in J.H.H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (2003), at 7; Maduro, 'Europe and the Constitution: What If This is as Good as it Gets?', in *ibid.*, at 74; Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', 11 *European LJ* (2005) 262; see also Krisch, 'Europe's Constitutional Monstrosity', 25 *Oxford J Legal Studies* (2005) 321.

[85] See A.-M. Slaughter, A. Stone Sweet, and J.H.H. Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence* (1998); F. Mayer, *Kompetenzüberschreitung und Letztentscheidung* (2000).

[86] See *supra* note 22.

[87] See also Maduro, *supra* note 84, at 81–86.

[88] See also Oeter, 'Föderalismus', in A. von Bogdandy (ed.), *Europäisches Verfassungsrecht* (2003) at 59, 110–119.

[89] On the general potential of extending the argument of domestic review of international organizations beyond the European context, see Walter, 'Grundrechtsschutz gegen Hoheitsakte internationaler Organisationen', 129 *Archiv des öffentlichen Rechts* (2004) 39.

1990s, the Council has increasingly targeted individuals directly, imposing travel and financial restrictions on them, without, however, providing them with procedural rights or possibilities of judicial review. As a result, in a number of cases national courts have been seized by those affected by sanctions.[90] In one of them, several Swedish nationals of Somali descent challenged measures implementing restrictions imposed by the Council before the European Court of First Instance (ECFI). Soon after the first steps in the proceedings (and after significant diplomatic pressure), the Security Council Sanctions Committee reconsidered the issue, striking two of the applicants from its list of targeted individuals and, more importantly, establishing a general procedure for revising the list upon request by a government (with only indirect participation by the individuals concerned, however).[91] These procedural improvements were central for the ECFI's eventual rejection of the applicant's case on the merits. However, the Court did not abdicate review of Security Council action, as had been sought by the EU institutions and some Member States. Instead, it emphasized its own power to assess Security Council action in light of peremptory norms of international human rights law, thus signalling that it could in the future police the limits of international sanctions.[92] Thereby, it would insist on enhanced accountability, not only to the affected individuals, but also to the European constituency more broadly, as Security Council decisions would be judged on the basis of a European interpretation of those international norms. In a similar vein, though potentially with even broader impact, the European Court of Human Rights has reviewed the implementation of Security Council sanctions by EU and national measures on the basis of the European Convention of Human Rights.[93] The court has so far not assessed Security Council procedures as such, but the logic of its reasoning could be extended to include such an assessment in the future. Thereby, global security regulation could be tied back not only to *international* human rights standards, but even to standards established by a *European* constituency. Yet, despite these reservations in principle, serious friction is unlikely in practice; in most cases, the possibility of challenge will suffice to produce pragmatic accommodation.[94]

[90] See Gutherie, 'Security Council Sanctions and the Protection of Individual Rights', 60 *Annual Survey of American Law* (2004) 491; Dyzenhaus, 'The Rule of (Administrative) Law in International Law', 68 *Law and Contemporary Problems* (2005) 127, at 140–150.

[91] See Cramér, 'Recent Swedish Experiences with Targeted UN Sanctions: The Erosion of Trust in the Security Council', in E. de Wet and A. Nollkaemper (eds), *Review of the Security Council by Member States* (2003), at 85, 90–97. Three months before the Committee decision, the CFI had rejected the request for provisional measures but reserved a decision on the merits: see the order of the President of the CFI of 7 May 2002 in Case T–306/01R, *Aden et al. v. Council and Commission* [2002] ECR II–02387.

[92] See the judgment of the CFI of 21 Sept. 2005 in Case T–306/01, *Yusuf and Al-Barakaat v. Council and Commission*, available at http://curia.eu.int/en/content/juris/index_form.htm. It is under appeal to the ECJ.

[93] See the judgment of the ECtHR of 30 June 2005 in App. No. 45036/98, *Bosphorus Hava Yollari Turizm v. Ireland*, available at http://cmiskp.echr.coe.int.

[94] On the general reserved deferral of domestic courts to UN sanctions and their implementation, see Gowlland-Debbas, 'Implementing Sanctions Resolutions in Domestic Law', in V. Gowlland-Debbas (ed.), *National Implementation of United Nations Sanctions: A Comparative Study* (2004), at 33, 55–65. On parallel cases, see also Lammers, 'Challenging the Establishment of the ICTY before the Dutch Courts', in de Wet and Nollkaemper, *supra* note 91, at 107; Marko, 'Challenging the Authority of the UN High Representative before the Constitutional Court of Bosnia and Herzegovina', in *ibid.*, at 113.

Similar pluralist orders, in which different constituencies balance each other through mutual challenges, can be observed in many other areas of global regulation too, ranging from national checks on global anti-doping decisions to European attempts to shift the accountability structure of the international accounting standards regime.[95] Likewise, the turn towards soft law and government networks in global regulation[96] can be understood as reflecting a need to balance different constituencies: by limiting claims to international authority, it allows for an interplay between the different levels which both cooperation and contestation are already part of.[97]

As is evident from these few examples, pluralist accountability mechanisms are a pervasive feature of global regulatory governance. We can explain and to some extent justify them as a response to the contested constituencies of global regulation that seeks to avoid the downsides of federal and consociational models of a more unitary, constitutionalist character. Pluralist mechanisms certainly have downsides too (I will consider some of them below), but on closer inspection, they are neither as anomalous nor as impractical as they may seem at first sight.

5 A Principled Case for a Pluralist Order

So far, I have defended a pluralist global administrative law mostly on prudential grounds: it seems superior to more unitary – especially federal and consociational – models of order in terms of its capacity to accommodate different views about the right constituency of global governance, and thus in its ability to create a relatively stable, and reasonably effective, institutional order. Yet, compared with more coherent, constitutionalist models, this approach has seemed to lack appeal because of its inability to reflect a distribution of powers according to fully justified principles.[98] As I will try to show in this section, this contrast between prudence and principle is overdrawn. There is actually a strong case to be made for a pluralist order on principled grounds.

A *The Constituencies' Equal Deficits*

This case can rest, in the first place, on the weakness of the supremacy claims of all constituencies, grounded in particular in the normative deficits of each of them.[99]

[95] See Van Vaerenbergh, 'Regulatory Features and Administrative Law Dimensions of the Olympic Movement's Anti-doping Regime', *IILJ Working Paper* 2005/11, available at www.iilj.org/papers/IILJ2005.11Vaerenbergh.htm, at 17–21; Mattli and Büthe, *supra* note 30, at 257–258. Other examples include conflicts over the regulation of water services: see Morgan, 'Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law', in this issue; or, in a different mode, mutual challenges between certification regimes in sustainable forestry: see Meidinger, 'The Administrative Law of Global Private-Public Regulation: The Case of Forestry', in this issue.

[96] See D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000); Slaughter, *supra* note 24.

[97] See Barr and Miller, 'Global Administrative Law: The View from Basel', in this issue.

[98] See *supra*, text at notes 72, 73.

[99] For a similar argument with respect to the EU, see Maduro, *supra* note 84, at 82–86.

The national constituency is limited in that it cannot fully respond to the needs and interests of those outsiders that are affected by its decisions or that have a claim to be considered, for example for reasons of transboundary justice. The international constituency is not capable of instituting structures of democratic participation that are nearly as thick and effective as those possible on the national level; it is too far removed from individuals, and intergovernmental negotiations will never come with the deliberative structures necessary for real public involvement. In a cosmopolitan constituency, too, we face serious limits of communication across cultural, linguistic and political boundaries. Making the international or cosmopolitan constituency supreme would also neglect the strong attachments of individuals to national (or subnational) groups and the importance this has for their identity.[100] Consequently, since none of the constituencies can make a convincing claim for primacy, we should regard them as complementary and recognize that they stand in a non-hierarchical relationship. Given the impracticability of consociational arrangements, such a status will best be reflected in a pluralist order as I have sketched it above.

Such an argument is, however, not without problems. One could allege, for example, that it ignores the differences in weight of these deficits in different issue areas. In some areas, externalities of national action may be high, and thus one may want to give priority to the international constituency. In others, they will be low, and the national constituency will have greater weight. Instead of a pluralist order we would then arrive, again, at a federal-style order with a distribution of powers among the various levels; which level to grant priority in a given area would be merely a question of balancing the different concerns.

This objection is of course to some extent valid: nobody thinks of establishing international or cosmopolitan control over issues such as regulating homes for the elderly or curricula for elementary schools.[101] Yet there is a wide range of issues on which solutions are far less evident; and in many cases, issue areas will be meshed, as we can see in the GMO dispute where trade, environmental and broader cultural concerns are closely linked. Here, the federal-type vision reaches its limits, and the right constituency is, for good reason, heavily contested.

B Equal Respect for Constituency Choices

A second, and probably stronger, defence of a pluralist order could start from this fact of reasonable contestation and base itself on an argument from liberty and autonomy.[102]

[100] See also the arguments presented *supra*, in sect. 2 C. Here, as there, I do not present a fully theorized argument, based on a particular normative vision, but rather an approach that might resonate with a number of different broader normative perspectives.

[101] Although, in the latter case, the OECD's efforts in the area of education may reflect inroads into the national domain.

[102] Basing the international order on such normative grounds is, of course, in itself problematic as it stands in tension with the strong value pluralism of international society. I cannot deal with this problem here, but the emphasis placed here on actual preferences may alleviate the general concern. On these problems with respect to global administrative law in general, see Kingsbury, Krisch, and Stewart, *supra* note 1, at 42–52.

Insofar as autonomy is linked to political self-government, it includes a right to participate in decisions on the constitutional framework of the political order; and this also has to encompass a right to participate in decisions on the shape and extent of the political group in which self-government is exercised and to whose decisions individuals are subject.[103] If individuals choose different and conflicting political groups, an order that seeks to equally respect their choices cannot grant any group primacy. And in our case, again, since non-hierarchical relationships among constituencies cannot be organized through consociational means, they will best find expression in a pluralist order.

The basic idea behind this argument is close to political theories based on the freedom of association. An early influential strand of this kind was English political pluralism, associated especially with Frederick William Maitland, G.D.H. Cole, John Neville Figgis, and Harold Laski.[104] For them, a political order based on voluntary associations appeared superior to a state-centred one because it promised individuals greater influence in their affairs. Because they originated in individual choice, such associations were, in their view, also independent from the state in their basis of legitimacy and possessed non-derived powers. Laski, in some of his works, took this so far as to assert that the state was in effect just another association, with no *a priori* claim to supremacy and dependent on acceptance by other associations and individuals whenever it sought to act on them.[105] Yet despite their general emphasis on the importance of associations, most English pluralists, including Laski in his most influential writings, accepted a superior role of the state as a guardian of the system: as a guarantor of the freedom of association, as an enforcer of common norms, and as an arbiter between associations.[106] This general line is also followed by contemporary theorists close to this tradition, in particular Paul Hirst and William Galston. Both emphasize the centrality of societal associations but regard them as embedded in an overarching order that is upheld by state institutions, however minimal their functions.[107] In effect, this recreates a federal order with a strong subsidiarity norm, albeit one that is organized along personal rather than territorial lines.

[103] E.g., David Held defines autonomy as follows: 'persons should enjoy equal rights and, accordingly, equal obligations in the specification of the political framework which generates and limits the opportunities available to them; …': D. Held, *Models of Democracy* (2nd edn., 1996), at 301. Much of Held's further specification of the principle, also with respect to global contexts, assumes particular political frameworks (along the lines of existing power-wielding institutions). But if participation is understood as an individual right (rather than the collective right of a given community), the general principle is easily applied also to the definition of the framework itself. In a related vein, Thomas Franck sees the increasing recognition of individuals' nationality choices as a reflection of their basis in autonomy: see T.M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (1999), at ch. 4.

[104] See P.Q. Hirst (ed.), *The Pluralist Theory of the State* (1989), at 1–47; D. Nicholls, *The Pluralist State: The Political Ideas of J.N. Figgis and his Contemporaries* (2nd edn., 1994); also D. Runciman, *Pluralism and the Personality of the State* (1997).

[105] See Laski, 'Law and the State', in Hirst, *supra* note 104, at 197, 214; also Hirst, in *ibid.*, at 28.

[106] See Nicholls, *supra* note 104, at ch. 5; Hirst, *supra* note 104, at 28–30; Laski, 'The Problem of Administrative Areas', in *ibid.*, at 131, 155.

[107] See P.Q. Hirst, *Associative Democracy* (1994), at 47, 56–61; W.A. Galston, *Liberal Pluralism* (2002), at ch. 9; in a similar vein, see Young, *supra* note 26, at 180–195.

A similar emphasis on freedom of association underlies Chandran Kukathas' recent work, but here we can find hints at more radical conclusions.[108] In his vision, society is an 'archipelago' of (partly overlapping) associations that coexist both next to each other and on different levels, but not in hierarchical relationships: all depend on negotiations and compromises with the others; none can command; and the basic operational principle is toleration. In this order, the state occupies an elevated place but is confined to an even more minimal role than in the approaches mentioned above. It is supposed to ensure order as an 'umpire' between associations, but questions of justice are out of its reach since they are contested among different associations and no neutral ground can be found to adjudicate them. What is just and right may therefore remain undecided; competing views will seek to broaden their support but cannot be enforced against associations that are unwilling to share them.[109]

Kukathas' approach assumes a society made up of relatively unconnected groups – 'islands' separated by the sea – which can govern many of their affairs without much effect on others; in that, it differs significantly from the situation we are facing in global regulatory governance.[110] Yet the basic normative idea holds much force also in these circumstances. It reclaims respect for the individual's exercise of her freedom of association through determining the group that forms the framework for political action. And it follows through with this respect by according all associations equal status in matters of justice; given their equal basis in individual freedom, none of them can claim superiority in this regard. For Kukathas, this results in toleration between groups that stand (mostly) in a horizontal relationship and are often relatively unconnected. In our circumstances, it would result in heterarchy and mutual challenge between the three vertically related, and closely linked, constituencies: the national, international, and cosmopolitan ones.

C *The Range of Relevant Constituencies*

If we start from this basis, though, it seems difficult to sustain limits on the range of eligible constituencies. We might thus have to extend their circle beyond the national, international and cosmopolitan groups to other constituencies that reflect individual preferences, such as, for example, the funders of a given institution. These groups would compete with the national, international and cosmopolitan constituencies; none of them would *a priori* emerge as supreme; and control over outcomes might eventually depend mostly on the power play between them.

From a perspective such as Kukathas', this result would be inevitable; he does not impose limits on the creation of associations or their equal recognition. Yet this position is founded on a particular conception of freedom; and if we adopt an alternative,

[108] C. Kukathas, *The Liberal Archipelago* (2003). Kukathas bases freedom of association not on autonomy but on freedom of conscience (*ibid.*, at 36–37); but this difference is of little importance in the present context.

[109] See *ibid.*, at ch. 6, and especially at 252 ('[t]he state should not be concerned about anything except order or peace').

[110] The difference escapes Kukathas who sees international society as remaining in a mostly coordinatory mode: see *ibid.*, at 28.

more substantive conception, limits on the range of relevant constituencies will follow much more naturally. Kukathas' approach is based on a minimalist, libertarian idea of freedom that deliberately excludes considerations of actual effectiveness. For him, freedom is essentially a formal notion, and this is reflected in many elements of his political vision, most visibly perhaps in the weak requirements to make the right to exit from a group effective.[111] Yet this starting-point is not the only conceivable one. Critics like Will Kymlicka would emphasize effective autonomy rather than formal freedom of conscience as a basis for ascribing rights to groups; and as a result, the circle of groups that are granted such rights is limited.[112] Likewise, in our context, it might seem more attractive to ground freedom of association in a more substantive idea of freedom, for example in one that focuses on political autonomy or non-domination.[113] In this case, the range of relevant choices will be more limited – such choices that, in effect, serve to impose rules and decisions on others, will be excluded from equal respect; the eligible associations will have to be sufficiently inclusive. Just as domestic institutions are no longer formally accountable primarily to the rich, the constituencies of global regulatory institutions will have to reflect some degree of effective freedom for all.[114]

This normative 'pre-screening' of eligible constituencies may seem like a negation of the central role of individual choice in determining the scope of the polity, but it really is an attempt to strike a balance between elements of justice and choice, as we find it in political orders in general. Even if we generally respect political choices, as we do in domestic democratic orders, we do not do so without limits. We shape them through democratic procedures and limit them through substantive constitutional rules, such as individual rights. Even more so, we do not accept all choices about the political process itself; instead we recognize only such choices that fall within a range of normatively defensible options and we reject in particular those that undermine the basic principle of equal participation of all. Participation in shaping the framework of politics is important, but it is not the only relevant factor.[115]

The same holds true for the determination of the size of the polity – of the constituency of the political order. During the era of the nation-state, this determination seemed self-evident, but once the question is posed explicitly, the democratic procedures as we know them domestically are of no help in answering it – they already presuppose

[111] See *ibid.*, at 93–114.

[112] W. Kymlicka, *Multicultural Citizenship* (1995), at ch. 8; see also Kymlicka, 'The Rights of Minority Cultures: Reply to Kukathas', 20 *Political Theory* (1992) 140, at 142–143.

[113] See Held, *supra* note 103, at 299–305; P. Pettit, *Republicanism* (1997).

[114] This does not imply that national constituencies that do not follow the model of liberal democracy would be excluded as relevant constituencies. Compared to actual alternatives, especially foreign domination, even authoritarian regimes will often have a better claim to ensure non-domination of their citizens.

[115] Another way of expressing this idea is to emphasize the simultaneous origin of private and public autonomy and the mutual constitution of rights and democracy: see J. Habermas, *Faktizität und Geltung* (1992), at ch. III. See also J. Waldron, *Law and Disagreement* (1999), at chs 11 and 13, for whom participation is central, yet only in so far as it concerns matters of 'good-faith disagreement' and thus presumably not about the question whether everybody's participation should matter equally in principle: *ibid.*, at 303–304. The question who decides what is 'good-faith disagreement' or 'justice' remains, of course, open here.

the primacy of a particular polity: the national one.[116] Therefore, we should answer it in the same way as we answer other questions about the shape of the political process: in both cases, actual political choice and conceptions of a just order have to be brought into balance. By introducing normative constraints on the range of eligible groups, we seek to achieve that balance; we seek, in particular, to ensure that the exercise of choice does not violate the very basis on which it rests: the idea of effective freedom through self-government.

The three main contenders for primary constituencies here – the national, the international, and the cosmopolitan ones – all come with a strong and defensible normative basis.[117] However, admitting others, such as the constituency of funders, might put equal self-government at risk if it granted non-inclusive groups a central role. This does not mean that none other than the three constituencies mentioned would be acceptable. Yet all of them would have to meet prior normative standards; their recognition does not follow merely from the fact that they are chosen by some person.[118] Unless one sees freedom best realized in a libertarian world, certain constraints on the eligible constituencies will be necessary and justified.

In our case, if we accept the basic normative strength of the claims of the national, international and cosmopolitan groups to be constituencies of global regulatory governance, we should deny any of them formal primacy; they can all make a valid claim to hold global regulatory governance accountable. Their relative strength will then result not from a predetermined hierarchy, but from their influence, their allegiances and support, which will be determined in the political processes of a pluralist order. This has the added advantage of allowing for shifting weights of the different constituencies in the fluid process of constructing global governance; it opens up space for politics and for attempts at radical transformation that might be barred by rigid institutionalization and constitutionalization. Such an order might appear unsatisfactory to those who have clear views on the single right constituency for particular issues. But it respects the fact that people have different views and make different choices; respect for this disagreement is, after all, respect for everybody's right to *self*-government, to equal participation in the design of the political order.[119]

6 Problems of Pluralism

Even if there are good prudential and moral reasons to favour a pluralist global administrative law in principle, many problems with this approach remain. In the space of this article, I cannot explore them all, but I want to highlight two central difficulties and point to possible ways of countering them.

[116] See Shapiro and Hacker-Cordón, 'Outer Edges and Inner Edges', in Shapiro and Hacker-Cordón, *supra* note 23, at 1.

[117] See *supra*, sect. 2 C. As pointed out there, all of them can be defended on the basis of different broader normative approaches.

[118] One might also think, e.g., of subnational groups as additional constituencies.

[119] See also Waldron, *supra* note 115, at ch. 11, especially on Wollheim's paradox, at 246.

One problem concerns *lack of certainty*: with the disappearance of a clearly competent authority and the resulting fluidity of decisions, the clarity and stabilization of expectations that we usually expect from the law would be severely compromised. This may be of particular concern in economic contexts where strategic decisions depend on a predictable legal environment; and given that global administrative law is in many instances concerned with economic regulation, legal certainty may gain particular importance here. To take the example of GMOs, an enduring lack of clarity about the legal framework will make decisions for all economic actors involved more difficult and might cause them to adopt a cautionary attitude; a result that may not be ideal in economic terms. However, similar charges could be brought against other mechanisms of accountability too: most of them are inherently destabilizing.[120] They challenge decisions that have already been taken, and especially when they involve court proceedings, they might leave the law unclear for many years. Even in the case of judicial review, we thus face a trade-off between efficiency and legal certainty on the one hand and fairness, individual rights and democratic accountability on the other. A pluralist model of challenge and contestation may indeed aggravate the problem, but this would only reflect the fact that the political and social structure at the global level is much more complex than in smaller and more homogeneous national communities. In order to achieve similar goals, we might have to sacrifice more in terms of certainty and predictability than on the domestic level. And economic actors are, in fact, well equipped to deal with this problem: it merely raises the costs of engagement, but as long as the benefits are high enough, it will not deter them.[121] We should also keep in mind that usually decisions will remain unclear over a longer period only when they concern issues of high salience, as in the GMO case. On most issues, though, a pluralist order will operate much more smoothly. And if it nonetheless appears necessary to provide for greater clarity and stability in some contexts, one might decide to establish institutions along consociational lines, or even on a federal model by sacrificing some procedural fairness for the sake of substantive goals. Yet these are significant trade-offs, and it is not clear that the added uncertainty of a pluralist order is as problematic as the risk of blockade and the lack of inclusiveness in these alternative models.

A yet more serious problem concerns *power disparities*. Pluralist approaches (even in a less radical shape) have long had to face the objection that some groups in society possess superior organizational capabilities and, in general, more power than others, so that relying on their free interplay will merely favour the powerful at the expense of the weak.[122] To some extent, this risk has been contained here by limiting the range of eligible constituencies; only sufficiently inclusive groups have been found to pass the kind of normative 'pre-screening' required. Still, the general objection retains

[120] Fisher, *supra* note 3, at 513–514.

[121] E.g., multinational water companies have changed their strategies but have not ceased to invest in developing countries in the face of unruly regulatory environments: see Morgan, *supra* note 95.

[122] See M.G. Schmidt, *Demokratietheorien* (2nd edn., 1997), at 159. See also the parallel critique of Kukathas' approach in the book review by Spinner-Halev, 67 *Journal of Politics* (2005) 595, at 596–597.

force in the context of global administrative law. In our GMO example, the EU challenge to international regulation bears much weight, whereas a similar challenge by a developing country would likely remain ineffectual. Likewise, for an international body to object to regulation in, say, Zambia, will usually be far more successful than to object to US regulation.

Yet it is open to question whether a pluralist landscape would be much different in this respect from a classical, hierarchically ordered, unitary structure. This will ultimately have to be assessed in specific contexts of global regulation, but as we know from domestic contexts, differences in organizational capacities are extremely important also in procedural models with clearly defined participation rights for affected interest groups;[123] the power relations outside an institution are always to some extent reflected inside it, despite provisions for formal equality. And power disparities may be more effectual when the regulatory process leads to one final decision; incentives for capture are biggest in a concentrated decision-making process.[124] The dominant influence of powerful actors on the final decision will then reinforce these actors' power and legitimize its exercise.[125] In contrast, recognizing the provisional and contestable nature of regulatory decisions limits their claim to legitimacy and may open up space for less powerful actors to articulate their position. Their contestation can remain visible and is not submerged in a process that claims to produce a decision reflecting the 'common good'.[126]

A second way to counter the argument from power is to devise substantive and procedural norms that would limit the influence of power on the pluralist process. Some prominent candidates are principles of mutual recognition, toleration, coherence, or inclusiveness of political communication.[127] The latter probably goes furthest in demanding not only respect for difference, but also the transformation of purely self-regarding argument into one that takes into account and responds to the perspective of the other.[128] If a principle like this could be established as the benchmark

[123] See Stewart, *supra* note 15, at 1760–1805; Schmidt-Aßmann, *supra* note 16, at 265–266.

[124] On the related tendency towards a 'politicization' of the judicial process when politics becomes judicialized, see Ferejohn, 'Judicializing Politics, Politicizing Law', 65 *Law and Contemporary Problems* (2002) 41, at 63–65.

[125] On dominant influence in the shaping of global regulatory institutions see Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', 56 *Int'l Org* (2002) 399; Shaffer, 'Power, Governance, and the WTO: A Comparative Institutional Approach', in M. Barnett and R. Duvall, *Power in Global Governance* (2005), at 130 (on the WTO); Mattli and Büthe, *supra* note 30 (on the setting of international accounting standards). On the generally precarious position of international legal norms between reinforcing and limiting power, see Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', 16 *EJIL* (2005) 369.

[126] For arguments along these lines, see Young, *supra* note 26, at 40–50, 108–120, 167–173; Kukathas, *supra* note 108, at 164, 191–192, 268. See also the discussion of counter-hegemonic, subaltern plurality in B. de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd edn., 2002), at 471–493. Laski's pluralism seems to have been motivated by similar concerns: see Nicholls, *supra* note 104, at 86.

[127] See Tully, *supra* note 17, at 117–124; Kukathas, *supra* note 108, at ch. 4; Maduro, *supra* note 84, at 99–100, Young, *supra* note 26, at ch. 2.

[128] See *ibid.*, at 35–36.

for decision-making by all the constituencies relevant for global administration, the problem of power could be limited, even if – as in all other forms of global administrative law – not eliminated. This may sound utopian, but not necessarily so. In the European Union, the fact that the question of ultimate authority has remained open and contested, may actually have helped to anchor a principle of 'constitutional tolerance' in political practice.[129] And in the discussion of the GMO dispute, we have seen that the different constituencies seemed often not only to observe the demands of their counterparts, but to take steps to accommodate them pragmatically.[130]

7 Conclusion

Organizing accountability in the global realm faces a dilemma. The classical mechanisms of legitimizing international law and international organizations have lost strength with the rise of global governance functions and their increasingly independent exercise, often at a far remove from conventional treaty frameworks. Consequently, the role of treaties as 'transmission belts', ensuring accountability to states and through the ratification process also to the public within states, has become weaker and weaker, just as demands for stronger accountability have risen in the face of ever more intrusive global regulation of formerly domestic affairs.[131] On the other hand, filling the resulting gap by using domestic models of accountability mechanisms also meets with significant obstacles. In domestic settings, standard elements of administrative law, such as procedural participation and judicial review, perform particular, limited functions, and most of the burden of ensuring accountability lies with the electoral processes that check parliamentary law-making as well as governmental action. Once this electoral anchor is lost, as it is on the global level, administrative law-type mechanisms risk being overburdened by the demands made on them.[132] As I have tried to show in this article, differences in the constitutional foundations present a serious challenge also in another respect: in global regulatory governance, unlike in domestic administrative contexts, the question of to whom accountability is primarily due – the question of the right constituency – is highly disputed. National, international and cosmopolitan constituencies are all vying for ultimate control, and this undermines the hierarchies that domestic administrative law is built upon. The clearly ordered accountability mechanisms that we know from national contexts, based as they are on the idea of a coherent and unitary system so characteristic of modern constitutionalism, are thus of limited use for the contested and decentred global administrative space.

[129] See Weiler, *supra* note 84, at 18–23.

[130] See *supra*, sect. 3 B.

[131] See Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', 64 *ZaöRV* (2004) 547.

[132] See Kingsbury, Krisch, and Stewart, *supra* note 1, at 48–49. For an attempt at conceptualizing non-electoral accountability mechanisms, see Macdonald and Macdonald, 'Non-Electoral Accountability in Global Politics: Strengthening Democratic Control in the Global Garment Industry', in this issue.

The 'pluralist global administrative law' that I have sketched in this article suggests a possible direction out of the dilemma this creates. It refrains from establishing a clearly structured institutional order and accepts that constituency contests will be played out in mutual challenges between different regimes and different levels in global regulatory governance. The connections between the parts of the overall order are heterarchical, not hierarchical, and often of a political rather than legal nature. Stability is thus created not by final decisions based on ultimate authority, but through processes of negotiation and compromise as well as challenge and concession between the different constituencies involved. The resulting picture is disorderly and fluid but, as we have seen in the examples of GMO regulation, Security Council sanctions and the European Union, not unworkable. Pluralist accountability mechanisms have emerged in many areas of global governance, and while they lead to open institutional confrontation on issues of high salience and contestation, they operate in most instances relatively smoothly through pragmatic mutual accommodation.

Such a pluralist order is not perfect; in fact, it poses many important problems, particularly with respect to legal certainty and power disparities. However, as I have tried to argue, there are good reasons for regarding it as superior to more coherent and unitary competitors on both pragmatic and moral grounds. A federal-style model that would grant each of the different constituencies primacy for distinct issue areas would likely create serious friction in a world in which this primacy is heavily contested. A consociational approach, while better at dealing with this contestation, faces significant problems of practicability, due to its cumbersome consensual processes. A pluralist order, in contrast, may be able to combine a reasonable degree of practicability with a respect for the different views and allegiances of people when it comes to determining the right constituency. These views differ for good reason: there is a strong normative case to be made for each of them, but also important arguments for why none of them should enjoy primacy. Rejecting formal supremacy claims in a pluralist order is a way of respecting the diverging individual choices while leaving space for shifts in their respective weights.

A pluralist global administrative law may not correspond to anybody's ideal; its design is far too unstructured and leaves too much room for political struggle. Yet this may be precisely its virtue. Being nobody's ideal, it refrains from taking sides in the fundamental contests that characterize the global order. Bracketing the issue of principle, and working around it pragmatically, may after all not only be prudent but also morally preferable. And it might be politically advantageous: rather than stabilizing a particular institutional setting, a pluralist order might open up space for the political transformation of a structure of global governance whose legitimacy is far from settled.