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Agencies on the loose? Holding government networks accountable

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In his speech to the conference that was the genesis of this volume, Sir Leon Brittan commented that he had observed, in the MRA negotiations, 'greater eagerness between governments than between agencies', a reluctance that he hoped would be overcome.[1] This distinction between 'government' and 'agency' may seem unremarkable, certainly if viewed through the lens of bureaucratic politics. But it is striking and indeed theoretically unintelligible when viewed from the perspective of traditional scholarship in international law and international relations. Both disciplines start from the fundamental premise that states are the principal actors in the international system and that they are unitary actors—'billiard balls', in Arnold Wolfers' memorable phrase.[2] The state is represented by a designated government institution—typically the Foreign Office, or perhaps the head of state or an agency such as the Treasury or the Central Bank for specified purposes. But how then could a distinction emerge between the 'government' and the 'agencies'?

The answer expresses a fundamental truth about transatlantic regulatory cooperation: it is often motivated and virtually always implemented by government institutions—in this case regulatory agencies or departments—acting and interacting quasi-autonomously from the rest of the government. Interacting intensively with one another, these agencies form regulatory networks that become increasingly institutionalized.[3] Various authors have various names for these networks; in my terminology they are a subset of the larger and growing phenomenon of 'government networks'.[4]

[1] See contribution of Sir Leon Brittan, this volume.

[2] Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (Baltimore: John Hopkins Press, 1962), 19.

[3] Sol Picciotto, 'Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism', *Northwestern Journal of International Law and Business*, vol. 17 (1996–7); see also Scott H. Jacobs, 'Regulatory Co-operation for an Interdependent World: Issues for Government', in *Organisation for Economic Co-operation and Development, Regulatory Co-operation for an Interdependent World* (1994) 15–16 ('[A] web of formal and informal intergovernmental regulatory relationships is emerging in the OECD area (and beyond) that simultaneously empowers and constrains governments with respect to their ability to solve problems through regulation').

[4] Anne-Marie Slaughter, 'The Real New World Order', *Foreign Affairs*, vol. 76 (1997); Anne-Marie Slaughter, 'Governing the Global Economy through Government Networks', in

The growth of government networks is an exciting and fruitful phenomenon that lies at the core of transatlantic regulatory cooperation. As an organizational form, networks have the advantages of speed, flexibility, and decentralization. These attributes allow them to function particularly well in a rapidly changing environment that thrives on the exchange of information and the ability to use it in different ways according to local context. Further, as both corporations and civic organizations such as NGOs have quickly discovered, networks are the fastest way to attain genuine global reach.

Yet networks also portend new problems. Above all, they summon suspicion—of secrecy, technocracy, exclusion, conspiracy. These various concerns typically cluster under the umbrella label of 'accountability'. How to hold the agencies participating in transgovernmental networks accountable to the democratic constituencies they serve domestically? How to ensure abroad at least the degree of democracy we enjoy at home?

This contribution focuses on that problem, seeking to canvass and distinguish the various types of objections raised as 'accountability' concerns and to offer some possible solutions. It identifies three distinct although interrelated critiques of transnational regulatory networks: their invisibility/lack of access, the inferior quality of decisions taken, and their illegitimacy. Each of these objections can be addressed on its own terms. Beyond these specifics, however, it is important to begin thinking of networks of government officials as an increasing and increasingly important form of global governance. In that context, we need to begin formulating 'constitutional' principles that can structure and regulate transgovernmental relations. The final section of the chapter sketches three such principles, as the first round of a larger debate.

I. THE ACCOUNTABILITY CRITIQUE(S)

The best place to start is to examine the actual charges laid against government networks under the general label of lack of accountability. These charges tend to lump together several different concerns, each of which must be unpacked and addressed on its own terms in the context of an overall definition of accountability and the purposes it is meant to serve. Only then can we begin to craft responses.

Michael Byers (ed.), *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000).

A. Defining accountability

In its broadest sense, accountability means responsiveness.[5] Accountability in a democratic society means responsiveness to the people—the responsiveness of the governors to the governed. Mature democracies have developed a number of mechanisms to assure such responsiveness. First is the specific creation of exact rules designed to regulate the behaviour of government institutions. These rules can be substantive, setting forth principles, directives, and limits that define the mandate and the operational space of a particular set of government officials. Alternatively, these rules can be procedural, requiring a particular mode of decision-making that gives individuals and groups affected by the decisions taken meaningful input into them.

A second principal mode of assuring accountability is a set of *ex post* mechanisms to allow the governed to respond to and/or reject decisions already taken. For elected officials and many of the bureaucratic officials they appoint and control, the mechanism is typically elections themselves. For non-elected officials, such as judges, the mechanism may be requirements that they provide a public rationale and justification for their decisions, often referred to as 'giving reasons requirements'.[6] These requirements permit regular response and critique by those who are subject to decisions along with sustained efforts to change them. For still other non-elected officials who are insulated from the election cycle, such as central bankers, the principal mechanism is the quality of their performance, as measured by their ability to achieve the goals that are written into their mandate.

Both the *ex ante* and the *ex post* procedural requirements are typically what is meant by 'transparency'. The premise is that government actions must be visible and accessible to the governed in a way that allows a meaningful response. Transparency is too often merely a mantra, however, invoked with little analysis of the precise purposes it is meant to achieve. Claims of a 'lack of transparency' may not actually address the underlying problem. Conversely, the standard response of enhancing transparency to address charges of unaccountability may privilege form over substance. As Joseph Weiler observes with regard to charges of a democracy deficit within the European Union: 'Transparency and access to documents are often invoked as a possible remedy to this issue. But if you do not know what is going on, which documents will you ask to see?'[7]

[5] My definition and discussion of accountability are informed by discussions at a workshop on accountability of international institutions hosted by Professor Robert O. Keohane, Duke University, 7–8 May 1999.

[6] Martin Shapiro, 'The Giving Reasons Requirement', *The University of Chicago Legal Forum*, (1992), 179–220.

[7] Joseph H. H. Weiler, 'To Be a European Citizen: Eros and Civilization', in *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), 349.

A. The critiques in context

Before turning to some possible solutions, it is important to take note of several more general responses. Critics charging government networks with lack of accountability all too often ignore comparisons between networks and other mechanisms and institutions of global governance. They may also hold transgovernmental networks to an impossibly high standard of accountability without supporting evidence of the problems they purport to identify.

To begin with, the asserted need for access to transgovernmental decision-making processes assumes that regulatory networks are developing and implementing substantive policies in ways that differ significantly from outcomes that would be reached as the result of purely national processes or of negotiations within traditional international institutions. Although reasons exist to accept this premise with regard to policy initiatives such as the 1988 Capital Accord adopted by the Basle Committee,[13] it is less clear regarding other networks, even within the financial arena. Network initiatives are theoretically subject to the normal political constraints on domestic policy-making processes once they are introduced at the domestic level. Arguments that they circumvent these constraints rest on the presumed ability of national officials in the same issue area to collude with one another in ways that strengthen their respective positions vis-à-vis bureaucratic rivals or legislative overseers back home. This presumption is often contested by experts in the different fields of financial regulation and requires further research on a case-by-case basis.

More generally, many government networks remain primarily talking shops, dedicated to the sharing of information, the cross-fertilization of new ideas, and the development of common principles based on the respective experiences of participating members. Informational power is soft power, persuasive rather than coercive.[14] It is 'the ability to get desired outcomes because others want what you want'.[15] Specific government institutions may still enjoy a substantial advantage over others due to the quality, quantity, and credibility of the information they have to exchange.[16] But in giving and receiving this information, even in ways that may significantly affect their thinking, government officials are not exercising power in the traditional ways for which polities find it necessary to hold them accountable. We may need to develop new metrics or even new conceptions of accountability geared to the distinctive features of power in the Information Age.

[13] Ethan B. Kapstein, 'Supervising International Banks: Origins and Implications of the Basle Accords' (Essays in International Finance Series No. 185, 1991), 185.

[14] Robert O. Keohane and Joseph S. Nye, Jr., 'Power and Interdependence in the Information Age', *Foreign Affairs*, vol. 77 (1998), 81, 86.

[15] Ibid.

[16] See ibid. 89–92 (discussing 'the politics of credibility').

A second and related response raises the question whether and when direct accountability is necessary for legitimate government. Some domestic institutions, such as courts and central banks, are deemed to act legitimately without direct accountability. Legitimacy may be conferred or attained independent of mechanisms of direct accountability; performance may be measured by outcomes as much as process. Insulated institutions are designed to counter the voters' changing will and whim, to garner the benefits of expertise and stability and to protect minorities. Many of the policy arenas in which government networks are likely to be most active are those in which domestic polities have agreed that a degree of insulation and expertise are desirable. Why then should the transgovernmental extension of these activities assure interested parties more access to decision-making than they have at home?

A third response is: 'accountable compared to what?' The presumed accountability or lack thereof of government networks must be contrasted with the accountability of international organizations on the one hand, and NGOs on the other. International organizations are hardly known for their accountability to anyone other than diplomats and international lawyers, which helps explain their relative disrepute in many countries. And accountable to whom? The UN suffers from the perennial perception that it is responsive primarily to its own bureaucracy; the IMF and to a lesser extent the World Bank are widely seen as fronts for the United States; EU institutions have been in crisis over a purported 'democracy deficit' for much of this decade; the WTO draws populist fire for privileging free trade, and hence the interests of large corporate interests best positioned to benefit from free trade, above employment, welfare, environmental, human rights, and cultural concerns of interest to large numbers of voters.[17]

NGOs hardly fare better. Although they must routinely sing for their supper and thus depend on their ability to persuade individual and institutional contributors of the worth of their activities, many if not most are single-issue groups who target a particular demographic and political segment of society and may well wield power quite disproportionate to the number of their supporters. Further, their contributors rarely have any direct control over policy decisions once the contribution is made, or,

[17] Consider the following passage from political scientist Henry Nau, which sounds virtually the same themes as Alston's critique of government networks: 'Whose political interests [are] being served by international institutions? Realists said state interests, but the major states today are democracies and consist of many societal and special interests that do not reflect a single government, let alone national interest. Critics of international institutions suspect that these special interests, especially corporate and bureaucratic elites with stakes in globalization, now dominate international organizations and use them to circumvent democratic accountability.' Henry Nau, 'Institutional Skepticism', Letter to the Editor, *Foreign Policy*, vol. 111 (Summer 1998), 168.

equally important, any means of ensuring how their contribution was spent.[18]

In this context, government networks have a major advantage. They are composed of the same officials who make and implement regulations domestically. To the extent that these networks do actually make policy, and to the extent that the policies made and subsequently adopted at the national level differ significantly from the outcome of a purely domestic regulatory process, it is reasonable to expect that other domestic political institutions—legislators, courts, or other branches of the bureaucracy—will extend their normal oversight functions to transgovernmental as well as domestic activities. Public-interest watchdogs are also likely to become more aware of transgovernmental activity and more insistent on participating in it. As Kal Raustiala has documented, provisions have been made for NGOs to participate in international environmental law regimes following the procedures developed for the expansion of the regulatory state in the United States following the New Deal.[19] It is not unreasonable to expect similar developments involving government networks.

B. Three modest proposals

Each of the specific charges distilled above can and should be addressed on its own terms. The responses below are not intended to be definitive, but at least to suggest ways of taking the accountability critique seriously and beginning to adapt the technology of governance to create or maintain the same degree of accountability as obtains for administrative agencies domestically.

1. *Virtual visibility*

Information technology may hold the key to responding to the challenge of invisibility—rendering the network itself and its decision-making processes visible. By making networks 'virtual', we can make them real. Web sites have many advantages for participants in government networks—offering a central site for the dissemination of information and the coordination of activities. At the same time, a Web site creates a public face for a network—the first step towards developing a more human face.

Many of the more institutionalized networks, such as the Basle Committee and IOSCO already have Web sites—for their members as well as the general public. Their Web sites give them permanence, much like headquarters and stationery for a more traditional organization. The tan-

[18] Peter J. Spiro, 'New Global Potentates: NGO's and the Unregulated Marketplace', *Cardozo Law Review*, vol. 18 (1996), 957–69; P. J. Simmons, 'Learning to Live with NGO's', *Foreign Policy*, no. 112 (1998), 82–96.

[19] Kal Raustiala, Note, 'The "Participatory Revolution" in International Environmental Law', *Harvard Environmental Law Review*, vol. 21 (1997), 537, 579–84.

gible (or rather virtual) instantiation of a network via a Web site also makes it possible to draw in a wide range of other actors in organized initiatives. Consider the creation of the Joint Year 2000 Council by the Basle Committee, the BIS Committee on Payment and Settlement Systems (CPSS), IOSCO, and IAIS. The formation of the Council was welcomed by the G-7 Finance Ministers; its Secretariat is provided by the BIS. Its mission was to encourage the development of coordinated national strategies to address the Year 2000 problem, including the development of a global databank of contacts in individual countries covering a wide range of actors in both the private and public sectors; the issuance of policy papers on specific Year 2000 issues; the provision of supervisory guidance on assessing Year 2000 preparations by financial institutions. It acknowledged and welcomed efforts by the World Bank and other international institutions to help address the Year 2000 problem, but has been focusing its attention directly on both private and public actors in the global financial supervisory community.[20] If public opinion and government power so required, similar energies could be devoted to networking with private and public actors devoted to enhancing global democracy in various ways.

The Internet is the ultimate network, enabling but also requiring those who would organize themselves in the Information Age to follow its form. As virtual visibility increasingly becomes actual reality for individual citizens, Web sites will become the focus of a range of regulatory efforts. First is likely to be a variety of transparency requirements, such as a record of meetings held and issues discussed and decided, as well as a calendar of upcoming meetings and projects. To the extent that participants in a government network are engaged in actual policy-making or implementation activities, they can be required to adopt notice and comment procedures along the lines developed in US administrative law. Such procedures are already being advanced to enhance the accountability of EU regulatory networks.[21] Less formally, they can also sponsor on-line discussions of various kinds with those subject to their regulations.

In many ways the Internet might appear antithetical to expanding accountability. Thomas Friedman argues that the defining characteristic of the Internet is that 'we are all connected but no one is in charge'.[22] The concern with the accountability of government networks is precisely that 'no one's in charge'. But creating a virtual incarnation of a government network through a Web site allows those who would be in charge—voters,

[20] Joint Year 2000 Council, Press Release (6 July 1998) <http://www.bis.org/press/p980706.htm>.

[21] Francesca E. Bignami, 'The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology', *Harvard International Law Review*, vol. 40 (1999), 451.

[22] Thomas L. Friedman, Editorial, 'Judgment Not Included', *New York Times*, 27 Apr. 1999, A23.

congressional committees, regulated entities—to begin to assert control or impose constraints in a number of ways. They need not be silent observers or passive consumers of information; rather, they can themselves be increasingly active participants in the network.

2. *Improving the quality of network decisions*

To address the 'bad-decisions' problem, assuming it can be more precisely identified, the most promising possibility is the growth of legislative net-works. Legislative oversight is the standard response to administrative delegation in both parliamentary and presidential systems. Where admin-istrative officials are increasingly making decisions in conjunction with their foreign counterparts, it might well behove legislative oversight committees to coordinate with their counterparts as well. Regular meet-ings between directly elected representatives from different countries on issues of common concern will help broaden the horizons of individual legislators in ways that are likely to feed back to their constituents. Coordinating legislation through direct legislator interaction rather than through treaty implementation may also result in faster and more effective responses to transnational problems, although the ability to generate leg-islation independent of the executive obviously varies in different national political systems.

In some areas, national legislation has been used to facilitate the growth of government networks.[23] In others, such as human rights and the envi-ronment, national legislators are increasingly recognizing that they have common interests. In the European Union, governments are increasingly having to submit their European policies to special parliamentary com-mittees, who are themselves networking.[24] The result, according to German international relations scholar Karl Kaiser, is the 'reparliamenta-rization' of national policy.[25] In addition, legislative networks can be used to strengthen national legislative institutions. For instance, the Association of African Election Authorities was founded in 1997. It is composed both of government officials and leaders of NGOs directly involved in moni-toring and assisting elections.

Other examples include legislative networks nested within inter-national organizations, as discussed further below. These networks, by

[23] MOUs between the US SEC and its foreign counterparts, for instance, have been directly encouraged and facilitated by several US statutes passed expressly for the purpose. Faith T. Teo, 'Memoranda of Understanding among Securities Regulators: Frameworks for Cooperation, Implications for Governance' (manuscript on file with author, Harvard Law School, 1998), 29–43.

[24] Shirley Williams, 'Sovereignty and Accountability in the European Union', in Robert O. Keohane and Stanley Hoffmann (eds), *The New European Community: Decisionmaking and Institutional Change* (Boulder, Colorado: Westview Press, 1991).

[25] Karl Kaiser, 'Globalisierung als Problem der Demokratic', *Internationale Politik* (Apr. 1998), 3.

allowing the regulators or parliaments of weak states to participate in global governance, serve the function both of setting a good example for fragile institutions as well as lending their strength and status to the orga-nization in question. The OSCE parliamentary assembly, for example, has played an important role in legitimizing Eastern European parliaments by monitoring elections and including them in all OSCE deliberations. The controversy surrounding the OSCE's rejection of the Belarussian del-egation for membership demonstrates that membership in the OSCE Assembly has become a symbol of its government's legitimacy for Belarussia.[26]

In encouraging the growth of legislative networks, however, it is impor-tant to recognize the distinctive features of much transgovernmental reg-ulatory rule-making. Transgovernmental networks typically do not adopt binding rules or agreements; they are far more likely to formulate model codes or compilations of 'best practices'. The message is that 'well-governed countries or well-regulated economies have the following fea-tures', with some recommendations about how to achieve them. Enforce-ment of these principles is left to the enormous number of foreign investors that Friedman calls the 'electronic herd'.[27] It is not clear what 'accountability' even means in this context; the problem is much more likely to be that the distributional consequences of adopting particular models of regulation are neither factored into the decision-making process nor made clear as a consequence. Legislators seeking to influence those decisions must thus focus on insisting that regulators take account of the wider social and political context in determining 'best practices' or regu-latory prototypes.

3. *Enhancing legitimacy*

Improving the visibility, accessibility, and monitoring of government net-works in all the ways suggested above should simultaneously help redress their legitimacy problems. Publicizing process will reassure some and engage others; creating legislative networks will help normalize the entire concept of transgovernmental regulatory governance. Publicizing the results of transgovernmental cooperation, even if only through routine legislative hearings on the provision of requested information, may also clarify precisely when and how the distinctions between recommended practices, agreed principles, and joint understandings have an actual impact on domestic policy.

Even if fully successful, however, such measures could at best address legitimacy problems at a domestic level. At the global level, critics will

[26] Aleksandr Potemkin, 'Session of OSCE Parliamentary Assembly Ends in Moscow', *ITAR-TASS News Agency*, 9 July 1997.

[27] Thomas L. Friedman, *The Lexus and the Olive Tree* (New York: Farrar, Straus & Giroux, 1999), 90–119.

likely continue to find a ready audience for claims ranging from technocratic conspiracy to neo-imperialism. Most trenchant will be accusations of regulation 'cloning', the deliberate replication of developed-country regulatory institutions and structures on developing countries and the creation of a global technocratic elite who are socialized to ignore the distributive effects and political trade-offs implicit in their regulatory choices. These charges may seem silly in the transatlantic regulatory context when 'transatlantic' means United States–European Union, but they will re-emerge sharply when transatlantic is expanded to involve interactions with Africa and Latin America.

To address legitimacy concerns in global context, I propose two initial strategies. First is to develop a framework that acknowledges that the 'soft power' of persuasion is still power. Just as it may be successfully wielded by those who possess it, it may also be resented by those subject to it. The remainder of this section sketches some of the issues raised by the exercise of soft power. The second strategy is to offer several general principles of transgovernmental governance, principles formulated from the perspective of a hypothetical global community. That is the subject of the final section.

Soft power, as defined by Joseph Nye, is the power flowing from an ability to convince others that they want what you want rather than an ability to compel them to forgo their preferences by using either threats or rewards.[28] Soft power rests much more on persuasive than coercive authority, a base that may in turn require a capacity for genuine engagement and dialogue with others. The power exercised through government networks is much more likely to be soft power than hard power; indeed, one of the distinguishing characteristics of such networks, as of bilateral regulatory relations, is that agreements reached are likely to be explicitly non-binding. Persuasion is the dominant currency.

For many, the absence of coercion might seem to end all accountability concerns. But soft power is still power. To determine whether and how those who exercise it should be held accountable requires a closer look at its nature and impact in specific contexts. It is helpful to construct a stylized spectrum with pure informational exchanges at one end and apparent persuasion efforts conducted against a backdrop of very unequal bargaining power and ready leverage for actual coercion at the other. The question to be asked at each point along the spectrum is whether power is being exercised by government officials in a way that should trouble their constituents, and if so, how can accountability be enhanced. I will sketch several possible scenarios here.

Consider first the case of pure dialogue and exchange of information among government officials and their foreign counterparts. If judges, or

[28] Keohane and Nye, 'Power and Interdependence in the Information Age' (above, n. 14), 81, 86.

regulators, or even legislators, learn about alternative approaches to a problem facing them in the process of disseminating their own nation's solution, and views that solution more critically thereafter, is there an accountability problem? The answer is likely to be that accountable government does not seek to constrain the sources of knowledge brought to bear on a particular governance problem, but rather the ways in which that knowledge is acted on.

Fair enough, but many government officials will think and act differently as a result of their participation in transgovernmental networks in ways that we cannot and arguably should not control. Judges, for instance, who meet with their foreign counterparts, report a subtle but undeniable change in their perspectives and attitudes towards their domestic cases simply as a result of conversations with judges who face the same issues in other countries and other legal systems and resolve them differently. Perhaps they will actually decide a case differently, as Judge Calabresi apparently did as a result of his awareness of a European precedent in a recent Second Circuit decision.[29] This broadening of intellectual horizons is the essence of comparative perspective, as Justice Ruth Bader Ginsburg notes in an article discussing not only US but also EU and Indian approaches to affirmative action. She calls for an 'international human rights dialogue' on this issue, but notes that the majority of the Supreme Court still thinks that comparative constitutional analysis is 'inappropriate'.[30] Justice O'Connor has similarly stumped the country urging lawyers to cite more comparative and international law.[31]

Justice Ginsburg paints her brethren's position as provincial and anti-intellectual; Justice Scalia would argue that hers is anti-democratic. In his characteristically pungent phrase: 'We must never forget that it is a Constitution for the United States of America that we are expounding.'[32] Yet if other countries come up with promising approaches to hard issues bedevilling US courts or other government officials, does democratic duty condemn them to deliberate ignorance? Surely not, as long as a judge makes the extent of reliance on foreign sources clear, just as he or she would with domestic sources, and the basis for that reliance is the creativity of the foreign approach or the power of its logic rather than any independent desire to emulate a particular foreign system or fall into step with global public opinion.

[29] *United States v. Then*, 56 F.3d 464, 468–9 (2nd Cir. 1995).

[30] Ruth Bader Ginsburg and Deborah Jones Merritt, 'Affirmative Action: An International Human Rights Dialogue', *Rutgers Race and the Law Review*, vol. 1 (1999), 193, 228.

[31] See, e.g., Sandra Day O'Connor, 'Broadening our Horizons: Why American Judges and Lawyers Must Learn about Foreign Law', *International Judicial Observer* (International Judicial Academy/ASIL), June 1997 (article adapted from speech given by Justice O'Connor at the 1997 spring meeting of the American College of Trial Lawyers), 2.

[32] *Thompson v. Oklahoma*, 487 US 815, 869 n. 4 (1988) (Scalia, J., dissenting).

A similar but more subtle problem arises with government regulators who participate in a wide variety of exchanges with their foreign counterparts. Elementary psychology teaches that those who would persuade others of their views are likely to be most effective when they appear equally willing to be persuaded of their listeners' positions. Such a psychological posture, however, may well result in genuine dialogue and a degree of persuasion on both sides. In short, the power of persuasion is likely to flow both ways. For scholars such as Lani Guinier, the potential for such a two-way exchange is the essence of 'power with' rather than 'power over'; a model of power that holds enormous potential for creative synergies and growth.[33] But from the perspective of voters seeking to hold officials accountable to a particular constituency and set of preferences, at least the decision to enter into such a dialogue, with partly unforeseen consequences, must be either authorized *ex ante* or monitored *ex post*.

Even the exercise of pure soft power may thus be more problematic than it first appears. Much more troubling, however, are situations in which soft power appears to mask hard power. Consider the following examples. The US Securities and Exchange Commission has succeeded in replicating itself in many developing countries. It provides technical assistance with various strings attached, such as the requirement that the recipient country pass legislation giving its securities regulators the same margin of independence from legislators that the SEC possesses in the United States.[34] The environmental agencies of the United States, Canada, and Mexico are linked in an 'environmental enforcement network' under NAFTA auspices, a development that the US Environmental Protection Agency trumpets but its Mexican counterpart regards as a thinly veiled apparatus for imposing US-style regulation and enforcement on Mexico. Finally, organizations like IOSCO and the Basle Committee are all busily adopting codes of 'best practices' in securities or central-bank regulation, codes for 'voluntary adoption' by any nation that so desires. The designers of these codes, who are overwhelmingly from industrialized countries with highly developed regulatory systems, see them as 'technical' or 'non-political'; their promulgation simply offers less-developed states the opportunity to help themselves by adopting and adapting state-of-the-art regulatory technology. Yet for many states on the receiving end, choice is an illusion. These codes are increasingly likely to be 'enforced' by private investors and increasingly by international institutions such as the IMF and the World Bank.[35] In such cases persuasion translates directly into coercion.

[33] Lani Guinier, 'Rethinking Power', *Tanner Lectures on Human Values*, 4–5 Nov. 1998 (lectures given by Professor Guinier at Sanders Theater, Harvard University).

[34] Teo, 'Memoranda of Understanding' (above, n. 23).

[35] Michael G. Froman, 'The Global Economy, the International Financial Crisis and their Impact on Sovereignty and International Law' (manuscript on file with author, Harvard Law School, 23 Apr. 1999).

Systematic thinking about the accountability of government networks requires recognizing that soft power is still power. Its exercise is on the whole preferable to hard power; even a small dose of direct coercion is the fastest way to bring out paeans to the virtues of persuasion. Nevertheless, soft power raises a distinct set of concerns both for its wielders and its subjects. To the extent that global dialogue among regulators or judges or legislators changes minds and practices in unexpected ways, the best solution does seem to be transparency, in the form of full disclosure of sources. Foreign ideas should not be emulated solely because they are foreign, but neither should they be rejected solely because they are not homegrown. To the extent that soft power serves as a mask for hard power, the links between the two mechanisms should be exposed and addressed up front. In other words, if a model code promulgated by a 'technical committee' of a transgovernmental organization is likely to become a template for financiers both private and public, then the representation of countries on that committee should be correspondingly broadened. Still a further step would be to require approval of or at least comment on any kind of model code by non-technocrats in developing countries, with a particular focus on distributional consequences. Developed-country regulators could be required to engage in the same kind of analysis before proceeding to negotiate bilateral agreements with their developing-country counterparts, analysis that would be fed into prior legislative approval of such initiatives.

It is impossible to develop a one-size-fits-all approach to accountability. Even the very tentative and general suggestions advanced here would need to be carefully contextualized. But the exercise of asking questions about the accountability of soft power and seeking to distinguish when it is problematic and when not as the predicate for developing specific solutions is both legitimate and necessary. Moreover, these solutions can be developed in the broader context of a few general principles of transgovernmental governance that can be applied to all government officials interacting with one another in virtually any context.

III. TOWARDS CONSTITUTIONAL PRINCIPLES OF TRANSGOVERNMENTALISM

A more fundamental response to enhancing the legitimacy of government networks from the perspective of the global community is a constitutional response: an effort to develop general principles that express the deeper values that government networks should serve. Specific mechanisms of control and constraint could then be developed to ensure that these principles are realized in specific cases. Three such principles are the principle of legitimate difference, the principle of positive comity, and the principle of positive conflict. These principles have already been developed,

although not always explicitly, in US–EU regulatory relations, as well as within the European Union. Thus it seems particularly appropriate to advance them here as candidates for wider adoption.

A. Legitimate difference

The first principle of transnational governance should be the principle of legitimate difference. As Justice Cardozo put it while on the Second Circuit:

> We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home . . . The courts are not free to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.[36]

In conflicts of law, the principle of legitimate difference is limited by the public policy exception, whereby a court will not apply a foreign law that would be otherwise applicable if it violates a fundamental principle of public policy. The principle of legitimate difference assumes that the public policy exception would be applied only rarely, in cases involving the violation of truly fundamental values. In the US context, fundamental equates with constitutional, in the sense that state courts cannot invoke the public policy exception to bar enforcement of another state's act unless that act arguably violates the Constitution itself.[37]

Transposed from the judicial to the regulatory context and from the United States to the global context, the principle of legitimate difference should be adopted as a foundational premise of transgovernmental cooperation. All regulators participating in cooperative ventures of various kinds with their foreign counterparts should begin from the premise that 'difference' per se reflects a desirable diversity of ideas about how to order an economy or society. 'That we deal with it otherwise at home' is not a reason for rejecting a foreign law or regulation or regulatory practice unless it can be shown to violate the rejecting country's constitutional rules and values.

The principle of legitimate difference applies most precisely to foreign laws and regulations. But a corollary of the principle is a presumption that foreign government officials should be accorded the same respect due to national officials unless a specific reason exists to suspect that they will chauvinistically privilege their own citizens. Several examples from the

[36] *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (N.Y. 1918).

[37] The full faith and credit clause of the Constitution requires each state to recognize the acts of another. US Const. art. 4, §1, cl. 1. It is a basic instrument of federalism, knitting the states into one larger polity.

judicial context illustrate the point. In the Laker antitrust litigation, US federal district judge Harold Green decided not to restrain the British parties from petitioning the British Government for help. Judge Green was presuming the same good faith on the part of the British executive as he would on the part of the US executive in a parallel circumstance and assuming that the British executive would not automatically ally with its own citizen in a case involving a foreign citizen in a foreign court.[38] The Seventh Circuit Court of Appeals has also made this premise explicit in several cases. In the *Amoco Cadiz* case, it chose to defer to a ruling by the French executive branch under the *Chevron* doctrine requiring deference to US agencies.[39] And more recently, in a case arising under federal trademark legislation, Judge Easterbrook argued that foreign courts could interpret such statutes as well as US courts, noting that the entire *Mitsubishi* line of Supreme Court precedents 'depend on the belief that foreign tribunals will interpret US law honestly, just as the federal courts of the United States routinely interpret the laws of the states and other nations'.[40]

Note that thus formulated, the principle of legitimate difference lies midway on the spectrum from comity to mutual recognition. Traditional comity prescribes deference to a foreign law or regulation unless a nation's balance of interests tips against deference. Legitimate difference raises the bar for rejecting a foreign law by requiring the balance of interests to include values of constitutional magnitude. 'Mutual recognition', on the other hand, has become an organizing principle in regimes of regulatory cooperation, as an alternative to either national treatment or harmonization.[41] As practised between Member States of the European Union, mutual recognition requires two countries to recognize and accept all of each other's laws and regulations in a specific issue area.[42] This state

[38] *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

[39] *In re* Matter of Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978, 954 F.2d 1279, 1312–13 (7th Cir. 1992) (per curiam). The Chevron doctrine was set forth in *Chevron USA. Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837, 844 (1984) (holding that 'a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . .').

[40] *Omron Healthcare, Inc. v. Maclaren Exports Ltd.*, 28 F.3d 600, 604 (7th Cir. 1994).

[41] Kalypso Nicolaïdis, 'Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects', Jean Monnet Working Paper No. 97/7 <http://www.law.harvard.edu/programs/JeanMonnet/papers/97/97-07.html>.

[42] After the Cassis de Dijon decision of 1979, in which German authorities were forced to respect French liquor standards, the European Commission announced the 'mutual trust' principle: if one state's rules allow a product to be marketed, all other states should have confidence in the first State's judgment and likewise allow the product to be marketed. Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein*, ECR 649 (1979). This concept has contributed significantly to creating an integrated internal market. It has been read to require mutual recognition of educational diplomas, so that professionals from one EU country are now largely free to practise in another without repeating their education. Council

represents a step towards closer and enduring cooperation by effectively assuming that the constitutional test has been met and passed for an entire corpus of foreign laws and regulations. Thus legitimate difference offers an intermediate position: it reflects the intent of regulatory officials who seek further cooperation with one another to move beyond mere comity but does not require them to establish or even to work towards mutual recognition.

In sum, legitimate difference is a principle that preserves diversity within a framework of a specified degree of convergence. It enshrines pluralism as a basis for, rather than a bar to, regulatory cooperation, leaving open the possibility of further convergence between legal systems in the form of mutual recognition or even harmonization, but not requiring it. At the same time, however, it does not try to stitch together or cover over differences concerning fundamental values, values involving basic human rights and liberties or the organizing principles for a social, political, or economic system. At a more practical level, the principle of legitimate difference would encourage the development of model codes or compilations of 'best practices' in particular regulatory issue areas, letting the regulators in different countries figure out for themselves how best to adapt them to local circumstance.

It is also important to be clear, however, on what a principle of legitimate difference will *not* do. It does not help individuals or government institutions figure out which nation should be the primary regulator in a particular issue area or with regard to a set of entities or transactions subject to regulation. Thus it cannot answer the question of which nation should be in the position of deciding whether to recognize which other nation's laws, regulations, or decisions are based on legitimate difference. But it can nevertheless serve as a *grundnorm* of global governance for regulators exploring a wide variety of relationships with their transnational counterparts. If regulators are not prepared to go even this far, then they are unlikely to be able to push beyond paper cooperation.

B. Positive comity

Comity is a long-standing principle of relations between nations. The classic definition for American lawyers is the formulation in *Hilton v. Guyot*: 'neither a matter of obligation on the one hand, nor of mere courtesy and good will on the other . . . comity is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of

Directive 75/362, 1975 OJ (L 167/1); Council Directive 89/48, 1989 OJ (L 19/16). Additionally, it has been applied to banking regulation, where branches of foreign banks are now supervised not by the host state, but by the authorities of the state of the head office, or home state. This approach reflects that each EU state accords a high degree of 'mutual trust' to the banking supervisory capabilities of the others. See Second Council Directive 89/646 on credit institutions, 1989 OJ (L 386/1).

another nation.'[43] 'Recognition' is essentially a passive affair, signalling deference to another nation's action. Positive comity, on the other hand, mandates a move from deference to dialogue. It is a principle of affirmative cooperation between government agencies of different nations. As a principle of governance for transnational regulatory cooperation, it requires regulatory agencies to substitute consultation and active assistance for unilateral action and non-interference.

Positive comity has developed largely in the antitrust community, as an outgrowth of ongoing efforts of EU and US antitrust officials to put their often very rocky relationship on a firmer footing. For long decades the US policy of extraterritorial enforcement of US antitrust laws based on the 'direct-effect' doctrine, even in various modified forms, was met by diplomatic protests, administrative refusals, and a growing number of foreign blocking statutes that restricted access to important evidence located abroad or sought to reverse US judgments.[44] The US Government gradually began to change course, espousing principles of comity and restraint in congressional testimony and in its international antitrust guidelines.[45]

In addition, US regulators began relying less on unilateral state action and more on agency cooperation. In the early 1980s the United States entered into separate cooperation agreements with the Governments of Australia (June 1982) and Canada (March 1984). In both agreements, the parties consented to cooperate in investigations and litigation by the others even when this enforcement affected its nationals or sought information within its territory. In return, the parties agreed to exercise 'negative comity'—to refrain from enforcing competition laws where such enforcement would unduly interfere with the sovereign interests of the other

[43] 159 US 113, 163–4 (1895).

[44] Beginning with *United States v. Aluminum Co. of America (Alcoa)*, the Sherman Act was held applicable to foreign conduct that had a direct, substantial, and foreseeable effect on US trade and commerce. 148 F.2d 416, 440–5 (2d Cir. 1945). This 'direct-effect' jurisdiction quickly became a source of tension with other states that argued that the United States had no right to assert jurisdiction over persons that were neither present nor acting within US territory. Governments whose nationals and interests were affected by US antitrust law filed diplomatic protests and amicus briefs, refused requests for assistance, invoked national secrecy laws, and eventually began passing blocking laws specifically aimed at the frustration of US antitrust enforcement. Spencer Weber Waller, 'National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law', *Cardozo Law Review*, vol. 18 (1999), 1111, 1113–14; see also Joel R. Paul, 'Comity in International Law', *Harvard International Law Journal*, vol. 32 (1991), 1, 32; Joseph P. Griffin, 'EC and US Extraterritoriality: Activism and Cooperation', *Fordham International Law Journal*, vol. 17 (1994), 353, 377.

[45] Spencer Weber Waller, 'The Internationalization of Antitrust Enforcement', *Boston University Law Review*, vol. 77 (1997), 343, 375. By 1988 the Department of Justice stated that it would only challenge foreign anticompetitive conduct that directly harmed US consumers. Robert D. Shank, 'The Justice Department's Recent Antitrust Enforcement Policy: Toward A "Positive Comity" Solution to International Competition Problems?', *Vanderbilt Journal of Transnational Law*, vol. 29 (1996), 155, 165.

party.[46] These agreements have led not only to greater cooperation between states,[47] but also to more effective enforcement of the antitrust statutes of both parties.[48] Several other countries, such as Germany and France (1984) as well as Australia and New Zealand (1990), have adopted similar bilateral arrangements addressing mutual assistance, including notification of activities, enforcement cooperation, and information exchange.[49]

In 1991 the United States executed an extensive antitrust cooperation agreement with the European Community.[50] The Agreement contained provisions on notification of enforcement activities, as well as information sharing and biannual meetings.[51] Most notably, the Agreement was the first to include the principle of positive comity. Article V of the Agreement provides that if Party A believes that its 'important interests' are being adversely affected by anticompetitive activities that violate Party A's competition laws but occur within the territory of Party B, Party A may request that Party B initiate enforcement activities.[52] Thus, Government B, in deference to Government A, is expected to consider enforcement steps that it might not otherwise have taken.[53]

[46] Charles F. Rule, 'European Communities–United States Agreement on the Application of their Competition Laws Introductory Note', *International Legal Materials*, vol. 30 (1991), 1487, 1488. The United States signed a comparable agreement with Germany in 1976. See Steven L. Snell, 'Controlling Restrictive Business Practices in Global Markets: Reflections on the Concepts of Sovereignty, Fairness, and Comity', *Stanford Journal of International Law*, vol. 33 (1997), 215, 234.

[47] No use of the Canadian federal blocking statute has been reported since the signing of the 1984 Agreement. See Waller, 'The Internationalization of Antitrust Enforcement' (above, n. 45), 368.

[48] In the past five years, cooperation between United States and Canadian antitrust agencies has led to prosecutions in the fax paper and plastic dinnerware industries. See Charles S. Stark, 'International Antitrust Cooperation in NAFTA: The International Antitrust Assistance Act of 1994', *US–Mexico Law Journal*, vol. 4 (1996), 169, 171–2.

[49] Nina Hachigian, 'Essential Mutual Assistance in International Antitrust Enforcement', *International Lawyer*, vol. 29 (1995), 117, 138. Antitrust cooperation has also been developing on a multilateral scale. The Organization for Economic Cooperation and Development (OECD) has established regular consultation conferences among national competition officials and has drafted a recommendation on antitrust cooperation, which encourages 'notification, exchange of information, coordination of action, consultation and conciliation on a voluntary basis'. See Waller, 'The Internationalization of Antitrust Enforcement' (above, n. 45), 362–3 (quoting 'Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade', *International Legal Materials*, vol. 35 (1996), 1314, 1315–17). More recently, a group of twelve experts called the International Antitrust Code Working Group proposed an International Antitrust Code to be adopted as a plurilateral trade agreement under the General Agreement on Tariffs and Trade (GATT). Under the Code, an International Antitrust Authority would be established, consisting of a president and an International Antitrust Council to ensure observance of the Code by contracting parties. See Shank, 'The Justice Department's Recent Antitrust Enforcement Policy' (above, n. 45), 186.

[50] See 'Agreement Regarding the Application of their Competition Laws, 23 September 1991, EC–US', *International Legal Materials*, vol. 30 (1991), 1491.

[51] Ibid. 1056–9.

[52] See Griffin, 'EC/US Extraterritoriality' (above, n. 44), 376.

[53] James R. Atwood, 'Positive Comity—Is It a Positive Step?', in Barry Hawk (ed.), *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute* (Fordham Corporate Law Institute, 1993), 79, 84.

This notion of positive comity is the converse of the traditional idea of deference, or 'negative comity'. Unlike the earlier agreements concluded by the United States with Australia and Canada, the EC Agreement focuses less on protecting the sovereign interests of one jurisdiction against the antitrust activities of the other and more on facilitating cooperative and even coordinated enforcement by antitrust authorities.[54] Where deference would tend towards less affirmative enforcement action, positive comity was designed to produce more affirmative enforcement.[55] While the EC–US Agreement reflects the increasing trend towards transnational cooperation in antitrust enforcement, the extent of enforcement coordination and information sharing contemplated by the agreement was unprecedented.[56] In practice, the Agreement has spurred an increase in the flow of information between the parties.[57] In addition, there has been increased enforcement of antitrust objectives, both quantitatively and qualitatively.[58] In coordinating their activities, the Parties under the Agreement work together to minimize the disruption to international trade that multiple uncoordinated investigations might otherwise cause.[59]

Can positive comity be translated from the antitrust context into a more general principle of governance? Two potential objections arise. First is the concern of many within the antitrust community that positive comity is a label with little content. In the words of one critic, 'It is not realistic to expect one government to prosecute its citizens solely for the benefit of another.'[60] The point here is that positive comity could only work where both governments involved already have a direct interest in prosecuting because the behaviour in question directly affects them, in which case cooperation is likely to occur anyway.[61] Further, any desire to undertake an investigation on behalf of a foreign government risks a domestic backlash.[62]

The second objection is a converse concern that to the extent positive comity works, it assumes enormous trust and close continuing relations

[54] See Rule, 'European Communities–United States Agreement on the Application of their Competition Laws' (above, n. 46), 1488.

[55] See Atwood, 'Positive Comity—Is It a Positive Step?' (above, n. 53), 84.

[56] See Rule, 'European Communities–United States Agreement on the Application of their Competition Laws' (above, n. 46), 1487.

[57] Joseph P. Griffin, 'EC/US Antitrust Cooperation Agreement: Impact on Transnational Business', *Law and Policy in International Business*, vol. 24 (1993), 1051, 1063.

[58] See generally Joel Klein and Preeta Bansal, 'International Antitrust Enforcement in the Computer Industry', *Villanova Law Review*, vol. 41 (1996), 173, 179.

[59] See Rule, 'European Communities–United States Agreement on the Application of their Competition Laws' (above, n. 46), 1490. This increased efficiency has also proved attractive to businesses themselves. In *United States v. Microsoft Corp.*, after learning that both the Department of Justice and the European Commission were investigating their licensing practices, Microsoft agreed to waive its confidentiality rights under US antitrust law to permit the two authorities to exchange confidential information. See Shank, 'The Justice Department's Recent Antitrust Enforcement Policy' (above, n. 45), 179.

[60] See Atwood, 'Positive Comity—Is It a Positive Step?' (above, n. 53), 87.

[61] Ibid.

[62] Ibid. 88.

between particular national regulatory agencies—factors that cannot be generalized. Spencer Waller points out that cooperation among agencies responsible for antitrust policy creates a community of competition officials who have been trained and socialized to speak, write, and think about competition issues in a similar way.[63] Thus if positive comity works anywhere, it should work here, but how can we adopt positive comity as a global principle of transnational regulatory cooperation before a relatively high level of cooperation has already been established?

The response to both these objections is a simplified and less stringent version of positive comity. As a general principle it need mean no more than an obligation to act rather than merely to respond. In any case in which Nation A is contemplating regulatory action and in which Nation B has a significant interest in the activity under scrutiny, either through the involvement of its nationals or through the commission of significant events within its territorial jurisdiction, the regulatory agency of Nation A has a duty at the very least to notify and consult with the regulatory agency of Nation B. Nation A's agency must further wait for a response from Nation B before deciding what action to take, and must notify Nation B's agency of any decision taken. Even the critics of positive comity acknowledge that to the extent a commitment to positive comity facilitates increased communication and exchange of information between governments, it may have an impact at the margin.[64] This communication and exchange of information in turn lays the foundation for more enduring relationships that ultimately ripen into trust. Thus at a global level, a principle of positive comity, combined with the principle of legitimate difference, creates the basis for a pluralist community of regulators who are actively seeking coordination at least and collaboration at best.

C. Positive conflict

The third and final norm of transnational governance should be one of positive conflict. To many the very notion may seem an oxymoron. But conflict in many domestic societies is seen as the motor of positive change, as the engine of economic growth in the form of competition, and as the lifeblood of politics. Conflict in the international arena, by contrast, is worrisome because of the possibility, however distant, that it could escalate into military conflict. Conflict between states is thus a problem to be solved and an eventuality to be avoided.

However, among liberal democracies the possibility of military conflict is so small as to be almost completely discounted in ordinary transgov-

[63] See Waller, 'National Laws and International Markets' (above, n. 44), 1125.
[64] See Atwood, 'Positive Comity—Is It a Positive Step?' (above, n. 53), 88.

ernmental relations.[65] This presumed absence of military conflict leads to a new view of non-military conflict. In US–EU regulatory relations, at least, conflict should be understood and addressed the same way as in domestic politics. Indeed, routine conflicts may well be more heated than in relations between liberal and non-liberal states, both because relations are less dense and thus generate fewer conflicts and because when conflicts do arise they are quickly dampened through high-level diplomacy.[66] Intra-family relations are often sharper than relations among friends, precisely because the depth of the relationship and thus the diminished likelihood of serious consequences flowing from a quarrel are taken for granted.

These conflicts should not, however, simply be endured. They should be accepted and perhaps even welcomed as a dynamic force that will ultimately deepen and improve the relationship. Writing about 'social conflicts as pillars of democratic market societies', Albert Hirschman underlines a point made by the German sociologist Helmut Dubiel: 'social conflicts themselves produce the valuable ties that hold modern democratic societies together and lend them the strength and cohesion they need.'[67] Hirschman reviews the long intellectual history of this idea, arguing that, due to its paradoxical power, it is 'reinvented with considerable regularity' in literatures ranging from political philosophy to development studies.[68]

No one suggests, however, that conflict cannot also be powerfully destructive of social relations. Thus the task, as Hirschman presents it, is to move beyond identification of the phenomenon of positive conflict to an understanding of the conditions under which conflict is more likely to act as a 'glue [than] a solvent'.[69] He develops the claim that conflicts in 'pluralist market societies', or more accurately the process of learning to 'muddle through' a 'steady diet' of such conflicts, are more likely to be productive.[70] The conflicts typical of these societies, in his view, have three basic characteristics:

1. They occur with considerable frequency and take on a great variety of shapes.

[65] The argument here does not simply flow from the democratic peace literature. As Robert Keohane and Joseph Nye pointed out in the 1970s, transgovernmental interaction is itself a measure of complex interdependence, which they argued was also characterized by a very low likelihood of military conflict. Anne-Marie Slaughter, 'International Law in a World of Liberal States', *European Journal of International Law*, vol. 6 (1995), 503, 512–13.
[66] By routine conflicts I exclude long-running and highly charged conflicts such as that between Libya and the United States over the Lockerbie bombing or between North Korea and the United States. These types of conflict generate an immediate international response, even if they then stalemate for long periods.
[67] Albert O. Hirschman, *A Propensity to Self-Subversion* (Cambridge: Harvard University Press, 1995), 235.
[68] Ibid. 237 (emphasis omitted).
[69] Ibid. 239.
[70] Ibid. 242–3, 244 (emphasis omitted).

2. They are predominantly of the divisible type and therefore lend themselves to compromise and to the art of bargaining.

3. As a result of these two features, the compromises reached never give rise to the idea or the illusion that they represent definitive solutions.[71]

Conflicts of the 'divisible type' refers to conflicts that are essentially distributive, 'conflicts over getting more or less' of something, as opposed to non-divisible 'either–or' conflicts 'that are characteristic of societies split among rival ethnic, linguistic, or religious lines'.[72] The conflicts that arise in US–EU regulatory relations are most likely to fit this 'divisible type' description, even though many have strong cultural overtones. They are thus likely to contribute to the construction of a strong transnational society. In particular, moving beyond Hirschman, they are likely to give rise to what Robert Cover called a 'jurisgenerative process'.[73] The procedures and substantive principles developed over the course of repeated conflicts among the same or successive actors take on precedential weight, through both learning processes and the pragmatic necessity of building on experience. As they become increasingly refined, these procedures and principles are increasingly likely to be codified in informal and increasingly formal ways.

This jurisgenerative process is the flip side of the legal-process insight that law is a tool more for managing conflict than resolving it.[74] Projecting some of the precepts of this school onto the international arena, Abram and Antonia Chayes depict compliance with international regulatory agreements as a process of 'managing' the problems that face countries seeking to comply with their obligations but often unable to do so for a variety of reasons.[75] They do not draw the further link between conflict

[71] Hirschman, A Propensity to Self-Subversion (above, n. 67), 246. [72] Ibid. 244.

[73] Robert M. Cover, 'The Supreme Court, 1982 Term—Forward: Nomos and Narrative', *Harvard Law Review*, vol. 97 (1983), 4, 15, cited for a similar proposition in Harold Hongju Koh, 'The 1994 Roscoe Pound Lecture: Transnational Legal Process', 75 *Nebraska Law Review* (1996).

[74] Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (prepared for publication from the 1958 tentative edition by William N. Eskridge, Jr. and Philip P. Frickey) (New York: Foundation Press, 1994), lxxi–lxxii.

[75] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995), 22–8. Other authors have similarly applied the legal-process insight in the context of international law. See, e.g., Note, 'Taking Reichs Seriously: German Unification and the Law of State Succession', *Harvard Law Review*, vol. 104 (1990), 588, 598 (noting that '[r]ules reflect underlying conflicts between competing values. They do not resolve, but rather manage, these conflicts by balancing irreconcilable policies.'). Another counter-intuitive relationship between law and conflict emerges from recent writings on international criminal trials. Jose Alvarez draws on Mark Osiel's work depicting international criminal trials as a way of managing 'civil dissensus', preventing closure over bloody and long-running social conflicts but channelling competing versions of the story and ensuring that as many voices as possible are heard. Jose E. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda', *Yale Journal of International Law*, vol. 24 (1999), 365, 469–83. The idea of 'civil dissensus' is an interesting further elaboration of 'positive conflict'; however, it is unlikely that the kinds of conflicts arising from transnational regulatory relations will generate the same deep passions and wounds as the commission of mass atrocities.

itself and a strong social order, but it is not a far step from their conception of compliance to a vision of a symbiotic relationship in which law manages conflict and repeated conflict helps build strong transnational relationships and generates the principles that ripen into law.[76]

Given these various rationales for understanding conflict as a positive phenomenon, what would a norm of 'positive conflict' actually mean as a governance principle? First, it dictates an attitude shift, requiring all parties to see conflict as a process to be managed rather than as an evil to be avoided or suppressed. Second, it is a process that can be managed largely by the regulators themselves, without the necessary intervention of diplomats, although courts and legislators are also likely to be involved. Third, all participants must understand that any conflict is inevitably part of a series of conflicts; they are players in a repeated game. This awareness not only dictates moderation in the hope of reciprocal treatment from the other side in the future, but also encourages all sides to crystallize and build on their past experience.

A final consideration regarding the principle of positive conflict involves transgovernmental regulatory cooperation beyond US–EU relations. Although transgovernmental regulatory networks are most concentrated among OECD countries, they extend to regulatory agencies in many different kinds of countries. In some cases, such as contact between environmental regulators in the United States and China, these ties are a way of creating some cooperative relations between countries that are otherwise often opposed to one another. Conflict of any kind between such countries still has the possibility of escalating into military conflict, and must be handled accordingly. Thus to adopt positive conflict as a global governance norm for regulatory networks would require an ongoing awareness of the distinction between positive and negative conflicts.

These three principles—legitimate difference, positive comity, and positive conflict—each build on the other. Together they frame a regime of pluralism, active cooperation, and productive if often messy conflict. Even if all regulators around the world were to adopt these principles in a charter governing relations with their foreign counterparts, however, it would not solve all the potential accountability problems that have been raised and discussed in this contribution. The perception of 'regulators on the loose', particularly when coupled with more general suspicion of the seemingly inexorable forces of globalization, is easy to manipulate and hard to address satisfactorily. But in addition to adapting domestic

[76] Chayes and Chayes developed their analytical framework with regard to international regulatory treaties; it applies equally well to transnational regulatory relations. In earlier work Abram Chayes elaborated the link between regulatory law and public policy, arguing that the resolution of regulatory issues necessarily involves broad debates over public policy and public values. Abram Chayes, 'The Role of the Judge in Public Law Litigation', *Harvard Law Review*, vol. 89 (1976), 1281, 1302.

governance structures in various ways and creating various Internet-based processes of decision-making that will enhance transparency and access, developing explicit principles of transnational governance will help establish regulatory networks as a legitimate form of governance, complementary to international and supranational institutions and national governments.

IV. CONCLUSION

Transnational regulatory cooperation is not only an important dimension of US–EU relations, but an increasingly important mechanism of global governance. Networks of government officials engaged in the same general endeavour and facing similar problems in the domestic context can work with one another to remove obstacles posed by national differences, exchange information about promising solutions, and develop common approaches to regulatory problems. At the same time, as this volume makes clear, transgovernmental regulatory relations are often a site for sharp conflict—often all the sharper for arising among friends.

For many observers of government networks, however, questions of conflict versus cooperation are less important than questions of accountability. The transnational nature of these activities suggests the slipping free of domestic constraints. Shadowy legions of technocrats appear to be forging consensus with one another at the expense of wider domestic constituencies. Whether true or not, the perception of the secretive and illegitimate nature of much of this activity is troubling and potentially damaging to the long-term effectiveness of transgovernmental governance. Yet adapting both the concept and the mechanisms of accountability to this new form of governance requires identifying and addressing the problem directly. This contribution is a first step along that road. The destination may someday be a transgovernmental constitution.[77]

[77] Brian T. Fitzgerald, 'Software as Discourse: The Power of Intellectual Property in Digital Architecture', *Cardozo Journal of Arts and Entertainment Law*, forthcoming 2000 (manuscript on file with author).

The challenges of globally accessible process

Peter L. Strauss

A note for the reader: In the conference the present volume reflects, this contribution was as much a visual as an auditory experience. Its principal aim was to open to view the possible implications of wider government and citizen use of the Internet for policy formation in the transatlantic regulatory community. Using the projected image of an Internet connection and moving through various examples of Internet use made it possible to engage the participants demonstrably in ways the print medium simply does not permit. The site illustrations that the publisher has kindly agreed to reproduce below may give an idea, but they too lack precisely the ingredients of immediacy and interactivity the Internet affords. The reader wishing to test or explore the ideas presented here is invited to read this contribution beside an open Internet connection, so as to respond to what is on the screen as well as on the printed page.

A domestic American administrative lawyer invited to contribute to a conference on transatlantic regulatory cooperation approaches the task with some trepidation, fearing his subject may be as obscure to the participants as theirs may be unknown to him. In addressing the subject of transatlantic regulatory cooperation and democratic values, however, I am hopeful about the possibilities of interchange. I start from the supposition that transatlantic regulatory cooperation will entail significant coordination of regulation. To win acceptance for their results, the partners would need at least to understand the growing American conviction that even technological regulation is the product of political action as well as expertise. The procedures the American Administrative Procedure Act prescribes for rule-making were distinctive even when it was adopted. In the fifty-three years since its enactment they have been increasingly adapted to accommodate public engagement and political influence. This ineluctable process of democratization carries its own implications for the formation of regulatory policy on an international scale. More strikingly, the explosive growth in use of the Internet by both politicians and governmental organizations over the past few years has created an intimacy of engagement between citizen and government that could not have been imagined even a decade ago.

The occasions for transatlantic regulatory cooperation lie not simply in the economic globalization reflected in so many of the papers in this volume, but also in the demands of what might be described as the obverse