

## **Legitimacy and Law-Making Alliances**

By Claire Kelly\*

<b>I. The Legitimacy Challenge for International Organizations.....</b>	<b>6</b>
<b>A. International Organizations As Institutions for Global Law-making .</b>	<b>6</b>
<b>B. The Legitimacy Problem .....</b>	<b>10</b>
<b>1. Input Legitimacy .....</b>	<b>12</b>
<b>2. Output Legitimacy .....</b>	<b>19</b>
<b>3. Challenges to Secure Input and Output Legitimacy .....</b>	<b>23</b>
<b>II. Derivative Legitimacy: Legitimacy through Linkage and Accommodation.....</b>	<b>29</b>
<b>A. Linkage and Accommodation .....</b>	<b>29</b>
<b>B. Derivative Legitimacy: Legitimacy Through Linkage and Accommodation.....</b>	<b>31</b>
<b>1. Partnering.....</b>	<b>32</b>
<b>2. Coordination.....</b>	<b>37</b>
<b>3. Endorsements .....</b>	<b>44</b>
<b>4. Resource Sharing .....</b>	<b>47</b>
<b>III. Derivative Legitimacy and its Benefits and Costs.....</b>	<b>48</b>
<b>A. Legitimate Institutions and Norms.....</b>	<b>49</b>
<b>B. False Legitimacy Claims.....</b>	<b>53</b>
<b>C. Marginalization.....</b>	<b>54</b>
<b>D. Entrenchment.....</b>	<b>57</b>
<b>E. Regime and Forum Shifting Strategies.....</b>	<b>58</b>
<b>F. The Potential for Abuse.....</b>	<b>59</b>
<b>IV. Evaluating Derivative Legitimacy Claims through Procedures.....</b>	<b>61</b>
<b>A. How Good Procedures Strengthen Derivative Legitimacy Claims ....</b>	<b>62</b>
<b>1. Partnering.....</b>	<b>62</b>
<b>2. Coordination.....</b>	<b>63</b>
<b>3. Endorsements .....</b>	<b>65</b>
<b>4. Resource Sharing .....</b>	<b>66</b>
<b>B. Process as Compared to Other Metrics .....</b>	<b>67</b>
<b>C. How Good Procedures Mitigate Problems Caused by Law-Making Alliances.....</b>	<b>69</b>

### *Abstract*

*Law-making institutions seek legitimacy to secure compliance with the norms that they generate. In the international setting this quest is made more difficult by the lack of both an identifiable public that international organizations*

*represent and competing normative prescriptions for international law-making. In light of these obstacles, various legitimacy theories attempt to evaluate the law-generating efforts of international organizations. These theories consider whether the organizations are representative, inclusive, procedurally fair, or effective. Law-making organizations that satisfy the legitimacy criteria articulated in these theories can claim legitimacy and expect greater compliance as a result.*

*Although these theories are helpful, a powerful new phenomenon forces us to reassess international law-making legitimacy and how we evaluate it. International organizations now form law-making alliances with each other in order to tackle complex problems. These alliances claim, and sometimes are credited with, legitimacy derived from the very relationship between the organizations. Any framework that assesses the legitimacy of these alliances needs to approach “derivative legitimacy” by examining that relationship. A framework must also address the particular concerns raised by these alliances, including marginalization, entrenchment, false legitimacy claims and abuse.*

*This article suggests that derivative legitimacy should be evaluated by examining whether the international law-making alliances employ good procedures. Although process is not a perfect assessment tool, it is best suited to ensure that the relationship between law-making alliances fosters inclusion and effectiveness. Good procedures also ward against the negative consequences these alliances generate. Although the necessary procedures will depend upon the particular organizations involved and their goals, the available procedures include: participatory mechanisms (such as notice and comment procedures), transparency procedures, rules against corruption, and rules requiring explanation.*

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International organizations (IOs) form law-making alliances to enhance the legitimacy of their work product. For example, the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank joined forces to promote a legislative guide for modernizing national bankruptcy statutes.<sup>1</sup> The World Trade Organization (WTO) has incorporated the standards

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\* Associate Professor of Law, Brooklyn Law School. I am grateful to Dana Brakman Reiser, Neil Cohen, Joseph DiBartolo, Laurence Helfer, Ted Janger, Katerina Linos, Barbara Murphy, Suzanne Offerman and David Zaring for their

set by the Codex Alimentarius Commission (for food safety), the International Office of Epizootics (for animal health) and the International Plant Protection Convention (for plant health) into its Agreement on Sanitary and Phytosanitary Measures (SPS).<sup>2</sup> The World Bank has incorporated into its Loan Guidelines the United Nations Convention on Biological Diversity, the 1972 Convention Concerning the Protection of World Cultural and Natural Heritage, and the Food and Agricultural Organization (FAO) Guidelines for Packaging and Storage of Pesticides.<sup>3</sup> The legitimacy claims of these alliances and the norms they generate are derivative; they flow from the legitimacy claims made by the constituent organizations of the alliance and from the act of allying. I believe the best method to assess the legitimacy of the resulting norms is to examine whether the alliance employs good procedures.

Legitimacy claims are increasingly important to IOs because they permit the IOs to: (i) answer concerns regarding accountability and inclusiveness that arise as democratic norms spread among the constituencies that IOs affect; and (ii) secure compliance with the norms they generate. IOs address difficult problems and often compete with each other to address these problems.<sup>4</sup> These

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<sup>1</sup> See Susan Block-Lieb & Terence C. Halliday, *Legitimation and Global Lawmaking* 12 (Fordham L. Legal Studies Research Paper No. 952492, 2006), available at <http://ssrn.com/abstract=952492> [hereinafter Block-Lieb & Halliday, *Legitimation*]

<sup>2</sup> Agreement on Sanitary and Phytosanitary Measures, Apr. 4, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex A, Para. 3, Legal Instruments--Results of the Uruguay Round of Multilateral Trade Negotiations, 1867 U.N.T.S. 493, 33 I.L.M. 1128 (1994) [hereinafter SPS Agreement].

<sup>3</sup> José Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 237 (2006) (citations omitted) (José Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS).

<sup>4</sup> See Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649, 693 (2006) [hereinafter Helfer, *Understanding Change*] (explaining how ILO "experienced

IOs face criticisms that they are unrepresentative or non-democratic at a time when democratic values are on the rise.<sup>5</sup> Thus, it is not surprising that increasingly, when developing law, they employ the tools of linkage and accommodation and turn to other IOs to form alliances in which they collaborate, share resources, or broker consensus. These alliances bring within their ambit more experts, more nuanced problem-solving techniques, more resources and establish a new basis for law-making legitimacy, *i.e.*, derivative legitimacy.

These alliances thus force us to consider what framework works best to assess derivative legitimacy.<sup>6</sup> IOs that seek to promulgate or propagate legal norms have always faced legitimacy questions: by what authority do they purport to act?<sup>7</sup> To whom are they accountable? What power do they have to enforce their commands?<sup>8</sup> Why should anybody listen?<sup>9</sup> These questions are more complex when addressed to alliances that claim legitimacy from a combination of sources.

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new forms of competition from other international bodies, in particular from the human rights activities of the United Nations Economic and Social Council.”); Joel P. Trachtman, *The Boundaries of the WTO: Institutional Linkage: Transcending “Trade and...”*, 96 AM. J. INT’L L. 77 (2002); Laurence Helfer, *Constitutional Analogies in the International Legal System*, 37 LOY. L.A. L. REV. 193, 211-212 (2003) (discussing “overlapping competencies” among international institutions.)

<sup>5</sup>Robert O. Keohane and Joseph S. Nye Jr., *Between Centralization and Fragmentation: the Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, Kennedy School of Government Working Paper Series, RWP01-004 at 9-10, (2001) available at [http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP01-004/\\$File/rwp01\\_004\\_nye\\_rev1.pdf](http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP01-004/$File/rwp01_004_nye_rev1.pdf) (discussing the spread of democratic norms and criticisms of IOs as undemocratic).

<sup>6</sup>Keohane & Nye, *supra* note 5, at 16 (calling for a new system to assess global governance).

<sup>7</sup>Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?* 68 LAW & CONTEMP PROBS. 63, 64 (2005) (discussing accountability of international organizations).

<sup>8</sup>THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990) (discussing legitimacy as a means to secure compliance.)

<sup>9</sup>See Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View From Basel*, 17 EUR. J. INT’L L. 15, 15-16 (2006) (discussing the legitimacy challenge to international organizations generally).

To answer these questions we must first define what we mean by legitimacy. IO legitimacy claims are complex and distinct from inquiries involving domestic entities.<sup>10</sup> As Ian Hurd explains, legitimacy of international organizations should be understood from a relational perspective.<sup>11</sup> Legitimacy results when one party (*e.g.*, a state) in relation to another (*e.g.*, an IO) perceives that other party as legitimate.<sup>12</sup> As Hurd explains, this perception is subjective,<sup>13</sup> but it responds to a legitimacy claim that can be assessed using objective criteria. To help concretize and systematize this relational analysis of legitimacy, it is helpful to divide legitimacy claims into two broad categories: input legitimacy and output legitimacy. Output legitimacy focuses on the ends of decision-making; are the resulting laws or proposed laws effective under a particular normative standard?<sup>14</sup> Input legitimacy focuses on the means of law-making; do the resulting laws come from democratic, representative, or procedurally fair processes?<sup>15</sup> It is difficult for IOs to satisfy both output criteria and input criteria at the same time.<sup>16</sup> This article considers whether derivative legitimacy is best assessed using an input metric, an output metric or some combination of the two.

Part I describes global law-making and the legitimacy challenge. It provides a typology of IOs that develop norms: (i) regulatory bodies, (ii)

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<sup>10</sup> Keohane & Nye, *supra* note 5, at 3. *See also* G. C. A. Junne, *International Organizations in a Period of Globalization: New (Problems of) Legitimacy in THE LEGITIMACY IN INTERNATIONAL ORGANIZATIONS* 189 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

<sup>11</sup> IAN HURD, *AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL* 7 (2007) [hereinafter HURD, *AFTER ANARCHY*]; Ian Hurd, *Legitimacy, Power and the Symbolic Life of the UN Security Council*, 8 *GLOBAL GOVERNANCE* 35, 35–38 (2002) [hereinafter, Hurd, *Legitimacy*].

<sup>12</sup> Hurd, *Legitimacy*, *supra* note 11, at 38 (2002) (noting that “[p]erceptions of legitimacy create the authoritative instructions”).

<sup>13</sup> HURD, *AFTER ANARCHY*, *supra* note 11, at 7.

<sup>14</sup> Keohane & Nye, *supra* note 5, at 12-16. This normative standard is typically set by the organization itself. An alternative approach would be to assess the normative legitimacy more generally, to question why it is that a global governance institution has the right to rule. Output legitimacy, or effectiveness, would be only one part of that inquiry which would be involved a more moral assessment of the institution. *See* Allen Buchanan and Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 *ETHICS IN INTERNATIONAL AFFAIRS* 405, 412 (2006).

<sup>15</sup> Keohane & Nye, *supra* note 5, at 12-16.

<sup>16</sup> Block-Lieb & Halliday, *Legitimation*, *supra* note 1, at 2 (noting the paradox).

governmental norm creating forums, and (iii) private norm creating forums. It explains that legitimacy is a subjective belief, but it provides objective paradigms for assessing legitimacy claims. It demonstrates how pursuing legitimacy according to one set of criteria can sacrifice legitimacy claims under another. It also examines the competition among IOs, the push for democratic norms and the resulting need for stronger legitimacy claims.

Part II explains linkage and accommodation and gives specific examples where these phenomena work to garner more legitimacy for specific organizations and the soft and hard law they develop.<sup>17</sup> Linkage and accommodation techniques result in at least four types of alliances: partnering, coordination, endorsements and resource-sharing arrangements. Each of these alliances enables claims of derivative legitimacy.

Part III outlines some of the positive and negative consequences of derivative legitimacy, including: stronger legitimacy claims, marginalization of interests, entrenchment, new regime and forum shifting opportunities, and unique opportunities for abuse that these alliances create.

Finally, Part IV argues that a derivative legitimacy analysis must focus on the relationship among the constituent IOs and that the best paradigm to do so is a process-based paradigm. We should consider whether these alliances have sufficient procedures to secure transparency, participation, and fairness. Although the particular processes will depend upon the type of alliance, some standard procedural devices, such as notice, transparency mechanisms, power-sharing devices, rules requiring explanation, and rules against corruption, will be important to promote stronger legitimacy claims and mitigate the negative consequences of these alliances.

## **I. The Legitimacy Challenge for International Organizations**

### **A. International Organizations As Institutions for Global Law-making**

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<sup>17</sup> Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421-22 (2000) (defining hard law as precise legally binding obligations that delegate authority for interpreting and implementing the law, while soft law is somewhat weakened in its obligations, precision, or delegation).

The institutions of global governance form a complex and overlapping web of problem-solving entities that touch upon almost every aspect of life.<sup>18</sup> In this paper I use the term international organization (IO) broadly to refer to intergovernmental organizations (IGOs)<sup>19</sup> (as embodied in some institution such as the WTO or UNCITRAL) and private international governance institutions (such as the International Chamber of Commerce).<sup>20</sup> I divide the relevant IOs by how they generate legal norms: (i) regulatory bodies, (ii) quasi governmental norm-generating forums, and (iii) private norm-generating forums.

*Regulatory Bodies.* Regulatory bodies are institutions established by states that have the power to generate norms and rules to which states have *ex ante* committed. These IOs derive their authority from the membership of sovereign states.<sup>21</sup> States are drawn to regulatory IOs;<sup>22</sup> IOs have efficiencies that make membership appealing.<sup>23</sup> Additionally, both developing and developed nations see membership in regulatory bodies as enhancing their standing in the community of nations.<sup>24</sup> Membership in some organizations, such as the WTO

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<sup>18</sup> Buchanan & Keohane, *supra* note 14, at 406.

<sup>19</sup> For a description of IGOs see MARGARET P. KARNS & KAREN A. MINGST, *INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE* 7 (2004).

<sup>20</sup> KARNS & MINGST, *supra* note 19, at 14. One could also analyze *ad hoc* arrangements (such as the G-7), or the International Organization of Securities Commissions (IOSCO).<sup>20</sup> Including these government networks in the analysis is possible, but for simplicity sake I will leave that task to another day. For a thorough description of government networks and the implications they have for global governance see Anne-Marie Slaughter, *A NEW WORLD ORDER* (2005).

<sup>21</sup> KARNS & MINGST, *supra* note 19, 4-5, 8-10.

<sup>22</sup> *Id.* at 4-5, 8-10.

<sup>23</sup> Kenneth W. Abbott and Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 *J. CONFLICT RES.* 1, 4-5 (1998).

<sup>24</sup> Developing nations may seek membership in IOs in order to affect domestic policies. Edward D. Mansfield & Jon C. Pevehouse, *Democratization and International Organizations*, 60 *INT'L ORG.* 137, 138-39 (2006). For example, IO membership helps leaders sustain domestic democratic reforms. *Id.* at 161. Mansfield and Pevehouse note democratizing countries may find that membership in IOs can positively or negatively affect their reputation and the credibility of their leaders depending on their actions within the organization *Id.* at 141, 144 and 161. See also Robert Howse, *The Legitimacy of the World Trade Organization* 356 in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS*, (discussing how "sovereigns use international organizations as a means of

for example, has become a must, given the economic benefits that accrue to members.<sup>25</sup>

*Quasi Governmental Norm-Creating Forums.* Other IOs generate norms to which states will agree *ex post*. For example UNCITRAL is an arm of the United Nations, and derives its authority from the UN.<sup>26</sup> UNCITRAL's work product includes conventions, model laws and legislative guides.<sup>27</sup> Likewise, the International Institute for the Unification of Private Law (UNIDROIT) is a law-making forum where member states that have acceded to the UNIDROIT statute work on harmonizing substantive private law issues.<sup>28</sup> It focuses on technical (and less political) issues.<sup>29</sup> Its work product includes conventions, principles, uniform laws and guides.<sup>30</sup> There are other governmental law-generating forums that address other issue areas.<sup>31</sup>

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legitimizing their own power" but questioning who in turn legitimizes the international organization.)

<sup>25</sup> See Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT'L L. 545 (2004).

<sup>26</sup> G.A. Res. 2205 (XXI), U.N. Doc. A/6396. (Dec. 17, 1966).

<sup>27</sup> *The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law United Nations*, 29-47 (2006), available at <http://www.uncitral.org/pdf/english/texts/general/V0650941.pdf> (last visited August 15, 2007).

<sup>28</sup> See Statute of the International Institute for the Unification of Private Law art. 1, Mar. 26, 1993, 15 U.S.T. 2504. See also Int'l Inst. for the Unification of Private Law, About UNIDROIT at <http://www.unidroit.org> (last visited

<sup>29</sup> *Structure, legislative policy, working methods of UNIDROIT* available at <http://www.unidroit.org/english/presentation/structure.htm> (last visited August 15, 2007). The UNIDROIT web page proclaims "UNIDROIT's independent status amongst intergovernmental Organisations has enabled it to pursue working methods which have made it a particularly suitable forum for tackling more technical and correspondingly less political issues." *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> The Hague Conference on Private International Law includes 67 member states which work towards the "progressive unification of the rules of private international law." Statute on the Hague Conference on Private International Law (Hague Statute) art. 1., formulated Oct. 9-31, 1951, 15 U.S.T. 2228, 220 U.N.T.S. 121 Also available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=29](http://www.hcch.net/index_en.php?act=conventions.text&cid=29) (last visited December 1, 2007). None of these bodies are legislatures or law creating bodies, rather they are institutions that develop rules and make policy choices that only

*Private Norm-Creating Forums.* International private norm-creating forums work much the same as private legislatures in the domestic setting; they generate rules or standards that parties choose to adopt if those parties think the rules or standards will be useful.<sup>32</sup> For example, the ICC sets standards that will facilitate business, should businesses choose to adopt them.<sup>33</sup> Among its most notable successes are the Uniform Customs and Practice for Documentary Credits (UCP 500 & UCP 600) which banks routinely adopt to govern their letters of credit, and ICC Incoterms which parties frequently adopt as a matter of course when engaging in the sale of goods.<sup>34</sup>

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become law once states choose to adopt them. States may coordinate their efforts among these governmental forums. Another law generating forum is the Basel Committee on Banking Supervision. See Bank for International Settlements website About the Basel Committee available at <http://www.bis.org/bcbs/index.htm> last visited July 31, 2007. See also Basel Committee on Banking Supervision, For a description of The Basel Committee see David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. OF INT'L L. 547 (2005). See also Barr & Miller, *supra* note 9, at 21 (discussing the Basel process design).

<sup>32</sup> See, e.g., Alan Schwartz and Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (examining “large private law making groups.”)

<sup>33</sup> ICC Constitution, Art. 1 available at [http://www.iccwbo.org/uploadedFiles/ICC/ICC\\_Home\\_Page/pages/Constitution8101907E.pdf](http://www.iccwbo.org/uploadedFiles/ICC/ICC_Home_Page/pages/Constitution8101907E.pdf), last visited August 9, 2007.

<sup>34</sup> See generally Henry Gabriel, *International Chamber of Commerce Incoterms 2000: A Guide to Their Terms and Usage*, 5 VINDOBONA J. INT'L COMM. L. & ARB. (2001). See also, e.g., the Institute for International Banking Law & Practice. Institute for International Banking Law and Practice, home page <http://www.iiblp.org/> (last visited August 9, 2007). Like the ICC, the IBLP has developed rules governing letters of credit (specifically standby letters of credit) that can be voluntarily adopted by private parties to govern their transactions. Another example of a private norm creating institution is the Comité Maritime International Comité Maritime International which promotes the unification of maritime law. Home Page, available at <http://www.comitemaritime.org/ratific/ratitle.html> (last visited August 9, 2007). Still another is the International Standards Organization. See ISO Standards Home page available at <http://www.isostandards101.com/> (last visited August 20, 2007).

Regulatory IOs, and to a lesser degree, governmental and private norm-creating forums, compete with each other for members, jurisdiction and relevancy.<sup>35</sup> Although one could contend that an IO has no independent persona beyond its constituents, one can see examples of IOs reaching beyond the original mandates established by their constituents to: (i) expand their jurisdiction, (ii) change their agendas in response to changed circumstances and (iii) remain relevant.<sup>36</sup> For example, the GATT/WTO drastically expanded its role from a body primarily aimed at tariff reduction and enforcing rules of non-discrimination to a body that promoted substantive harmonization.<sup>37</sup> Laurence Helfer has explored the ILO's ongoing evolution over its 90 year history including the competition it faced from other institutions such as the United Nations Economic and Social Council.<sup>38</sup> Whether these changes are the result of an institutional persona, or merely the result of nation state desires, as IOs change they often compete with other IOs for jurisdiction over important issues.<sup>39</sup> IOs pursue legitimacy because it helps them to compete, change, and remain relevant.<sup>40</sup>

### B. The Legitimacy Problem

To evaluate an IO's legitimacy claims, we must define legitimacy. As Ian Hurd explains, legitimacy is "an actor's normative belief that a rule or institution ought to be obeyed."<sup>41</sup> It is intersubjective.<sup>42</sup> IOs have legitimacy when other

<sup>35</sup> Helfer, *Understanding Change*, *supra* note 4, at 693.

<sup>36</sup> Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1605-07 (discussing the phenomenon of "mission creep" in IOs and utilizing WTO's expanding its mandate as an example).

<sup>37</sup> Arie Reich, *The WTO as a Law-Harmonizing Institution*, 25 U. PA. J. INT'L ECON. L. 362 (2004).

<sup>38</sup> See Laurence R. Helfer, *Understanding Change*, *supra* note 4, at 693.

<sup>39</sup> Laurence R. Helfer, *Mediating Interactions in an Expanding International Intellectual Property Regime*, 36 CASE W. RES. J. INT'L L. 123, 134-35 (2004) [Helfer, *Mediating*]. UNCITRAL sets its working agenda in part in response to the prevailing commercial law needs. UNCITRAL *Guide: Basic Facts*, *supra* note 27, at 10. The ICC has adopted the ISP 98 promulgated by the Instituted for International Banking Law and Practice. See *International Standby Practices: ISP98*, ICC Publication No. 590 (1998).

<sup>40</sup> Hurd, *Legitimacy*, *supra* note 11, at 35 – 36 (noting "[t]he power of social institutions in a society is largely a function of the legitimacy of those institutions").

<sup>41</sup> HURD, *AFTER ANARCHY*, *supra* note 11, at 7. Alternatively, one could question the normative prescription more generally. See Buchanan & Keohane, *supra* note

actors believe that they do.<sup>43</sup> As a result one can not truly hope to assess an IOs legitimacy.<sup>44</sup> Rather at best, one can hope to assess an IO's legitimacy claim to ascertain whether states will *likely* perceive the IO and its work product as legitimate.<sup>45</sup>

IOs' legitimacy claims can be assessed by reference to their institutional functioning or institutional accomplishments.<sup>46</sup> This distinction has been drawn by Professor Fritz Scharpf, and later Robert Keohane and Joseph Nye. They

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14, at 412. Buchanan and Keohane reject the three traditional standards to judge the normative question, *i.e.*, state consent, consent by democratic states and global democracy in favor of a more complex inquiry that mixes consent, justice democracy, morality, fairness and procedure. *Id.* at 417-18.

<sup>42</sup> HURD, *AFTER ANARCHY*, *supra* note 11, at 7 - 8. Naturally, when one considers the relational quality of legitimacy one must identify the parties. Whose subjective belief matters: states, citizens or other IOs? *Id.* at 9.

<sup>43</sup> *Id.* at 7 (describing legitimacy as a subjective quality "defined by the actor's perception of the institution").

<sup>44</sup> *Id.* at 8 (characterizing legitimacy as a "difficult concept to study . . . [which] is not "readily accessible to outside observers").

<sup>45</sup> *Id.* at 31 (noting that since legitimacy is not accessible by outside observers, it can only be measured "through an assessment of whether the audience in question acknowledges it.").

<sup>46</sup> Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L. J. 1490, 1495-96 and 1515 (2006) (articulating a "taxonomy of legitimacy" consisting of "democratic, results-based, order-derived, systemic, deliberative, and procedural" values seeing administrative law at the heart of legitimacy.); Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88, 93 (2006); José E. Alvarez, *International Organizations: Then and Now*, 100 AM. J. OF INT'L L. 324, 332 (2006) [hereinafter Alvarez, *International Organizations: Then and Now*] (discussing universal legitimacy in the context of customary international law). The lack of an international demos has made a "domestic analogy" less helpful than one might initially think. Keohane & Nye, *supra* note 5, at 11 (describing the lack of a political community and referring to Hedley Bull). Keohane and Nye discuss alternatives to voting that might be used to increase international democratic accountability namely increasing domestic accountability and "legislative control over policy at the supranational level." *Id.* at 13.

describe these lenses as input and output legitimacy or input and output criteria.<sup>47</sup> Input legitimacy captures those legitimacy claims that focus on the means by which constituents participate in IOs, *e.g.*, representation, inclusiveness or process. Output-legitimacy represents those paradigms that focus on substantive outcomes, *e.g.* trade liberalization, or fairness, and whether goals set by the IOs themselves are reached, *i.e.*, is the IO effective.<sup>48</sup> Not surprisingly, IOs seek both input and output legitimacy even though the pursuit of legitimacy through one set of criteria may undermine or forfeit legitimacy through another.<sup>49</sup>

### 1. Input Legitimacy

*Representation.* IOs enhance their legitimacy claims by developing norms in a representative manner. For example, the ILO is a representative body that

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<sup>47</sup> F. Scharpf, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 2 (1999). Input legitimacy Scharf explains is government “by the people” and output is “government for the people.’ *Id.* These labels are merely guides that I adopt for purposes of discussion rather than definitive categories. Thoughtful scholars have articulated other useful ways of approaching the legitimacy question. Thomas Franck famously categorized three ways to approach legitimacy: through process, through substance and process, and finally through outcomes, most specifically fairness. FRANCK, *supra* note 8, at 16-18. Joseph Weiler distinguishes formal legitimacy (legitimacy from following legal requirements) from social legitimacy (legitimacy stemming from general societal acquiescence). J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403, 2468-69 (1991). Peter Gerhart structures an analysis which inquires as to whether an institution fosters foundational goals of democracy, constitutionalism and sovereignty. Peter M. Gerhart, *The Two Constitutional Visions of the World Trade Organization*, 24 U. PA. J. INT’L ECON L. 1, 9 (2003). *See also*, Junne, *supra* note 10, at 191 (identifying, justice, procedure, representation, effectiveness and charisma as sources of legitimacy). And Nathaniel Berman proposes a theory of legitimacy through defiance. Nathaniel Berman, *Legitimacy Through Defiance: From Goa to Iraq*, 23 WIS. INT’L L. J. 93 (2005). *See also* Nathaniel Berman, *Intervention in a “Divided World”: Axes of Legitimacy*, 17 EUR. J. INT’L L. 743 (2006) (focusing on interventions and arguing for a more fluid legitimacy analysis). These approaches are all helpful and one can readily see overlap with the categories I adopt.

<sup>48</sup> Esty, *supra* note 46, at 1517.

<sup>49</sup> Keohane & Nye, *supra* note 5, at 8 (quoting Harlan Cleveland as saying “how do you get everyone into the action, and still get action?”); Block-Lieb & Halliday, *Legitimation*, *supra* note 1, at 45-46.

has evolved over time.<sup>50</sup> Its members include states that send delegates representing different constituencies including worker and employer delegates.<sup>51</sup> Where IOs work in a representative or democratic fashion, their norms reflect the will of the entities on whose behalf they act; they represent and are accountable to their constituents.<sup>52</sup>

Whether an IO is truly accountable depends on its relationship with its constituents.<sup>53</sup> That relationship can be strained by a variety of factors. The constituents are often numerous with diverse and sometimes conflicting interests.<sup>54</sup> Even the interests of discrete groups will change over time.<sup>55</sup> It is not always clear that the groups representing various interests are themselves governed by democratic norms.<sup>56</sup> Both states and IOs may be undemocratic or

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<sup>50</sup> Helfer, *Understanding Change*, *supra* note 4, at 693. ILO membership includes 179 states and state delegations are themselves representative. INTERNATIONAL LABOUR ORGANIZATION [ILO] CONST. art. 3, para. 5 <http://www.ilo.org/public/english/about/iloconst.htm> (last visited Jan. 5, 2007); ILO, Structure of the ILO, <http://www.ilo.org/public/english/depts/fact.htm> (last visited Jan. 5, 2007). ILO CONST., arts. 1-3, 7.

<sup>51</sup> ILO CONST. arts. 1-3, 7.

<sup>52</sup> Esty, *supra* note 46, at 1507 (discussing accountability). Esty explains that “democratic legitimacy depends on decisionmakers being seen as acting on behalf of a community.” Esty, *supra* note 46, at 1504.

<sup>53</sup> *Id.* at 1505 (noting “The legitimacy of decisionmaking becomes more strained as the sense of community thins and the distance between those exercising authority and the public grows.”) *See also* Paul B. Stephen, *The New International Law – Legitimacy, Accountability, Authority and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1578 (1999).

<sup>54</sup> Junne, *supra* note 10, at 192 (discussing global society).

<sup>55</sup> *See, e.g.*, Elisabeth Bumiller, *Evangelicals Sway White House on Human Rights Issues Abroad*, N.Y. Times, Oct. 26, 2003, at 1.1. available at <http://www.commondreams.org/headlines03/1026-08.htm> (last visited August 15, 2007). (“The religious dynamic at the White House reflects a larger change within American evangelicals themselves, and their interest over the last decade in moving beyond the divisive domestic issues that consumed them a generation ago — abortion, school prayer, homosexuality, pornography — into an international arena. *See also*, Luther L. McDougal III, *Codification of Choice of Law: A Critique of the Recent European Trend*, 55 TUL. L. REV. 114, 133 (1980) (discussing changing state interests and choice of law analysis.)

<sup>56</sup> Keohane & Nye, *supra* note 5, at 14. On the State level many countries operate under dictatorial regimes and still participate in IOs. *See e.g.*, Pervez Musharraf,

unrepresentative.<sup>57</sup> And as IOs achieve greater integration, more questions concerning their law-making legitimacy arise.<sup>58</sup>

*Inclusion.* Scholars have documented the organizational structure of UNCITRAL as an inclusive body.<sup>59</sup> UNCITRAL employs working groups in specific issue areas.<sup>60</sup> UNCITRAL seeks representativeness by constituting these groups with a broad base including: official state delegations from a world wide geographic and economic cross section equaling 60 states, observer states (all states are invited) and other IOs.<sup>61</sup>

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Pakistan, United Nations, Organisation of the Islamic Conference, South Asian Association for Regional Cooperation, Economic Cooperation Organisation, and the WTO; King Abdullah, Saudi Arabia, United Nations, International Monetary Fund, World Bank, OPEC; Bashar al-Assad, Syria, Arab League, Organization of the Islamic Conference; Seyed Ali Khamane'i, Iran, Developing 8 Countries (D8), Group of Fifteen (G15); Omar al-Bashir, Sudan, African Union, Community of Sahel-Saharan States, Arab League; and Hu Jintao, China, Permanent member of UN Security Council, Asia-Pacific Economic Cooperation, Shanghai Cooperation Organization, and the WTO. On the organizational level see Michael T. Hayes *The New Group Universe* in Allan J. Cigler and Burdett Loomis eds. *INTEREST GROUP POLITICS* 142 (1986). "At a minimum, the policy views of group leaders often will diverge from those of their members. In distinct contrast to the rank and file, group leaders tend to be attracted by the prospect of distant and intangible rewards. This interest in expressive rewards may be rooted in self-interest as well as ideology." See also Paul A. Sabatier, *Interest Group membership and Organization: Multiple Theories*, in Mark P. Petracca, *THE POLITICS OF INTERESTS* 106 (1992) (citing Terry M. Moe, *THE ORGANIZATION OF INTERESTS*, (1980); Terry M. Moe, *Toward a Broader View of Interest Groups*, 43 *JOURNAL OF POLITICS* 531-543 (1981)).

<sup>57</sup> Even where an IO provides for one state one vote, powerful nations can exert themselves over weaker states. See Junne, *supra* note 10, at 192-193 (discussing the United Nations).

<sup>58</sup> Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 *AM. J. OF INT'L L.* 489, 530 (2001) (confirming the "correlation between the level of integration (normative-institutional and empirical social), on the one hand, and the intensity of the discourse on the democracy legitimacy deficit, on the other).

<sup>59</sup> Block-Lieb & Halliday, *Legitimation*, *supra* note 1, at 14, 72 (discussing inclusiveness).

<sup>60</sup> UNCITRAL *Guide: Basic Facts*, *supra* note 27, 29-47.

<sup>61</sup> *Id.* at 2-4.

Inclusion as the basis for a legitimacy claim is a close cousin to representation, but there are some differences between the two. Inclusion, like representation, provides accountability.<sup>62</sup> However, inclusion involves participation of non electoral bodies.<sup>63</sup> One might want to include the views of experts or of civil society, for example.<sup>64</sup> Thus, IOs garner legitimacy through tactics of inclusion targeting states, citizens, NGOs and other IOs.

Broad-based state membership does not necessarily equate with input legitimacy from either a representation or inclusion perspective. The WTO has near universal membership, and yet has been characterized under the “club model” where only a limited number of states enjoy meaningful representation with respect to agenda-setting.<sup>65</sup> As discussed more fully below, the club model, as explained by Keohane and Nye, describes institutions that exclude outsiders – outsiders being those deemed “not concerned” with the particular issue area, *e.g.* *only* trade ministers are included in the “trade” club.<sup>66</sup> But the club model has also come to refer to institutions run by a small, discrete, homogenous group, typically from wealthy governments that limit transparency and participation.<sup>67</sup>

*Process.* IO norms, rules and standards can claim legitimacy because they result from fair procedures, deliberations or discourse. Process imposes transparency, participation and dialogue upon institutions. Some process tools focus on the discourse among decision-makers or stakeholders as promoting fair and effective conduct.<sup>68</sup> Among the process tools that promote legitimacy are:

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<sup>62</sup> Keohane & Nye, *supra* note 5, at 12.

<sup>63</sup> *Id.* at 14 (discussing participation of NGOs, professional and transnational networks as well as markets).

<sup>64</sup> Keohane & Nye, *supra* note 5, at 13.

<sup>65</sup> See James Thon Gathii, *The High Stakes of WTO Reform*, 104 MICH. L. REV. 1361, 1362 (2006) (citing Keohane & Nye, *supra* note 5,). The club model refers to institutions where outsiders – those not involved with the issue area or the public generally – are not included in the work of the institution. Thus for example only trade ministers might do the work of the WTO. A club can have limited and restricted membership or be open to all. See generally Keohane & Nye, *supra* note 5, at 2 (explaining how “key regimes for governance operated like clubs”).

<sup>66</sup> Keohane & Nye, *supra* note 5, at 4.

<sup>67</sup> Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125, 131 (2005).

<sup>68</sup> Esty, *supra* note 46, at 1520-21..

rules for sound rulemaking,<sup>69</sup> transparency rules,<sup>70</sup> public participation mechanisms,<sup>71</sup> controls against corruption,<sup>72</sup> and power-sharing devices.<sup>73</sup>

IOs strengthen legitimacy claims by adopting good procedures. Some call for IOs to adopt better procedures generally.<sup>74</sup> Recent scholarship, in particular the Global Administrative Law Project, has examined the use of various “administrative law” mechanisms in global law-making.<sup>75</sup> Few IOs adopt all of the available processes, but many IOs adopt some. The International Civil Aviation Organization’s (ICAO’s) procedures for developing Standards and Recommended Practices involves a process that could be characterized as a type of notice and comment rulemaking.<sup>76</sup> Recently, the World Bank sought comments on its anticorruption initiative, *Strengthening Bank Group Engagement on Governance and Anticorruption*.<sup>77</sup> The International Atomic Energy Agency generally holds open meetings and allows other international organizations observer status.<sup>78</sup> Likewise, the International Hydrographic Organization which

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<sup>69</sup> *Id.* at 1527-30.

<sup>70</sup> *Id.* at 1530-34; Stephen, *The New International Law*, *supra* note 53, at 1580.

<sup>71</sup> Esty, *supra* note 46, at 1530-34; Stephen, *The New International Law*, *supra* note 53, at 1580.

<sup>72</sup> Esty, *supra* note 46, at 1524-26.

<sup>73</sup> *Id.* at 1534-37.

<sup>74</sup> Stewart, *supra* note 7, at 64 (discussing accountability of international organizations).

<sup>75</sup> See the Global Administrative Law Project, [www.iilj.org/global\\_adlaw](http://www.iilj.org/global_adlaw), and symposium at 37 NYU Journal of International Law and Politics (2005). See also Barr & Miller, *supra* note 9, at 16-18.

<sup>76</sup> See International Civil Aviation Organization [ICAO], Making an ICAO Standard, [http://www.icao.int/cgi/goto\\_m.pl?icao/en/anb/mais/index.html](http://www.icao.int/cgi/goto_m.pl?icao/en/anb/mais/index.html) (last visited Jan. 5, 2007). See also Nico Kirsch and Benedict Kingsbury, *Introduction, Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT’L L. 1, 4 (2006) (discussing administrative law trends and specifically notice and comments procedures adopted by the OECD and the World Bank).

<sup>77</sup> World Bank, *Invitation to Comment: Bank Group Work in Governance and Anticorruption*, <http://www.worldbank.org/html/extdr/comments/governancefeedback> (last visited Jan. 5, 2007).

<sup>78</sup> See International Atomic Energy Agency [IAEA], Rules of Procedure of the General Conference § 5,

develops standards for Navigational Products opens its proceedings to other IOs or National Agencies, and has procedures for submitting issues to the general body.<sup>79</sup>

Input legitimacy, whether it takes the form of representation, inclusion or process, has its deficiencies. Representation does not necessarily equate with democracy.<sup>80</sup> Although democracy is not an essential requirement of input legitimacy, commentators sometimes focus on democratic deficits among IOs.<sup>81</sup> Unfortunately, the democratic paradigm simply does not translate in the international setting.<sup>82</sup> Even where one requires only some form of representation or inclusion, as opposed to democratic representation, representative institutions

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<http://www.iaea.org/About/Policy/GC/gcrules.html#item5> (last visited Jan. 5, 2007).

<sup>79</sup> International Hydrographic Organization [IHO], General Regulations of the IHO, arts. 6, 9, [http://www.iho.shom.fr/GEN\\_INFO/GENERAL\\_REGS\\_E.pdf](http://www.iho.shom.fr/GEN_INFO/GENERAL_REGS_E.pdf) (last visited Jan. 5, 2007). Interpol requires any staff member to “abstain from any action which might be prejudicial to their international task.” INT’L CRIM. POLICE ORG. – INTERPOL CONST. art. 30, <http://www.interpol.int/Public/ICPO/LegalMaterials/constitution/constitutionGenReg/constitution.asp> (last visited Jan. 5, 2007). Most major IOs have some code of ethics. See e.g. Joan S. Powers, *Overview Of The Rules On Conduct And Ethics At The IMF*, available at <http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/powers.pdf> (last visited August 15, 2007); Press Release, Director-General Implements New Code Of Conduct For Financial Disclosure, WHO/55, July 21, 1998 available at <http://www.who.int/inf-pr-1998/en/pr98-55.html> (last visited August 15, 2007).

<sup>80</sup> Esty, *supra* note 46, at 1531-32 (noting “In the supranational governance context, the ability to participate in a meaningful way in policymaking is not evenly distributed across countries or even across interests within nations.”)

<sup>81</sup> Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law* 4 (Inst. for Int’l Law & Justice, Global Administrative Law Series, Working Paper No. 2004/1, 2004), available at <http://www.iilj.org/papers/2004/documents/2004.1KingsburyKrischStewart.pdf> (describing “global administrative law” project) (last visited August 15, 2007); Jonathan G.S. Koppell, *Global Governance Organizations, Legitimacy and Authority in Conflict*, JOURNAL OF PUBLIC ADMINISTRATION RESEARCH AND THEORY, 1 (January 16, 2008) (noting the criticism).

<sup>82</sup> Keohane & Nye, *supra* note 5, at 11-15. Buchanan & Keohane, *supra* note 14, at 416.

do not necessarily represent all interests or all interests equally.<sup>83</sup> Interests change and some constituents have more voice than others.<sup>84</sup> Purportedly democratic or representative IOs are subject to capture by special interests.<sup>85</sup> Institutions that claim only to be inclusive are subject to the criticism that inclusion is not representation.<sup>86</sup> Also, institutions that do seek legitimacy through representation or inclusion may find it difficult to get things done.<sup>87</sup> For example, law-generating forums that seek consensus on model instruments may find those instruments un-adopted.<sup>88</sup> Thus, representation or inclusion can undermine effectiveness.<sup>89</sup>

Process can undermine effectiveness as well. Some processes impose difficult political costs on states.<sup>90</sup> Transparency, for example, may generally be a healthy attribute for an IO, but it may also cause domestic repercussions for member states of that organization.<sup>91</sup> Moreover, while one can hope that procedurally fair institutions will, as a result of these attributes, generate useful and fair norms, none of these attributes assures a substantively fair or just law or any law at all.<sup>92</sup> Additionally, process can slow progress.<sup>93</sup> For example, notice

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<sup>83</sup> See *supra* note 54 and accompanying text.

<sup>84</sup> See *supra* notes 56 to 57 and accompanying text.

<sup>85</sup> Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, *supra* note 3, at 246 (comparing international law-making to national administrative law systems); Kirsch and Kingsbury, *supra* note 76, at 4 (discussing capture).

<sup>86</sup> Stewart, *supra* note 7, at 71 (discussing substantive criticisms of international regulatory process as “dominated by well-organized economic interests and powerful countries”).

<sup>87</sup> Keohane & Nye, *supra* note 5, at 8.

<sup>88</sup> See *infra* notes 185 to 187 and accompanying text.

<sup>89</sup> Keohane & Nye, *supra* note 5, at 17 (using the WTO as an example to illustrate that increased participation by groups threatened by losses relating to certain negotiations may “foster deadlock”).

<sup>90</sup> Kirsch & Kingsbury, *supra* note 76, at 8.

<sup>91</sup> *Id.* at 8.

<sup>92</sup> Zaring, *supra* note 31, at 580 (referring specifically to Basle Committee, “it is difficult to draw normatively rich conclusions about the substantive outcomes of procedurally legitimate decisions”).

<sup>93</sup> Stewart, *supra* note 7, at 81 (discussing the rationale of the parity minus approach, “excessive legalization and procedural formality will compromise confidentiality in international negotiations and otherwise impair the ability of the executive to conclude and promptly implement international agreements”).

and comment rulemaking ideally leads to dialogue that leads to better rules,<sup>94</sup> but it also takes time and has costs.<sup>95</sup> There are numerous examples of rulemaking in the United States that have spanned years and sometimes decades.<sup>96</sup> Process can be abused.<sup>97</sup> Special interests can delay and obfuscate by using process.<sup>98</sup> Analytical requirements and review of rulemaking can lead to ossification.<sup>99</sup>

## 2. Output Legitimacy

Alternatively, IOs can claim legitimacy to develop norms based upon their accomplishments. Results-based, or output, legitimacy focuses on good

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<sup>94</sup> *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (noting that notice and comment improves agency rulemaking by putting rules to the test of public commentary); *American Bus Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) (stating that notice and comment requirements "infuse[] the administrative process with [a] degree of openness, explanation, and participatory democracy."); *Batterton v. Marshall*, 648 F.2d 694, 704 (D.C. Cir. 1980) (stating that comments educate the agency before rules with substantial impact are enacted).

<sup>95</sup> Jim Rossi, *Participation Run Amok: The Costs Of Mass Participation For Deliberative Agency Decisionmaking*, 92 NW. U.L. REV. 173, 217-48 (1997) ("Excessive participation interferes with ordinary decisions in at least three respects: by interfering with agenda setting by politically accountable agency decisionmakers, by causing information problems for decisionmakers and participants, and by impairing collegiality among decisionmakers.")

<sup>96</sup> *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (chronicling the 15 year ordeal of seatbelt and passive restraint rulemaking).

<sup>97</sup> Lars Noah, *Sham Petitioning As a Threat To the Integrity Of the Regulatory Process*, 74 N.C.L. REV. 1, 3-48 (1995) ("real opportunities exist for sham petitioning in administrative proceedings . . ."); Thomas O. McGarity, *Some Thoughts On "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385-96 (1992) (discussing ossification).

<sup>98</sup> Michael E. Levine & Jennifer L. Florence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J. L. ECON. & ORG. 167, 169 (1990) (explaining capture theory as viewing politicians and bureaucrats as susceptible to incentives offered by individual interests or firms). In one example, the cigarette industry was able to insinuate its representatives into the WHO process for its Framework Convention on Tobacco leading to claims that the process had been abused. *See infra* note 228 and accompanying text.

<sup>99</sup> McGarity, *supra* note 97, at 1385-96.

outcomes.<sup>100</sup> Assessing what is a “good” outcome requires a normative position and might include determining whether a law, standard or rule is fair, just, well-ordered, universally accepted, or supportive of a particular goal, *e.g.*, trade liberalization. In short, output legitimacy questions whether the IO is effective at generating useful norms and having them implemented.<sup>101</sup> While compliance is neither a necessary nor sufficient basis for output criteria, assessing output criteria can be a bit circular because legitimacy aids compliance. Parties are more likely to comply with norms they perceive as legitimate. Thus, the perception of legitimacy leads to greater compliance (effectiveness) and in turn stronger legitimacy claims. But effectiveness should not be limited to measuring implementation. Effectiveness also involves developing useful norms in the first place.<sup>102</sup> Effectiveness in developing norms can result from IOs’ expertise or a limited constituency with convergent interests and/or limited focus and mandate.<sup>103</sup> Effective norm development may also be fostered by inclusion, process, deliberation and discourse or any of the attributes that constitute the input paradigms.<sup>104</sup> But the focus here is distinct – the focus is on the ends and not the means.

Assessing the ends necessarily requires a normative judgment about what is and is not desirable. An even distribution of trade benefits, for example, may

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<sup>100</sup> Esty, *supra* note 46, at 1517 (discussing the nature of results-based legitimacy as being focused on generating social welfare gains). One can also claim legitimacy as stemming from one’s work product as effective, neutral or expert (*e.g.* output legitimacy, neutral or communal legitimacy). See Alvarez, *International Organizations: Then and Now*, *supra* note 46, at 332 (discussing legitimacy and customary international law).

<sup>101</sup> Robert O. Keohane, *Decisiveness and Accountability as Part of a Principled Response to Nonstate Threats*, 20 ETHICS & INTERNATIONAL AFFAIRS 219, 229 (2006).

<sup>102</sup> Robert O. Keohane, *The Contingent Legitimacy of Multilateralism*, GARNET Working Paper No. 09/06 available at [http://www.garnet-eu.org/fileadmin/documents/working\\_papers/0906.pdf](http://www.garnet-eu.org/fileadmin/documents/working_papers/0906.pdf) last visited August 15, 2007 [Keohane, *Contingent Legitimacy*] 15 (discussing the need for epistemic legitimacy).

<sup>103</sup> See, *e.g.*, Jean-Marc Coicaud, *Conclusion: International Organizations, the Evolution of International Politics and Legitimacy*, in LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 521 (discussing limited mandate, focus and values) (2001).

<sup>104</sup> Keohane, *Contingent Legitimacy*, *supra* note 102, at 5 (noting that output legitimacy depends on input legitimacy).

not be an appropriate end, if the normative goal is to maximize the returns from trade overall without regard to how those returns are distributed.<sup>105</sup> If fairness is a goal, then trade liberalization may be sacrificed.<sup>106</sup> As discussed more fully below, almost any legitimacy claim based upon outcome can be challenged by challenging its normative premise.<sup>107</sup> Not surprisingly, given the importance of the normative prescription, it is easier to come to a normative conclusion if the group reaching that conclusion is a club organization, exclusive rather than representative, or inclusive.

As Keohane and Nye explain club organizations are “dominated by states . . . [and] . . . largely invisible to their various publics. They operate[] as clubs of negotiators, often technically trained, bargaining with one another within specific issue areas.”<sup>108</sup> Clubs support legitimacy claims for themselves and for their norms through their effectiveness. The WTO, the IMF, the World Bank, the OECD and the Basel Banking Committee have all been characterized as “clubs.”<sup>109</sup> These organizations have a normative agenda that is agreed to by the parties involved and they remain effective by exploiting their expertise, limiting access, limiting transparency and minimizing the diversity of interests represented.<sup>110</sup>

Although IOs that claim output legitimacy justify themselves by their accomplishments, their accomplishments may be well-served by means that also serve input legitimacy. An expert organization can seek broader representation in order to enhance its expertise.<sup>111</sup> “The OECD is, primarily, an exclusive club whose members produce two-thirds of the world’s goods and services . . . [and] provides a private setting for wealthy industrialized governments to share

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<sup>105</sup> See, e.g., Herman E. Daly, *From Adjustment to Sustainable Development – The Obstacle of Free Trade*, 15 LOY. L.A. INT’L & COMP. L. J. 33, 34-42 (1992).

<sup>106</sup> Sungjoon Cho, *Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma*, 5 CHI. J. INT’L L. 625, 645-47 (2005) (discussing that under the theory of comparative advantage, more developed countries have an easier task of complying with trade standards than do lesser developed countries and that there is a need to link free trade with social regulation).

<sup>107</sup> *Infra* note 117 and accompanying text.

<sup>108</sup> Keohane & Nye, *supra* note 5, at 2.

<sup>109</sup> *Id.* at 2.

<sup>110</sup> *Id.* at 4-5.

<sup>111</sup> Esty, *supra* note 46, at 1552 (discussing increased legitimacy of the WHO by incorporating outside experts and input from external sources regarding its Tobacco Treaty).

experiences, identify issues of common concern, and coordinate domestic and international policies.”<sup>112</sup> The OECD relies upon its expertise to achieve desired outcomes and as a general rule does not engage civil society.<sup>113</sup> But, as James Salzman explains, in the OECD’s Mutual Acceptance of Data (MAD) program “member countries and non-member countries agree[d] to accept non-clinical data from one another.”<sup>114</sup> Data tests were developed with the aid of a host of non-state experts, NGOs and other members of civil society.<sup>115</sup> Salzman explains that efforts to incorporate the knowledge of non club experts made the MAD program exceptionally successful and legitimate.<sup>116</sup>

Output legitimacy has its deficiencies. First, the normative goal that defines effectiveness is assumed.<sup>117</sup> A challenge to that normative agenda is a challenge to legitimacy. Second, it is not necessarily inclusive or representative (let alone democratic).<sup>118</sup> Evaluating the effectiveness of organizations comprised

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<sup>112</sup> James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 LAW & CONTEMP. PROB. 189, 191 (2005). See Article 6 of OECD requiring consensus. The OECD has not embraced participation or transparency. See Salzman, *supra* note 112, at 194 (Noting that the OECD “has expressly avoided . . . transparency, responsiveness and public accountability.” See also Barr & Miller, *supra* note 9, at 25 (describing the Basel process).

<sup>113</sup> See Salzman, *supra* note 112, at 218-19.

<sup>114</sup> *Id.* at 200.

<sup>115</sup> *Id.* at 202.

<sup>116</sup> *Id.* at 202-203. Nevertheless the OECD’s failure to reach out for more representative input met failure in another case. Commentators cite the lack of developing country participation as one factor in the failure of the Multilateral Agreement on Investment. Esty, *supra* note 46, at 1549; Salzman, *supra* note 112, at 197.

<sup>117</sup> Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. OF INT’L L. 596, 597 (1999). As Daniel Bodansky notes the expert model of legitimacy rests on some assumptions: “first, the decisions in question have better and worse answers; second, certain people possess special knowledge (expertise) about what those answers are; and third, we (the non-experts) can identify the people with this special knowledge.” *Id.*

<sup>118</sup> MICHAEL BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS*, Ithaca: Cornell University Press 172 (2005). IOs pursuing liberal ideals are at times “unabashedly undemocratic.” *Id.* “Harmonizing the substantively liberal goals of these organizations with

of members with convergent views seems to diminish the role of participation in the evaluative process.<sup>119</sup> Effective organizations may also believe that too much process impedes efficient functioning, and therefore, might sacrifice process as well.<sup>120</sup> Finally, the output legitimacy model can also lead to false legitimacy claims.<sup>121</sup> Perceived expertise can supply an undeserved veneer of output legitimacy. For example, the IMF relies upon output legitimacy and in some cases that model supports the organization's legitimacy claims even when the IMF is not actually effective. Barnett and Finnemore have explained how IMF failures at economic stabilization for borrower countries led to expansion of IMF activities and authority over those economies.<sup>122</sup> They explain, "the logic of Fund models suggests that program failures often result from omitting parts of the economy from the stabilization program, thereby justifying more expansive conditionality in the future."<sup>123</sup> They suggest, though, that such expansion raises normative questions.<sup>124</sup> More specifically, "as analytic frameworks draw them into spheres of economic and social life increasingly distant from their core macroeconomic competencies, the Fund's staff's authority as experts diminishes and the possibility for poor policy rises."<sup>125</sup>

### 3. Challenges to Secure Input and Output Legitimacy

IOs face a number of challenges when trying to make strong legitimacy claims. First, IOs confront an input/output paradox.<sup>126</sup> Securing one form of

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procedures that, if not democratic, at least provide some accountability and representation will be an ongoing task that is essential to the long term legitimacy of global governance." *Id.*

<sup>119</sup> Cf. Stewart, *supra* note 7, at 70 (noting criticisms of club organizations such as the WTO and IMF that claim these organizations impose "measures generated by secret processes without opportunity for participation and review by affected domestic interests.")

<sup>120</sup> However, as Robert Keohane explains however process actually is necessary for output legitimacy. *See generally*, Keohane, *Contingent Legitimacy*, *supra* note 102.

<sup>121</sup> *See infra* notes 300 to 307 and accompanying text.

<sup>122</sup> Barnett & Finnemore, *supra* note 118, at 71.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Barnett & Finnemore, *supra* note 118. Hurd, *Legitimacy*, *supra* note 11, at 35; Keohane & Nye, *supra* note 5, at 12 (discussing the paradox of democracy in the

legitimacy criteria sometimes comes at the cost of other criteria. As discussed above, one potential weakness of each approach is that it sacrifices the other.<sup>127</sup> Secondly, despite the tensions between output and input legitimacy, there are a variety of pressures on IOs that make it important for them to secure both input and output criteria. Globalization demands effective institutions that can address complex problems.<sup>128</sup> IOs compete with each other to solve these problems in part by claiming to be more legitimate.<sup>129</sup> In addition, the ascendancy of democratic norms pressures IOs to seek input legitimacy.<sup>130</sup> Finally, legitimacy is necessary for compliance,<sup>131</sup> and thus, to be effective IOs must be perceived as legitimate.

Although IOs may try to achieve both input and output legitimacy, it is not difficult to understand how one basis of legitimacy claims might come at the cost of the other.<sup>132</sup> Output legitimacy may suffer when IOs attempt to improve input legitimacy; consensus developing law becomes more difficult as the number of decision-makers increases.<sup>133</sup> Ultimately, one can be left with a decision that is so vague, aspirational or littered with exceptions that it is not worth much.<sup>134</sup> Likewise, process and procedures slow down law-making resulting in less

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international setting). Block-Lieb & Halliday, *Legitimation*, *supra* note 1, at 2 (noting the paradox).

<sup>127</sup> See *supra* notes 81 to 98 and 117 to 125 and accompanying text.

<sup>128</sup> Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT. ORG. 277, 277 (2004) (noting the demand for international regimes).

<sup>129</sup> IOs compete with each other by trying to obtain greater compliance; compliance is secured in part by securing greater legitimacy. FRANCK, *supra* note 8, at 24.

<sup>130</sup> Keohane, *The Contingent Legitimacy*, *supra* note 104 at 11; Raustiala & Victor, *supra* note 128, at 277-78 (discussing the alternative to a single regime governing a particular topic—a “regime complex”, comprised of several interconnected elemental regimes).

<sup>131</sup> HURD, *AFTER ANARCHY*, *supra* note 11, at 35 (noting legitimacy, coercion and self-interest as modes of securing compliance); see also FRANCK, *supra* note 8, at 24.

<sup>132</sup> Block-Lieb & Halliday, *Legitimation*, *supra* note 1, at 45-46.

<sup>133</sup> Kirsch & Kingsbury, *supra* note 76, at 4.

<sup>134</sup> Block-Lieb & Halliday, *Legitimation*, *supra* note 1, at 45-46 (noting the danger of “bland generalities”).

responsive, more costly laws.<sup>135</sup> Conversely, output legitimacy may come at the cost of input legitimacy. The hesitancy to reach out more broadly may stem from the idea that representation or process may undermine norm generating effectiveness.<sup>136</sup> It is more difficult to reach consensus where greater interests are represented.<sup>137</sup>

Nevertheless, globalization requires IOs to craft international solutions to complex problems.<sup>138</sup> Business people from all over the world need to engage in commerce even though they operate under different and sometimes conflicting domestic legal regimes that would govern their transactions.<sup>139</sup> The social, environmental, developmental, and human costs of globalization need to be addressed even though countries embrace vastly different values or approaches.<sup>140</sup> Whether it is establishing a harmonized securitization system or coordinating the use of pesticides in agricultural products, globalization challenges IOs to come up with solutions despite different backgrounds, approaches and values.<sup>141</sup>

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<sup>135</sup> *Id.* at 2 (discussing that the incorporation of divergent interests by IOs may "complicate and...thwart consensual lawmaking" and they risk "vague, unhelpful and highly abstract principles")

<sup>136</sup> *Id.* at 15-16 (discussing "tension between legitimation and effective rulemaking," resulting from increased representation).

<sup>137</sup> *Id.* at 45-46.

<sup>138</sup> KARNs & MINGST, *supra* note 19, at 226; Andrew Hurrell, *Power, Institutions and the Production of Inequality*, 34 in Michael Barnett and Raymond Duvall, *Power in Global Governance*. See, e.g., UNCITRAL *Guide: Basic Facts*, *supra* note 27, at para 1.

<sup>139</sup> Raustiala & Victor, *supra* note 128, at 295 (discussing elemental regimes in regime complexes).

<sup>140</sup> Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CALIF. L. REV. 401, 459-60 (2002) ("Different states at different levels of development and with different national value systems will have different socioeconomic priorities; see, e.g., Tracey DiLascio, *How Safe Is The Safe Harbor? U.S. And E.U. Data Privacy Law and the Enforcement Of The FTC's Safe Harbor Program*, 22 B.U. INT'L L.J. 399, 402-03 (2004) (discussing different approaches to data privacy).

<sup>141</sup> *Cf.* Raustiala & Victor, *supra* note 128, at 295 (noting that rules from one regime or forum may challenge rules from another).

IOs compete with other IOs to address these problems.<sup>142</sup> For example, both WIPO and the WTO regulate intellectual property.<sup>143</sup> The SPS and the Cartagena Protocol to the Convention on Biological Diversity both set standards relating to genetically modified organisms.<sup>144</sup> Several IOs have grappled with issues of international investments.<sup>145</sup> The World Bank and the OECD have

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<sup>142</sup> Coicaud, *supra* note 103, at 522. Cf. Jeffrey Wah-Teck Chan, *Allocation of Work Among Formulating Agencies, Model Law for Global Commerce*, at para 17, July 9, 2007 available at <http://www.uncitral.org/pdf/english/congress/Chan.pdf> (last visited August 15, 2007) (discussing contributing factors to coordination problems and explaining that institutions evolve and develop a life of their own; Alvarez, *International Organizations: Then and Now*, *supra* note 46, at 328 discussing the problems at the “joints [of] regime complexes.” See also Helfer, *Mediating*, *supra* note 39, at 134-35 (explaining how competition affects IO behavior). Kal Raustiala and David G. Victor refer to “elemental regimes”, individual regimes that overlap with other regimes in terms of “scope, subject and time” as forming what they refer to as “regime complexes”. They encourage analyzing these complexes systematically across various fields. Raustiala & Victor, *supra* note 128, at 279.

<sup>143</sup> See World Intellectual Property Organization, Convention Establishing the World Intellectual Property Organization, Signed at Stockholm on July 14, 1967 and as amended on September 28, 1979 (WIPO Publication No. 250(E), 1998 and Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 108 Stat. 4809, 1869 U.N.T.S. 299.

<sup>144</sup> Agreement on Sanitary and Phytosanitary Measures, Apr. 4, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments--Results of the Uruguay Round of Multilateral Trade Negotiations, 1867 U.N.T.S. 493, 33 I.L.M. 1128 (1994) [hereinafter SPS Agreement]; Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M. 1027 (2000), available at <http://www.biodiv.org/biosafety/protocol.asp> (last visited August 15, 2007). It is a supplementary agreement to the Convention on Biological Diversity (CBD) negotiated under the United Nations Environment Programme (UNEP), opened for signature at the Earth Summit in Rio de Janeiro in June 1992, and entered into force in December 1993. United Nations Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

<sup>145</sup> See, e.g., Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Results Of The Uruguay Round Of Multilateral Trade Negotiations: The Legal Texts, GATT Sales No. 1994-4 (1994). The OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts,

addressed corruption.<sup>146</sup> UNCITRAL and the World Bank have tackled international insolvency.<sup>147</sup> The ILO has competed with UNESCO.<sup>148</sup> Where one IO fails to take up the law-making mantle, there are other organizations ready to use their cloak of authority to expand their mandates.<sup>149</sup> Through their existing

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DAFFE/IME(2000)20 (Nov. 9, 2000), United Nations Conference on Trade and Development (UNCTAD), *Bilateral Investment Treaties in the Mid-1990s*, annex I at 159-217, U.N. DOC. UNCTAD/ITE/IIT/7, U.N. Sales No. E98.II.D.8 (1998).

<sup>146</sup> See Parthaprati Chanda, *The Effectiveness of the World Bank's Anti-Corruption Efforts: Current Legal and Structural Obstacles and Uncertainties*, 32 *Denv. J. Int'l L. & Pol'y* 315 (2004); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 *I.L.M.* 1 (1999); Sope Williams, *The Debarment Of Corrupt Contractors From World Bank-Financed Contracts*, 36 *PUB. CONT. L. J.* 277, 280-83 (2007) (explaining the Bank's policies) *Strengthening the Bank Group Engagement on Governance and Anticorruption* at <http://www.worldbank.org/html/extdr/comments/governancefeedback/gacpaper.pdf>

Global Coalition for Africa, Past Activities, 25 Principles to Combat Corruption, at <http://www.gca-cma.org/epastact.htm>. The Inter-American Convention Against Corruption, Mar. 29, 1996, 35 *I.L.M.* 724. and United Nations general Assembly Declaration against Corruption and Bribery in International Commercial Transactions G.A. Res. 51/191, U.N. GAOR, 51st Sess., reprinted in 36 *I.L.M.* 1043 (1997).

<sup>147</sup> See UNCITRAL 2004 Legislative Guide on Insolvency Law, available at [http://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf) (last visited August 15, 2007) and The World Bank, Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, 2001 available at <http://www.worldbank.org/ifa/Insolvency%20Principles%20and%20Guidelines%20April%202001.pdf> (last visited August 15, 2007).

<sup>148</sup> For example, Article Nine of UNESCO's Declaration on Race and Racial Prejudice addresses racial discrimination in employment. UNESCO Declaration on Race and Racial Prejudice, E/CN.4/Sub.2/1982/2/Add.1, annex V, 1982, avl at [http://www.unesco.org/education/pdf/RACE\\_E.PDF](http://www.unesco.org/education/pdf/RACE_E.PDF). Likewise, ILO's Declaration on Fundamental Principles and Rights at Work aspires toward "the elimination of discrimination in respect of employment and occupation." ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, (1998) avl at [http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static\\_jump?var\\_language=EN&var\\_pagename=DECLARATIONTEXT](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT).

<sup>149</sup> Barnett and Finnemore, *supra* note 118, at 6, 18 and 162.

authority and reputations IOs can generate new ideas, act as coalition builders, and branch into new subject areas.<sup>150</sup> Sometimes these regimes have reached beyond what their framers intended.<sup>151</sup> Naturally, as IOs' approaches conflict one may begin again to question which IO may legitimately act and which norms should prevail in the case of a conflict.<sup>152</sup> As a result, IOs try to offer some comparative advantage over other alternatives.<sup>153</sup> That advantage may come in the form of a stronger legitimacy claim either based upon input criteria, output criteria, or ideally both.

Effective IOs, ones that generate useful norms and secure compliance with those norms, will be seen as more legitimate than those that do not.<sup>154</sup> But effectiveness also is linked to input criteria. The rise of democratic norms worldwide suggests that democratic values influence societal perceptions concerning the duty to obey norms.<sup>155</sup> Robert Keohane makes the point that the ascendancy of democracy in the 21<sup>st</sup> century requires that multilateral institutions respond to civil society and the larger interests they represent in order to be effective.<sup>156</sup> They can no longer rely under a statist construction of legitimacy in order to secure their normative goals.<sup>157</sup> Thus, despite the input/output paradox, IOs must secure both input and output legitimacy.

One can predict that as globalization continues, democracy ascends and IO competition persists, IOs will increase their efforts to secure both input and output

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<sup>150</sup> *Id.* at 162.

<sup>151</sup> See Alvarez, *International Organizations: Then and Now*, *supra* note 46, at 328 (discussing IOs extending beyond their original mandates).

<sup>152</sup> Barnett and Finnemore, *supra* note 118, at 163 (discussing the effects of expansion). See also Raustiala & Victor, *supra* note 128, at 295 (discussing how rules from different forums may conflict with each other).

<sup>153</sup> Jean-Marc Coicaud, *International Organizations, The Evolution of International Politics and Legitimacy* in Jean-Marc Coicaud and Veijo Heiskanen *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 522.

<sup>154</sup> Keohane & Nye, *supra* note 5, at 15 (discussing the importance of effectiveness).

<sup>155</sup> Keohane, *The Contingent Legitimacy*, *supra* note 104 at 11 (discussing the revival of "ideologies of democratic governance.")

<sup>156</sup> *Id.* at 3-6. See also Buchanan & Keohane, *supra* note 14, at 407.

<sup>157</sup> Keohane, *The Contingent Legitimacy*, *supra* note 104, at 3-6. Keohane specifically suggests that an organization should meet the standards of "inclusiveness, decisiveness and epistemic reliability." *Id.* at 15.

legitimacy in their efforts to meet globalization's challenges.<sup>158</sup> One way that they do so is through alliances where they share resources and develop norms with other IOs. These alliances are made possible by linkage and accommodation, mechanisms that have both positive and negative consequences.

## II. Derivative Legitimacy: Legitimacy through Linkage and Accommodation

IOs use linkage and accommodation to form alliances from which they derive legitimacy. Linkage and accommodation allow IOs to partner, coordinate, endorse, and share expertise in order to answer the challenges of globalization and improve their legitimacy claims. The legitimacy gained from these alliances is derivative, each IO imbues the alliance, and to some extent the other IO, with its input and/or output criteria. And the very act of allying can strengthen claims of input legitimacy through inclusion. The act of allying may also lead to better norm generation and compliance. These benefits are neither certain nor costless. Whether the alliance should be credited with derivative legitimacy depends upon relationships between the IOs and how they function within the alliance.

### A. Linkage and Accommodation

Linkage and accommodation describe instances where regimes or forums incorporate, either explicitly or implicitly, the rules, decisions or norms of another regime or forum. Linkage involves the influence of one IO's norms, decisions or rules on another IO in an affirmative way.<sup>159</sup> Others have already set forth the different linkage types and rationales in great detail.<sup>160</sup> For example, an IO might affirmatively consider the expertise of another IO and reference that expertise in making a decision.<sup>161</sup> Accommodation is similar to linkage in that it occurs when one regime implicitly acknowledges the norms, rules or decisions of another;<sup>162</sup> it

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<sup>158</sup> See *id.* at 15, (discussing the institutional prerequisites to legitimacy); see also Block-Lieb & Halliday, *Legitimation*, *supra* note 1, at 6 (discussing the "crippling dissensus in global bodies").

<sup>159</sup> David Leebron, *Linkages*, 96 AM. J. INT'L L. 5, 10-11 (2002).

<sup>160</sup> *Id.* at 16-24.

<sup>161</sup> See, e.g., The WTO SPS's agreement cross-references the Codex. See discussion *infra* note 258 to 263 and accompanying text.

<sup>162</sup> See, e.g., Claire R. Kelly, *Power, Linkage and Accommodation: The WTO as an International Actor and its Influence on Other Actors and Regimes*, 24 BERKELEY J. INT'L L. 79, 91-92 (2006) (discussing attempts to avoid conflict among regimes).

allows regimes to avoid conflicts.<sup>163</sup> It may take the form of a clear demarcation of boundaries, so that one IO does not contradict another, or it may involve an effort to avoid future conflicts through the use of savings clauses.<sup>164</sup> Thus, where the drafters of the Cartagena Protocol crafted a precautionary principle akin to that of the WTO's SPS Agreement, those drafters accommodated the WTO.<sup>165</sup> The Protocol does not invoke the SPS Agreement, but it parrots the language used there, implicitly accommodating the values in that agreement.<sup>166</sup>

Linkage and accommodation can operate in tandem, allying regimes or forums and providing new strategic opportunities for regimes and the constituencies that they affect. Others have already detailed some examples of connections in the intellectual property field including those between the WTO and the World Intellectual Property Organization (WIPO).<sup>167</sup> Professor José Alvarez has documented linkage involving the World Bank setting norms by cross-referencing other arrangements and regimes.<sup>168</sup> Professor Alvarez details the “technocratic regulation” of the World Bank Guidelines:

The Guidelines even incorporate by reference some of the UN's products, such as the UN Convention on Biological Diversity, the 1972 Convention Concerning the Protection of the World Cultural

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<sup>163</sup> See, e.g., *id.* at 120 (discussing the Cartagena Protocol's accommodation of the SPS Agreement).

<sup>164</sup> Raustiala & Victor, *supra* note 128, at 297, 301. Raustiala and Victor discuss efforts to avoid conflicts within regime conflicts and give boundary setting and savings clauses as examples. As they explain a savings clause is a legal provision inserted into the [a treaty] that purports to immunize [another treaty's] provisions from inconsistency.” *Id.* at 300-01

<sup>165</sup> Kelly, *Power, Linkage and Accommodation*, *supra* note 162 at 120.

<sup>166</sup> Kelly, *Realist Theory*, *supra* note 25, at 114-116.

<sup>167</sup> See, e.g., Leebron, *supra* note 159, at 19-20 (discussing regime borrowing between the WTO and WIPO); see also Helfer, *Mediating*, *supra* note 39, at 132-33 (discussing, *inter alia*, applications for observer status at the WTO and WIPO, the formal 1995 agreement between WIPO and the WTO to share information; “provide technical and legal assistance to developing countries that are members only of the other organization”; “delegate[] to WIPO certain administrative functions”); Marney L. Cheek, *The Limits of Informal Regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Regime*, 33 GEO. WASH. INT'L L. REV. 277 (2001).

<sup>168</sup> Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS *supra* note 3, at 237.

and Natural Heritage, the FAO Guidelines for Packaging and Storage of Pesticides, and programmatic instruments generated from UN policy conferences such as Agenda 21 of the 1995 Global Program of Action for the Protection of the Marine Environment from Land-based Activities. By requiring that the Bank, and, to the extent the terms are incorporated in its loans, its borrowers, comply with such instruments, the Bank strengthens compliance with both soft and hard law produced by it and other IOs. The World Bank Guidelines, no less than some treaties, are a mechanism to “harden” a dense network of otherwise “soft law” norms or treaties whose terms are vague or that have drawn few parties.<sup>169</sup>

Cross-references as a means of linkage are ubiquitous.<sup>170</sup> But they are only one type of relationship among IOs. The depth and scope of the various types of relationships depend in part on the reason for each particular alliance and the particular linkage or accommodation employed to support that alliance.

The reasons for alliances can be complex. IOs may ally because of normative, strategic, or sanctioning reasons.<sup>171</sup> Linkage or accommodation may occur as a reaction to IO power, for strategic reasons, or as a reaction to IO linkage.<sup>172</sup> Neither linkage, nor accommodation, is bad or good. They are tools. Arguably linkage is explicit while accommodation is implicit, and thus accommodation may more easily obfuscate debate,<sup>173</sup> but it is not necessary that it does so. Finally, the quest for legitimacy may also explain linkage and accommodation as these tools allow IOs to borrow or derive legitimacy from other IOs.

### **B. Derivative Legitimacy: Legitimacy Through Linkage and Accommodation**

Alliances among organizations occur as a result of linkage and accommodation, creating derivative legitimacy for the alliance and its resulting norms. These alliances may improve the resulting law, making it more

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<sup>169</sup> *Id.* at 237 (citations omitted).

<sup>170</sup> *Id.*

<sup>171</sup> Leebron, *supra* note 159, at 11-16 (discussing a taxonomy of linkage claims).

<sup>172</sup> Kelly, *Power, Linkage and Accommodation*, *supra* note 162, at 91-92 (explaining linkage and accommodation).

<sup>173</sup> HURD, *AFTER ANARCHY*, *supra* note 11, at 7.

representative, inclusive, procedurally fair or effective. Alternatively, these alliances may simply lead to the perception of more representation, inclusion, process or effectiveness. As legitimacy is a subjective belief, one needs an objective framework to assess the legitimacy claim underlying such perception. In order to choose a framework, I create a typology of alliances so that we can examine each type and parse out any particular problems it might raise for a legitimacy analysis. The types are: partnering, coordination, endorsements, and information sharing.

### **1. Partnering**

Sometimes organizations form partnerships. The IOs form a partnership alliance in order to work together on a law-making project. Partnering can be a deep or shallow commitment. Partnerships can involve both linkage and accommodation. The alliance will link the IOs together in their approach and the alliance will accommodate each IOs values where possible.<sup>174</sup> Partnership implies that the partners have worked through a problem together, using process and dialogue as part of a joint effort. Partnership also suggests that the partners have considered each other's views, although the partners may (or may not) exclude the views of others. Partnerships may or may not be effective.

Norms developed in partnerships derive legitimacy in several ways. A partnership alliance may lead to more effective norm generation, or it may be more inclusive. The partnership may claim the legitimacy of its constituent IOs so that others will perceive its norms as more legitimate. Two examples of partnerships are described below.

#### UNCITRAL and the World Bank

UNCITRAL is a governmental norm-generating forum. It develops law in various forms (conventions, model laws, legislative guides) that states choose whether to adopt.<sup>175</sup> States are involved in the drafting of UNCITRAL products

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<sup>174</sup> For another example of a partnership not listed here see the description of the relationship between the WTO and WIPO in Helfer, *Mediating*, *supra* note 39, at 132.

<sup>175</sup> UNCITRAL *Guide: Basic Facts*, *supra* note 27, at 1, 2, and 13.

but they do not commit *ex ante* to adopt the products.<sup>176</sup> The perceived legitimacy of these products affects whether they are adopted by states.<sup>177</sup>

UNCITRAL's legitimacy claims stem from both input and output legitimacy criteria. Established by the General Assembly to harmonize and unify the law of international trade, UNCITRAL members are representative of the world regions and economic groups.<sup>178</sup> In its legislative activities it relies upon a framework of inclusiveness.<sup>179</sup> It operates through several working groups, composed of experts in the relevant substantive field and delegates from the member states. Other organizations partner with UNCITRAL committing to the substantive project.<sup>180</sup>

UNCITRAL itself and commentators have touted its effectiveness and alliances with other organizations.<sup>181</sup> As a norm-generating forum UNCITRAL's effectiveness and the effectiveness of the partnerships that it forms can be assessed based upon whether states actually adopt its norms, standards or rules. For example a number of UNCITRAL's products have enjoyed considerable success. The United Nations Convention on the Carriage of Goods by Sea, 1978

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<sup>176</sup> *Id.* at 1, 4-5.

<sup>177</sup> Professor Medhat Hassanein and Dr. Asif Chida, Legal Mechanisms to empower Informal Businesses, Model Law for Global Commerce, at p. 7, July 10, 2007 available at [http://www.uncitral.org/pdf/english/congress/Medhat\\_Hassanein.pdf](http://www.uncitral.org/pdf/english/congress/Medhat_Hassanein.pdf)) last visited August 14, 2007.

<sup>178</sup> UNCITRAL *Guide: Basic Facts*, *supra* note 27, at 1, 4-5.

<sup>179</sup> Angelo Estrella Faria, *The Relationship Between Formulating Agencies in International Legal Harmonization: Competition, Cooperation, or Peaceful Coexistence? A Few Remarks on the Experience of UNCITRAL*, 51 LOY. L. REV. 253, 276 (2005). Faria notes that "UNCITRAL tries to limit the risk of duplication by involving . . . all multilateral financial institutions in its own projects." Further UNCITRAL has been successful in parlaying this inclusive approach into more uniform projects. As a representative institution UNCITRAL sometimes struggles to reach consensus and thus be effective. For example, Terrence Halliday and Susan Block-Lieb chronicle UNCITRAL's choice of a Guide, rather than a Model Law or Convention reflecting its concern with reaching a consensus. Block-Lieb & Halliday, *Legitimation*, *supra* note 1, at 4-5.

<sup>180</sup> UNCITRAL *Guide: Basic Facts*, *supra* note 27, at 4 para.

<sup>181</sup> *Id.* at 10 (discussing its coordinating role); Block-Lieb & Halliday, *Legitimation*, *supra* note 1, at 14-15 (discussing UNCITRAL's technical and representative expertise.)

(Hamburg) has 32 signatories,<sup>182</sup> and the United Nations Convention on Contracts for the International Sale of Goods (1980) has 70 signatories.<sup>183</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) with 142 signatories is a tremendous success.<sup>184</sup>

Other projects, while highly regarded, have been less successful. Products which have failed to enter in force or gain widespread acceptance include: the United Nations Convention on International Bills of Exchange and International Promissory Notes (1988) which has five States parties (it requires ten States parties for entry into force);<sup>185</sup> and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991) which has four signatories and requires five for entry into force.<sup>186</sup> UNCITRAL's model laws have also enjoyed mixed results.<sup>187</sup>

Although each UNCITRAL project is unique, in its *Legislative Guide on Insolvency* (the *Guide*), UNCITRAL worked with many states, and a number of international actors, as partners. The *Guide* for example accommodates prior World Bank work by drawing on the Bank's *Principles and Guidelines for Effective Insolvency and Creditor Rights System* (*Principles*) to set key objectives,<sup>188</sup> which orient the *Guide*.<sup>189</sup> In turn, the World Bank has derived legitimacy from UNCITRAL by accommodating the *Guide* and linking its *Principles* to UNCITRAL.<sup>190</sup> When promoting the *Principles*, the World Bank

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<sup>182</sup> Status of Conventions and Model Law, United Nations Commission on International Trade Law, Fortieth Session, A/CN.9/626 (25 May 2007)[Status of Conventions and Model Law].

<sup>183</sup> *Id.*

<sup>184</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 2539; Noah Rubins, *The Enforcement and Annulment of International Arbitration Awards in Indonesia*, 20 AM. U. INT'L L. REV. 359, 360 (2005).

<sup>185</sup> Status of Conventions and Model Law, *supra* note 182.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Block-Lieb & Halliday, *Legitimation*, *supra* note 1, at 49 (discussing the prior work of other organizations).

<sup>189</sup> *Id.* at 49 (discussing the key objectives in Part One of the Guide).

<sup>190</sup> World Bank, *Principles for Effective Insolvency and Creditor Rights Systems (Revised) 2005*, available at <http://www.worldbank.org> (last visited August 15, 2007) (follow the "Topics" hyperlink, then "Law and Development", then "Insolvency and Creditor Rights", then "Revised Principles and Guidelines for

has partnered with UNCITRAL and the organizations participating in the UNCITRAL *Guide* to ensure consistency between *Principles* and the *Guide*.<sup>191</sup>

The United Nations Forum on Forests and the Collaborative Partnership on Forests

The Collaborative Partnership on Forests (CPF) is a unique network of IOs – 14 – established upon the recommendation of the Economic and Social Council of the United Nations (ECOSOC).<sup>192</sup> The partnership is part of the Food and Agriculture Organization (FAO) in the United Nations and provides expertise to the United Nations Forum on Forests (UNFF).<sup>193</sup> It also works to support and implement rather detailed and specific proposals for action established by The Intergovernmental Panel on Forests (IPF) and the Intergovernmental Forum on Forests (IFF).<sup>194</sup>

The success of the CPF hinges upon the success of the UNFF. Although the IPF and IFF were somewhat successful, both these initiatives occurred prior to the establishment of the CPF. Indeed, the CPF formed in response to IPF and IFF proposals, specifically to develop a legal framework on forests. Its efforts have

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Effective Insolvency and Creditor Rights Systems” and scroll to the bottom of the page).

<sup>191</sup> *Id.*

<sup>192</sup> Collaborative Partnership on Forests, About CPF, [www.fao.org/forestry/site/5166/en](http://www.fao.org/forestry/site/5166/en) (last visited Jan. 5, 2007). Partnership is built into the UN system as specialized agencies within the UN System are directed by the UN Charter to coordinate activities. See UN Charter at Art. 57 and 58.

<sup>193</sup> The Collaborative Partnership on Forests’ (CPF) Framework to Support the Work of The UNFF, 4 (2002) available at <http://www.fao.org/forestry/webview/media?mediaId=4779&langId=1>

<sup>194</sup> *Id.* For a critical discussion of these proposals see Briefing on the United Nations Forum on Forests (UNFF) and Collaborative Partnership on Forests (CPF) available at [www.forestpeoples.org/documents/ifi\\_igo/unff\\_brief\\_cpf\\_dec04\\_eng.shtml](http://www.forestpeoples.org/documents/ifi_igo/unff_brief_cpf_dec04_eng.shtml) (last visited July 31, 2007). See also, United Nations Forum on Forests, About UNFF: IPF/IFF Process (1995-2000), [http://www.un.org/esa/forests/ipf\\_iff.html](http://www.un.org/esa/forests/ipf_iff.html). Interestingly, one organization that is not a member is the Forest Stewardship Council, an international NGO that sets nominally voluntary standards. For a description of the power that these standards are garnering see Errol Meidinger, *The Administrative Law of Global Private-Public Regulation*, 17 EUR. J. INT’L L. 47 (2006).

been less than successful. Despite the size and seeming inclusiveness of this partnership, it faces criticism that it is really much ado about nothing. Some claim that despite high hopes for the CPF “it has done little to advance implementation of international commitments on forests at the local and national levels.”<sup>195</sup> There has been an ongoing debate concerning the adoption of a convention on forests that has been delayed until at least 2016.<sup>196</sup> Critics complain of a lack of transparency and process at the UNFF that prevents meaningful participation by all interested parties.<sup>197</sup> Others complain that there is no real dialogue or debate occurring at the sessions, just delegates repeating what they have been instructed to say by their respective governments.<sup>198</sup> Some question whether the UNFF can have any possible impact on forests.<sup>199</sup>

One NGO, Forests and the European Union Resource Network (FERN)<sup>200</sup> reported on the failings of the UNFF, noting that the process could not even be evaluated due to insufficient data resulting from UNFF’s failures over the years.<sup>201</sup> The report points out that “although an evaluation questionnaire was

<sup>195</sup> See Forest Peoples Programme at [http://www.forestpeoples.org/documents/ifi\\_igo/unff\\_brief\\_cpf\\_dec04\\_eng.shtml](http://www.forestpeoples.org/documents/ifi_igo/unff_brief_cpf_dec04_eng.shtml)

<sup>196</sup> Did Anyone Notice? At [http://www.fern.org/media/documents/document\\_3525\\_3526.pdf](http://www.fern.org/media/documents/document_3525_3526.pdf)

<sup>197</sup> FERN Special Report: *Live or Let Die? An Evaluation of the Fifth Session of the United Nations Forum on Forests*, 1 (2005) available at [http://www.fern.org/media/documents/document\\_1582\\_1583.pdf](http://www.fern.org/media/documents/document_1582_1583.pdf) last visited at August 15, 2007 (FERN Special Report). The FERN report criticizes the participatory process at UNFF. FERN places particular blame for the failure at UNFF5 on countries from the South, naming Cuba and Venezuela, as the countries that have blocked meaningful integration of the topics discussed at MSD into the main sessions of UNFF. *Id.* The major groups (other than states) were only not allowed to speak in text negotiations, but only in plenary sessions, and then only after all Member States had spoken. *Id.* In other words, besides not having a direct say in the negotiations of texts, Major Groups would speak after most delegates had already left the room. The FERN report concludes that the UNFF is instead being used by some countries as a shield against revealing the lack of progress made on promoting SFM. *Id.*

<sup>198</sup> World Rainforest Movement – United Nations Forum on Forests: Was Anyone Listening? (2004) <http://www.wrm.org.uy/bulletin/82/UNFF.html>

<sup>199</sup> Did Anyone Notice? At [http://www.fern.org/media/documents/document\\_3525\\_3526.pdf](http://www.fern.org/media/documents/document_3525_3526.pdf)

<sup>200</sup> <http://www.fern.org> (last visited November 2, 2007)

<sup>201</sup> FERN Special Report, *supra* note 197 at 1.

sent out, because governments had not provide[sic] the necessary data, only the EU and 14 other countries (including two EU countries) sent their response back to the UNFF secretariat, thereby ruling out any meaningful evaluation.”<sup>202</sup> FERN believes that UNFF has grossly failed in its objectives of monitoring and reporting. According to the report, only 8 of the 191 countries (or about 4% of the membership) had reported to the secretariat about progress made on forest management.<sup>203</sup> There was also a noticeably large lack of responses from heavily forested countries in the South. Of the eight that responded, six were European.<sup>204</sup>

Recently, the UNFF has made some progress by adopting a *Non-legally Binding Instrument on All Types of Forests*.<sup>205</sup> The instrument sets forth principles to which states commit themselves to promote sustainable forest management.<sup>206</sup> Nevertheless, critics complain that the instrument is weak,<sup>207</sup> ignores the views and values of indigenous peoples and lacks a means of implementation and funding.<sup>208</sup>

## 2. Coordination

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 2.

<sup>204</sup> *Id.* at 1.

<sup>205</sup> Seventh Session of UN Forum on Forests 16-27 April 2007, Report of the Seventh Session (E/CN.18/2007/8, E/CN.18/2007/8 (SUPP), E/2007/42, E/2007/42 (SUPP)) available at <http://daccessdds.un.org/doc/UNDOC/GEN/N07/349/31/PDF/N0734931.pdf?OpenElement>

<sup>206</sup> *Id.*

<sup>207</sup> *UNFF Adopts...the Status Quo*, By Andrei Laletin, Friends of the Siberian Forests, Russia and Simone Lovera, Global Forest Coalition, in 22 Forest Cover 8-9 (2007) available at <http://www.wrm.org.uy/GFC/cover/ForestCover22.pdf> (last visited August 1, 2007).

<sup>208</sup> *UNFF Fails Indigenous Peoples Again*, Briefing, available at [http://www.forestpeoples.org/documents/ifi\\_igo/unff7\\_briefing\\_may07\\_eng.pdf](http://www.forestpeoples.org/documents/ifi_igo/unff7_briefing_may07_eng.pdf) last visited August 1, 2007 (*UNFF Fails Indigenous Peoples Again*). To be fair, the World Bank has developed strategies to address funding SFM. See, e.g., *Sustaining Forests, A World Bank Strategy* (2002) available at [http://lnweb18.worldbank.org/ESSD/ardext.nsf/14ByDocName/ForestStrategyBooklet/\\$FILE/Forest+Strategy+Booklet.pdf](http://lnweb18.worldbank.org/ESSD/ardext.nsf/14ByDocName/ForestStrategyBooklet/$FILE/Forest+Strategy+Booklet.pdf) last visited August 1, 2007.

Coordination involves a consideration of what the other IO has done, or can do, to generate or promote its norms. Thus, IOs with vastly different agendas might coordinate by making accommodations for each other. The alliance would recognize that each IO has an agenda or set of values and try to coordinate activities so that one does not interfere with the other. In this way the alliance derives input legitimacy from each IO and will likely avoid conflicts and be more effective. Alternatively, where the IOs have similar values or agendas, the alliance might coordinate to take advantage of efficiencies, synergies and leverage that comes from working together. In such cases, the alliance becomes more effective and makes each of the IOs more effective, garnering derivative legitimacy for itself and strengthening the legitimacy claims of the constituent IOs.

#### The WHO and the WTO

The World Health Organization (WHO) is the UN organization addressing issues relating to global public health. It sets standards and norms, conducts research and provides technical assistance to states. There are 193 member countries that have accepted the WHO constitution.<sup>209</sup> The Health Assembly is comprised of all member nations and its executive Board is constitutionally required to be geographically representative.<sup>210</sup> WHO staff are experts who assist member nations in their negotiations of conventions. The WHO is empowered to “act as the directing and co-ordinating authority on international health work.”<sup>211</sup> It performs a wide variety of informational, research, supportive and standard-setting activity.<sup>212</sup> Among its standard-setting powers the WHO has the power to issue binding regulations although it does not often exercise that power.<sup>213</sup> Daniel Esty explains that this hesitancy reflects staff concerns about “the legitimacy of an aggressive global governance role for the WHO.”<sup>214</sup>

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<sup>209</sup> World Health Organization [WHO], Const. of WHO, (July 22, 1946) (entered into force Apr. 7, 1948), available at [http://www.who.int/governance/eb/who\\_constitution\\_en.pdf](http://www.who.int/governance/eb/who_constitution_en.pdf) (WHO Constitution)

<sup>210</sup> WHO Constitution, *supra* note 209, Art. 24.

<sup>211</sup> *Id.*, Art. 2 (a).

<sup>212</sup> *The role of WHO in public health*, <http://www.who.int/about/role/en/index.html> (last visited Oct. 20, 2007)

<sup>213</sup> WHO Constitution, *supra* note 209, Art. 21. Esty, *supra* note 46, at 1550-51 (noting that the WHO typically uses non binding resolutions)

<sup>214</sup> Esty, *supra* note 46, at 1551

One recent WHO coordination effort revealed an attempt by the WHO to improve its legitimacy claims. The WHO “recognized the need to expand the legitimacy of [its] governance activities” when it sought to regulate tobacco.<sup>215</sup> As Daniel Esty explains the WHO’s efforts to conclude the Framework Convention on Tobacco Control (FCTC)<sup>216</sup> demonstrated an instance where the WHO relied in part upon process legitimacy and in particular “good governance and the deployment of the tools of administrative law.”<sup>217</sup> The organization did this by engaging the public and other institutions to partner in its work.<sup>218</sup> Its efforts included reaching out to the WTO and the World Bank.<sup>219</sup> While it may go too far to categorize the WHO’s engagement as accommodation, it does open the door to allow for accommodation of the norms, values and rules from these other IOs. In fact, a 2002 joint report took note of the various trade rules and specific trade cases where restrictions upon tobacco could or did cause a conflict with WTO rules.<sup>220</sup> The report endorsed efforts to reduce smoking worldwide so long as those efforts did not conflict with the trading rules.<sup>221</sup>

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<sup>215</sup> *Id.* at 1552.

<sup>216</sup> *See* WHO Framework Convention on Tobacco Control, June 16, 2003, available at <http://www.who.int/tobacco/framework/en/>.

<sup>217</sup> Esty, *supra* note 46, at 1552.

<sup>218</sup> *Id.* at 1552. Esty explains “as they moved to legislate limits on tobacco globally, the WHO staff developed draft provisions, posted these on the WHO website, held public hearings, convened open dialogues with NGOs and private sector representatives, accepted policy papers and other inputs from external sources, and encourage debate by posting these materials on the internet.” *Id.* at 1552.

<sup>219</sup> Esty notes that this type of dialogue was atypical for the WHO, which seems to rely more upon expertise and less upon process and the use of administrative law tools to promote its legitimacy. Esty, *supra* note 46, at 1552-53 (explaining the WHO’s focus on a culture of expertise at the expense of the “global health policymaking process”).

<sup>220</sup> WTO Agreements & Public Health: A Joint Study by the WHO and WTO Secretariat (2002) [Joint Study] available at [http://www.who.int/media/homepage/en/who\\_wto\\_e.pdf](http://www.who.int/media/homepage/en/who_wto_e.pdf) (last visited August 14, 2007).

<sup>221</sup> Joint Study, *supra* note 220, at 72. “Reducing tariffs and eliminating non-tariff barriers to trade- does not prevent governments applying non-discriminatory internal taxes and certain other measures which they may consider appropriate to safeguard public health.” *Id.*

Subsequently, the report noted that the WHO's then current draft of the FCTC proposed that restrictions upon tobacco "shall not constitute a means of arbitrary or unjustifiable discrimination on international trade."<sup>222</sup> The articulated standard accommodated WTO norms which call for measures not to impose "arbitrary or unjustifiable discrimination" on trade.<sup>223</sup> This language, however, did not make it into the Convention.<sup>224</sup> The report identified WTO agreements that could be implicated by measures to reduce tobacco usage including the Technical Barriers to Trade Agreement, the Agreement on Agriculture and the Agreement on Trade Related Aspects of Intellectual Property.<sup>225</sup> Nevertheless as Joost Pauwelyn explains, attempts to situate the WTO Agreements as inherently superior to the FCTC were eventually thwarted when language acknowledging the obligations under prior treaties was deleted in favor of relying on the general rules of treaty interpretation found in the Vienna Convention on the Law of Treaties.<sup>226</sup>

Indeed, the WHO faced criticism for procedures that allowed special interests, including the cigarette companies, to influence the FCTC.<sup>227</sup> An expert report on the influence of tobacco companies revealed that the industry used other UN organizations, as well as state delegates, to influence the WHO process more generally.<sup>228</sup>

### The World Bank and the WTO

The World Bank is not a law-generating institution, but as a proponent of certain rules and practices it plays a critical role in promoting international legal and non-legal norms. In 1996, the Bank and the WTO entered into an agreement

<sup>222</sup> Joint Study, *supra* note 220, at 138.

<sup>223</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, Art. XX.

<sup>224</sup> See WHO Framework Convention on Tobacco Control, June 16, 2003, available at <http://www.who.int/tobacco/framework/en/>; Joost Pauwelyn, *WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for "Conflict Diamonds"*, 24 MICH. J. INT'L L. 1177, 1201-02 (2003).

<sup>225</sup> Joint Study, *supra* note 220, at 75-76.

<sup>226</sup> Pauwelyn, *WTO Compassion*, *supra* note 224, at 1201-02.

<sup>227</sup> Esty, *supra* note 46, at 1552-53.

<sup>228</sup> Tobacco Company Strategies to Undermine the Tobacco Control Activities at the World Trade Organization available at <http://repositories.cdlib.org/context/tc/article/1107/type/pdf/viewcontent/>

to “consult and exchange views on all matters of common interest,”<sup>229</sup> allow each organization to observe each other’s meetings,<sup>230</sup> and allow access to the other’s research and databases.<sup>231</sup> The World Bank has a series of programs that accommodate and support WTO norms. A number of these programs involve partnerships with the WTO relating to agriculture including: *Trade Liberalization, Rural Poverty, and the Environment; Agriculture and the New Trade Agenda in the WTO Negotiations; Standards and Trade Development Facility; Integrated Framework for Trade Related Technical Assistance*.<sup>232</sup> These projects accommodate trade liberalization norms and increase the World Bank’s relevance to developing countries seeking to operate more effectively within the WTO framework.

One manifestation of the coordination between the WTO and the Bank is the *Integrated Framework for Trade-Related Technical Assistance to Least-developed Countries* (IF).<sup>233</sup> IF brings together a number of agencies (UNCTAD, the WTO, the World Bank, the IMF, the UNDP) that help developing countries with economic growth. It was introduced by the WTO Singapore Ministerial Conference in 1996. The IF involves a diagnostic process, where a team of experts evaluates a country’s economic competitiveness.<sup>234</sup> An action plan is then

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<sup>229</sup> *Agreements Between The WTO And The IMF And The World Bank*, Decision adopted by the General Council at its meeting on 7, 8 and 13 November 1996 (WT/L/194) available at [http://www.wto.org/english/thewto\\_e/coher\\_e/wtl194\\_e.doc](http://www.wto.org/english/thewto_e/coher_e/wtl194_e.doc) (“Cooperation agreement”) cl. (2)

<sup>230</sup> Cooperation Agreement, *supra* note 229, cl. (4(a)).

<sup>231</sup> *Id.*, cl. (2). According to the WTO’s press release, the WTO would value access to the “Bank’s Economic and Social Database (BESD),” and the “World Debt Tables.”

<sup>232</sup> See World Bank Agriculture and Rural Development Partnerships, at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTARD/0,,contentMDK:20451169~pagePK:148956~piPK:216618~theSitePK:336682,00.html>. The Integrated Framework involved partnerships with four other IOs: the IMF the International Trade Centre, UNCTAD and UNDP. See Integrated Framework for Trade-Related Technical Assistance to least-developed countries (IF) at <http://www.integratedframework.org/>.

<sup>233</sup> Integrated Framework for Trade Related Assistance to Least Developed Countries available at <http://www.integratedframework.org/> (last visited August 14, 2007).

<sup>234</sup> Integrated Framework: Diagnostic Phase, available at <http://www.integratedframework.org/diagphase.htm> (last visited August 14, 2007) [Integrated Framework: Diagnostic Phase].

developed that “spells out a set of policy recommendations and priority technical assistance needs.”<sup>235</sup> Thus for example, the action plan for Ethiopia focused primarily on moving forward with WTO succession.<sup>236</sup> The action matrix for Tanzania suggests broadening the tax base so as to reduce import tariffs.<sup>237</sup>

### The ILO and the Bretton Woods Institutions

The ILO has pursued an ongoing campaign to work with the Bretton Woods Institutions in order to integrate its “decent work agenda” into the activities of these institutions.<sup>238</sup> It sought and achieved entrance as an observer institution in the governance structure of the Bretton Woods Institutions and has sought a “progressive movement towards greater policy integration.”<sup>239</sup> The ILO has also sought to infuse its policies concerning core labor standards on a state level by its coordination with these institutions.<sup>240</sup> One can see the potential for the ILO to harden soft law if, for example, the World Bank or IMF incorporates ILO standards into their work with specific countries.

The ILO claims this incorporation is actually happening and that there is a “policy convergence” between the ILO and the Bretton Woods institutions.<sup>241</sup> In particular, the ILO has noted that through its participation and dialogue with the IMF and the World Bank these institutions have incorporated, to some extent,

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<sup>235</sup> Integrated Framework: Countries, available at <http://www.integratedframework.org/ifcountries.htm> (last visited August 14, 2007).

<sup>236</sup> See Action Matrix for Ethiopia, available at <http://www.integratedframework.org/countries/ethiopia.htm> (last visited August 14, 2007).

<sup>237</sup> *Id.*

<sup>238</sup> Committee on Employment and Social Policy, First Item on the Agenda available at <http://www.ilo.org/public/english/standards/reim/gb/docs/gb279/pdf/esp-1.pdf> (last visited August 14, 2007).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *ILO Relations With Bretton Woods Institutions*, GB.279/ESP/1 (2000) available at <http://www.ilo.org/public/english/standards/reim/gb/docs/gb279/pdf/esp-1.pdf> (last visited August 14, 2007)

ILO comments in their final work products.<sup>242</sup> These comments further ILO legal norms articulated in its conventions and declarations such as The Declaration of Fundamental Principles and Rights at Work (1998),<sup>243</sup> and reflect an ongoing dialogue. As a result of this dialogue these Bretton Woods Institutions have linked themselves to the ILO principles and norms.

The ILO has been less successful in linking itself to the WTO, or even getting it to accommodate ILO legal norms. The WTO resisted ILO linkage both in the Singapore Declaration<sup>244</sup> and the Doha Declaration.<sup>245</sup> This attempted linkage illustrates an attempt to regime shift – move the implementation of labor norms to a new forum – one that might better promote compliance.<sup>246</sup> One can

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<sup>242</sup> *Id.* at para. 5 (noting “The IMF’s twice-yearly *World Economic Outlook* (WEO) is a significant component of the IMFC’s agenda, and since 1995 the ILO has had the opportunity to provide its views to the IMF secretariat on the draft reports. From the outset, the impact of ILO inputs was generally perceived to have been less than anticipated. Nevertheless, some welcome changes were noted in the draft of the April WEO, including acknowledgement of the need to promote domestic ownership of the reform agenda through the closer involvement of unions, employers’ organizations and other representatives of civil society in its design.”) The Report continues “Also welcome was the more cautious stance taken on capital account liberalization, with poor and some middle-income countries being advised to delay this until they are better able to cope with the greater risk involved. The statements at the IMFC provide an opportunity to reinforce the ILO’s main messages, and it is interesting to note that the ILO’s comments on the April 2000 draft WEO had a more substantive impact on the final document than in the past.” *Id.*

<sup>243</sup> International Labor Organization Declaration on Fundamental Principles and Rights at Work, 1998, available at [http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ABOUTDECLARATIONHOME?var\\_language=EN](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ABOUTDECLARATIONHOME?var_language=EN) (last visited August 14, 2007)

<sup>244</sup> See Singapore Ministerial Declaration, December 18, 1996 available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/wtodec\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm) (last visited July 24, 2007)

<sup>245</sup> Doha WTO Ministerial 2001: Ministerial Declaration, WT/MIN(01)/DEC/1, November 20, 2001 available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm) (last visited July 24, 2007).

<sup>246</sup> Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1, 6-7 (2004) [Helfer, *Regime Shifting*].

see why the ILO might want to link with other institutions. If the ILO can coordinate with other institutions then it may be able to promote compliance with its norms through those institutions.<sup>247</sup>

### 3. Endorsements

Endorsements involve IOs touting each other's work product as worthwhile. Where the endorsed product is soft law, not binding, it can be hardened into binding law through an endorsement by particular IOs. The endorsed IO (and its norms) derive legitimacy from the endorsement, but so does the endorsing IO. The endorsing IO proclaims its legitimacy to endorse. The resulting alliance has derivative legitimacy cumulated from each of the IOs.

#### UNCITRAL and Private Norm Generating Forums

UNCITRAL has linked itself to private norm-generating forums by endorsing their products. It has "endorsed" the work of the Institute of International Banking Law and Practice, which promulgated the International Standby Practices (ISP98) as well as the ICC's Uniform Customs and Practices for Documentary Credits (UCP 500).<sup>248</sup> UNCITRAL, by endorsing both, bestows

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<sup>247</sup> Int'l Labour Office [ILO], *ILO relations with the Bretton Woods Institutions*, at 3, GB.279/ESP/1 (Nov. 2000).

<sup>248</sup> Yearbook of the United Nations Commission on International Trade, 2000, vol. XXXI, p. 56. UNCITRAL *Guide: Basic Facts*, *supra* note 27, at 7, para. 27. The ICC has also adopted the ISP98 and endorsed the UNCITRAL Convention on Independent Guarantees and Stand-by Letters of Credit. See Policy Statement, *ICC Endorsement of the UNCITRAL Convention on Independent Guarantees and Stand-by Letters of Credit* available at <http://www.iccwbo.org/id420/index.html> (last visited July 26, 2007). Interestingly the ISP98 and UCP 500 overlap themselves. Although the ISP applies to Standby Letters of Credit, the UCP has been used for both Letters of Credit and Standby Letters of Credit. The ICC adopted the ISP 98 in 1998. David J. Barru, *How To Guarantee Contractor Performance On International Construction Projects: Comparing Surety Bonds With Bank Guarantees And Standby Letters Of Credit*, 37 *GEO. WASH. INT'L L. REV.* 51, 68 (2005), *International Standby Practices: ISP98*, ICC Publication No. 590 (1998). It is thought that UCP 600 will encourage the use of ISP 98 for standby letters of credit. Commercial Lending Update, November (2006) available at <http://www.aldrichandbonnefin.com/documents/CommercialLending11-06.pdf> (last visited August 15, 2007).

legitimacy upon both, but at the same time, enhances its own legitimacy as the arbiter of sound commercial practices for international trade. The ICC itself has gotten into the endorsement game by adopting ISP98,<sup>249</sup> and endorsing the UNCITRAL Convention on Independent Guarantees and Stand-by Letters of Credit.<sup>250</sup>

The FAO's Code of Conduct on the Distribution and Use of Pesticides and the World Bank

The World Bank has seemingly codified the advisory rules of the Food and Agriculture Organization Code of Conduct on the Distribution and Use of Pesticides by incorporating them into loan agreements with states.<sup>251</sup> Its Agricultural Investment Sourcebook targets rural poverty by promoting sound agricultural policies in investment.<sup>252</sup> In this project the Bank endorses the FAO's Code of Conduct as part of a plan to pursue investments in agriculture.<sup>253</sup> Here, the Bank affirmatively links its efforts to conform national policy to these rules transforming these soft law rules into hard law obligations.

Professor Alvarez explains the codification of the soft law of the FAO (as well as other institutions) into hard law through The World Bank Guidelines

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<sup>249</sup> See International Standby Practices: ISP98, ICC Publication No. 590 (1998).

<sup>250</sup> See Policy Statement: ICC endorsement of the UNCITRAL Convention on independent guarantees and stand-by letters of credit Commission on Banking Technique and Practice, 21 June 1999, available at <http://www.iccwbo.org/id420/index.html> (last visited July 25, 2007).

<sup>251</sup> Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, *supra* note 3, at 220 (discussing multi-organizational law making). Professor Alvarez also gives the example of UNCLOS, the Convention on the Law of the Sea which "incorporates by reference 'generally accepted' international 'rules, standards, regulations, procedures and/or practices' . . . effectively transform[ing] a number of [International Maritime Organization] IMO's codes, guidelines, regulations, and recommendations . . . into binding norms, even for states that may not have approved of these standards within the context of the IMO but have been parties to the Law of the Sea Convention." *Id.* at 220

<sup>252</sup> See Sourcebook; Agricultural Investment, available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTARD/EXTAGIS/OU/0,,contentMDK:20974694~pagePK:64168445~piPK:64168309~theSitePK:2502781,00.html> (last visited August 14, 2007) (Sourcebook).

<sup>253</sup> *Id.*, Module 4 pages 49 and 50.

which Bank staff use when assessing various projects and drafting loan agreements.<sup>254</sup> “The World Bank Guidelines, no less than some treaties, are a mechanism to ‘harden’ a dense network of otherwise ‘soft law’ norms or treaties whose terms are vague or that have drawn few parties.”<sup>255</sup> As Professor Alvarez explains, the Bank’s legitimacy claim with respect to these guidelines rests more upon process values than representative values, as the Guidelines are not adopted through a political process, but are often administratively adopted with comment from various interested parties.<sup>256</sup> But when these Guidelines are adopted within a particular loan agreement they become binding, at the very least as a matter of contract law.<sup>257</sup>

### The WTO and Various Standard-Setting Organizations

Similar to the World Bank’s cross-referencing of the FAO, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) cross-references and validates several standards set by IOs. WTO Members who enact SPS measures that are based on the Codex Alimentarius Commission, the International Office of Epizootics, and the International Plant Protection Convention fall into a safe harbor within the SPS.<sup>258</sup> WTO law thus links itself to these standards and accommodates the values that they reflect.<sup>259</sup>

The WTO endorsements have transformed soft law into hard law. The WTO invocation of the Codex Alimentarius, for example, has taken a voluntary code concerning food safety and made it the safe harbor provision under the SPS agreement.<sup>260</sup> By doing so the WTO has all but assured that countries will

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<sup>254</sup> Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, *supra* note 3, at 236-37.

<sup>255</sup> *Id.* at 237.

<sup>256</sup> *Id.* at 236.

<sup>257</sup> *Id.*

<sup>258</sup> The Agreement On The Application Of Sanitary And Phytosanitary Measures of the WTO, Article 3.4

<sup>259</sup> The Codex Alimentarius Commission is a subsidiary Organization of the WHO and the FAO. Codex Alimentarius Homepage available at [http://www.codexalimentarius.net/web/index\\_en.jsp#](http://www.codexalimentarius.net/web/index_en.jsp#) (last visited August 14, 2007).

<sup>260</sup> Michael A. Livermore, Note, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 N.Y.U. L. REV. 766, 776 (2006) (discussing Members incentives to adopt the Codex).

conform to that standard. This has put new pressures on the Codex.<sup>261</sup> One commentator has questioned whether the input criteria that supported the Codex as a voluntary code can support the Codex's new stature:

Inequities between the various participants are perhaps the most important failing. In order for there to be true deliberation, equality between participants is essential. There are a number of important disparities between the parties in the Codex process. First, developing countries are less able to participate in Codex deliberations due to a lack of resources. In addition, states have more power than non-state actors, limiting the ability of interests that are not effectively represented by states to be heard. Finally, within the non-state groups present at the Codex, there is a bias towards industry groups, with many fewer active consumer group participants.<sup>262</sup>

Differences in participation rates between developed and developing countries also lead to inequities in input.<sup>263</sup> Nevertheless, the Codex has been hardened into a standard that will apply to all WTO member countries alike.

#### 4. Resource Sharing

Resource sharing includes sharing data and personnel. It may or may not lead to global law-making. But still, the very act of working together signals, rightly or wrongly, that each IO (and its norms) has legitimacy. In a way it is an implicit co-endorsement that allows the IOs (and the norms they generate) to claim greater legitimacy.

##### The OECD and the WHO

The OECD both develops norms<sup>264</sup> and promotes the legal norms developed by other organizations.<sup>265</sup> Not surprisingly, the OECD works with

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<sup>261</sup> *Id.*, at 781 (discussing the pressure for legitimacy of the Codex given its new position in the international legal framework).

<sup>262</sup> *Id.* at 783.

<sup>263</sup> *Id.* at 783 (citing Bruce Traill et al., Report of the Evaluation of the Codex Alimentarius and Other FAO and WHO Food Standards Work (2002)).

<sup>264</sup> See *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* available at [www.oecd.org/daf/nocorruption/convention](http://www.oecd.org/daf/nocorruption/convention) (last visited January 10, 2008).

development banks such as the Asian Development Bank, the World Bank and the Inter-American Development Bank, but in 2005 it prioritized its relationship with the WHO.<sup>266</sup> The WHO/OECD alliance involves sharing data on health statistics, mortality rates and diseases in OECD member countries, systemic terminology in health care and biotechnology, food safety and chemicals management.<sup>267</sup> OECD information and links are provided on the WHO Health Evidence Network web page “which gives rapid access to reliable health information and evidence.”<sup>268</sup>

### The WHO and the WTO

In 2002 the WHO and the WTO published their study, *The WTO Agreements & Public Health*.<sup>269</sup> The report does more than share information. It details a list of linkages between the activities, concerns and norms of both regimes and identifies areas where the IOs can share input and perhaps coordinate.<sup>270</sup> One can see with this example that resource sharing can be part of a more in-depth alliance such as coordination or partnership.<sup>271</sup>

### **III. Derivative Legitimacy and its Benefits and Costs**

Achieving greater legitimacy through alliances, whether through partnerships, coordination, endorsements or simple information and resource sharing, is desirable, but still problematic. Although alliances may create more legitimate laws, they may also lead to false legitimacy claims. And they may marginalize those voices that do not participate in the alliances and can lead to entrenchment. These alliances also offer new regime and forum shifting strategies and the creation of these opportunities should be considered when evaluating these norms. Finally, these alliances may provide new opportunities for abuse or manipulation. In this part, I detail these consequences. In Part IV, I

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<sup>265</sup> See For a Better World Economy, About the OECD available at [http://www.oecd.org/pages/0,3417,en\\_36734052\\_36734103\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html) last visited January 10, 2008).

<sup>266</sup> Framework for Co-operation Between the OECD and WHO, available at <http://www.oecd.org/dataoecd/47/58/36545479.pdf> (last visited August 14, 2007).

<sup>267</sup> *Id.*

<sup>268</sup> See WHO, Health Evidence Network, available at <http://www.euro.who.int/HEN> (last visited August 14, 2007).

<sup>269</sup> Joint Study, *supra* note 220.

<sup>270</sup> *Id.* at 57-137.

<sup>271</sup> See *supra* notes 209 to 214 and accompanying text.

suggest that good procedures will promote more legitimate norms and mitigate negative consequences.

### A. Legitimate Institutions and Norms

Properly managed, linkage and accommodation can enhance legitimacy of IOs, alliances, and global law-making.<sup>272</sup> Alliances among IOs can enable resulting norms to claim both output and input legitimacy criteria, even though either organization might lack one or the other. Alliances formed through linkage and accommodation might also enable output and input legitimacy claims that might otherwise not be possible because one or both of the IOs has reached beyond its original mandate. The very act of allying strengthens claims based on inclusion and makes it more likely that the IOs will be effective.

Linkage and accommodation may enable an alliance to claim legitimacy criteria lacking in one of the members of the alliance. For example, an IO partnership between a club model IO and a representative one would be able to claim input legitimacy. Representation by proxy provides at least some input legitimacy.<sup>273</sup> And the very act of partnership promotes inclusion. Likewise, if output legitimacy requires effective functioning based upon some normative yardstick, then it can be helpful to broker consensus or ally with an already functioning effective institution.<sup>274</sup> The World Bank/UNCITRAL partnership on insolvency serves as an example.<sup>275</sup> UNCITRAL can make strong representation and inclusion claims.<sup>276</sup> And although it develops some remarkably successful instruments – others are less than successful.<sup>277</sup> The World Bank, however, although operating as a club, has a great deal of success in effectively implementing norms.<sup>278</sup> Thus, the World Bank/UNCITRAL partnership on insolvency can claim input legitimacy and output legitimacy.

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<sup>272</sup> See Cho, *supra* note 106, at 674.

<sup>273</sup> Keohane, *The Contingent Legitimacy*, *supra* note 104, at 13 (discussing criteria for comparative legitimacy and stating that "multilateralism per se...confers legitimacy" because it is more inclusive).

<sup>274</sup> Leebron, *supra* note 159, at 11-16 (discussing strategic linkage).

<sup>275</sup> See *supra* notes 175 to 191 and accompanying text.

<sup>276</sup> See *supra* notes 178 to 179 and accompanying text.

<sup>277</sup> See *supra* notes 185 to 187 and accompanying text.

<sup>278</sup> Jeremy J. Sanders, *The World Bank and the IMF: Fostering Growth in the Global Market*, 9 CURRENTS INT'L TRADE L.J. 37 (2000); Kim Reisman, *The World Bank and the IMF: at the Forefront Of World Transformation*, 60 Fordham

Linkage and accommodation strengthen legitimacy claims strained by IO evolution. Joost Pauwelyn notes that the WTO, for example, now lacks both input and output legitimacy because its effectiveness in trade liberalization has waned, and although nominally representative, it operates more as a club.<sup>279</sup> Linkage and accommodation can help it be more effective. It could also help its inclusiveness. Thus, even though the WTO has stalled in efforts to generate greater trade liberalization, it has had some success in its alliance with the World Bank to embed its liberal trade values within developing countries.<sup>280</sup> The WTO endorsement of soft law standards, such as the Codex, has furthered WTO harmonization efforts.<sup>281</sup> Whether such success is desirable, it nevertheless gives the WTO a stronger claim to output legitimacy. Coordination efforts could provide the WTO with an opportunity to strengthen input legitimacy, in particular, through inclusiveness and process. So for example, although the WTO has allowed a number of organizations to be observers,<sup>282</sup> and it has coordinated with others,<sup>283</sup> it has resisted partnerships that might result in stronger process or inclusion claims such as a more in-depth alliance with the ILO.<sup>284</sup>

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L. Rev. 349 (1992) (“The World Bank and the International Monetary Fund . . . are major forces in promoting market-oriented policy reforms and reducing poverty in those countries making the transition to market economies.”).

<sup>279</sup> Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 6, 35-36 (2005).

<sup>280</sup> See *infra* notes 229 to 240 and accompanying text.

<sup>281</sup> Kelly, *Power, Linkage and Accommodation*, *supra* note 162, at 121-23 (discussing potential the Codex as a safe harbor within the SPS).

<sup>282</sup> International intergovernmental organizations granted observer status to WTO bodies available at [http://www.wto.org/english/thewto\\_e/igo\\_obs\\_e.htm](http://www.wto.org/english/thewto_e/igo_obs_e.htm) (last visited July 31, 2007).

<sup>283</sup> The WTO web site proclaims “The WTO maintains extensive institutional relations with several other international organizations; there are some 140 international organisations that have observer status in WTO bodies. The WTO also participates as observer in the work of several international organizations. In all, the WTO Secretariat maintains working relations with almost 200 international organisations in activities ranging from statistics, research, standard-setting, and technical assistance and training. Although the extent of such cooperation varies, coordination and coherence between the work of the WTO and that of other international organizations continues to evolve so as to assist Members in the operation of their economic policies.” *The WTO and Other Organizations* available at

Law-making alliances may also enhance legitimacy by the very process of allying, creating more innovation and more responsive approaches to difficult problems. Bringing together different constituencies to work together in a new setting may generate new thoughts, new perspectives and more effective functioning. UNCITRAL's *Legislative Guide on Insolvency* drew a panoply of experts from different arenas to work on a difficult problem.<sup>285</sup> It may also reveal the benefits of participation, access, transparency and generally the payoffs from typical administrative law tools. Such benefits may spur more inclusion. As a result, participation may beget still more participation.<sup>286</sup>

The process of allying can also result in more holistic and efficient efforts. Norm-generating alliances reduce duplication and avoid unnecessary inconsistencies.<sup>287</sup> For example, in the area of international trade law there are a number of agencies working on related (or even the same) issues.<sup>288</sup> Informal collaboration is sometimes imperfect.<sup>289</sup> Alliances can improve cooperation and increase efficiencies.<sup>290</sup> The Integrated Framework (IF) serves as an example of a multilayered approach to a complicated problem that provides a number of efficiencies.<sup>291</sup>

Despite the efficiencies that alliances create, linkage and accommodation have their costs. In some instances alliances undermine legitimacy. Alliances can be used to solidify positions and to deflect calls for greater transparency. For example, as discussed above the coordination efforts between the WTO and the World Bank have resulted in an IF involving not only these organizations but also

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[http://www.wto.org/english/thewto\\_e/coher\\_e/coher\\_e.htm](http://www.wto.org/english/thewto_e/coher_e/coher_e.htm) last visited July 31, 2007.

<sup>284</sup> The WTO and the International Labour Organization, available at [http://www.wto.org/english/thewto\\_e/coher\\_e/wto\\_ilo\\_e.htm](http://www.wto.org/english/thewto_e/coher_e/wto_ilo_e.htm) last visited August 1, 2007.

<sup>285</sup> See *supra* notes 188 to 191 and accompanying text.

<sup>286</sup> Barr & Miller, *supra* note 9, at 17.

<sup>287</sup> Raustiala & Victor, *supra* note 128, at 300-01 (discussing the push for consistencies among elemental regimes).

<sup>288</sup> Wah-Teck Chan, *supra* note 142, at para 15.

<sup>289</sup> *Id.* at para 15.

<sup>290</sup> *Id.* at para 16.

<sup>291</sup> See *supra* notes 233 to 237 and accompanying text.

UNCTAD, the IMF, and the UNDP.<sup>292</sup> The goal of the IF is to help developing countries with economic growth. A team of experts evaluates a country's economic competitiveness and develops an action plan.<sup>293</sup> The IF is a sensible, holistic approach to development and it would seem that the norms provided by the IF through its recommendations and action plans would be entitled to a significant amount of legitimacy. But not all voices are represented in the IF. The IF lacks a systemic labor or environmental partner.<sup>294</sup> Although the ILO participates in individual projects it is not a partner to the IF in the same way as the IMF or the WTO.<sup>295</sup> The ILO has been vigilant in trying to be part of the policy discussions that underlie the IF.<sup>296</sup> Omitting labor concerns or norms from an action plan for development marginalizes those norms and can also undermine effectiveness.<sup>297</sup>

Ultimately, IOs' alliances addressing difficult problems may lead to more effective norms. By forming alliances IOs collect more input, more information, and more expertise to solve difficult problems.<sup>298</sup> They also garner a greater number of constituents invested in the final product such that compliance becomes more likely, and thus, the IO may be more effective.<sup>299</sup> Ultimately, the

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<sup>292</sup> See Susan Prowse, *Mega-Coherence: The Integrated Framework at 85 in TRADE AND AID: PARTNERS OR RIVALS IN DEVELOPMENT POLICY?* (2006)

<sup>293</sup> Integrated Framework: Implementation, available at <http://www.integratedframework.org/diagphase.htm> (last visited August 14, 2007).

<sup>294</sup> See Prowse, *supra* note 292 at 83 and 85.

<sup>295</sup> Integrated Framework: Implementation, available at <http://www.integratedframework.org/diagphase.htm> (last visited August 14, 2007).

<sup>296</sup> *The Impact of the ILO's Engagement with the Poverty Reduction Strategy Papers (PRSPs) Process* available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb294/pdf/esp-5.pdf> (last visited August 20, 2007).

<sup>297</sup> The failure to include a broader array of voices actually harmed the initial efforts of the IF. Susan Prowse reports that the IF failed at the country level, at least initially because there was no country ownership beyond the trade ministries. See Prowse, *supra* note 292 at 83 and 85.

<sup>298</sup> Block-Lieb & Halliday, *Legitimation*, *supra* note 1, at 13-14 (discussing expert authority and, in particular, UNCITRAL's incorporation of experts and other organizations in formulating the Legislative Guide).

<sup>299</sup> Helfer, *Mediating*, *supra* note 39, at 136 (noting that review by many organizations "may ultimately lead to better outcomes by generating a range of

legitimacy of these alliances will depend upon whether they are seen as effective and perceived as inclusive and process-oriented.<sup>300</sup>

### B. False Legitimacy Claims

While on the whole international norm-generating alliances are positive developments, one of their great dangers is that they cloak themselves, or their constituent IOs, with underserved derivative legitimacy. Not every alliance that makes a claim to greater legitimacy will be entitled to it. The alliance may be one of name only, lacking substance. In other words, States or civil society might perceive the alliance or the constituents as having a greater claim to input or output legitimacy than can be objectively justified.

False legitimacy claims may arise because the alliance uses the act of allying to mask its deficiencies. The Collaborative Partnership of Forests (CPF) is a good example that seems to claim more legitimacy than it should. Although it is billed as an inclusive and representative organization, there have been challenges to its representativeness.<sup>301</sup> Some claim that it has ghettoized indigenous peoples and civil society.<sup>302</sup> And one can also question whether it is effective.<sup>303</sup> Only recently has the UNFF, which the CPF supports, been able to move forward by producing a non-binding instrument.<sup>304</sup> And some have claimed that this instrument is not much of a step forward.<sup>305</sup>

Similarly, the coordination between the WTO and WHO with respect to the Framework Convention on Tobacco masks the normative conflict between the two IOs. In one way the coordination that the WHO invited with the WTO was essential. A FCTC that challenged the foundational trading rules and the WTO would be seriously handicapped.<sup>306</sup> On the other hand, the Joint Report issued by

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preliminary policy responses that prevents any a one organization from prematurely locking in an equilibrium that is sub-optimal or biased toward particular interest groups.”). HURD, *AFTER ANARCHY*, *supra* note 11, at 12 (noting that legitimacy promotes compliance).

<sup>300</sup> Keohane & Nye, *supra* note 5, at 16-17.

<sup>301</sup> *See supra* note 204.

<sup>302</sup> *See supra* note 208.

<sup>303</sup> *See supra* notes 201 to 204 and accompanying text.

<sup>304</sup> Seventh Session of UN Forum on Forests, *supra* note 205.

<sup>305</sup> *See supra* notes 200 to 208 and accompanying text.

<sup>306</sup> *See* Joseph N. Eckhardt, *Balancing Interests in Free trade and Health: How the WHO's Framework Convention on Tobacco Control Can Withstand WTO*

the WHO and WTO does not seem to resolve any of the potential normative conflicts between the organizations.<sup>307</sup> Any claim by either institution that it is more legitimate as a result of the coordination does not seem warranted.<sup>308</sup>

### C. Marginalization

Alliances marginalize those not included in the alliance. Elsewhere I have raised the possibility that accommodation, though desirable in some respects, might obscure real debate over substantive normative differences.<sup>309</sup> As Barnett and Finnemore point out “IOs promote a particular, mostly liberal, moral vision in world politics, and determining this moral vision is itself an act of power in the most fundamental sense.”<sup>310</sup> These alliances may strengthen the resulting IOs and their influence on states. Now perhaps that is the point. But views that are external to these IOs may not find a forum.

UNCITRAL for example, was established in part to provide a forum for developing countries to participate in the harmonization of international trade law.<sup>311</sup> But as UNCITRAL forms alliances with other organizations those organizations obtain influence in UNCITRAL’s norm-setting agenda and process. Such influence is not an evil in itself – it is exactly what is desired by the

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*Scrutiny*, 12 *Duke J. Comp. & Int'l L.* 197, 199 (2002); *see also* Timothy J. Miano, *Understanding And Applying International Infectious Disease Law: U.N. Regulations During An H5n1 Avian Flu Epidemic*, 6 *CHICAGO-KENT JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 26, 43 (2006) (discussing infectious disease regulation).

<sup>307</sup> Pauwelyn, *WTO Compassion*, *supra* note 224, at 1201-02 (discussing the negotiations between the WHO and the WTO). Alternatively, false legitimacy claims may stem from a nominal integration of one of the IOs rather than a substantive one.

<sup>308</sup> Raustiala & Victor note how in regime complexes negotiators will attempt to avoid conflicts by “demarcating clear boundaries” and negotiating “savings clauses” Raustiala & Victor, *supra* note 128, at 297.

<sup>309</sup> *See* Kelly, *Power, Linkage and Accommodation*, *supra* note 162, at 113-27 (discussing potential conflict between the Cartagena Protocol and the SPS); *accord* Cho, *supra* note 106 at 639 (discussing the tension between trade and social regulation).

<sup>310</sup> Barnett & Finnemore, *supra* note 118, at 165 (discussing Sen’s criticism’s discussing how institutionalizing may silence most of the world’s population).

<sup>311</sup> Wah-Teck Chan, *supra* note 142, at para. 7.

alliance.<sup>312</sup> That influence raises the question of whether other voices – voices that may otherwise be un- or under-represented - are marginalized by the alliance.<sup>313</sup> The failure of the IF to include labor interests in a meaningful way exemplifies the problem of marginalization.<sup>314</sup>

Linkage and accommodation can also blunt the force of counter regime norms that regime and forum shifting promotes. Others have written about regime shifting strategies and their potential for generating counter regime norms.<sup>315</sup> Linkage and accommodation dilute norms and undermine the creation of counter regime norms.<sup>316</sup> Leebron for example has discussed how linkages between regimes may dilute the normative framework of the regimes,<sup>317</sup> and the danger that one regime's policies will overshadow another's.<sup>318</sup> As discussed below, the CPF is an interesting example of forum shifting that has pushed non-state actors out of forest negotiations even though it was those same actors that called for action that created the CPF in the first place.<sup>319</sup>

The dilution of counter regime norms is compounded by the strengthening of alliance-supported norms. The convergence of multiple IOs in the same issue area strengthens the power of the norms that result. Barr & Miller document what they call “nested regimes” in assessing the legitimacy of the Basel Banking Committee:

The process of accession to the WTO financial services agreement and concomitant efforts to ensure liberalization under the agreement, resolution of currency and debt crises, IMF and World

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<sup>312</sup> UNCITRAL *Guide: Basic Facts*, *supra* note 27, at 10.

<sup>313</sup> Developing countries may feel market pressures to adopt a standard that they had little say in developing. See Barr & Miller, *supra* note 9, at 17 (discussing market pressure to adopt Basel Banking Committee guidelines).

<sup>314</sup> See *supra* section II. B.

<sup>315</sup> Helfer, *Mediating*, *supra* note 39, at 127-29.

<sup>316</sup> Kelly, *Power, Linkage and Accommodation*, *supra* note 162, at 127-28 (concluding on the necessity of evaluating accommodation models because of their propensity to produce undesirable effects)

<sup>317</sup> Leebron, *supra* note 159, at 25 (giving an example of the possibility of including labor rights within the trade regime).

<sup>318</sup> *Id.* at 25-26. Leebron also suggests that “linkage will sometimes create an additional source of regime instability [because] . . . it may be that no regime can be stronger or more stable than the least stable of those regimes.” *Id.* at 26.

<sup>319</sup> See *infra* notes 321 to 345 and accompanying text.

Bank policy prescriptions and lending conditions, all interact with Basel adoption in the developing world. The Basel standards, while voluntary in principle, are effectively embedded in a range of other policies and market practices that make adoption in some form or another difficult to resist for developing nations. Because these other policy and market regimes give added force to the Basel Committee's hortatory pronouncements, the extent and nature of global administrative law mechanisms designed to enhance the legitimacy and accountability of the Basel Committee's processes need to take account of these extra-Basel inputs.<sup>320</sup>

Thus, alliances that promote efficiencies and increase leverage are more likely to succeed in implementing their norms. They are also more likely to succeed in marginalizing views that are inconsistent with those norms.<sup>321</sup>

Finally, marginalization results from unification and harmonization. Some voices get pushed out.<sup>322</sup> Brokered consensus may involve replacing accountability with efficiency or expertise.<sup>323</sup> For example, one commentator has suggested that although the Codex is relatively good about participation from non-state interests, the interest of consumer groups "to be effectively heard in consultations with national delegations to the Codex may be impaired by a lack of domestic political influence."<sup>324</sup> Business groups have much greater access.<sup>325</sup> Such disparate treatment may be unavoidable. Nevertheless the WTO/SPS endorsement of the Codex and the resulting conversion of the Codex from soft to hard law magnifies the importance of that marginalization.<sup>326</sup> Arguably, such marginalization is an unavoidable by-product of harmonization. That is the whole point of harmonization, *i.e.*, pushing out the non-conforming. But marginalization is a cost to be considered and it is more likely to result from alliances that involve club-like IOs and lack procedural mechanisms to include non-members in the law-making process.

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<sup>320</sup> Barr & Miller, *supra* note 9, at 41.

<sup>321</sup> *Id.* at 20 (discussing "lock-in" created by harmonization).

<sup>322</sup> Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 753 (1998).

<sup>323</sup> *Id.* at 744.

<sup>324</sup> Livermore, *supra* note 260, at 785.

<sup>325</sup> *Id.*

<sup>326</sup> *See supra* notes 261 to 263 and accompanying text.

#### D. Entrenchment

Related to the problem of marginalization is the problem of entrenchment. Entrenchment results in frozen rules that are unresponsive to changed circumstances or norms.<sup>327</sup> Alliances bring more parties together in support of a particular norm. As more invest in that norm or rule it may become more difficult to have that norm or rule change or evolve.<sup>328</sup> States reconstruct their interests through participation in these IOs and the alliances that they form.<sup>329</sup> Once actors invest in IOs there is always a danger that the law will become unresponsive and immutable,<sup>330</sup> and ultimately less effective.<sup>331</sup>

One can see the relationship between marginalization and entrenchment by again turning to the Codex. The SPS/WTO endorsement of the Codex causes national regulators to hold more closely to their pre-established domestic preferences in Codex negotiations fearing that whatever standard is adopted will become the defacto world standard by virtue of the WTO/SPS endorsement.<sup>332</sup> As Michael Livermore points out such reticence cuts off serious deliberation and debate.<sup>333</sup>

As discussed above, alliances solidify positions and render law-making institutions less open to new voices, new ideas and new norms. IOs and alliances or networks of IOs are just as susceptible to entrenchment as national agencies or legislatures.<sup>334</sup> While coordination between the World Bank and the WTO may

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<sup>327</sup> Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002); McGarity, *supra* note 97, at 1385-96.

<sup>328</sup> *Cf.* Barr & Miller, *supra* note 9, at 20 (discussing harmonization generally and in particular public choice critics of the Basel process). “The greater the level of coordination among supervisory authorities, the lower is the level of utility of firms using regulatory arbitrage to evade regulatory burdens. The lower threat from exit reduces incentives on regulators to develop efficient regulation.” *Id.*

<sup>329</sup> *See* Alvarez, *International Organizations: Then and Now*, *supra* note 46, at 338.

<sup>330</sup> Raustiala & Victor, *supra* note 128, at 296 (noting path dependence in regime complexes at the meso scale).

<sup>331</sup> *Cf.* Barr & Miller, *supra* note 9, at 26.

<sup>332</sup> Livermore, *supra* note 260, at 786.

<sup>333</sup> *Id.* at 786-87.

<sup>334</sup> Kenneth Anderson, *Squaring The Circle? Reconciling Sovereignty And Global Governance Through Global Government Networks: A New World Order*, 118

produce efficiencies, it also entrenches the liberal trade values that those institutions espouse.<sup>335</sup> Entrenchment, like marginalization, may be unavoidable. But unlike marginalization it really is not the point of harmonization, and therefore is all the more problematic.

### E. Regime and Forum Shifting Strategies

Regime and forum shifting involves “an attempt to alter the status quo ante by moving treaty negotiations, lawmaking initiatives, or standard setting activities from one international venue to another.”<sup>336</sup> Regime and forum shifting, in my view, are neither good nor are they bad, they are strategies that can be put to different purposes. Actors engage in regime or forum shifting as a strategy to affect IO agendas and functioning.<sup>337</sup> They also tend to forum shop to best suit their own interests when initiating a change in the rules.<sup>338</sup> Alliances formed through linkage and accommodation in order to facilitate law-making open new pathways to regime shifting.<sup>339</sup>

These new alliances provide a new forum to which to shift. It might be a new venue in which to promote counter regime norms.<sup>340</sup> So for example, it may be possible for labor rights advocates to insinuate themselves into World Bank agendas on development with the World Bank alliances.<sup>341</sup> However, alliances

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Harv. L. Rev. 1255, 1276 (“National governments, international agencies, and large corporations are all subject to bureaucratic ossification . . .”).

<sup>335</sup> Pablo Zapotero, *Searching for Coherence in Global Economic Policymaking*, 24 PENN. ST. INT’L L. REV. 595, 622-24 (2006) (discussing how the partnering of WTO, IMF and World Bank has furthered their goal of trade liberalization, but at the same time has discriminated against the economic policies of other institutions which “inevitably produce[s] a particularly restricted phenomenon of path dependence in their activities”).

<sup>336</sup> Helfer, *Regime Shifting*, *supra* note 246, at 53.

<sup>337</sup> *Id.*

<sup>338</sup> Raustiala & Victor, *supra* note 128, at 299.

<sup>339</sup> Helfer, *Regime Shifting*, *supra* note 246, at 16-17 (discussing how less rigid regime boundaries lead to the creation of “multi-issue, multi-venue mega-regime[s]” in which participants may shift negotiations to venues more suited to their interests).

<sup>340</sup> Helfer, *Mediating*, *supra* note 39, at 127-29.

<sup>341</sup> Committee on Employment and Social Policy, First Item on the Agenda available at

may also operate to thwart regime or forum shifting attempts. Because these alliances broker consensus they may force participants to compromise and close out dissent.<sup>342</sup> Likewise, where the WHO accommodates trade concerns, those who would want to use trade devices to promote health concerns are shut out.

One can imagine the situation where alliances are formed in order to displace the jurisdiction of other law-creating IOs. The CPF provides an interesting example of forum shifting and partnerships. It was after the Rio Earth Summit that civil society and indigenous peoples petitioned the United Nations Commission on Sustainable Development (CSD) to take up forest issues that went unimplemented after Rio.<sup>343</sup> The result, as discussed above, was the IPF and then the IFF, both of which begat the IAF and the resulting UNFF and the CPF.<sup>344</sup> Some claim that the CPF and the UNFF have ghettoized civil society and indigenous peoples and relegated their views as far inferior to states' positions on forests.<sup>345</sup> State control of the UNFF process has muted the concerns of non-state stakeholders in this new forum even though it was these stakeholders that had instigated the creation of the forum in the first place.<sup>346</sup>

#### F. The Potential for Abuse

Alliances offer creative parties an opportunity to abuse the process that creates the alliances. Abuses may come in the form of manipulation or capture, placing one stakeholder's or set of stakeholders' agenda over another. Capture also can lead to other problems already discussed, including marginalization, entrenchment and false claims of legitimacy.

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<http://www.ilo.org/public/english/standards/relm/gb/docs/gb279/pdf/esp-1.pdf>

(last visited August 14, 2007).

<sup>342</sup> Kelly, *Power, Linkage and Accommodation*, *supra* note 162, at at 113 ("Unfortunately, concealing the differences among regimes may be detrimental to the interests embodied in the less powerful regime and indeed may force the less powerful regime to appease the more powerful regime's interest").

<sup>343</sup> Briefing on the United Nations Forum on Forests (UNFF) and Collaborative Partnership on Forests (CPF) available at [www.forestpeoples.org/documents/ifi\\_igo/unff\\_brief\\_cpf\\_dec04\\_eng.shtml](http://www.forestpeoples.org/documents/ifi_igo/unff_brief_cpf_dec04_eng.shtml) (last visited July 31, 2007).

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *See supra* notes 192 to 199 and accompanying text.

Much like a national administrative agency is subject to capture,<sup>347</sup> the alliances themselves can become tools that the alliance members utilize in order to obtain their policy objectives.<sup>348</sup> The WHO process of inclusion and coordination reveals a compelling example. The tobacco industry took advantage of the WHO philosophy of inclusion to undermine its efforts to curb tobacco use.<sup>349</sup> In addition to lobbying and public relations efforts to discredit the WHO and change its agenda, the tobacco industry cultivated relationships with WHO staff and employees, sometimes offering them future employment.<sup>350</sup> The industry also tried to use its financial and political power to influence WHO budgets.<sup>351</sup> The WHO report documenting this abuse deals with tobacco industry actions directed at the WHO generally.<sup>352</sup> But one can see how these tactics could easily be applied to an alliance. Alliances provide multiple points of entry for those wishing to capture an agenda.<sup>353</sup>

Alliances that involve club organizations may be more subject to capture. Club-like organizations can be non transparent, and thus, more subject to efforts

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<sup>347</sup> See Levine, *supra* note 98 at 169.

<sup>348</sup> Allyn Lise Taylor, *Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health*, 18 AM. J. L. & MED. 301, 339 (1992) (“[public international] organizations are also subject to significant external influence from individuals, nations, non-governmental organizations, and other international organizations”). Raustiala & Victor, note the potential for abuse: “while efforts at achieving consistency drive much of the action within a regime complex, the PGR case illustrates that states may also attempt to create what we term strategic inconsistency. Cognizant that the growing legalization of world politics means that legal conflicts focus efforts at solutions, states at times attempt to force change by explicitly crafting rules in one elemental regime that are incompatible w/ those of another....” Raustiala & Victor *supra* note 128, at 302.

<sup>349</sup> Tobacco Company Strategies to Undermine the Tobacco Control Activities at the World Trade Organization available at <http://repositories.cdlib.org/context/tc/article/1107/type/pdf/viewcontent/>

<sup>350</sup> *Id.* at 32.

<sup>351</sup> *Id.* at 37.

<sup>352</sup> *Id.*

<sup>353</sup> Helfer, *Regime Shifting*, *supra* note 246, at 8-9 (explaining that linkages create a need for international bodies to manage complex policy issues which leads to regime shifting and creates considerable room for groups of states and NGOs to maneuver with a view towards maximizing their own interests")

to capture.<sup>354</sup> Miller & Barr give the Basel Committee as an example of a club organization that is particularly vulnerable to capture.<sup>355</sup> Where alliances exercise leverage to secure implementation, the problem of capture and “regulatory imperialism”<sup>356</sup> is particularly acute. Thus for example, the coordination between the WTO and the World Bank leaves little room for non-liberal trade norms. Wealthy countries develop the trading rules and wealthy countries can impose them through the World Bank.<sup>357</sup> These may or may not be good rules, but developing countries may have little choice but to accept them.<sup>358</sup> Weaker groups, as opposed to states, might be pushed aside as well. Business groups, for example, may have more access than consumer groups to alliances and international organizations.<sup>359</sup> Alliances compound the access problem because they reduce transparency and increase the power of the underlying organizations.

#### IV. Evaluating Derivative Legitimacy Claims through Procedures

Where an alliance maintains good procedures it will be more likely that its derivative legitimacy claims will be objectively warranted.<sup>360</sup> Derivative legitimacy results from the relationship between the IOs. That relationship may or may not foster more legitimacy. The relationship may cause the alliances to have mixed, contentious, or simply blurred objectives, making effectiveness an illusive measure. Or the alliances may compound the problems of representation and inclusion. Process addresses these issues by promoting accountability and transparency.<sup>361</sup> Good process ensures that the relationship is meaningful, open,

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<sup>354</sup> See, e.g., Barr & Miller, *supra* note 9, at 19 (discussing the Basel Committee).

<sup>355</sup> *Id.* at 19-20 (noting criticisms of the Basel Committee).

<sup>356</sup> *Id.* at 20 (discussing where “most powerful economic nations meet to develop rules that will affect a broad range of countries excluded from the process of developing the rules.”)

<sup>357</sup> See *supra* notes 229 to 236 and accompanying text.

<sup>358</sup> Barr & Miller, *supra* note 9, at 20.

<sup>359</sup> Stewart, *supra* note 7, at 87.

<sup>360</sup> The process criteria discussed here can be situated in the larger global administrative law project. See, e.g., Stewart *supra* note 7, at 74-75.

<sup>361</sup> Esty, *supra* note 47, at 1522 (discussing how process can give structure to policymaking, further accountability and encourage dialogue, thereby enhancing legitimacy and effectiveness).

and fruitful.<sup>362</sup> Although process does not solve all problems (and indeed it creates some)<sup>363</sup> it best supports strong legitimacy claims for law-making alliances. Moreover, process is better suited than another metric because it can alleviate some of the particular dangers raised in these alliances.

### **A. How Good Procedures Strengthen Derivative Legitimacy Claims**

Even if one might have adopted a particular output or input framework for assessing the legitimacy claims of IOs, it is not clear that such a framework would necessarily be suitable to objectively assess derivative legitimacy claims spawned by these alliances. A derivative legitimacy claim should be assessed by examining the relationship of the members because it is from that relationship that the legitimacy is derived. When examining that relationship we should assess whether it employs good procedures in order to evaluate whether its legitimacy claims are objectively justified. Process promotes the substantive exchange of ideas, facilitates accountability and transparency, ameliorates negative externalities of alliances and can be tailored for each particular alliance.

A process analysis best suits derivation legitimacy claims because it reveals the workings of the relationship. We can see the exchange of views. We can see whether inclusion is undercut by the exclusion of others or whether it was designed to shift debate to a non-effective path. Process can reveal whether the relationship entrenches the parties and creates path-dependence resulting in less effectiveness. The ideal procedure needed will depend upon the alliance, but a suitable derivative legitimacy framework uses procedure to ensure an open and effective relationship between the IOs. More specifically, when thinking about the most suitable derivative legitimacy framework we should consider the typology of alliances and the potential relational queries each raise.

#### **1. Partnering**

Where partnering means a real dialogue concerning various alternatives and the norms that they represent, crediting the resulting norms with the other IOs' input legitimacy seems genuine. And in such cases it seems more likely that

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<sup>362</sup> *Id.* at 1521 (“A thoughtfully structured rulemaking process will clarify underlying issues, bring facts to bear, promote careful analysis of policy options, and engage interested parties in a political dialogue”).

<sup>363</sup> Stewart *supra* note 7, at 68 (explaining for example how transparency can increase costs and impede successful negotiations.)

the dialogue will lead to the most effective alternatives available. The partnership between UNCITRAL and the World Bank in Drafting the *Guide* seemed to involve a real airing of views and attempt to represent a wide variety of interests.<sup>364</sup>

However, it may be that “partnerships” are merely nominal entities. One could question, for example, the work of the Collaborative Partnership on Forests. Although, this alliance claims to be a partnership and claims input legitimacy in terms of inclusion and representation, arguably it is not really inclusive or representative;<sup>365</sup> its legitimacy claims are false. One can distinguish such false claims from deserved claims by examining whether the alliance employs good procedures. For example, where alliances have procedures to allow transparency, interested parties can see if the partnership is working. A meaningful exchange of ideas through notice and comment or other participatory mechanisms should result in more effective rules.<sup>366</sup> Power-sharing procedures minimize manipulation and capture opportunities.

Additionally nominal partnerships have serious costs. They actually undermine legitimacy claims because they push out marginal voices or entrench the status quo. Worse, partnerships may enable interested parties to shift debate of the normative issues to a forum or a regime where outcomes can be manipulated.<sup>367</sup> Participation and transparency mechanisms reduce the likelihood of manipulation by eliciting debate and increasing accountability.<sup>368</sup> Rules for explanation should minimize opportunities for abuse as well.

## 2. Coordination

Coordination suggests three possible scenarios, each aided by good procedures. First, institutions may coordinate their law-making activities so different experts work on separate segments of a problem. UNCITRAL, for example holds itself out as the coordinating IO in the area of international trade law.<sup>369</sup> Here, coordinating substantive work reduces duplication and leads to

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<sup>364</sup> See *supra* notes 175 to 194 and accompanying text. Nevertheless, even this partnership can be criticized because it resulted in a hybrid document that some would claim avoided the truly difficult questions.

<sup>365</sup> See *supra* notes 192 to 208 and accompanying text.

<sup>366</sup> See *supra* note 94.

<sup>367</sup> See *infra* notes 343 to 345 and accompanying text.

<sup>368</sup> Keohane & Nye, *supra* note 5, at 12. Barr & Miller, *supra* note 9, at 28-29.

<sup>369</sup> UNCITRAL *Guide: Basic Facts*, *supra* note 27, at 29-47.

greater effectiveness.<sup>370</sup> One would want to be certain that the alliance chose the best means of dividing work to promote effectiveness. Participatory mechanisms will generate more alternatives and debate concerning the appropriate division of labor.<sup>371</sup> Although each organization might be an expert in the area, and thus, might have its own ideas about how to divide work, the fact that they are working together suggests that none of the organizations is suited to do the job alone.<sup>372</sup> Therefore, it is more likely that their efforts will be effective if they have power-sharing procedures.

Second, the coordination effort might be an attempt to try to work together in overlapping areas of expertise. So, where the ILO attempts to coordinate its labor reform efforts with Bretton Woods Institutions' efforts on economic development,<sup>373</sup> one can see an opportunity for greater inclusion.<sup>374</sup> One would want to ensure that the inclusive opportunities were real, through transparency and participatory mechanisms.

Third, coordination might result in a shared understanding that the resulting law will not conflict with the values or already established laws of either of the IOs. This "hands off" coordination is troubling, as it suggests that parties represented by counter regime norms are cut out of the process of norm development.<sup>375</sup> If for example, the WHO had carved out language in its FCTC to appease the WTO agreements,<sup>376</sup> those who see trade measures as an acceptable tool to combat the spread of tobacco use would be shut out of a forum, the WHO.

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<sup>370</sup> Susan Block-Lieb & Terence C. Halliday, *Incrementalisms in Global Lawmaking*, 32 BROOK. J. INT'L L. 851, 844-86 (2007) (explaining that many of UNCITRAL's law-making accomplishments stem from its usage of "pyramidal incrementalism" in partnering with other organizations and building upon their prior work) [hereinafter Block-Lieb & Halliday, *Incrementalisms*].

<sup>371</sup> Barr & Miller, *supra* note 9, at 26-27.

<sup>372</sup> Block-Lieb & Halliday, *Incrementalisms*, *supra* note 370, at 900-02 (explaining that various incrementalisms are necessary to facilitate global consensus, which could suggest that within a given area of global law-making there exists an inherent division of labor and that some organizations are better suited to certain functions).

<sup>373</sup> See *supra* notes 238 to 243 and accompanying text.

<sup>374</sup> See *supra* notes 240 to 243 and accompanying text.

<sup>375</sup> Kelly, *Power, Linkage and Accommodation*, *supra* note 162, at 123 (stating that implicit deference is especially troublesome because it "masks...normative differences and allows norms to evolve in a skewed fashion").

<sup>376</sup> See *supra* note 222 and accompanying text.

Transparency is particularly important here as it reveals the normative compromise to those that would wish to challenge it and enables accountability.<sup>377</sup> Participation mechanisms would be important as well because they would provide some outlet for those values pushed out by the accommodation.

Some coordination efforts will be difficult to evaluate. The WTO and the World Bank support each other's values of liberal trade in support of economic development.<sup>378</sup> In one sense this alliance produces efficiencies. Working together these organizations increase their leverage to promote their liberal trade agenda.<sup>379</sup> Thus, coordination may help promote the trading rules even in the face of opposition to those rules.<sup>380</sup> At the same time, this mutually reinforcing coordination empowers the constituent IOs and the norms that they develop without necessarily including more views.<sup>381</sup> However, such coordination may lead to greater effectiveness, and thus, warrant more legitimacy from an output legitimacy perspective. Input credentials would benefit from process and the inclusive mechanisms that process generates.

### 3. Endorsements

An endorsement typically involves one institution promoting the rules or standards of an expert institution. Endorsements bestow legitimacy on both the endorsing and the endorsed institution. The endorsing institution claims the authority to pronounce another IOs norms, rules or standards as useful and the endorsed IO has its work product validated. So both UNCITRAL and the ICC

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<sup>377</sup> Barr & Miller, *supra* note 9, at 31.

<sup>378</sup> Zapotero, *supra* note 335 at 596-97 (discussing synergies among rules and policies of WTO, IMF and World Bank with regards to trade liberalization for purposes of international growth and development).

<sup>379</sup> *Id.* ("The modern institutional architecture of global governance is comprised of a group of coexisting and interrelated international regimes, such as international institutions and treaties with a degree of institutionalization. These regimes consolidate horizontal networks of inter-institutional relations on diverse stages of development. The mechanism of coordination between the International Monetary Fund, the World Bank, and the World Trade Organization stands out among them. This three-sided model of coordination promotes the convergence of agendas and activities in the areas of trade integration, development, and macroeconomic stability.") *Id.*

<sup>380</sup> *See, e.g.,* Kelly, *Power, Linkage and Accommodation*, *supra* note 162 at 120.

<sup>381</sup> *Id.*

benefit from UNCITRAL's endorsement of the UCP 500.<sup>382</sup> UNCITRAL tells the world that the ICC has a great product, while at the same time, proclaiming itself as the arbiter of great products.<sup>383</sup> In one sense endorsements seem ideal. One can imagine a representative institution seeking the endorsement of an expert technical law-creating body. However, endorsements may lead to false legitimacy where the rules or standards of one institution are codified without any real consideration of whether they are consistent with the interests of those represented by the endorsing institution.<sup>384</sup> Here, it would seem that an endorsement would be more legitimate if it resulted from a meaningful examination of the norms, laws or standards endorsed. Process helps ensure that the examination is meaningful. For example, as Jose Alvarez explains, when the World Bank Guidelines codified the FAO standards, the Bank relied on process, using participatory mechanisms to garner legitimacy.<sup>385</sup>

#### 4. Resource Sharing

Information and resource sharing is helpful, but should not be touted for more than they are worth. Sharing information allows for more effective norms. The more an institution knows, the better that it can address a problem. And to be sure, information sharing can be a way of making an IO more inclusive and more effective. But information alone does not assure that interests are represented or that values are considered. Nor does access to information guarantee positive outcomes. So while information sharing is to be applauded, alliances that proclaim legitimacy based on information sharing should face meaningful examination. The ILO and the WTO have recently concluded an important report, *Trade and Employment: Challenges for Policy Research*.<sup>386</sup> This report compiles a host of information on the economic links between labor and trade and is certain to be very useful to policy makers. But it does not integrate the ILO into the IF as the ILO might like.<sup>387</sup>

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<sup>382</sup> Yearbook of the United Nations Commission on International Trade, 2000, vol. XXXI, p. 56 (congratulating the ICC on its work and noting the UNCITRAL endorsement as a function within the Commission's mandate).

<sup>383</sup> UNCITRAL *Guide: Basic Facts*, *supra* note 27, at 2.

<sup>384</sup> Livermore, *supra* note 260, at 786-87.

<sup>385</sup> See *supra* notes 255 to 257 and accompanying text.

<sup>386</sup> *Trade and Employment: Challenges for Policy Research* (2007) available at *Trade and Employment: Challenges for Policy Research* (last visited August 20, 2007).

<sup>387</sup> See *supra* note 296 and accompanying text.

## B. Process as Compared to Other Metrics

Process criteria are a superior metric to other legitimacy criteria for assessing derivative legitimacy claims. Any output metric used to test these alliances necessarily involves a normative assumption; an inescapable assumption for output criteria. True, output criteria is always subject to criticism for its normative assumptions. But this criticism takes on special salience where alliances as involved. Linkage and accommodation mask normative struggles,<sup>388</sup> obscuring output criteria's normative assumptions. Take for example the derivative legitimacy of the UNCITRAL/World Bank collaboration on the *Legislative Guide*. On one hand the *Guide* represents a stunning accomplishment.<sup>389</sup> It employs new technologies to address a difficult challenge to harmonization, fundamental differences in domestic insolvency laws.<sup>390</sup> Yet one could complain that by brushing over the hard questions with these technologies the drafters have avoided the real conflicts.<sup>391</sup> Thus, the *Guide*'s effectiveness depends upon its goals. If one concludes that UNCITRAL's mandate is to harmonize,<sup>392</sup> than the *Guide* did not achieve that goal. If one believes that the UNCITRAL partnership with the World Bank was meant to modernize insolvency law so that it may ultimately at some later point lead to harmonization then perhaps the *Guide* is effective.<sup>393</sup> Thus, we see that where alliances leave open questions concerning goals, any output metric will be inadequate because of subjective disagreements over what is effective.

Still, one could accept the normative assumption, despite the danger of ignoring difficult normative questions, and ask whether the alliance is effective in terms of fulfilling the mandate it sets for itself. However, given the particular problems raised by alliances discussed above, I submit that using output criteria to judge these derivative legitimacy claims is a second-best solution. The proliferation of these alliances and the power that they have to affect every part of

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<sup>388</sup> Kelly, *Power, Linkage and Accommodation*, *supra* note 162, at 120.

<sup>389</sup> Block-Lieb & Halliday, *Legitimation*, *supra* note 1, at 4-5.

<sup>390</sup> *Id.* at 5.

<sup>391</sup> *Cf.* Susan Block-Lieb & Terence Halliday, *Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law*, 42 TEX. INT'L L.J. 475, 508-09 (2007) (discussing the Guide's ability to deal with and sidestep some difficult issues) [Block-Lieb & Halliday, *Harmonization and Modernization*].

<sup>392</sup> G.A. Res. 2205 (XXI), U.N. Doc. A/6396 at para. 8 (Dec. 17, 1966).

<sup>393</sup> Block-Lieb & Halliday, *Harmonization and Modernization*, *supra* note 391, at 512.

our lives simply demands more rigorous review than assessing whether the alliance has achieved a self-defined and somewhat self-serving objective.

Likewise, representation criteria falter because of the lack of international demos.<sup>394</sup> Again, this is not a new criticism, but it is magnified by alliances. It is difficult enough to apply a representation framework to IOs;<sup>395</sup> the failure of the democratic analogy is compounded where IOs team up to create law. For example, although most states are WTO members, the WTO is not considered a truly representative organization.<sup>396</sup> It really falls into the club model.<sup>397</sup> The Codex also lacks equitable representation among states.<sup>398</sup> Although it is a UN agency (located within the FAO) different countries have different abilities to participate in developing the norms established there.<sup>399</sup> Thus, although both the WTO and the Codex “represent” the interest of a majority of states, it would be difficult to say whether or not the WTO endorsement of the Codex was entitled to a claim of input legitimacy based upon representation.<sup>400</sup>

Inclusion as a paradigm is helpful but incomplete. Inclusion criteria promote dialogue, transparency and more representative norms. But inclusion, like representation, does not necessarily promote effective norms. In my view process facilitates inclusion and serves additional purposes that promote fairness, order, predictability, transparency and accountability. Process can at least tell us if the alliances allows for representative values. But it can also elicit debate, lead to more effective results and contribute to accountability.<sup>401</sup>

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<sup>394</sup> Keohane & Nye, *supra* note 5, at 11 (describing the lack of a political community).

<sup>395</sup> *Cf.* Barr & Miller, *supra* note 9, at 26 (noting the high cost of public participation in international law-making).

<sup>396</sup> Keohane & Nye, *supra* note 5, at 20 (explaining that while WTO delegates claim accountability, their negotiations are often shrouded in secrecy, leaving outsiders with the feeling that they are not adequately represented).

<sup>397</sup> *Id.* at 7-8 (describing WTO as a “club of trade ministers” and its negotiations as “clublike”).

<sup>398</sup> Livermore, *supra* note 260, at 783 (citing Bruce Traill et al., Report of the Evaluation of the Codex Alimentarius and Other FAO and WHO Food Standards Work (2002)).

<sup>399</sup> *Id.*

<sup>400</sup> Levit, *supra* note 67, at 200-01 (discussing the accountability “mismatch”).

<sup>401</sup> Barr & Miller, *supra* note 9 at 28-29.

Process is also a superior metric because it can be tailored. The particular procedures needed to objectively assess derivative legitimacy claims will depend on the organizations and issues involved.<sup>402</sup> For example where a partnership such as the WTO and the World Bank form, the concerns relate more to marginalization and entrenchment rather than false legitimacy claims.<sup>403</sup> Thus, transparency and participatory process mechanisms are more important. Likewise, alliances that claim to be partnerships should have procedures in place that enable power-sharing and should be transparent so that interested parties can see the true nature of the partnership. While endorsements may involve one body adopting the work product of a more expert body, any lack of public participation in the operations of the latter should be countered by participatory mechanisms and transparency. The procedures best suited for coordination alliances will depend on the particular method of coordination. For example, an alliance that divides work will need different procedures than one that accommodates values by avoiding conflicts. I will not attempt to prescribe procedures for every type of alliance here, I will just argue that procedural choices will need to be tailored.

### **C. How Good Procedures Mitigate Problems Caused by Law-Making Alliances**

I submit that the best means to assess the derivative legitimacy claims of these alliances is to examine whether the alliances employ procedural devices to increase participation, dialogue, transparency, accountability and integrity. These procedures promote more legitimate norms, but they also mitigate the particular problems that law-making alliances cause, including: false legitimacy claims, marginalization, entrenchment, harmful regime and forum shifting opportunities and abuse.

False legitimacy claims proffer shared information, partnership or coordination as grounds for greater legitimacy, but examination of the actual alliance fails to reveal any positive benefit from the proffered relationship. The CPF could be accused of this.<sup>404</sup> Transparency mechanisms allow interested parties to see the false claim objectively and not credit the claim. Participation avenues will also be helpful as they can be useful in holding ineffective alliances accountable. Alliances that marginalize or push out other voices that might offer real criticism or prodding can be held accountable, if there are procedures to allow such criticism and participation.

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<sup>402</sup> *Id.* at 17.

<sup>403</sup> *See supra* notes 320, and 334 to 337 and accompanying text.

<sup>404</sup> *See supra* note 200 to 204 and accompanying text.

Process also thwarts false legitimacy claims because it promotes effectiveness more generally. Notice and comment procedures not only allow stakeholders an expressive outlet, they promote debate that fosters more effective rules.<sup>405</sup> In fact, process criteria such as notice and comment provisions, power-sharing devices, transparency, controls against corruption and explanatory requirements all elicit debate and hopefully, but not necessarily, better rules. Through transparency interested parties can see what is being done and at least try to intervene should they find it objectionable or irrational.<sup>406</sup> Power-sharing devices force those in power to share their ideas with each other in order to persuade each other. Debate leads to better solutions.<sup>407</sup> The partnership between the World Bank and UNCITRAL on the *Guide* allowed UNCITRAL to develop new technologies in its law harmonization and modernization efforts.<sup>408</sup> Arguably the project would not have been successful without these technologies.<sup>409</sup> Also, rules generated with adequate process will be more likely to secure compliance (because of their input legitimacy credentials) and thus be more effective.<sup>410</sup>

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<sup>405</sup> Barr & Miller, *supra* note 9, at 24-27. *See also*, Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983) (noting that notice and comment improves agency rulemaking by putting rules to the test of public commentary); American Bus Ass'n v. United States, 627 F.2d 525, 528 (D.C. Cir. 1980) (stating that notice and comment requirements “infuse[] the administrative process with [a] degree of openness, explanation, and participatory democracy.”); Batterton v. Marshall, 648 F.2d 694, 704 (D.C. Cir. 1980) (stating that comments educate the agency before rules with substantial impact are enacted).

<sup>406</sup> Barr & Miller, *supra* note 9, at 24 (noting that transparency provides for accountability).

<sup>407</sup> Esty, *supra* note 46, at 1520 (discussing deliberative legitimacy and asserting that it “promote[s] rationality and improve[s] outcomes”).

<sup>408</sup> Block-Lieb & Halliday, *Legitimation*, *supra* note 1, at 5 (explaining new technologies and rule-types).

<sup>409</sup> *Id.* at 5-6 (suggesting that the new technologies and rule-types facilitated the success of the Guide).

<sup>410</sup> Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 574-75 (1977) (“the public may be more likely to accept and less likely to sabotage a rule if it has been allowed to participate in its formulation.”).

Arguably process, and inclusion, can frustrate efforts to generate useful norms in the first place.<sup>411</sup> Club organizations work, in part, because through exclusion and secrecy they reach decisions and take action.<sup>412</sup> However, I do not believe that this argument defeats a push for more procedures in law-making alliances because these alliances by their very existence suggest that the IOs need to reach out to other IOs in order to be effective. They have already sacrificed some exclusivity and secrecy, and if we wish to credit them with derivative legitimacy we should be able to see that they are actually entitled to it.

Process also alleviates negative consequences caused by alliances. As discussed above, harmonization and convergence necessarily leads to some marginalization,<sup>413</sup> but process can at least minimize marginalization that results from excluding others from debate.<sup>414</sup> Voices that lose the debate will of course be marginalized, but participatory procedures, power-sharing, transparency and explanation enable those voices to at least be heard once.

The debate and dialogue facilitated by process wards off entrenchment. Decision-makers may become entrenched and path-dependent, choosing only to perpetuate the status quo.<sup>415</sup> Procedural safeguards, and their resultant transparency and dialog, allow interested parties to examine the causes, and combat the effects, of entrenchment.<sup>416</sup>

Process has its problems. Although I argue that process can alleviate entrenchment, admittedly process can create entrenchment through ossification. Procedural rules can frustrate attempts at reform and make the law less responsive.<sup>417</sup> Process can also be biased in favor of well-organized and well-funded stakeholders.<sup>418</sup> But I am not suggesting that we adopt process for process sake. The process needed must be tailored for each alliance.<sup>419</sup> Sometimes transparency will be more important than notice and comment procedures. Moreover, ossification results from demanding analytical review, rather than

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<sup>411</sup> Stewart, *supra* note 7, at 68 (explaining for example how transparency can increase costs and impede successful negotiations.)

<sup>412</sup> Levit, *supra* note 67, at 194 (discussing decision making in small groups).

<sup>413</sup> See *supra* note 322 and accompanying text.

<sup>414</sup> Stewart, *supra* note 7, at 87.

<sup>415</sup> Zaring, *supra* note 31, at 578-79.

<sup>416</sup> Stewart, *supra* note 7, at 83-84.

<sup>417</sup> See *supra* note 97.

<sup>418</sup> Barr & Miller, *supra* note 9, at 26.

<sup>419</sup> See *supra* notes 402 to 403 and accompanying text.

particularly procedural devices that ensure transparency and notice. While I would argue that good process requires that decision-makers give reasons, the international setting lacks the type of analytical review present in national administrative schemes where ossification occurs.

Nevertheless, some baseline explanatory requirement spurs dialogue and debate and combats path-dependence.<sup>420</sup> It is not a rational explanation to say that something has always been done one way so that now it must continue to be done that way. Moreover, process begets process.<sup>421</sup> Imbuing an organization with a culture of process, openness and dialogue is perhaps the most important guard against entrenchment.

Procedures that provide for transparency and combat corruption also serve to minimize capture opportunities.<sup>422</sup> Various IO alliances consolidate power and raise concerns regarding the abuse of that power.<sup>423</sup> Efforts at both regime shifting and forum shifting respond, in part, to perceived power balances.<sup>424</sup> Transparency and anti-corruption procedures reveal the workings of alliances and minimize incentive to succumb to capture.<sup>425</sup> Admittedly, process can be abused.<sup>426</sup> It can be used to delay and derail.<sup>427</sup> The choice to employ procedures

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<sup>420</sup> Barr & Miller, *supra* note 9, at 28-29 (explaining that public participation improves rationality).

<sup>421</sup> *Id.* at 17. Using the Basel Committee process as an example:” Moreover, international regulatory processes, including Basel, can in some instances help to reinforce, rather than undermine, domestic norms of accountability and legitimacy, particularly in countries where inside elites block reforms and prevent transparent domestic regulatory processes from occurring. The interaction among these international, transnational and domestic administrative procedures generates norms of behaviour and structures of practice that can help to promote accountability and legitimacy in the global administrative space.” *Id.*

<sup>422</sup> Stewart, *supra* note 7, at 70 (discussing process-based criticism of international regulation).

<sup>423</sup> See, e.g., the Integrated Framework discussed *supra* notes 335 to 339 and accompanying text.

<sup>424</sup> Helfer, *Regime Shifting*, *supra* note 246, at 6-7 (noting that some actors attempt to regime shift in order to enhance their own power).

<sup>425</sup> Stewart, *supra* note 7, at 71-72 (explaining that the creation of transnational administrative law promotes transparency and accountability through compliance with due process standards, thereby counteracting the injustices of regulatory decisionmaking that can disadvantage affected, yet politically weak, parties.)

<sup>426</sup> Stewart, *supra* note 7, at 68.

involves a cost benefit analysis. Process may slow down international law-making alliances, but the benefits are that they develop more legitimate norms.

## CONCLUSION

Law-making alliances among IOs are ubiquitous, useful and unique. While we should embrace those that can lead to more legitimate norms; we need to rethink how we make such an assessment. Although legitimacy will always be a subjective conclusion, claims to legitimacy can be objectively assessed. IO law-making alliances require a new framework, a process-based framework that examines the very relationship between the organizations and inquires as to whether it indeed leads to more inclusiveness, or more efficiency or both. Good procedures help ensure that the relationship between the IOs promotes legitimate functioning and results. These alliances also impose costs. The costs include those costs associated with an IO, but there are also unique costs as well. These unique costs and concerns can be mitigated through process.

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<sup>427</sup> Stewart, *supra* note 7, at 68 and 81.