NEW MODES OF PLURALIST GLOBAL GOVERNANCE

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This paper describes three modes of pluralist global governance. Mode One refers to the creation and proliferation of comprehensive, integrated international regimes on a variety of issues. Mode Two describes the emergence of diverse forms and sites of cross-national decision making by multiple actors, public and private as well as local, regional and global, forming governance networks and "regime complexes," including the orchestration of new forms of authority by international actors and organizations. Mode Three, which is the main focus of the paper, describes the gradual institutionalization of practices involving continual updating and revision, open participation, an agreed understanding of goals and practices, and monitoring, including peer review. We call this third mode Global Experimentalist Governance. Experimentalist Governance arises in situations of complex interdependence and pervasive uncertainty about causal relationships. Its practice is illustrated in the paper by three examples: the arrangements devised to protect dolphins from being killed by tuna fishing practices; the U.N. Convention on the Rights of Persons with Disabilities; and the Montreal Protocol on the Ozone Layer. Experimentalist Governance tends to appear on issues for which governments cannot formulate and enforce comprehensive sets of rules, but which do not involve fundamental disagreements or high politics, and in which civil society is active. The paper shows that instances of Experimentalist Governance are already evident in various global arenas and issue areas, and argues that their significance seems likely to grow.

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Introduction

It is by now a commonplace that international law and world politics is less and less dominated by states even as it becomes more and more pluralist. Tribunals such as the European Court of Justice, the Appellate Body of the World Trade Organization, and various international criminal and human rights courts issue binding judgments without asking the consent of national courts or governments. Transnational corporations, civil society organizations, public-private partnerships, and other non-state entities enter into agreements and build institutions that affect the lives of people within many countries. As no formal hierarchy or other constitutional ordering binds states and non-state actors, they freely engage with one

another across national lines, often disregarding the jurisdiction of existing international regimes, to cooperate on matters of common or overlapping interest. The result is deep pluralism: the profusion within many domains of international organizations with partially complementary, but also partially competing purposes, representing differing values and accountable to distinct sets of authorizing actors—to the extent they are accountable at all.

This global pluralism is also rapidly diversifying its forms. Even as they proliferate, international organizations link with each other, and with firms, NGOs, and other civil society actors in novel and rapidly changing ways. These linkages can lead international organizations to accommodate their differences and involve civil society actors in agenda setting and implementation of agreements more systematically than before. One result is that novel forms of regulation are developing alongside more traditional forms of international law.

We argue in this paper that the concept of Experimentalist Governance, hitherto presented largely within domestic U.S. legal scholarship and European Union studies literature,[1] can enhance our understanding of global pluralist governance in both law and political science.[2] Experimentalist Govern-

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1. *See, e.g.*, LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006) (exploring the emergence of new governance in the European Union and the United States); EXPERIMENTALIST GOVERNANCE IN THE EUROPEAN UNION: TOWARDS A NEW ARCHITECTURE (Charles F. Sabel & Jonathan Zeitlin eds., 2010) (discussing innovations in E.U. governance); Michael C. Dorf & Charles F. Sabel, *A Constitution of Experimentalist Governance,* 98 COLUM. L. REV. 267 (1998) (discussing Experimentalist Governance in the United States); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in American Public Law*, 100 GEO. L.J. 53 (2011) (exploring alternatives to the "command and control" style of public administration in the United States).

2. On pluralism in global and European governance, see Paul Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007) (exploring legal pluralism and methods for managing hybridity); Paul S. Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301 (2007) (discussing the New Haven School of International Law, Robert Cover's work and Koh's theory of transnational legal process); William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963 (2004) (arguing that international law is being transformed into a pluralist system); Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002) (exploring constitutional pluralism); Julio Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14 EUR. L.J. 389 (2008) (discussing legal pluralism and coming to

ance[3] describes practices that operate within a broadly pluralist structure of politics and law[4] consistent with the broad framework of complex interdependence developed 35 years ago in *Power and Interdependence*.[5] In the terms used in *Power and Interdependence,* state and non-state actors are both sensitive and vulnerable to the actions of others: there is mutual dependence, although it may be asymmetrical. There are multiple state and non-state actors, linked by multiple channels of contact. Direct force is not a usable instrument of power. There is no overarching international constitutional framework with institutionalized hierarchical relations between governance units or courts. There are areas of agreed authority, but on many issues authority is overlapping, contested and fluid; and there is no necessary teleological movement toward greater integration or formal constitutionalization. The concept of Experimentalist Governance helps us to understand one particular—and, we suggest, increasingly prevalent—set of ways in which complex interdependence has become institutionalized to cope with problems of uncertainty in which continued discord is widely perceived as costly to all participants. Experimentalist Governance represents a form of adaptive, open-ended, participatory, and information-rich cooperation in world politics, in which the local and the transnational interact through the

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terms with Maastricht-Urteil). *See generally* Sally E. Merry, *Legal Pluralism*, 22 Law & Soc'y Rev. 869 (1988) (reviewing the history and development of legal pluralism).

3. The concept of Experimentalist Governance will be defined and clarified more fully below in section I.C of this Article. Some of the differences and commonalities between the literature on "new governance" in Europe, and the literature on experimentalist governance are discussed in Gráinne de Búrca, *New Governance and Experimentalism: An Introduction*, 2010 Wis. L. Rev. 227 (2010), and in the other essays contained in the same symposium issue, Symposium, *New Governance and the Transformation of Law*, 2010 Wis. L. Rev. 227 (2010). For a useful discussion of the debates on the meaning of "new governance" in the European Union, see Adrienne Héritier and Dirk Lehmkuhl, *The Shadow of Hierarchy and New Modes of Governance,* 28 J. Pub. Pol'y 1 (2008), and Kenneth Armstrong, *The Character of EU Law and Governance: From "Community Method" to New Modes of Governance*, 64 Current Legal Probs. 179 (2011).

4. *See generally* Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law (2010) (exploring the alternative of postnational pluralism).

5. Robert O. Keohane & Joseph S. Nye, Jr., Power and Interdependence: World Politics in Transition (1977).

localized elaboration and adaption of transnationally agreed general norms, subject to periodic revision in light of knowledge locally generated.

Experimentalist Governance as we present it is an "ideal type" in the sense used by Max Weber.[6] Actual instances of governance may approximate to the ideal type even while none of them fully exemplifies it. Other governance practices occurring within the context of more conventional integrated international regimes, or in the relations between two more conventional international regimes, may also partake of some of the important elements of Experimentalist Governance even without including all of the elements we identify as necessary below. Peer review systems within the OECD, treaty-body monitoring within the U.N. human rights system, and transnational certification of environmental standards all have affinities to the fully-fledged Experimentalist Governance system embodying all five characteristics specified below. As the examples we discuss in this paper—the Inter-American Tropical Tuna Commission, the U.N. Convention on the Rights of Persons with Disabilities, and the Montreal Protocol ("Protocol")—illustrate, forms of Experimentalist Governance are already evident in various arenas of global governance. We elaborate on the idea of Experimentalist Governance and place it in relation to what we call "Modes One and Two," which are characterized respectively by comprehensive and integrated international relations on the one hand, and the proliferation of regime complexes and governance networks on the other. Though we consider a number of explanatory and normative issues, this paper aspires more to raise questions than to provide definitive answers.

A key feature of contemporary world politics that contributes to the growing difficulty of constructing comprehensive, integrated (Mode One) regimes is the increased diversity of interests and preferences among states whose consent is required for the operation of meaningful international regimes. Rapid economic growth in formerly poor countries has diffused power: The rich states of Europe, East Asia, and North America can no longer impose their will on others. On a variety of issues ranging from trade to intellectual property protec-

6. Max Weber, Economy and Society 19–22 (Gunther Ross and Claus Wittich eds., 1978).

tion and to climate change, developing countries have markedly different preferences from those of industrialized countries. We argue that this increasing diversity of preferences has played an important role in the shift in international governance regimes from Mode One to Mode Two, and that increasing uncertainty provides incentives for the development of Experimentalist Governance (Mode Three).

We also make some tentative normative observations. It may be too early in some cases to tell whether the instances of Experimentalist Governance operating in various global domains are functioning well and adequately addressing the global problems they were established to tackle. While their distinctive participatory, deliberative, locally-informed, and adaptive problem solving is normatively attractive, human institutions are easily distorted or corrupted; and unintended consequences are common. But we believe that Experimentalist Governance has the potential under appropriate conditions to be a constructive development, establishing relationships of legitimate authority by keeping the circle of decision making open to new participants, stabilizing expectations, and generating possibilities for effective and satisfactory problem solving in a non-hierarchical fashion. We set out the positive case for Experimentalist Governance in this paper without taking the position that all of its instances are likely to operate satisfactorily, or that the effects of any set of Experimentalist Governance practices will *necessarily* deliver positive results or be good in normative terms.

I. Three Modes of Governance

Experimentalist Governance is a relatively new, indeed incipient, form of transnational governance. To understand its significance, therefore, we must see it against the background of more established forms of global governance: the integrated international regimes of Mode One and the regime complexes and networks of Mode Two. Our use of the terms, "Mode One" and "Mode Two," in contrast to Experimentalist Governance, which we present as "Mode Three," may seem to suggest a sequence of development; but, there is no implication either that Experimentalist Governance necessarily *replaces* Mode One or Mode Two Governance or even that it necessarily comes later in time. Indeed, two of our examples of

Experimentalist Governance date originally from the 1980s; and more generally, Experimentalist Governance in some issue areas may be complementary to, rather than a substitute for, other modes of governance. Nor do we argue that these three modes are equivalent or directly comparable. The most familiar of the three modes is likely to be the formally established Mode One international institutions and systems, while the evolutions we describe as Mode Two and Mode Three arrangements in many cases emerge from, build on, supplement, or complement these traditional and coherent integrated regimes. Our category of Mode Two institutions on the other hand is broad, encompassing many kinds of networked arrangement and regime complexes, whereas our Mode Three category of Experimentalist Governance is narrower in scope and is also likely to be least familiar to readers.

A. *Mode One: Integrated International Regimes and Relations*

The first mode of governance involves the creation of comprehensive and integrated international regimes. Attempts at creating such institutions were made in the years after World War I, but only came to fruition with the creation of the United Nations and its specialized agencies, along with the International Monetary Fund (IMF), World Bank, and General Agreement on Tariffs and Trade (GATT), at the end of World War II. The Bretton Woods Monetary Regime (1958-1971) is a classic Mode One institution, dominated by states with clear rules for exchange rates and changes thereof.[7] The other prototypical international regime was the GATT, which was later transformed into the World Trade Organization (WTO), but regimes were created also for oceans governance, air transport, food safety, and a wide variety of other issue areas.[8]

Mode One international regimes can be reasonably well-characterized in terms of a principal-agent model: the leading nation-states or coalitions of states can be considered as principals who create international regimes to act as their agents in addressing and solving what are considered to be well-defined

7. *See* KEOHANE & NYE, *supra* note 5, at 78–79.

8. *See, e.g.*, INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983) (containing essays exploring the major arguments surrounding international regimes).

governance problems arising from interdependence. The states believe that they understand the problems clearly and they define them in advance. Their resolution is delegated to the agents, the international organizations, to resolve according to specific rules that they are mandated to follow.

The early Mode One institutions underwent both growth and crisis during the first 40 years after World War II.[9] They seemed to undergo a revival from the mid-1980s until the mid-1990s, marked by the negotiations leading to the formal launch of the WTO on January 1, 1995, which was much more comprehensive and integrated than the earlier GATT launched in 1947. The Rio Conference in 1992, which established the U.N. Framework Convention on Climate Change (UNFCCC), exemplified the drive to establish new issue-specific international regimes, stimulating discussion of how such a climate regime would be linked to regimes for international trade, forestry, and transport.

The construction of integrated and comprehensive international regimes is at the heart of what we call Mode One. International regimes are devised in order to provide governance for areas of increased interdependence, facilitating coordination by reducing the costs of making and enforcing agreement and generating information about current and likely future actions.[10] These formal rules are rarely determinative: On the contrary, powerful states can use the threat of exit to secure acquiescence by others to actions that they take, contrary to the formal rules, to pursue their own interests on issues important to them.[11] But for most states almost all of the time and for powerful states most of the time, the formal rules shape feasible actions. As we will see, however, over time and in certain contexts, the extension by these international organizations of their mandates and the expansion of their powers beyond what could plausibly be accommodated within a principal-agent model of accountability have led to the emergence of novel forms of governance and administrative law.

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9. *See, e.g.*, ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984).

10. *See generally* KEOHANE & NYE, *supra* note 5, at 63–162 (focusing on international regimes in the areas of oceans and money).

11. *See* RANDALL W. STONE, INFORMAL GOVERNANCE: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL ECONOMY 79 (2011).

The largely state-centric nature of these international regimes does not imply that they can be understood purely by focusing on states as units. The domestic politics of powerful states must also be understood—in a transnational context—if we are to understand the formation and evolution of international regimes.[12] States, furthermore, are not necessarily united; different sub-units of the same state may well have different interests with respect to particular issues, and may develop political strategies entailing active participation in transgovernmental coalitions and networks involving sub-units of other governments, sometimes in opposition to transgovernmental networks that include different sub-units of the same government.[13]

Looking back, it is easy to see the political conditions that facilitated the establishment of coherent international regimes, both in the immediate post-World War II period and just after the Cold War ended: namely, the concentration of power either in one state or a small number of states with similar interests. Between 1944, when the World Bank and IMF were created at Bretton Woods, and 1973, when the first oil crisis shook the confidence of the West, the United States had such dominance among Western democracies that it could exercise what has been called "hegemonic leadership."[14] Hegemonic leadership did not mean that the United States dictated terms—on the contrary, it often had to revise its initial plans and make concessions to accommodate other states—but it did mean that it set the agenda and that nothing substantial could be agreed without its consent. The United States was

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12. *See generally* Stephan Haggard and Beth A. Simmons, *Theories of International Regimes*, 41 INT'L ORG. 491 (1987) (outlining a research program with greater focus on how "domestic political forces determine patterns of international cooperation"); HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS (1997) (arguing that "domestic politics and international relations are inextricably interrelated"); Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997) (concluding that "[r]elaxing the assumption of unitary state behavior would support a range of 'two-level' hypotheses about the differential ability of various domestic state and societal actors to pursue semiautonomous transnational activities").

13. *See, e.g.*, Robert O. Keohane & Joseph S. Nye, Jr., *Transgovernmental Relations and International Organizations*, 27 WORLD POL. 39 (1974); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 12–15 (2004).

14. *See* KEOHANE, *supra* note 9, at 139–41.

clearly the most influential actor in creating institutions such as NATO, the GATT, the World Bank, and the IMF and in shaping their practices. The United States' enormous influence was even evident in areas without such institutions, such as the oil trade.

There was a post-hegemonic pause in integrated regime construction during the 1970s and 1980s, but this pause was followed by the creation of the World Trade Organization (WTO), which began operations at the beginning of 1995. Creation of the WTO was possible because, before the rapid economic growth of large developing countries such as China, India, and Brazil, the global political economy was dominated by the United States and the European Community, as the European Union then was called. It took these two entities eight years to agree on the terms of the WTO, but when they had done so, they compelled other states' acceptance by the simple expedient of formally abolishing the GATT and requiring other states to accept WTO rules or be placed under restrictive 1930s tariff disciplines.[15]

By the end of the 1990s, the disappearance of the Soviet threat and the expansion and increasing institutionalization of the European Community had made Europe a more coherent and independent actor in world politics. During the 1990s, the European Community, now the European Union, had begun to conclude major international treaties—notably the Land Mines Treaty and the Rome Statute establishing an International Criminal Court. Human rights agreements such as the Convention on Torture and the Convention on the Rights of the Child were also instituted and strengthened during this period, gaining almost universal membership.[16] There seemed to be hope for the further institutionalization of international regimes—following the pattern in trade—and for building systematic connections among them. However, as we will see, it was not long before this architectonic view of global governance through coherent institutions ceased to be plausible.

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15. *See* Richard Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002).

16. *See* BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS 256–348 (2009).

B. *Mode Two: Regime Complexes and Orchestrated Networks*

From the mid-1990s on, patterns of institutionalization changed. Newly constructed international regimes less often received universal support: For instance, the Land Mines Treaty and the Rome Statute establishing the International Criminal Court were pushed to fruition largely by European states, without support from the United States. Efforts to make new rules for international trade under the auspices of the WTO collapsed; a sustained effort to build a comprehensive climate change regime, manifested by the creation of the U.N. Framework Convention for Climate Change (UNFCCC) at Rio in 1992, also failed. The first indication of this failure came with the Berlin Mandate in 1995, which exempted developing countries from requirements to limit their emissions of greenhouse gases; later, the United States refused to ratify the Kyoto Protocol and Canada, having ratified, failed to comply with the emissions limits that it had accepted. In some cases counter-regimes were established as alternatives to, and platforms from which to influence the development of existing international organizations. The Biosafety Protocol, for example, was agreed by international environmental NGOs, several European states, and some developing countries to establish the legitimacy of "precautionary" regulation of genetically modified organisms, as a counterweight to WTO rules then presumed to allow for restrictions in the trade of a product only when scientific analysis conclusively demonstrated that it was hazardous.[17]

The period after 1995 therefore witnessed the stagnation or collapse of attempts to develop new comprehensive and integrated international regimes, the fragmentation of established ones, and occasional overt challenges to their authority. This period also featured a departure from hierarchy as a structuring principle of international organizations, and the spread, in its place, of novel forms of networked information exchange. This "new world order," as Anne-Marie Slaughter has described it, is best depicted as a set of networks among independent and interdependent entities—not just states but sub-units of states and non-state actors.[18] In a global society

17. *See* KRISCH, *supra* note 4, at 190–219.

18. *See* SLAUGHTER, *supra* note 13 (discussing the need to recognize interconnected networks of state and non-state actors that must be mobilized to solve present international issues).

linked by the internet and the social media derived from it, the *connections between entities* rather than the entities or organizations themselves are transforming relationships in world politics. For example, entities now often have authority because other actors regard them as legitimate rule-makers and therefore defer to them. Jessica Green has developed the concept of "entrepreneurial authority" to refer to the construction of authority by civil society actors without formal authorization by or delegation from states.[19] One prominent instance of entrepreneurial authority is the Forest Stewardship Council (FSC), which was established by civil society organizations after the failure of inter-state negotiations made it clear that there would be no comprehensive forestry regime.[20] The FSC does not have authority over states, but its rules are influential and are followed particularly by firms that seek certification as pursuing sustainable forestry practices.

Some emergent authorities are "orchestrated," in the sense that they are supported and coordinated by existing (often Mode One) international organizations, seeking to extend governance beyond the point of state agreement or to deepen the application of rules by involving other organizations and actors in their construction.[21] One increasingly common form of authority, whether orchestrated by multilateral institutions or originating in entrepreneurship by civil society organizations, is the institution of public-private partnerships. And indeed, since the 1990s, public-private partnerships have proliferated and international organizations have increasingly

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19. Jessica Green, Private Actors, Public Goods: Private Authority in Global Environmental Politics Politics (2010) (unpublished Ph.D. dissertation, Princeton University) (on file with author); Jessica Green, *Order out of Chaos: Public and Private Rules for Managing Carbon*, 13 GLOBAL ENVTL. POL. (forthcoming May 2013).

20. *See* FOREST STEWARDSHIP COUNCIL, https://us.fsc.org/our-history.180.htm (last visited Mar. 6, 2013). For criticism of the Forest Stewardship Council, see generally FSC-WATCH, www.fsc-watch.org (last visited Mar. 6, 2013).

21. *See* Kenneth N. Abbott, *Public-Private Sustainability Governance*, 88 INT'L AFF. (SPECIAL ISSUE) 543, 561 (2012); Kenneth N. Abbott & Duncan Snidal, International Regulation without International Government: Improving International Organization Performance through Orchestration (June 1, 2007) (unpublished manuscript), *available at* http://ssrn.com/abstract=1487129.

orchestrated new forms of authority involving non-state actors.[22]

The inertia of established institutions was a precondition for much of this innovation. International regimes are difficult to change: Changing rules generates losers as well as winners, and binding majority voting is rare. So, even as social and political circumstances change, often at a rapid rate, regimes neither disappear nor are radically reformed. Instead, their rules persist but—leaving aside happy accidents when old routines serve new environments—they become increasingly obsolete. This process generates significant gaps between the capabilities of existing institutions and the demands for collective action of some member states or of transnational or transgovernmental coalitions. In our heuristic model Mode Two, institutions respond to this gap. Formerly coherent international regimes are unable, when state preferences are diverse, to cope with rapid changes. The result may be the formation of other institutional arrangements not tightly linked to existing regimes, or deadlock, if states are unable to agree on a unified set of rules and practices.

Institutional inertia and the dispersion of power and interests have thus led to the emergence of a variety of governance arrangements, including regime complexes and various internationally "orchestrated" governance arrangements.[23] A regime complex has been defined in the pioneering article on the subject as "an array of partially overlapping and non-hierarchical institutions governing a particular issue area."[24] Regime complexes have been identified in the areas of climate change, energy, intellectual property, and anti-corruption.[25]

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22. Liliana Andonova, *Public-Private Partnerships for the Earth: Politics and Patterns of Hybrid Authority in the Multilateral System*, 10 GLOBAL ENVTL POL. 25, 25 (2010).

23. *See* Kenneth W. Abbott, P. Genschel, D. Snidal & B. Zangl, International Organizations as Orchestrators (Aug. 31, 2010) (unpublished manuscript), *available at* http://stockholm.sgir.eu/uploads/SGIR%20Stockholm%20100901.pdf.

24. Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277, 279 (2004).

25. *See, e.g.*, Karen Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7 PERSPECTIVES ON POL. 13 (2009) (defining regime complexity); Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSPECTIVES ON POL. 7 (2011) (discussing regime complexity in the case of climate change); Jeff D. Colgan, Robert O. Keohane & Thijs van

Further, one could interpret the partial fragmentation of trade arrangements, with the proliferation of bilateral and regional deals, and the fragmentation of monetary arrangements, as indicating that regime complexes characterize these issue areas as well. We observe that regime complexes, involving various institutions (often including states, sub-state units, international organizations, civil society organizations, private actors, and others) many of which are linked non-hierarchically to one another, have increasingly replaced more tightly integrated (Mode One) international regimes.

The interstate climate change regime, in Figure 1, illustrates one instance of what we are calling Mode Two institutions. For a more complete picture, private actors should also be included. The circle is intended to indicate the institutions, clubs, or networks that are focused most directly on issues of climate change.

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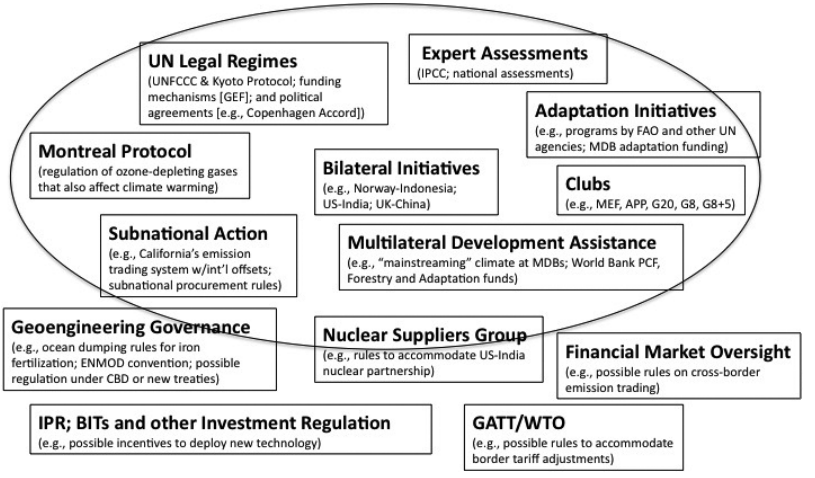
de Graaf, *Punctuated Equilibrium in the Energy Regime Complex*, 7 REV. INT'L ORGS. 117 (2012) (describing the history of the energy regime complex); Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, YALE J. INT'L L. 1 (2004) (arguing that the "expansion of intellectual property lawmaking into . . . diverse international fora is the result of a strategy of a 'regime shifting' by developing countries and NGOs that are dissatisfied with . . . TRIPS"); Kevin Davis, *Does the Globalization of Anti-corruption Law Help Developing Countries?* (N.Y. Univ. Law and Economics Working Papers, Paper No. 203, 2009) (examining the impact that the transnational anti-corruption regime has had on developing countries).

FIGURE 1. THE REGIME COMPLEX FOR CLIMATE CHANGE.



Source: Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSPECTIVES ON POL. 7, 7-23 (2011).

Our Mode Two category therefore includes regime complexes (some of whose components may pursue divergent interests), as well as networks and other novel institutions that arise from entrepreneurial authority, or from non-hierarchical arrangements that are orchestrated by existing international organizations. These institutions are networked and involve connections between independent entities. They have little in common with the integrated regimes of Mode One that answer to sovereign states.

Some semblance of continuity and normalcy is however maintained by the diffusion in Mode Two institutions of various forms of what has been termed "Global Administrative Law,"[26] a bundle of principles, rules, and practices derived from or analogous to principles of domestic administrative law, including due process, proportionality, judicial review, and transparency. The spread of such principles and practices reflects a broadly shared concern to protect the values of the

26. *See* Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005). *See generally* Global Administrative Law Project, INST. FOR INT'L LAW & JUST., http://www.iilj.org/GAL/ (last visited May 18, 2013) (providing an overview of the extensive literature that has grown up around this school of thought).

rule of law associated with the democratic nation state, especially by means of the procedural devices commonly used to induce domestic administrators to "listen" to the objections of those subject to their decisions and generally to remain faithful to the statutory mandates authorizing their action. But as Nico Krisch, one of those scholars who initially called attention to the significance of Global Administrative Law, has observed, these safeguards presuppose the existence of a unitary (democratic) sovereign or legislator; their utility as instruments of oversight depends in substantial measure on the backstop of elections in which citizens hold their representatives accountable for the way they call administrators to account. There is of course no unitary sovereign, much less an electoral backstop in the pluralist settings of global governance. Global Administrative Law may thus under some circumstances make international organizations responsive enough to diverse stakeholders to ensure their legitimacy; but its overall effectiveness as a safeguard of the rule of law is open to question, at least to the extent that it hews in practice to the domestic administrative law that inspired it.[27]

But in an increasingly wide range of cases, international organizations, to be effective and legitimate, are going beyond the accommodations of Mode Two and the procedural protections of traditional administrative law, and adopting organizational forms that allow state and non-state actors to learn, accountably, from their different perspectives how to respond to problems that none understands sufficiently to address alone.

C. *Mode Three: Experimentalist Governance*

Since the distinctive feature of this Article is its focus on Experimentalist Governance, we need to be quite specific about what we mean by this term. *Experimentalist Governance describes a set of practices involving open participation by a variety of entities (public or private), lack of formal hierarchy within governance arrangements, and extensive deliberation throughout the process of decision making and implementation.* The ideal-type of deliberation within an Experimentalist Governance regime entails initial reflection and discussion based on a broadly shared perception of a common problem, resulting in the articulation of a frame-

27. Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247 (2006).

work understanding with open-ended goals. Implementation of these broadly framed goals is then left to lower-level actors with knowledge of local conditions and considerable discretion to adapt the framework norms to these different contexts. There is continuous feedback from local contexts, with reporting and monitoring taking place across a range of contexts. Outcomes are subject to peer review, and goals and practices are periodically and routinely evaluated and reconsidered in light of the data gathered, the results of the peer review, and the shared purposes. Experimentalist Governance regimes frequently operate in the shadow of a background "penalty default" that penalizes non-cooperation, typically by substantially reducing the parties' control over their fate, and thus inducing re-evaluation of the relative benefits of joint efforts.

Consequently, five crucial identifying features of Experimentalist Governance are as follows:

> 1. Openness to participation of relevant entities ("stakeholders") in a non-hierarchical process of decision making;
> 2. Articulation of a broadly agreed common problem and the establishment of a framework understanding setting open-ended goals;
> 3. Implementation by lower-level actors with local or contextualized knowledge;
> 4. Continuous feedback, reporting, and monitoring; and
> 5. Established practices, involving peer review, for revising rules and practices.

As we have noted above, various new governance arrangements, including several of the pluralist governance systems we have categorized as Mode Two, meet many of our criteria for Experimentalist Governance. For example, transgovernmental networks and public-private partnerships such as the Forest Stewardship Council are typically non-hierarchical and open to fairly wide participation; they also provide for the local implementation and adaptation of transnationally-agreed framework goals.[28] But only arrangements that meet *all five* of the

28. *See* Christine Overdevest & Jonathan Zeitlin, *Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector*, REG. & GOVERNANCE 9–11 (2012) (discussing the Forest Stewardship Council's experimentalist features).

criteria that we have specified constitute Experimentalist Governance in our sense. The concept of Experimentalist Governance is therefore more demanding than the broader category of pluralistic governance processes outlined in Mode Two. We emphasize, however, contrary to some descriptions of "new governance" systems, that binding legal obligations or sanctions for certain aspects of non-performance are not necessarily incompatible with an Experimentalist Governance regime.

Mode Three or Experimentalist regimes regularize and officialize many of the practices that Mode Two institutions undertake sporadically. Like Mode Two institutions, experimentalist institutions connect a wide range of state and nonstate actors in non-hierarchical configurations that are not simply an informal adjunct or complement to the closed and rule-based regimes of Mode One. But whereas Mode Two gapfilling efforts may be thought of as ad hoc responses to unusual circumstances, the Experimentalist institutions that we describe as Mode Three are premised on the understanding that uncertainty is a persistent feature of some issue areas and that to respond effectively, institutions must enable participants to learn continuously to redefine the problems they face in the very process of solving them.

Such experimentalist arrangements institutionalize the kind of consultation and associated exercise of discretion that, when exercised informally, are characteristic of transgovernmental networks. Peer review in the ideal-type of Experimentalist institutions is not, however, as in many transgovernmental networks, merely a matter of occasional exchange of views among colleagues, part information-gathering, part coalition-building. Rather, it is a mechanism both for learning systematically from diverse experience—diverse because each "local" actor is interpreting the general problem and corresponding solutions in a particular context—and for holding actors accountable in the sense of determining whether their interpretations and solutions are compelling or, at a minimum, defensible given the reactions of peers in similar circumstances.

Similarly, experimentalist institutions should, ideally, regularize the kinds of organizational innovation undertaken by Mode Two entrepreneurs and orchestrators. A common feature of Mode Two governance arrangements is that some subset of an existing organization or regime with jurisdiction in a domain tries to extend its problem solving capacity either by

creating a novel institution or expanding its jurisdiction. Extending problem solving capacity may involve creating a public-private partnership—to inform and so augment the capabilities of the incumbents. Expanding jurisdiction may involve creating new, competing organizational actors with a novel understanding of the domain, its problems, and possible remedies. The role of the entrepreneurial or orchestrating institutions is thus to instigate, from time to time, in the face of persistently unmet needs, the exploration of institutional possibilities in the domain, and, where advisable, to encourage the creation of new organizations.

But this kind of occasional or ad hoc practice within Mode Two arrangements is, in effect, what the guiding entities within an experimentalist system—constituting the "center" of such a system—should routinely do. Given that the overarching purposes of Experimentalist Governance institutions are cast as a general framework, local units are then authorized or obligated to *contextualize* these purposes in applying generally agreed norms and practices to local contexts. Implementation of the institution's goals will frequently involve exploration of unforeseen particulars, the discovery both of local dead ends and of novel, generalizable solutions, some of which may indeed raise questions about the originally agreed framework's goals and ends. In organizing periodic, peer review of local results, the central nodes of an Experimentalist Governance system bring such findings to light, and then have responsibility for instigating the organizational reforms that they suggest. In this sense Experimentalist institutions should routinely orchestrate their own reform.

Put another way, the emergence of Experimentalist institutions completes and makes manifest a break with familiar forms of principal-agent accountability. Mode One fits clearly within a principal-agent model: Powerful states—the principals—create international regimes—the agents—to solve well defined governance problems arising from interdependence. The regimes are rule-based. Even though the rules officially afford agents some administrative discretion, and informal consultation affords them further room for maneuver at the margins of the officially permissible, in the end there is a set of actors ("principals" in this literature) authorized to monitor

agents' behavior and impose sanctions when this behavior deviates from prescribed rules.[29]

In Mode Two, the fragmentation of authority means that no single set of principals (whether states or others) is able in a comprehensive way to sanction behavior by agents. In the regime complex for climate change, for instance, there are sharp differences over which states should bear responsibility for limiting emissions of greenhouse gases; the principals are divided in ways that prevent coherent principal-agent relationships from developing. The creation of public-private partnerships is similarly a joint confession by both parties that each is incapable of acting unilaterally: Neither can issue instructions except in consultation with the other. These breaches of the strict principal-agent relationship may be inconspicuous but they are nonetheless significant.

Going beyond this point, Experimentalist institutions, as we will see below, routinize patterns of accountability that are different from those underpinning the standard principal-agent model. Uncertainty is increasingly important. Mutual monitoring and peer review, involving elaborate processes of consultation that are horizontal rather than vertical in structure, replace established hierarchical authority as the basis for accountability.

Another way to think about our typology of three modes of governance is to envisage them as arrayed on two dimensions of variation. The first captures the degree of rule coherence. Mode One institutions cluster at the coherent pole of this axis: They aim to be consistent with one another and as comprehensive or all-inclusive in their domain as possible. Mode Two institutions cluster at the incoherent pole: They make no pretense of regulating their entire domain and accept that the rules they make may conflict with those made by other institutions operating in the same mode.[30] The second dimension captures the actors' beliefs regarding the degree of uncertainty they face: whether they have sufficient knowledge of the issue area to have clearly defined preferences over policies rather than simply over outcomes. Mode One actors clus-

29. *See* Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005).

30. *See generally* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 150–94 (1990) (discussing rule coherence).

ter at the low-uncertainty pole, reasonably confident in their ability to establish workable policies ex ante, on the basis of current knowledge. Less confident, Mode Two actors will occupy the middle range, while Experimentalist actors, aware of the uncertainty they face, collect at the opposite extreme. Table 1 illustrates this point.

TABLE 1. MODES ONE, TWO AND THREE: UNCERTAINTY AND COHERENCE.

	Uncertainty		
Coherence	*Low*	*Medium*	*High*
High	Mode One		
Low		Mode Two	Mode Three

The Experimentalist actors know broadly what outcomes they desire—such as a cleaner environment, protection of dolphins and sustainable tuna fishery, or arrangements that include and empower disabled people while respecting their autonomy; but initially they are uncertain about how to obtain these objectives. This difference is reflected in a fundamental difference in the understanding of what rules are. Mode One and sometimes Mode Two institutions aim to fix precise, binding, and definitive rules to give effect to their policy preferences. Experimentalist institutions, aware of current and perhaps persistent limits on their foresight, set provisional goals and establish procedures for periodically revising them on the basis of peer review of the diverse experience of the actors attempting to realize them. Because Experimentalist institutions encourage local autonomy and contextual responses to diverse situations, they will tend towards the "incoherent" pole of the integration-fragmentation dimension; but this diversity, in addition to accommodating the particulars of local circumstance, serves broad, joint exploration of possibility. It is not a sign of clashing, irreducibly plural understandings of the world. As another way of schematically summarizing this discussion, we present Table 2, which succinctly defines each Mode of Governance, indicates the major period in which such entities have been created (without implying a strict time demarcation

or a linear progression), and provides three prominent examples of each Mode.

TABLE 2. THREE MODES OF GOVERNANCE.

Governance Mode:	Definition:	Major periods:	Examples:
One.	Comprehensive, integrated international regimes	1945-	Bretton Woods Monetary System, Air Transport Regime, WTO
Two.	Regime complexes: multiple, non-hierarchical sets of institutions	1995-	Regime Complex for Climate Change, Public-private health regime complex
Three.	Experimentalist Governance: institutionalized network patterns	1995-	Inter-American Tropical Tuna Commission, UN Convention on the Rights of Persons with Disabilities, Montreal Protocol on Substances Depleting the Ozone Layer

To illustrate how Experimentalist Governance works in practice, we now discuss three examples of this mode of governance: the Inter-American Tropical Tuna Commission, the U.N. Convention on the Rights of Persons with Disabilities, and the Montreal Protocol on Substances Depleting the Ozone Layer.

II. EXPERIMENTALIST GOVERNANCE IN ACTION: THE INTER-AMERICAN TROPICAL TUNA COMMISSION AS AN EXPERIMENTALIST REGIME

The purpose of the Inter-American Tropical Tuna Commission (IATTC) is to maintain tuna stocks in the Eastern Tropical Pacific while minimizing the death of dolphin by-catch.[31] Its origins and organization exemplify the characteristically experimentalist co-development of organizational structure, problem definition, and solutions (and the changes in

31. *See* INTER-AMERICAN TROPICAL TUNA COMMISSION, http://www.iattc.org/HomeENG.htm (last visited May 18, 2013).

the parties' understanding of their interests and objects which all this supposes) under the continuing influence of background penalty defaults in the form of draconian trade sanctions.[32]

The regulatory problem arose because in the Eastern Tropical Pacific, herds of dolphins accompany schools of tuna swimming below them. Starting in the late 1950s large fishing vessels began to use the dolphin herds, easily visible on the surface, to locate tuna in international waters, and then encircle the school with huge purse seine nets which draw shut at the bottom—a technique known as dolphin sets. Dolphins do not abandon the tuna and, absent precautions, drown when the fish are hauled aboard.

Public concern about dolphin mortality contributed to pressure in Congress for passage of the Marine Mammal Protection Act (MMPA) in 1972. This legislation obligated the U.S. tuna fishing fleet to reduce serious harm to dolphins to "insignificant levels approaching a zero . . . rate."[33] The legislation also required placement of observers on board vessels to ensure compliance with equipment and practice requirements, and with fleet-wide mortality limits.[34] The Act additionally banned imports of tuna catch that involved "incidental kill or incidental serious injury of ocean mammals in excess of United States standards."[35]

As part of its efforts to enforce implementation of the MMPA internationally, the National Marine Fisheries Service, an agency of the National Oceanic and Atmospheric Administration, in consultation with the Department of State, sought the collaboration of the IATTC. The IATTC was founded as an intergovernmental fisheries management commission by coastal states in 1948 and had, in the mid-1970s, long-standing relations to the key actors in the industry. But the IATTC also had the familiar, tragedy-of-the-commons problems of deep-sea fisheries, where, in the absence of property rights, each user has an incentive to exploit the resource before others do,

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32. This case study draws significantly on the account of Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1 (1999).

33. Marine Mammal Protection Act §101, 16 U.S.C. § 1371(a)(2) (1972).

34. *Id.* §114(e).

35. *Id.* §101(a)(2).

with overfishing as the result. This combination of capacities and debilities (exacerbated by the need for external support in enforcing quotas) made the IATTC the forum of choice for the U.S. dolphin protection initiative. Beginning in 1976 it organized programs to place observers on tuna vessels (at the IATTC's expense, and initially without enforcement powers). The observers were to collect data on fishing techniques and dolphin mortality, estimate trends in dolphin populations, investigate possibilities for reducing mortality, and disseminate information regarding best practices with dolphin sets to vessel captains and crews. But participation in the crucial observer operations remained minimal until the MMPA was amended in 1984 to require exporters to demonstrate compliance with a regulatory system "comparable" to that in the United States, a requirement that the Fisheries Service determined would be automatically met by participation in IATTC observer program.

Broad participation in the observer program produced a flood of information that reshaped existing understandings of both the problem and the solution. Between 1985 and 1986, the first year of reliable observation, the estimate of dolphin mortality caused by the non-U.S. fleet increased from 40,000 to 112,000 dolphins. It was also discovered that dolphin mortality could be very significantly reduced by using simple technologies for releasing dolphins from closing nets, and by avoiding certain bad practices, such as setting nets on unusually large herds of tuna or dolphin, in new areas, beginning at sundown and continuing into the dark, in the presence of strong sub-surface currents, or with faulty gear.[36] In the years following these discoveries, the IATTC systematically interviewed the fishers to learn what techniques did and did not work, and diffused this information to the fleet in workshops, thus becoming "a fleet-wide clearinghouse of information on dolphin mortality reduction gear, techniques, and experience."[37]

But promising new practices were not implemented until there was a credible threat of a penalty default, once more in the form of trade sanctions. Public awareness of the disparities in mortality rates between the U.S. and foreign fleets led to

36. *See* Parker, *supra* note 32, at 28.
37. *Id.* at 28–29.

further 1988 amendments of the MMPA that placed an embargo on imports of Eastern Tropical Pacific tuna from any country without a precisely defined regulatory program closely keyed to the latest U.S. practice *and* a kill rate "comparable" to that of the U.S. fleet.[38] Thus qualifying regulatory programs had to, for example, prohibit "sundown sets," as did U.S. law; foreign fleet kill rates, after a one-year grace period, could not exceed the U.S. rate by more than 25 percent; and observers had to accompany all foreign as well as U.S. vessels. After passage of the amendment there was a dramatic increase in the frequency of IATTC dolphin mortality reduction seminars and the number of attendees.[39]

This process of both ensuring compliance with the existing program and learning to improve mortality-reducing practices by monitoring the actions of individual vessels and systematically disseminating the findings was codified in the 1992 La Jolla Agreement signed by Mexico, Venezuela, the United States, and other coastal flag states, with the support of many NGOs.[40] The Agreement committed signatories to an International Dolphin Conservation Program that would progressively reduce dolphin mortality in the Eastern Pacific Ocean. Overall dolphin mortality in the fishery was to be capped by 1999 at less than 5,000, with each "qualified vessel" allocated a pro rata share of the total. Every vessel capable of deploying dolphin sets was required to carry an observer to monitor dolphin mortality, and half the observers were to be nominated by the IATTC. The Agreement also created an Implementation Review Panel composed of IATTC staff, six delegates from signatory states, and two representatives each from industry and NGOs. The 1992 La Jolla Agreement was officially non-binding, but all signatories have complied with it, and data show that there has been a reduction of mortality rates to levels below the best previously achieved by the U.S. fleet. Despite U.S. Congressional legislation to ban imports of tuna caught using dolphin sets, the La Jolla Agreement survived as fleets based primarily in Mexico and Venezuela sold their catch to Latin American and E.U. markets whose con-

38. *Id.* at 30.
39. *Id.* at 31.
40. *Id.* at 47.

sumers are environmentally conscious but not insistent on complete protection of dolphins.[41]

The IATTC regime exhibits the five features that define experimentalist regimes. Though the regime was created at the instigation of the United States, *participation was open* to those who identified themselves as relevant stakeholders: NGOs (some of which played a crucial role in achieving the La Jolla Agreement), fleet owners and crews, and flag states. The initial *goals* of the regime—preservation of Eastern Tropical Pacific tuna stocks and protection of dolphins—were *broad and open ended* (no one had precise ideas of how to accomplish either) and their relation to one another unknown. Methods for achieving these goals, and a clarification of the trade-offs involved in their pursuit, were only established by *continuous monitoring and reporting* of implementation of best current practices by lower-level actors—the on-board observers. That is, decision making was not hierarchical: It responded more to local experience than to the prior preferences of major states. Indeed, the La Jolla Agreement was negotiated to institutionalize the regime without relying on the support of the U.S. review of local implementation, and the elaboration of proposals

41. The success of the La Jolla Agreement is all the more striking because in the years immediately preceding it (and following the discovery of the high mortality rate of foreign fleets), Earth Island, a U.S.-based NGO, had campaigned successfully among canners and in Congress for complete protection of dolphins through an outright ban on tuna harvested by dolphin sets; only tuna caught by other techniques could be labeled "dolphin free" and imported into the United States. But, as had long been known, alternative fishing methods spared dolphin at the cost of ensnaring large numbers of juvenile tuna, thus reducing the reproductive capacity of the fishery and speeding depletion of stocks. The campaign divided the movement to regulate the fishery, with environmental groups including The World Wildlife Fund, Greenpeace, and The Environmental Defense Fund joining the IATTC in taking an "environmental" perspective that gave priority to defense of the whole ecosystem, while Earth Island and its allies in Congress (given a free hand by the migration of much of the U.S. fleet to skipjack fisheries in the Western Pacific) made protection of dolphins their exclusive goal. *See* Parker, *supra* note 32. In recent proceedings brought before the Appellate Body by Mexico (which was compliant with the La Jolla agreement) against the United States in July 2012 (Tuna II), the labeling requirement imposed by the United States was found to be discriminatory and unjustified. Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 299, WT/DS381/AB/R (May 16, 2012).

for improvement was organized by the IATTC. As a result of this *continuous monitoring*, emerging rules and practices were subject to *revision through processes of peer review*. The interplay of on-board observation and concerted evaluation of results by the IATTC was indispensible to defining the scope of the problem, in identifying a general approach to a solution, and improving the techniques for implementing it.

Yet these processes of Experimentalist Government were by no means purely consensual and free from the constraints and dynamics of power. On the contrary, penalty defaults, in the form of trade sanctions that threatened fleets from noncompliant countries with loss of the U.S. market for tropical tuna, were indispensible both to the creation of the monitoring regime and to the broad implementation of the measures it suggested. Indeed, the threat of trade sanctions to induce deliberative formation of regimes has become a common device for establishing Experimentalist international organizations. Experimentalist Governance in such circumstances clearly takes place within the shadow of power and against a backdrop of coercive alternatives.

III. The Regime of the U.N. Convention on the Rights of Persons with Disabilities as an Emergent Experimentalist Regime

Although the domain of human rights protection may at first sight appear an unlikely candidate for Experimentalist Governance,[42] and many other human rights treaties do not operate in a particularly experimentalist way, the U.N. Convention on the Rights of Persons with Disabilities (CRPD) includes many provisions characteristic of an experimentalist system.[43] Each of the five features of experimentalism we have

42. *See* Gráinne de Búrca, *EU Race Discrimination Law: A Hybrid Model?*, *in* Law and New Governance in the EU and the US 97 (Gráinne de Búrca & Joanne Scott eds., 2006); Gráinne de Búrca, *New Modes of Governance and the Protection of Human Rights, in* Monitoring Fundamental Rights in the EU 25 (Philip Alston & Olivier De Schutter eds., 2005).

43. *See* Gráinne de Búrca, *The European Union in the Negotiation of the U.N. Disability Convention,* 35 Eur. L. Rev. 174 (2010) (exploring the E.U.'s role in the drafting of the Convention on the Rights of Persons with Disabilities and its impact or otherwise on the experimentalist nature of the Convention). For a reading of the U.N. Convention on the Elimination of Discrimination against Women (CEDAW) which shares many of the understandings of ex-

outlined above is present in the architecture of the regime established in 2008 when the CRPD came into force.

In some ways the CRPD is similar to conventional international human rights treaties. It sets broad goals (e.g. promoting and ensuring full and equal enjoyment of all human rights and fundamental freedoms of all disabled persons), and follows these with a series of eight overarching general principles: respect for dignity, full participation and inclusion, non-discrimination, respect for difference, equal opportunity, accessibility, gender equality, and respect for the evolving capacities of children.[44] These in turn are followed by an extensive series of positive and negative obligations on states to ensure the full realization of the rights of disabled persons.[45]

However, a number of more unusual provisions and features of the CRPD add significantly to its experimentalist character.[46] Examples of these novel provisions are: (i) the central role accorded to civil society organizations—in this case mainly disabled persons' organizations (DPOs), other NGOs, and national human rights institutions (NHRIs)—in all aspects of the Convention's drafting, implementation, decision making, monitoring, and operation; (ii) a specific provision requiring *national* implementation and monitoring, with a central role for national institutions, to complement the more traditional provisions on international monitoring; (iii) an obligation on states to collect relevant data; and (iv) a provision for the holding of a substantive annual conference of the parties. Other features of the CRPD also resonate with the premises of Experimentalist Governance, in particular the open-ended and flexible nature of many of its provisions.[47]

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perimentalism, see Judith Resnik, *Comparative (In)equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production*, 10 INT'L J. CONST. L. 531 (2012).

44. U.N. Convention on the Rights of Persons with Disabilities, art. 1, 3, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD].

45. *Id.*, art. 4.

46. *See, e.g.*, Frédéric Mégret, *The Disabilities Convention: Towards a Holistic Conception of Rights*, 12 INTL J. HUM. RTS. 261 (2008) (analyzing the novelty of the Convention on the Rights of Persons with Disabilities as a human rights instrument).

47. *See* Tara J. Melish, *The U.N. Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 HUM. RTS. BRIEF 37, 45 (2007) (commenting on the relevance of the flexibility in the CRPD that "the Committee carefully avoided 'shopping lists' and over-specification of details and

Recall the five key features of Experimentalist Governance as we have defined the term: openness to participation of relevant entities; the establishment of a framework understanding setting open-ended goals; implementation by lower-level actors with local or contextualized knowledge; continuous feedback, reporting, and monitoring; and established practices, involving peer review, for revising rules and practices. All five of these Experimentalist features pertain to the CRPD.

A. *"Open Participation"*

The CRPD's emphasis on ensuring the participation of persons with disabilities was not only evident in the negotiation and drafting of the Convention itself, but also animates many of its substantive provisions.[48] The impetus to ensure

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standards as an agreed operational modality in the drafting process. It did so precisely to ensure that the Convention's text would remain relevant and vital over time and space, capable of responding to new challenges and modes of abuse as they arose, as well as the vastly different challenges faced by States at different levels of development. It also wished to avoid the negative inference that anything not expressly included in a detailed provision was intended to be excluded. Thus, broadly exemplary terms with inclusive references and a higher level of generality were consistently preferred to overly-specific, narrowly-tailored ones or 'lists' of abuse and standardized implementing measures. The choice and design of precise implementing measures is properly left to the discretion of States, in consultation with civil society and informed by the processes of constructive dialogue and information sharing envisioned by the supervisory framework established under the Convention.").

48. *See* CRPD, *supra* note 44, pmbl. (m) (recognizing the enhanced sense of belonging that will result from full participation of persons with disabilities); *id.* pmbl. (o) (noting that persons with disabilities should have an opportunity to participate in decision-making processes that directly concern them); *id.* pmbl. (y) (stressing that promotion and protection of the rights of persons with disabilities would promote their participation in society); *id.* art. 3(c) (making full participation one of the guiding principles of the Convention); *id.* art. 4(3) (obligating the involvement of persons with disabilities in development and implementation of legislation and policies to implement the Convention); *id.* art. 24(1)(c) (ensuring the right to education to enable full participation of persons with disabilities in society); *id.* art. 24(3) (ensuring full and equal participation in education); *id.* art. 26(1)(b) (providing habilitation and rehabilitation services which ensure participation and inclusion in the community and all aspects of society); *id.* art. 29 (ensuring participation in political and public life); *id.* art. 30(5) (encouraging and promoting participation in recreational, leisure and sporting activities); *id.*

such inclusion of disabled persons derived in part from the growing influence of the social model of disability that emerged during the civil rights movement in the United States, was institutionalized in the Americans with Disabilities Act in 1990, and gradually diffused internationally.[49] The social model of disability contrasts with the more traditional medical model of disability, in emphasizing that the disadvantages which arise from the variation in the physical, mental, and emotional characteristics of human beings are the consequences of avoidable social and relational impediments. The prominent place given to NGOs and NHRIs during the lead-up to and in the drafting of the Convention, and their influence on many governments, help to explain the reliance of the Convention on this progressive social model, rather than the traditional medical model that underpinned the disability law and policy of many states.

The Convention itself was drafted with extensive participation on the part of persons with disabilities and other experts on disability, in all aspects of its negotiation and drafting.[50] Further, since the Convention came into force, the emphasis on participation in so many of its provisions has been used to substantial effect by DPOs and other NGOs.[51] While

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art. 32(1) (involving civil society and NGO participation in international cooperation); *id.* art. 33(3) (including civil society and DPOs in monitoring implementation of Convention); *id.* art. 34(4) (including persons with disabilities in the Committee on the Rights of Persons with Disabilities).

49. The slogan adopted by Disability NGOs was "Nothing about us without us." *See, e.g.*, JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 3 (1998) ("As Ed Roberts, one of the leading figures of the international DRM, has said, 'If we have learned one thing from the civil rights movement in the U.S., it's that when others speak for you, you lose.'").

50. *See* Melish, *supra* note 47, at 37.

51. The information on which this and other parts of the account below are based is drawn from a series of interviews conducted in September and October 2012 with a range of key DPOs and other participants active in the international disability regime including: (1) Janina Arsenjeva, European Disability Forum; (2) Regina Atalla, President of RIADIS, (the Latin-American network of organizations for persons with disabilities and their families); (3) Alexandre Cote, Capacity Building Program Officer, International Disability Alliance; (4) Amy Farkas, Disability Section, Programme Division, UNICEF; (5) An-Sofie Leenknecht, Human Rights Officer, European Disability Forum; (6) Ron McCallum, Chair of the CRPD Committee; (7) Amanda McRae, Disability Rights Researcher at Human Rights Watch; (8)

they continue to be vocal critics of the reluctance of states to fully implement various requirements of the Convention, these organizations have actively embraced the many opportunities provided for their central involvement in the new disability regime, often to challenge the stance of states. DPOs and the umbrella groups and networks which coordinate many of them play central roles in monitoring and data-gathering, as well as continuing in their traditional roles of advocacy, critique, and mobilization.

In countries with established independent monitoring mechanisms under Article 33(2) (which is discussed further below), civil society groups generally have a seat at the table, and in countries such as Spain, the designated monitoring mechanism is actually a DPO umbrella group. Civil society groups in many countries also submit information to their governments. Although many governments are reluctant to seek or incorporate this feedback into their periodic reports to the CRPD Committee (hereinafter the Committee of Experts), the civil society groups' submissions nevertheless serve as relevant inputs to the Committee.[52] At the regional and international levels, civil society groups are trained to prepare shadow reports to the Committee of Experts, and other organizations

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Victoria Lee, Human Rights Officer responsible for U.N. Treaty Bodies at the International Disability Alliance; (9) Lauro Purcil, Philippine Coalition on the U.N. CRPD; (10) Ana Sastre Campo, CRPD Delegate, CERMI (DPO umbrella organization and independent monitoring mechanism in Spain); and (11) Marianne Schulze, Chairperson of the Austrian Independent Monitoring Committee.

52. *See* Telephone Interview by Alyson Zureick with An-Sofie Leenknecht, Human Rights Officer, European Disability Forum (Oct. 12, 2012) (noting that in Belgium the government only gave civil society groups a short period of time to comment on the draft initial report); Interview by Alyson Zureick with Marianne Schulze, Chairperson of the Austrian Independent Monitoring Committee (Oct. 16, 2012) (noting that, in Austria, the government only gave civil society three weeks to comment on the draft National Action Plan, though civil society still managed to submit more than one hundred comments over a longer period); Interview by Alyson Zureick with Amanda McRae, Disability Rights Researcher, Human Rights Watch (Sept. 11, 2012) (noting that the Croatian government only consulted their allies within civil society when drafting their initial report); Interview by Alyson Zureick with Regina Atalla, President, RIADIS (Sept. 12, 2012) (noting that Brazilian NGOs sent several letters to the government with feedback for the State's initial report and never received a response).

also conduct capacity building activities.[53] Capacity building is increasingly viewed as an important investment in ensuring that civil society organizations understand the CRPD and are able to participate actively in its implementation, monitoring, and evaluation.[54]

B. *"A Framework Understanding and Open-ended Goals"*

Whether to include a precise definition of disability was a controversial issue in drafting the Convention. An Experimentalist approach to lawmaking emphasizes the importance of flexibility and revisability in the interests of adaptation to change and inclusiveness, which militates against the inclusion of a precise definition of disability. A traditional human rights approach, on the other hand, tends to be much more skeptical of this kind of flexibility, seeing it as an opportunity for states to evade real commitments. Consequently, many NGOs argued for a precise definition of disability, primarily to avoid the exclusion of certain disabilities by states parties in their internal policies and laws. And indeed, it seems that there was concern on the part of government delegations to avoid being too detailed and prescriptive in this way, for precisely these kinds of reasons.[55]

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53. The European Disability Forum also conducts capacity building on monitoring and reporting with its member organizations in Europe. Interview with An-Sofie Leenknecht, *supra* note 52. RIADIS, a network of Latin American NGOs and DPOs, conducts capacity building activities with civil society groups and is in the process of establishing an online platform for civil society to share information and best practices with each other. RIADIS had, at the time of writing, conducted 14 regional seminars and trained 1,800 leaders on the Convention. Interview with Regina Atalla, *supra* note 52. There are similar regional networks in Asia and Africa. Interview by Alyson Zureick with Alexandre Cote, Capacity Building Program Officer, Int'l Disability Alliance (Sept. 28, 2012); Interview with Marianne Schulze, *supra* note 52.

54. Tunisia has been cited as one example where grassroots groups joined together to create a new DPO, which includes all of the different disabled persons groups in the country. Unlike the DPOs of the Ben Ali period which were primarily focused on service provision, the new organization is focused on human rights advocacy per se. Telephone Interview by Alyson Zureick with Victoria Lee, U.N. Human Rights Officer, U.N. Treaty Bodies, Int'l Disability Alliance (Oct. 4, 2012).

55. *See* Andrew Byrnes, *The Proposed U.N. Draft Convention on the Human Rights of Persons with Disabilities: What's in it, and What Isn't?*, AUSTRALIAN

The compromise ultimately agreed upon avoided a precise definition of disability. A provision on the meaning of disability was included in the first article of the Convention on "purposes" rather than in the second article on "definitions." Article 1 includes the following sentence: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."[56] The approach adopted here clearly follows the social rather than the medical model of disability,[57] and fits with the premises of an Experimentalist Governance approach, adopting an inclusive and open-ended definition.

Article 2 of the CRPD similarly adopts a broad and inclusive definition of discrimination in the following terms:

> "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[58] It includes all forms of discrimination, including denial of reasonable accommodation; "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.[59]

Two aspects of this definition are of particular note from an experimentalist perspective. The first is the breadth of the definition of discrimination, including both intentional and

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HUMAN RIGHTS COMMISSION (Mar. 25, 2004), http://www.hreoc.gov.au/disability_rights/convention/byrnes_2503.htm.

56. CRPD, *supra* note 44, art. 1.

57. *See also id.* pmbl. (e) ("[r]ecognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others").

58. *Id.* art. 2.

59. *Id.*

unintentional (impact-based) discrimination, even while not using the language of "direct" or "indirect." The second notable feature is the inclusion of denial of reasonable accommodation as part of the definition of discrimination. This formulation fits well with premises of experimentalism in its flexibility and adaptability to need and circumstance, describing both the wrong (denial of reasonable accommodation) and the remedy (provision of reasonable accommodation) in the same terms.

C. *"Implementation by Lower-level Actors" with "Continuous Feedback, Reporting and Monitoring"*

Here we discuss together the third and fourth components of our definition of Experimentalist Governance: implementation by lower-level actors and continuous feedback and monitoring. There are two parts to the monitoring system established by the CRPD: a more conventional international human rights treaty-monitoring Committee of Experts, and a novel provision for national monitoring, which includes the participation of DPOs and other civil society actors.

Articles 34-39 of the CRPD establish a fairly standard international human rights monitoring mechanism with a Committee of Experts[60] empowered to monitor compliance with the Convention through receiving, examining, and responding to state reports and reporting to the U.N. General Assembly and Economic and Social Committee, with a slightly more controversial individual right of complaint to the Committee contained in an Optional Protocol.[61] A novel provision of the Convention, however, is that it mandates inclusion of persons with disabilities in the membership of the Committee of Experts.[62] At the time of writing, 15 of the 18 members of the Committee are persons with disabilities.[63] According to one

60. What renders this traditional international mechanism somewhat distinctive in the CRPD context is that Article 34(4) requires consideration to be given to the inclusion of persons with disabilities on the Committee. This has since been done and the Committee of 17 experts is composed of various individuals with disabilities.

61. Optional Protocol to the Convention on the Rights of Persons with Disabilities art. 1, Dec. 13, 2006, 2518.

62. CRPD, *supra* note 44, art. 34(4).

63. Interview by Alyson Zureick with Ron McCallum, CRPD Comm. (Sept. 13, 2012).

knowledgeable observer, the participation of persons with disabilities and civil society members in the Committee itself has significantly changed the culture of the Committee and its willingness to engage actively with civil society, as compared with other human rights treaty bodies.[64]

Civil society organizations currently have a robust relationship with the Committee and interact formally and informally with its members through a number of forums. As in other U.N. human rights treaty monitoring arrangements, national, regional, and international civil society organizations are active in submitting parallel reports to the Committee prior to its review of a particular State's report. The International Disability Alliance (IDA), which is the network of global and regional DPOs, trains local organizations to submit shadow reports to the Committee and has worked closely with civil society organizations in the Philippines, India, and El Salvador to prepare shadow reports.[65] Committee members rely on civil society parallel reports to provide a more complete picture of a State's compliance with the CRPD, and to help them formulate questions to states during the reporting process.[66]

Civil society representatives also attend the Committee sessions held in Geneva twice a year.[67] IDA organizes side events during these sessions that allow Committee members to interact with DPO representatives from the countries under review, and is quite proactive in ensuring wide participation.[68] The side events normally take place prior to the Committee hearings and are aimed at briefing the Committee on a state which is coming up for review. These are generally private side events which are not open to the attendance of States but only to civil society, NHRIs, and U.N. agencies. When DPOs in Tunisia were unable to attend Tunisia's review before the Committee, IDA representatives traveled to Tunisia to gather infor-

64. Interview with Amanda McRae, *supra* note 52.

65. Interview with Alexandre Cote, *supra* note 53.

66. Interview with Ron McCallum, *supra* note 63.

67. *See Committee on the Rights of Persons with Disabilities – Sessions*, UNITED NATIONS HUMAN RIGHTS, OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Sessions.aspx (last visited Oct. 20, 2012) (listing the dates of previous Committee sessions).

68. Interview with Alexandre Cote, *supra* note 53; Interview with Victoria Lee, *supra* note 54.

mation to present to the Committee members on behalf of the organizations.[69] IDA also held a workshop in Hong Kong including both Chinese and Hong Kong DPOs to assist them in preparing an anonymous submission to the Committee prior to China's review.[70] Civil society organizations are thus able to provide feedback to the Committee before the adoption of the so-called "List of Issues" and before the State appears before the Committee for its official review.[71] The Committee also actively welcomes the inclusion by States of persons with disabilities on their reporting delegations, and it seems that almost all States now make sure to have persons with disabilities on their delegations.[72]

The second and more obviously novel aspect of the monitoring and implementation regime established by the CRPD is the provision in Article 33 on mechanisms for independent *national* monitoring and implementation.[73] Clearly this emphasis on domestic or local implementation and monitoring, rather than relying primarily on a somewhat remote periodic review by an international body, conforms to a central tenet of Experimentalist Governance. Although the U.N. Office of the High Commissioner for Human Rights (OHCHR) preferred to seek an integrated monitoring body on the U.N. level,[74] other states indicated that they did not want a typical U.N. monitoring mechanism, which they considered to be a recipe for failure. Consequently, some of the NGOs and NHRIs suggested a number of innovative ideas, including: a monitoring role for NHRIs; national focal points; and the inclusion of

69. Interview with Victoria Lee, *supra* note 54.; Interview with Ron McCallum, *supra* note 63.

70. Interview with Victoria Lee, *supra* note 54.

71. Interview with Alexandre Cote, *supra* note 53; Interview with Victoria Lee, *supra* note 54.

72. Interview with Ron McCallum, *supra* note 63.

73. CRPD, *supra* note 44, art. 33.

74. This was apparently influenced by a series of debates which took place in the 1980s and 1990s, leading to the recommendation for an integrated, consolidated monitoring system. *See* U.N. Econ. & Soc. Council, Final Report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System, U.N. Doc. E/CN.4/1997/74; CHR 53d Sess. (Mar. 27, 1997) (by Philip Alston); U.N. Secretary-General, *Effective Implementation of International Instruments on Human Rights, including Reporting Obligations under International Instruments on Human Rights: Note by the Secretary General,* U.N. Doc. A/44/668 (Nov. 8, 1989).

stakeholders in the monitoring mechanism.[75] Ultimately, both NGO groups and NHRIs played a significant role in the discussions and helped to ensure that the implementation mechanisms for the CRPD were not held hostage to the broader and more difficult debate about reform of the U.N. Treaty-body system more generally.[76]

The provision which emerged from these discussions, Article 33 of the Convention, introduces the idea of "*focal points*" by providing that states parties shall "designate one or more focal points within government for matters relating to the implementation of the present Convention" and also provides for the establishment of a *coordination mechanism* within government.[77] This proposal was promoted during the negotiation of the Convention by NGOs and the NHRIs, and is consistent with the provision in Article 33(3) that civil society and, in particular DPOs, are to be fully involved in the monitoring process. Article 33 also assigns a key role to NHRIs in the elaboration of the Convention by providing that state parties shall "maintain, strengthen, designate or establish . . . a framework, including *one or more independent mechanisms* . . . to promote,

75. Another somewhat innovative element in the monitoring mechanism was the provision in Article 36(4) (inspired by a similar provision in the U.N. Convention on the Rights of the Child) on the transparency and broad availability and accessibility of the comments and suggestions of the international monitoring committee in response to state reporting. CRPD, *supra* note 44, art. 36(4).

76. See Marianne Schulze, *Effective Exercise of the Rights of Persons with Disabilities: National Monitoring Mechanisms in* Global Standards—Local Action—15 Years Vienna World Conference on Human Rights 217 (Wolfgang Benedek, et al. eds., 2009).

77. Article 33(1) provides that: "States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels." CPRD, *supra* note 44, art. 33(1). It seems that this provision was not initially well understood, and in particular that states parties implementing the Convention did not understand the difference between a focal point and a coordinating mechanism, and that different parties are interpreting the provision on a suitable focal point quite differently from one another.

protect and monitor implementation of the present Convention."[78]

National implementation and monitoring is also emphasized elsewhere in the Convention.[79] Taken together, the Convention's monitoring and implementation provisions emphasize the crucial relationship between the international framework and the national level, and the extent to which the practical realization of the commitments contained in the Convention will depend on the constant engagement of independent actors. Following the logic of Experimentalist Governance, the framework commitments themselves take shape and are fleshed out through the interaction of the domestic and the international levels, bolstered by constant information-gathering, feedback, and scrutiny.

It is also clear that these novel provisions of the Convention have been brought to life in practice by the involvement of the various stakeholders.[80] The combination of mandating focal points, recommending that state parties establish coordination mechanisms to facilitate action around the CRPD across government departments, and the requirement in Art 33(2) for independent monitoring mechanisms, have, in conjunction with one another, had significant effects. The domestic monitoring mechanisms, which are required by Article 33(2) to include "one or more independent mechanisms,"[81]

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78. CPRD, *supra* note 44, art. 33(2) (emphasis added). Article 33 makes indirect although not explicit reference to the so-called Paris Principles on the status of independent national human rights institutions, which was adopted by a resolution of the U.N. General Assembly in 1993. *See* G.A. Res. 48/134, U.N. Doc. A/RES/48/134 (Mar. 4, 1994), *available at* www2.ohchr.org/English/law/parisprinciples.htm.

79. Article 16(3) of the Convention requires states to ensure that all facilities and programs designed to serve persons with disabilities are effectively monitored by independent authorities. CPRD, *supra* note 44, art. 16(3). Article 31(1) provides, "States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention." *Id.* art. 31(1). *See also id.* art 33(3).

80. The information which follows is drawn from the series of interviews conducted in September and October 2012. *See supra* note 51.

81. This term is widely understood to refer to the National Human Rights Institutions whose criteria were established by the U.N. Paris Principles of 1993. *See, e.g.*, Meredith Raley, *The Paris Principles and Article 33.2 of the CPRD,* DISABILITY AND HUMAN RIGHTS (Oct. 11, 2011), http://disabilityandhumanrights.com/2011/10/11/the-paris-principles-and-article-33-2-of-

carry out a range of functions. They provide information and feedback to the government when the government is drafting its reports to the CRPD Committee or when drafting their own parallel reports, they advise governments on compliance of new or proposed legislation with the requirements of the Convention, and they organize public meetings— to include civil society actors and others—on the operation of the Convention.

D. *"Peer Review and Practices for Revising Existing Rules and Practices"*

In addition to the peer review, which takes place regularly in the context of the reporting and monitoring system of the Committee of Experts, the CRPD provides, in Article 40, that "the States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the present Convention."[82] It is unusual for an international human rights treaty explicitly to mandate such regular meetings, and for such meetings to include substantive rather than merely procedural discussions. Article 40 was strongly advocated by NGOs during the drafting of the Convention. The model which the NGOs had in mind for a substantive annual conference was apparently inspired by a similar provision in the Ottawa Landmines Convention, in which the annual conference plays a particularly important role because there is no independent monitoring provision provided for in that Treaty.[83] Although the CRPD has an international monitoring mechanism (the Committee of Experts) with an optional individual complaints procedure, Article 40 was nevertheless "designed to allow States Parties to meet regu-

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the-crpd/ (explaining that Article 33(2) was drafted with NHRIs in mind); *Statement by the ICC of NHRIs*, Deutsches Institut Für Menschenrechte, http://www.institut-fuer-menschenrechte.de/en/monitoring-body/statement-by-the-icc-of-nhris.html (last visited May 18, 2013) (stating that "Article 33(2) of the CPRD recognizes this important role and function of independent NHRIs").

82. CRPD, *supra* note 44, art. 40.

83. *See* Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Dec. 12, 1997, 2056 U.N.T.S. 211; Melish, *supra* note 47, at 46.

larly to discuss best practices, difficulties, needs, and other matters regarding implementation of the Convention."[84]

The annual Conference focuses on a different theme each year, and is organized around a series of talks by States Parties and thematic panels.[85] In addition to providing for the election of new CRPD Committee members, the Conference also enables civil society organizations to network with each other, to place issues on the agenda, and to share experiences and best practices in relation to the monitoring and implementation of the Convention. It appears that the most interesting critical thinking and discussion take place during the side events. These are organized at the annual conference of states parties and are generally open to all to attend, including states. Civil society's role has largely been facilitated through IDA, which organizes the Civil Society Forum that takes place the day before the conference begins and works with the U.N. Department of Economic and Social Affairs in selecting the theme, panels, and speakers for the conference.[86]

It is clear that the new regime established by the CRPD is an interesting novelty compared to other international human rights systems. The central involvement of key stakeholders in all aspects of the Convention's operation has transformed it into a dynamic regime for bringing about relevant social and political change for persons with disabilities. In addition to the extensive stakeholder involvement, the iterative nature of the regime and the regular interaction between the local, national, and international levels in its implementation and op-

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84. Melish, *supra* note 47, at 46.

85. The 2012 theme was "Making the CRPD Count for Women and Children." *Conference of States Parties*, UNITED NATIONS ENABLE, http://www.un.org/disabilities/default.asp?id=1535 (last visited Oct. 20, 2012). *See generally Fifth session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, 12-14 September 2012*, UNITED NATIONS ENABLE, http://www.un.org/disabilities/default.asp?navid=46&pid=1595 (last visited Oct. 20, 2012) (referencing the draft agenda for the Conference).

86. *See* Interview with Victoria Lee, *supra* note 54 (explaining which side events are private and which are open to States); Interview with Amanda McRae, *supra* note 52 (stating that the IDA organizes the Civil Society Forum that takes place the day before the Conference); Interview with Regina Atalla, *supra* note 52 (noting that the IDA organizes the Civil Society Forum at the conference); Interview with Alexandre Cote, *supra* note 53 (stating that the IDA is closely associated with the organization of the conference and thus sending a strong message about civil society's role).

eration have given it a degree of effectiveness and momentum that has been lacking in some of the other human rights regimes.[87]

IV. The Montreal Protocol on Substances that Deplete the Ozone Layer as an Experimentalist Regime

Our third exemplar of Experimentalism is the Montreal Protocol on Substances that Deplete the Ozone Layer. The regime created under the auspices of the Montreal Protocol has led to a striking reduction in the production and emissions of chlorofluorocarbons (CFCs) and other ozone-depleting substances (ODSs); it is widely regarded as one of the most successful of all international environmental regimes. The agreement is distinctive in that many of its principal architects and proponents assumed that developments in science would continue to shape the Protocol's goals and that failure to comply with its eventual requirements was more likely to result from misunderstanding of its terms, or incapacity to meet obligations under them, rather than from self-interest. In accord with this "managerialist" perspective on compliance, the regime was designed from the start to be comprehensive and adaptive—able both to respond to changing understandings of threats to the ozone layer, and to assist signatory states to develop the capacity to perform as required. But, with few exceptions, even the advocates of the Protocol did not anticipate the extent to which the institutionalized interplay between ground-level problem solving and the reconsideration of goals and methods for achieving them—key features of Experimentalism, induced by but not foreseen in the initial design—would be the key to the regime's success.[88]

A. *The Origins of the Problem*

Concern that pollution of the atmosphere could disrupt the stratospheric ozone layer, increasing human exposure to ultraviolet rays and thus the risk of skin cancer, along with

87. *C.f.* Resnik, *supra* note 43 (discussing the comparable evolution of the CEDAW regime).

88. *See* Owen Greene, *The System for Implementation Review in the Ozone Regime*, *in* The Implementation and Effectiveness of International Environmental Commitments 89, 118–24 (David G. Victor et al. eds., 1998).

changes in climate, arose in the late 1960s. The initial focus was on the risks associated with nitrous oxide and water vapor emitted in the exhaust trails of high-flying, supersonic aircraft then entering service or being designed. Further research quickly drew attention to possible interactions between ozone and chlorine and bromine, especially the chlorine in CFCs used as refrigerants, propellants for aerosols, and as mild solvents for cleaning metal parts and circuit boards, and the bromine in halons used in fire extinguishers and agriculturally important biocides. The chemical inertness that made these molecules attractive in many settings allowed them to remain intact as they mixed upward into the stratosphere, where exposure to intense sunlight split them into components, initiating the destructive interactions with ozone.

Public and political reaction to scientific conjecture about this connection was abrupt and emphatic. Sales of aerosol cans in the United States, having grown at an average annual rate of 25% during the preceding two decades, dropped by 25% in 1975 as information about the consequences of CFCs became widespread. A Federal Interagency Task Force was created to determine the location and extent of federal authority to regulate CFCs, beginning a process that would result, after two years, in a joint rule-making by the Federal Trade Commission, the Environmental Protection Agency (EPA), and the Consumer Safety Protection Commission essentially banning CFCs as aerosol propellants.[89] Even before this rule came into effect, moreover, the 1977 amendments to the Clean Air Act required the administrator of the EPA to commission biennial studies of the ozone layer by the National Academy of Sciences and to regulate any substance that "may reasonably be anticipated to effect the stratosphere, especially ozone in the stratosphere, and such effect may reasonably be expected to endanger public health or welfare."[90]

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89. *See* Edward A. Parson, Protecting the Ozone Layer: Science and Strategy 35–42 (2003).

90. *Id.* at 59; Clean Air Act Amendments, 42 U.S.C.A. § 7671n (West 1990) (stating, "[i]f, in the Administrator's judgment, any substance, practice, process, or activity may reasonably be anticipated to affect the stratosphere, especially ozone in the stratosphere, and such effect may reasonably be anticipated to endanger public health or welfare, the Administrator shall promptly promulgate regulations respecting the control of such substance,

But efforts by U.S. activists and officials—in alliance with Canada, some of the Nordic countries, and the United Nations Environmental Program (UNEP)—to secure international support for the ban on aerosols, and for regulation of ozone-depleting substances generally, failed in the following decade. The European public and NGOs outside the Nordic countries and the Netherlands did not by and large react with the same immediate alarm as their U.S. counterparts.[91] Through the early 1980s continuing research on the stratosphere was inconclusive,[92] and production of CFCs stagnated,[93] suggesting that the problem, if any, might be self-limiting. European producers of CFCs, led by Imperial Chemical Industries (ICI) of Great Britain, suspected—incorrectly, as would soon be demonstrated—that their U.S. competitors already had developed substitutes and that they were seeking to secure a competitive advantage through an international ban. ICI's views got sympathetic hearing in official circles not only in Great Britain but also in other producer countries such as France and Italy. Even in the United States the tide of regulation was ebbing. Reagan's victory in the 1980 elections put appointees with an anti-regulatory agenda at the head of the EPA. At about the same time DuPont, a global chemical company, took the lead in forming the Alliance for Responsible CFC Policy, grouping large producers (with substantial scientific and legal resources) and many small user firms (which together provided a grass-roots constituency that could influence Congressional decisions) in a coordinated effort to limit or entirely block additional controls.[94]

But this reversal proved temporary. Worldwide production of CFCs, after declining in the 1970s, began to grow again after 1982, largely for non-aerosol uses. Better understanding of the kinetics of reactions involving chlorine, nitrous oxide, and ozone confirmed initial conjectures about the vulnerability of the ozone layer and intensified concerns of accelerated depletion.[95] Improvements in measurement instruments, in-

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practice, process, or activity, and shall submit notice of the proposal and promulgation of such regulation to the Congress.").

91. *See* PARSON, *supra* note 89, at 43.

92. *See id.* at 125.

93. *See id.* at 125.

94. *See id.* at 58.

95. *Id.* at 66–74.

cluding the use of satellite data, led to more reliable estimates of ozone concentrations, established that there were no natural "sinks" to absorb CFCs, and gave the first indications of a decreasing trend in ozone levels, including evidence of an ozone "hole" above the Antarctic.[96] The authoritative, "blue books" study by NASA and the World Meteorological Organization—commanding credibility because it involved essentially all the leading figures in the debate—found after an exhaustive review of the data and modeling projections that even a three percent annual increase in world output of the chemicals would likely lead to dangerous depletion of the ozone layer.[97] A change of course in the Reagan administration brought pro-regulatory appointees back to the EPA.[98] Industry changed its position as well: After a senior DuPont manager revealed that the company had ceased development of promising substitutes for CFCs in 1981 because the products were under the then prevailing conditions not commercially viable, the alliance of producers and users of CFCs endorsed a "reasonable global limit on the future rate of growth" of CFC emissions, as large increases would be "unacceptable to future generations."[99]

Proponents of international regulation could now plausibly argue that the alternative to an agreement might well be unilateral U.S. action in the form of restrictions in trade in ODSs. As in the case of the tuna-dolphin regime originating in the same period, the threat of trade sanctions created a penalty default that brought vacillating parties to negotiate.

B. *The Emergence of the Regime*

In 1985 the Vienna Convention for the Protection of the Ozone Layer established a general obligation to promote cooperation by means of systematic observations, research and information exchange on the effects of human activities on the ozone layer and to adopt legislative or administrative measures against activities likely to have adverse effects on the ozone layer, but no specific requirements were at this stage agreed. The key measure to protect the ozone layer was the

96. *See id.* at 75, 84–85.
97. *See id.* at 103–04.
98. *Id.* at 133–37.
99. *See id.* at 123, 126.

subsequent Montreal Protocol to the Vienna Convention, negotiated and opened for signature in 1987, which came into force in 1989. Besides setting an initial schedule for the reduction and eventual elimination of CFCs and halons (with exceptions made for "essential" uses for which no substitutes could be found), the Protocol set out in spare terms the core elements of a regime for extending and modifying protective measures.[100] The parties were to apply certain control measures, which they were to re-assess every four years in light of the currently available scientific, environmental, technical, and economic information, as determined by panels of experts in each of these domains.[101] To permit verification of their performance, parties were to report annual production, as well as imports and exports of regulated chemicals, using 1986 as the baseline for evaluating reductions in output.[102] Trade in controlled substances with countries not party to the Protocol was tightly restricted. Developing countries, defined as those annually consuming less than 0.3 kilograms of controlled substances per capita, were authorized to defer control measures.[103]

A multilateral fund (Fund), financed by the developed countries, was established to meet "all agreed incremental costs" that developing countries would incur in complying with control measures, and to provide technical assistance to them in doing so.[104] Arrangements were later made to support, through the Global Economic Fund administered by the World Bank, compliance efforts by countries with economies in transition—Russia and former states of the Soviet Union—that had trouble meeting their obligations but did not qualify as developing countries.[105] At the urging of the U.S. delegation, the parties established a committee to determine noncompliance with the Protocol's provisions and to propose re-

100. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 316.

101. *Id.* art. 6.

102. *Id.* art. 7.

103. *Id.* art. 5, ¶ 1.

104. *Id.* art. 10, ¶ 3.

105. *See, e.g.*, RICHARD ELLIOT BENEDICK, OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET 276–86 (2d ed. 1998) (detailing how the Global Economic Fund and other agencies supported countries transformed by political, economic, and social changes).

sponses.[106] The meeting of the parties, to be held at regular intervals, retained broad authority to review implementation of the agreement, add or remove substances from the annexes specifying controls and adjust control measures, and oversee the quadrennial assessments. A secretariat was established to provide administrative assistance to the parties, especially in the preparation of meetings and the collation and distribution of data reported under the agreement.

All of these components are indispensible to the systematic operation of the regime; and the shadow of power—in the form of the threat of trade sanctions, and the denial of funding from the Global Economic Fund to transition economies, as well as the threat of sanction by the E.U. against member states that did not comply with data reporting requirements—was indispensible to overcoming blockages, especially in the early stages of implementation. But the Technology and Economic Assessment Panel, established as part of the quadrennial review apparatus, and the sector-specific Technical Options Committees operating under it, as well as the multilateral fund are of particular interest here because together they came to institutionalize the broad stakeholder participation, revisability of goals, and continuous learning from the monitoring of performance that defines an experimentalist organization.

Thus, the principal function of the Technical Options Committees is to determine, in sectors ranging from solvents to refrigerants to halon fire-extinguishing agents, the feasibility of finding substitutes for ozone-depleting substances currently in use. They effectively set the schedule for application of restrictions, and establish exemptions for "essential" uses if formally requested to do so through the Technology and Economic Assessment Panel by a party to the Protocol. In denying such requests, the Technical Options Committees must provide detailed explanations of the reasons and a guide to meeting the requirement.[107] Doing all this in turn requires joint exploration of innovative possibilities by producers and users

106. *See* Patrick Szell, *Implementation Control: Non-compliance Procedure and Dispute Settlement in the Ozone Regime, in* THE OZONE TREATIES AND THEIR INFLUENCE ON THE BUILDING OF INTERNATIONAL ENVIRONMENTAL REGIMES 43, 45 (Winfried Lang ed., 1995).

107. Greene, *supra* note 88, at 96–100.

of ozone-depleting substances in the sector. To limit the risks of capture associated with such collaboration, formal membership on Technical Options Committees is limited to representatives of user industries and groups, and of regulators and standard setters. Actual investigation, however, involves joint efforts by working groups of users and producers, including plant visits, pilot projects with regular exchanges of information on progress, and so on.[108]

The effectiveness of such efforts is especially evident in two sectors where observers least expected it: solvents for industrial use and halons for fire extinguishers. Thus, for example, the solvents Technical Options Committee found that AT&T and a small firm had developed an environmentally benign solvent for cleaning circuit boards based on terpenes, a chemical previously ignored by both electronics producers and large producers of CFCs.[109] Similarly, a group of Technical Options Committee experts on a site visit observed a German machine that soldered in a controlled-atmosphere chamber, limiting oxidation of the joint, and so the need for fluxes and the expensive cleaning of parts and equipment with solvents after their use; user firms then agreed to buy the machine and exchanged reports on improvements to it.[110] The Halons Technical Options Committee, largely composed of experts in military and civilian fire fighting, found that more purposive tests that did not require release of halons and better management of halon banks would substantially reduce production and emissions of the substance. The cumulative effect of such institutionalized problem solving was to induce the regulated actors to produce and continuously update the information regulators needed to establish and periodically adjust rules that are both public-regarding and feasible.[111]

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108. *See id.* at 96–97 (indicating that Technical Options Committee members are overwhelmingly selected from entities that use ozone-depleting substances or ozone-depleting substance regulators and standard setters); PARSON, *supra* note 89, at 173–96 (detailing the efforts of different industry sectors in both decreasing the use of ozone-depleting substances and finding alternative chemicals); *id.* at 197–244 (detailing the instrumentality of Technical Options Committees in different sectors in providing the data and guidance necessary to advance negotiations to phase out ozone-depleting substances).

109. PARSON, *supra* note 89, at 189.

110. *Id.* at 189–90.

111. *See id.* at 191–92.

Once this process establishes initial regulatory goals, the targets have to be translated into concrete plans for dismantling or repurposing particular ozone-depleting substance production facilities, and for building plants to manufacture substitute products. The largest of these projects could run into the tens of millions of dollars; for a large economy the conversion costs run into the hundreds of millions. Efforts of this scale and complexity overtaxed the financial and technical capacities of developing countries; the risks of corruption inherent in such projects were especially acute there as well. The multilateral fund (in tandem with the Global Economic Fund) was designed to address these limits by providing project finance and technical support—including support for building local technical capacity—and overseeing implementation.

But it was soon clear that to achieve these goals the multilateral fund would have to develop its own institutional capacities and those of its national counterparts. The Fund is administered by four implementing agencies—the World Bank, the United Nations Development Program, the United Nations Industrial Development Organization, and the U.N. Environmental Program—reporting to an executive committee, whose composition and voting rules promote consensus by giving developed and developing countries group veto powers, and ultimately to the Meeting of the Parties. In the early years, projects were approved individually and implementing agencies acted essentially as advocates for national partners, with the Secretariat taking the lead in monitoring and project evaluation. Even in those years, informative debates resulted in important changes in producer countries' plans and reconsideration in the Meeting of the Parties of rules on the production, use, and export of controlled substances in developing counties.[112]

During the 1990s a more comprehensive system emerged, enabling funders and recipient countries to better monitor program design and execution and to improve performance of particular projects and the organization of the decision making process. To receive Fund support, a developing country was henceforth required to establish a national ozone unit to collaborate with one or more Implementing Agencies and must prepare a national program, with detailed sectoral plans

112. Greene, *supra* note 88, at 102.

and a national regulatory framework, for phasing out production and use of ozone-depleting substances.[113] This framework is frequently revised in the light of experience, as a World Bank report put it, plans "should be flexible enough to allow incorporation of findings and experience gained from the early phases of programs to improve the effectiveness of the strategies or the program over time."[114] Both the Implementing Agencies and the national ozone units face continuing pressure for innovation as attention shifts to non-point-source polluters: small and medium sized firms using CFCs and farms using methyl bromide, a general-purpose biocide for which there is no single, generally applicable substitute.

The cumulative effect of all this institutional development was to produce, over the course of the 1990s, a highly decentralized regime, with connections with the public and private sectors—often down to ground level actors—in countries all over the world, and making substantive and procedural rules that are at once mandatory and subject to frequent revision. Figure 2, taken with slight modification from Greene, presents a schematic overview.[115]

113. *See* World Bank, Case Study, *The Multilateral Fund for the Implementation of the Montreal Protocol* x–xi (2004) [hereinafter World Bank Case Study]; Jimin Zhao & Leonard Ortolano, *The Chinese Government's Role in Implementing Multilateral Environmental Agreements: The Case of the Montreal Protocol*, 175 China Q. 708, 714 (2003).

114. World Bank Case Study, *supra* note 113, at 7.

115. Greene, *supra* note 88, at 93.

FIGURE 2.

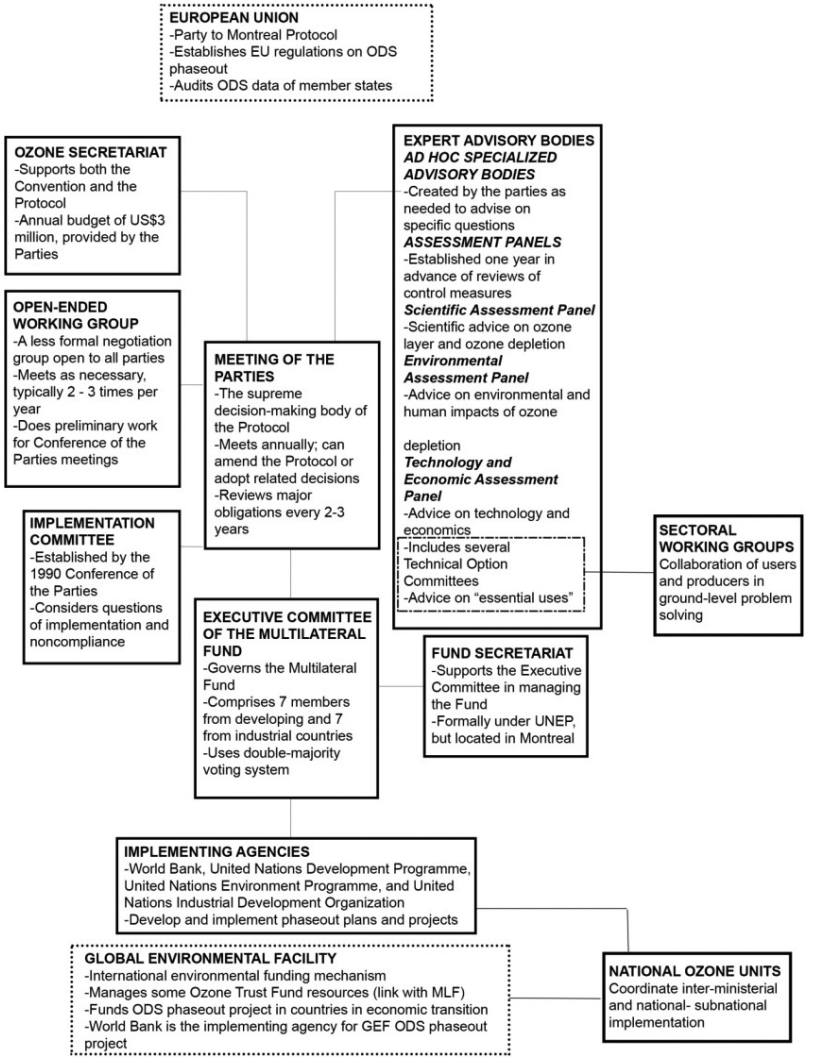

Figure based on Owen Greene, *The System for Implementation Review in the Ozone Regime*, *in* THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS 89, 93 (David G. Victor et al. eds., 1998).

These institutions are marked by the "close link" between (sub)systems "for reviewing implementation, responding to implementation problems, and revising and developing rules and institutions"—links that are seen as key to the Protocol's

ability to extend to meet demanding phase-out targets while extending the control regime to new domains.[116] Experimentalist institutions are designed to establish just such links, which are by nature non-hierarchical. Higher level rule revision in light of local rule application depends on local levels having sufficient autonomy to report defects in the rules they observe and to explore alternatives. This rule revision also requires authority of the center or apex of the organization to be sufficiently limited that it must take account of local experience.[117] It is therefore not surprising that the bureaucratic apex of the Montreal Protocol, the Secretariat, plays a coordinating role but has little or no directive authority. It acts primarily as a "hub," generally performing information-pooling functions that facilitate exchanges between the center and local units. [118]

Two leading managerialist proponents of the Montreal Protocol, Abram and Antonia Handler Chayes, had different expectations. They appreciated that in view of scientific uncertainty, international environmental regimes like the Montreal Protocol would have to adapt continuously to changing demands. But, influenced by the organizational models of their day, and particularly the experience of the most successful administrative agencies in the United States, they assumed that such adaptation required a robust, centrally placed secretariat to make sense of information that overtaxed the capacities of the parties. Indeed, their recommendation to parties building regimes for the international regulation of the environment

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116. *See* Greene, *supra* note 88, at 120; *see also* DAVID VICTOR, GLOBAL WARMING GRIDLOCK: CREATING MORE EFFECTIVE STRATEGIES FOR PROTECTING THE PLANET 219–224 (2011) (discussing the success of the Protocol).

117. The authorities at the apex of a hierarchy can, in principle, change ineffective rules, but in practice the only way the higher-ups are likely to be alerted to the need for such changes is by reports of subordinates, whose incentives to demonstrate compliance with rules, regardless of their effectiveness, will inhibit such reporting.

118. A recent study of the bureaucracies of nine international environmental organizations—ranging from the UNEP, the OECD environment directorate, the International Maritime Organization, the environmental department of the World Bank to the Global Environment Facility—found the Montreal Secretariat to be by far the smallest of them all, employing only six to eight program officers, including the executive secretary and its deputy. Steffen Bauer, *The Ozone Secretariat* 2 (Global Governance Working Paper No. 28, 2007), *available at* http://www.glogov.org/images/doc/WP28.pdf.

was blunt: "[D]elegation of authority to a central body with sufficient staff and resources to manage the implementation of [treaty] obligations."[119]

The success of the Montreal Protocol vindicates many aspects of their understanding of international problem solving, above all their intuition that regimes had the potential to play an active role in "modifying preferences, generating new options, persuading the parties to move toward increasing compliance with regime norms, and guiding the evolution of the normative structure in the direction of the overall objectives of the regime."[120] But the actual organization of the Montreal systems shows as well that the regime ultimately took a very different institutional form from the one assumed to be most adaptive.

V. Unsuccessful or Pseudo-Experimentalist Governance

Attempts to create Experimentalist Governance are not always successful. In some situations actors have sought to create arrangements intended, at least by some, to approximate the ideal type of Experimentalist Governance; but for a range of reasons, including political disagreement, its opposite (an excess of shared confidence that the essentials of the solution are already understood), entrenched veto-positions, or a limited commitment to fuller participation, they have failed to do so. Such failures often generate governance arrangements that have some of the architectural features of Experimentalist Governance, but ultimately do not meet our criteria for functional Experimentalist Governance systems or practices. To put it in Weberian terms, they are insufficiently close to the Experimentalist Governance ideal-type exemplified in our three case studies for us to regard them as approximations of the model. It is important to point to failed efforts to institutionalize Experimentalism to underscore that this form of organization is not an automatic and inevitable response to all situations marked by diversity and uncertainty: Experimental-

119. Abram Chayes, Antonia Handler Chayes & Ronald B. Mitchell, *Managing Compliance: a Comparative Perspective*, *in* Engaging Countries–Strengthening Compliance with International Environmental Accords 39, 61 (Edith Brown Weiss & Harold Jacobson eds., 1998).

120. Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements 229 (1995).

ism appears to work well only under some additional conditions. It is, moreover, especially important to distinguish these "pseudo-experimental" situations from the genuine article since otherwise the performance failure of pseudo-experimentalist organizations could be taken, incorrectly, as falsifying some of our general arguments about the functioning and promise of Experimentalist Governance. In this section we briefly present three such cases. In the next, generalizing from these examples, we discuss four conditions that make successfully functioning Experimentalist Governance more likely, although we do not put forward a fully elaborated theory of those possibility conditions.

One of the salient cases in which formal veto powers have led to a pseudo-experimentalist outcome is the International Labor Office (ILO). The ILO was created after World War I as part of a global movement to ban sweatshops, in which labor is overworked and exploited. In the ensuing decades the ILO agreed on many detailed conventions regulating, for instance, the minimum age of seafarers or the organization of hiring halls for them, and established procedures for annual review by experts of the Parties' compliance with their obligations under the convention, including suggestions for improvement in both the conventions and the national performance.[121] Outwardly, the ILO seemed like a model of an adaptive international organization, and Chayes and Chayes referred to it as such in illustrating the possibilities of a managerialist approach to treaty compliance.[122]

But by the mid-1990s it was clear to many in the ILO that the combination of convention and annual review was ineffective. The conventions were often too detailed to be applicable in a wide range of cases; the experts lacked the kind of on-the-ground knowledge that was necessary for probing and informative reviews; their reports were in any case typically ignored. In response, the leadership of the ILO tried to introduce "new governance" reforms that, had they worked, could well have resulted in Experimentalist Governance. Conventions were consolidated as "core standards," NGOs were to be drawn into

121. For a list of these Conventions, see *Conventions*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:0::NO::: (last visited May 18, 2013).

122. CHAYES & CHAYES, *supra* note 120, at 230.

the review process, and countries were to develop plans for addressing systematic problems and were to receive technical assistance in implementing them, all as part of a new governance scheme.[123]

The reforms however failed, largely because of the traditional tri-partite governing structure of the ILO. As a recent paper puts it:

> The efforts of the ILO leadership have been waylaid by the organization's corporatist structure, which gives employer associations and trade unions veto power over policy developments at a time in which these actors are increasingly unable to agree on concrete policy measures.[124]

In short, despite many of the basic features of Experimentalist Governance, such as the articulation of framework goals, the involvement of civil society, and the establishment of an iterative system for monitoring and reviewing implementation of the goals over time, the ILO's attempt at Experimentalist-style reform failed because of the veto-position of the two key stakeholders within the internal governance structure of the ILO, and their unwillingness to allow NGOs and civil society organizations to speak for workers and other enterprises in contexts in which the traditional corporatist actors were absent.[125]

Failed or pseudo-experimentalism can also result from informal actor preferences, rather than the exercise of formal veto powers. Examples are found among the cluster of institutions established by the European Union under the rubric of the Open Method of Coordination (OMC) to coordinate and learn from innovations in policy in domains such as employ-

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123. *See* Kimberly Ann Elliott, *The ILO and Enforcement of Core Labor Standards*, INT'L ECON. POL'Y BRIEF, July 2000; Philip Alston, *"Core Labour Standards" and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT'L L. 457 (2004).

124. Lucio Baccaro & Valentina Mele, *Pathology of Path-Dependency? The ILO and the Challenge of New Governance*, 65(2) INDUS. & LAB. REL. REV. 195, 195 (2012), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2096&context=ilrreview. *See also* Kenneth Abbott, Philipp Genschel, Duncan Snidal & Bernhard Zangl, IOs as Orchestrators 22–23 (Aug. 31, 2010) (unpublished manuscript), *available at* http://www.stockholm.sgir.eu/uploads/SGIR%20Stockholm%20100901.pdf.

125. *See* Baccaro & Mele, *supra* note 124 (discussing the downfalls of the organization's corporatist structure).

ment and the organization of the labor market. The formal resemblance of the OMCs to Experimentalist Governance is striking: The E.U. Council of Ministers sets framework goals; countries review their national and subnational policies; benchmarks and indicators of progress are agreed upon; countries submit action plans showing how they are progressing, or not, and remedial actions are proposed.

But outcomes have diverged significantly among OMCs, depending largely on the actors' disposition to allow others into the decision-making processes. In the European Employment Strategy OMC, designed to improve the operation of the labor market, well-established groups such as trade unions blocked efforts to make participation more open and also limited the extent of their own contribution to the process they had helped create. In the Social Exclusion OMC, formed to improve life chances for marginal groups, NGOs representing the excluded had much less access to decision makers to begin with, so they participated wholeheartedly. In short, whether organizations sought inclusion depended substantially on whether they already had access to the policy-making process.[126]

A surfeit of agreement among key actors can frustrate attempts to establish Experimentalist Governance as much as overt or covert disagreement. A case in point is the Poverty Strategy Reduction Program (PRSP) of the International Financial Institutions (IFIs).[127] The architecture of the PRSP has the familiar experimentalist elements: the setting of broad framework goals, the delegation of responsibility and discretion to local units and actors (also known as "country-ownership") to implement these broad goals in diverse settings, the formal commitment to broad participation, and to revision in the light of experience. But the central actors—IFI officials

126. THE OPEN METHOD OF COORDINATION IN ACTION: THE EUROPEAN EMPLOYMENT AND SOCIAL INCLUSION STRATEGIES 274–78 (Jonathan Zeitlin et al. eds., 2d prtg. 2005).

127. For discussion of the experimentalist potential of this initiative, and the reasons why it failed, see Gráinne de Búrca, *Developing Democracy Beyond the State*, 46 COLUM. J. TRANSNAT'L L. 221 (2008). For a similar case concerning the formulation and diffusion of international standards in competition law, see Yane Svetiev, Partial Formalization of the Regulatory Network (Mar. 1, 2010) (unpublished draft), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1564890.

and experts—were convinced that they knew the appropriate solution to the problems of poverty, and practices at the country-level were dominated by like-minded finance ministries, without effective participation by other stakeholders who might have challenged the consensus.[128] Hence the "center" was not much interested in "local" or country-level input, and did little or nothing to facilitate it; and, aware of this, the participation of the "local" or country level was *pro forma*.

Between the poles of the continuum defined by the ideal-typical cases of Experimental Governance success on the one hand and pseudo-Experimentalist failure on the other there are manifold situations where Experimentalist Governance is currently developing, has yet either to succeed or to stall, and could eventually do either. Some of these arise through adaption of Mode One institutions, similar to the path taken by the CRPD's innovative reconfiguration of the U.N. human rights regime. Others emerge through the re-assembly of institutions from Modes One and Two. A development of potentially broad significance in this connection is an incipient division of labor between Mode One framework organizations, such as the WTO, which set out overarching substantive goals, and implementing regimes. The implementing regimes, often with marked Experimentalist features, establish standards for action in particular domains (for instance, protection of various aspects of the environment in relation to the international trade regime).[129] The Tuna-Dolphin regime was a forerunner in creating such a division of labor, and the resolution of the legal controversies accompanying its development helped establish its legitimacy. In 1991 a panel of the GATT rejected the United States' assertion of authority in the MMPA to impose environmental conditions on the process by which goods such as tuna are produced outside its sovereign jurisdiction. The decision, never enforced (not least because of the protests of environmentalists) was in effect reversed in a 1998 WTO Appellate Body decision concerning requirements for the use of shrimp nets designed to protect sea turtles from ensnarement. In 2012, an Appellate Body decision responding to a Mexican

128. De Burca, *supra* note 127, at 266–71.

129. *See generally* Margaret A. Young, Trading Fish, Saving Fish: The Interaction Between Regimes in International Law (2011) (discussing the allocation of this responsibility).

complaint against the restrictive U.S. tuna-labeling regime reaffirmed the legality under the WTO of environmental restrictions on the production of traded goods, provided that the restrictions conform to standards set by a competent international body, open to all potential stakeholders.[130] Still other embryonic Experimentalist regimes in the mid-range of the continuum arise, similar to the model of the Montreal Protocol, as deliberate efforts to design institutions adapted to the prevailing conditions of diversity and uncertainty (and mindful of the division of institutional labor just described). A prominent example is the commodity roundtables, established by the World Wildlife Fund, an international environmental NGO, together with other civil society stakeholders and leading producers and users of commodities such as palm oil, cotton, sugar, and soy, to establish production standards that protect the environment, the economic interests of the developing economies that depend on exporting these commodities, and the well being of the individuals and communities immediately affected by their production.[131] The extent to which Mode Three Experimentalist Governance shapes international organizations depends on what happens in this developing middle ground; and the next section presents a preliminary statement of the conditions under which it is likely to flourish or not.

VI. Conclusion

In this Conclusion we undertake three tasks: to review Experimentalism as a mode of governance; to advance, though not yet to test, some hypotheses about the conditions under which we would expect Experimentalist Governance to develop in global settings and to be effective; and to discuss the value of Experimentalist Governance, which we do not see as a

130. *See generally* Gregory Shaffer, *The WTO Tuna-Dolphin II Case: United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, 107 Am. J. Int'l L. 12–62 (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2176863 (providing background and analysis of the recent decision).

131. *See* James Brassett, Ben Richardson & William Smith, *Private Experiments in Global Governance: Primary Commodity Roundtables and the Politics of Deliberation*, 4.03 Int'l Theory 367 (2012) (discussing the history of the commodity roundtables and evaluating their performance against benchmarks derived from a conception of Experimentalist Governance).

panacea but which, applied under circumstances to which it is well-adapted, is normatively appealing.

A. *Experimentalism as a Mode of Governance*

We have characterized Experimentalist Governance as Mode Three, distinguished both from governance through traditionally integrated international regimes (Mode One) and from a range of more pluralistic arrangements such as those discussed in the literatures on regime complexes, networks, and Global Administrative Law (Mode Two). We have defined the concept of Experimentalist Governance explicitly, emphasizing that five distinctive features must all be present:

> 1. Openness to participation of relevant entities in a non-hierarchical process of decision making;
> 2. Articulation of a broadly agreed common problem and the establishment of a framework understanding which sets open-ended goals;
> 3. Implementation and elaboration by lower-level actors with local or contextualized knowledge;
> 4. Continuous feedback, reporting, and monitoring; and
> 5. Established practices, involving peer review, for regular reconsideration and revision of rules and practices.

Our three extensive case studies demonstrate that, in three global issue areas, the actual governance patterns closely approximate the Experimentalist Governance ideal-type and that Experimentalist Governance is a distinct subset or type of international regime. A key contribution of this Article is to show that this form of governance is not limited to administrative or regulatory settings in sovereign states, or the historically unique transnational setting of the European Union, in which member states have long shared deep cultural and institutional ties, even while retaining formal sovereignty. It can emerge and flourish in the international order both under the shadow of power—as with the threat of unilateral action by the United States in the case of Tuna-Dolphin and the Montreal Protocol—and without it—as in the case of the CRPD.

B. *Conditions for Experimentalist Governance*

The natural social scientific question about Experimentalist Governance is: "Under what conditions does it thrive as a mode of governance in world politics?" We have not developed a comprehensive theory to answer this question, but we have formulated four hypotheses, which we put forward here, in the spirit of preliminary inquiry as meriting further elaboration and possible testing.

First, we propose as a necessary condition for Experimentalist Governance that: *Governments are unable to formulate a comprehensive set of rules and efficiently and effectively monitor compliance with them.* This condition will be met in uncertain and diverse environments, where it is difficult for central actors to foresee the local effects of rules, and where even effective rules are likely to be undermined by unpredictable changes. In none of the situations of Experimentalist Governance that we examine in this paper—involving tuna fishing, the CRPD, or the regulation of ozone-depleting chemicals—did governments have the capacity to formulate and monitor detailed and comprehensive rules sufficient to address the extent and nature of the problem in question. Thus the increases in uncertainty and diversity that contributed to the shift from Mode One to Mode Two forms of international organization, make the emergence of Experimentalist institutions more likely, though certainly not inevitable. Another way of stating this condition is to say that if there is too much formal or (as the PRSP example shows) informal agreement on cause-effect relationships and desirable strategies, Experimentalist Governance is unlikely to take hold.

The second condition is the obverse of the first one: *Governments must not be stymied by a lack of agreement on basic principles.* In the ILO and OMC pseudo-experimentalist cases, for example, key actors did not agree on the need jointly to investigate solutions beyond the limits of existing bargains and compacts. Hence they hindered the collection of local information and obstructed effective use of what nonetheless was collected. In other words, Experimentalist Governance can no more work if there is too little agreement than if there is too much. Experimentalist Governance progresses in the "Goldilocks Zone"—where there is neither too much nor too little

agreement, and the balance, like the temperature of Goldilocks' porridge, is "just right."

A third condition follows from the first two: *Civil society actors must be deeply involved in the politics of the issue.* Successful Experimentalist Governance regimes and practices depend on extensive and open participation of civil society actors in agenda setting, revision, and on-going problem solving. The more uncertain and diverse the setting, the more likely it is that ground-level actors, such as NGOs and firms, will begin to identify and solve problems that central, state actors, even in neo-corporatist concert with peak associations of labor and capital, ignore or will not address for fear of jeopardizing established interests. Increases in uncertainty and diversity also make it more likely (but of course far from certain) that authorities and interest groups that might otherwise resist the participation of civil society actors as a check on their discretion will tolerate or even welcome the entry of new players in recognition of the limits of their own problem-solving capacities. Hence the cooperation of (newly formed or previously marginal) civil society actors either as agenda setters or problem solvers (with the same groups sometimes in both roles) will normally be indispensable to the success of Experimentalist regimes. In the Tuna-Dolphin regime, NGOs sounded the alarm about the dangers of dolphin sets, and helped move passage of the MMPA. Fishers and observers placed on boats by the IATTC identified dangerous practices and helped devise a workaround. NGOs organized the La Jolla Agreement to stabilize the regime when the flag states were deadlocked. In the CRPD context, NGOs helped write the rules, including the novel rules that gave themselves a major role in monitoring compliance and revising the rules. In the Montreal Protocol, NGOs played a key role in putting the dangers of ozone depletion before the public, and putting pressure on Congress for a regulatory response. Firms and associations of firms (the Alliance for Responsible CFC Policy) eventually became proponents of reform, and firms were central participants in the sectoral working groups that actually devised proposed alternatives to ozone depleting substances or ways to substantially reduce their production and use. The integration of civil society actors into Experimentalist regimes as both agenda setters and problem solvers blurs the distinction between public and private regulation. It makes this kind of regime more effective

than typical Mode One and Mode Two regimes in adapting international agreements to the lessons of local experience.

All this implies as a fourth condition that: *the issue must not be a matter of high politics*. In situations where governments are in direct control of relevant decisions, uncertainty arises from the strategic interactions of sovereign states, and the costs of error are very high. Control of nuclear weapons during the Cold War is the classic example of the situation and the adaptive response: detailed treaties, including monitoring regimes to provide mutual assurance of compliance with their terms. Issues such as the management of trade and climate change that have come to be defined as matters of high politics—global problems to be addressed by binding, global agreements—are, as we noted at the outset, intractable under current conditions. There are correspondingly efforts, as part of the new division of labor between Mode One and Mode Two institutions, to redefine them as the joint effect of a constellation of regional and sectoral problems. Problems may be defined in general terms at a global level, but responses take place through specialized local, regional, or international regimes that (on the model of the Montreal Protocol) reset their goals in light of rigorously evaluated experience, rather than deriving them from a precisely defined overall target set ex ante. If this reframing fails, Experimentalist Governance will not be part of an eventual solution to climate change; if it succeeds, we expect its success to go hand in hand with the diffusion of Experimentalist regimes.[132]

C. *Experimentalist Governance: Not a Panacea but Normatively Promising*

Elinor Ostrom was fond of saying that, however valuable the principles she articulated were for local self-governance, they were not a panacea for all sorts of collective action problems.[133] Experimentalist Governance is also not a pan-

132. *See* VICTOR, *supra* note 116 (criticizing the framing of global climate change as a currently intractable issue of high politics, advocating a decomposition of the problem on the lines suggested above, and using the Montreal Protocol as the prototype of the specialized, problem-solving regimes that would collectively replace global agreement on carbon-emissions reduction targets and a cap-and-trade system for achieving them).

133. *See, e.g.*, Elinor Ostrom, Marco A. Janssen & John M. Anderies, *Going Beyond Panaceas*, 104 PROC. NAT'L ACAD. SCI. U.S. 15176 (2007) (challenging

acea. Even if suitable in principle and adapted to a given domain, Experimentalist Governance is likely to be impractical or unworkable where key actors are unwilling or reluctant to cooperate—because they have veto rights over relevant decisions, prefer not to put established interests at risk, or agree too much on the answers to the questions they pose—and when it is impossible to place the reluctant parties under the threat of a "penalty default." As we have seen, penalty defaults can change parties' preferences by raising the cost to them of persisting in habitual but ineffective strategies, inducing them to consider alternatives and thus increasing the chance that they enter the "Goldilocks" zone where joint exploration of further possibilities is mutually attractive. So long as the parties do not face such a penalty, they are free to translate reluctance to participate in new arrangements into overt or covert obstructionism. But note that the "so-long-as" condition is important here: As we have seen in the case of the Tuna Dolphin and Montreal Protocol regimes, new information can mobilize the public, touching off a cascade of political and administrative responses that can put previously invulnerable parties at risk of penalty defaults.

Even where key actors embrace Experimentalist Governance, institutions reflecting its principles could fail because of unexpected, negative consequences. Experimentalist processes can be captured by groups with hidden agendas, hoping to capitalize on processes that give them the ability to shape agendas or to exercise vetoes at crucial points. The new forms of transparency created by regular peer review of results and increased participation of civil society groups presumably create new obstacles to familiar forms of capture; but they also presumably create new forms of vulnerability to outside influence and new opportunities to temper criticism in return for access to decision makers. More fundamentally, the actors may mistake their situation and institute Experimentalist processes on the assumption that there is no comprehensive, analytical solution to a set of problems, when in fact such a solution ex-

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"the presumption that scholars can . . . deduce general solutions to problems of the overuse of resources"); Elinor Ostrom, *The Challenges of Achieving Conservation and Development*, IV ANN. PROC. WEALTH & WELL-BEING OF NATIONS 21 (2011) (stating, "[o]ne of the primary challenges in achieving sustainability is overcoming what I call the 'Panacea Trap.'").

ists but is unknown to them. In short, human fallibility cuts very deeply into institutional planning, even in the experimentalist mode.

Yet one of the greatest normative merits of Experimentalist Governance is that it recognizes human fallibility. Indeed, its reliance on non-hierarchical decision making and implementation by local level actors, as well as its provisions for monitoring, peer review, and revisability, all derive from a profound awareness of human fallibility. We are often poorly informed, unwilling to pay costs to produce public goods, and limited in our analytical ability to predict human behavior, especially where strategic interactions are involved. In other words, we may recognize problems but not know how to deal with them. Under such conditions, Experimentalist Governance advises that often we should consider establishing a process that helps us generate alternatives we might not have imagined exist and improving our ability to choose among them by rigorously exposing each to criticism in light of the others.

A second appealing feature of Experimentalist Governance, especially in international cooperation, is its potential to increase participation in, and thus the democratic legitimacy of, such institutions. A familiar objection to delegation by treaty of aspects of sovereign authority to international organizations is that the transfer of authority diminishes the scope for domestic democracy. A rejoinder interprets delegation of particular sovereign powers to international bodies as a complement and extension of constitutional democracy: Just as the checks and balances provided by the domestic constitution and analogous entrenching legislation can improve the quality of collective self rule, protecting the rights of minorities or safeguarding diffuse and long-term interests against the immediate power of the majority or concentrated groups, so too can participation in international regimes.[134] The proviso of course is that such gains come at the price of limits on important forms of democratic participation. So the test of the legiti-

134. *See, e.g.*, Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1 (2009) (arguing that participation in international institutions can enhance the quality of domestic democracy in several ways including by restricting the power of special interest factions).

macy of constitutional institutions, domestic or international, is whether the increases in fairness and responsiveness they provide outweigh the costs they impose on majoritarian rule.

International cooperation organized on the principles of Experimentalist Governance may reduce the trade-off between overall responsiveness and democratic participation broadly conceived. To work, Experimentalist Governance must open agenda-setting and problem solving to a wide range of actors, particularly, we have argued, from civil society. Enlarging the circle of decision making, and keeping it accessible to new participants is a condition of success. Moreover, through regular peer review of the interchange between "central" or framework-making entities and "local" or implementing ones, Experimentalist Governance requires deliberative justification of current norms, or their revision, and so induces parties to reconsider their possibilities and preferences in the light of goals and procedures they gradually articulate together. In this way, Experimentalist Governance makes possible a form of forward-looking or dynamic accountability unavailable in traditional, principal-agent regimes—regimes which, in any case, are notoriously ineffective in international settings, because states can enter agreements on the basis of a "thin," formal domestic consensus, and can rarely monitor effectively the regimes thus authorized.[135] In Experimentalist Governance at its best the openness of decision-making improves dynamic accountability, and improvements in accountability enlarge participation in decision making. This is neither traditional, representative democracy, nor counter-majoritarian constitutionalism, but it is surely a form of deliberative, joint rule making that may contribute in transnational and global contexts, to self-governance under the rule of law.

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135. *See* Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U. J. INT'L L. & POL. 763 (2005) (giving an overview of dynamic accountability); Joost Pauwelyn, Ramses A. Wessel & Jan Wouters, *The Stagnation of International Law* 20–21 (Leuven Ctr. for Global Governance Studies, Working Paper No. 97, 2012), *available at* https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp91-100/wp-97-pauwelyn-wessel-wouters-revjp.pdf (discussing the distinction between "thin state consensus" underpinning many traditional international organization and the "thick stakeholder consensus" supporting international standard-setting bodies with Experimentalist features).