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Asher Alkoby*

I. THE RISE OF GLOBAL NETWORKS

The concept of "networks" is gaining currency in the study of global politics and international law. The term usually refers to a loose organization of nonstate actors characterized by "voluntary, reciprocal, and horizontal patterns of communication and exchange."[1] A network operating globally may include individuals (activists, scientists, or government actors), nongovernmental organizations ("NGOs"), social movements, and intergovernmental organizations ("IGOs"). Network members interact with each other, with states, and with other IGOs to promote their political agendas both within and outside institutions of global governance. Much of this network activity takes place outside of state and intergovernmental structures. There are an increasing number of international environmental standard-setting initiatives taken without any participation on the part of the state, much less state primacy.[2] The focus of this Article, however, is the direct and indirect participation of global networks in international environmental decisionmaking fora, as a matter of both practice and aspiration. The discussion below is limited to two forms of networks involved in international environmental lawmaking, in which NGOs are key

1   Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* 8 (Cornell 1998).

2   Examples include the United Nations Global Compact, the World Commission on Dams, the Forest Stewardship Council, and the International Organization for Standardization. These have been termed "Global Public Policy Networks" by Reinicke and Deng. Wolfgang H. Reinicke and Francis Deng, *Critical Choices: The United Nations, Networks, and the Future of Global Governance* 1 (Intl Dev Rsrch Ctr 2000). For an extended discussion, see Matthew J. Hirschland, *Corporate Social Responsibility and the Shaping of Global Public Policy* (Palgrave 2006).

members—networks of environmental nongovernmental organizations ("ENGOs") and business and industry nongovernmental organizations ("BINGOs").

The rise of global networks is closely linked to the "democratic deficit"[3] in global governance because individuals and private organizations increasingly perceive themselves as excluded from policy decisionmaking that affects their interests. This participatory gap in global governance stands at the center of much scholarly debate across disciplines. It is often claimed that the involvement of global networks in international lawmaking improves the democratic quality of political arrangements because it gives people more control over the ways their lives will be governed—something that nondemocratic governments refuse to provide and democratic governments are increasingly unable to provide.[4]

In attempting to explain the motivation for global network activity, international relations scholars have looked at the domestic opportunity structure and its impact on transnational activism, or, in other words, the local institutional conditions under which network members operate and the network's points of access to the domestic political system. These scholars have documented how domestic groups in repressive regimes try to bypass their governments and to seek allies to bring pressure on their governments from the outside by linking with international NGOs and transnational networks of activists.[5] In repressive regimes, the lack of domestic political opportunity to influence policymaking is what brings collective actors to seek allies transnationally. Their allies in democratic regimes cooperate with them in an effort to bring about change in the repressive target-state by coercive means (mostly through tactics of public shaming and economic pressure). But this still does not explain what motivates nonstate actors in democracies to initiate collective action. If the domestic political opportunity exists, as it does in democracies, and domestic actors can find channels of influence in their own countries, why would they resort to transnational action and act through global networks?

A possible answer is that easy access to the political system might be a precondition to, but does not guarantee, policy outcomes. And so when local NGOs in democracies find it difficult to reach the desired policy changes

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3   See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, 93 Am J Intl L 596, 597–99 (1999).

4   Richard Falk and Andrew Strauss, *On the Creation of a Global People's Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 Stan J Intl L 191, 192 (2000).

5   See Keck and Sikkink, *Activists Beyond Borders* at 12–13 (cited in note 1). See generally Thomas Risse, et al, eds, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge 1999).

domestically, they seek global channels of influence to achieve their goals. A related explanation, which stands at the center of international law discourse on public participation, concerns the consequences of globalization on the national policymaking capacity of democratic governments.[6] International lawyers have identified a growing shift in the decisionmaking authority from states to international institutions, which creates a "democratic deficit" in international law. In national democracies, the justification of the government's authority derives from the participation of citizens in the decisionmaking processes. Citizens may hold governments accountable for their actions through elections, and the political process allows for pathways of public participation and ensures transparency. But these domestic channels of influence have decreasing relevance, since many decisions that directly impact the lives of citizens in national democracies are being made at the global level, in international institutions that were formed by governments.

Justification for authority of international norms and institutions was traditionally based on state consent—both to specific commitments made by states in international agreements and to the delegation of authority to international institutions. But the legitimating force of state consent is being increasingly diminished, especially in the context of environmental governance, where there is a growing need for the development of lawmaking procedures that do not depend on consensual decisionmaking.[7] Furthermore, the rules that such institutions produce are no longer aimed at states alone. Nonstate actors are increasingly targeted or affected by global institutions of environmental governance. Such actors have no choice but to act transnationally in order to influence policy outcomes.

For these reasons, many international law scholars view the growing involvement of activist networks in global politics favorably.[8] The way to address the democratic deficit, they argue, is to allow for participation of individuals and groups in international policymaking. An increased involvement of the interested public in global governance would contribute to the popular legitimacy of international institutions and, as a result, advance their effectiveness.

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6   For an extended review of this literature, see Asher Alkoby, *Non-State Actors and the Legitimacy of International Environmental Law*, 3 Non-State Actors & Intl L 23 (2003).

7   Daniel Bodansky, *Legitimacy*, in Daniel Bodansky, Jutta Brunnée, and Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* 704, 712–14 (Oxford 2007).

8   See, for example, Kal Raustiala, *The "Participatory Revolution" in International Environmental Law*, 21 Harv Envir L Rev 537, 585–86 (1997); Peter J. Spiro, *New Global Communities: Nongovernmental Organizations in International Decisionmaking Institutions*, 18 Wash Q 45, 51 (1995).

While in agreement with the view that global networks improve the democratic quality of international institutions, this Article advances a particular conception of democratic governance, one that is more useful for understanding the role of networks in international rule creation and enforcement, as well as for assessing their operational effectiveness. Under the proposed discourse approach, the essence of democracy is deliberation rather than voting, preference aggregation, or self-government. The interaction of civil society in the public sphere, the realm of network activity, is likely to produce norms that will be legitimate in the eyes of their addressees because such interaction is typically nonhierarchical and unconstrained by power imbalances. The institutional discursive framework, in turn, is where the communicative appeal of the ideas that networks seek to advance can be tested. In the area of international environmental governance, much of this discursive activity takes place within intergovernmental institutions, which have been gradually opening up to the input provided by networks of nonstate actors.

The Article's discussion begins in Section II by outlining the discourse approach and explaining why it is arguably superior to the alternatives, especially in the global context where preference aggregation is not a viable option. Section III then turns to examine the involvement of ENGO and BINGO networks in the climate debate, demonstrating how patterns of discursive interaction may be observed both within each network and in the ways in which these networks attempt to channel their respective agendas into the institutional deliberation. In Section IV, this Article argues that the proposed conceptual schema is also useful in responding to commentators who are critical of global networks' involvement in environmental lawmaking. These critics claim that global networks are not legitimate international actors because they answer to no one in their power wielding political activity. Under a discourse approach, the legitimacy of networks—both environmental and business—lies in their ability to infuse the institutional debate with different policy perspectives and arguments, out of which well-informed, consensual decisions may be reached. The Article concludes by pointing to some of the implications flowing from a discourse approach for institutional design.

II. THE LEGITIMATING FUNCTION OF NETWORKS: A DISCOURSE APPROACH

A. GLOBAL GOVERNANCE: RETHINKING DEMOCRACY

Theories on democracy have traditionally assumed a "spatial congruence" between rulers (the nation-state) and subjects (the national society), namely, the

space where a community resides marked the political boundaries of that community.[9] But this assumption becomes problematic as soon as we begin to consider expanding political communities beyond national borders. A common argument is made that "beyond the nation-state, the political prerequisite for a democratic political community—the political space—is missing,"[10] and, thus, in the absence of an international political authority, stretching the reach of democracy to the global (or regional) level is not a possibility.[11]

Against this skeptical view stand two types of proposals for democratizing global governance. The first solution, most associated in international law literature with Thomas M. Franck, centers on the right to democratic government as the basis for legitimacy in international law.[12] The way to democratize the international system, Franck maintains, is by ensuring that those who speak in global discourse themselves represent democratically elected governments. While widely influential, this approach rightly attracted much criticism on several grounds. This two-level solution overlooks the fact that some countries are only democratic by name and that democracy, however understood, is far from being truly entrenched in their political cultures. For some cultures, notions of electoral democracy are alien, but other forms of political participation may be found there.[13] Furthermore, to trust the legitimating effect of this two-level discourse is to suggest, counterintuitively, that the cure for the democratic deficit in the international system is simply to ignore it. If the consent of the governed in representative democracies is sufficient for legitimating the international norms created by those governments, why do individuals feel the need to become involved in global politics? The fact that the largest numbers of international NGOs come from liberal democratic states suggests that a legitimacy deficit in international law exists even when those who speak in the global discourse represent democratically elected governments.

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9   Michael Zürn, *From Interdependence to Globalization*, in Walter Carlsnaes, Thomas Risse, and Beth A. Simmons, eds, *Handbook of International Relations* 235, 244 (Sage 2002).

10   Id at 245.

11   Two examples for this critique are Claus Offe, *The Democratic Welfare State in an Integrating Europe*, in Michael T. Greven and Louis W. Pauly, eds, *Democracy Beyond the State: The European Dilemma and the Emerging Global Order* 63 (Rowman & Littlefield 2000), and Robert Dahl, *Can International Organizations be Democratic? A Skeptic's View*, in Ian Shapiro and Casiano Hacker-Cordon, eds, *Democracy's Edges* (Cambridge 1999).

12   See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 Am J Intl L 46 (1992).

13   See Gerry J. Simpson, *Imagined Consent: Democratic Liberalism in International Legal Theory*, 15 Aus YB Intl L 103, 123–24 (1994).

Other scholars advance arguments for some form of cosmopolitanism embodied in institutional arrangements resembling a world government.[14] But these proposals to extend democracy to the global level are typically presented as an extension of liberal democracies, and a global democracy is imagined that "results from, and only from, a nucleus, or cluster, of democratic states and societies."[15] Setting aside the objections such proposals raise at the normative level, particularly the difficulties with imagining global democracies, cosmopolitan arrangements are not politically feasible in the short- or medium-term. Even the existing international institutions, which arguably form the basis for a future world government, are not especially democratic today and are not likely to be so in the foreseeable future.

Given the lack of prospects for radical cosmopolitan reform, scholars have turned to elements of democratic theory that are said to enhance the legitimacy of global institutions: accountability, transparency, and access to justice.[16] The meaning of these concepts and the purpose that they serve, however, continue to be constrained by an understanding of "democracy" as a mechanism for aggregating preferences. True and meaningful participation in democracies, it is argued, is made possible mainly through the ballot box. Since that is not available globally, any alternative form of participation can only result in a partial and diffuse influence on the rulemaking process. Therefore, while public participation by itself "is not sufficient to legitimate an institution, it may be necessary to avoid concerns about legitimacy."[17] When democracy is thus understood as representation, the involvement of nonstate groups in policymaking is rightly scrutinized since these networks of NGOs do not represent the "public" in any meaningful sense: they are elected by no one.[18]

But this conception of democracy implies that representation, mostly through voting, is the most important channel of influence on policy formation. Elections, however, provide a very thin form of political influence. They often do not serve as a mechanism for creating political balance, but rather as markers of the prevailing balance.[19] In the past two decades, some democratic theorists have been advancing an alternative conception of democratic legitimacy that rests not only on representation, but deliberation. Two streams of thought may

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14   See, for example, David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity 1995). See also Falk and Strauss, 36 Stan J Intl L 191 (cited in note 4).

15   Held, *Democracy* at 22 (cited in note 14).

16   Jonas Ebbesson, *Public Participation*, in Bodansky, Brunnée and Hey, eds, *Handbook* 681 (cited in note 7).

17   Bodansky, *Legitimacy* at 717 (cited in note 7).

18   I will address this critique in Section IV below.

19   John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* 25–27 (Oxford 2000).

be identified in the deliberative turn in democratic theory: the liberal and the critical. Both advance the claim that the essence of democracy should be deliberation rather than voting, preferences aggregation, or even the idea of self-government. The liberal strand considers the representative institutions and legal systems of liberal democratic states (for example, parliaments and courts) as the primary locus of political deliberation.[20] Critical theorists, on the other hand, put more emphasis on informal discursive forms of deliberation and consider civil society and the public sphere to be the primary sources of democratic transformation and renewal.[21]

For liberal deliberative democrats, institutional fora of liberal democracy are where deliberation ought to take place: they are where participants aim to persuade one another of the rightness of their positions. These theorists typically do not engage directly with the separate role of civil society in the process of structured deliberation, although they do emphasize the importance of the publicity of the political debate. By contrast, in critical theories of deliberative democracy, civil society plays a predominant role.[22] Critical theorists understand civil society as a tool for achieving radical political projects. They remind us that profound changes in public policies in western democracies in the past few decades were not the result of electoral decisions, but the outcome of collective efforts of numerous individuals engaged in all kinds of communication directed at the state. The civil rights movement in the United States, the international women's rights movement and the environmental movement are three notable examples.[23]

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[20]   See, for example, Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap 1996). There is also a growing interest among legal scholars in deliberative constitutionalism. See, for example, Cass R. Sunstein, *The Partial Constitution* (Harvard 1993). For a discussion of the empirical aspects of deliberation in formal arenas, see André Bächtiger and Jürg Steiner, *Introduction*, 40 Acta Politica 153 (2005).

[21]   Dryzek, *Deliberative Democracy and Beyond* (cited in note 19).

[22]   See Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory* (MIT 1992). For a critical adoption of their model in the context of global environmental governance, see Asher Alkoby, *Globalising a Green Civil Society: In Search of Conceptual Clarity*, in Gerd Winter, ed, *Multilevel Governance of Global Environmental Change* 106 (Cambridge 2006).

[23]   For a discussion of the civil rights movement, see Dryzek, *Deliberative Democracy and Beyond* at 51–52 (cited in note 19). For a discussion of the evolution of the women's rights movement (particularly the right to formal political participation), see Martha Finnemore and Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 Intl Org 887, 894–896 (1998). For the argument that based on the experience in domestic contexts radical shifts in environmental conservation may only be achieved through "green agitation" driven by mass publics, see John S. Dryzek, *Resistance is Fertile*, 1 Global Envir Pol 11, 13–14 (2001).

B. DISCOURSE IN THEORY AND PRACTICE

In the study of global governance, deliberative models of legitimation are·
often based on Habermas's theory of communicative action.[24] Early in his
writings, Habermas developed the concept of the "public sphere" as a discursive
space, seen as separate from the economy and the state, where citizens
participate and act through dialogue and deliberation.[25] The discursive aspects of
this public sphere later served as a basis for his theory of deliberative
democracy.[26] The notion of discourse builds on the need to allow participants in
political deliberation to account for their beliefs and actions in terms that would
be intelligible to others, who may accept or contest them.[27] Principles, norms, or
any institutional arrangement can be said to be valid only if they meet the
approval of those affected by them.[28] Discourse theory rejects the vision of
democracy as an agglomeration of private preferences, and instead introduces
the notion of "institutionalized discourses" as the processes through which
political consensus is formed. Legitimacy, under this view, requires that
decisions rest on "good arguments" made by participants in the debate. It
derives from a mutual respect for the rules of argumentation: that participants
must be free and equal actors who challenge the validity of each other's claims,
that they seek a reasoned consensus about their situation and justifications for
the norms chosen, and that they are open to being persuaded by the better
argument.[29]

To say that all participants are equal is to imply that relations of power
recede in the background, and it is only the power of the better argument that
must persuade all participants in the debate. The assumption is that principles,

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[24] Jürgen Habermas, 1 & 2 *Theory of Communicative Action* (Beacon 1981 & Beacon 1987) (Thomas
McCarthy, trans). For an extension of this theory to international relations, see Thomas Risse,
Let's Argue! Communicative Action in World Politics, 54 Intl Org 1 (2000).

[25] Jürgen Habermas, *Structural Transformation of the Public Sphere* (MIT 1989) (Thomas Burger, trans).
In this book, Habermas provided an historical account of the emergence of the public sphere in
eighteenth-century Europe in the form of private clubs, coffee houses, learned societies and
literary associations, journals, and newspapers. While historically much of the described activity
took place in physical spaces, the concept is defined in analytical terms and relates to a "sphere"
(which, as described below, is any realm of uncoerced conversation oriented toward a pragmatic
agreement), rather than a "place." With the advance of communication technology, the
interaction in the public sphere is increasingly conducted through electronic media.

[26] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*
275 (MIT 1996).

[27] Habermas, *Structural Transformation* at 99 (cited in note 25).

[28] Id at 82.

[29] See the recent restatement of the rules of argumentation, as applied to the international realm, in
Andrew Linklater, *Dialogic Politics and the Civilising Process*, 31 Rev Intl Stud 141, 143 (2005).

norms, or any institutional arrangement can be said to be valid only if it meets the approval of all those affected by it. Therefore, the legitimating appeal of norms is derived not mainly from the fact that they were created by elected representatives, but because they were produced in an inclusive lawmaking process absent domination.

How can such discourse be practiced in actuality? The first principle of discursive argumentation, as noted above, is inclusiveness—all those who may be affected by the outcomes of the discourse should be allowed to take part in it. In addition to inclusiveness, participants should accept several preconditions before entering the discourse that could assure the development of legitimate norms:

> First, they should enter dialogue convinced that no-one can know who will learn from whom. Second, they should strive to reach agreements which rely on the force of the better argument and which try to reduce overt and subtle forms of power. Third, they should think from the standpoint of others and aim to agree on universalisable principles which bind all together as moral agents.[30]

These procedures aim to ensure that just outcomes will be reached. They perform a critical function by way of filtering out arguments that are unsubstantiated, unconvincing or self-serving, and they help to make a distinction between better and worse claims. Agreements that are reached are "right" because they are supported by good reasons.[31]

When theorizing the possible loci of discursive activities, Habermasians make a distinction between "strong publics," formally organized institutions of the political system, and "weak publics," the informally organized public sphere located within civil society, which includes, among others, voluntary associations and the mass media. The realm of "weak publics" is where social problems are identified, interpreted, and resolved. They are then further filtered through the Habermasian "system," the political discourse that assumes the decisionmaking responsibility and addresses these problems at the level of policy change.[32] The challenge, Habermas himself maintained, is how to design "institutions of political will-formation so that they reflect the more complex preference structure of individuals rather than simply register the actual preferences that individuals have at any given time."[33]

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30   Id at 142.

31   Risse, 54 Intl Org 1 at 10 (cited in note 24).

32   Kenneth Baynes, *A Critical Theory Perspective on Civil Society and the State*, in Nancy L. Rosenblum and Robert C. Post, eds, *Civil Society and Government* 123, 125 (Princeton 2002).

33   Habermas, *Between Facts and Norms* at 275 (cited in note 26).

When mapped onto the international relations realm, this conceptual schema suggests that the public sphere is where informally organized global networks create and legitimate norms through discourse. In the political sphere, networks act strategically in order to gain recognition, achieve benefits, and influence the political discourse. This offensive, political mode of action is not all about material gains; it also involves "the politics of influence," targeting political actors and making them more receptive to the needs and self-understandings of actors in civil society. The risk is, however, that by acting "in the state," civil society actors may lose their critical edge. This bind that collective actors find themselves in has long been identified by social movement scholars:

> [I]nstitutional participation . . . is a double edged sword. Social movements that are too alienated from institutions risk isolation and sectarianism; but those which collaborate too closely with institutions and take up institutional routines can become imbued with their logic and values.[34]

Therefore, from the perspective of a discourse approach, the challenge that global networks face is how to straddle the two venues of deliberation successfully, finding the optimal channels to influence policy outcomes while being aware of the risks of co-option on the one hand and staying mindful of the benefits that working within institutions can bring on the other.

International relations scholars have found evidence for discursive construction of norms at the inter-state level (or the realm of "strong publics") and have demonstrated how patterns of persuasive argumentation are found in the adoption of international norms through an interaction among state officials, involving mutual persuasion. Jeffery Checkel argued that state elites engage in argumentative persuasion, defined as "an activity or process in which a communicator attempts to induce a change in the belief, attitude, or behaviour of another person . . . through the transmission of a message in a context in which the persuadee has some degree of free choice."[35] He demonstrated, for example, how a pattern of constitutive compliance was found in the adoption of the Council of Europe's citizenship rights norms in the Ukraine, through an interaction of state officials with regional experts.[36] Similarly, Thomas Risse, drawing on studies of German unification, suggested that a process of social learning is what brought Soviet leadership to agree to German unification within NATO at the end of the Cold War. Soviet leaders were convinced by the

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[34] Sydney Tarrow, *Power in Movement: Social Movements and Contentious Politics* 208 (Cambridge 2d ed 1998).

[35] Jeffrey T. Checkel, *Why Comply? Social Learning and European Identity Change*, 55 Intl Org 553, 562 (2001) (citation omitted).

[36] Id at 574–78.

arguments made by German and US officials, through a process of "true dialogue of mutual persuasion," among which was the legitimacy of the principle of self-determination.[37] Other contributions have shown how advocacy networks are also involved in the development and the entrenchment of international norms through political action, often involving discursive argumentation.[38]

Two concerns are often raised by critics of discursive approaches to global governance. The first is that the idea of discursive argumentation is good in theory, but it rarely takes place in practice.[39] The inclusiveness requirement, which instructs that all individuals or groups who may be affected by collective decisions should be allowed to participate in the dialogue, is hardly ever met. Admittedly, it is impossible for all members of a community to engage in such dialogue over every issue that affects them. Yet for critical theorists, the requirement of inclusiveness, as well as the other rules of argumentation, is not absolute. The idea of discourse "is a regulative idea, a counterfactual stance from which to assess and criticize nondeliberative processes and power politics."[40] In this sense, procedural fairness as required by a discourse approach—including inclusiveness, equality, and openness to be persuaded—should be viewed as an aspiration rather than as a goal that could be entirely achieved. The insight that this approach provides, however, remains forceful nonetheless: the closer the lawmaking process comes to reaching this regulative ideal, the more legitimate the norms that it produces will be.

A second concern is that opening lawmaking fora to a multitude of participants would compromise the effectiveness of the process. This claim rests on the finding by some analysts that persuasion works better in insulated, in-camera settings, where negotiators can freely exchange ideas and alter their positions without worrying about the possible embarrassment involved in retracting and publicly admitting that they were wrong.[41] The implication is that an inclusive process may not result in discursive argumentation on the part of

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37   Risse, 54 Intl Org 1 at 23 (cited in note 24). For an extended discussion see Thomas Risse, *The Cold War's Endgame and German Unification (A Review Essay)*, 21 Intl Security 159, 178–79 (1997).

38   For a comprehensive review of this literature, see Richard Price, *Transnational Civil Society and Advocacy in World Politics*, 55 World Pol 579 (2003).

39   See Randall L. Schweller, *Fantasy Theory*, 25 Rev Intl Stud 147, 147 (1999) (suggesting that discursive approaches to international relations argue "by fiat rather than by the weight of hard evidence, which is in scant supply here").

40   Ilan Kapoor, *Deliberative Democracy or Agonistic Pluralism? The Relevance of the Habermas-Mouffe Debate for Third World Politics*, 27 Alternatives 459, 462 (2002).

41   See Checkel, 55 Intl Org at 563 (cited in note 35). For a discussion of other conditions for successful persuasion, see Alastair I. Johnston, *Treating International Institutions as Social Environments*, 45 Intl Stud Q 487 (2001).

state delegates because it would likely be tainted with rhetoric, demagoguery, and overbidding. There is often a necessary trade-off, then, "between *public* reason and public *reason*."[42]

But there is some evidence to suggest that at least in some areas of global governance an inclusive process also produces more effective outcomes. Reviewing a series of case studies on arguing and bargaining in multilateral negotiations, Ulbert and Risse conclude that public settings are more conducive to effective arguing when the debaters are uncertain about the preferences of their constituents *and* when the consent of their constituents is required.[43] In such instances, a "two-level" arguing and persuasion process can be observed with negotiators having to justify their positions twice: at the negotiating table and in front of their domestic audiences.[44] These findings suggest that in issue areas that involve scientific uncertainty and that require domestic implementation involving a multitude of actors, as environmental matters often do, a more transparent and inclusive dialogue would also be more effective. Further empirical research is needed in order to clarify under what conditions shielding debate from the public improves its discursive quality and whether in balance the loss of the legitimation effect is worthwhile.

The following discussion is much more modest in scope, however. It examines one area of global environmental governance where a discourse approach to democratic legitimacy arguably finds confirmation. Through an examination of the active involvement of global networks in the law and politics of climate change, this Article demonstrates how instrumental these actors were in initiating and bringing about normative change by discursive means. Furthermore, it suggests that network actors not only shape, but also may be shaped *by*, the process of discursive argumentation.

III. GLOBAL NETWORKS IN ACTION: DEBATING CLIMATE CHANGE

The climate change negotiations have been at the forefront of attempts to open up international institutions to civil society input.[45] The influence of both ENGO and BINGO networks on the negotiations was made possible because of the relatively open approach taken by the international community towards

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42   Simone Chambers, *Measuring Publicity's Effect: Reconciling Empirical Research and Normative Theory*, 40 Acta Politica 255, 263 (2005).

43   Cornelia Ulbert and Thomas Risse, *Deliberately Changing the Discourse: What Does Make Arguing Effective?*, 40 Acta Politica 351, 357–59 (2005).

44   Thomas Risse, *Global Governance and Communicative Action*, 39 Govt & Opposition 288, 312 (2004).

45   See Alkoby, 3 Non-State Actors & Intl L at 36–41 (cited in note 6). See generally Peter Newell, *Climate for Change: Non-State Actors and the Global Politics of the Greenhouse* (Cambridge 2000).

their participation. This approach is reflected in the text on the United Nations Framework Convention on Climate Change ("UNFCCC"),[46] which addresses the role of NGOs in Articles 4.1(i), 7.2(l), and 7.6. These provisions establish the rules for admission of NGOs to the proceedings as "observers," recognize the importance of NGOs for public awareness of climate change, and state that the Conference of the Parties ("COP") shall utilize their services and cooperation in the supervision of the implementation of the UNFCCC.

The UNFCCC established the ultimate objective of the regime—the stabilization of the concentration of greenhouse gas ("GHG") emissions in the atmosphere to the levels that would help avoid the adverse impact of climate change on humans and the environment. It also provided the institutional and procedural framework within which this goal is to be achieved. In the five years that followed, parties to the UNFCCC met annually in an attempt to reach an agreement on a set of more specific, binding commitments to limit and to reduce GHG emissions. A pact was finally reached at the Third Conference of the Parties in 1997, when the Kyoto Protocol was signed.[47] The Protocol requires developed ("Annex I") countries to reduce their emissions of six GHGs in accordance with country-by-country targets, which will reduce their combined emissions by an average of 5.2 percent below 1990 levels at the end of the Protocol's first commitment period (2008–2012).[48] Global networks, it is argued below, played a key role in the deliberations leading to the conclusion of this ambitious treaty.

A. THE INVOLVEMENT OF ENGO NETWORKS IN THE CLIMATE DEBATE

Some of the most influential environmental groups in the climate change negotiations were ENGOs such as the World Wildlife Fund, Greenpeace, the Sierra Club, Ozone Action, and the World Watch Institute. But most ENGOs coordinated their activities under the umbrella of the Climate Action Network ("CAN")—a group of ENGOs with over 280 members. These NGOs were given limited access to deliberation fora. The procedural rules allowed for mainly two forms of formal participation by NGO observers: oral interventions and written submissions.[49] Observers were allowed to attend sessions of the COP

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[46] See United Nations Framework Convention on Climate Change (1992), 1771 UN Treaty Ser 107.

[47] Kyoto Protocol to the Framework Convention on Climate Change (1997), 37 ILM 22 (1998) ("Protocol").

[48] Id, art 3.1.

[49] UNFCCC, *Draft Rules of Procedure of the COP and its Subsidiary Bodies to the UNFCCC*, art 7(2)(1), UN Doc FCCC/CP/1996/2 (1996). Rule 7.2 states that observers may, "upon invitation of the president, participate without the right to vote in the proceedings of any session in matter of

and its Subsidiary Bodies, and an informal practice developed whereby representatives of NGO "constituencies" were allowed to make oral statements during the sessions.[50] NGOs also submitted documents directly to state delegates, who found them particularly useful.[51] During the Kyoto negotiations, however, representatives of CAN were only initially allowed to attend the sessions and deliver formal statements during the meetings. As deliberations advanced, delegates tended to meet in closed-door sessions to which NGOs were not admitted. NGOs then had to use informal means of influence, attempting to lobby their cause by catching delegates in the corridors between sessions, and, in some cases, "even searched trashcans and copiers in hopes of retrieving draft documents."[52] Another indirect channel of influence was involvement as participants or advisors of state delegations. The Center for International Environmental Law, for example, in coordination with Greenpeace, helped form and coordinate the positions of the Alliance of Small Island States—a group of countries expected to suffer most from rising sea levels as a result of global warming. The ability of this group of thirty-seven states to influence policy outcomes was greatly enhanced by NGO contributions to their position papers and interventions, because these developing countries were typically represented by very small delegations which did not possess the kind of expertise and knowledge that were available to other state participants.[53]

Throughout the negotiations, ENGOs used two valuable sources of leverage in order to influence policy outcomes. The first was their expertise and specialized knowledge on issues such as carbon sinks and emissions trading, which state delegates found useful when debating different policy options.[54] The second was their link to public opinion through use of various media. One of

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direct concern to the body or agency they represent, unless at least one third of the Parties at the session object." As applied in practice, this Rule was understood to define what observers cannot do (vote), and consequently their participation included access to deliberation venues, oral interventions during the hearings, and distributions of documents to state delegations. See Sebastian Oberthür, et al, *Participation of Non-Governmental Organisations in International Environmental Governance: Legal Basis and Practical Experience* 128–29 (Ecologic & FIELD 2002).

50   Most NGOs did not find these to be particularly useful, Oberthür and his colleagues report, and preferred to make spontaneous interventions during the substantive debate—which were only rarely allowed. Id at 131–32.

51   Id at 132–33.

52   Elisabeth Corell and Michele M. Betsill, *A Comparative Look at NGO Influence in International Environmental Negotiations: Desertification and Climate Change*, 1 Global Envir Pol 86, 95 (2001).

53   Peter Spiro, *Non-governmental Organizations and Civil Society*, in Bodansky, Brunnée, and Hey, eds, *Handbook* 770, 783 (cited in note 7). The Center for International Environmental Law has since been renamed the Foundation for International Environmental Law ("FIELD").

54   Chiara Giorgetti, *From Rio to Kyoto: A Study of the Involvement of Non-Governmental Organizations in the Negotiations on Climate Change*, 7 NYU Envir L J 201, 238–243 (1999).

the powerful instruments that ENGOs used during the negotiations leading to signing of the Protocol was the online publication of the daily newsletters *ECO* and the *Earth Negotiations Bulletin*. These publications served as important sources of information on the deliberations, revealing the current state of the negotiating process as well as helping to clarify the obscure language of international diplomacy to the public.[55]

B. THE INVOLVEMENT OF BINGO NETWORKS IN THE CLIMATE DEBATE

The more innovative feature of nonstate actors' involvement in the climate debate is the appearance of relatively new players in the international environmental arena: business entities, which will be directly affected by the regulation of climate change mitigation policies. The business sector had significant influence on the negotiation process leading to Kyoto. At times, BINGOs outnumbered ENGOs at the conferences of the parties.[56] While only nonprofit entities are allowed to participate in the proceedings under the UNFCCC, business associations are not considered profit-making entities but groups working to advance the political interests of their constituents, and therefore may be accredited as observers in the same ways as ENGOs.[57]

The profit-making criterion in itself should not serve as the gatekeeper, if only because the assumption that for-profit entities are necessarily anti-environment is false.[58] Ever since the climate debate gained momentum, one can observe a diversity of views held by different segments of the private sector. The business community was divided into "grey" industry groups, which were concerned with the economic impacts of the forming agreement, and the "light

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55   ECO is published by CAN and is available online at <http://www.climatenetwork.org> (visited Nov 17, 2007). The *Earth Negotiations Bulletin* is published by the International Institute on Sustainable Development and is available online at <http://www.iisd.ca> (visited Nov 17, 2007).

56   Giorgetti, 7 NYU Envir L J 201 at 220 (cited in note 54).

57   The wording of the permitting provision in Article 7(2)(l) of the UN Framework Convention on Climate Change, for example, does not exclude the possibility of allowing business corporations into the process. It refers to "non-governmental bodies," and since this term has no exclusive definition in the Convention, theoretically it could also include business corporations (cited in note 46). However, the *Note by the Secretariat: Admission of Observers: Intergovernmental and Nongovernmental Organizations*, states that in preparing the list of eligible NGOs, "the secretariat has taken due account of the provisions of Article 7, paragraph 6, of the Convention and of the established practice whereby nongovernmental organizations are required to furnish proof of their nonprofit (tax-exempt) status in a State Member of the United Nations." *Organizational Matters: Admission of Organizations as Observers*, UNFCCC, 6th Sess, Provisional Agenda Item 2(e) at 2, UN Doc FCCC/CP/2000/2 (2000).

58   For an extended discussion of the inclusion of corporate actors in a discursive framework, see Alkoby, *Globalising a Green Civil Society* at 134–39 (cited in note 22).

green" groups, representing renewable energies, cogeneration, natural gas and other energy efficient industries which were expecting to benefit from a regulatory change.[59] The insurance sector, on the other hand, expects to suffer major financial losses in a changing climate, and most insurance companies favored an international agreement from the outset.[60]

Still, the dominant actor within the BINGO network in the negotiations until 1997 was the hard-line Global Climate Coalition ("GCC"), representing companies and industry associations that were major producers and users of fossil fuels. This coalition opposed any binding restrictions on GHG emissions, questioning the scientific basis for concerns about anthropogenic global warming and arguing that any attempts to cut down emissions would be devastating to industrial states' economies.[61] Other active BINGOs were the International Chamber of Commerce, the World Business Council for Sustainable Development, and the International Emissions Trading Association. Their strategies for influencing the international negotiations were similar to those of ENGOs: attending sessions as observers, making submissions when possible, and offering assistance to policymakers. When formal participation became more limited, they, too, had to resort to informal means of influence such as lobbying and working through like-minded state delegations. The GCC, for example, reportedly advised the Saudi Arabian, Kuwaiti, and Russian governments for the purpose of obstructing deliberations.[62]

Most observers agree that NGO networks—both environmental and business—played a crucial role in the Kyoto negotiations. The agreement adopted was a compromise reflecting the push and pull from both sides: an internationally binding agreement to curb greenhouse gas emissions was indeed reached, but the final text did not fully reflect the stated goals of ENGOs, and commitments were not as stringent as they had hoped.[63] Overall, however, considering the dominance of the oil industry in the negotiations, the failure of the oil multinationals to thwart the reaching of an agreement seems puzzling. Backed by politically and financially powerful corporate actors, BINGOs had every chance to win the battle with ENGOs over the outcomes of the COP

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59   See Sebastian Oberthür and Hermann Ott, *The Kyoto Protocol: International Climate Policy for the 21st Century* 31 (Springer 1999).

60   Matthew Paterson, *Risky Business: Insurance Companies in Global Warming Politics*, 1 Global Envir Pol 18, 20–23 (2001).

61   David E. Levy, *Business and the Evolution of the Climate Regime: The Dynamics of Corporate Strategies*, in David E. Levy and Peter J. Newell, eds, *The Business of Global Environmental Governance* 73, 82–83 (MIT 2005).

62   Stephen Tully, *Commercial Contributions to the Climate Change Regime: Who's Regulating Whom?*, 5 Sustainable Dev L & Poly 14, 16 (2005).

63   Corell and Betsill, 1 Global Envir Pol at 96–97 (cited in note 52).

rounds. What is even more puzzling is the apparent shift in the oil industry's own stance on climate change since the conclusion of the Kyoto Protocol, even after the US had renounced the Protocol in 2001 and made the chances for its successful implementation dimmer than ever. Companies began to accept the scientific basis for curbing GHG emissions and to invest in low emission technologies. One plausible explanation for this change, this Article suggests, lies in the discursive qualities of the climate debate, both inside and outside institutional frameworks.

C. GLOBAL NETWORKS IN THE KYOTO PROCESS: DISCOURSE APPROACH APPLIED

As critical theorists have suggested, global networks are not simply vehicles for influencing policy outcomes. They also serve as sites of cultural and political negotiation. They do not merely serve as diffusers of ideas and shared understandings; these ideas are articulated, formulated, and often transformed inside the network (in the "public sphere") and then advocated through its political activity. International norms, under this view, are likely to attain a high level of legitimacy when they are filtered through this transnational deliberative process, which may also serve as an equalizing force in global social relations. The relative success of ENGO networks in identifying and publicizing the problem of climate change, developing policy-relevant knowledge, and effectively transmitting this knowledge into the institutional debates was derived from their ability to coordinate their efforts through internal dialogue. During the negotiations, lead campaigners from each member of CAN attended all conferences and met daily in order to agree on policy tactics.[64] The network succeeded in organizing consensus despite the internal conflicts between members, particularly between Northern and Southern ENGOs, with their respective emphasis on environmental versus equity implications of global warming.[65] The CAN's unwritten code of conduct "prescribes the inclusion of developing country NGO views."[66] This requirement often uncovers deep conflicts, but through continuous dialogue members of CAN have managed to translate the differences of opinion into comparative advantages and areas of expertise:

> [N]orthern NGOs have often reviewed their positions (on forestry, agriculture and population in particular) after discussion with partners from

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[64]   Simone Pulver, *Organising Business: Industry NGOs in the Climate Debates*, 39 Greener Mgmt Intl 55, 60 (2002).

[65]   Id.

[66]   Matthias Duwe, *The Climate Action Network: A Glance behind the Curtains of a Transnational NGO Network*, 10 RECIEL 177, 180 (2001).

the South who draw their attention to new dimensions of environmental problems (consumption per capita, poverty, etc.). In parallel, southern NGOs have been working on those issues, which used to be considered exclusively northern.[67]

Reconciling the differences between the northern and southern members of CAN is an ongoing challenge, and a recent study reveals that in the past few years, "the initial impetus for balanced cooperation may have been lost to some extent to the routine of the process."[68] Powerful actors within CAN have alienated others, and the growing complexity of the Kyoto process makes it difficult to negotiate a long-term vision of the regime internally. Nonetheless, the level of continued cooperation reached so far is impressive.[69]

ENGOs also disagreed on the use of market-based mechanisms, such as emissions trading, as part of the regulatory framework's formation. European ENGOs believed that such mechanisms would compromise the environmental integrity of the Protocol because it would allow some states to avoid taking any meaningful action to curb their GHG emissions, while American ENGOs were strong advocates of emissions trading based on the successful US experience in trading schemes.[70] Despite the ongoing disagreement among network members, the CAN managed to present a unified front, which made its input into the policy process coherent and effective. When consensus was not reached at the network level, members in disagreement with CAN's position could still offer their input into the institutional deliberation since each member of the network could also be accredited to the UNFCCC independently as observer. This ability to work both with and independently of the network had an equalizing effect on the intra-network dialogue because it limits the incentive of each member to try to control the network.[71]

The business network, on the other hand, was not able to organize a similar consensus for several reasons. First, the challenge of reaching consensus was far greater to begin with, given the wide divergence of business perspectives on climate change. From the initial phase of the negotiations, there was no umbrella organization similar to CAN that represented all segments of the private sector, because industries were deeply divided between companies that saw climate change as a business opportunity and others that saw it as a liability.

Second, the access of business entities to the policy process was more limited than that of the environmental groups. Given the UNFCCC's nonprofit

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[67]   Id at 181 (quoting from CAN website).

[68]   Id at 189.

[69]   Id.

[70]   Pulver, 39 Greener Mgmt Intl at 60–61 (cited in note 64).

[71]   Id at 64.

accreditation criteria for NGOs, a company that was a member of a business association could not register under its own name as an observer in the negotiations. Therefore, any input into the policy process had to be made through BINGOs.[72] When consensus could not be reached at the BINGO level, internal conflicts were difficult to resolve and divergent views could not be otherwise accommodated. Disagreeing members' only option was to join a different BINGO or form a new association through which to influence the negotiations. The GCC, for example, represented 40 percent of the US economy, dominated by oil industry members such as Exxon, Mobil, Chevron, and Texaco.[73] While two major European multinationals, BP and Shell, attempted to coordinate efforts with the GCC at the early stages of the negotiations, they parted ways because of their inability to reach a consensus on policy issues.[74] Close to the signing of the Protocol, BP and Shell publicly accepted the science of climate change and expressed their support for global climate regulation. These companies' only recourse was to form the World Business Council for Sustainable Development, through which to exert their influence on the lawmaking process. The GCC experienced a number of additional defections of members during the late 1990s, and by 2002 the GCC had disbanded and withdrawn from the climate debate altogether.[75]

The third crucial difference between the business networks' activity and that of the environmental networks concerns their methods of engagement with the institutional deliberation fora. While ENGOs perceived themselves as participants in the international political debate, many of the BINGOs, particularly those based in the US, maintained an oppositional stance toward the international political authorities. The GCC's style of lobbying was an extension of an American model of political engagement, encouraging the view that "regulation is the product of ongoing conflict between interest groups, and business wields influence through the action of lobbying groups in Washington, D.C."[76] In the language of discourse theorists, members of the GCC refused to accept one of the basic rules of discursive argumentation—an openness to be persuaded by the better argument. Their adversarial style of network activity did not fit well with the international institutional setting, where a discursive model

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72   Id at 58–60, 65.

73   Id at 61.

74   Id at 63–64.

75   Levy, *Business and the Evolution of the Climate Regime* at 91–92 (cited in note 61). See also Lester R. Brown, Issue Alert, *The Rise and Fall of the Global Climate Coalition* (Worldwatch Inst July 25, 2001).

76   Pulver, 39 Greener Mgmt Intl at 63–64 (cited in note 64). For an analysis of different corporate strategies as a function of the domestic political culture (juxtaposing ExxonMobil and American culture with Shell and Dutch culture), see Jon Birger Skaerseth and Tora Skodvin, *Climate Change and the Oil Industry: Common Problems, Different Strategies*, 1 Global Envir Pol 43 (2001).

of lawmaking was being developed as a result of the relatively inclusive framework. Other companies, however, were more influenced by the European political model of a business's relationship with the government, which "relies on a more consultative process based on a clear division of responsibilities."[77] European-based BINGOs thus preferred to pursue a more collaborative process with other participants in the institutional debate, both ENGOs and states.[78] BP and Shell, for example, rejected the aggressive lobbying tactics of the GCC and distanced themselves from this network for that reason.[79] Arguably, then, business associations that accepted the discursive method of engagement, and perceived themselves as full participants in the climate debate (rather than as adversaries or information providers only), were more successful in channeling their input into the policy process.[80] Others, like the GCC, were eventually filtered out of the debate and dissipated.

The foregoing suggests that effective discourse within networks, as well as between networks and international institutions, produces the kind of lawmaking that approximates the regulative ideal advanced by critical deliberative democrats. The question remains, however: what convinced companies like BP and Shell, which were initially opposed to any international climate regulation limiting GHG emissions, to adopt a supportive policy? The institutional deliberation and the broader discursive framework within which global networks operate provide a partial explanation for this shift in corporate strategy.

Several analysts have explored the reasons for the shift of American companies towards the acceptance of precautionary action and more accommodative positions on emission controls.[81] After defecting from the GCC,

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77   Pulver, 39 Greener Mgmt Intl at 64 (cited in note 64).

78   They collaborated not only with state delegates but with ENGOs as well. The Business Council for Sustainable Energy, the World Business Council on Sustainable Development, and the International Climate Change Partnership teamed up with the World Resources Institute and Environmental Defence to pursue research on profitable emission reductions. See generally Levy, *Business and the Evolution of the Climate Regime* at 93 (cited in note 61).

79   Pulver, 39 Greener Mgmt Intl at 64 (cited in note 64).

80   Some analysts argue that the level of influence of ENGOs on the outcomes of the negotiations was only "moderate" since the Protocol does not fully reflect the ENGOs' stated position at the beginning of the process (higher emission reduction goals, strong review and compliance mechanisms, and no market mechanisms such as emission trading). Corell and Betsill, 1 Global Envir Pol at 96–97 (cited in note 52). When compared to the stated goals of forces opposing international regulation of any sort, however, it is clear that ENGOs were more successful in influencing the outcomes.

81   See generally Levy, *Business and the Evolution of the Climate Regime* (cited in note 61); Skaerseth and Skodvin, 1 Global Envir Pol 43 (cited in note 76); Vicki Arroyo and Benjamin Preston, *Change in the Marketplace: Business Leadership and Communication*, in Susanne C. Moser and Lisa Dilling, eds, *Creating a Climate for Change: Communicating Climate Change and Facilitating Social Change* 319 (Cambridge 2007).

some of the member companies became affiliated with the Pew Center on Global Climate Change and developed a joint statement that accepts the science of climate change.[82] The Pew Center has since worked with the companies in its Business Environmental Leadership Council to develop voluntary climate-related strategies intended to reduce GHG emissions despite the uncertainty regarding future governmental regulation.[83] These are not isolated cases; numerous initiatives have been undertaken by private sector actors in preparation for a carbon-constrained world.[84] One catalyst for this activity is the realization that reduction of GHG emissions also saves money by reducing costs through savings in energy and materials consumption.[85] This factor is only part of the broader imperative of "ecological modernization" in which the climate debate is embedded. Ecological modernization aims to achieve the goal of environmental protection through the use of technological, organizational, and financial resources of the private sector, through collaboration between government agencies and business, and through the use of flexible market-based implementation measures.[86] The discourse of ecological modernization marks a paradigm shift in the conceptualization of the business-environment-society relationship. Business corporations are no longer seen only as part of the problem of environmental degradation; they are part of the solution, crucial partners in the quest for social and ecological sustainability. The Protocol and its implementation through the use of market-based mechanisms is designed as a positive-sum game for corporate actors and best reflects the "win-win" rhetoric of the ecological modernization approach.[87] The intense interactions within the network and with the UNFCCC advanced the diffusion of this conceptual

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[82]   These included American Electric Power, Boeing, BP, Amoco, LockheedMartin, Shell International, Sunoco, Toyota, United Technologies, and Whirlpool. See Eileen Claussen, *Responding to Global Warming Problem: Climate Change, Present and Future*, 27 Ecology L Q 1373, 1375–77 (2001).

[83]   For a detailed analysis of the climate change mitigation actions taken by these companies (Cinergy, Swiss Re, DuPont, Alcoa, the Shell Group, and Whirlpool), see Andrew Hoffman, *Getting Ahead of the Curve: Corporate Strategies that Address Climate Change* (Pew Center 2006).

[84]   For a review, see Levy, *Business and the Evolution of the Climate Regime* (cited in note 61).

[85]   Arroyo and Preston, *Change in the Marketplace* at 323–28 (cited in note 81).

[86]   Maarten A. Hajer, *The Politics of Environmental Discourse: Ecological Modernization and the Policy Process* 46 (Oxford 1996).

[87]   Levy, *Business and the Evolution of the Climate Regime* at 93 (cited in note 61). For example, the Protocol establishes in Article 17 the international emissions trading (IET) mechanism, which involves trading of surplus GHG emissions, of countries that stay below their allowed emissions, with countries that exceed their emission levels in the commitment period. This would allow the parties involved in the transfers to achieve their GHG emission objectives while minimizing the overall economic costs of reduction.

framework so that international regulation was no longer seen as a liability but as another business opportunity.

But what is perhaps more indicative of the change in the business sector's participation in this discussion is the apparent acceptance of environmental protection as a moral imperative in and of itself. Embedded in the emerging movement of corporate social responsibility, the CEO's of multinationals in the oil, manufacturing, and utility industries have adopted the rhetoric used until recently only by environmentalists.[88] They articulate personal concerns for the future of the planet and have incorporated environmental considerations in their internal policies, calling for early action on climate change. One study has found that "doing the right thing" ranks very high in the list of primary motivations for climate-related strategies, according to the managers of six major multinationals.[89] Cynics may doubt the seriousness of these statements and see them as part of corporate actors' attempts at "greenwashing" their business. But rhetoric, as Thomas Risse has demonstrated, can have a very powerful effect even on self-interested actors.[90] The rhetorical adoption of precepts, norms, and ideas in response to external pressure often leads to the "self-entrapment"[91] of the participant in the discourse. What starts as strategic adaptation to the discursive framework ends with argumentative behavior resembling the criteria for discursive argumentation defined above: inclusiveness, equality, and openness to be persuaded.[92] Accordingly, even if we assume that some corporate actors currently do not "really believe" in the science of climate change and the need for mitigation policies, their adoption of the climate change rhetoric is the first step toward a genuine internalization of the shared understandings that the climate debate has generated.

Yet the significance of the shift in the position of corporate actors in the climate debate should not be overstated. The future of the regime also depends on the broader discourse in which global networks are embedded, and its fate will likely be determined by state actors involved in the Kyoto process. In this regard, a recent partnership of like-minded states raises some serious concerns. The United States, Australia, South Korea, China, and India formed the Asia-Pacific Partnership for Clean Development and Climate ("APP"); Canada recently joined. It is described as "an innovative new effort to accelerate the

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88   Arroyo and Preston, *Change in the Marketplace* at 332–33 (cited in note 81).

89   See Hoffman, *Getting Ahead of the Curve* at 21–22 (cited in note 83).

90   Risse, 54 Intl Org at 32–33 (cited in note 24).

91   Id at 32.

92   For a study confirming this hypothesis with regard to the adoption of human rights norms by leaders of repressive regime, see Risse, et al, *The Power of Human Rights* (cited in note 5).

development and deployment of clean energy technologies."[93] While this initiative is presented as "consistent with" the UNFCCC and as "complementary" to the Protocol,[94] it is rightly viewed by critics as an attempt to sideline Kyoto by pushing for an alternative "voluntary, non-legally binding" framework.[95] Interestingly, in three of the states involved, this strategic move was accompanied by a change in rhetoric of the state leaders from denial of the science of climate change to apparent acceptance (George W. Bush in the US, John Howard in Australia, and Stephen Harper in Canada). While the change of rhetoric may signal a first move toward the internalization of norms as discourse theorists predict, the fact that this "self-entrapment" is also marked by their exit from Kyoto's discursive framework may further slow down the disciplining effect that institutional deliberation could exert on these actors. It remains to be seen what effect this development will have on the successful implementation of the Protocol and the negotiations toward the second phase of the Protocol after 2012.

IV. THE LEGITIMACY OF GLOBAL NETWORKS

The growing recognition of the political power that global networks have recently gained raises the question of their accountability. There is general agreement that nonstate actors involved in international lawmaking have a voice, not a vote. But the idea that giving them a voice includes granting them access to institutional deliberations is far from being accepted. The main objection comes from those who claim that the sources of the legitimacy of NGOs are complex and open to question. The discussion below offers a two-fold response to such concerns. First, the assumption underlying the claim that NGOs are not accountable is that, at least in democratic states, governments are accountable to their citizens, and this fact makes them (the only) legitimate actors in the global arena. As many commentators have shown, this assumption is far from accurate because representative governments also suffer from a legitimacy deficit. Second, the ontological shift in the conceptualization of democracy offered by the discourse approach provides an even better argument in defense of NGOs.

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93   See *About the Asia-Pacific Partnership on Clean Development and Climate*, available online at <http://www.asiapacificpartnership.org/About.htm> (visited Nov 17, 2007).

94   Asia-Pacific Partnership on Clean Development and Climate, Second Ministerial Meeting, New Delhi, India, *Communiqué* (Oct 15 2007), available at <http://www.asiapacificpartnership.org/ DelhiCommunique.pdf> (visited Nov 17, 2007).

95   See Sierra Club Canada, *Backgrounder on the Asia Pacific Partnership*, October 2007, available online at <http://www.climateactionnetwork.ca/e/resources/publications/member/asia-pacific-partnership-info.pdf> (visited Nov 17, 2007). The six original members refused to ratify the Protocol, and Canada joined this initiative after having ratified the Protocol, thereby signaling a future renunciation of the agreement.

True, these groups are not particularly representative, but that does not mean that they lack legitimacy: their legitimacy derives from the discursive qualities they bring to the debate.

A. THE CRITICS OF GLOBAL NETWORKS

Critics of NGOs often argue that NGOs lack accountability because no one entrusted them with the power they wield, yet they claim to represent the world's public. While their actions often affect the entire world's public, NGOs remain responsible to no one.[96] Kenneth Anderson, perhaps the most astute of these critics, identifies the political roots of the recent hostility against international NGOs as coming particularly from American conservatives.[97] "[S]trong conservatives," he writes, express the concern that international NGOs, most of whom hold a liberal progressive agenda, see international law as a means to achieve results that have been rejected by national democratic political processes.[98] On the other hand, "pragmatic conservative[s]," with whom Anderson takes issue, are beginning to look for ways to work with NGOs, realizing that NGOs are here to stay. They seek "to use them as providers of services, to take advantage of their expertise and networks, to find common ground with them on pressuring recalcitrant countries on issues such as human rights and sometimes even the environment, and to obtain their support for administration policies where possible."[99]

This acceptance of global civil society actors is based on the assumption that international NGOs are the genuine equivalent of domestic NGOs in democratic societies. This assumption, Anderson contends, is deeply flawed because international NGOs operate in an entirely different structure and environment from the domestic ones. In democratic states, NGOs represent only themselves and are thus accountable to no one—"nor should they be, because the function of democratic accountability is accomplished by a wholly different mechanism: elections."[100] In an international system that suffers from a democratic deficit, civil society actors offer themselves as "substitutes for

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[96] See Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11 Eur J Intl L 91, 112–19 (2000). See also Jeremy Rabkin, *International Law vs. the American Constitution—Something's Got to Give*, Natl Interest 30, 37 (Spring 1999).

[97] See Kenneth Anderson, *The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations with International Nongovernmental Organizations*, 2 Chi J Intl L 371 (2001).

[98] Id at 372–74.

[99] Id at 375.

[100] Id at 382.

democracy," especially in international institutions that are developing a dangerous symbiosis with these voluntary groups. That is, international institutions increasingly accept NGOs as legitimate international actors and NGOs, in turn, confer legitimacy on these international institutions because they provide them with the policies that national governments often do not. For their role in the continued erosion of state sovereignty, Anderson concludes, NGOs ought to be regarded not only as "undemocratic" but even "antidemocratic."[101]

B. IN DEFENSE OF GLOBAL NETWORKS

Anderson's line of argument shows precisely why a discourse approach to conceptualizing the role of global networks is superior to conventional approaches. The conservative case against NGOs puts too much trust in the workings of accountability mechanisms in democratic countries. The interest group liberalism that Anderson endorses is problematic for many reasons that democratic theorists have highlighted for years.[102] Reclaiming state sovereignty by excluding NGOs from participating in international lawmaking, therefore, would not solve the internal legitimacy deficit from which representative democracies will continue to suffer. Either way, "franchise itself is a crude tool for keeping governmental authorities in line."[103] So to argue that NGOs lack accountability while states enjoy it is far from accurate.

Under a discourse approach, NGOs are a part of a democratizing force, not because they represent the people of the world in any aggregative sense, but because global civil society is a venue for the pursuit of discursive democracy. Most of the time, the democratic advances these networks of nonstate actors offer are sought in the public sphere, but they are also sought in the institutional sphere. Using representativeness criteria for admitting NGOs to the political debate (by asking "who do NGOs represent" or "who elected the NGOs"?[104]) is an absurdity, since the level of representation says very little about the legitimacy of the group or the organization which speaks on its behalf. Even organizations who seek to promote the most hateful and destructive ideas could be

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[101] Id at 383.

[102] The attack on the representative model of democracy has not only been pressed by deliberative democrats. The social choice critique is one example. See Dryzek, *Deliberative Democracy* at ch 2 (cited in note 19). Social choice theorists argue that any system of preference aggregation is inherently arbitrary. In its extreme version, this theory holds that "there is no point in any individual voting for what is in his or her personal interest. Instead, the individual will vote for what is in his or her 'expressive' preferences, the social values he or she would like to stand for." Id at 34. For a discussion of other critical voices, see Paul Wapner, *Defending Accountability in NGOs*, 3 Chi J Intl L 197, 198–99 (2002).

[103] Peter J. Spiro, *Accounting for NGOs*, 3 Chi J Intl L 161, 164 (2002).

[104] Anderson, 2 Chi J Intl L at 379 (quoting David Rieff) (cited in note 97).

representing a broad constituency, which surely does not make them more legitimate than less representative groups.

NGOs are held accountable differently, and sometimes more effectively, than states because their actions are monitored more directly through internal accountability.[105] NGOs are accountable to their members, who hold the right of exit from the organization and who can "also vote with their pocketbooks."[106] NGOs must satisfy their members in order to garner continued support. Externally, it is argued that the networks, within which NGOs often work, may serve as checks on abuse of power.[107] In this sense, NGOs are also accountable to each other. In many ways, at least environmental NGOs are accountable to a much wider public because of their need to maintain a good reputation. Unlike state actors, who may occasionally betray the public trust without suffering any consequences, the stakes for NGOs are very high: "the only thing they have going for them is their reputation, and this rests on credibility."[108]

Furthermore, NGOs are held accountable not only internally but toward international institutions. Some institutions (such as the UNFCCC) make arrangements for NGO participation by establishing accreditation criteria. These arrangements are usually devised to verify that the participants are "qualified" in the relevant field, and the need to employ such gatekeepers is understandable.[109] Peter Spiro, a friendly critic of NGOs, goes further to suggest a formal inclusion of NGOs in international institutions in order to increase their external accountability. He is in favor of granting them formal access rights precisely for the purpose of attaching responsibilities to them as well. But the picture of NGO responsibility that Spiro paints begins to look like a dangerous scenario of co-option with the institutions of the state alluded to above.[110] Once the status of NGOs becomes more formal, Spiro argues, it would be possible to constrain their political activities in ways that may enhance their accountability:

> No longer could NGOs opt out of bargains to which they had attached their names. As ongoing institutional participants, they would have a greater incentive to facilitate institutional success. Advocacy groups would no

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[105] See Wapner, 3 Chi J Intl L (cited in note 102). See also my discussion in Alkoby, 3 Non-State Actors & Intl L at 45–47 (cited in note 6).

[106] Wapner, 3 Chi J Intl L at 201 (cited in note 102).

[107] Id at 202. This is what Grant and Keohane term the "peer accountability" mechanism. Ruth Grant and Robert O. Keohane, *Accountability and Abuses in World Politics*, 99 Am Pol Sci Rev 29, 37 (2005).

[108] Wapner, 3 Chi J Intl L at 203–04 (cited in note 102). See also Grant and Keohane, 99 Am Pol Sci Rev at 37 (cited in note 107) (discussing "public reputational accountability").

[109] UNFCCC, art 7.6.

[110] See text accompanying note 34.

longer be able to launder their influence through pliant front-states or backroom lobbying.[111]

This is the same symbiosis, or "powerful romantic embrace,"[112] between global institutions and NGOs that Anderson describes in less favorable terms; the idea that a pragmatic conservative would prefer to bring in the "sometimes noisy, sometimes rude, sometimes crazy equivalent of domestic civil society" in order to contain their "wilder impulses."[113] The implication is that NGOs can be made accountable only at the cost of entrapping them in political arrangements that they helped design. But to limit the ability of NGOs to revisit these arrangements and to criticize them when necessary could mean bad news for democracy. What needs to be ensured is that civil society groups will maintain their independence and avoid becoming imbued with the institution's logic, and that can only be done if their ability to stand in opposition to the institution and to challenge it when necessary remains a strategic option. The transformative potential that NGOs have lies precisely in their ability to continuously reconsider the political consensus when it no longer reflects the needs of individuals in the public sphere.

A recent report by the UN Panel of Eminent Persons ("Panel") rightly takes a more careful approach to external accountability than the one advocated by Spiro. The Panel has advised the UN to work with NGOs to determine possible codes of conduct and self-policing mechanisms "to heighten disciplines of quality, governance, and balance."[114] It proposes accreditation criteria for NGOs that will be based on technical merit (their expertise in the relevant area, their professional qualifications, their internal governance structure) and urges the UN to depoliticize the admission process by establishing clear, merit-based rules in order to avoid the arbitrariness of the current selection process.[115] Most importantly, it is recognized in the report that the main contribution of civil society groups to global governance is in the diversity of viewpoints that they bring into the institutional deliberative process, rather than the number of

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[111] Spiro, 3 Chi J Intl L at 167 (cited in note 103).

[112] Anderson, 2 Chi J Intl L at 381 (cited in note 97).

[113] Id at 376.

[114] Panel of Eminent Persons on United Nations–Civil Society Relations, *We the Peoples: Civil Society, the United Nations and Global Governance*, UN Doc A/58/817 at 59 (2004).

[115] Id at 53–54 (emphasizing this point in articles 124 and 127). A reminder for the political bias of the selection process was given last year when the United States backed an Iranian initiative to deny consultative status in the UN's ECOSOC to organizations working to protect the rights of lesbian, gay, bisexual, and transgender (LGBT) people. See Human Rights Watch, *United Nations: U.S. Aligned with Iran in Anti-Gay Vote: Rice Must Explain Repressive UN Ban on LGBT Rights Groups*, (Jan 25, 2006), available online at <http://www.hrw.org/english/docs/2006/01/25/iran12535.htm> (visited Nov 17, 2007).

people that they represent. The UN is thus advised to open up to as many civil society groups as possible and to "resist hand-picking civil society organization actors, especially for deliberative processes." While grouping NGOs together may be required for the efficiency of deliberation (and the network form, as we have seen, is a successful example for such grouping), the UN should "offer incentives for aggregation, without requiring it."[116]

Similarly, under a discourse approach, the major accountability mechanism of participants is the deliberative process itself, from which bad arguments eventually get filtered out. The demise of the GCC nicely illustrates this function. As shown above, the fall of the GCC can be partly explained by its inability to reach an internal consensus and its unwillingness to engage in genuine dialogue with the institutional authorities (perceiving them as adversaries rather than equal participants). This mechanism is supported by the "peer" and the "reputational" accountability: bad performance can reflect on the credibility of a group in the public sphere as well as in the institutional debate, just like with the GCC. In other words, "[o]rganizations that are poorly rated by their peers are likely to have difficulty in persuading them to cooperate and, therefore, to have trouble achieving their own purposes."[117]

The challenge, therefore, from an institutional design perspective, is how to devise deliberative processes that would encourage a genuine dialogue between and among state and nonstate parties, where the communicative appeal of the ideas that they each seek to advance can be tested. Part of this challenge is to ensure that all civil society groups interested in providing their input will have a fair opportunity to do so. Observers of ENGO participation in global relations, for example, appear to agree that political civil society actors are disproportionately middle-aged, professional, relatively wealthy, urban, Christian, white males from Northern countries.[118] The most vulnerable groups of global civil society are underrepresented in global governance institutions because they lack the resources and expertise to participate. Some have suggested addressing this imbalance by establishing "Civil Society Chambers"—an assembly of sorts through which NGO input will be channeled into international decisionmaking. In these chambers, it would be possible to ensure geographically balanced

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116 Panel of Eminent Persons, *We the Peoples* at 59 (cited in note 114). Interestingly, the Panel has found that there have been "very few occasions of crowding—either in debating time or in seating." Id at 58. So the claim that the vast number of NGOs makes participation impractical may not be a real concern, at least not yet.

117 Grant and Keohane, 99 Am Pol Sci Rev at 37 (cited in note 107). See also Panel of Eminent Persons, *We the Peoples* at 59, art 141 (cited in note 114).

118 Jan Aart Scholte, *Civil Society and Democracy in Global Governance*, 8 Global Governance 281, 296 (2002); Sebastian Oberthür, et al, *Participation of Non-Governmental* at 238 (cited in note 49). See also Panel of Eminent Persons, *We the Peoples* at 59, 65 (cited in note 114).

representation of various civil society groups.[119] But a direct involvement of governments in the selection process to such chambers again would raise concerns regarding political bias. Namely, it may compromise their ability to maintain an oppositional stance toward the state delegates who elected them.[120] The Panel of Eminent Persons adopts a more flexible approach and recognizes that the UN may only provide improved conditions for increased involvement of Southern NGOs in its operation, not dictate it. The Secretary-General is called upon to "enlist donor support for enhancing the capacity of the United Nations to identify and work with local actors, establishing a fund to build Southern civil society capacity to participate and ensuring that country-level engagement feeds into the global deliberative processes."[121]

Overall, the recommendations made by the Panel of Eminent Persons seek to ensure that a fine balance is maintained between the need to keep global civil society free from government control and the responsibility of governments to help it thrive. The possible pact between international institutions and civil society groups is not understood as "access in exchange for your support," as Kenneth Anderson's "pragmatic conservatives" would have it. The formula is rather "access in exchange for your valuable contribution to institutional deliberation." According to the Panel, civil society groups could help UN institutions to be better informed, keep them in tune with global public opinion, and enhance their legitimacy as a result.[122]

V. CONCLUSION

Implementing the ideals of deliberative democracy has important advantages, especially for environments characterized by a high level of cultural pluralism, where there are enduring differences in the conceptions of the good. Collective decisions in deliberative democracy are not made only through aggregating pre-existing preferences of the members of the community, but mainly through deliberation. The first, informally organized arena of deliberation is the network, which is located within the public sphere ("weak publics"). Members of the network attempt to influence each other's opinion by engaging

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[119]   Michael Edwards, *NGO Rights and Responsibilities: A New Deal for Global Governance* 32 (Foreign Poly Ctr 2000).

[120]   See Oberthür, et al, *Participation of Non-Governmental Organisations* at 239 (cited in note 49).

[121]   Panel of Eminent Persons, *We the Peoples* at 65–66 (cited in note 114). Oberthür and his colleagues also suggest, with some reservations, establishing NGO Advisory Bodies and holding more multilateral negotiations in developing countries in order to allow more local NGOs to participate. Oberthür, et al, *Participation of Non-Governmental Organisations* at 239–40 (cited in note 49).

[122]   Panel of Eminent Persons, *We the Peoples* at 27 (cited in note 114).

in a discourse in which they examine and critique the positions of others, while explaining the reasons for their own views. The persuasive appeal of the better argument, under this view, is the main legitimizing factor of collective decisions. The second deliberative arena includes formally organized institutions of the political system, where political will-formation takes place, or in other words, where law is created ("strong publics"). While it is important to keep civil society separate from and independent of the political system, the interaction between the two publics, the "weak" and the "strong," can sometimes be genuinely deliberative. This Article has argued that this conceptual framework is useful in making sense of the relative success of the climate change negotiations and for understanding the centrality of ENGO and BINGO networks in the formation of the regime.

While the relatively inclusive approach to network input taken by the UNFCCC resulted in a framework that has made significant strides toward the regulative ideal of discourse, it is still far from fully conforming to it. One difficulty identified above is the artificial distinction in the UNFCCC nongovernmental organization admission criteria between for-profit entities (who may not be admitted) and associations of for-profit entities (who may be allowed in as observers). Corporate actors' inability to influence the policy process directly was one of the factors leading to a destabilization of the business network because it affected its ability to reach a reasoned consensus among its members.[123] Allowing private companies to register directly as observers may have the same equalizing effect it had on the ENGO network, by emphasizing the voluntary basis of participation in the network and its nonhierarchical nature. Members then participate not because they *must* act through the network, since they would have an easy alternative to voice their arguments independently of the network, but because they truly want to deliberate in order to reach a consensus. If consensus is not reached at the network level, this increased flexibility of corporate participation would still benefit the institutional deliberative process by broadening the range of business perspectives considered in the negotiations.

Moreover, discourse does not end with the conclusion of the negotiations and the adoption of legal instruments. The successful implementation of norms is also part of the lawmaking endeavor, and it depends on the discursive qualities of the process. So far, state parties to the UNFCCC have chosen not to extend the involvement of nonstate actors beyond the treaty-making stage and to allow them, for example, to get involved in the Non-Compliance Procedure under the UNFCCC.[124] While the overall approach to resolving disputes relating to

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123 Pulver, 39 Greener Mgmt Intl at 58–59, 66 (cited in note 64).

124 See the discussion in Alkoby, 3 Non-State Actors & Intl L at 40–41 (cited in note 6).

noncompliance with the treaty is facilitative rather than adversarial—and for that it may exhibit distinctly discursive qualities—it is not envisioned by state parties as particularly inclusive. Nonstate actors will not be permitted to file complaints against violating states, or to submit questions of implementation to the UNFCCC Compliance Committee. Only state parties may trigger the Non-Compliance Procedure and debate the matter among themselves. Closing off this institutional deliberative forum to the input of all affected actors may compromise the legitimacy of the regime as it evolves in the future.

CJIL