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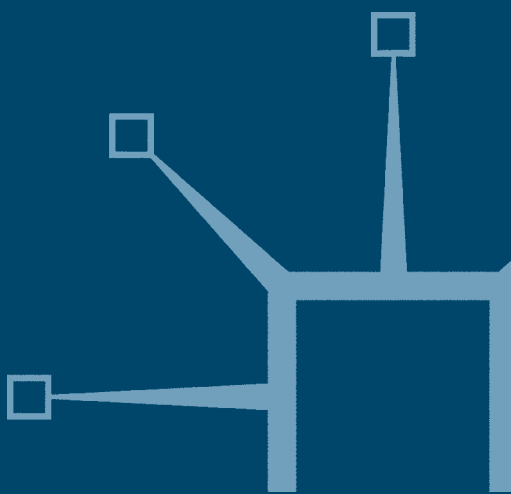
Civil Society Participation in European and Global Governance

A Cure for the Democratic Deficit?

Edited by

Jens Steffek, Claudia Kissling and Patrizia Nanz



Transformations of the State

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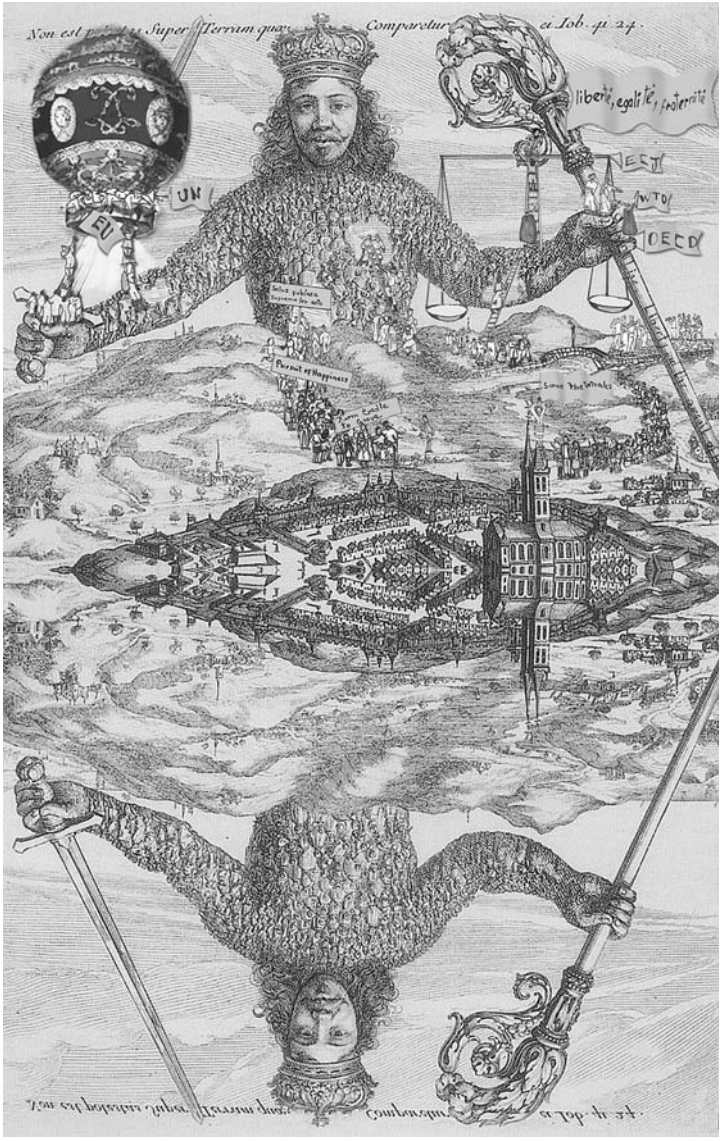

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Civil Society Participation in European and Global Governance

A Cure for the Democratic Deficit?

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List of Abbreviations

ACRE	Advisory Committee on Release to the Environment
ACTEMP	Bureau for Employers' Activities (ILO)
ACTRAV	Bureau for Workers' Activities (ILO)
APEAL	Association of European Producers of Steel for Packaging
Art.	article
ATA	Association of Atlantic Treaty Organizations (NATO)
AU	African Union
BEUC	European Consumers' Organisation
BIS	Bank for International Settlements
CAC	Codex Alimentarius Commission
CAN-E	Climate Action Network Europe
CCME	Churches' Commission for Migrants in Europe
CEACR	Committee of Experts for the Application of Conventions and Recommendations (ILO)
CEFIC	European Chemical Industry Council
CETS	Council of Europe Treaty Series
CFA	Committee for the Freedom of Association (ILO)
CFSP	Common Foreign and Security Policy (EU)
CI	Consumers International
CiO	Chairman-in-Office (OSCE)
CIOR	Interallied Confederation of Reserve Officers (NATO)
CITES	Convention on International Trade in Endangered Species of Wild Flora and Fauna
CIVGOV	Organized Civil Society and European Governance
CJTF	Combined Joint Task Forces (NATO)
COGEM	Commissie Genetische Modificatie (Dutch GM advisory committee)
CONECCS	Consultation, the European Commission and Civil Society (EU)
COORDEUROP	European Co-ordination for Foreigners' Fight to Family Life
CPC	Conflict Prevention Centre (OSCE)
CPME	Standing Committee of European Doctors
CS & CT	Content and Themes Drafting Group (WSIS)

CSCE	Conference on Security and Cooperation in Europe
CSF	Community Support Framework (EC)
CSO	civil society organization
CTD	Committee on Trade and Development (WTO)
CTE	Committee on Trade and Environment (WTO)
CUTS	Consumer Unity and Trust Society
DG	Director-General (ILO) Directorate General (EC)
DG SANCO	Directorate General for Health and Consumer Affairs (EC)
Doc.	document
DPC	Defense Planning Committee (NATO)
DSB	Dispute Settlement Body (WTO)
EACC	Euro-Atlantic Cooperation Council (NATO)
EAGGF	European Agricultural Guidance and Guarantee Fund
ECAS	European Citizens' Action Service
ECB	European Central Bank
ECEG	European Chemical Employers' Group
ECJ	European Court of Justice
ECOFIN	Economic and Financial Affairs Council of the European Union
ECOSOC	Economic and Social Committee of the European Union Economic and Social Council of the United Nations
ECRE	European Council on Refugees and Exiles
ECs	European Communities
EEB	European Environmental Bureau
EESC	European Economic and Social Committee
EFSA	European Food Safety Agency
EHF	European Humanist Federation
EMCEF	European Mine, Chemical and Energy Workers' Federation
ENAR	European Network Against Racism
EP	European Parliament
EPHA	European Public Health Alliance Environment Network
ERDF	European Regional Development Fund
ESF	European Social Fund
ETUC	European Trade Union Confederation
ETUI	European Trade Union Institute

EU	European Union
EURATEX	European Apparel and Textile Organisation
EUROCOOP	European Community of Consumer Co-operatives
FAO	Food and Agriculture Organization of the United Nations
FECC	European Association of Chemical Distributors
FIFG	Financial Instrument for Fisheries Guidance
FoE	Friends of the Earth
FoEE	Friends of the Earth Europe
FOSS	Free and Open Source Software
G8	Group of Eight
GA	General Assembly (UN)
GAO	US General Accounting Office
GATT	General Agreement on Tariffs and Trade
GB	governing body (ILO)
GM	genetically modified
GMO Panel	Panel on the Regulation of Genetically Modified Organisms (EFSA)
GMO	genetically modified organism
HCNM	High Commissioner on National Minorities (OSCE)
HR	human rights
HRW	Human Rights Watch
IATA	International Air Transport Association
IBRD	International Bank for Reconstruction and Development
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICFTU	International Confederation of Free Trade Unions
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICT	information and communication technology
ICTSD	International Centre for Trade and Sustainable Development
IDA	International Development Association
IDEA	International Institute for Democracy and Electoral Assistance
IFAP	International Federation of Agricultural Producers
IFC	International Finance Corporation
IFN	International Friends of Nature
IISD	International Institute for Sustainable Development
ILC	International Labour Conference

ILGA	International Lesbian and Gay Association
ILO	International Labour Organization
ILPA	Immigration Law Practitioners' Association
IMF	International Monetary Fund
IO	international organization
IOE	International Organization of Employers
IP	Internet protocol
IPEC	International Programme on the Elimination of Child Labour
IPM	interactive policy-making (EU)
IPR	intellectual property rights
IR	international relations (academic discipline)
ITO	International Trade Organization
ITU	International Telecommunication Union
IUCN	International Union for Conservation of Nature and Natural Resources
JHA	justice and home affairs (EU)
JRC	Joint Research Centre (EC)
LDCs	least developed countries
MA	Managing Authority (EC)
MC	Monitoring Committee (EC) Military Committee (NATO) Ministerial Council (OSCE)
MCs	Monitoring Committees
MIGA	Multilateral Investment Guarantee Agency
MNCs	multinational corporations
MOU	Memorandum of Understanding
MPG	Migration Policy Group
NAC	North Atlantic Council (NATO)
NACC	North Atlantic Cooperation Council
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
NPG	Nuclear Planning Group (NATO)
NPT	Nuclear Non-Proliferation Treaty
NUTEK	National Board for Industrial and Technical Development
OAS	Organization of American States
ODIHR	Office for Democratic Institutions and Human Rights (OSCE)
OECD	Organization for Economic Co-operation and Development

OSCE	Organization for Security and Co-operation in Europe
PA	Paying Authority (EC structural funds)
PC	Permanent Council (OSCE)
PfP	Partnership for Peace (NATO)
PrepCom	Preparatory Committee (WSIS)
PSI	Public Services International
QMV	qualified majority voting (EU)
R & D	research and development
REACH	Regulation on the Registration, Evaluation, and Accreditation of Chemicals (EC)
Res.	resolution
RIPs	REACH Implementation Projects (EC)
SAP-FL	Special Action Programme to Combat Forced Labour
SC	Security Council (UN)
SEMDOC	Statewatch's European Monitoring and Documentation Centre
SEWA	Self-Employed Women's Association (India)
SEWU	Self-Employed Women's Union (South Africa)
SNIF	summary notification information format (EC)
SPDs	single programming documents (EC)
SPORT	Strategic Partnerships on REACH Testing
SPS-Committee	Committee on the Agreement on the Application of Sanitary and Phytosanitary Measures (WTO)
T&E	European Federation for Transport and Environment
TABD	Transatlantic Business Dialogue
TACD	Transatlantic Consumer Dialogue
TBT-Committee	Committee on the Agreement on Technical Barriers to Trade (WTO)
TWN	Third World Network
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change

UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICE	Union of Industrial and Employer's Confederation of Europe
UNIDO	United Nations Industrial Development Organization
UNSC	United Nations Security Council
US	United States of America
USCIB	United States Council for International Business
WBCSD	World Business Council of Sustainable Development
WCD	World Commission on Dams
WGIG	Working Group on Internet Governance (UN)
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WSIS	World Summit on Information Society
WTO	World Trade Organization
WWF	World Wide Fund for Nature
WWF-EPO	WWF European Policy Office

Series Preface

When we think about the future of the modern state, we encounter a puzzling variety of scholarly diagnoses and prophecies. Some authors predict nothing less than the total demise of the state as a useful model for organizing society – its powers eroded by a dynamic global economy and by an increasing transference of political decision-making powers to supranational bodies. Others disagree profoundly. They point to the remarkable resilience of the state and its core institutions. For them, even in the age of global markets and politics, the state remains the ultimate guarantor of security, democracy, welfare and the rule of law. These debates raise complex questions for the social sciences: what is happening to the modern liberal nation-state of the OECD bloc? Is it an outdated model? Is it still useful? Is it in need of modest reform or far-reaching changes?

The state is a complex entity, providing many different services and regulating many areas of everyday life. There can be no simple answer to these questions. The Transformations of the State series will try to disaggregate the tasks and functions of the state into four key, but manageable dimensions:

- the monopolization of the means of force;
- the rule of law as prescribed and safeguarded by the constitution;
- the guarantee of democratic self-governance;
- and the provision of welfare and the assurance of social cohesion.

In the OECD world of the 1960s and 1970s these four institutional aspects merged as the central characteristics of the modern state, forming a synergetic whole. This series is devoted to empirical and theoretical studies exploring the transformations of this historical model and the promise it still holds today and for the future. Books in the series address research on one or several of these dimensions, in all of which crucial change is taking place. Although political science is the main disciplinary approach, many books will be interdisciplinary in nature and may also draw upon law, economics, history and sociology. We hope that taken together these volumes will provide its readers with the 'state of the art' on the 'state of the state'.

This book contributes to the work of the Collaborative Research Center *Transformations of the State* at the University of Bremen (Germany), and is funded by the German Research Foundation (DFG). The state analyses pursued by the Centre are readily accessible through two overview volumes: Stephan Leibfried and Michael Zürn, (eds), *Transformations of the State*? (2005); and Achim Hurrelmann, Stephan Leibfried, Kerstin Martens and Peter Mayer, (eds), *Transforming the Golden-Age Nation State* (2007), published in the Transformations of the State series. Further information on the Centre, can be found at www.state.uni-bremen.de.

Achim Hurrelmann, Stephan Leibfried,
Kerstin Martens and Peter Mayer
Series Editors

Acknowledgements

This volume presents the first major results of an ongoing research project on 'Legitimation and Participation in International Organizations', which is part of the Collaborative Research Centre 'Transformations of the State' at the University of Bremen. The research centre is generously funded by the Deutsche Forschungsgemeinschaft (German Research Foundation) whose financial support is gratefully acknowledged. The unique interdisciplinary approach of this institution is reflected in this publication. Among its authors are specialists in political theory, international relations and international law. All contributors to this volume have worked in the context of this project in Bremen, some as researchers at the Centre, others in neighbouring academic institutions. Their close collaboration over an extended period of time enabled us to develop a common frame of analysis that all the contributions to this volume refer to. Over the past years the overall results of this project, as well as draft versions of individual chapters, were presented at various academic meetings in Germany and abroad. Due to the sheer number of events we are unable to list them here and to express our gratitude to all the discussants and commentators who have been helpful in developing our thinking further. Some individuals should be mentioned, however. Bernhard Peters, who sadly passed away in 2005, greatly helped us in designing this project and closely followed it over the first years. We should also like to express our gratitude to Niklas Blaum, Oliver Dambock, Tim Flink, Katinka Friedrich, Martina Piewitt, Ole Reissmann and Urs Wahl for their valuable research assistance. An anonymous reader provided helpful comments on the entire manuscript of the book, and Chris Engert, our language editor, worked patiently with us to improve the quality of our English. We are thankful to all of them.

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Emergent Patterns of Civil Society Participation in Global and European Governance

Jens Steffek and Patrizia Nanz

Since the 1990s, the disciplines of European Studies and International Relations have taken a remarkable normative turn. Questions of democratic legitimacy, which, for many years, were marginalized on the agenda, have moved into the focus of scholarly interest. More than a decade after it began, the debate about legitimacy and democracy beyond the nation-state is now becoming mature, increasingly fine-grained and sophisticated (Føllesdal 2006; Patomäki and Teivainen 2004). Very few authors would deny that the European Union (EU) and global organizations suffer from a 'democratic deficit'. Most definitely, they are far from being as democratic as liberal Western nation-states. And while there is widespread agreement on this diagnosis, there is still much controversy over the appropriate remedy. A wide range of options is currently being discussed. They may be provisionally divided into three major clusters: proposals for representative-parliamentary institutions; proposals for new accountability mechanisms; and proposals for enhanced political deliberation. These groups will be briefly discussed.

A first group of authors suggest democratization by domestic analogy; that is, by reproducing representative-parliamentary institutions in the international domain. The most advanced form of parliamentarianism beyond the nation-state has emerged in the EU (Rittberger 2005). Accordingly, the European Parliament (EP) is often seen as the main site of democratic legitimacy in the EU, and it is argued that a democratization of European governance should focus on strengthening the EP and its powers (Lord and Beetham 2001). The EP also serves as a blueprint for parliamentary thinking on a global scale. With regard to the global level,

Falk and Strauss have advocated the creation of a 'Global Peoples' Assembly' as a parliamentary branch of the United Nations (2000, 2001). Such a new, representative institution would complement or substitute existing forms of diplomatic representation. While Falk and Strauss suggest directly elected representatives, others would consider more unconventional forms of citizen representation as well (Kuper 2004: 165–8).

A second group of scholars see the main problem with internationalized policy making in its lack of public accountability (see contributions to Held and Koenig-Archibugi 2005). Authors who advocate enhanced accountability would typically refrain from calling for representative democratic institutions, finding such calls 'premature' (Grant and Keohane 2005: 34). As governance beyond the state functions through a broad variety of institutional forms, public accountability is also thought to be multidimensional (Bovens 2006). Not all forms of accountability can qualify as democratic, however. Accountability of decision makers to markets (Grant and Keohane 2005: 36), to courts (Fisher 2004: 504), or to peers (Benner *et al*. 2005: 75) would not necessarily enhance citizens' influence in, and control over, the institutions of global and European governance.

A third strand of theorizing focuses on the potential for a deliberative democratization of global and European governance. Authors working in this tradition emanate from the assumption that legitimate governance can be achieved through the institutionalization of deliberative practices (for example, Eriksen and Fossum 2000; Gerstenberg and Sabel 2001; Payne and Samhat 2004). It is debated to what extent forms of expert deliberation contribute to the democratic quality of governance; inclusiveness of deliberative arrangements seems to be the main issue here. We will turn to this debate in more detail below. As for the current state of the art, we face three distinct sets of proposals for bringing inter- and supranational forms of governance closer to the democratic ideal of self-governance of the people by the people. Although they are not mutually exclusive, there will most probably be trade-offs in realizing them and, given limits of time, resources and reform capacities, priorities must be set.

How can we decide which of these strategies for democratizing international governance is the most promising? So far, this question has been discussed almost exclusively at theoretical level. Undoubtedly, this is an indispensable debate in its own right. However, when we wish to propose strategies for democratizing international politics, we should also know how they fare in practice. We therefore need empirical data

and in-depth case studies about them. In the national context, many empirical studies on the functioning of national democracies are available. They explore how representative existing institutions are, how deliberative their decision-making processes, and how accountable their power holders. The situation is radically different, however, in the context of international governance. For the time being, we only have an abundance of proposals for new institutions and new procedures, while there is very little empirical research that would assess their democratizing potential.

One might object, at this point, that there is little to evaluate empirically because most of the proposed institutions do not yet exist. It is undoubtedly true that we do not have an operational democratic system in European or global governance. Nevertheless, we can already find instances of all the proposed mechanisms of democratization. There are parliamentary assemblies, there are deliberative bodies, and there are legal accountability mechanisms in international affairs. Therefore, it is possible to assess empirically how these mechanisms work at the international level, and to evaluate whether they are already contributing to the democratization of governance beyond the nation-state. This is, in very general terms, the purpose of the research presented in this volume.

Clearly, we cannot assess all the existing mechanisms for a potential democratization of international governance in the framework of one research project. In this project, we concentrated on the democratizing potential inherent in civil society participation in the institutions of global and European governance. From the normative point of view, the participation of civil society organizations[1] (CSOs) in international organizations (IOs) holds two major promises. First, by participating in political debate at global level, non-state actors may communicate new issues, interests and concerns from local stakeholders to global governance arrangements. Second, they may contribute to the emergence of a global public sphere in which policy choices are exposed to public scrutiny. Civil society actors collect and disseminate information about, and critical evaluations of, international governance that enable both citizens and the media to engage in informed political debate (Nanz and Steffek 2004). Organized civil society thus has the potential to function as a 'transmission belt' between a global citizenry and the institutions of global governance. We will explain this model in more detail in the following section of this chapter. We then proceed to explicate the central question of our research: to what extent do the participatory practices already in place contribute to the democratization of international governance?

Subsequently, we present our empirical research programme, which was built around four theory-driven criteria for evaluating existing institutions and procedures for civil society participation: access, transparency, responsiveness and inclusion. We will briefly discuss these criteria and their operationalization in our research design (for a more extensive discussion, see Nanz and Steffek 2005). This constitutes a common framework of analysis, and all subsequent chapters of this volume will refer to it. We also use this introduction to present some overall findings of our empirical analysis. While Chapters 3 to 9 concentrate on single case studies, our aim here is to sketch a map of the existing participatory arrangements in European and global governance. In this mapping exercise, we concentrate on the formal rules governing civil society access to political decision making, and on the transparency of this decision-making process. We thus are able to present some aggregate data on how organized civil society is involved in more than 30 international organizations, informal regimes and EU policy fields. This data set is also used in Chapter 2 by Claudia Kissling to highlight certain important legal aspects of these results. Among international lawyers, the status of CSOs has been contested for a long time. Kissling argues that CSOs have a status in international law and that this legal status is also a good indicator of the legitimacy of IOs themselves. In her view, the legal personality of non-state actors can be taken as a minimum safeguard clause for the surmounting of the legitimacy deficit of international organizations.

The democratic deficit and how it might be mitigated

Democracy is a political ideal that principally applies to arrangements for the making of binding collective decisions. Such arrangements are democratic if they ensure that any authorization to exercise public power arises from collective decisions by the citizens over whom that power is exercised. There are a variety of institutional forms of modern government that realize this principle of democratic will formation in slightly different ways. Most Western countries have developed some form of electoral democracy that formally secures the inclusion of citizens' interests and concerns into government rule by aggregating them through political parties and parliamentary bodies. For the majority of citizens, participation in this system is possible by electing their representative to the parliament, as the main body of political decision making.

Emanating from such a conceptualization of representative democracy, Robert Dahl (1999) has forcefully argued that international organizations

cannot be democratic. He gives two reasons for this: first, popular control over policy decisions at international level is not possible. 'The opportunities available to the ordinary citizen to participate effectively in the decisions of a world government would diminish to the vanishing point' (Dahl 1999: 22). The extent of the 'delegation of authority' to international policy elites goes beyond any acceptable threshold of democracy. Second, there is no common identity and no political culture that supports international institutions. Only a shared collective identity (a demos) – able to ensure societal cohesion, mutual trust and solidarity – would be able to make policy decisions widely acceptable among the losers. In short, Dahl argues that the enormous size and heterogeneity of the global citizenry make the democratization of global governance impossible. He therefore suggests that international organizations be regarded as 'bureaucratic bargaining systems' that offer no prospects for democratization.

Undoubtedly, international organizations are unlikely ever to resemble a democratic nation-state. If global governance becomes democratic, it will certainly not look like a national democracy writ large (Stein 2001), and it is questionable whether it should. The current state of Western mass democracy has been criticized extensively for governments being remote from citizens, for decisions not reflecting their true concerns, and for thus fostering a trend away from the active citoyen towards the passive bourgeois. In the view of some critics (Barber 1984; Pateman 1970), interest aggregation dominates over the value-oriented discussion that seeks political consensus and novel solutions to problems through a co-operative and creative process of dialogical exchange.

Thus, the question is whether there is an alternative avenue towards the democratic legitimation of global governance – one that neither presupposes international equivalents to national electoral democracies, nor a demos, or, in other words, a certain (pre-political) homogeneity of the citizens of a polity. How can we devise an alternative model for formation of democratic will for the emerging system of global governance? It is often argued that a deliberative understanding of democratic collective decision making is particularly suited for European and global governance (Eriksen and Fossum 2000; Payne and Samhat 2004; Schmalz-Bruns 2001). Deliberation is central to democracy, because it focuses political debates on the common good: in fact, it is the interests, preferences and aims that comprise the common good that 'survive' the process of deliberation. Deliberative democracy needs a framework of social and institutional conditions that facilitate the expression of citizens' concerns and rational debate about them, as well as a mechanism to ensure the responsiveness of political power to these concerns.

In the context of international relations, the model of deliberative decision-making has taken on a vision sui generis. Some authors suggest well-informed and consensus-seeking discussion in expert committees that are embedded in international decision-making procedures as an effective remedy to the legitimation problems of international governance (Joerges and Neyer 1997a). From this perspective, political deliberation is primarily viewed in a functional fashion as a pre-requisite for high levels of efficiency, efficacy and quality in political regulation. This approach to deliberation is inspired by thinking from public policy and international relations theory, which has highlighted the importance of scientific expertise and consensus-seeking in the epistemic community of experts (Haas 1992; Majone 1999). This process is not designed to aggregate particularistic interests, but to foster mutual learning instead, and eventually to transform the actors' preferences while converging on a policy choice that is oriented towards the common good. Deliberation among experts thus becomes a key device of good governance by a responsive administration.

However, the desirability of deliberative governance by functional elites is questionable from a normative perspective on democratic legitimacy. 'Deliberation, understood as reasoning about how to best address a practical problem, is not intrinsically democratic: it can be conducted within cloistered bodies that make fateful choices, but are inattentive to the views or the interests of large numbers of affected parties' (Cohen and Sabel 2003: 366–7). Deliberative democracy must ensure that citizens' concerns feed into the policy-making process and are taken into account when it comes to a decision on binding rules. It is therefore crucial to open the process of political deliberation within international organizations both to public scrutiny and to the input of stakeholders' concerns. The democratization of international governance will ultimately depend upon the development of an appropriate transnational public sphere. Arguments made for or against certain political proposals at international level need to reach the citizens as the ultimate stakeholders of governance, thus enabling public debate about those proposals. Moreover, what is missing in the model of expert deliberation is a strong link for communication between the global constituency and the international organizations in which crucial decisions are made.

The role of civil society in democratizing governance

In the previous section, we have shown that the two interrelated questions of 'who deliberates?' and 'whose arguments are included in

deliberation?' are of crucial importance for the democratizing effects of deliberative arrangements in international politics. We also argued that many existing forms of expert consultation may be contrasted against an ideal of public deliberation as a source of democratic legitimacy (at national and global levels). What is important to the notion of public deliberation is that there is a warranted presumption that public opinion is formed on the basis of adequate information, and that those whose interests are affected have an equal and effective opportunity to make their own interests (and their reasons for them) known. This 'public use of reason' depends on civil society as 'a network of associations that institutionalizes problem-solving discourses on questions of general interest inside the framework of organized public spheres' (Habermas 1996: 367).

Habermas's theory distinguishes between deliberation in political institutions (or decision-making bodies) and deliberation in a wider, decentred public sphere. Our conception departs from this view in so far as it focuses on sites of public deliberation in which organized civil society participates as an intermediary agent between the political institutions and the wider public. We argue that, at international level, the public sphere – conceived as a pluralistic social realm of a variety of sometimes overlapping or contending (often sectoral) publics engaged in transnational dialogue – can provide an adequate political realm with actors and deliberative processes that help to democratize global governance practice. Deliberative-participatory publics within governance regimes stimulate an exchange of arguments in which policy choices are exposed to public scrutiny. If we conceptualize the public sphere as a communicative network in which different (national and sectoral) publics partially overlap, the emerging features of global governance regimes can also be seen as offering the chance for the creation of new transnational communities of political action (Nanz 2006).

There is already some empirical evidence of an emerging transnational discourse about the faults and merits of global governance. The campaign against the international monetary institutions, for example, was publicized through the media and triggered transnational public debate on the activities of these organizations. The legitimacy of global governance is questioned in a public discourse on international organizations and their policies (Steffek 2003: 271). The empirical evidence also suggests that non-governmental actors play a key role in triggering transnational public debates on global governance, thus making international governance more transparent and accountable (Scholte 2004: 217). However, opening up political deliberation in

international organizations to the wider public requires transcending boundaries between functional elites and citizens. It has to be ensured that information is made available to the interested public. In turn, citizens' concerns have to reach the agenda of the political or administrative bodies that formulate the decisions to be made in international organizations. Therefore, deliberative procedures in international organizations need to be complemented by participatory practices in order to push global governance towards democratization.

If organized civil society has the opportunity to participate in international governance, it may act as a 'transmission belt' between international organizations and an emerging transnational public sphere. This transmission belt might operate in two directions: First, civil society organizations can give voice to citizens' concerns and channel them into the deliberative process of international organizations. Second, they can make internal decision-making processes of international organizations more transparent to the wider public and formulate technical issues in accessible terms. Figure 1.1 displays this normative model of organized civil society.

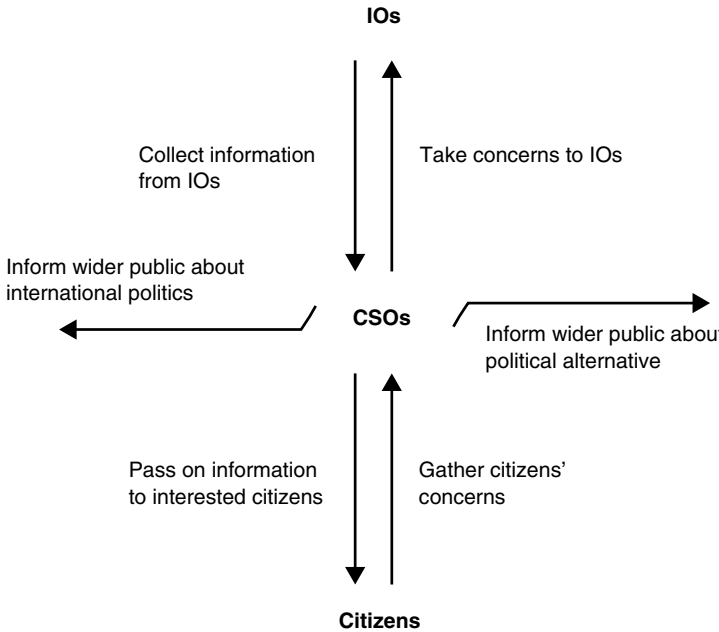

Figure 1.1 CSOs as transmission belt between IOs, a global citizenry and the public sphere: a normative model

The research project presented in this volume analyses the vertical dimension of this normative model, and, in particular, the upper half of the envisaged vertical transmission belt. It concentrates on the institutional settings that function as an interface between international governmental organizations and regimes, and transnationally organized civil society. In our empirical research, we seek to analyse the 'democratic quality' of these interfaces. The following section will explain what exactly we mean by democratic quality, and how it is operationalized for empirical research. The other dimensions of the transmission belt model will be studied in future research, in particular, the contributions of CSOs to an emerging public sphere. Moreover, the legitimacy of CSOs that act as transmitters of the will of the citizens will be the subject of further scrutiny, as the normative model hinges upon CSOs being legitimate actors in international affairs.

Operationalizing 'democratic quality'

Our research project sets out to assess the democratic quality of the existing deliberative arrangements in international governmental organizations; such as the EU, the United Nations (UN), the World Trade Organization (WTO) and the World Bank. For the time being, there is very little empirical research in the field of international politics that is driven by insights from democratic theory. We thus refer to comparable efforts in domestic political settings (Holzinger 2001; Steiner et al. 2005). Our project differs from these, however, in that we do not seek to measure the quality of deliberation as such, but focus on the institutional mechanisms that enable and organize participation in such deliberation. We assess the existing deliberative settings and the rules by which they operate against a normative yardstick that we have derived from deliberative democratic theory. This normative yardstick takes the form of a catalogue of criteria. In this section, we present these criteria and explain the normative reasoning behind them.

Before we start this discussion, however, the definition of some key terms is required. In line with our approach to democracy, we define the 'democratic quality' of an institution or procedure as its capacity to bring about free, informed and inclusive deliberation. 'Free' means that interested participants should be allowed to listen, to speak and to amend the agenda. 'Informed' signifies that participants should have equal access to all the available information pertaining to the issue at stake. 'Inclusive' means that the concerns and arguments of all those affected by the decision should be present in the debate. The term

'decision making' is used in a wide sense here; it can relate to a legal act, but also to a recommendation or advisory opinion. By focusing on decision-making processes, we exclude general exchanges of views that are unrelated to any discernable deliverable. A decision-making process is to be regarded as 'deliberative' when we observe a sustained exchange of arguments, in which actors offer (and ask others to present) reasons for their proposals. In a deliberative process, we also expect to find a malleability of such proposals; that is, the fact that actors may still make changes to their proposals and are not exposed to extreme time pressure.

To assess the capacity of an institution to bring about free, informed and inclusive deliberation, we need a comprehensive, but manageable, set of theory-guided criteria against which our empirical evidence can be measured. For our research programme, we have developed a set of four indicators. We argue that the following, rather parsimonious, list is sufficient to cover the key dimensions of democratic quality:

1. Access to deliberation;
2. Transparency and access to information;
3. Responsiveness to stakeholder concerns;
4. Inclusion of all voices.

Access to deliberation

It follows from the principle of democratic self-governance that all those affected by political decisions should have an equal influence on the process of formulating these decisions. Therefore, one core requirement for successful self-governance is that citizens' arguments can enter the process of political deliberation. This is an essential pre-condition for democratically legitimate decision making. In global governance, however, direct citizen access to deliberations in international organizations is extremely difficult to accomplish. As we explained above, we rely on CSOs to communicate arguments from affected/concerned citizens to the sites of global deliberation. It is therefore essential, for a democratic procedure, that CSOs have institutionalized access to these deliberative settings. This is the only way to secure that stakeholders' arguments can be voiced.

Transparency

In order to take part in deliberation, all the actors involved in a rule-making process should have full information about the problem at stake, the options for its solution, and the costs and benefits associated with these options. Transparency serves two purposes: first, it enables

CSOs to participate directly in the debate equipped with all the information that governmental actors have. Second, transparency is required for the emergence of a public sphere in which political issues are debated and decisions exposed to wider public scrutiny. Regarding the access to documentation, an analytical distinction can be made between background documents providing information on an issue or a problem, and policy documents providing information on political options and proposals. In both cases, the relevant information might come either from the IO secretariat or from the actors involved in the deliberation, mainly from the state representatives.

Responsiveness

Access to the deliberation and the transparency of the policy process are the pre-conditions for a deliberative process to take place. However, they are meaningless for the democratic quality of the procedure if the concerns that are presented by CSOs are not adequately reflected in the deliberation and, thus, cannot affect the resulting decisions or recommendations. The deliberative process must be responsive to these concerns. We distinguish two forms of responsiveness: justification and adjustment. The justification of political proposals and decisions is central to deliberative theories of democracy (Gutmann and Thompson 1996). All proposals made in the deliberative process should be justified with a view to the common good of the constituency and/or in response to the specific concerns voiced by other participants. Thus, justification, understood as giving reasons for positions taken or proposals made, is a major asset to the democratic quality of deliberation.

However, the justification of a proposal can be (and, in fact, in politics, often is) an ex post rationalization of a fixed position in the light of the criticism that the proposal has received. If justification is merely an acknowledgement of criticism without the critical reflection and potential modification of an actor's own position, it does not contribute much to the evolution of political debate. Hence, the mere fact that we observe justification on the part of state representatives does not document that civil society input leads to a process of reflection. Since it is difficult to observe such processes of reflection directly in our research, we use the observable transformation of the actors' articulated positions as a proxy, instead. Therefore, adjustment means that positions raised by CSOs become adopted, either in part or as a whole, by state actors.[2] An alternative manifestation of adjustment is an adjustment of the agenda. This is the case when new issues raised by civil society are specifically designated for future deliberation.

Inclusion

One of the core principles of democratic political deliberation is that the arguments of all the people who might be affected by the decision should be included in the process of decision making. Inclusion realizes the principle of political equality and is, therefore, a key issue that affects the democratic quality of decision making. As we explained above, we are concerned with the inclusion of arguments, rather than with the inclusion of individuals. However, the two issues cannot be separated completely. The inclusion of arguments is specifically problematical when certain groups of stakeholders are disadvantaged with regard to their resources and their degree of organization. Therefore, the democratic quality of deliberative procedures hinges upon their capacity to include arguments made by all groups concerned.

This is of particular relevance in an international context in which there are enormous differences in the resources available to stakeholders and in their ability to organize their concerns at international level. More specifically, certain groups from developing countries – for example, rural populations and indigenous peoples – do not have adequate means for presenting their concerns in international governance. Thus, there is a certain probability that the arguments of these people may be excluded from political deliberation. In empirical research, however, it is very difficult to account convincingly for a lack of inclusion at the level of argumentation. We would have to search for arguments that both exist and are of relevant concern to certain groups, but which are, nonetheless, not voiced in deliberation. We would have to rely on a fairly speculative version of counterfactual reasoning here. To avoid this, we regard institutional mechanisms of empowerment as a proxy for inclusion. The theory-driven requirement is that public organizations make appropriate arrangements for empowering the most disadvantaged stakeholders to participate in deliberative processes. In practice, this can take the form of IOs providing CSOs from developing countries with travel subsidies to attend political meetings. Alternatively, there might be training courses or seminars to improve the technical knowledge of CSO representatives for an adequate understanding of international politics; or IO staff might undertake missions in developing countries to consult with affected citizens directly.

The empirical research

To account for the empirical situation regarding the criteria of access and transparency, we developed a list of 20 empirical indicators, which are displayed in Table 1.1 below. The indicators are grouped in five

Table 1.1 Indicators for access and transparency

Group A – Recognition	
*(*indicators related to criterion 1, access)	
A1	Accreditation procedures exist
A2	Several categories of CSOs are distinguished
A3	Accreditation is regularly reviewed
A4	Specialized CSO divisions or liaison offices exist
A5	CSO representatives have access to IO premises
Group B – Consultation in Policy-Making	
(indicators related to criterion 1, access)	
B1	IOs organize special meetings for CSO consultation
B2	CSOs are allowed to submit or circulate own documentation
B3	CSOs are allowed to attend political meetings
B4	CSOs have the right to speak in political meetings
B5	CSOs have the right to put topics on the IO's agenda
Group C – Co-operation in Policy-Implementation	
(indicators related to criterion 1, access)	
C1	CSOs implement projects with or on behalf of the IO
C2	CSOs commit own resources to these projects
C3	CSOs are involved in the review of projects
C4	CSOs deliver information on state parties' compliance
Group D – Involving CSOs in Dispute Settlement	
(indicators related to criterion 1, access)	
D1	CSOs can be heard in dispute settlement procedures between state parties
D2	CSOs have the opportunity to lodge complaints against the IO or a state party
Group E – Transparency	
(indicators related to criterion 2, transparency)	
E1	Clear rules on restriction/de-restriction of documents exist
E2	CSOs have access to background information
E3	CSOs have access to negotiation texts
E4	Documents are actively disseminated by the IO (e.g., posted on the web)

clusters and are tailored towards the particular institutional setting in which IO–CSO interaction takes place. This setting is characterized, first of all, by strong asymmetries in power and status between the two types of actors. The intergovernmental side, in fact, has the power to define the terms of any consultative relationship with civil society. It can interact with CSOs or ignore them; it can create new forums for consultation or terminate established ones; it can insist on accreditation procedures or scrap them. Therefore, most of our indicators report the formal terms of the consultative relationship as determined by the IOs. Our five

groups of indicators and the dimensions of institutionalization that they describe follow:

Group A – Recognition of CSOs

Under traditional international law, non-governmental organizations (NGOs) did not have any particular legal status (see Chapter 2). Terms such as CSO or NGO merely described a residual category of non-state actors. In a similar vein, the law of most international organizations did not foresee any particular legal status for non-governmental actors. As a consequence, interaction between IOs and CSOs has been marked by the predominance of informal practices, exceptions – such as the Economic and Social Council (ECOSOC) scheme in the UN – notwithstanding. These informal practices left a great deal of room for discretion for the IO to define the terms of interaction with non-state actors.

Any democratization of international relations via CSO involvement would require clear rules of collaboration, clearly defined participation rights for non-state actors and reliable, formalized procedures to govern their interaction with IOs. First of all, CSOs must be acknowledged as legitimate interlocutors in political debate. One of the most important indicators of the formal recognition of CSOs is procedures of accreditation – a process that might, in practice, also be called registration, and so on (Indicator A1). Accreditation is normally preceded by an application procedure in which CSOs file a request, which is then examined according to certain criteria fixed by the IO in question: the final decision about accreditation is usually (but not always) made by state representatives on the proposal of the IO bureaucracy.

A more sophisticated form of recognition is the distinction between several categories of CSO, according to the character of the organizations or the range of topics with which they are concerned. We interpret such distinctions as evidence of an increasing complexity in the evolution of CSO–IO relations (A2). In a similar vein, we believe that a regular re-examination of whether CSOs still fulfil the accreditation criteria is also evidence of an enhanced institutionalization (A3). A further indicator of the increasing importance ascribed to CSOs by IOs is the creation of a specialized division or contact point in the IO that deals exclusively with CSO affairs (A4). One of the most advanced forms of recognizing CSOs as legitimate interlocutors is to grant them regular access to IO premises – of course, subject to certain security regulations and other restrictions (A5).

Group B – Consultation in policy making

A second set of indicators for access concerns consultative arrangements. If CSO participation is to enhance the democratic quality of global governance, regular CSO consultation in processes of rule making is crucial. Any such consultation needs some forum for an exchange of views and an articulation of political values or interests. Empirically, such a forum can take on various forms. A first step is often to introduce special institutional arrangements for CSO consultation; such as joint workshops, seminars or public symposia (B1). Some of these meetings take place only occasionally, others on a regular basis. In such a context, CSOs can make their arguments, their (counter-)expertise and their data heard in an intergovernmental context. Another opportunity for CSOs to make their arguments heard is to submit their own documentation to an IO (B2). Some IOs also open their intergovernmental political meetings to the scrutiny of CSO observers (B3). Such a right to observe debates turns into real consultation once CSOs are allowed to intervene actively in the intergovernmental process of policy deliberation and address delegates directly (B4). What goes even further than the right to influence ongoing policy debates by making oral interventions is the right of non-state actors to put topics for future deliberation onto the IO's agenda (B5).

Group C – Co-operation in policy implementation

A third set of indicators of institutionalization focuses on co-operative arrangements in the implementation of global governance. Implementation can mean carrying out projects in the field; for example, in development assistance, humanitarian aid, or environmental protection. This is not directly related to CSO input in the process of policy formulation. Nevertheless, such enhanced co-operation can lead to the adjustment or revision of rules. One of the first indicators for co-operation in policy implementation is whether or not IOs rely on CSO assistance in carrying out their projects, or delegate entire projects to CSOs (C1). The partnership goes further when CSOs not only work for IOs (and are paid for it), but also commit resources from their own budget to joint projects (C2). From the deliberative point of view, a more important indicator for partnerships is the presence of CSOs in the review and evaluation of projects. Here, CSOs can feed their expertise and experience in the field back into the next cycle of project planning (C3). Quite clearly, the last three indicators are only applicable if an IO has projects of this kind to implement. Rule-making IOs usually do not have such tasks. However, even if IOs are mainly involved in

rule-making activities, CSOs can contribute to the implementation of their policies. More importantly, they can deliver information on state parties' compliance with their international obligations (C4). Hence, involving CSOs in monitoring compliance is an important opportunity for them critically to monitor the implementation of international governance and to denounce shortcomings, or non-compliance.

Group D – Dispute settlement

Over the last decades, the evolution of global governance regimes has been characterized by a wave of legalization or judicialization (Abbott et al. 2000). If disputes arise among the state members of an international organization or regime, these are increasingly referred to courts or to arbitration. Traditionally, non-governmental organizations, just like individuals, have not been involved in such procedures. However, there have been two recent developments in this field. First, CSOs may have the possibility of bringing their arguments to bear in dispute settlement between state parties. This advisory practice, which is quite common inter alia in US domestic law, is known as 'amicus curiae briefs' (D1). Second, there might be the possibility for CSOs to file complaints against IOs or against state parties that violate or fail to implement the norms and rules of IOs (D2). Such possibilities for private parties greatly enhance the standing of non-state actors in international governance.

Group E – Transparency

The last set of indicators operationalizes our research on the criterion of transparency. Traditionally, there has been a tendency among diplomats to impose an air of secrecy around their negotiations. Secrecy, in fact, might be a precondition for certain bargaining processes to succeed. Trade negotiations, for example, are facilitated when proposed concessions do not become public immediately. At the same time, secrecy precludes both public scrutiny and meaningful participation by non-state actors in internationalized policy making. CSOs can only participate successfully in international governance when they have sufficient information about the IO's work and its agenda. In traditional practice, such information has often been passed on informally to CSOs by sympathetic civil servants or like-minded delegates. However, from the normative point of view, we should expect formal guarantees for access to such information, giving non-state actors (often along with individual citizens) the *right* to obtain information about the work of the IO.

An important aspect in this regard is the formalization of disclosure policies. In the past, many organizations had very few rules – sometimes

none at all – regarding the conditions under which non-state parties could access their documents. The explicit formulation of disclosure policies is, therefore, an important advance (E1). Two types of documents can be distinguished in the context of internationalized policy making. First, there is background documentation, such as studies or reports commissioned by the IO or its state parties, which contains politically relevant information. Access to such information for CSOs should be taken for granted but, in reality, is not always secured (E2). Second, there are documents that accompany the negotiation of new international norms, agreements or treaties. Draft texts, national position papers or notes prepared by a committee chairman fall into this category. Clearly, delegates are often very reluctant to share such documents with a wider audience. Nevertheless, CSOs should have access to them in order to participate fully in the debate (E3). The most active part that can be played by an IO with respect to transparency is to disseminate its documents actively as a matter of routine. Nowadays, the most obvious avenue for public dissemination is the Internet (E4). Table 1.1 displays the complete list of indicators that we use to investigate access and transparency.

As they cover all the major dimensions of potential interaction between IOs and CSOs, these indicators can give us an encompassing account of the democratic quality of participation with regard to access and transparency. Our empirical findings show that some indicators are not applicable to all organizations; in particular, in the dimensions C and D. Some IOs are mainly rule-making organizations and do not have projects to implement. Others do not have their own dispute settlement mechanisms, and refer litigating parties to the International Court of Justice. Consequently, in the section on aggregate results below, we present general trends only for the dimensions A, B and E. For the same reason, we do not aggregate all dimensions into an overall 'democratic quality index' or a ranking of organizations. For individual organizations, the results are instead organized as a sort of scorecard that will be used for comparative purposes.

Case selection

The indicators listed in Table 1.1 have been used to conduct a standardized analysis of participatory arrangements in 32 cases. In our selection of cases, we sought to cover all major issue areas of international governance. Therefore, our sample comprises organizations and regimes in six central policy fields: international security, economic co-operation, protection of the environment, development co-operation,

financial affairs and human rights. Within each policy field, we selected what we considered to be the most important organizations and regimes. We are well aware that any decision about the relative importance of a particular organization is arbitrary, but we believe that our choice is reasonable. Moreover, in areas that cover a broad variety of issues – such as economic co-operation and development – we tried to include several major sub-fields. We also sought to cover organizations/regimes at both global level and regional level in order to detect the possible variation between global and regional settings of internationalized policy making. In the case of the UN, in particular, there is a huge variety of participatory arrangements among its numerous bodies, programmes and specialized organizations. Table 1.2 displays the organizations that were examined in this study.

Table 1.2 Cases studied with regard to CSO access and transparency, n = 32

International Security						
UN General Assembly	UN Security Council	NPT-Treaty Regime	NATO	OSCE	EU/CFSP	
Economic Co-operation						
WTO	ILO	OECD	WIPO	NAFTA	G8	EC/Trade
Environment						
UNFCCC	UNEP	Montreal Protocol	CITES	EC/Environment		
Development						
UN ECOSOC	World Bank	FAO	WHO	WSIS	EC/Structural Funds	
Human Rights						
UN HR Commission (since 2006 HR Council)	UN HR Conferences	Council of Europe	EU/Asylum and Migration			
Financial Affairs						
IMF	BIS	ECB	EU/ECOFIN			

Note: All abbreviations used in this table are explained in the List of Abbreviations at the beginning of this book.

Most of the cases we selected represent international governmental organizations. However, we also consider governance arrangements that are not 'organizations' in the strict sense of the term, such as the G8 summits, or the Montreal Protocol for the protection of the stratospheric ozone layer. It was also necessary to disaggregate the 'giants' of international governance, the UN and the EU, into different bodies and areas of activity as conditions for CSO access vary greatly among them.

Aggregate trends and patterns

On the following pages, we will present the results from the study of these organizations and regimes with regard to access for CSOs and transparency. By the year 2005, almost all the institutions of European and global governance under study here held consultations with organized civil society in some form or other. Only two organizations kept their doors tightly shut: the Bank for International Settlements (BIS) and the North Atlantic Treaty Organization (NATO). G8 summits remain completely closed to non-state actors as well. However, G8 is not an organization, but an informal institution without headquarters or a permanent staff. It is at the discretion of host governments as to whether they wish to consult with civil society in the preparation of the summit. As a rule, they hold a meeting with the representatives of trade unions and business associations. In a similar vein, the European Central Bank consults with civil society only in the framework of its macro-economic dialogue, which involves the social partners.

With regard to the accreditation of CSOs, in exactly half of the cases under study here international organizations selected privileged partners through accreditation mechanisms. The most important exception to this is the European Union, which has not introduced such schemes to date. A distinction of CSOs with divergent participation rights was found much less frequently (37.5 per cent). Only about half of the organizations that require CSOs to go through accreditation procedures review whether these criteria are still being fulfilled on a regular basis (54 per cent). In 59 per cent of the cases, we found specialized administrative units dealing with outreach to civil society. All organizations that accredit CSOs allow CSO representatives to enter their buildings on certain occasions – such as conferences – but only very few, most notably the UN and the European Parliament, issue badges for permanent access. In many cases, civil society is consulted through special outreach or liaison meetings (59 per cent). Organizations that do not hold such consultations fall in two categories: the first group (BIS, NATO) does not

consult with non-state actors at all. Others, such as the World Health Organization (WHO), include civil society representatives in their regular meetings so that there is little need for special consultation.

The most decisive regulations for the democratizing effect of civil society participation concern CSO access to political meetings, where crucial decisions are prepared, discussed and taken. However, access to political meetings is not easy to compare between organizations, as the definition of the term 'political meeting' is elusive. Some organizations under study here, such as the European Commission, have an enormous number of preparatory committees that meet early in the legislative process. Their activity is political, in that they discuss concrete legislative proposals, and many of these meetings can be attended by CSOs. However, the EU's intergovernmental negotiation process in the Council cannot be observed by their representatives. Other organizations have opened select intergovernmental meetings to CSOs, such as plenary meetings of conferences, without granting access to the preparatory process in committees (WTO). In order to account for the differences between types of political meetings, we made the following, more fine-grained calculation: 25 per cent of the organizations under study here do not allow CSO representatives into any political meeting. In 19 per cent of the cases, we found that CSOs are consulted only in the early phase of the political process; for example, in committees. In 47 per cent of the cases, we found access to both early stage meetings and to intergovernmental bargaining at later stages; and in 9 per cent of the cases, access was limited to only the late negotiation stages (plenary sessions of conferences).

In the vast majority of cases (83 per cent), organizations that admit CSOs as observers to political meetings also grant speaking rights to CSOs, subject to various restrictions. The possibility of amending the agenda was found in only three cases: the Monitoring Committees of EC Structural Funds, the UN ECOSOC and the UN Human Rights Commission.[3] Regulations for the circulation of CSO documentation among policy makers vary across organizations. As a general rule, the right to distribute written material in political meetings (rather than only outside in the corridors) coincides with speaking rights in the respective meetings.

With regard to transparency and access to information, clearer rules seem to be on the rise. In almost 90 per cent of the cases, we found clear guidelines on the public release of documents. Information on the work and current projects was found in all cases on the web, but the amount of documentation accessible varies greatly among organizations. Not

surprisingly, political documents – for example, texts currently under negotiation – are handled much more restrictively than background information.

An increasingly common practice that we observed in many organizations is the inclusion of civil society representatives in governmental delegations. This seems especially widespread in specialized functional organizations, where members of NGOs participate as experts in national delegations. We found evidence of this practice in all policy fields except finance, including sensitive issues such as the review of the Nuclear Non-Proliferation Treaty (NPT) and trade negotiations (WTO). However, quantifying this phenomenon is very difficult, as the composition of national delegations is at the discretion of the member states and very few international organizations collect relevant data. In a survey, the WHO found that, between 1998 and 2000, nine to eleven national delegations at the annual meetings of its governing bodies included (official) representatives of civil society. The delegations of Canada, Cyprus, Norway, Sweden and the USA included civil society representatives in all of the three years under study.[4] As members of governmental delegations, civil society representatives clearly work under very different conditions and often have access to meetings, including informal ones, that CSOs cannot attend as observers. They also have the opportunity to defend civil society concerns within their own national delegation. On the other hand, the fact that they are members of a national delegation – and hence of a governmental structure – compromises their capacity to act as an independent voice in global policy making.

Civil society access by policy field

With regard to the formal conditions of civil society access, we noted some interesting differences across policy fields. It appears that, at least to some degree, the chances for organized civil society to consult with an IO depend on the subject matter that the IO deals with. However, within some policy fields, there are surprising exceptions to the rule, which will be highlighted in the following paragraphs.

International security

Unlike any other topic in international politics, security has been associated with a need for secrecy. In the realm of international security, one would certainly not expect a great deal of openness towards non-state actors. Yet, it seems that we have to at least partly revise our views. Only

NATO thoroughly confirmed our expectations that security organizations are reluctant to interact with CSOs: n a similar vein, the EU Common Foreign and Security Policy (CFSP) is also formulated in a secretive manner. Within the UN system, for a long time the Security Council did not regard CSOs as legitimate interlocutors, either. Since the 1990s, however, it has maintained consultations with selected CSOs, mainly in the framework of the so- called Arria formula. However, this is a series of informal consultations in which Council members meet with CSO representatives and these consultations are not part of the Council's regular meetings.

External transparency and institutionalized CSO access are considerably better in the nuclear non- proliferation regime. CSOs can attend the Plenary Sessions of the Review Conferences of the Treaty on the Non-Proliferation of Nuclear Weapons and its Preparatory Committees. A completely different picture was found in the Organization for Security and Co-operation in Europe (OSCE), which reflects significant changes in the agenda of international security policy. Some of the most pressing challenges to international security today are to build peace in areas of civil war, aid the reconstruction of failed states, and to stop ethnic and other forms of tension from turning into open violence. This has repercussions on the way they deal with civil society. The OSCE is a prime example of an organization that focuses on domestic security, stabilization and peace building. To accomplish these tasks, it co-operates intensively with non-state actors. Thus, in the field of international security, we should at least differentiate between classic military alliances on the one hand, and peace-building organizations on the other. The relations of a security IO with civil society are likely to be determined by what sort of tasks the IO is designed to perform.

Economic co-operation

The tasks of international economic co-operation are manifold, and so are the organizational structures that have developed. It is therefore not surprising that the modes of interaction with non-state actors also vary in this field of governance. They range from the participatory culture of the International Labour Organization (ILO) to the closed consultations of the G8 group. The ILO includes representatives of the employers' organizations and the trade unions as members in its assembly, but also enters into consultations with many other non-state actors. The G8 group marks the other extreme. It remains an exclusive club that does not entertain any institutionalized relationship with non-state actors, although some summit host countries do consult selected CSOs (mainly

the social partners) in advance. The other organizations studied are to be found somewhere between these two extremes. The Organization for Economic Co-operation and Development (OECD) maintains privileged relations with only four corporate actors, but relies on ad hoc consultations with the rest of the non-state world. The World Intellectual Property Organization (WIPO) grants more formally secured access to a large number of CSOs, and is considerably more accessible than the WTO. The Treaty setting up the North American Free Trade Area (NAFTA) institutionalized CSO consultation only in a side-agreement pertaining to environmental protection. The trade branch of the EC has institutionalized a stakeholder dialogue for an exchange of views in advance of international negotiations, while its decision-making process proper remains closed. The variation in this policy field can again be explained by the specific tasks of the IOs involved. IOs that are devoted to tariff bargaining remain much more shielded against external scrutiny than those devoted to the setting of standards.

Environmental co-operation

Arguably, environmental politics is a field in which non-state actors have played an unprecedented role in agenda setting and policy making. This is well documented by the existing literature on epistemic communities and CSO activism (Haas 1992; Lipschutz and Mayer 1996). In fact, all the regimes that we analysed in this issue area maintain extensive relations with non-state actors and accept them as legitimate interlocutors. However, with regard to the degree of formalization and legalization of this relationship, there are some interesting variations. In the EU, there is little formalization, while the UN climate-change regime grants CSOs far reaching participation rights in its policy process.

Development

Patterns of participation in this field are characterized by a remarkable gulf between policy making and policy implementation. In the implementation of development projects, organizations rely heavily on non-state actors. In the case of the World Bank, for example, more than 70 per cent of all projects are implemented in collaboration with non-state actors.[5] CSOs are involved in all phases of its project cycle, including evaluation. However, this openness is not reflected at the level of political decision making. Where strategic choices are made, the doors remain closed both to CSOs and the wider public. Although development agencies in the UN system grant more access to political meetings, there is also a division between the political and operational level. The

same is true for the EU, whose (intra-European) structural funds we took as an instance of regional development assistance. Although CSOs are involved in implementation processes on the ground, there is very little guidance on these processes by the Commission and, consequently, there is remarkable variation both within and across countries as to how CSO consultation is handled in practice. The allocation of the funds is an intergovernmental affair and its decision-making process remains opaque.

Human rights

Similar to environmental protection, the protection of human rights is a policy field in which CSOs are particularly active. Human rights protection is also the raison d'être for some intergovernmental organizations, such as the UN and the Council of Europe. Hence, one should expect a pattern of highly institutionalized relationships between the two types of actors. Our data confirm that this is true for both the UN human rights regime and the Council of Europe. Both bodies collaborate extensively with civil society, which they need to do, in order to detect human rights violations. Without CSOs, they would not be able to monitor compliance with the relevant regime. However, the picture changes when we examine the processes of policy making that impact heavily on human rights. In the EU, for example, in the fields of migration and asylum, policy making is shielded against too much insight and influence by non-state actors.

Financial affairs

International co-operation in the financial sector has been, and still largely is, a pronouncedly intergovernmental affair. Neither the European Central Bank (ECB), nor the Bank for International Settlements (which administers the Basel Accords) have granted CSOs any particular status or consult with them on a regular basis. In a similar vein, the International Monetary Fund (IMF) has very reluctantly opened up to civil society. It now organizes joint outreach meetings together with the World Bank, although the policy-making process still remains closed. It should be noticed here that, in the financial sector, secrecy has particular justification. With regard to IMF credits, for example, a premature release of information can trigger market speculation that runs counter to the intentions of the Fund.

Studying responsiveness and inclusion: in-depth case studies

The empirical analysis conducted for all the organizations in our sample concentrated on the access that civil society actors had to policy-making

processes, project implementation and judicial review. In addition, the formal rules governing access to relevant documentation could be investigated for all the organizations under study here. However, responsiveness and inclusion cannot be mapped in a comparable way for a large number of organizations. In order to know whether intergovernmental bodies are responsive to CSO input and to spot the potential problems of inclusion, an in-depth study of single organizations and negotiation processes within them is necessary. This could not be achieved for the large set of 32 cases in the framework of our project. We therefore chose examples for our in-depth study, maintaining a balance between European and global level, and between institutional conditions that are favourable or less favourable to CSOs.

Chapter 3 by Charlotte Dany reports the results of a case study on the World Summit on Information Society (WSIS). This process was organized by the United Nations to draft a programmatic declaration for the information age. The case is salient for our study because of its unprecedented design, which provided non-state actors with most favourable conditions. CSOs actively participated during the whole preparatory process as well as at the summit by contributing to the drafting process of the policy documents. The WSIS thus represents a most likely case for organized civil society to have an impact on the decision-making process. In particular, the chapter focuses on the responsiveness towards the concerns voiced by CSOs under such favourable conditions.

Chapter 4 by Lars Thomann also investigates an organization in which non-state actors can work under very privileged conditions. The ILO features a unique 'tripartite' structure, in which the social partners – that is, employers organizations and trade unions – work alongside governmental representatives on an equal footing. As a consequence, the ILO has been regarded for a long time as being quite extraordinary in its outreach to organized civil society. In recent years, however, the ILO has been challenged by new problems related to labour, which were not well represented by the social partners. At the same time, new types of actors, mainly activist NGOs, have been pushing into the ILO. This chapter investigates how the ILO and, in particular, the established social partners have reacted to this challenge.

Chapter 5 by Jens Steffek and Ulrike Ehling provides a contrast to the very favourable conditions for CSO access and input that both the WSIS and the ILO provide. They investigate the situation of civil society in the WTO, which has a reputation for being one of the most secretive international organizations. In fact, the WTO provides very limited formal pathways for civil society access. Not surprisingly, the WTO has been

one of the prime targets of NGO campaigns against the institutions of global governance. This chapter investigates how the WTO has responded to such criticism and how it has tried to open up alternative settings for CSO consultation. It also investigates how CSOs have tried to have an impact upon its policy formulation under these rather adverse conditions.

Chapter 6 by Peter Mayer deals with another issue area of international governance in which many IOs have tried to keep the gates closed to the public. In the field of international security, the stakes for states are extraordinarily high. However, as much of international security policy has shifted from alliance formation towards conflict prevention and peace building, the collaboration of CSOs has become desirable, if not inevitable. To account for this development, Mayer compares the way in which the NATO and the OSCE are reaching out to civil society. He finds that OSCE is much more open to civil society and collaboration is extensive. Mayer argues that this phenomenon can be explained by the fact that the OSCE in its daily work is much more in need of CSO resources than NATO – for example, in cases of post-conflict peace building.

Chapters 7, 8 and 9 are devoted to civil society participation in the European Union (EU). The EU is of particular interest for this study because it represents the most densely integrated realm of governance beyond the nation-state. The number of policy fields that it covers, and the depth of integration that it has achieved, are unprecedented. No other international body has a comparable impact on the sovereignty of its member states and the everyday lives of their citizens. Due to the primacy and supremacy of European law, no other international body has disempowered national parliaments in a similar way. Thus, the EU has a particularly high need for democratizing practices.

In recent years, efforts to bring the policy and politics of the European Union closer to citizens have intensified at a rate that is unparalleled by any other intergovernmental entity. The White Paper on Governance (2001) introduced a set of novel standards for EU policy processes. In Chapter 7, Dawid Friedrich sets out to present an overview of recent efforts to strengthen civil society participation in the EU. His chapter examines the formal institutional framework crafted for the participation of civil society organizations in EU governance as a whole, but nevertheless distinguishes between the different bodies and different fields of activity. Friedrich then investigates the conditions for participation in two issue areas of European governance. He contrasts the field of asylum and migration policy, in which the Council plays a major role due to its competencies under the Second Pillar, with the field of environmental

policy, which is driven by the Commission. In order to assess the responsiveness of governmental actors to civil society concerns, he studies the documentation of two policy processes: the negotiation of Council Directive 2003/86/EC on the right to family reunification for third-country nationals, considered the 'flagship directive' in the field of legal migration; and the REACH Directive on the regulation of chemicals, one of the most contested directives in the field of environmental politics.

In Chapter 8, Maria Paola Ferretti explores the participatory strategies of the European Food Safety Agency's Panel on the Regulation of Genetically Modified Organisms (GMO Panel). In the EU, risk governance is a focal point for exploring the tensions between the need to address technical difficulties, which seems to require experts, and the democratic commitment to finding public rules and processes that are transparent and open to the appraisal and scrutiny of citizens. The chapter focuses on the initiatives for democratic inclusion in the first months of the activities of the GMO Panel. The responsiveness to the concerns of non-state actors is assessed by means of a content analysis of the minutes of the two public consultations organized so far by the GMO Panel, and of consumer comments on a selection of notifications about deliberate field trials and the placing of genetically modified organisms on the market.

Chapter 9 is concerned with civil society participation in the implementation stage of European policy making. Jan-Hendrik Kamlage focuses on the work of the Monitoring Committees, which are deliberative bodies at regional level, whose main task is to supervise the operation of the Structural Funds. One of the major guidelines of the European Commission for the operation of its Regional Policy is the 'principle of partnership'. Partnership means that the formulation, implementation, operation, monitoring and evaluation of regional policy are conducted in close co-operation with a wide range of governmental and non-state actors. To understand the role of civil society in this process, the chapter analyses the functioning of the regional Monitoring Committees in Norra Norrland (Sweden) and Mecklenburg-Vorpommern (Germany).

In Chapter 10, the conclusion, Claudia Kissling and Jens Steffek take up the discussion about the democratizing potential of civil society involvement in international governance that was outlined in this introductory chapter. The aim is to assess both the prospects and limits of such an approach to democratization in the light of the evidence presented in the case studies. Organized civil society does, in fact, have an important role to play in exposing international governance to public

scrutiny. The presence of CSOs in international organizations and regimes can render international governance more visible and add critical commentary to official communications. There is also clear evidence that CSOs expand the range of viewpoints present in international negotiations and can give a voice to the concerns of marginalized groups – such as indigenous peoples – that are not well represented in the intergovernmental process.

On the other hand, we also find important shortcomings and potential pitfalls. First, the granting of consultative status to CSOs is no guarantee that the interests and values promoted by civil society actually enter intergovernmental deliberation and are given due consideration in the decision-making process. The case studies show that, even when institutional conditions are particularly favourable, governmental actors are often reluctant to adopt CSO concerns. Second, involving organized civil society in internationalized governance has, in some cases, tended to reinforce existing international asymmetries between North and South. In many issue areas, Northern civil society is much better represented than Southern. Third, it seems that extensive co-operation between IOs and CSOs can lead to problems of co-optation. CSOs might become entangled in financial and organizational dependencies that compromise their ability to function as independent and potentially critical voices.

We conclude that civil society participation holds some major promises for making international governance more democratic and more accountable to citizens. Judging from the evidence about the current situation, however, it appears unlikely that all these promises will be fulfilled in practice. CSO involvement contributes significantly to the transparency and, hence, the accountability of policy making at international level. However, we found limits to its functioning as an alternative avenue for citizens' concerns. The current institutional arrangements reflect the enormous power asymmetries between CSOs and governmental delegates, which is unlikely to disappear in the foreseeable future. While CSOs do enhance the number of arguments, concerns and points of view present in international governance, their arguments count much less. There is no equal opportunity to influence political debates and, as a consequence, the results of policy making.

Notes

1. It is a contested question as to who is, or who should be regarded as, part of civil society (Castiglione 1998). In this book, we define civil society organizations as

all the non-governmental, non-violent, non-profit seeking actors that have legal personality recognized by at least one country. This definition excludes corporations from the realm of civil society, but includes business associations.

2. An obvious objection to this is that careful reflection might also lead actors to reject a proposal as being unreasonable so that the absence of adjustments cannot be equated with the absence of responsiveness. However, in the negotiation processes that we are studying, we have a great variety of arguments being made by civil society, which makes it unlikely that all of these arguments will be rejected by all state-actors as unreasonable.
3. In theory, there is a procedure for CSOs to amend the agenda of the World Health Organization's Assembly meetings through the Executive Board. According to one interview, this mechanism does not seem to be used, however (interview with Ms. J. Matsumoto, WHO external relations officer).
4. Source: WHO Civil Society Initiative, CSI Review Series, 'Analysis: NGO Participation in WHO Governing Bodies, 1998 to 2002', WHO Doc.CSI/2002/WP3: 6.
5. In the fiscal year 2003, 72 per cent of all projects funded by the World Bank involved CSOs. Source: http://siteresources.worldbank.org/CSO/Resources/World_Bank_Civil_Society_Progress_Report_2002-2004.pdf (accessed 2 February 2006).

2

The Evolution of CSOs' Legal Status in International Governance and Its Relevance for the Legitimacy of International Organizations

Claudia Kissling

This chapter introduces the concept of the legal personality of non-state actors as an indicator of the democratic legitimacy of international organizations (IOs). Both normatively and empirically based policy proposals tend to suggest an augmented role of the new actors – mainly civil society organizations (CSOs) or non-governmental organizations (NGOs) – in overcoming the legitimacy deficit of IOs. However, if the participation of non-state actors in international governance is to be effective, efficient and have a meaningful and lasting effect, institutional rights and duties are required – and, with them, legal personality. Thus, the legal personality of non-state actors can be taken as a minimum safeguard clause for surmounting the legitimacy deficit of international organizations (the normative approach). It can also be used as a helpful analytical framework for organizing empirical data on the participation of these actors in IOs (the empirical approach). This chapter evaluates the legal rights and duties of NGOs in their co-operation with more than 30 international organizations, and seeks to assess whether this implies that they have acquired legal personality – and, if so, what quality this personality assumes. Such a comparative study is a novelty in both political science and international law. By combining the perspectives of two different disciplines, this chapter illustrates the intrinsic empirical *and* theory-building value of (international) positive law in political science.

In legal theory, the terms (legal) 'person' or 'subject' indicate the concept used to describe the main actors – those who matter – in (international) law. A (legal) person is an entity capable of possessing (international) rights and duties, whereas an actor does not necessarily have such a capacity. Legal personality is thus a normative concept, rather than a mere metaphor, with legal consequences in the real world. The recent debate around this notion was triggered off by the emergence of new subjects in international law; such as individuals, transnational enterprises or non-governmental organizations. The state, as the main subject of international law, was – and unquestionably continues to be – an international subject or person, without resorting to the term of actor, instead. With regard to non-governmental organizations, however, a debate evolves – albeit separately within different national legal systems. This relates to the question of whether or not these organizations may qualify as legal persons in international law, or whether they may be treated as 'simple' actors.[1] As Dupuy has recently suggested, there seems to be a dichotomy between 'ancient' and 'modern' international lawyers, or between Europe and America, with regard to the classification of NGOs (Dupuy 2003: 262). I would add that it is also a rift between lawyers trained in different legal systems; namely, the continental and the Anglo-Saxon (common law) tradition. In continental legal systems in general, and the French system in particular, on the one hand, there is a more pronounced split between different disciplines, political science and law while, on the other hand, one can observe a more sociologically informed English legal tradition (Mosler 1962: 12). However, this is not only a linguistic, generational, national and cultural problem. Whereas 'old Europe' remains firmly attached solely to the agents that seem to qualify for legal personality (states and international organizations), and fails to consider the increased political weight of new actors, 'new America' tries to resituate international law in its social context, to the detriment of striving for a sound legal analysis embedded in legal positivism. The solution may be found in a 'legal statutes of 'participation' of NGOs in international organizations (Dupuy 2003: 275–7).

Actors or persons: does it matter?

This said, the question remains as to whether, and in what sense, this legal discussion might matter for political science in general and international relations (IR) theory in particular. Does it make any difference whether NGOs are considered as international legal persons, as actors,

or even as something in between? The point I wish to make is that it does. The reason why this might be the case can be found in the debate instigated within the last 15 years on the (missing) legitimacy of international organizations. Expressed mainly in descriptive, rather than normative or prescriptive,[2] terms, be it in the realms of political theory (Dahl 1994; Held 1995; Scharpf 1999) and law (Gramlich 2003), or more manifestly in the streets through acts of 'civil disobedience', and far less visible in national parliaments, this debate is mainly about societal acceptance of international organizations and the (missing) belief in their legitimacy on the part of those who are ruled. However, as Zürn, referring to Lipset (1960), pointed out, the 'empirical belief in the legitimacy of an institution closely depends on the normative validity of a political order' (Zürn 2004: 261). Thus, an empirical or descriptive approach to the question of international legitimacy cannot operate without being grounded in a normative judgement on the rightfulness of a social order – or, at least, in a prescriptive concept on the rightful grounds that help this order to be labelled 'legitimate'. Be they exclusively normative-prescriptive or predominantly empirical-descriptive, proposals about how to overcome the legitimacy deficit in international organizations increasingly tend to refer to an ever greater role of new actors; primarily civil society at large (Falk 1995; Nanz and Steffek 2004; Scholte 2004) or international parliamentary institutions in particular (Blichner 2000; Falk and Strauss 2001; Kissling 2001). All these proposals involve institutional rights on the part of these actors if the requested participatory procedures are intended to operate effectively, efficiently and to have a lasting effect. However, NGOs,[3] in particular, are also challenged and examined with regard to their own legitimacy (Beisheim 1997; Edwards 2000; Held 2004: 385; Kovach et al. 2003). This points to the assumption that the concept of international legitimacy cannot simply refer to the rights of new actors without examining their corresponding duties, especially if the actors wish to play a role in the process of holding IOs accountable (Scholte 2004: 232).

Thus, the (legal) rights and duties, and consequently the legal personality, of these new international actors *do* matter. They can be taken as a minimal safeguard clause for overcoming the legitimacy deficit of international organizations. 'Official rules of engagement can have … enabling … effects for civil society activities' (Scholte 2004: 226), but also disabling ones in the case of prohibiting or non-existing rules. If non-governmental organizations or inter-parliamentary assemblies could be said to have a certain legal standing in international law, some minimal preconditions for legitimate governing might be guaranteed.

This does not mean that legal rights and duties would dispense with the necessity of their being applied or implemented (on the part of the rulers), nor of their being accepted as binding and generally being respected (on the part of those ruled) but, without their actual existence, there is no guarantee for the non-arbitrary involvement of civil society or parliamentarians, and therefore no equal opportunity for all. The door would be open to inconsistency, subjectivity, chance and the undermining of the weak: in short, to arbitrariness.[4] Thus, rights and duties here are a de jure safeguard clause for the equal de facto legitimizing capabilities of both the legitimizing new international actors and the organization that searches for the legitimacy of its international order through the accordance of these rights and duties. Therefore, one might take the concept of the legal personality as a starting point for operationalizing normative legitimacy claims or prescriptive policy proposals. At the same time, the concept might provide a helpful minimal framework of analysis for empirical data on the participation of new actors in international organizations. This points to an intrinsic empirical *and* theory-building value (international) which positive law can take on in political science.

The research project in the context of which this chapter has been elaborated has a normative concept of deliberative democracy at its outset. This chapter proposes to examine the procedural preconditions for political deliberation by adopting a legal analytical approach. This could provide an alternative methodological approach, which delivers an encompassing and fine-tuned picture of preconditions for legitimacy within different IO settings. Thus, I propose an analysis of empirical data regarding the degree of international legal status of NGOs within different IOs – comparable to investigations of the status of inter-parliamentary assemblies in international law (Kissling 2006: ch. 2.2) – as an analytical framework for the existence of minimal procedural safeguard clauses for the legitimacy of international organizations.

Criteria of NGO personality

Lawyers, in general, tend to approach a subject by first giving precise definition to the terms that they use in their analysis, as do international lawyers, when they speak about international personality.[5] What is meant is '*das Bezogensein eines Subjektes auf eine bestimmte Rechtsordnung*' [The Reference of a subject to a certain legal order][6] (Anzilotti 1929: 89). A subject of international law is thus the addressee of the international legal norms of a specified positive legal order.[7] However, the definitional

consensus of international lawyers ends here. Even though the criteria of international personality have been singled out and precisely formulated – especially with regard to new, non-state subjects – in subsidiary sources of international law; such as judicial decisions[8] and teachings of prominent international lawyers, legal doctrine has never agreed upon the exact combination of the criteria that would map out the scope of the concept. In grosso modo, one can distinguish five different criteria that are proposed either alternatively or cumulatively. When I speak of the legal status of an entity in international law in this chapter, I refer to one or more of these criteria, albeit without being bound by any particular combination. For some, for example, it suffices for an entity, in order to be called a legal subject, to be the addressee of one or more rights (criterion 1).[9] In this view, every human person is a subject of international law in the sense that he or she is the addressee of international human rights norms. Others proffer the addition, alternatively or additionally, of legal duties to the requested criteria (Epping 2004: 55; Hailbronner 2001: 169) (criterion 2). However, in both cases, rights and duties alike have to be conferred directly (Nguyen Quoc et al. 2002: 403); that is, not through an intermediary, such as the legal order of a state. Another version is to include the capacity to maintain the accorded rights by bringing international claims into the list of criteria (Brownlie 2003: 57) (criterion 3).[10] Lato sensu, the procedural extension of this capacity to defend its own rights encompasses a capacity to act in its own favour, not only before a court, but also before administrative instances in charge of controlling the implementation of international norms (Dupuy 2003: 265–6). Another strand adds the necessity of an entity to be held to account before an international court, a corollary of the existence of international duties (Cahier 1985: 93–4) (criterion 4). *Restatement of the Law Third, The Foreign Relations Law of the United States* seems to take criteria 3 and 4 as a condition for calling the entities concerned international persons. Entities that 'have only rights and obligations' ought to be called subjects (American Law Institute 1987: 70–1). I will use this linguistic distinction between 'subjects' and 'persons' in the following when elaborating on a gradual legal approach to international personality. Finally, a minority of international lawyers assume that, in order to speak of personality, an entity has to possess the capacity to create international law or, at least, to participate decisively in its creation – directly or indirectly, through representatives – and thus to dispose of so-called 'normative power' (Stoecker 2000: 90) (criterion 5).[11]

Turning to the specific case of NGOs, most authors of law (Dupuy 2002: 27–8; Klein 2001: 279; Verdross and Simma 1984: 251) and

politics (Martens 2003) reject the idea of a legal status for these groups. However, the dismissal of legal personality for these entities often occurs prematurely, as it lacks any in-depth legal-empirical evaluation. First, one has to bear in mind the dictum of the International Court of Justice that '[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community'.[12] Moreover, the question of whether NGOs possess international personality is intrinsically linked to the comprehension that one has of the term (Stoecker 2000: 89). Having taken a decision on which concept of personality to apply, a careful investigation has to search for its correspondence to real-world settings with regard to the life and activities of NGOs. This is the basis on which some authors have recently taken the stand that NGOs have acquired legal status in international law. Thus, (some) mainly German-speaking lawyers have begun to talk about partial personality.[13] Others admit a certain international legal status without attributing international personality (Lagoni 1991: 869–70; Rechenberg 1997: 617; Stoecker 2000: 98).

However, further clarifications have to be made with regard to NGO international personality. It is clear that NGOs, in the event that legal personality is attributed to them, can never be considered to be original subjects – a status that is solely reserved to states. Since they derive their personality from other international subjects (states or IOs), they can only take on the status of *secondary – or derived – subjects*. Moreover, as Martens rightly acknowledges (2003: 19), there is no general (global) recognition of NGOs (of their rights/duties and of their legal status in general) in international law; that is to say, in treaty or customary international law.[14] Instead, the status of NGOs differs from IO to IO. In this sense, one can speak of the legal status of NGOs solely within a partial – or functional – international legal order, or of *functional personality* targeted towards NGO tasks in relation to a specific IO. In this context, it might make a difference whether IOs recognize NGOs through primary international law that establishes their legal order (that is, their founding treaty or other primary international law sources) or through corresponding secondary international rules; namely, their derived legal order (mainly statutes and resolutions). The latter would simply bestow NGOs with *indirect international personality*, whereas the former would also give them *direct international personality*. However, indirect personality might become direct personality when it is contained in soft law that gradually evolves into customary international law through practice reaffirmed by opinio iuris.[15] Moreover, since they are in no way the main subjects

within that IO's legal order, NGOs have their rights and duties attributed in only a limited fashion and not in an all-embracing manner (in toto). One may thus conceive of these attributes as *partial personality*. A corollary of the functional personality of NGOs – contrary to that of international organizations[16] – is its missing objectivity; that is, the absence of opposability erga omnes.[17] This means that NGOs may enjoy personality only with regard to the members of the respective IO's legal order. In order to benefit from this in other circumstances, they would need to be recognized as subjects by the members of other international organizations or by other subjects of international law. In this way, NGO *personality* can only be *relative*.[18] A final question concerns the role of the recognition of an individual NGO within an IO's legal order. In order to obtain relative personality, does an NGO have to be recognized explicitly or implicitly by the IO in question (and/or its members) even though the selection criteria for acquiring a certain status are prima facie fulfilled? On the face of it, any single NGO attains legal status when the respective IO admits it to its legal order, mainly by majority vote through general accreditation, by single case decisions, or in the way its legal order foresees it. In this way, the corresponding IO's decision functions, at the very least, as an implicit recognition of the NGO in question. Beyond this, no additional recognition (for example, by the state members of the IO) seems to be required for the rights and duties of an NGO to take effect. Thus, the old quarrel about the constitutive or declaratory function of the recognition of states in international law acquires another role here. For any NGO, *IO – simply IO*[19] *– recognition is constitutive* for acquiring legal status in the first place.

Do international organizations assign legal personality to NGOs?

Since there is no general international law – that is, treaty or customary law detectable with regard to the legal status of NGOs – I propose to look at the rules concerning the rights and duties of NGOs and their legal situation in each international organization or treaty regime[20] separately (Dahm et al. 2002: 238).[21] As regards legal status within each organization or regime, I adopt a gradual approach, which establishes different degrees of legal status depending on the number of criteria met. This gradual approach is illustrated in Table 2.1.

Even though I adopt a wide concept of legal status that encompasses all the criteria discussed in the context of legal personality, I do not agree that '*de façon alternative, tel ou tel critère de dévolution*' [Alternatively, one

Table 2.1 Degrees of legal status

	Degree of legal status	Criteria for legal status	Corresponding legal rights and obligations
Legal Status	Subject	Rights	- Accreditation - Regular access to buildings - Right to have access to documents (background documents/policy papers) (distribution/Internet) - Access to governmental meetings - Right to speak - Right to submit documents - Special meetings for NGO consultation/obligatory consultation - Right to put topics on the IO's agenda - Rights in implementing projects (also financing) - Rights in review of projects - Control and monitoring of governments' compliance - Right to submit briefings in dispute settlement procedures between States or States and IOs
	⇓	Duties	- Duty to fulfil certain criteria for accreditation
	Person	Enforcement capacity	-Right to lodge a complaint against IO or State
	⇓	Accountability	- Accountability for loss of entitlement to be accredited, checked through re-examination procedure - Accountability before Court - Accountability as part of national delegation or of organs with voting power
	Comprehensive legal status	Normative power	- Members of national delegations - Drafting rights - Right to vote

or the other criterion][22] would matter (Dupuy 2003: 266). Instead, the empirical data suggest that the five legal criteria can be allocated to three groups of legal capacities that gradually increase the corresponding legal status. These begin with simple rights and/or duties (first group), adding the capacity to enforce these rights and/or to be held accountable for the fulfilment of duties (second group), and finally deal with full normative

powers (third group). These capacity groups differ with regard to the legal status that they confer; the first group bestowing the status of 'subject' on an NGO, the second conferring the status of 'person' to it, and the third being classified as encompassing 'comprehensive legal status'. The legal rights and obligations enumerated in the right-hand column of Table 2.1 are not exhaustive but are, rather, a tentative list of common characteristics with regard to NGO rights and duties: they may be supplemented by others. However, the list indicates that the first group entails a far wider range of legal rights (and duties) than the second and third groups. I therefore adopt the view that legal status can already be achieved through the conferment of a single legal right or duty of the first category even though this is, admittedly, a very low level of status. The threshold of qualification as 'person', however, would be at the level of enforcement capacity (second group). This procedure corresponds to the approach taken with regard to individuals before the International Criminal Court was established. As the addressees of human rights norms, individuals were usually considered to acquire (limited) personality in international law only in the legal contexts in which they could enforce their rights and duties (Dupuy 2003: 265–6). However, the threshold of qualifying as 'person' has to be investigated very carefully. When one speaks of enforcement capacity and accountability, the corresponding capacity to act only makes sense when the rights and obligations *of NGOs* are enforced, not duties of other subjects in international law. When Ipsen (2004: 93) requires controlling, monitoring and implementing rights for NGOs in order for any legal status to be acknowledged, he misconceives that NGOs in these cases only enforce the duties of states, and not their own. For NGOs, these capacities are equal to 'simple' rights and duties.

Another implication – evidenced through empirical research – that can be drawn from Table 2.1 is the under-representation of NGO duties. The debate on the internal legitimacy of NGOs in both the scientific and political community might change this obvious bias in the near future. To date, however, the internal legitimacy of NGOs (the rules concerning their establishment, internal organization, requirements for membership and members' rights, definition of an NGO, legal status, independence, and so on) mainly remains self-regulatory; for example, through codes of conduct (see Scholte 2004: 232). In some cases, international organizations even openly accredit NGOs, which, according to some, would not pass the line of legitimacy; for example, when financed by governments.[23] Since I focus on the legal situation of NGOs in international organizations in general, I exclude from this study the attribution

of personality to some specific and single NGOs; such as the Red Cross, which takes on a variety of functions under the four Geneva Conventions of 1949 and their two Additional Protocols of 1977 (see Nowrot 1999: 630–1). Another NGO, the International Olympic Committee, even has a good level of normative and jurisdictional power (Hobe 1997: 4). I also exclude the single NGOs that appear to act as a prolonged arm of state regulation; such as the International Air Transport Association (IATA). However, an effort is made to single out the first introduction of NGO rights and duties by year at every level, in order to draw conclusions as to when a certain legal status was conferred. Finally, since international law encompasses both treaty law *and* customary law, I also include the legal rights and obligations relating to NGOs that seem to have acquired customary law status through practice and opinio iuris.

International organizations in comparison

In the following, I will address the question of the legal status of NGOs in international organizations by grouping IOs alongside specific policy fields.[24]

Table 2.2 shows the legal status acquired by NGOs in the different international organizations and the moment when they acquired that status. Moreover, it specifies when direct (through primary international law) or indirect (through secondary international law) personality was achieved.[25] In this context, the rights/duties deemed as conferring direct personality are those that are directly contained in international treaties[26] or that have developed into customary law out of soft law[27] – such as resolutions[28] – or out of other practices combined with opinio iuris. Indirect personality is based on internal decisions; such as the specific rules of procedure of an organization. It is clear that many organizations grant a whole range of different rights and/or duties that – taken together – confer direct, as well as indirect, personality. Some reputed 'rights' and 'duties', however, do not confer any personality at all. This is the case when one deals with soft law (resolutions/guidelines, and so on) that either has not yet acquired the status of customary law or cannot develop into customary law because state parties want to maintain its non-binding status. The Organization for Security and Co-operation in Europe (OSCE) constitutes a particular case in this context since all its documents have no legal value, only political value. However, since OSCE documents are framed in legal language and express a clear opinio politica, one assumes that they, at least, create soft

Table 2.2 Legal status of NGOs in different international organizations

Policy field	Organizations/ regimes	Degree of NGO legal status	Introduction	Direct/ Indirect personality	Introduction
Security	UN GA	Subject	1946	Indirect	1946
	UN SC	Subject	1946	Indirect	1946
				Direct	1996
	NPT	Subject	?	Direct	?
				Indirect	?
	NATO	Subject	?	Direct	?
	OSCE	No status	–	–	–
	EU CFSP	Person	1993	Direct	1993
Economy	WTO	Subject	1995	Direct	1995
				Indirect	1996
	ILO	Comprehen- sive	1919	Direct	1919
				Indirect	1919
	WIPO	Subject	1970	Indirect	1970
	G8	No status	–	–	–
	OECD	Subject	1962	Indirect	1962
				Direct	1997
	NAFTA	Subject	1994	Direct	1994
	EU Trade	Person	1958	Direct	1958
				Indirect	1958
Environment	UNEP	Subject	1988	Indirect	1988
	UNFCCC	Subject	1994	Direct	1994
				Indirect	1996
	Montreal Protocol	Subject	1989	Indirect	1989
	Aarhus Convention	Subject	2002	Direct	2002
				Indirect	2002
	CITES	Subject	1975	Direct	1975
				Indirect	1975?
	EU Environment	Person	1987	Direct	1987
				Indirect	1987
Development	World Bank	Person	1993	Direct	1993
	Group	Subject	1944?	Indirect	1993
	UNDP	Person	?	Indirect	?
	UN ECOSOC	Person	1946	Indirect	1946
				Direct	>1946
	FAO	Person	1957	Direct	1953
		Subject	1953	Indirect	1957
	UN Conferences	Person	1950	Indirect	1950
				Direct	>1950
	WHO	Person	1948	Direct	1948
				Indirect	1948
Human rights	UN Human Rights	Person	>1946	Direct	>1946
				Indirect	1947
	EU Asylum and Migration	Person	1993	Direct	1993
				Indirect	1999

Table 2.2 Continued

Policy field	Organizations/ regimes	Degree of NGO legal status	Introduction	Direct/ Indirect personality	Introduction
Financial affairs	IMF	Subject	1999	Indirect	1999
	BIS	No status	–	–	–
	ECB	Person	1998	Direct	1998
				Indirect	2004
	EU ECOFIN	Person	1958	Direct	1958
				Indirect	?

law. Moreover, no personality is accorded by documents that do not contain any sort of international law because their authors do not have normative power in international law; such as the rules or practices of the experts or secretariats of international organizations.

NGO legal status and type of personality within different IOs

The results of our enquiry are astonishing. Of the 31 organizations examined, only three (Bank for International Settlements (BIS), Group of Eight (G8), and OSCE) confer no legal status at all to NGOs. While within the OSCE this is due to the mere political value of its documents, G8 and the Bank for International Settlements remain very much closed policy circles that are not accessible to NGOs. On the other hand, only one organization – namely, the International Labour Organization (ILO) – grants comprehensive status to NGOs that also encompasses normative power. Most IOs thus accord the status of either subject or person to non-governmental organizations. The proportion here is fairly balanced, with 14 IOs bestowing subject status and 13 bestowing the qualitatively higher person status on NGOs. However, if one looks closer at the results, it can be seen that the good results for person status are, on the one hand, due to the equal results for all European Union (EU) institutions. In the European Union, or rather the European Communities (ECs), NGOs have had person status from the very beginning of the EC due to introduction of direct rights to institute court proceedings. The difference in the timing of introduction of that status (column 4 of Table 2.2) only depends on the moment of takeover of the respective policy field into Community/Union politics. On the other hand, the

good results for person status can be attributed to United Nations (UN) organizations working in the field of development or human rights. Apart from the World Bank Group, these IOs had already conferred person status to NGOs during the very first years of their existence, which was long before the 1990s.

Hence, neither within the category of comprehensive, nor within that of person status, could a meaningful increase in the number of IOs granting such status during the last 15 years be detected. The ILO's tripartite structure has already been in existence since 1919. With regard to person status, one may enumerate the new EU policy fields (Asylum and Migration, Common Foreign and Security Policy (CFSP), and the European Central Bank (ECB)). Apart from these, it was – unexpectedly – only the World Bank Group that upgraded NGO subject status – in the past, mainly characterized by the opportunity to ask for the implementation of projects and funding – to person status in 1993. This was achieved through the establishment of the right to lodge complaints against the Bank for not following its operational policies and procedures before Inspection Panels of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). Since the year 2000, NGOs can also lodge complaints for being affected by the social and/or environmental impact of projects before the Compliance Advisor/Ombudsman Office of the International Finance Corporation (IFC) or the Multilateral Investment Guarantee Agency (MIGA). One very recent development is the acceptance of the first amicus curiae[29] briefs from CSOs by the tribunal of the International Centre for Settlement of Investment Disputes (ICSID) in May 2005.

Within the category of subject status, the picture is somewhat different. Here, there is an increase of five organizations that newly accorded this status to NGOs, whereas for two organizations – the North Atlantic Treaty Organization (NATO) and the Nuclear Non-Proliferation Treaty (NPT) – the moment of introduction of this status was not detectable. However, NATO is a marginal case, since the only right NGOs have here is access to most of NATO's documents. The IOs that newly instituted NGO subject status include the North American Free Trade Agreement (NAFTA) (1994) and the UN Framework Convention on Climate Change (UNFCCC) (1994), the World Trade Organization (WTO) (1995), the International Monetary Fund (IMF) (1999) and the Aarhus Convention (2002). However, in the case of the Aarhus Convention, NAFTA, UNFCCC and the WTO, this is due to the foundation of these treaty regimes or organizations. It should be mentioned that NAFTA also

allows for amicus curiae briefs in some cases and, with regard to the North American Agreement on Environmental Co-operation, for enforcement grievances through citizens' submissions. Similarly, the WTO provides the opportunity to submit amicus curiae briefs in WTO disputes to its Dispute Settlement Panel or Appellate Body. At the IMF, rights remain somewhat limited and do not go beyond access to some (mainly archived) information and consultation with regard to the member states' formulation of their Poverty Reduction Strategy Papers.

Looking at the type of personality (direct or indirect), two thirds (20) of all the international organizations analysed that confer legal status to NGOs do so through direct and indirect personality in parallel. Only six organizations (the IMF, the Montreal Protocol, the UN Development Programme (UNDP), the UN Environment Programme (UNEP), the UN General Assembly (UNGA) and the World Intellectual Property Organization (WIPO)) restrict legal status to indirect personality, and only two (NAFTA and NATO) restrict it to direct personality. Some of them (the IMF, NATO, UNGA) only dispose of a fairly limited range of NGO rights anyway. However, the assumption that international organizations would prefer to accord indirect personality to NGOs instead of direct personality has been refuted by the analysis. Thus, 22 IOs directly grant personality to NGOs through treaty or customary (primary) law; ten of them did so even before indirectly conferring personality through internal (secondary) rules, while seven others did so at the same time. Ten of these 22 organizations had already introduced direct status before 1990; ten others did so afterwards.[30] Of the 26 organizations that accord indirect NGO status, 15 of the organizations had established this status before 1990, and nine afterwards. Clearly, most of the latter organizations or treaty regimes were new. Hence, the immense increase in new rights for NGOs, which might have been expected by observers of international politics for the last 15 years, does not seem to have taken place. Nevertheless, it must be borne in mind that the moment of the introduction of status does not shed much light on the density of the rights within an IO, or the addition of new rights and duties where status already existed. This will form part of the analysis below.

Finally, viewing the results from a different angle – namely, the different policy fields – one can draw the following conclusions. First, all IOs working in the policy fields of development and human rights confer person status to NGOs, and have done so mainly since the 1940s or 1950s. However, within the category of the environment, a fairly new policy field that emerged only during the 1970s, NGOs mainly have subject status – in contrast to the widespread conviction that NGO

participation in this field is especially effective. This is particularly remarkable, since, with regard to financial affairs, two of the four organizations (the ECB and EU Economic and Financial Affairs (ECOFIN)) even grant person status to NGOs. For the other categories, status varies without demonstrating many similarities. However, one remark should be added with regard to the EU: different policy fields have been examined, which makes sense when one looks at the introduction of direct or indirect personality. At a first glance, NGOs in every policy field have person status from the moment of the introduction of that subject area into EC/EU politics. There is no difference with regard to policy fields attributable to the First, Second or Third Pillar. As mentioned previously, this is due to the NGOs' right to initiate court proceedings. These rights are all contained in treaty law and thus confer direct personality. However, as soon as indirect personality is considered, the picture becomes somewhat different. Here, one must distinguish between the First Pillar (EU Environment and EU Trade), and the Second and Third Pillars (EU Asylum and Migration, and EU CFSP); the First Pillar accords indirect personality at the same time as direct personality, while the Second and Third Pillars accord it only at a later date,[31] or not at all. The same, however, applies to EU financial affairs. Both the ECB and EU ECOFIN were, to some extent, hesitant to grant indirect personality rights to NGOs.

The quality of rights

The picture obtained from Table 2.2 is a limited one. It covers only the end result of an addition of different rights and duties. Thus, as already mentioned, no evidence is given of the extent, content or breadth and density of the rights and duties attributed to NGOs. This will form part of a qualitative analysis, which is undertaken in the following. As expected, the scale of NGO rights and duties varies extensively from organization to organization. It ranges from one single right (NATO: access to documents) to an uncountable number of rights and duties in the United Nations human rights field. The organizations that definitely grant the fewest rights include the ECB, EU CFSP, EU ECOFIN, the IMF, NATO, UNGA and the UN Security Council (UNSC). Taken together with the IOs that do not confer any status to NGOs – namely, the BIS, G8, and OSCE – this confirms our view that organizations in the field of security and financial affairs prefer to work behind closed doors. In this category, fall organizations that only allow access to documents (NATO, UNGA), others that also permit more information and consultation

rights (IMF, UN SC),[32] and finally the EU policy fields, which add enforcement capacity to the few information rights (ECB, EU CFSP, EU ECOFIN).[33]

About half (17) the organizations provide for accreditation and/or registration of NGOs,[34] most of those (15) also asking for the fulfilment of corresponding conditions. However, accreditation is only regularly re-examined in six cases (Food and Agriculture Organization (FAO), ILO, UN Conferences, UN Economic and Social Council (ECOSOC), UN Human Rights, and the World Health Organization (WHO)). From accreditation, participation and speaking and/or submission rights usually follow.[35] However, the opportunity for NGOs in general consultative status to propose a topic for the agenda is unique to UN ECOSOC (and human rights bodies under ECOSOC). One curiosity in the Aarhus Convention is the right for an NGO representative to participate in Bureau meetings as an observer. Moreover, voting power only is attributed to NGOs within the ILO. Almost all (27)[36] organizations allow access to undisclosed documents, whereas the ILO – and partly the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), UNEP, UNFCCC, the Montreal Protocol, the WHO, and WIPO – also distribute negotiation texts. A peculiarity to the EU is the right of every citizen of the Union – that is, including an NGO representative – to receive an answer to a written request from any EU institution or body (Article 21 (3) of the EC Treaty). A similar provision of the UNDP Public Information and Documentation Disclosure Policy allows for the reconsideration of a request for a document by the Public Information and Documentation Oversight Panel in the event of the denial, in whole or part, of such a request. Project implementation through NGOs is, of course, only possible when an organization implements projects. The UN and the EU have set up a number of trust funds and grants for the implementation of their projects to which NGOs can apply. At the WHO, on the other hand, the duty in this regard is especially strong: NGOs in informal and official relations with the WHO have to implement, formulate and review certain projects. NGOs in official relations have to implement a programme of co-operation, have to inform on the WHO, and to collaborate in WHO programmes and with WHO member states; otherwise, they lose their official status. UNFCCC formulates duties in a less binding way: its Guidelines for the Participation of Representatives of non-governmental organizations contain a sort of code of conduct for NGOs.

Some IOs have set up specific advisory bodies in which NGO representatives partake exclusively or alongside governmental members.

Thus, NAFTA's North American Agreement on Environmental Co-operation has instituted a Joint Public Advisory Committee, which consists of citizens appointed by governments. The EU also has a European Economic and Social Committee (EESC)[37] along with the numerous advisory committees of the Commission. The UN human rights Treaty Bodies, the Permanent Forum on Indigenous Issues, or the UN Working Group on Indigenous Populations, as many other bodies within the UN system, are expert member bodies. The UNDP CSO Advisory Committee, composed of 14 leaders of CSOs, gives NGOs the opportunity to report on the compliance of parties to the UNDP Administrator through the Committee. Admittedly, this is the implicit claim that all NGOs assert with regard to most of the statements that they submit to international organizations. However, rarely does an institutionalized monitoring mechanism authorized by an IO exist. Other compliance monitoring mechanisms exist within CITES, the ILO and OSCE. The Aarhus Convention has not yet legally made concrete a similar right for the public – as foreseen in Article 15 of the Convention – to be involved in reviewing the compliance of states with the provisions of the treaty.

The more far-reaching rights of NGOs to be included in monitoring the compliance of states are complaint procedures. Here, one must distinguish between, on the one hand, the opportunity to present amicus curiae briefs in dispute settlement procedures (NAFTA, WTO)[38] or statements in complaint procedures (ILO) between states and, on the other hand, an effective enforcement right through becoming a party to a dispute before a court, tribunal or panel, and so on (the EU, the World Bank Group) or a complainant instigating a complaint procedure against a Member State (EU, ILO, NAFTA, UN Human Rights). The Organization for Economic Co-operation and Development (OECD) has a complaint procedure against multi-national enterprises through National Contact Points, which accept comments and enquiries from NGOs. Similarly, the ICSID of the World Bank Group provides for the settlement of disputes between governments and foreign investors. In May 2005, the ICSID tribunal decided for the first time to accept amicus curiae briefs from five CSOs on the basis of Article 44 of the ICSID Convention. Altogether, a broad variety of NGO rights and duties in different IOs can be detected. In the majority of these IOs, new rights have been added over the last 15 years and have thus led to an intensified breadth and density of legal status.

Outlook

Our inquiry has looked at 31 IOs and their rules on NGO participation in detail. However, there are many more international organizations to

be examined. An outlook on interesting cases to be examined will be given in this section. Some of them seem to promise new and interesting mechanisms for NGO participation. For example, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction of 1997 provides a role for NGOs in the assistance of the destruction of these weapons. The International Convention for the Regulation of Whaling and the United Nations Convention to Combat Desertification similarly contain implementation rights for NGOs. Moreover, there are many more organizations and treaty regimes that extend rights in complaint procedures or court proceedings to NGOs, either as petition or amicus curiae briefing rights,[39] or in the form of real enforcement power granting party status to NGOs.[40] In some cases, accredited NGOs can even request the interpretation of treaty rules.[41]

However, in order to find genuine NGO membership, it is often necessary to leave classical governmental co-operation through international organizations or treaty regimes. One exception is the International Telecommunication Union (ITU), which grants private organizations sector membership. Apart from this, membership rights can be found in the inter-agency co-operation (Joint UN Programme on HIV/AIDS (UNAIDS)/UN Office for the Co-ordination of Humanitarian Affairs) or hybrid network organizations, such as the World Commission on Dams (WCD) or the International Union for Conservation of Nature and Natural Resources (IUCN). The agreement establishing the International Institute for Democracy and Electoral Assistance (IDEA) provides for associate membership with limited voting rights for NGOs alongside the full membership of governments and intergovernmental organizations party to the Agreement. However, in some of these cases (IUCN/WCD), it is questionable as to whether, given the non-binding character of co-operation not dominated by governments, the organizations concerned can confer status in international law to NGOs.[42] In 'classical' intergovernmental co-operation, an invitation to participate in Executive Committees or Boards (UN High Commissioner for Refugees (UNHCR)/ UN Industrial Development Organization (UNIDO)/World Food Programme) seems to be the maximum attainable. The UN Population Fund (UNFPA) allows members of its NGO Advisory Committee to participate in Executive Board meetings as observers. The UN Educational, Scientific and Cultural Organization (UNESCO) Constitution – which, similar to the ILO structure, in its first draft of 1944 had provided for the membership of individuals serving in their personal capacity and the participation of educators – provides for collaboration with national educational, scientific and cultural institutions, preferably through

National Commissions that serve in an advisory capacity to their respective governments. Moreover, the Convention Concerning the Protection of the World Cultural and Natural Heritage makes arrangements for an advisory function of some NGOs to the World Heritage Committee. Besides these, one can only find accreditation and registration of NGOs as observers (African Union (AU)/Organization of American States (OAS)). Some headquarters agreements confirm the status given to NGOs by a particular IO through expanding protection to them.[43]

Conclusion

This chapter started out from the premise that the legal status of NGOs could function as a minimal safeguard clause to overcome the deficit in legitimacy of international organizations. It was assumed that, if NGOs had a certain legal standing in international law, some minimal preconditions for legitimate governing might be guaranteed. Our inquiry arrives at the conclusion that, in the majority of cases, IOs confer legal status to NGOs, mainly in the form of subject or person status. Moreover, they have predominantly done so since the early days of their existence. Changes in status over the years from non-status to subject status, or from subject status to person status, are rare and only took place within four organizations (the FAO, the IMF, UNEP and the World Bank). The other IOs that newly granted NGO status were new organizations or regimes. However, the latter do not seem to be as willing to accord person status – rather than subject status – as were the IOs founded after World War II. Furthermore, IOs did not and do not make a substantial difference between direct or indirect personality, and often accord both. Thus, IOs generally seem to be quite sympathetic to according legal status to NGOs – and direct and indirect personality alike – but remain somewhat static with regard to the status model once chosen – with the declining affinity of new organizations to the introduction of person status. However, the factor that makes the difference is the quality of rights. Over the past 15 years, the rights and duties of NGOs have increased significantly in the majority of IOs, even though the NGO duties still remain under-represented. Altogether, this has led to an increasing breadth and density of NGO legal status that might be capable of absorbing some of the criticisms with regard to the deficit in legitimacy of international organizations. The safeguards do exist and have been consolidated. However, the question as to whether this will be accepted as being sufficient in the view of public opinion still remains to be answered.

Notes

1. See also below.
2. For a clarification of the terms normative, empirical, descriptive, and prescriptive, see Steffek (2003).
3. NGOs are often seen as representing civil society at large or are taken as a proxy for measuring civil society input in international fora. In some contexts, the notion of a civil society organization (CSO) is used instead, often with a somewhat more expansive meaning. In the following, I apply the term of NGOs in its proxy function, also encompassing, as such, CSOs.
4. This is specifically valid for informal avenues for influencing international decision-making. I do not preclude that those avenues – for example, lobbying – sometimes might even be more successful, as Paech (2001: 11) argues. However, they are open only to the strong and powerful, which discards the democratic postulate of equal opportunity.
5. Whereas the concept is usually referred to as 'personality' ('*personnalité*', '*Rechtspersönlichkeit*'), the addressee of the concept is preferably named a 'subject' ('*sujet*', '*Rechtssubjekt*'). For the distinction between subjects and persons, see below.
6. Translation by the author.
7. Inductive approach (prevailing opinion). For a distinction between deductive and inductive approaches, see Hempel (1999: 56–71).
8. See *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports* 1949: 174. With regard to the United Nations, the Court used the criteria of 'capable of possessing international rights and duties' and the 'capacity to maintain its rights by bringing international claims' (ibid.: 179).
9. Some distinguish here between the capability ('suitable candidate') of an entity to possess legal rights (and duties) and the de jure conferment of those rights to the corresponding entity (see Brownlie 2003; *Advisory Opinion of the I.C.J.*, ibid.). I do not insist on this distinction since capability is hardly acknowledged for nascent cases of personality and what – in my view – counts in the end from a legal viewpoint is the definite conferment of rights (and duties). Capability may thus only be helpful when distinguishing between general subjects of international law and those with a limited personality.
10. See also note 8. It has to be added that there is a doctrinal controversy about the necessity of existence of certain legal capacities (minimal functions) in order to claim international personality. Thus, some argue, for example, that the capacity to conclude international treaties, the capacity to establish diplomatic relations, and the capacity to be held responsible are minimal conditions for legal status (Dominicé 1996). As this seems to be a minority position (Mosler 2000: 714), I take the stand that the only minimal capacity for the quality as person is that of bringing international claims since otherwise, there is no way meaningfully to enforce rights and duties, and to possess full capacity to act (cf. Hempel 1999: 70–1).
11. Legal status hence in no way depends on the existence of a legal definition or on a general circumscription of rights and duties of an entity in, or its creation through, international law (Mosler 1962: 41 and 45), even though

those circumstances undoubtedly would do away with some uncertainties and would greatly enhance general application of the concept to a specific entity. With regard to NGOs, attempts have been made – so far unsuccessfully – to develop progressively the legal status of NGOs through treaty law (see Dahm et al. 2002: 233; Wiederkehr 1987: 753).

12. *I.C.J. Reports 1949*: 178.
13. See Bleckmann 2001: 518; Dahm et al. 2002: 240–2; Hobe 1999; Hummer 2004: 241; Nowrot 1999: 614, 31, and 35; Riedinger 2001: 320–1. Hempel classifies the personality of NGOs as derived personality (Hempel 1999: 190–2). See also note 15. For an early expression of this view, see Kaiser (1961: 614) and, more carefully, also Mosler (1962: 25 and 45), arguing for an indirect inclusion of NGOs in the international legal order. The latter also gives a detailed analysis of the principal capacity of the international legal order to include other international subjects; that is, what are today called NGOs (esp. 3–5 and 39). For a more extensive view on NGO personality, see Lador-Lederer (1963).
14. The only general (regional) treaty dealing with NGO status – namely, the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations of 24 April 1986 (CETS No. 124) – merely regulates mutual state recognition of legal personality of NGOs in national law (see Wiederkehr 1987).
15. Opinio iuris et necessitates: the element in the practice of states that denotes that the practice is required by contemporary international law. For international NGOs at UN Conferences and ECOSOC, Willets (2000: 205–6) acknowledges international personality in form of customary international law.
16. See *I.C.J. Reports 1949*: 185.
17. Erga omnes: opposable to, valid against, 'all the world'; that is, all other legal persons, irrespective of consent on the part of those thus affected.
18. In this sense, Mosler (1962: 32).
19. Which, however, is substituted again by states in cases where we do not deal with an international organization in a legal sense; see note 20.
20. For convenience, I will only speak of international organizations in the following, even though the case studies also encompass treaty regimes, state groupings (G8), or organs/bodies (UN) and policy fields (EU) of international and supranational organizations. With regard to the power to create law, this is not relevant since, for those cases that legally do not qualify as an international organization per se, state representatives who dispose of the power to create law are the main actors. The OSCE is an exception here. Apart from the fact that its IO quality is still controversial, its documents, in any case, have only political, and no legal, value.
21. I propose to approach each organization directly – that is, through its own rules directly concerning rights and duties of NGOs – and not indirectly through any legal recognition of outside rules attributing NGO rights and duties, or of rules elaborated by NGOs themselves that would acknowledge a certain – limited – normative power (see Pauwelyn 2004). Referrals to other legal orders within the so-called 'direct NGO rules' are taken into account.
22. Translation by the author.

23. See the UN ECOSOC criteria for accreditation, which only require that financial contributions or other support (direct or indirect) from a government shall be openly declared to the Committee through the Secretary-General and fully recorded in the financial and other records of the organization, and shall be devoted to purposes in accordance with the aims of the UN.
24. This corresponds to the classification used in Project B5 of the Collaborative Research Center 597, 'Transformations of the State', in Bremen. However, I do not evaluate the questionnaires on the UN Secretariat and on the EU Structural Funds. The first category does not really fit in the chosen policy fields (cross sectional area). The second does not rest on common legal rules at the European level with regard to participation of NGOs. Member states are free to organize NGO involvement (mainly in monitoring committees) and, consequently, participation depends on national rules and/or practice. Thus, a common European practice could only be reliably detected when more than two countries (Germany and Sweden) were to be analyzed.
25. Wherever a question mark remains, the introduction of legal status or direct/indirect personality could not be identified.
26. For example, the UN's Article 71 providing for ECOSOC that it 'may make suitable arrangements' does not satisfy the requirement of direct introduction of NGO rights in treaty law. All further arrangements are contained in resolutions and thus in secondary, not primary international law (see also Nowrot 1999: 624).
27. Here, the conferral of rights/duties does not take place immediately after the adoption of a certain soft law document, but only within a certain time lapse. This is therefore marked by adding '>' before the year of introduction, which means 'after' [year].
28. The question of whether resolutions of IOs might lead to internal or external custom over time has been decided in favour of external custom (= direct personality) in this case since the actors concerned (NGOs) in the examined resolutions are not part of the organization itself.
29. Amicus curiae: a person permitted to present arguments bearing upon issues before a tribunal, yet not representing the interests of any party to the proceedings.
30. With regard to NATO and the NPT, an exact moment for the introduction of status could not be determined.
31. The partial transfer of Asylum and Migration from the Third to the First Pillar in 1999 is reflected by the introduction of indirect personality the same year.
32. IMF: access to documents, civil society newsletters, outreach seminars, consultation of NGOs in member states' formulation of their Poverty Reduction Strategy Papers; UN Security Council: online access to documents, NGO Working Group meetings meant to brief NGOs, submission of written NGO documents to the Council, and Aria Formula meetings allowing NGOs to brief the Council.
33. In each of the three policy fields, NGOs have the right to receive an answer from an EU organ to a written request; to have access to unrestricted documents – which, however, are often restricted; and to submit complaints through the EU Ombudsman or to institute court proceedings. At the ECB,

open hearings within the framework of macroeconomic dialogue, social dialogue or public consultation take place also.

34. Aarhus Convention, CITES, FAO, ILO, Montreal Protocol, NPT, OECD, OSCE, UN Conferences, UNDP, UN ECOSOC, UNEP, UNFCCC, UN Human Rights, WHO, WIPO, and the WTO.
35. For more details about these and other NGO rights and possibilities, see Chapter 1 of this volume by Steffek and Nanz. We restrict ourselves to some legal curiosities in the following.
36. Apart from the BIS, the G8, NAFTA and the OECD.
37. The EESC's 317 members are drawn from economic and social interest groups in Europe. Members are nominated by national governments and appointed by the Council of the European Union for a renewable four-year term of office. They belong to one of three groups: Employers, Employees, and Various Interests.
38. At the UN's International Court of Justice, NGOs have only once participated in proceedings; namely, the International League for the Rights of Man in the advisory opinion on the international legal status of South-West Africa (Nowrot 1999: 632). The Permanent Court of International Justice, however, allowed for NGO claims before the Court (Martens 2003: 14). With regard to arbitration, the first case arbitrated by agreement between a state and an international NGO was the arbitration between France and Greenpeace following the destruction of the Rainbow Warrior (Nowrot 1999: 634).
39. Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (Council of Europe), African (Banjul) Charter on Human and Peoples' Rights (AU), American Convention on Human Rights (OAS), and (European) Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe). In the case of the European Social Charter itself, NGO participation is foreseen with regard to the governmental reporting mechanism. Protocol No. 2 amending the European Charter of 1991, which is not yet in force, will expand NGO involvement in this supervision, especially at an early stage.
40. Additional Protocol to the European Social Charter Providing for a System of Collective Complaints and (European) Convention for the Protection of Human Rights and Fundamental Freedoms (both Council of Europe).
41. African (Banjul) Charter on Human and Peoples' Rights and African Charter on the Rights and Welfare of the Child (both AU).
42. In the case of the IUCN, for example, governments transferred bureau duties to IUCN under the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat. We can thus observe the reverse procedure of conferring rights to the IUCN through governments.
43. Thus, the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations protects NGOs in consultative status with ECOSOC from any impediments to transit to or from the headquarters' district; see GA Res. 169 (II) of 31 October 1947.

3

Civil Society Participation under Most Favourable Conditions: Assessing the Deliberative Quality of the WSIS

Charlotte Dany

When the United Nations (UN) World Summit on the Information Society (WSIS) took place in Geneva in 2003, its innovative multi-stakeholder design was widely praised. The inclusion of non-state actors developed into one of the defining and legitimizing goals of the summit. The WSIS ought to be 'the scene of a new world dialogue, a new form of international communication based on the values of responsiveness, exchange, solidarity and sharing'.[1] The WSIS symbol is a flower, whose four petals around the dot on the 'i' represent governments, international organizations, businesses and civil society organizations (CSOs), which all contribute to the common vision of an 'Information Society for All'.[2] CSOs,[3] as well as other observers, actively participated during the whole preparatory process, as well as at the summit, by contributing to the drafting process of the policy documents. Indeed, when it became apparent that the summit would not be a success with regard to substance, the WSIS strived more forcefully to promote the announced multi-stakeholder approach. The participation of civil society actors aimed to allocate legitimacy to the policy output.

In the logic of the deliberative approach to democracy (Cohen 1996; Dryzek 2000; Elster 1998; Habermas 1992), the WSIS could be a case in which we can observe a democratic and legitimate decision-making process, since it provided favourable formal conditions for the participation of CSOs. CSOs formally had a wide degree of access to the negotiations. The policy process was transparent in that it allowed full

access to both policy documents and background material. The WSIS also provided some, albeit insufficient, measures to ensure the inclusion of marginalized stakeholders. This leads to the assumption that CSOs were able to bring substantial arguments to the summit, and potentially shape both the discussions and the policy output. In other words, that the WSIS was responsive to contributions of the CSOs.

Despite the exhilarated rhetoric of the WSIS organizers regarding the multi-stakeholder approach at WSIS, and the assumptions that can be drawn from a deliberative approach to democracy, many CSOs were frustrated about the marginal impact they had on the policy output. They felt as though they were a fig leaf put in place to legitimate policy outcome without having any real power to influence it. In the end, civil society distanced itself from the official policy process and published its own Declaration of Principles, entitled 'Shaping Information Societies for Human Needs'.[4] This CSO criticism suggests that favourable conditions for civil society participation and their input do not necessarily lead to an awareness of, and reaction to, their concerns in international policy processes.

This case study evaluates the WSIS using criteria for democratic quality based on a deliberative approach in order to see whether it lived up to its demands. The criteria to measure the participation of CSOs and their impact on the policy process by means of deliberation are (i) the access of CSOs to deliberation; (ii) the transparency of and access to information; (iii) the inclusion of all stakeholders; and (iv) the responsiveness of the WSIS documents to CSO concerns (see Chapter 1 in this volume by Steffek and Nanz). While the variables access, transparency and inclusion will be taken to indicate the relatively favourable preconditions for civil society participation at the WSIS, responsiveness is the focus of this chapter. Responsiveness is the most decisive criterion to assess the democratic quality of the negotiations, since it best captures the legitimacy of the policy output: responsiveness encompasses not only the CSO input that was included in the final documents, but also the arguments that have not been considered, provided that they were discarded after a rational discourse.[5] In the deliberative approach to democracy, the latter would be an indicator of justification, whereas the former could be referred to as adjustment. Justification means that governmental actors take the arguments of CSOs into account and justify their positions with regard to them. Since justification is hard to observe directly in a document analysis of a stylized negotiation process such as that of the WSIS, it is here subsumed under the indicator of responsiveness and assessed only indirectly by looking at how the contents of the

documents changed over time. The variation over time adds to the understanding of how the arguments of CSOs and other actors were discussed, discarded or accepted in the course of the entire preparatory process.

The first part of this chapter will present an overview of the involvement of civil society actors in the WSIS in Geneva in 2003 and its preparatory phase. The access, transparency, and inclusiveness of the negotiations are all analyzed to assess the preconditions of civil society participation. The chapter will then turn to the influence of CSOs on the content of the policy output, a Declaration of Principles and a Plan of Action, at various stages in order to determine the responsiveness of the WSIS process towards CSO arguments. On the basis of the empirical evidence, conclusions are finally drawn with regard to the democratic legitimacy of the WSIS.

The multi-stakeholder approach of WSIS: a mutual learning process

The WSIS was organized by the International Telecommunication Union (ITU), a specialized agency of the UN, and took place in two phases. Its first phase, which led to the summit in Geneva in December 2003, is the object of the investigation in this chapter, while its second phase culminated in another summit which took place in Tunis, from 16 to 18 November 2005.[6]

The governmental representatives that gathered at the WSIS were to develop a framework for or a common vision of an information society to bridge the digital divide.[7] The information society is a loosely defined and contested concept, and an unfamiliar issue on the global policy agenda.[8] At the WSIS, the agenda comprised a variety of issues, ranging from the regulation of the Internet over communication rights, to the attainment of the UN Millennium Development Goals through information and communication technology (ICT), issues that often led to conflicts between economic, societal and developmental claims.

The preparatory process of the WSIS was comprehensive: in nearly two years, six preparatory conferences, five regional conferences and one intersessional meeting were held. A large amount of written documentation was produced, and discussions on several conflicts were so extensive and controversial that even the three newly convoked 'last-minute' Preparatory Conferences (PrepComs) 3a, b and c were unable to solve them.

Two documents were adopted at WSIS 2003, a Declaration of Principles and a Plan of Action, which are neither visionary nor binding but, instead, represent the least common denominator between governments and merely sketch out the outline of the agenda ahead for the implementation of a worldwide information society. However, while the WSIS can be criticized because of the vagueness of its subject, its difficulties in reaching out to a broader public or its inability to provide concrete solutions for those that are actually affected by the digital divide, it has, nonetheless, been an innovation, not so much with regard to substance as to process.

The organizers of the WSIS declared their intention of involving all stakeholders, even in the preparatory phase, and asked civil society, businesses and international organizations to shape the negotiations and to participate in the drafting of the documents[9] (Kleinwächter 2004b: 34). Civil society participation was institutionalized in the Civil Society Division of the WSIS Executive Secretariat. This ambitious policy design evolved as a benchmark of success for the summit. However, when civil society demanded the actual implementation of this approach, its operation proved to be difficult in the absence of viable rules and procedures. In the following, the multi-stakeholder approach was constantly under discussion at the preparatory conferences and was the cause of severe controversies. Over time, its implementation evolved in a process of mutual learning on the side of civil society as well as governments.

In fact, civil society participation was immense and rising. At the summit itself, the number of representatives of civil society (3425 participants) almost matched that of governments (3759 participants). During the preparatory process, complex CSO structures emerged, which was, to some extent, predetermined by the United Nations but also, to a large degree, due to a self-organization process from below. In a top-down approach, the United Nations installed the Civil Society Division of the WSIS Executive Secretariat as part of a tripartite structure, along with a division for governments and for the business sector. From below, the Civil Society Plenary was set up as an open meeting during the PrepComs, which served as a mechanism to legitimize decisions made by civil society. At PrepCom2, the Civil Society Bureau was founded. The representatives of the civil society working groups, families, regional and thematic caucuses were all working together in this co-ordination body. The Civil Society Bureau was closely connected to governments through consultation meetings with the Governmental Bureau. When it came to agree on content – that is, the argumentative

input for the negotiations – among CSOs, the diverse caucuses and working groups, organized in families, and the Content and Themes Drafting Group (CS C&T) were key entities. In seven regional, and more than 20 thematic caucuses and working groups, the ground-level work was done: issues were discussed, arguments developed and statements produced. The considerable but still unsystematic input was compiled by the CS C&T. The group drafted versions of the Action Plan and the Declaration, priority lists, benchmarks and, in the end, an independent Civil Society Declaration to specify a common civil society position and to declare their disapproval of the official documents.

This bottom-up process was probably the greatest and most sustainable success that civil society achieved at the WSIS: it independently organized a complex institutional structure in the course of the negotiations, it developed common strategies and goals, and it created new networks. The active participation of civil society in developing policies together with governmental actors was unprecedented and makes the WSIS a fascinating object for the analysis of new forms of global governance.

Favourable formal requirements for legitimate decision-making

According to the deliberative approach to democracy, access for CSOs at the negotiations, transparency and the inclusiveness of the policy process are the necessary formal requirements for democratically legitimate decision-making (see Chapter 1 in this volume). Stakeholders may only voice their arguments when they have institutionalized access to the deliberative settings. Transparency is crucial in order to provide CSOs with the necessary information to participate meaningfully in the negotiations and to expose the decision-making process to public scrutiny. It is guaranteed by the disclosure of policy documents as well as by the possibilities of accessing information on the background of the WSIS. Inclusiveness ensures that the arguments of all the stakeholders who may be affected are included in the policy process. This can be achieved by supporting marginalized stakeholder groups to take part in the negotiations through institutional settings such as scholarships.

Access: disintegration of rules in favour of civil society participation

The broad and active participation of all the stakeholders was a defining and legitimizing aspect of the WSIS. However, as it was primarily an

intergovernmental summit, formal restrictions to access the negotiations were set for both the CSOs and the other observers. The accreditation process was obligatory for all CSOs that did not possess consultative status with the UN Economic and Social Council (ECOSOC). This comprised an application containing detailed information on the organization, on the basis of which the Executive Secretariat decided upon the expertise and relevance of the CSOs willing to participate. The list of recommended observers that emerged was then distributed to the member states, which could request more information, or delay or overturn the accreditation process. CSO participation could be blocked by individual member states not granting the required legal status to organizations in their states of origin, as was the case with Human Rights China (EPIC 2004: 196).

Once accredited, the participation of civil society actors was dependent on the Rules of Procedure and Participation. CSOs were allowed to take part in the plenary meetings as observers, but not in the meetings of the Governmental Bureau, the sub-committees or the working groups. They had the right to speak, but had no voting rights. This formal design of civil society participation was quite conventional in that it resembled the rules of other recent high-level world summits.[10]

In practice, however, the rules on civil society participation at the WSIS were constantly discussed and interpreted. Thus, CSOs were informally able to gain more participation rights than were officially provided. In particular, since the intersessional meeting in Paris in July 2003, observers have increasingly been accepted to take part in working groups and sub-committees. The Working Group on Internet Governance is one example of the tug-of-war that was taking place with regard to civil society participation. At PrepCom3, non-governmental participants were permitted to speak for five minutes at the beginning of the session, although this was not provided for in the official Rules of Procedure. However, when CSO representatives started to report directly out of the conference room via the Internet, they were again excluded from the sessions. As a consequence, some diplomats who were against this decision briefed civil society actors outside the negotiation rooms on the discussions that were taking place inside. Kleinwächter (2004b) argues that this disintegration of the Rules of Procedure in favour of civil society participation was triggered by practical constraints. Governmental representatives were simply swamped with the discussions about technical details, for example, on Internet governance. Some of the CSO representatives proved to be helpful experts who could explain to the diplomats the complex context of the questions at stake.

CSO representatives as well as business actors were, in part, also accepted as members of national delegations. The decision to include them in the national delegations depended on the respective nations. Denmark was outstanding in this respect; it was the first country to invite civil society and business advisors into their governmental delegation. Germany began to include two non-state actors out of six national delegates at the intersessional meeting in Paris.

In summary, CSOs had access to the negotiations; they could speak in meetings and submit their own documentation. Although their right to participate actively at the working level was restricted by formal rules, de facto, civil society actors were increasingly able to access most deliberations: thus, one major precondition for democratic and legitimate decision-making was fulfilled by the WSIS process.

Transparency: broad access to documentation

The policy process and background of the WSIS is comprehensively documented. Official documents, working documents, non-papers, administrative documents and the contributions of the different stakeholders were, and still are, available on the official WSIS website. Since PrepCom2 and WSIS 2003, the ITU's Internet Broadcasting Service has taped all meetings. Civil society, for their part, distributed the information via a plethora of mailing lists and websites of their own. Background information was offered through press releases and summaries of 'daily highlights' of the WSIS process. The website on the WSIS additionally provided external links that dealt, in a wider sense, with the world summit's goal of using ICT for development, and announced WSIS-related events.

In the intersessional period between PrepCom2 and PrepCom3, the ITU made a special effort to give an overview of the differing positions of both governments and observers. The working documents were released with an additional section comprising 'observers contributions'.[11] This enhanced transparency, even though it also provoked some objections with regard to the seemingly arbitrary selection of non-state actors input.[12] The Reference Document[13] was another endeavour to compile both governments' and observers' contributions to the Declaration of Principles and the Action Plan. Since the Reference Document was bulky, an additional Reading Guide[14] was produced as an overview of the divergent views of the different stakeholders.

Despite these efforts, criticism was voiced by civil society with regard to access to the documentation. On the one hand, the brevity between

the release of some documents for the broader public and the deadline to submit statements with regard to those documents was criticized. On the other hand, the lack of translation or the hesitant translation into other languages than English was a problem that, considering the tight time-frame, could potentially lead to the exclusion of, for example, Latin American CSOs.

Despite these deficiencies, the WSIS was a well-documented event. Everybody was able to receive policy documents in order to make informed choices about the policy proposals. Additionally, background documents were widely accessible for access to further information on the issues at stake.

Mechanisms of inclusion and exclusion of marginalized stakeholders within civil society

A further requirement for legitimate decision-making is that all the stakeholder groups concerned by a policy decision have a say in its formulation (see Chapter 1 in this volume). Since there are potentially marginalized groups that face barriers to be heard, the decision-making institution should ideally abolish barriers to participation and take special measures to include these voices. CSOs face barriers to participation also because of lack of personal and financial resources. Within civil society, some specific groups are likely to be under-represented; for example, indigenous peoples, women, disabled persons and people from developing countries (for the latter, see Panos Institute and Commonwealth Telecommunications Union 2002). And yet, it is precisely those groups that have an outstanding concern in the issues under discussion at the WSIS, because they are the groups most affected by the digital divide. Hence, these stakeholders are less likely to be able to take part in the Information Society as envisioned at the WSIS and, at the same time, they face multiple barriers to participating in policy-making on information and communication technologies. This, of course, is a vicious circle.

As a matter of fact, civil society actors from developing countries were under-represented at the WSIS summit in Geneva and at the PrepComs: the majority of civil society actors came from Europe (Dany 2005).[15] Moreover, women were under-represented at the WSIS. Within civil society, females represented only a third of all CSO participants.[16] As a result, Sreberny (2004: 197) criticizes 'the gap between the expressed intentions around gender equality and the actual embodied speakers or writers who are overwhelmingly male'. It can be inferred from this

unbalanced representation that certain voices are likely to be excluded, although it is, of course, possible that male speakers or representatives from Northern CSOs raise issues particularly relevant to people from developing countries or women. However, the euro-centrism and slight gender inequality of civil society involved in the WSIS raises questions about the very legitimacy of civil society, because civil society itself seems to exclude certain voices. It would be an important contribution to a further evaluation of CSO participation at the WSIS to analyze the composition of civil society actors in order to evaluate its legitimacy.

Thus, it would have been a necessary requirement to achieve legitimate decision-making for the organizers of the WSIS to have taken measures to include marginalized civil society actors. The ITU, though, did not completely remove the barriers to the participation of marginalized groups. Most meetings of the preparatory phase and of the summit were held in Europe, with the only exceptions being the regional conferences, one of which was held on each continent. This led to high travel expenses, which hindered the participation of delegations from, for example, the civil society groups of developing countries, since they are usually low on financial resources. The effective participation of small delegations, mainly a feature of CSOs coming from developing countries, was additionally inhibited by simultaneously scheduled events, which could not all be attended.[17] However, the ITU granted a restricted number of fellowships for the participants at both the PrepComs and the summit as a measure to include the marginalized groups, in particular, for people from least developed countries (LDCs) and for women.[18]

In brief, fellowships were the only arrangement made at the WSIS to safeguard inclusion, especially that of women and people from the LDCs. However, barriers to participation for small and resource-poor delegations still remained; such as the venue of the conferences and the number of parallel events. It is possible that, as a consequence of this, developing country and female civil society delegates were underrepresented. To sum up, the ITU did not provide sufficient measures, beyond that of fellowships, to include particularly marginalized groups of civil society.

Responsiveness: does input lead to impact?

The multi-stakeholder approach, however, is not accomplished by merely providing the preconditions for the participation of civil society: it also requires provision of a real opportunity to shape policy output. Thus, in assessing the democratic quality of the WSIS, it is crucial not only that

CSOs should be able to participate and provide input to the negotiations, but also that they have an impact on the deliberations and the documents. Input in UN processes, though, does not automatically lead to impact, and, indeed, often has no impact at all: 'many in civil society are becoming frustrated; they can speak in the United Nations but feel they are not heard and their participation has little impact on outcomes'.[19]

Civil society impact can be measured by looking at the degree to which governmental negotiators responded to the claims and arguments of CSOs and how their voice was reflected in the documents. Along with the three preconditions for civil society impact – access, transparency and inclusion – responsiveness is important to assess the democratic quality of the WSIS.

A content analysis of the documents of the CSOs and the official working documents of the UN allows us to obtain an assessment of the adjustment of the working documents towards CSO demands over time, and hence to see the degree of responsiveness of the WSIS. Three issue areas that were highly contested, and therefore crucial in the WSIS process, were analyzed: Internet governance, intellectual property rights and communication rights (for a more detailed description of the methods employed, see Dany (2006).

Internet governance, IPR and communication rights: the background of the debates

Internet governance is a contested term but, at the WSIS, it was mainly used to describe the global political governance of the technical core resources of the Internet: domain names, Internet Protocol (IP) addresses, Internet protocols and the root server system. In contrast to a narrow definition of Internet governance, others argue that the term encompasses much more; such as intellectual property, privacy, spam, cultural and linguistic diversity or consumer protection (Drake 2004: 6–7). The core question dealt with at the WSIS was: Who should govern the Internet? (Kleinwächter 2004a: 233). In short, the USA and the EU favoured private regulation of the Internet, meaning the existing system with a reformed Internet Corporation for Assigned Names and Numbers (ICANN) as the main regulatory body; China and other developing countries, such as South Africa and Brazil, would have liked to see the International Telecommunication Union in charge, thus favouring multilateral governmental leadership; business actors opposed any governmental influence on the Internet and argued for self-regulation; civil society, for its part, promoted the decentralization of responsibility.

The political, as well as the academic, debate about intellectual property rights (IPR) deals with the questions of ownership, and control of information and knowledge. The debate at the WSIS focused on three central issues: first, should the existing IPR regime be challenged in the WSIS context, or should it be maintained and enforced? Second, what is the optimal regime design for regulating IPR in the Information Society? Third, the need for Free and Open Source Software (FOSS) and Open Access solutions was discussed. Different conceptions of the rights holders, the users of information and knowledge, and indigenous peoples competed with each other with regard to these questions.

Additionally, the centrality of human rights with regard to information and communication in the official documents was a hotly debated issue. Most controversial was the demand for a new human right, called 'the right to communicate' or 'communication rights'. Key conflicts derived from the question of whether such a right should be promoted or neglected. Among those who promoted the right to communicate – namely, most civil society organizations – there was also a debate about the proper definition of communication rights. Some conceptualized it as an additional human right that should be at the heart of the information society; others perceived it as an umbrella term for human rights already in existence relating to communication and information.

CSO input and the evolution of the WSIS documents

The tracing of the argumentative input of CSOs on these issue areas in the evolution of the WSIS Declaration and Action Plan allows us to conclude that CSOs only had a marginal impact on the formulation of the decisions on Internet governance, communication rights and intellectual property rights. Instead, other factors – such as conflicts between states, the point of time in the negotiation process and issue characteristics – seem to have been decisive in shaping the policy output.

In the case of Internet governance, civil society agreed that a decentralized governance mechanism should be employed and that all stakeholders should collectively exercise control over the Internet. In particular, CSOs and developing countries were urged to play a stronger role in Internet governance. For the most part, a reformed ICANN was proposed as the suitable organization to be in charge of Internet governance. Some also stressed that, in the long term, the Internet community – that is to say, the users – should govern the Internet itself. Altogether, civil society opposed a strong governmental supervision of

Internet governance. The final Civil Society Declaration rather vaguely promoted a global multi-stakeholder entity as regulatory body.

Although it was very hard to come to any decision at all concerning the question of who should control the Internet, the WSIS documents were still responsive towards some of the CSO demands. For example, in the final Declaration, civil society was explicitly mentioned as playing an important role in Internet matters,[20] whereas, in earlier versions of this document, civil society had not been mentioned. The establishment of the Working Group on Internet Governance (WGIG) in itself was in accordance with CSO demands, because it was set up as 'a mechanism for the full and active participation of governments, the private sector and civil society from both developing and development countries'.[21] But these adaptations should not conceal the fact that this decision was strongly determined by a stalemate between powerful states, such as the USA and China, and the unwillingness of each party to retreat from its position. Indeed, the WGIG was not established because of the demands of CSOs but, rather, because of the inability of these counterparts to agree on a satisfying compromise. The governments agreed to disagree and, by means of the WGIG, to establish a mechanism for further debate.

With regard to intellectual property rights, the majority of CSOs wished to challenge the existing regime. Information and knowledge should be freely available; hence, Open Access and FOSS solutions were supported. These claims were justified by reference to the common-good character of knowledge and the benefits that people in developing countries, in particular, could reap from freely available information. Within civil society, a minority held quite a different stance towards intellectual property rights. These included, on the one hand, the unions of content creators, publishers and distributors and, on the other, indigenous peoples. The first group supported the existing intellectual property rights regime that protects the rights of authors and distributors. The second group demanded its expansion in order to protect the traditional knowledge of indigenous peoples in particular. In short, although there were different factions within civil society, each having its own interest in the IPR debate, the majority demanded a challenge to the existing rights regime.

The document analysis revealed that there were some adjustments towards CSO claims regarding IPR, but that the responsiveness decreased as the negotiation process proceeded. In the end, the existing rights regime was not challenged, but the necessity of a wide dissemination of knowledge was recognized. FOSS and Open Access to scientific

literature were also promoted in the final WSIS documents. However, these concerns were only addressed cautiously, and more advanced concessions to the CSO claims were withdrawn in the course of the drafting process. At an earlier period in the negotiation process, the documents contained a greater variety of suggestions made by CSOs on IPR. In the last weeks and months of the process, when the summit was approaching, many ideas put forward by CSOs vanished from the documents. They were probably considered to be too far-reaching and contrary to the least common denominator that governments finally agreed upon. It seems that, as the positions of states consolidated and the need to find compromises increased, CSO ideas were adopted less and less into the documents. This shows that there was considerable variation over time with regard to the responsiveness of the WSIS process. Even if the final documents do not contain a great deal of CSO input, CSO ideas were discussed and adopted into the documents at some point. Governmental actors did deal with CSO claims, although ultimately it was not the arguments but, rather, the stage in the negotiation process that was most important in shaping the policy output. Therefore, the declining degree of adjustment towards CSO arguments notwithstanding, the negotiators justified their decisions in light of the CSO demands.

Concerning communication rights, most of the CSOs promoted this concept because of the centrality of communication for societies and the importance of access to the means of communication.[22] The introduction of a right to communicate would lead to 'the strengthening of the political, economic, social and cultural lives of our people'.[23] Those who favoured it had differing views on how such a right should be defined and how it is connected to existing human rights. Increasingly, communication rights were conceived as a generic term that comprised existing human rights related to communication and information; such as freedom of expression and opinion.[24] However, some CSOs argued that communication rights should be understood as an additional human right, distinguished from those already in existence.[25] In the final Civil Society Declaration, universal human rights relevant to information and communication processes, together with access to the means of communication, were described as the essence of communication rights.[26] Only a minority of CSOs firmly rejected communication rights because of 'serious doubts about the scope, intention and impact of this right'.[27]

In spite of the CSO input, communication rights did not loom large in the official WSIS working documents. In the Action Plan, the concept

was not mentioned at all and, in the Declaration, its prominence diminished over time. In the end, a right to communicate was not referred to in the Declaration, but the importance of communications for society was mentioned in a way that could be understood as being a remnant of the communication rights debate: 'Communication is a fundamental social process, a basic human need and the foundation of all social organization. It is central to the Information Society. Everyone, everywhere should have the opportunity to participate and no one should be excluded from the benefits the Information Society offers'.[28]

Although the output was not in line with the CSO demands for communication rights, the drafting process showed that CSO concerns were discussed and were taken into consideration. At an earlier stage, the documents contained references to communication rights; most important, however, was the fact that, at the intersessional meeting, Brazil made a proposal that supported the CSO claims on the need for communication rights to be identified as a human right. This stimulated the debate on the right to communication, but the paragraph nonetheless vanished and, in the following versions of the Declaration, communication rights were not mentioned to any further extent. The case of communication rights confirms that the responsiveness of the WSIS towards CSO demands varied with regard to the stage of the negotiation process, and that responsiveness was at a higher level in the earlier stages and a lower level towards the summit. This variation over time is an indicator not only for adjustment, but also for justification. Although not all the arguments of the CSOs were incorporated in the final documents, their ideas were discussed and were subsequently partially discarded during the negotiation process.

Conclusion: reasons for low responsiveness

The WSIS provided favourable conditions for CSO participation. CSOs had access to the negotiations of the preparatory phase as well as to the summit, and the policy process was transparent. Notwithstanding this, the WSIS process did not take sufficient measures to include marginalized voices within civil society. Despite the high aspirations of the WSIS and the still favourable formal conditions of civil society participation, the impact of civil society on the policy outcome remained relatively low. A content analysis of the policy documents and the civil society statements with regard to three selected issue areas – namely, Internet governance, intellectual property rights and communication rights – revealed that CSOs were, in many cases, unable to influence the discussion

outcomes. Their argumentative input only led to minor changes in the policy documents, which were, for the most part, restricted to an early stage in the negotiation process.

This contradicts the initial expectations that were derived from the normative deliberative approach to democracy. Factors other than the exchange of reasonable arguments between state and non-state actors seem to have been decisive for the output of the WSIS. The imperative task for future research on the subject that can be derived from these results is to find reasons for this low impact. The results of the study suggest that the responsiveness of the WSIS process depended less on the influence of the CSO arguments, and more on the interests of governments, the structure of the problems discussed and on the stage in the preparatory process in which the CSO arguments were negotiated. The CSO influence was contingent on the willingness of states to support their arguments. The issues contested within civil society were less likely to lead to an adjustment towards their demands. Responsiveness was highest at an earlier stage of the negotiation process when the positions of state actors were still to be determined and still unresolved. Towards the end of the negotiations, the responsiveness to CSO arguments decreased.

Therefore, on the basis of the empirical analysis, three hypotheses can be formulated for future research:

1. The power and interests of states in the preparatory process are more decisive for the policy outcome than arguing and rational discourse, even in cases where an adjustment towards CSO positions can be detected.
2. The less contested an issue is within civil society, then the more adjustments towards CSO demands will take place.
3. The responsiveness towards and justification of CSO arguments decrease towards the end of the negotiations. They are higher in an earlier stage of the negotiations when the positions of state actors are still to be determined and resolved.

The case of the WSIS indicates that, on their own, favourable conditions for CSO participation do not necessarily present a cure for the democratic deficit in international governance. The WSIS lacks democratic quality according to the criteria developed for deliberative democracy here, although CSOs have been broadly enabled to participate and contribute to the negotiations. However, there was no rational discourse between civil society, state actors and other observers at the

WSIS. Even in such a promising case as the WSIS, state power, the time in the negotiation process and the character of the issues discussed seemed to outweigh a deliberative policy process.

Notes

1. WSIS Executive Secretariat, 'World Summit on the Information Society', Geneva 2003–Tunis 2005: 3.
2. WSIS, 'Declaration of Principles, Building the Information Society: A Global Challenge in the New Millennium', WSIS-03/GENEVA/DOC/4-E, 12 December 2003: 3.
3. Here, the term 'civil society organizations' (CSOs) refers to those organizations that were accredited at WSIS as non-governmental organizations according to the UN terminology; it does not comprise the private sector or the public sector, see United Nations (2004), 'Report of the Panel of Eminent Persons on the United Nations–Civil Society Relations, We the Peoples: Civil Society, the United Nations and Global Governance' [The Cardoso Report], UN A/58/817: 13.
4. WSIS, 'Civil Society Declaration on the World Summit on the Information Society, Shaping Information Societies for Human Needs', WSIS Civil Society Plenary, 8 December 2003, Geneva.
5. This is not to argue that civil society impact on policy output is a necessary condition for legitimate governance, since this assumption would imply the obviously naïve belief that civil society actors always have the best arguments. However, CSOs are recognized as an important transmission belt between society and policy-makers and their opportunity to influence policy output is seen as a necessity for legitimate and democratic decision-making processes. However, the legitimacy of civil society itself, and its potential to add legitimacy to policy-making processes, should be addressed critically.
6. An extension of the analysis to the second summit in Tunis 2005 and a comparison of the two WSIS phases may lead to further understanding of civil society participation and the legitimacy of the policy output of WSIS. This has not been the focus of this chapter but is currently analyzed by the author in her dissertation project at the Graduate School of Social Sciences, University of Bremen, Germany.
7. The term 'digital divide' illustrates the fact that there are some nations or social groups within nations that are excluded from the benefits that information and communication technology (ICT) provides. It is assumed that connection of these disadvantaged groups to ICT, in particular the Internet, could be a valuable step towards economic, social and democratic development (Norris 2001). This challenge was the initial point for conducting a world summit to deal with the information society.
8. Information and communication have been on the global agenda only twice: in 1948 at the UN Conference on the Freedom of Information and from the mid-1970s to the mid-1980s during the debate on the New World Information and Communication Order (for further reading, see Kleinwächter 2004b; Ó Siochrú and Girard 2004).
9. WSIS Executive Secretariat, 'World Summit on the Information Society', Geneva 2003–Tunis 2005: 3.

10. See, for example, Rule 64 of the Rules of Procedure of the World Summit on Sustainable Development (United Nations, 'World Summit on Sustainable Development', Rules of Procedure, A/Conf.199/2.), 16 July 2002, or Rule 64 of the Rules of Procedure of the International Conference on Financing for Development (United Nations, 'International Conference on Financing for Development', Rules of Procedure, A/Conf.198/2.), 27 February 2002.
11. WSIS, Draft Action Plan, based on the Discussion in the Working Group of Sub-Committee 2, WSIS/PCIP/DT/2-E, 21 March 2003; Draft Declaration of Principles, based on the Discussion in the Working Group of Sub-Committee 2, WSIS/PCIP/DT/1-E, 21 March 2003.
12. CPSR, Computer Professionals for Social Responsibility, 'Comments on the 21 March 2003 Draft Declaration of Principles and Draft Plan of Action to the World Summit on the Information Society', WSIS/PC-3/CONTR/90-E, 31 May 2003.
13. ITU, International Telecommunication Union, Reference document, 'Governments' and Observers' Contributions to the Draft Declaration of Principles and the Draft Action Plan', WSIS/PCIP/DT/3-E, 12 June 2003.
14. ITU, International Telecommunication Union, Reading guide, 'Governments' and Observers' Contributions to the Draft Declaration of Principles and the Draft Action Plan', WSIS03/PCIP/DT/6, 2 July 2003.
15. Overall, however, developing countries were not under-represented at WSIS. On the contrary, there were more and higher-level state representatives from developing rather than developed countries.
16. Less than a quarter of the governmental participants at the summit were female. No data is available on the participation of disabled persons and indigenous peoples within civil society.
17. Brazil, 'Preliminary inputs from Brazil on the Declaration of Principles and Plan of Action', WSIS/PC-2/CONTR/57-E, 1 January 2003: 2.
18. Not all funds for fellowships and the recruitment of staff from developing countries were spent: of the 871000 CHF (572000 €) available for fellowships, only about sixty per cent were spent until after the Geneva summit. Of the amount provided for the recruitment of staff from developing countries – that is, some 656000 CHF (423000 €) – only about twenty per cent were spent. The respective remaining amounts were carried over to the next phase of the WSIS in Tunis 2005. However, no information is available on by whom the fellowships were received – in particular, whether most of the fellows actually came from LDCs and were female.
19. United Nations (2004), 'Report of the Panel of Eminent Persons on the United Nations–Civil Society Relations, We the Peoples: Civil Society, the United Nations and Global Governance' [The Cardoso Report], UN A/58/817: 7.
20. WSIS, 'Declaration of Principles, Building the Information Society: A Global Challenge in the New Millennium', WSIS-03/GENEVA/DOC/4-E, 12 December 2003, para. 49c.
21. Ibid., para. 50.
22. CPSR, Computer Professionals for Social Responsibility, 'Comments on the 21 March 2003 Draft Declaration of Principles and Draft Plan of Action to the World Summit on the Information Society', WSIS/PC-3/CONTR/90-E, 31 May 2003.
23. Asian NGOs, Collective Contribution from several Asian NGOs, 'The World Summit on the Information Society: An Asian Response', WSIS/PC-2/CONTR/25-E, 7 December 2002.

24. Article 19, 'Statement on the right to communicate', WSIS/PC-2/CONTR/95-E, 14 February 2003.
25. WSIS Civil Society, Civil Society Observations and Response to the Tokyo Declaration, Asia Pacific Regional Conference on the World Summit on the Information Society, 15 January 2003.
26. WSIS, 'Civil Society Declaration on the World Summit on the Information Society, Shaping Information Societies for Human Needs', WSIS Civil Society Plenary, 8 December 2003, Geneva: 3.
27. IFJ, International Federation of Journalists, 'WSIS Draft Action Plan and Draft Declaration, Position of the IFJ on Role of Media', WSIS/PC-3/CONTR/35-E, 30 May 2003.
28. WSIS, 'Declaration of Principles, Building the Information Society: A Global Challenge in the New Millennium', WSIS-03/GENEVA/DOC/4-E, 12 December 2003, para. 4.

4

The ILO, Tripartism, and NGOs: Do Too Many Cooks Really Spoil the Broth?

Lars Thomann[1]

The mandate of the International Labour Organization (ILO) is to promote the implementation of international human and labour rights. Due to the unique tripartite structure in its bodies and decision-making processes, the ILO has always been able to claim a high degree of (input) legitimacy with regard to the participation of non-state actors. In recent years, the prominent role of the traditional non-governmental constituents of the ILO – the employers' and workers' organizations – has been challenged by the growing participation of civil society organizations (CSOs). Non-governmental organizations (NGOs) – as the ILO calls them – are intruding into the activities that were traditionally the prerogative of the social partners. How are the ILO and its constituents affected by this development, and how do they react to it? For a long time, trade unions, in particular, have been (and still are) critical to some degree of the inclusion of NGOs in the work of the ILO. On the other hand, the recent controversy over labour standards, trade and the role of the World Trade Organization (WTO) has created a new type of global labour movement that unites trade unionists with human rights activists, globalization critics and other grass-roots organizations. In addition, ever more corporate codes of conduct are being adopted, with NGOs actively participating in the development of these codes and in their subsequent implementation and monitoring. The creation of a new set of technical co-operation activities – such as, under the ILO Declaration on Fundamental Principles and Rights at Work of 1998 or the International Programme on the Elimination of Child Labour (IPEC) – has led to an increase in the participation of NGOs in the ILO. Has this

integrative approach proved to be counterproductive for the achievement of the objectives of the ILO? Has it eroded the role of the 'classic' labour movement, or has it de-legitimised the work of the ILO? Are too many cooks really spoiling the broth? Or is this strategy the only practicable means to engage in a multi-frontier battle in pursuit of the recognition and observance of international labour rights? This chapter will focus on the access of non-state actors other than workers' and employers' organizations to the ILO. Special attention will be given to the relationship between these two groups of non-state actors. The case of the ILO as an international organization with a unique tripartite structure might prove useful in answering the overarching question of legitimacy and NGO participation.

The ILO: who it is, how it works and what it does

The ILO was founded in 1919 through the integration of its constitution into the Versailles Treaty as Part XIII, 'Labour'. The mandate of the ILO is the promotion of social justice and internationally recognized human rights and labour rights. According to the preamble of its constitution, working conditions can only be improved when they are not viewed as domestic affairs but are, rather, established and protected through international norms and standards. The measures that the ILO uses are the setting of (minimum) international basic labour rights in the form of conventions, which are open for ratification, and (legally non-binding) recommendations in various policy fields. The fundamental conventions, which are also referred to as core labour standards, cover the areas of freedom of association and collective bargaining, the abolition of forced labour, the elimination of child labour and the end of discrimination in occupation and at work.[2] Other areas covered by ILO instruments relate to employment, working conditions, labour administration, social security, occupational safety and health, and specific economic sectors and groups of workers. Apart from norm setting and implementation, the ILO offers technical co-operation in the form of advisory services and capacity building. The ILO also carries out research projects and studies relating to the world of work.

One of the main features of the ILO's organizational structure is its principle of tripartism, laid down in Article 3 of the ILO Constitution.[3] This arrangement of encompassing non-state actors as equal partners of governments in the work of the organization is unique within the UN system. Besides governmental representatives, the social partners

(which are the organizations of employers and workers) are equal members of the ILO and have – in almost all organs – equal rights, including the adoption and monitoring of the enforcement of conventions and recommendations.[4] The ILO and its tripartite structure can, in comparison to other international organizations within and outside the United Nations (UN) system, claim a high level of legitimacy, because the active participation of non-governmental actors is institutionalized. For a long time, this unique structure of member representation has been the reason why international labour standard0s are recognized as being so highly legitimate (Senghaas-Knobloch 2004: 142).

The legislative organ of the ILO is the annual International Labour Conference (ILC), which is responsible for the adoption of international labour standards. Two governmental, one employer and one worker delegate represent each member state. The governing body (GB) is the Executive Council of the ILO, which meets three times a year: its tasks are the establishment of the programme and budget, the preparation of the agenda of the ILC and the election of the Director General (DG). The GB is composed of 28 government members, 14 employers' members and 14 workers' members. The GB runs several committees, of which the Committee for the Freedom of Association (CFA) and the Committee of Experts for the Application of Conventions and Recommendations (CEACR) are the most important. The CEACR is the main body of the ILO's regular system of supervision, and is in charge of examining the application of conventions. The independent CEACR examines governments' reports, which are periodically due on the application of ratified conventions, together with comments made by the social partners. If the CEACR discovers that a country has not fully implemented a convention, it may forward its comments to the government in question, in the form of either direct requests or observations concerning the specific problems of implementation. The final report of the CEACR is submitted to the tripartite Conference Committee on the Application of Conventions and Recommendations, which then discusses the report publicly in the ILC.[5]

Apart from the ILO's regular reporting and monitoring system, a special supervision procedure exists with three different mechanisms. Article 24 allows any national or international workers' or employers' organizations to make a so-called 'representation' in which they may make a claim that a given member state has failed to apply a ratified convention. An ad hoc tripartite committee of three members is then set up to examine the matter. Both the government involved and the association that has made the representation may comment on the

representation and provide further information. The GB may finally decide either to publish the representation or to initiate a complaint under Article 26.[6]

Complaints under Article 26 assert that an ILO member state is not satisfactorily securing the application of a ratified convention. Besides being lodged by the GB, a complaint can be brought forward by another member state that has ratified the same convention or any delegate of the ILC. The GB then decides whether to appoint a Commission of Inquiry. The independent Commission of Inquiry thoroughly investigates the complaint, establishes its procedures as required by the case, and reports its findings, giving recommendations and a time frame for their implementation. The CEACR is responsible for the follow-up on the implementation of the recommendations.[7]

The tripartite CFA is set up to receive and review complaints that allege the violations of the right of freedom of association and the right to collective bargaining. Organizations of workers, employers or governments may lodge these allegations, whether the concerned state has ratified the relevant conventions (Numbers 87 and 98) or not.[8] If the case is accepted, the government concerned will be asked to provide further information and the Committee will examine the documentary evidence. The report of the CFA is then submitted to the GB, which may draw the attention of the government concerned to anomalies, and ask for measures to be taken. Again, the CEACR may be asked to follow-up on the recommendations and conclusions of the CFA, especially in cases in which the conventions on freedom of association have been ratified by the states in question.[9]

In 1998, the ILC adopted the Declaration on Fundamental Principles and Rights at Work, which sought to place emphasis on a set of core labour standards that are enshrined in the eight previously mentioned fundamental conventions and their promotion and implementation. Although not legally binding, the Declaration emphasizes that all member states are obliged to respect these fundamental principles, irrespective of their having ratified the relevant conventions or not. This rights-based approach acknowledges basic rights without their having to be legislated and, at the same time, offers opportunities at societal, political and economic level (Sen 2001: 37). Together with the Declaration, a specific reporting system was established to scrutinize progress made in the implementation of the core Conventions. This follow-up mechanism includes a special annual report designed to provide a dynamic global picture of the situation and to facilitate the assessment and prioritization of ILO technical co-operation activities (Senghaas-Knobloch

et al. 2002: 7). So far, several special programmes have been installed under the Declaration: these aim to provide technical co-operation and advisory services in the specific policy fields. This includes a technical co-operation programme that has been operative in the field of child labour since the year 1992 –the 'International Programme on the Elimination of Child Labour (IPEC)' – whose goal is the progressive elimination of all forms of child labour, especially in its worst forms, as described in Convention No. 182.[10]

The promotional and legally non-binding character of the 1998 Declaration has been heavily criticized. Alston (2004) sees the instrument with its 'ethos of voluntarism' in the middle- and long run as undermining the existing system of enforceable international labour rights (p. 518). Others, however, reject this critique outright and point to the positive impact that the Declaration has been able to create so far, without finding evidence of a downward trend regarding the implementation of core labour standards (Thomann 2005). In general, the Declaration can be regarded as the ILO's strategic answer to the discussion of the impact of trade and globalization on working and living conditions of workers in times of globalization, a debate on the so-called 'social clauses' (O'Brien 2004). At their ministerial meeting in Singapore in 1996, the WTO members had already rejected any use of labour standards for protectionist purposes, and had declared the ILO to be the competent body to set and deal with the adoption and implementation of core labour standards. However, this demanding commitment of the international community has not led to any intensification in the relationship between the ILO and the WTO in respect of other international financial institutions – such as the International Monetary Fund (IMF) and the World Bank. In fact, the ILO is the only international organization that does not have any official link with the above-mentioned institutions, for example in the form of a Memorandum of Understanding (MOU). The linkage between the ILO and the WTO thus remains a rhetorical one (Wilkinson 2002: 216). The 1998 Declaration is accompanied by a new policy approach of the ILO; entitled 'Decent Work', this aims to promote 'opportunities for men and women to obtain decent and productive work, in conditions of freedom, equity, security and human dignity'.[11]

The general trend in the adoption of instruments is, however, weakening. In the periods from 1961 to 1970 and from 1971 and 1980, 19 conventions were adopted. This figure remained stable throughout the 1980s, with 18 adopted conventions. Between 1991 and 2005, however, only 14 were adopted.[12] While the ratification rate of conventions is

again on the increase today,[13] after it had almost halted in the mid-1990s (Senghaas-Knobloch 2004: 10), the implementation of the instruments is, at best, unsatisfactory. The CFA, for example, noted that, between 1970 and 1999, only 180 cases – out of a total of 1,444 cases examined – had led to an actual improvement of the situation (Gravel et al. 2001: 74). A similar observation regarding progress can be observed for the CEACR (Gravel and Charbonneau-Jobin 2003). Taken together, these developments in the areas of norm setting and norm implementation do not suggest that the so-called 'jurisdictional gap' (Brühl and Rittberger 2001: 29) describing the discrepancy between the necessity for and existence of international institutionalized co-operation in the area of international labour rights has closed or even narrowed. In fact, the opposite is probably true.

Compared to other global governance institutions, the ILO, with its tripartite structure, cannot be alleged to have a 'democratic deficit'. Taking the overarching criteria of access, transparency, responsiveness and inclusion, one has to concede that these criteria are fulfilled to an extent not seen in any other international organization. This exceptional organizational feature has not, however, led to an increased public awareness of the ILO. Recent debates over trade and social clauses have mainly targeted the WTO, although some references have also been made to ILO standards. Even in academia, the ILO, its structure and procedures are not a priority topic when talking about globalization and global governance, although the degree of legitimacy of the ILO remains higher than in any other international organization. In addition, the high degree of legitimacy has not led to an increased effectiveness in terms of better compliance rates.

The ILO and NGOs: avenues of co-operation

Before moving on, a terminological clarification is necessary. Although, in most research, the terms CSO and NGO are frequently used, in order to describe the increasing role that these actors play in the concept of global governance (Brühl and Rittberger 2001: 3), the terms themselves can hardly be described as going beyond a very general definition that encompasses a wide range of actors; such as international NGOs, epistemic communities, advocacy networks, or even multinational corporations (MNCs). Authors such as Kaldor suggest differentiating between four ideal types of civil society actors: social movements, NGOs, social organizations and national or religious organizations (Kaldor 2003). In the context of the ILO, the social partners would fall

into the category of social organizations. Social organizations differ from NGOs in that they typically represent particular parts of societies and are mainly dependant upon their members for funding. The goals of these organizations are largely orientated towards the interests of their members. Although being non-profit organizations, social organizations mainly pursue interest-driven instrumental goals. While businesses control capital and seek to maximize their returns, trade unions represent the property rights over their labour and are equally interested in maximizing their returns, either in the form of increased wages or improved working conditions (Braun and Gearhart 2004: 187). In addition, social partners are included in national collective bargaining systems, and are vested with a specific legal status. It may be true that both trade unions and employers' organizations mainly depend on the contributions and interests of their members, and are thus interest-driven, but one must also concede that trade unions, in particular, have also always had broader political and social concerns on their agenda (Spooner 2004: 19).[14] NGOs, on the other hand, are voluntary non-profit organizations, whose activities often are value-driven. Advocacy NGOs offer a wide range of activities, mainly in the form of advocacy and service provision. While service provision includes emergency relief, health care, education, housing and legal services, advocacy activities mainly comprise lobbying and raising awareness of or campaigning for specific policy issues.

The policy-making level

In recent years, various voices have been calling for an increase in co-operation between the ILO's constituents, specifically between the trade unions and NGOs (Gallin 2000; O'Brien 2002; Spooner 2004).[15] However, looking at ILO level, this call for co-operation has, at best, shown average results. NGO participation in the ILO occurs at two different levels – the policy-making and the operational levels – thus resembling the distinct activities that NGOs inter alia carry out: advocacy and service provision.

The access of NGOs to the policy-making level of the ILO – meaning the ILC and the supervisory mechanisms – is rather limited and marginalized. The participation of NGOs is regulated through provisions in the ILO Constitution and the Standing Orders of the ILC and other bodies and committees. In the ILC, as well as in other more technical or regional meetings, an accreditation policy classifies NGOs into three categories: the first two categories are exclusively made up of international

or regional employers' and workers' organizations that are granted either general or regional consultative status. These organizations bring together national trade unions and their federations. The third category is the so-called Special List, which is comprised of international NGOs other than employers' or workers' organizations and which have an interest in the work of the ILO. Being placed on the Special List gives NGOs the right to be invited to the annual ILC, to make statements and to submit documents, albeit without voting rights.

The right to deliver statements derives some of its impact from the fact that NGOs are often given the floor after the official representatives to the ILC have made their addresses.[16] The right to submit and distribute documents is taken advantage of quite extensively, with the result that, on the tables surrounding the plenary NGO documents, statements and urgent appeals are displayed. However, the documents of NGOs on the Special List may be copied and distributed by the ILO, without receiving an official document number. At first sight, it seems that NGOs are reduced to their 'classical' role of lobbying at ILO policy-making level, without having any actual opportunity to influence the items on the agenda or the outcomes of the decision-making procedures.

There is, however, an interesting exception worth mentioning. In 1957, the ILO adopted the Indigenous and Tribal Populations Convention No. 107. The fact that this Convention put at its centre the integration of indigenous populations into larger society as their only possible future was soon challenged (Swepston and Tomei 1996). Thus, even in the mid-1970s, a revision of the instrument was called for, not only within the ILO, but also within the Working Group on Indigenous Populations under the UN Sub-Commission for the Prevention of Discrimination and Protection of Minorities. The question that arose was how to include organizations of indigenous peoples in the revision process of Convention No. 107, as it was clear that the social partners did not represent those affected by this instrument. Moreover, only international NGOs were allowed to participate in the policy-making procedures of the ILO, and many NGOs of indigenous peoples were somewhat national in character. It took until 1986 for a meeting of experts finally to begin the revision process (Rodríguez-Piñero 2003: 365). Interestingly, though, most members of the expert group were from the indigenous NGO community, who were only entitled to speak, and did not have the right to vote. At the first discussion of the experts' proposals at the ILC in 1988, any comments by indigenous peoples on the draft proposal for a revised convention could only be submitted through governments. At the subsequent ILC in 1989, the member

states were asked in advance to include representatives of indigenous populations in their delegations. It was the workers' delegations that generally spoke on behalf of the indigenous groups and submitted their proposals to the ILC. In this way, the ILO Indigenous and Tribal Peoples Convention No. 169 was adopted in 1989; indigenous NGOs, even though they had no direct voting power, had found a proxy to include their concerns (Swepston 1990).[17]

The supervisory machinery

Similar to the norm-setting activities of the ILO, the participation of NGOs in the supervisory machinery is also rather indirect. The CEACR, for example, is not allowed to use information provided by NGOs directly in their analysis of the governments' reports. However, NGO information can be used when it has been filtered or channeled through the comments or observations of workers' or employers' organizations. This, however, presupposes that NGOs already have linkages or working relations with these organizations in order to bring any situation concerning the violation of workers' rights to the attention of the ILO supervisory bodies.[18] The CEACR may, on its own initiative, only use information that emanates from a publicly available source; this includes all documents that are publicized either in print or through the Internet.[19]

NGOs also do not have the right to file a complaint within the special procedures, be it regarding a representation under Article 24, a complaint under Article 26 or under the CFA procedure. Again, NGOs are restricted to bringing their information on the violation of workers' rights forward through an eligible complainant. An illustrative example of how information provided by NGOs is used in the supervisory machinery is the appointment of a Commission of Inquiry under Article 26 to examine the observance of the Forced Labour Convention (No. 29) by the Government of Myanmar (Burma). In its examination of the case, the Commission not only used the testimonials of the victims interviewed, but also a wide range of documents submitted by NGOs, ranging from Human Rights Watch, Amnesty International and Anti-Slavery International, to local and regional NGOs. However, not all of the material was actually used by the Commission, as it often contained more background information than specific evidence.[20] In 2000, for the first time in the history of the ILO, the findings of the Commission of Inquiry actually led to the imposition of sanctions under Article 33 against Myanmar, due to its persistent failure to implement the

recommendations within the given time frame.[21] So far, however, the measures under Article 33 have not proven to be effective. In November 2005, the government of Myanmar even threatened to withdraw from the ILO. The ILO decided to offer Myanmar the opportunity to maintain an effective dialogue with the ILO, even though many members complained that the 'wait-and-see' approach had yielded no results to date.[22]

The operational level

While the participation of NGOs at the policy-making level of the ILO is more indirect, the picture changes when we look at the operational level. First, the participation of NGOs in the implementation of projects does not follow any specific rules or regulations, with the exception of internal circulars. Moreover, NGOs do not have to be on the Special List to be eligible to implement a project. Project implementation through NGOs generally takes the form of sub-contracting. In the biennium 2000–01, around 15.2 per cent of all technical co-operation projects were implemented through sub-contracting, while, in 2002–03, sub-contracting had increased to 18.7 per cent.[23]

The International Programme on the Elimination of Child Labour (IPEC) is the major technical co-operation project of the ILO to combat child labour, and can serve as a useful example for analyzing the current ways in which NGOs implement projects. In the year 2004, IPEC had already delivered 38.7 per cent of all technical co-operation of the ILO with an approved extra-budgetary funding of US$ 66.3 million.[24] Approximately 211 million children aged between 5 and 14 years are working today, almost 60 per cent of them in hazardous situations and conditions, many of them in the informal economy.[25] Within the IPEC, NGOs mainly implement the so-called action programmes. These are specifically designed interventions aimed at implementing a part of a larger programme of the IPEC at local level. The activities carried out within such action programmes can take the form of direct action, education, institutional development, policy development, and/or support services. Until the end of 2001, the IPEC had worked with 150 NGOs through action programmes.[26] A National Programme Steering Committee, composed of governmental, social partners and NGO representatives, approves the implementing agencies.[27] The selection process often takes the form of competitive bidding – although the technical, political, managerial and structural capacities of the agencies are taken into account. The National Steering Committee can be regarded as a clearance body for choosing only suitable NGOs; for example, only those

that pursue developmental goals and are less active on the policy-making or advocacy level.[28] NGOs are, however, also active in the international awareness-raising campaigns of the IPEC – such as the World Day against Child Labour or the Red Card Campaign. The International Programme Steering Committee was set up to review the IPEC's overall policy, priorities and programme activities. It comprises representatives of donors, as well as workers' and employers' delegates.

Although, at the beginning of the IPEC, the majority of programmes were implemented by NGOs, their share in implementation had dropped to around one third in 1996/97,[29] while, in 2002/03, the IPEC still spent around one quarter of its budget with NGOs.[30] This high proportion of implementing NGOs is initially explained by the nature of child labour. As most child labour occurs in the informal economy, it is difficult for both employers' and workers' organizations to be active in these areas because they lack access to the places where child labour occurs. Moreover, both employers' organizations and trade unions lack the institutional capacity and the experience to implement projects. Even though there are very practical reasons behind the participation of NGOs in the field of child labour, the still considerable involvement that they maintain in the IPEC's activities is being put into question. Workers' and employers' organizations call for a greater participation and point to the observance of the principle of tripartism in the implementation process. At almost every meeting of the IPEC International Steering Committee in recent years, workers' delegates have made comments in this direction.[31] The trade unions, in particular, see the inclusion of NGOs in the fight against child labour as critical, because they see it as a problem belonging to the world of work, and not merely as a developmental issue connected to poverty.[32] In the aftermath of the discussion of the Global Report on Child Labour at the ILC in 2002,[33] the relationship between the social partners, NGOs and the IPEC as a programme of the ILO was critically referred to as 'tripartite plus'.[34] The criticism of NGO participation in the IPEC is somewhat awkward as the IPEC can, in general, be considered as the programme within the ILO that has managed to give the ILO publicity at international level.

Although the co-operation between NGOs and the ILO mainly takes place at operational level, and NGOs have little influence at policy-making level, the attitude of the social partners and the trade unions, in particular, is somewhat reserved concerning concepts such as the aforementioned 'tripartite plus'; however, an ILO representative felt it necessary to clarify that the term would only refer to networks and not to institutional structures. The underlying argument of the social partners

is that they alone can claim the legitimacy and representativeness conferred upon them through the principle of tripartism in the 1919 ILO Constitution. In this regard, one specific normative action on the part of the ILO is worth mentioning. The 2002 ILC – which had the informal economy as one of the main issues on its agenda – adopted a resolution concerning tripartism and social dialogue.[35] The resolution emphasized: 'that the social partners are open to dialogue and that they work in the field with NGOs that share the same values and objectives and pursue them in a constructive manner'; 'the valuable contributions of civil society institutions and organizations in assisting the Office in carrying out its work – particularly in the fields of child labour, migrant workers and workers with disabilities' and it was recognized 'that forms of dialogue other than social dialogue are most useful when all parties respect the respective roles and responsibilities of others, particularly concerning questions of representation.'[36]

Reading the resolution with greater attention, one could view this instrument as a reaction – on the part of the social partners – to the increasing participation of NGOs in the work of the ILO.[37] The fact that the social partners are rather critical of this development can also be seen in the last paragraph of the resolution, in which the ILO is called upon to 'ensure that the tripartite constituents will be consulted as appropriate in the selection of and relationships with other civil society organizations with which the ILO might work'. The crucial point of the resolution is that the social partners accept the role of NGOs at operational level, but at the same time want to have further influence in the selection process of all NGOs implementing projects in specific policy fields. On the other hand, with its emphasis on tripartism, the resolution rejects all calls for further or deeper participation of NGOs on the policy or decision-making level. The ILO's constituents see many NGOs as critical with regard to their legitimacy and representativeness. The ILO itself argues that only NGOs that can speak on behalf of their members and follow democratic rules that are transparent and accountable can claim to be legitimate and representative.[38] However, several developments throughout the 1990s show that a representational gap has evolved, as there have been incidents that may actually challenge the legitimacy argument of the social partners.

The social partners and NGOs: changing patterns of legitimacy

The argument of the social partners – not to expand the current participation of NGOs, but to limit it – has always been that the mandate of

the ILO based on the 1919 Constitution included trade unions and employers as the legitimate actors in the world of work, because they provide a representative basis for which they are accountable. Much of the research that has been carried out in recent years has focused on the role of CSOs in global governance structures. However, organized labour and the trade union movement have not played a significant role in this research. Harrod and O'Brien (2002) point to three aspects for this lack of interest in labour as a form of social organizations: at national level, organized labour is seen as a 'spent social force'; it is further considered to be somewhat conservative, gender-biased and lacking modernity because of its traditional focus on blue-collar work; organized workers with stable and structured employment will, in the future, represent a minority 'within a flexible, changing and precarious workforce' (p. 15). One way or another, these claims also reflect the developments that have attacked the membership-based legitimacy claim of the social partners.

Decreasing unionization and the evolution of a new social movement

With the end of the Cold War, a severe decline in trade union density occurred. Examples show the membership development between 1980 and 1995: Ireland (−26 per cent), Germany (−21 per cent), UK (−38 per cent), Italy (−27 per cent), Japan (−21per cent) and USA (−29 per cent) (Ebbinghaus 2002: 24). The decline in membership in the industrialized countries can mainly be explained by the change towards a post-industrial and information economy with fewer hierarchical production structures.[39] In almost all transition countries, the decline has been even greater, mainly due to the former compulsory membership in the socialist trade unions: the Czech Republic (−44 per cent), Hungary (−25 per cent), or Poland (−42 per cent).[40] On the other hand, a few countries in the developing world have seen a remarkable increase in membership, largely due to democratization: South Africa (+127 per cent), the Philippines (+69 per cent), South Korea (+61 per cent). Particularly noticeable is that, in these countries, it was NGOs that paved the way in pre-democratic times for the successes of trade unions today (Spooner 2004: 21). This also reflects the fact that, in many instances, trade unions still face severe pressure and constraints. In general, however, the degree of unionization in developing countries is very low. In addition, there is an extreme difference between the representation of working people in industrialized countries and those in the developing countries. Even though the industrialized countries have somewhat low

levels of unionization, almost all of their labour forces are covered by collective agreements, albeit that there is a diminishing trend. In developing countries, in contrast, the majority of the work force is not covered by collective agreements, either because the trade unions are too weak or because large parts of the working population are active in the informal economy and are thus, per se, not covered by trade unions.

The relationship between migrant workers and trade unions illustrates the problems connected to representativeness, especially since it is estimated that, in the year 2000, there were some 86 million economically active migrants across the globe.[41] Although, in a number of countries, trade unions are legally prohibited from recruiting non-nationals as members – and thus the right of migrant workers to enjoy freedom of association is restricted, especially that of migrants without legal status, in other countries – it is the trade unions themselves that have erected boundaries with regard to their membership through their own statutes. However, the situation is changing and trade unions are opening up to migrants: successful cases of revitalization of union density can be found, for example, in Switzerland, the UK, the USA and Germany.[42] Apparently, trade unions are changing their strategies in order to regain the position they once had as a major actor in the fight for workers' rights. Even though the decline in membership has halted in some countries, generally, one could argue that, with the overall decrease in membership, the trade union movement has lost some of its former representativeness.

Traditionally, there have always been economic sectors or specific categories of workers that have had low degrees of unionization. Due to the exclusion of female-dominated sectors from the legal protection of freedom of association, women, for example, show low levels of unionization.[43] Other examples can be found in the public sector, and with workers in export processing zones, domestic workers and agricultural workers, especially in developing countries. Nearly half of the world's workforce is engaged in agriculture, either as tenant farmers, sharecroppers, landowners or wage earners; the latter form about 40 per cent of the people engaged in agricultural work.[44] However, in agriculture, legal or de facto obstacles to joining a trade union are very common[45], although this is in sharp contrast to a variety of ILO conventions, such as the Freedom of Association Convention No. 87 (1948), which stipulates that the right to organize and bargain collectively applies to all categories of workers.

In contrast to the decline of trade union density, a significant increase in the number of NGOs can be observed throughout the 1990s,

although this does not necessarily mean an increase in formally represented people. A recent study states that, between 1992 and 2002, the number of secretariats of international and internationally oriented NGOs rose from 12,173 to 17,428; the absolute growth of NGOs in this period was 45 per cent, and the organizational density increased by some 25 per cent.[46] Which of these organizations is actually engaged in labour rights and can be classified as a new labour movement, is hard to tell. The decline in the membership of trade unions, the traditional low levels of organization in specific sectors, and the increasingly broad spectrum of NGOs with common concerns gives us at least the *theoretical* possibility of increasing the co-operation between trade unions and NGOs (Spooner 2004: 21).

The rise of the informal economy

The informal economy is one of the economic areas where the relationship between NGOs and the social partners – again, specifically, the trade unions – is of great and increasing importance. The informal economy is defined as all remunerated work that is not recognized, regulated or protected by existing legal or regulatory frameworks, and comprises informal employment both inside and outside informal enterprises. Informal workers are not only deprived of secure work, and social and legal protection, but are also deprived of representation and voice.[47] The informal sector is characterized by high degrees of non-unionization and a general lack of protection through a legal and regulatory framework.[48] The majority of people working in the informal economy are women; due to their sector-specific occupations, such as domestic work, women have traditionally been under-represented in trade unions.[49] The informal economy is not only on the increase in many developing and transition countries, with the majority of new jobs emerging in this part of the economy, but is also on the increase in the developed economies.[50] Efforts to increase the organization and representation of workers in the informal economy tend to be difficult; membership organizations, in particular, have only managed to organize workers at grass-roots level with limited effectiveness.[51] Trade unions have only begun to organize in the informal sector in recent years, a factor that is also due to their decrease in membership. For a long time, however, they concentrated on servicing their core members and were not very interested in organizing the informal sector. In many cases, NGOs have filled this gap, mainly through organizations of women and local community organizations (Gallin 2002: 24). Some of these NGOs

have been quite successful in organizing workers in the informal economy. Examples of such organizations include the Self-Employed Women's Association (SEWA) in India or the Self-Employed Women's Union (SEWU) in South Africa, both of which started as associations organizing women in the informal sector, and are now recognized as trade unions (Gallin 2002: 26). The former organization, SEWA, has been particularly successful with its approach of combining home, workplace and community issues, thereby mainly targeting women in the informal economy (Mayo 2005: 85).

However, at the 2002 ILC discussion of the report of the DG on the informal economy, it was organizations such as SEWA that came in for criticism. The debate clearly showed the tensions between trade unions on the one hand, and the NGOs on the other. The trade unions, and the International Confederation of Free Trade Unions (ICFTU) in particular, were, and still are, reluctant to accept both the term and the concept of the informal economy itself, as they see it mainly as a problem of a lack of protection for workers. They state that all workers are workers, and that only the specific status of their lack of protection has to be addressed by the trade unions active in the industry and the sector. The ICFTU made it clear, in the context of the informal economy, that any further engagement of NGOs in the work of the ILO could weaken the influence of trade unions, and that any developments leading to a weakening of tripartite social dialogue should to be rejected (Spooner 2004: 31). NGOs, on the other hand, point to the specific situation of workers in the informal economy, which is distinct from a sector-based approach as pursued by the ICFTU: most of them are women, living on the street and so on, and this is a situation that cannot merely be addressed by sector-specific trade unions, which often do not have the capacity to organize themselves in the informal economy (Spooner 2004: 30). The discussion (again) reflected very clearly the fear of many trade unions that the ILO is becoming quadripartite due to the increasing influence of NGOs, who, for example, forge alliances with trade unions. The argument mentioned in this regard is that NGOs cannot be representative as they are not democratically accountable. However, many of the NGOs in the informal economy are member-based organizations and can be identified more as unions than as NGOs, although trade unions are often reluctant to acknowledge this fact, and prefer the label of NGO (Spooner 2004: 31). At the ILC discussion on the informal economy, an NGO representative specifically stated that the representation of workers in the informal economy by NGOs would not be desirable at any level, and that there was no need for a further social partner – namely, NGOs – in the institutional structure of the ILO.[52]

Codes of conduct

Although, traditionally, issues relating to international labour have been on the agenda of trade unions, the improvement of working conditions in the global economy has increasingly become part of the work of NGOs. The growing emergence of voluntary private-sector initiatives addressing labour practices – be they in the form of codes of conduct, social labelling or investor initiatives – has, however, not taken place without tensions between the trade unions and the NGOs involved (Shaw 2004: 169). The tensions mainly arise over questions relating to the overall purpose and effectiveness of codes of conduct, their actual content, and their implementation and monitoring (Braun and Gearhart 2004: 184).

Private-sector initiatives mainly originate from businesses or business associations, and are the most rapidly proliferating. The necessity to 'preserve or legitimize a reputable public image' has led businesses to create such initiatives at all stages of the supply chain, from production to retail stores (Diller 1999: 101).[53] Another major part of these initiatives stems from the collaborative and combative approaches of NGOs who are pushing for an improvement of working conditions.[54]

Looking at adopted codes of conduct more closely reveals some major discrepancies regarding the stakeholders involved. While many of the private-sector initiatives are initiated by NGOs, it has been only recently that workers' organizations have embarked on such initiatives or have even taken the leading role, albeit together with NGOs (Diller 1999: 105). The crucial point regarding participation of stakeholders is not so much who initiated the code of conduct, but rather who is monitoring and verifying it. Trade unions argue that only the existence of independent trade unions can ensure an effective monitoring of working conditions, as trade unions are (or should be present) at the company's production site, and it is only they, and not NGOs, who can legitimately represent the workers. In addition, trade unionists claim that NGOs, as outsiders unfamiliar with industrial relations, would run the risk of being co-opted by employers. NGOs, on the other hand, point to the fact that they have managed to gain access to factory sites that have been inaccessible for trade unions; it is also argued that some monitoring is better than none at all (Braun and Gearhart 2004: 193), and that it is codes of conduct with NGO participation that have enabled unions to survive in factories (Shaw 2004: 175).

Often, codes of conduct are regarded as the third way of enforcing international labour standards; governmental regulatory action being

the first way and trade union organizing and collective bargaining the second (Compa 2004). Corporate codes of conduct are specifically criticized because they would offer MNCs the opportunity to evade governmental scrutiny and regulation (Braun and Gearhart 2004: 187) or to sidestep collective agreements with trade unions through the promotion of self-regulation (Gallin 2000: 26). On the other hand, codes of conduct with the participation of NGOs often emerge in an environment characterized by the lack of state regulation or the recognition of trade unions (O'Brien 2002: 232).

Additionally, many codes of conduct only include *selected* labour rights that are not necessarily based on the relevant ILO Conventions (O'Brien 2002: 231). A study carried out by the ILO in 1998 showed that, out of 215 codes of conduct analysed, only 15 per cent mentioned the freedom of association and the right to collective bargaining, 25 per cent referred to forced labour, 45 per cent to child labour, 40 per cent to wage levels, 66 per cent to discrimination and 75 per cent to occupational safety and health issues.[55] However, it has to be acknowledged that the issue selection often reflects the general nature of sector- or industry-specific labour problems that have become known to a broader public. As trade union rights are at the core of the international labour rights system and have a direct impact on the existence and functioning of trade unions, the latter oppose any codes of conduct that do not entail such rights, especially when codes are being monitored by NGOs (Shaw 2004: 174). Codes of conduct without trade union participation or specific reference to the rights of workers to organize freely or bargain collectively could be used by MNCs to ease outside public pressure and, at the same time, suppress and bypass the influence of trade unions (O'Brien 2002: 232).

NGOs, on the other hand, accept the right to organize and bargain collectively as being as equally important as other basic labour and human rights. They point to the situation in various countries – such as China, Vietnam or Bangladesh, with large production sites or export processing zones for low-skilled manufacturing – in which free trade unions are considerably restricted in their activities, and codes of conduct could provide an alternative (Braun and Gearhart 2004: 191).

Conclusion: do too many cooks really spoil the broth?

The inclusion of the social partners in the work of the ILO has, on the one hand, created an incomparably high degree of legitimacy within

and without the UN system, as these non-state actors are equipped with the same rights as governments. With regard to the social partners, the criteria of access, transparency, responsiveness and inclusion are fulfilled, with a few exceptions, in an exemplary manner within the ILO. Tripartism, with the active role of both employers' and, notably, workers' organizations, is one of the reasons for the reputation that the ILO enjoys, particularly among developing countries. However, as the traditional constituents of the ILO, the social partners are rather critical of any further inclusion of other non-state actors, such as NGOs. Their participation in the ILO remains a classical one, similar to those in other international organizations, in contrast to the institutionally included social partners.

At the ILO's policy-making level, NGOs have little influence, restricted to participation, making statements and the distribution of documents at certain meetings. Even though NGOs were able (or, rather, enabled themselves) to engage actively in the negotiation of certain ILO conventions – such as the one regarding indigenous peoples (No. 169) – this has been a clear exception. At operational level, however, NGOs are active in implementing specific projects for the ILO. The reason for this is twofold: first, NGOs are seen as a reliable partner with expertise and experience in particular policy fields, such as child labour; and, second, the social partners lack the capacities and capabilities to engage themselves in such projects.

The implementation of ILO projects through NGOs has, however, been viewed by the ILO's traditional constituents in a somewhat critical manner. Hand in hand with this development, the employers' and, in particular, the workers' organizations have also criticized the engagement of NGOs in the informal sector or in the adoption of corporate codes of conduct. The trade unions fear that their role within the tripartite structure of the ILO could be reduced by the increasing participation of NGOs and that this NGO engagement could represent the beginning of 'quadripartism' within the ILO; a development which would, at first, have an impact on the role of the workers' representatives. The tripartite structure of the ILO has clearly led to the development of tensions with other non-state actors, such as NGOs.

The social partners claim that, in contrast to NGOs, they are legitimate through their membership-based organizations. Decreasing unionization across the globe as well as increasing sections of the working population that are not represented – such as those in the informal economy or in specific economic sectors such as agriculture – or the adoption of codes of conduct in sectors or industries where unions are

not present, have undermined the legitimacy claim of the social partners. Even though the ILO's constituents are correct in pointing to the role appointed to them through the ILO constitution, one must not forget that the world has changed considerably since the adoption of the ILO's constitution in 1919. Many parts of the world's workforce are not represented by trade unions, either due to practical obstacles to unionizations or to legal exclusions from the right of freedom of association in particular sectors. Thus, in certain economic sectors, a legitimacy gap has developed that the social partners cannot close. Although in the mid-term or long run, the existence of trade union rights would seem to be the best way of organizing an order to ensure the protection of workers' rights at present, it falls to NGOs to fulfil the role of representing and giving a voice to the workers. Sectors such as child labour or the informal economy lack representation through the social partners, and thus the increasing participation of NGOs in the work of the ILO is not merely due to functional reasons. The argument of the social partners concerning legitimacy runs dry in some sectors in which workers, so far, are neither represented by workers' organizations nor covered by collective agreements. Apart from increasing the capacities of the social partners to work in these sectors, the ILO has to include other actors such as NGOs in order not to experience increasing representational gaps in various sectors. The social partners often claim that not all NGOs have a clear-cut mandate or are based on a membership to whom they are accountable: this criticism might be true to a certain extent, but it does not generally apply to all NGOs. Moreover, the argument put forward by the social partners covers the fact that they themselves lack legitimacy in the sectors mentioned.

Attempts by the ILO's social partners to restrict the role that NGOs play in the implementation of ILO projects somehow neglect the increasing importance that NGOs play in global governance. The sceptical attitude of employers' and workers' organizations is even more surprising, as it is usually states that are highly sceptical of non-state actors. In the case of the ILO, governments are, however, in the fortunate position of not to having to criticize NGO influence openly, as the social partners are already doing so. Any attempts at reform of the current system of NGO participation seem to be unrealistic, even though a new arrangement of NGO participation could serve precisely as a tool for overcoming problems with some non-accountable NGOs that do, in fact, lack a legitimate membership base.

Given the current system of global governance, characterized by fragmentation and decentralization, measures at international, national

and market level are needed in order to protect labour rights. In times of globalization, the international labour rights system is too complex to be pursued by the traditional constituents of the ILO alone. The further inclusion of NGOs in the area of labour standards can be helpful as trade unions, in particular, do not currently have the capacity to represent all workers in all sectors: some groups of workers are increasingly not represented. NGOs that are able to reach sectors in which workers are particularly vulnerable, can serve to increase the legitimacy of the international labour rights system, as they can give voice to those workers who so far remain unheard. In order to protect basic workers' rights, too many cooks do *not* spoil the broth; instead, more cooks can add some spice to the soup.

Notes

1. In 2005, the author worked as a consultant for the ILO's Special Action Programme to Combat Forced Labour (SAP-FL). The views presented in this chapter are his personal ones and do not necessarily represent the ILO's views.
2. The fundamental Conventions are the following: Freedom of Association and Protection of the Right to Organize Convention, 1948 (no. 87); Right to Organize and Collective Bargaining Convention, 1949 (no. 98); Forced Labour Convention, 1930 (no. 29); Abolition of Forced Labour Convention, 1957 (no. 105); Minimum Age Convention, 1973 (no. 138); Worst Forms of Child Labour Convention, 1999 (no. 182); Equal Remuneration Convention, 1951 (no. 100); Discrimination (Employment and Occupation) Convention, 1959 (no. 111).
3. In the latter part of the chapter, all articles without further specification refer to the ILO Constitution, unless otherwise mentioned.
4. The only non-tripartite Committee appointed by the ILC is the Finance Committee, following Article 7b of the ILC Standing Orders, which is responsible for the arrangements of the collection and allocation of expenses of the ILO among the member states.
5. ILO (1998) 'Handbook of Procedures relating to International Labour Conventions and Recommendations', Geneva: International Labour Office, para. 53.
6. Ibid., para. 74.
7. Ibid., para. 76.
8. This exception derives from the importance that is given to the two principles, and is based on the constitution of the ILO. The CFA is considered to be the gravest procedure of the supervisory procedures, as it is often related to the denial of fundamental civil liberties, including the right to live and freedom from torture. Since its creation in 1950, the CFA has examined 2,273 cases (up until June 2003). See ILO (2004) 'Organizing for Social Justice', Global Report under the Follow-Up to the Declaration on Fundamental Principles and Rights at Work, Geneva: International Labour Office, para. 83.

9. ILO (1998) 'Handbook of Procedures relating to International Labour Conventions and Recommendations', Geneva: International Labour Office, para. 79.
10. ILO (2005) 'IPEC Action against Child Labour: Highlights 2004', Geneva: International Labour Office: 5.
11. ILO (1999) 'Overview of Global Developments and Office Activities Concerning Codes of Conduct and Other Private Sector Initiatives Addressing Labour Issues', GB.273/SDL/1, Geneva: International Labour Office: 3.
12. http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN
13. The number of ratifications of all Conventions was 6,253 in 1995, while in 2005 (up until 1 December) it had reached 7,348. See http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN
14. In particular, members of the Bureau for Workers' Activities (ACTRAV) insist that trade unions have always had a broader agenda based on the achievement of (global) social justice instead of being merely interest-driven.
15. See also: ILO (2004) 'A Fair Globalization: The Role of the ILO', Report of the Director General, ILC 92nd session, Geneva: International Labour Office.
16. At the discussion of the Global Report on Forced Labour at the ILC 2005, the NGOs that were entitled to deliver a statement did so when the plenary meeting was almost empty. The decreasing attendance of the discussion also affected government, trade union and employers' speakers and was criticized quite openly. See ILO (2005) 'IPEC Action against Child Labour: Highlights 2004', Geneva: International Labour Office: 38.
17. Interestingly, both Conventions no. 107 and no. 169 are, so far, the only international binding instruments relating to indigenous peoples. Although a Working Group on a Draft Declaration on the Rights of Indigenous Peoples was installed in 1995, any agreement on its adoption is unlikely in the near future.
18. Anti-Slavery, 'International Action against Child Labour: Guide to Monitoring and Complaints Procedures', London: Anti-Slavery International, 2002: 5.
19. http://www.ilo.org/public/english/standards/norm/enforced/supervis/regsys2.htm#reports
20. ILO (1998) 'Forced Labour in Myanmar (Burma): Report of the Commission of Inquiry Appointed under Article 26 of the Constitution of the ILO to Examine the Observance by Myanmar of the Forced Labour Convention, 1930', (no. 29), Official Bulletin vol. LXXXI, Geneva: International Labour Office, para. 38.
21. ILO (2000) 'Resolution Concerning the Measures Recommended by the Governing Body under Article 33 of the ILO Constitution on the Subject of Myanmar', ILC 88th session, Geneva: International Labour Office.
22. ILO (2005) 'Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930', (No. 29), Further action pursuant to the resolution adopted in 2000 by the ILC, GB294/6/1 (Add.), Geneva: International Labour Office; ILO (2005) 'Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930', (No. 29), GB.294/6/2, Geneva: International Labour Office.
23. ILO (2002) 'ILO Programme and Budget Implementation 2000–01', Report of the Director General. ILC 90th session', Geneva: International Labour Office:

83; ILO (2004) 'ILO Programme and Budget Implementation 2002–03', Report of the Director General. ILC 92nd session', Geneva: International Labour Office: 89.

24. ILO (2005) 'IPEC Action against Child Labour: Highlights 2004', Geneva: International Labour Office: 25.
25. ILO (2002) 'A Future without Child Labour', Global Report under the Follow-Up to the Declaration on Fundamental Principles and Rights at Work, Geneva: International Labour Office.
26. Ibid., para. 227.
27. ILO (2003) 'Operational Aspects of the International Programme on the Elimination of Child Labour (IPEC)', GB.286/TC/3, Geneva: International Labour Office.
28. A staff member of the ILO Bureau for Employers' Activities (ACTEMP), for example, stated to the author that the ACTEMP helped and assisted national employers' organizations in dealing with policy-making NGOs. He also stated that, in general, national employers were less reluctant to work with NGOs that pursued only commonly accepted developmental goals compared to those that tried to intervene at the policy-making level.
29. ILO (1998) 'Operational Aspects of the International Programme on the Elimination of Child Labour (IPEC)', GB.271/TC/2, Geneva: International Labour Office, para. 51.
30. ILO (2004) 'Operational Aspects of the International Programme on the Elimination of Child Labour (IPEC)', GB.289/TC/4, Geneva: International Labour Office.
31. ILO (2002) 'Operational Aspects of the International Programme on the Elimination of Child Labour (IPEC)', GB.283/TC/2, Geneva: International Labour Office; ILO (2003), 'Decent Work in Agriculture', International Workers' Syposium on Decent Work in Agriculture, Geneva: International Labour Office; ILO (2004) 'Operational Aspects of the International Programme on the Elimination of Child Labour (IPEC)', GB.289/TC/4, Geneva: International Labour Office; ILO (2005) 'Operational Aspects of the International Programme on the Elimination of Child Labour (IPEC)', GB.292/TC/4, Geneva: International Labour Office.
32. A staff member of ACTRAV called this development within IPEC a 'deviation of the mandate of the ILO'. Trade unions as yet not active in the issue of child labour should be trained, and awareness-raising activities were being carried out, instead of engaging NGOs. Structural changes in a matter such as child labour would, in any case, need a common position to be held by the social partners.
33. ILO (2002) 'A Future without Child Labour', Global Report under the Follow-Up to the Declaration on Fundamental Principles and Rights at Work, Geneva: International Labour Office.
34. ILO (2003) 'Decent Work in Agriculture', International Workers' Syposium on Decent Work in Agriculture, Geneva: International Labour Office.
35. ILO (2002) 'Effect to be Given to Resolution adopted by the International Labour Conference at its 90th Session', GB.285/7/1.285th Session, Geneva: International Labour Office.
36. Ibid.
37. In an interview with a staff member of ACTRAV, this notion was confirmed. The ACTRAV member stated that the resolution was a part of a strategy by

the social partners to restrain the increasing influence of NGOs within the ILO and to strengthen tripartism as the constitutional principle of the ILO.

38. ILO (2002) 'Decent Work and the Informal Economy', Report VI, ILC 90th session, Geneva: International Labour Office: 74.
39. ILO (2004) 'Organizing for Social Justice', Global Report under the Follow-Up to the Declaration on Fundamental Principles and Rights at Work, Geneva: International Labour Office: 53.
40. ILO (1997) 'World Employment Report 1996–97', Geneva: International Labour Office.
41. ILO (2004) 'Towards a Fair Deal for Migrant Workers in the Global Economy', Report VI, ILC 92nd session, Geneva: International Labour Office: 7.
42. ILO (2004) 'Organizing for Social Justice', Global Report under the Follow-Up to the Declaration on Fundamental Principles and Rights at Work, Geneva: International Labour Office: 41.
43. ILO (2000) 'Your Voice at Work', Global Report under the Follow-Up to the Declaration on Fundamental Principles and Rights at Work, Geneva: International Labour Office: 14.
44. ILO (2004) 'Organizing for Social Justice', Global Report under the Follow-Up to the Declaration on Fundamental Principles and Rights at Work, Geneva: International Labour Office.
45. ILO (2003) 'Operations Manual (POM)', Geneva: International Labour Office: 18.
46. Kaldor, Anheiner and Glasius (2003), *Global Civil Society*, available at: www.lse.ac.uk/depts/global/publications/yearbooks/2003/2003chapter911b.pdf
47. ILO (2002) 'Women and Men in the Informal Economy: A Statistical Picture', Geneva: International Labour Office: 13.
48. ILO (2002) 'Decent Work and the Informal Economy', Report VI, ILC 90th session, Geneva: International Labour Office.
49. ILO (2000) 'Your Voice at Work', Global Report under the Follow-Up to the Declaration on Fundamental Principles and Rights at Work, Geneva: International Labour Office: 14.
50. ILO (2004) 'Organizing for Social Justice', Global Report under the Follow-Up to the Declaration on Fundamental Principles and Rights at Work, Geneva: International Labour Office: 44.
51. ILO (2002) 'Decent Work and the Informal Economy', Report VI, ILC 90th session, Geneva: International Labour Office: 72.
52. ILO (2002) 'Report of the Committee on the Informal Economy', Provisional Agenda 25, ILC 90th session, Geneva: International Labour Office, para.37.
53. A staff member of ACTEMP noticed in this regard, that various multinational operating clothing and footwear companies have repeatedly approached the ILO to monitor their corporate codes of conduct. However, as ILO standards are only binding upon member states as subjects of international law rather than individual entities such as private enterprises, this request could not be fulfilled. The member of ACTEMP viewed such requests as a marketing strategy of some MNCs, without any serious commitment to their application.
54. ILO (1998) 'Overview of Global Developments and Office Activities Concerning Codes of Conduct and Other Private Sector Initiatives Addressing Labour Issues', Geneva: International Labour Office, para. 14.
55. Ibid., para. 46.

5

Civil Society Participation at the Margins: The Case of the WTO

Jens Steffek and Ulrike Ehling

Since the 1990s, the World Trade Organization (WTO) has been one of the prime targets of a global social movement against the neo-liberal version of globalization.[1] Many of these critics accused the WTO of having opaque decision-making structures and a secretive policy style, next to the programmatic bias of its liberalization agenda. As a means of remedy, activists and academics alike have called for the enhanced participation of civil society in world trade governance (Charnovitz 1996; Esty 1998; 2002; Shell 1996). The WTO has responded to this criticism by seeking to enhance transparency and to create new forums in order to reach out towards civil society. In this chapter, we critically assess the progress of these reforms and analyse whether the existing consultative practices in the WTO live up to the deliberative-democratic ideals outlined in Chapter 1 of this volume. Using the indicators of access, transparency, access to information, inclusion of all voices and responsiveness to stakeholder concerns as yardsticks, we investigate several institutional mechanisms through which representatives of civil society are involved in the proceedings of the WTO.

In the first section of this chapter, we briefly review the history of the participation of civil society organizations (CSOs) at the WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT). We then evaluate the current participatory landscape at the WTO, which has emerged after the recent waves of reform. In the second section, we present the results of a case study on the practice of civil society involvement at the WTO, concentrating on the issue of the trade-related aspects of the regulation of genetically modified organisms (GMOs). This highly

contested issue has mobilized all types of CSOs, from business lobby groups to advocacy non-governmental organizations (NGOs). We wish to know to what extent the consultative agreements established at several levels of WTO policy-making and dispute resolution foster the give-and-take of reasons between civil society representatives and decision-makers. Our case study is based on document analysis and interviews with representatives of CSOs, national delegates and WTO staff. It identifies major problems of inclusion and responsiveness, and finds very little evidence of a real dialogue between the WTO and organized civil society. We conclude that, despite the recent reforms, civil society's participation remains at the margins of WTO policy-making.

Civil society and the WTO

The original, or '1947,' General Agreement on Tariffs and Trade was a side agreement to the aborted International Trade Organization (ITO). This remote ancestor of the WTO was envisaged as an organization that encompassed the field of international economic co-operation and only, inter alia, was concerned with trade. The ITO was supposed to tackle a much wider range of issues, including full employment and economic development (Gardner 1956; Graz 1999). For the purposes of the ITO, the drafters of the Treaty envisaged extensive co-operation with civil society (Charnovitz and Wickham 1995: 114). Provisions for an institutionalized consultation of CSOs had also been made in the first draft of the ITO Charter. Article 71, paragraph 3 envisaged that the ITO 'may make suitable arrangements for consultation and co-operation' with CSOs and 'may invite them to undertake specific tasks'.[2] In the course of the Charter negotiations, the reference to these 'specific tasks' was deleted, but the call for consultation and co-operation remained.[3] The ITO Charter was adopted in March 1948 at the United Nations Conference on Trade and Employment in Havana, but, as is well known, was never ratified.

What remained from the multilateral effort was the General Agreement on Tariffs and Trade that had been concluded in 1947. GATT dealt almost exclusively with trade in products and tariff reduction in the interest of major commercial powers (Hudec 1990: 57). It was constructed according to a 'club model' of international co-operation (Keohane and Nye 2001). It relied on confidentiality of proceedings, excluded minor actors and later benefited from the widespread belief that the highly technical questions of international trade should be left to technocratic decision-making by qualified experts (Esty 2002: 10).

Not least because of this insulation, the GATT spawned a transnational community of trade experts and diplomats who cultivated a considerable team spirit and an ethos of problem solving (Weiler 2001: 337). Given its limited tasks and its institutional design, it is not surprising that the GATT did not develop formal arrangements for consultation or collaboration with non-governmental organizations. Hence, policy-making and settlement of disputes in the GATT remained closed to observers, and documents concerning its activity rarely became public.

Things changed, however, at the beginning of the 1990s, as public attention turned to the GATT, particularly with the emergence of the trade and environment debate (Eckersley 2004; Schoenbaum 1997; Shaw and Schwartz 2002). Unlike trade, environment was a field in which activities of public interest CSOs were well established. Representatives of environmental CSOs as well as academic commentators argued that, in resolving trade disputes such as *Tuna–Dolphin*, the GATT had gone beyond the scope of its trade facilitation mandate and de facto adjudicated national environmental policies (Esty 1999). As a consequence, CSO networks started campaigning against the pitfalls of globalization and demanded access to the GATT and a voice in its policy-making.

At roughly the same time, negotiations of the Uruguay Round were coming to a close and a World Trade Organization with a much broader mandate than the GATT appeared on the horizon. As one observer put it, the world trade regime entered a phase of enhanced (re-) politicization (Howse 2002), with non-state actors playing an important part in this process. For the newly founded WTO, the question of how to deal with an increasingly politically active public became imminent (Charnovitz 1996). Accordingly, the Agreement Establishing the World Trade Organization, states that: '[t]he General Council may make appropriate arrangements for consultation and co-operation with non-governmental organizations concerned with matters related to those of the WTO' (Art. V, Paragraph 2).

In July 1996, the WTO General Council responded to public pressure and adopted its 'Guidelines for Arrangements on Relations with Non-Governmental Organizations' that concretized the somewhat vague language of the Agreement.[4] In the guidelines, it states that member states pledge to enhance transparency of WTO policy-making and that: '[t]he Secretariat should play a more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the public debate.'[5]

With regard to transparency, the WTO has, in fact, made some remarkable progress over the years. In 2002, the General Council revised

its procedures for the circulation and derestriction of documents.[6] All official WTO documents – including the minutes of meetings – were to be de-restricted and made available via the website in the organization's official languages.[7] They are normally put on the WTO website, which has been judged as being among the best in the field of international organizations (Kovach et al. 2003: 15).

The situation is completely different, however, with regard to the direct access of observers to WTO meetings. In its 1996 guidelines on relations with NGOs, the General Council states that: 'there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings.'[8]

Thus, CSOs remain excluded from almost all WTO bodies, even at the level of specialized committees. The only exception to this rule is that CSOs may attend the plenary sessions of ministerial conferences as registered observers. Since 1996, numerous CSOs have sought accreditation to the ministerial conferences (see Figure 5.1). Applications for attending the ministerial conferences are accepted 'on the basis of Article V, paragraph 2 of the WTO Agreement' which states that CSOs must indicate in detail how they are 'concerned with matters related to those of the WTO'.

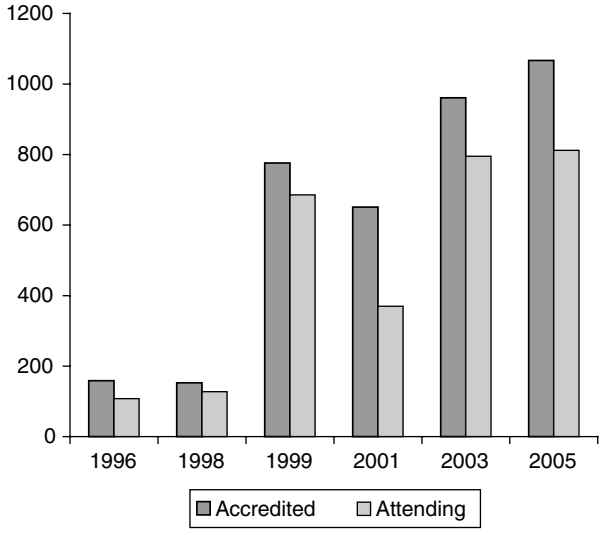

Figure 5.1 Participation of CSOs in WTO ministerial conferences since 1996

Source: Own calculations based on WTO data available at http://www.wto.org/english/forums_e/ngo_e/ngo_e.htm#news (accessed 22 May 2007).

Furthermore, over the years, the WTO has organized a number of outreach activities. First, a series of public symposia were designed to consult with CSO representatives on topics that are of particular concern to civil society, such as environment and development. These symposia cover a wide range of trade-related topics, but are rarely devoted to the discussion of specific proposals on the WTO agenda. Attendance by national delegates, which could facilitate a dialogue between CSOs and governments, is scarce.[9] Moreover, CSOs may be invited to join informal advisory bodies. However, these bodies meet on an irregular basis and are convoked according to the personal interests and contacts of the Director-General. The WTO Secretariat organizes occasional briefings for CSO representatives on current issues of world trade. In these meetings, members of WTO staff pass information on to civil society, but there is generally little room for debating these topics. Finally, in the WTO dispute settlement procedure, CSOs and private individuals may file amicus curiae briefs. However, this issue has spurred controversy among WTO members and academic experts, as there is no explicit reference to such a practice in the respective agreements.[10] However, in several of its rulings, the WTO Appellate Body has affirmed its authority to accept unsolicited statements, even though there is no legal right to make such submission.[11] Given the legal uncertainty around the amicus curiae practice, it is difficult to predict whether this is likely to become a valuable tool for non-state actors.

In summary, since the 1990s, the WTO has improved its external transparency significantly, and it has also opened up various new avenues for consultation with civil society stakeholders. On the other hand, formal participation rights have remained underdeveloped in comparison with those provided by other international organizations, such as the United Nations (UN). In the following sections, we analyse how CSOs are coping with this rather ambivalent situation, characterized by multiple opportunities for informal dialogue with few formal participatory rights.

The case study: civil society and GMO regulation at the WTO

This empirical study is based mainly on interviews with WTO officials from the Secretariat in Geneva, with CSO staff, and with national delegates. We also attended several outreach meetings in person, including the 2004 and 2005 public symposia. In addition, we have analysed a wide range of official WTO documents, such as minutes of committee meetings, and CSO publications (to be found mainly on websites). As we

strive to identify problems of stakeholder inclusion at WTO, we deem it helpful to differentiate between various segments of organized civil society and to distinguish the different types of strategies that CSOs follow in their interaction with the respective institutional level of WTO decision-making, as described in Table 5.1 below. On the vertical axis, we distinguish between three types of organizations: public interest and activist CSOs, research and academic institutions, and organizations representing industry and business. Activist CSOs primarily campaign on issues of public interest, mobilize people and engage in fund-raising for these activities. Research CSOs and academic institutions seek to provide for scientific knowledge and often strive to integrate single issues into broader contexts. Industry CSOs usually lobby for quite specific economic interests on a rather narrow base of stakeholders.

On the horizontal axis, which differentiates between prevailing types of interaction, our typology is threefold: first, we find strategies that address the public only and hence do not lead to direct interaction with WTO. Those activities can enhance democracy, inasmuch as they inform the public on distant activities and therefore set the preconditions for the emergence of a global public sphere – at least, for specific issue areas. Second, we find CSOs addressing the WTO from the outside in a unidirectional way, trying to effectuate policy changes in the intergovernmental forum. These activities are designed to transport concerns into the WTO. Their aim is to raise interests *and* to make them heard within WTO decision-making. Third, we find CSOs engaged in a dialogue with delegates and WTO staff without having clear-cut political demands. An example of this kind of activity would be the discussion of complex technical issues in advisory bodies. The objective here is mutual learning rather than immediate policy change. Table 5.1 displays the prevalent types of CSOs active at the WTO and their strategies.

Table 5.1 Types of CSOs at the WTO and their strategies

Type of CSO	**Prevailing type of CSO strategy**		
	Addressing the general public	**Addressing WTO (uni-directional)**	**Dialogue/interaction with WTO**
Public interest/ activist CSOs	Campaigning, shaming, blaming	Demanding policy changes	…
Research/ academia	Raising public awareness	Communicating scientific information	Expert deliberation
Industry/ private sector	…	Lobbying WTO staff and national delegates	…

With this provisional map of possible forms of CSO involvement in mind, we approached one single-issue area – the trade-related aspects of GMO regulation – in order to keep the empirical range of the study manageable. The GMO case has been chosen for several reasons: first, agricultural biotechnology is controversially debated among citizens. Across countries, in particular, we detect considerable differences in people's preferences (Gaskell and Bauer 2001: 108–9) as well as in national regulatory systems (Bernauer and Meins 2003). Second, trade in genetically modified (GM) crops is a salient issue for both policy-makers and businesses. Europe's restrictive regulations on agro-biotechnology allegedly cost American farmers already up to $300 million per year (Augsten and Buntzel-Cano 2004: 14). These export losses have caused tensions among major trading partners, and were debated before the WTO dispute settlement body (WTO DSB) in the *EC Biotech* case (Boisson de Chazournes and Mbengue 2004; Busch and Howse 2003). Third, GMO regulation exemplifies a 'trade and' issue that poses severe challenges to the WTO, as the organization increasingly decides on the legality of not primarily trade-related domestic regulations (Esty 2002: 13).

To sum up: the 'regulatory polarization' (Bernauer 2003: 44) between different countries and international organizations, along with the complexity of values and interests involved, makes GMO regulation an especially interesting topic. Nevertheless, certain problems arise with the selection of this particular case as well. Civil society campaigns rely heavily on *prospective* WTO rule making in the area of food safety. At present, GMO regulation is not carried out within the WTO. Only through its interaction with other standard-setting organizations and its binding dispute settlement procedure does the WTO come to play a role in global GMO regulation (Gehring 2002; Gstöhl and Kaiser 2004).[12] This interdependence raises concerns among civil society actors that trade rules may have the upper hand over other international obligations, such as the Biosafety Protocol. Therefore, for the time being in the WTO, it is mainly the DSB that is actively involved in the issue.

In our empirical analysis of CSO activities, we found that private business interests are still heavily represented at the WTO. While, formally speaking, business associations do not have privileged access, they can still quite effectively push commercial interests so that they are addressed in negotiations (Hoekman and Kostecki 2001: 70). Industry has been so successful in lobbying policy-makers that some observers came to argue that GMO regulation is 'regulation for business rather than regulation of business' (Newell and Glover 2003: 6) and that, in general, the development of WTO rules has been determined by

industries and commercial interests (Correa 2001: 112). However, this is not just a question of financial resources, professional organization and availability of personnel. In the case of biotechnology, policy-makers were in need of these businesses, as they have for a long time been the key providers of scientific expertise and economic data that is highly relevant for regulatory decisions (Howse and Mavroidis 2000: 351).

Compared to the business sector, there is a striking contrast in relation to public interest. Besides an asymmetric knowledge base, consumer representatives have limited means by which to put their demands onto the agenda and are denied similar access to decision-makers. While, for example, the Transatlantic Business Dialogue (TABD) – a network of European and American companies – was highly influential in pushing for their interests in food safety regulation, their counterpart in public interest, the Transatlantic Consumer Dialogue (TACD), faced more difficulties (Levidow and Murphy 2002).[13] As a result, public interest CSOs chose other means of contesting governmental and private biotech regulation: one, via litigation at national level, the other, via its physical presence in international organizations and on the streets in front of these organizations. Many advocacy groups focused on campaigning outside international organizations or governmental bodies without addressing them directly or seeking dialogue.[14] Others, again, had an educative impetus, analyzing WTO decision-making, offering their results to an interested public and, by these means, building awareness of the linkages between, for example, trade and environment. In summary, CSO activities (apart from industry activities) were an attempt to form a coalition between scientists and activists outside the intergovernmental institutions, and this did not go unnoticed by policy-makers.[15] This coalition building also involved an attempt to initiate a transnational discourse on GMO regulation, which, in general, can be seen as a necessary precondition for the democratization of global governance (Nanz and Steffek 2004).

The committee level: CSOs and the TBT and SPS Committees

Only few CSOs keep track of all activities and deliberations going on in the day-to-day work at WTO committee level. The most evident reason for this is that CSOs do not have direct access to these committee meetings. Observer status in these meetings is limited to selected international governmental organizations.[16] The limited engagement can additionally be explained by a combination of an agenda overload of

committee sessions and a shortage of personnel on all sides. Blackhurst (1998) has calculated that there is an average of at least eleven WTO meetings a week for national delegates to participate in (p. 37). Most of these meetings take place at the level of committees and cover a wide range of issues. Even among governmental delegates, there is often a striking lack of expertise. It has been remarked that many delegations do not seem to have a particular understanding of linkage issues, such as the effects of trade policies on environmental or health regulations (Esty 1999: 200).

With regard to the responsiveness to CSO concerns, the absence of direct access to the committee level implies that we can only indirectly assess the responsiveness to arguments promoted by CSOs when government officials refer to these matters in the committee sessions. Therefore, we searched the proceedings of two committees primarily concerned with the GMO issue – the Committee on the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Committee) and the Committee on the Agreement on Technical Barriers to Trade (TBT Committee) – for references made by governmental delegates to stakeholder interests, and additionally relied on the assessments that CSO representatives voiced in the interviews.

In general, disagreement over GMO related issues remains concentrated in debates among developed countries, especially between the USA and Canada, on the one hand, and the European Union (EU), on the other. In both the SPS and the TBT Committees, the EU's authorization system, which has several GM crops pending authorization for the European market, has been contested.[17] Additionally, the European system of labelling GM products (forcing producers to indicate that their products may contain GMOs, for reasons of transparency) has been a matter of debate in the TBT Committee.[18] While consumer choice and consumer information has been a central issue in both committees, serious reference to the arguments brought forward from civil society remains limited. On the one hand, references to consumer interests are plentiful;[19] on the other, explicit reference to the campaigns of consumer CSOs cannot be detected at all. Hence, the activities of public interest CSOs – such as submitting citizens' objections or organizing demonstrations in front of the WTO Secretariat – do not seem to reach the expected level of attention among WTO delegates.

As for *science* in general, debates on GMOs are imbued with references to scientific testing methods and scientific data. However, again, explicit reference to any specific study or research organization cannot be found here. In particular, the arguments raised by CSOs to include non-science

parameters and to go beyond science-based justifications for SPS measures are hardly reflected in committee deliberations. On the contrary, countries were reluctant to open the regulatory process to anything other than science-based elements; namely, to take 'ethical concerns and attitudes towards the use of biotechnology in different parts of the world' into account.[20] Even with regard to the concerns of industry, only general statements from the GM producing countries on prospective export losses[21] and 'overly burdensome' trade-barriers were found.[22] Demands for a voluntary labelling system that could provide for both consumer information and compliance with WTO obligations were voiced.[23] However, no serious deliberation on alternative forms of consumer information took place. As the decisions on labelling requirements were taken elsewhere, lobbying by companies and business CSOs also concentrated on forums other than the WTO (Buckingham and Phillips 2001: 6; Newell and Glover 2003: 16).

In summary, it is noteworthy that, in practice, committee sessions are dominated by reporting activities, notification procedures or information exchange and, only to a very limited extent, by deliberations on an issue. For CSOs, there are very limited prospects of influencing any substantial decisions given that the competences of the committees are clearly circumscribed and limited. In fact, although the DSB may refer to arguments brought forward in committee meetings, it is by no means obliged to, thus further limiting the relevance of the committee deliberations (Roessler 2000). Hence, in WTO decision-making, deliberations on the committee level seem to be only of little importance to both governments and civil society. Ultimately, only research-oriented CSOs follow the deliberation process and see their objective in the documentation of what is being discussed there.[24] Nevertheless, given their scarce resources, continual 'engagement' by CSOs at this level would hardly be worth the trouble.

The negotiating level: CSOs and ministerial conferences

Civil society participation at ministerial conferences has increased steadily within the last couple of years, as documented in Figure 5.1. Presence at ministerial conferences is limited to CSOs that have gone through an accreditation procedure and have a steady interest in WTO activities.[25] The number of CSO representatives allowed to attend is limited, depending on the total number of applications and the capacity of the facilities provided for at the conference venue. Additionally, one

detects a disproportionate representation among CSOs: there are more CSOs from developed countries present than from developing countries, just as business associations outnumber public interest CSOs (Srivastava 2005: 5). Nevertheless, the transparency of the negotiating process and the access to information has improved. By now, the infamous 'green room' negotiations are no longer taking place in complete secrecy but are, at least, announced to member states.[26]

As for organized civil society, it has become a general procedure at the ministerial conferences to provide an 'NGO Centre' either directly at the conference venue or close by. There, the Secretariat organizes regular briefings about the state of negotiations. However, CSOs not only want to see the WTO being more transparent, they also want to be able to challenge WTO policy-making and to bring forward concerns at the level of ministers (Marceau and Pedersen 1999: 32). For public interest CSOs, campaigning outside the conference venue, but in sight of media as well as delegates, is an important tool for attracting attention to their demands.[27] They look for innovative forms of protest and new forms of networking to bring the perceived effects of free trade on citizens to the attention not only of the trade negotiators, but also of the citizens.[28] In fact, the media focus is more on public protests *outside* the WTO and, to a much lesser extent, on the problems arising *inside* working groups or on the decisions taken by ministers.[29] For CSOs, this implies that they might successfully direct public attention beyond WTO activities and current negotiations towards more general problems of world trade. Ultimately, major scale protests at ministerial conferences, where the decision-makers meet, promise to be considerably more effective than small demonstrations in front of the WTO Secretariat, where it is mainly administrative staff who pass by.

Similar to their activities at the committee level, research CSOs monitor negotiations and attend briefings by the WTO Secretariat on each working group, as well as informal information sessions by delegates. Here, again, their aim is the generation of knowledge of and capacity building *on* – but not necessarily agenda-setting *in* – the WTO. For them, however, attendance at ministerial conferences is not a focal point of activity. Geneva-based CSOs, in particular, profit more from day-to-day contacts with WTO delegates and Secretariat personnel directly in Geneva.[30]

The biotech industry, in contrast, often had a great interest in the WTO ministerial conferences. In 1999, the year of the chaotic Seattle Ministerial Conference, they wanted a working group on biotechnology to be established within the confines of the World Trade regime in order

to enhance trade in biotech products.[31] This request was converted into a formal inquiry by the USA, supported by Canada and the EU trade commissioner, Pascal Lamy. Protests from member states, especially European environmental ministries, and the failure of the entire conference brought an end to the idea. Nonetheless, the fact that the proposal was brought to the negotiating table reflects the potential influence of industry and business networks on WTO decision-making.[32]

In summary, it could be observed that the various types of CSOs have divergent levels of interest in the ministerial meetings. While academically oriented CSOs once again see their main objective in the generation of knowledge on the part of the stakeholders, public interest CSOs and industry try to bring their interests more or less directly to the negotiators' attention. However, real participation in WTO deliberations at the negotiating level is only possible if national governments include CSO representatives in their national delegations, which is an increasingly common practice.[33] Otherwise, CSOs need to rely on informal contacts with delegations as there is no way of presenting their arguments directly to the assembly of negotiators. The consequences of the lack of institutionalized input mechanisms at the political branch of the WTO (committees and ministerial meetings) are twofold. First, many CSOs active in the field of GMO regulation turn their attention to international standard-setting organizations where they have more access and where regulation actually takes place (such as the Codex Alimentarius Commission (CAC)). Second, many CSOs choose to lobby delegates and politicians at national level instead of addressing international bodies directly (Glowka 2003: 25).

The judicial level: CSOs and the DSB

In contrast to the committee and ministerial level, CSO activity in the case of a dispute is directed straight to the WTO, either to the respective division or to the panellists. The access point here is the opportunity to submit amicus curiae briefs to the DSB. In the field of GMO products, a dispute was initiated by the United States in May 2003, supported by Argentina and Canada. In this so-called *EC Biotech* case, the claimants argued that the European authorization system of GMOs was in violation of several WTO agreements: the GATT, the TBT, the SPS and the Agriculture Agreement. Additionally, national safeguard measures in Austria, France, Greece, Germany and Luxembourg were challenged.[34] In this case three amicus curiae briefs were submitted; two came from public interest CSOs and one from independent researchers.[35] They all

tried to put forward certain arguments that they see as under-represented in WTO rules or in submissions by the parties to the dispute. The industry sector refrained from submitting a formal brief.[36] Eventually, the panellists did not consider any of the briefs submitted. As there is no legal requirement for the panel to take amicus curiae briefs into consideration, several public interest CSOs adopted other strategies in order to be heard. They relied on symbolic action, pointing out that GMO issues should be tackled politically at the WTO and not by a judicial body such as the DSB.[37] Lastly, research CSOs have tried to confront WTO staff and delegates regularly with counter expertise on legal questions and have tried to bring forward alternative viewpoints.[38]

In WTO dispute settlement, the transparency of the process remains a matter of constant concern to CSOs, despite the fact that, in 2005, hearings were opened to the public for the first time in the *Continued suspension of obligations in the EC Hormones dispute*.[39] So far, however, this has not become a general practice. Additionally, in cases such as the complex *Biotech* case, the panel can establish a scientific advisory panel to assist it in assessing non-judicial questions such as the consequences of the introduction of GMOs into the open environment, or their potential harm to human health. Information on the participants on advisory panels, however, remains unknown until the final ruling is made.

What is more, our empirical analysis of WTO dispute settlement has revealed that, even in this context, there are power asymmetries in existence among CSOs. In order to bring the non-compliance of other parties before the WTO DSB, member states need to show that they have suffered economic losses as a result of the deviant behaviour. As it is companies who are usually the first to notice this, industry associations often play a crucial role in setting the process of litigation in motion. Even individual companies with high stakes in an issue area or a profound interest in the export conditions for a certain product have triggered national action in the past (Shaffer 2003: ch. 3).

The administrative level: CSOs and the WTO Secretariat

In contrast to the closed political decision-making process, the WTO administration provides some opportunities for direct stakeholder involvement. The *Guidelines for Relations with NGOs*, in particular, give the WTO Secretariat some leeway for enhancing a policy dialogue with civil society. In fact, the External Relations Division of the WTO is primarily occupied with CSO requests and grants CSO representatives

limited access to the Secretariat and its divisions on a personal and informal basis. There is a range of activities through which CSOs can present alternative viewpoints and bring attention to new issues; among them are public symposia, internal briefings, NGO position papers and the recently established informal advisory bodies to the Director-General.

Over the last years, the WTO Secretariat has organized several public symposia. Their panels cover many aspects of global trade governance; such as environmental or development concerns. On such occasions, CSOs have repeatedly raised the issue of GMO regulation. In general, they view public symposia as an interesting tool for information exchange among the various CSOs active in a particular issue area.[40] Dialogue with decision-makers, however, remains rudimentary. Hence, many CSOs see merely networking among each other as the prime incentive for attending public symposia. Theoretically, they could also use this occasion to form issue-based coalitions, to mobilize the public in a joint effort, and to try to influence policy-making via campaigning. However, meetings at the WTO do not seem to deliver direct results such as joint civil society statements, which could then be distributed to WTO members.

While public symposia retain a dialogical character, even though this dialogue is, in practice, limited mainly to civil society representatives, CSO briefings by the WTO Secretariat are perceived to be unidirectional. In these briefings, members of the Secretariat usually report what is being discussed in WTO committees and councils to about a dozen representatives of Geneva-based CSOs. These briefings amount to a certain transparency and access to information, as they are open to any CSO that wishes to attend. However, in practice, CSOs outside Geneva do not receive any information on these briefings in advance. Criticism or discussions hardly ever arise at these briefings because experts from WTO divisions do not attend, and very rarely national decision-makers.[41] Only a very few CSOs organize briefings for delegates themselves in order to advance their interests and concerns.[42]

Additionally, the opportunity for CSOs to submit position papers is meant to be a tool for the building of awareness and for exchange of arguments. Their distribution via the website reflects the view that CSOs might bring in expertise and experience that is of relevance to a wider audience. However, as indicated by interviewees, position papers are seen more as a 'visibility tool' for CSOs, and not so much as a way of influencing the WTO agenda or upcoming political decisions.[43] On the issue of food safety, various position papers have been submitted to the Secretariat. In total, 29 position papers related to the subject, either

directly to GMOs or to food safety in a broader sense. All three types of CSOs seem to use the tool on a regular basis, most commonly in the run-up to a ministerial conference.[44] Nonetheless, CSO representatives do not assume that delegates or ministers will take their position papers into consideration.

Finally, in 2003, WTO Director-General Supachai Panitchpakdi appointed informal business- and public-interest advisory bodies.[45] Their objective is to establish an informal platform for dialogue with international business leaders as well as with leaders of various non-governmental organizations. Both bodies remain informal and non-political and do not aim to be representative in sectoral or regional terms. In practice, they met three times separately for a joint lunch with Director-General Supachai in advance of major WTO events. It is hard to assess the impact of those informal meetings. Furthermore, it remains to be seen whether this practice will be continued, and potentially institutionalized, in the future (Srivastava 2005: 3).[46]

In concluding the analysis of the administrative level, it remains to be pointed out that there is a vital debate on the WTO Secretariat's role in decision-making processes (Xu and Weller 2004). This debate was reflected in our interviews as well. Especially in a complex dispute such as the *Biotech* case, public interest CSOs expect the Secretariat to bring in expertise, to draft papers or to consult experts with different professional backgrounds on the issues in question – and, by these means, to have influence on policy-making. Secretariat members, however, emphasize their mere administrative status, not being able to influence discussions or to table papers. What can be said, though, is that, by its administrative activities, the WTO Secretariat serves as a 'buffer' between civil society and WTO members (Marceau and Pedersen 1999: 11). Nevertheless, its outreach activities can be criticized for being insufficiently focused on a dialogue between civil society representatives and national delegates. In addition, the new advisory bodies are also questionable tools, as their establishment depends entirely on the Director-General's interests.

Conclusion: who deliberates at the WTO?

In this chapter, we have tried to assess whether the current practices of consulting civil society at the WTO are sufficient with a view to the normative demands posed by deliberative-democratic theory. Our evaluation has yielded ambivalent results. First, it has to be noted that, when compared to the GATT 47, the WTO has made remarkable progress over the last ten years. The organization now officially acknowledges civil

society actors as significant and legitimate interlocutors. It has devised some guidelines on how to relate to non-state actors, even if, at the time of writing, they still remain rudimentary. The most notable evolution has taken place with respect to external *transparency*: access to official WTO documents has been liberalized and its website offers them to the public in a remarkably user-friendly way. This disclosure of the organization's documentary record is contrasted, however, by the extremely limited *access* of observers to its policy-making process.

With respect to civil society access to official meetings, the WTO lags far behind other international organizations. Opportunities for civil society to influence the deliberation process directly at the WTO are quite scarce. Remarkably little has changed since the GATT became operational in 1948. Consultation between non-governmental actors and, occasionally, a limited number of government representatives takes place mainly in the form of so-called outreach activities, such as public symposia. However, it has to be stressed that such discussions remain detached from the WTO's regular policy-making process. There is no way in which non-state actors could enter a regular dialogue with policy-makers on concrete regulatory proposals, or exchange views with the assembly of national delegates as a whole. Intergovernmental and non-state areas remain clearly separated.

These rather adverse conditions for CSO activity quite obviously have repercussions on the strategies by which CSOs try to influence WTO policy-making. Public interest CSOs concentrate on building awareness, addressing the public and on campaigning, addressing the WTO. It is through informal, personal contacts with national delegations and WTO officials that most civil society representatives seek to influence policy-making. For research-based CSOs, this is especially valid. Yet, even these informal ways of interaction, which are buttressed by long-standing personal relationships, do not seem to result in much of a two-way dialogue. The members of research CSOs that we interviewed did not see themselves in a position to transport the concerns of civil society *into* the WTO, but considered themselves only able to enhance public knowledge *about* the WTO. Finally, industry concerns, in particular, seem to be reflected in WTO deliberations, as the member states are quite ready to take them up. In their interaction with the WTO, though, they, too, seem to remain focused on informing themselves about WTO activities and current discussions in order to be able to act on contentious issues without delay.

Therefore, we come to the conclusion that there is very little evidence of a real dialogue between the WTO and organized civil society. The

transparency of decision-making via the release of official WTO documents is hampered by informal policy practices and by the restricted flow of information on dispute settlement processes. The *access* to regular committee or council meetings is prohibited. Problems of *inclusion* arise concerning the privileged position of industry CSOs in addressing national delegates and WTO officials, in particular, when compared to the difficulties of representatives from developing country. In addition, given the lack of documented direct interaction between delegates and CSOs, it is hard to assess to what degree policy-makers are *responsive* to civil society's concerns.

What does this mean for the potential democratization of global governance and the role that civil society presumably should play in it? In the case of the WTO, there is no give-and-take of reasons between civil society representatives and government officials. Hence, the preconditions to mitigate the organization's democratic deficit have not yet been met. CSOs only have a very limited chance to affect the formulation of policy proposals, and, in fact, many of them do not even aspire to do so. They prefer to focus their activities on generating and disseminating knowledge on internal WTO processes, and see their role as one of making the general public more aware of (and more sensitive to) the manifold consequences that WTO policies have on the lives of people all over the world.

Notes

1. Ulrike Ehling's research for the paper on which this chapter is based was funded by the European Commission, Contract no. CIT1-CT-2004-506392, Integrated Project NEWGOV. For more information on NEWGOV, see http://www.eu-newgov.org. The authors are indebted to Leo Maier for helpful comments on an earlier version of this chapter.
2. The Draft Charter is included in the Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, London, October 1946, UN Doc. E/PC/T/33 (1946).
3. See Havana Charter for an International Trade Organization, Art. 87, Paragraph 2, UN Doc. E/Conf.2/78, 24 March 1948, published in: *United Nations Conference on Trade and Employment, Final Act and Related Documents*, Havana (1948).
4. See WTO Doc. WT/L/162, 23 July 1996.
5. Ibid., para. IV. See, also, para. II of the declaration, in which '[m]embers recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs'.
6. See 'Procedures for the Circulation and Derestriction of WTO Documents,' WTO Doc. WT/L/452, 16 May 2002.

7. Ibid., paras 1 and 3. For the derestriction of minutes of meetings, see ibid., para. 2(c).
8. WTO Doc. WT/L/162, 23 July 1996, para. VI.
9. In 2005, for example, the programme listed 21 government representatives among 150 speakers. Some speakers, however, among them several ambassadors, cancelled their attendance at short notice. Source: http://www.wto.org/english/news_e/events_e/symp05_e/symposium_2005_e.htm (accessed 3 January 2006).
10. This controversy is focused, inter alia, on the interpretation of the 'Understanding on Rules and Procedures Governing the Settlement of Disputes,' which is Annex 2 to the 'WTO Agreement (DSU),' and the 'Working Procedures for Appellate Review' (WTO Doc. WT/AB/WP/7, 1 May 2003); see Appleton 2000; Howse 2003; Mavroidis 2002.
11. For a discussion by the Appellate Body on the admissibility of briefings from non-governmental actors to the Dispute Settlement Panel, see 'United States – Import Prohibition of Certain Shrimp and Shrimp Products,' Report of the Appellate Body, WTO Doc. WT/DS58/AB/R, 12 October 1998, para. 104–10. For the right of the Appellate Body to receive and consider such briefs, see 'United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,' Report of the Appellate Body, WTO Doc. WT/DS138/AB/R, 10 May 2000, para. 42; and 'European Communities – Trade Description of Sardines,' Report of the Appellate Body, WTO Doc. WT/DS231/AB/R, 26 September 2002, para. 164. In the asbestos case, which was of great interest to environmental CSOs, the Appellate Body even devised an ad hoc Special Procedure, setting out modalities for the submission of amicus curiae briefs (without considering any of them in the end); see 'European Communities – Measures Affecting Asbestos and Asbestos-Containing Products,' Communication from the Appellate Body, WTO Doc. WT/DS135/9, 8 November 2000.
12. For the Codex Alimentarius Commission as the relevant standard-setting organization, see Boutrif 2003; Merkle 2001. For the interaction between the various organizations and regimes involved in the process of GMO regulation, see Raustiala and Victor 2004.
13. See, also, 'The Global Voice for Consumers. 2004 Annual Report,' Consumer International 2004, pointing to the fact that the TABD was explicitly invited to the 2004 EU–US summit, whereas the TACD was not.
14. After an initial optimism that the WTO would balance trade and non-trade interests, several CSOs deliberatively chose not to engage in dialogue with the WTO, in general, see Andretta et al. 2002: 188. Inter alia, they had been disappointed by the institutionalization of committees dealing with linkage issues such as trade and development (CTD) or trade and environment (CTE), which they found to be acts of symbolic politics in the end, see Ehling forthcoming.
15. For examples on the interaction between research and activist CSOs, see Aaronson 2001: 149, and interview with a research CSO, November 2005.
16. Discussions on observer status have been especially contentious in sessions of the CTE. According to the Secretariat, it would be 'inappropriate to allow NGOs to participate directly as observers in the proceedings of the CTE [as] the primary responsibility for informing the public and establishing relations with NGOs lies at the national level' (WTO Trade and Environment Division,

'Trade and Environment at the WTO,' Geneva: WTO Secretariat, 2004: 45). For the question of observer status in general, see von Moltke 2002.

17. Discussions on the issue in the SPS-Committee were suspended once formal consultations under the DSB were requested.
18. As early as 1997, Canada complained about the non-notification of technical regulations relating to GMOs by the EC in the TBT-Committee, see WTO Docs G/TBT/M/8, 20 June 1997 and G/TBTR/M/10, 3 October 1997. For the general peak of the debate on GMOs in this Committee, see WTO Docs G/TBT/M/21–7 and 32–4.
19. The USA, Canada and Argentina (all parties to the GMO dispute) questioned whether the European labelling system was really to benefit consumers or whether it was only a discriminatory barrier to trade, whereas the EU, Switzerland and Norway found the labelling systems 'to inspire consumer confidence in new products and technology,' see WTO Doc. G/TBT/M/16, 11 June 1999, para. 35.
20. WTO Doc. G/TBTM/13, 15 September 1998, para. 27. See also WTO Docs G/TBT/M/26, 15 March 2002, para. 27 and G/TBT/M/32, 23 March 2004, para. 69.
21. See WTO Docs G/SPS/R/26, 19–21 March 2002, para. 33 and G/SPS/R/27, 25–26 June 2002, para. 21.
22. See, for example, WTO Doc. G/TBT/M/26 15 March 2002, para. 65; for the quote, G/TBT/M/33, 1 July 2004, para. 74.
23. Canada and the USA were in particular in favour of this idea. Discussions on the issue had a peak in 2001 and 2002, see WTO Doc. G/TBT/M/17, 1 October 1999, para. 30; G/TBT/M/23, 30 March 2001, paras 29–34; G/TBT/M/25, 9 October 2001, paras 5–8; G/TBT/M/26 as well as G/TBT/W/134.
24. Some of the long-term delegates to the WTO have their Geneva-based 'pet NGOs,' which they supply with up to date, and sometimes confidential, information. This information is then circulated to other stakeholders via several means – among them are monthly newsletters or weekly briefings. Their aim is to highlight questions of concern, but they do not try to alter the WTO's agenda.
25. See, for the procedure of the Hong Kong Ministerial Conference, WT/MIN(05)/INF6, 1 June 2005.
26. Interview with a national delegate, November 2005.
27. Friends of the Earth Europe (FoEE) initiated the 'Bite Back – WTO Hands Off Our Food!' campaign. Some 730 groups worldwide support it. Central to the campaign is a citizens' objection, which was agreed upon by several initiating environmental CSOs. Trades unions, farmer associations, consumer groups and environmental CSOs support the consensus document. According to their own record, the CSOs participating in the campaign represent 55 million consumers, 130,000 individuals having additionally signed the objection. For more details, see http://www.bite-back.org (accessed 20 June 2005). Other CSO networks – such as Consumers International (CI), a global non-profit federation of 250 consumer organizations with observer status to several international institutions – also campaign on GMOs and try to influence standard setting. For more information on the 'Consumers Say No to GMOs' campaign, see http://www.consumersinternational. org/Templates/ News.asp?NodeID=89677&int1stParentNodeID=89650 (accessed 19 August 2005).

28. Stakeholders organize preparatory meetings in order to identify whether public interest and academic CSOs have similar objectives on their agenda. They fear the danger of dispersion; that is, presenting too many opinions that, in the end, do not result in having any serious impact. The General Council of Peoples, for example, brought stakeholders together before the Hong Kong Ministerial meeting, see http://www.omc-wto.org (accessed 15 July 2005).
29. It has to be pointed out that media – as CSOs – can only attend briefings by WTO Secretariat members or national delegations. Hence, their knowledge of what is happening behind the doors is also limited.
30. Interview with Geneva based CSOs, July and November 2005.
31. US General Accounting Office (GAO) (2001) 'International Trade, Concerns of Biotechnology Challenge US Agricultural Exports,' Reporting to the Ranking Minority Member, Committee on Finance, US Senate, GAO-01-727: 24.
32. In this particular case, negotiations on the Biosafety Protocol that were taking place in parallel might also be an explaining factor. The US government was opposed to the Protocol and tried to shift negotiations to a forum more in favour of the new technology – interview with a national delegate, November 2005.
33. To a limited extent, for example, the European Commission includes both business and non-business associations in delegations, whereas at the national level the practice varies. Additionally, particularly public interest CSOs may turn down the opportunity to join delegations in fear of their independence and credibility, interview with a national delegate, November 2005. As there is no formalized rule on the composition of delegations, the UK NGO Trade Network submitted an NGO position paper to the WTO in the advance of the Doha Ministerial in 2001 on the diplomatic and political means to send a CSO representative with a national delegation, see http://www.wto.org/english/forums_e/ngo_e/posp19_e.htm
34. See 'European Communities – Measures Affecting the Approval and Marketing of Biotech Products,' WTO Docs WT/DS291 (US), WT/DS292 (Canada) and WT/DS293 (Argentina), 13 May 2004. For the legal arguments, see also Howse and Mavroidis 2000.
35. For the briefs, see http://www.trade-environment.org/page/theme/tewto/biotechcase.htm (accessed 10 July 2005).
36. This could be explained by the fact that companies do not feel their interests to be undermined in WTO disputes, as governments usually have an interest in improving conditions for national companies and tend to argue in their favour.
37. As part of the Bite-Back campaign, CSOs tried to submit a petition directly to the WTO Director General.
38. Among very few CSOs, Consumers International held a workshop on consumer interests with WTO Appellate Body members.
39. Seats for a closed circuit broadcast of the panels' hearings in a separate viewing room were granted to the public and WTO members, see the Communication from the chairman, WTO Docs WT/DS320/8 and WT/DS321/8, 2 August 2005. Members of the WTO Secretariat share the opinion that this will be the first step to open hearings to the public on a regular basis – interviews with WTO Secretariat members, August 2005.

40. Interview with research CSO, Geneva, July 2005.
41. Interview with research CSO, Geneva, July 2005.
42. Consumers International has organized briefings at the WTO and events with national delegates, see 'The Global Voice for Consumers. 2004 Annual Report,' Consumer International, 2004: 12.
43. Interview with business CSO, Geneva, August 2005.
44. In years of ministerial meetings, the number of position papers more than doubled: 2003 (Cancún): 117; 2001(Doha): 86; 1999 (Seattle): 115; whereas only 42 papers were received in 2004, 45 in 2002, and 30 in 2000.
45. Members in the Informal Business Advisory Body are: the Chairman of the International Chamber of Commerce (ICC), the President of the International Organization of Employers (IOE), the President of the World Business Council of Sustainable Development (WBCSD), the President of the Union of Industrial and Employer's Confederation of Europe (UNICE), the Vice Chairman of Nippon Keidanren, the Chairman of the United States Council for International Business (USCIB), the Chairman of the Evian Group, the Chairman of the First Eastern Investment Group, the Chairman and Managing Director of Bajaj Auto Ltd, the Chairman of the Brisdas Corporation, the Chairman of Anglovaal Mining, the Chairman of the Tongaat-Hulett Group, and the CEO of the China Netcom Corporation Ltd.

    Members in the Informal NGO Advisory Body are: an adjunct associate of the Center of Concern, the Director-General of Consumers International (CI), the Secretary-General of the Consumer Unity and Trust Society (CUTS), the President of the International Federation of Agricultural Producers (IFAP), a representative of the World Wide Fund for Nature International (WWF), the Director of the Third World Network (TWN), the Director of Christian Aid, the Secretary General of the International Confederation of Free Trade Unions (ICFTU), the General Secretary of the Public Services International (PSI), the Executive Director of the International Centre for Trade and Sustainable Development (ICTSD) and the President and CEO of the International Institute for Sustainable Development (IISD). Several public interest CSOs did not want to join these bodies, among them Oxfam International and Friends of the Earth International.
46. Doubts about the immediate relevance of discussions in those bodies were also raised in an interview with a business CSO, November 2005.

6

Civil Society Participation in International Security Organizations: The Cases of NATO and the OSCE

Peter Mayer[1]

The field of international security involves the highest stakes and is almost coterminous with 'high politics'. Here, we expect states to call the shots, international institutions to enjoy very little autonomy and non-state actors to play hardly any role at all (Rittberger et al. 1999: 120). The reasons are evident: where the physical survival of states and societies is at stake and errors may be fatal, mistrust among governments is widespread and asymmetries of information are regarded as vital resources that are anxiously protected (Lipson 1984). Although states sometimes disclose facts relevant to their security to other states, including adversaries, in order to manage alliance and other security dilemmas (Downs et al. 1986; Jervis 1978; Snyder 1984), they face strong incentives to maintain tight control over the flow of information and also to uphold a high level of secrecy vis-à-vis third parties, who might intentionally or unintentionally weaken their strategic position by spreading sensitive information. As a consequence, international security is a 'least-likely case' for the hypothesis that international organizations increasingly open up to non-governmental organizations (NGOs)[2] providing them with opportunities for meaningful participation in policy-making. States and the international institutions they use as instruments for promoting their security interests cannot afford to share information – let alone power – with organizations that are typically unconstrained by considerations of national, or alliance, interest due to their transnational character and their idealist agenda, giving pride of place to the promotion of human rights and other cosmopolitan values.

This traditional, realist-inspired picture of the – less than marginal – role of NGOs in the co-operative production of international security is not altogether wrong, but it is incomplete. Indeed, at least when it comes to security, the variable 'issue area' (Vasquez and Mansbach 1984) is a poor predictor for the extent of civil society participation in international governmental organizations (IOs). This becomes apparent when we look at two prominent transatlantic security organizations:[3] the North Atlantic Treaty Organization (NATO) and the Organization for Cooperation and Security in Europe (OSCE). Both organizations are products of the Cold War and continue to play important roles for European and transatlantic security (and beyond), although their very success in helping to bring about the demise of the East–West confrontation called into question their raison d'être in the early 1990s. As a result, both organizations underwent a period of uncertainty and far-reaching functional and institutional adaptation (Peters 1997; Theiler 1997). Both organizations now endorse a broadened concept of security, which goes beyond traditional concerns with military 'threats' emerging from other states or alliances to include attention to political, economic or environmental 'risks' to the integrity and wellbeing of societies and individuals that originate in the policies of both state and non-state actors (Buzan 1997). Yet, they could hardly be more different when it comes to the opportunities for NGOs to participate in their operation and policy-making: while NATO seems to conform perfectly well to the traditional picture, closing itself off to any meaningful NGO participation, the OSCE offers ample and dependable opportunities for NGOs – indeed encourages them – to feed in their expertise, interpretations and concerns regarding issues relevant to the organization's mandate, and also co-operates closely with NGOs in the field.

As Steffek and Nanz argue in Chapter 1 of this volume, this difference is potentially significant from a normative point of view. In general, governance through IOs tends to undermine democratic self-determination by diminishing the influence of elected parliaments, which are by-passed or confronted with 'take-it-or-leave-it' choices. Security governance, in particular, is not only about the 'technical' or 'politically neutral' provision of a collective good; it is also about the joint exercise of political authority and the production of binding decisions which have the potential to deeply affect the wellbeing of numerous individuals, only some of whom could (however indirectly and marginally) influence those decisions through formal democratic procedures such as voting. Meanwhile, whether or not there is a 'democratic deficit' in global governance is not merely an empirical question, but also depends on the

presupposed theory of democracy. According to an important strand in contemporary political philosophy, the essence of democratic decision-making is collective choice flowing from 'free, informed, and inclusive deliberation' about issues of public concern. As a result, providing a plurality of NGOs with institutionalized access to the preparation, making and implementation of political decisions within IOs, including the extensive opportunity to influence these decisions by making suggestions and expounding arguments of their own, might decisively augment the democratic legitimacy of global governance. At a minimum, as Steffek and Nanz point out, NGOs might operate as a kind of 'transmission belt' between IOs on the one hand and stakeholders on the other, providing decision-makers with first-hand knowledge of the concerns and views of citizens worldwide and, at the same time, making international political processes more transparent to the public, allowing the individuals and groups potentially affected by these processes to form rational opinions about the issues in the first place.[4]

In this chapter, I flesh out the differences between NATO and the OSCE with respect to the inclusion of NGOs using a set of categories that have been devised to measure the democratic impact of civil society participation in international institutions (Chapter 1 in this volume). In particular, I will look at a set of indicators informing on (i) the formal recognition by the security organizations of NGOs; (ii) the consultation of NGOs in the organizations' policy-making; (iii) the role of NGOs in the implementation of organizational policies; and (iv) the transparency to NGOs of the decision-making processes of the organizations. Access to deliberation (as measured by the first three indicators)[5] and transparency of decision-making are indispensable preconditions for the ability of NGOs to alleviate the 'democratic deficit' of global governance (including security governance) and, therefore, deserve close scrutiny. To be sure, even high levels of access and transparency do not guarantee democratic governance at the international level. The responsiveness of member states and bureaucracies of IOs may be low: that is, they may fail to contemplate NGO arguments seriously, in particular where they clash with pre-defined preferences and established practices of the organization; or the NGOs themselves may prove incapable of playing their part in a deliberative institutional setting by failing to include the concerns and points of view of marginalized, usually non-Western, stakeholders (Chapter 1 in this volume by Steffek and Nanz). There is, however, a strong pragmatic case for first addressing the criteria of access and transparency. As opposed to responsiveness and inclusion, the assessment of which is fraught with conceptual and empirical difficulties

and therefore goes well beyond the confines of this chapter, they are comparatively easy to measure. At the same time, being necessary conditions for deliberative democracy at the international level, they may ground a negative judgement on the democratic quality of the governance arrangement under study. If either access or transparency is not provided for, the IO is seriously deficient by the standards of deliberative democratic theory.

In the concluding section of this chapter, I briefly address the empirical puzzle outlined above. How can we account for the striking differences in terms of openness to NGOs – and, hence, at least potentially of democratic performance – that exist between NATO and the OSCE or, for that matter, among other IOs, some of which are analysed in this volume? I argue that a rationalist explanation operating in terms of the functions and resources of the organizations involved provides a plausible 'first cut' at this problem. According to this 'resource exchange' perspective, differences in the tasks that IOs face and the capabilities they are endowed with translate into an unequal demand on the part of these IOs for resources controlled by NGOs, such as legitimacy, knowledge and personnel. As a consequence, NGOs are variably able to 'trade' such resources for meaningful participation in the policy-making of these organizations.

NATO and organized civil society

In the past 15 years, NATO, the world's most powerful political and military alliance, has undergone significant changes to meet the challenges posed by the end of the Cold War. In the process, it has opened up to former enemies and increased the transparency of its military rules and practices. So far, these changes have had no perceptible impact on its relationship with NGOs, however. Acting in this regard as a traditional security organization, NATO keeps organized civil society at a distance, providing NGOs with no opportunities for meaningful and regularized participation in its policy-making. In this section, I first review the most important purposes and institutional features of NATO and then go on to address its relationship with NGOs.

Functions, institutional attributes and decision-making arrangements of NATO

NATO was established through the Washington Treaty in 1949. The original members were Belgium, Canada, Denmark, Iceland, Italy,

France, Luxembourg, the Netherlands, Norway, Portugal, the UK and the USA. Throughout the Cold War, NATO's primary purpose was to deter a Soviet attack on the territory of any of its members by a promise of mutual support in the event of aggression and by joint efforts in peace time to prepare for effective common defence should deterrence fail. From the point of view of the European members, who were joined in 1952 by Greece and Turkey, the transatlantic co-operation in NATO was of vital importance both for ensuring US commitment to Western European security and for making the American security guarantee credible in the eyes of potential enemies. At the same time, NATO served as a kind of insurance against the re-emergence of the German threat. Thus, in the famous words of its first Secretary-General, Lord Ismay, NATO was set up 'to keep the Russians out, the Americans in, and the Germans down' (quoted in Wallander and Keohane 1999: 41). The Korean War (1950–53) prompted NATO members to deepen security co-operation, including the permanent deployment of American and British troops in Europe. Another lesson learned was that, without a German military contribution, the continent was unlikely to be successfully defended against a Soviet attack, paving the way to the re-armament of West Germany and its accession to NATO in 1955. As a result, NATO, although first and foremost a political and military alliance directed against a common external threat, to some extent served as, and developed features of, an inwardly looking 'security management institution' intended to foster trust among its members by increasing transparency and generating practices of consultation and collaboration (Tuschhoff 1999; Wallander and Keohane 1999).[6]

Another striking characteristic that sets NATO apart from most other alliances in history is the complex institutional structure it has developed over the years in order to fulfil its mission (NATO 2001). Initially little more than a loose 'alignment', NATO, which is headquartered at Brussels (Belgium), gradually turned into a large organization including both a political and a military component, each with its own supranational bureaucracy. The supreme decision-making body is the intergovernmental North Atlantic Council (NAC). Decisions are taken invariably by consensus. The NAC convenes at different levels, although this does not affect the authority of its deliberations and declarations. On a routine basis, at least weekly, permanent representatives of the member states meet to discuss and to decide upon issues relevant to the alliance's goals and policies. Only twice a year, their seats are taken by the ministers of defence, the foreign secretaries or the heads of state or government. The NAC is complemented by the Defense Planning

Committee (DPC) and the Nuclear Planning Group (NPG) – two military-political institutions, in which France does not participate[7] – and is supported by a multitude of subordinate committees and working groups dealing with political, economic, technical and other issues such as (dis-)armament, non-proliferation, infrastructure, standardization or finance.

Meetings of the NAC are chaired by the Secretary-General, who also heads NATO's integrated (civilian) International Staff and speaks for the alliance in public. The high-level political institutions NAC, DCP and NPG instruct and receive advice from the Military Committee (MC), the highest military body of the alliance, which is composed of the members' Chiefs of Defence or their permanent representatives. Just as the International Staff gives administrative support to the political institutions, the MC is assisted by an integrated International Military Staff, which prepares its meetings and implements its decisions. Another institutional asset of NATO is its integrated military structure; that is, members temporarily or conditionally assign troops to NATO commanders enabling joint exercises and building capacity for collective action ('interoperability'), set up multinational units, host NATO headquarters and agree to the deployment of foreign troops on their territory.[8]

The end of the Cold War and the dissolution of the Soviet Union raised doubts about NATO's future. In particular, realists were quick to predict the demise of the alliance (Mearsheimer 1990; Waltz 1993). However, NATO did survive and managed to adapt to the new security environment increasingly characterized by multiple and diffuse risks emanating from diverse sources – such as state failure, ethnic strife, rogue states or terrorism – rather than concrete threats posed by a given opponent.[9] Since 1990, NATO has transformed by acquiring additional functions and creating new political and military institutions (Dembinski 2002; Theiler 1997). While the commitment to collective defence and mutual support against external threats that may (re-)emerge in the future is still in place, the focus of military activity has shifted to out-of-area (non-Article 5) crisis management, including peace keeping and peace enforcement as in the former Yugoslavia. Partly foreshadowing and partly reflecting these changes, NATO overhauled its military strategy in two instalments at the beginning and at the end of the 1990s. Moreover, the alliance redeployed, restructured and substantially reduced its conventional and nuclear forces, and it introduced new concepts, such as the Combined Joined Task Forces (CJTF),[10] and new instruments, such as the NATO Rapid Force, in order to upgrade its ability to respond immediately, flexibly and effectively to contingencies that may arise at its periphery.

A second new function, which was linked to the first, was the exportation of stability to the East and, to a lesser extent, to the South of the alliance by creating new arrangements for security co-operation, including both forums for political dialogue and mechanisms for practical military collaboration. Political institutions for consultation and discussion of a wide range of security issues – ranging from arms control and non-proliferation to terrorism and disaster relief – include the North Atlantic Cooperation Council (NACC) (initiated in 1991) and its successor, the Euro-Atlantic Cooperation Council (EACC) (established six years later), as well as special arrangements with Russia and the Ukraine. Military co-operation between members and 'partners' (non-members) is organized through the Partnership for Peace (PfP) programme launched in 1994, which covers areas such as preparation for joint peace operations or various aspects of civil–military relations (including democratic control of the forces). Finally, since 1999 several Eastern European countries (including three former republics of the Soviet Union) have joined NATO as full members – indicating that membership still matters, even though partner countries have been deeply involved in the daily work of the organization through institutions and practices such as the EACC and PfP. For one thing, decisions about NATO policies including military action (such as the intervention in Kosovo) are still made exclusively by the NAC; for another, the collective defence commitment of Article 5 is restricted to member states. Thus, while NATO has moved closer to the ideal-type of a 'security management institution' in recent years, it has not relinquished its identity as a political and military alliance.[11]

Arrangements for NGO participation in NATO

The story of institutionalized NGO involvement in NATO policy-planning, policy-making, and policy implementation is quickly told: there has been none so far. NATO officials meet from time to time with representatives of selected NGOs – including Amnesty International, Human Rights Watch and the International Crisis Group – for informal exchanges of views. At least once, within recent years, NATO invited a group of NGOs active in humanitarian assistance and civil reconstruction in the Balkans and Afghanistan for a two-day conference at its headquarters.[12] But such sporadic contacts clearly fall short of an institutionalized consultative relationship. Hence, although in the 1990s there was much talk about 'opening NATO's door' (Asmus 2002), this door, while opened to new member states and partner countries from

the East and the South, was kept closed for NGOs. Likewise, when NATO bodies debated the limits of consultation, participation, and co-decision with and by outside actors, they did so with regard to Russia and not Greenpeace or Médicins Sans Frontières.

An important precondition of meaningful participation is *transparency* of the policy-making process in the organization in question. In order for NGOs to bring their views and arguments to bear in deliberations, they need to know what the issues are, what options are discussed, how proponents defend them and which agreements are ultimately reached. In particular, they should be given access to background papers produced by the IO or member states delineating and evaluating possible courses of action, as well as to negotiating texts or draft resolutions to which they may then respond. NATO provides no such information to the public – and NGOs do not enjoy any privileges in this regard. This, of course, does not mean that NATO makes no efforts to inform on its mission, structure, procedures and so on (NATO 2001). In fact, its website provides easy access to 'most public NATO documents'[13] including basic texts such as the North Atlantic Treaty and other agreements, summit declarations and decisions, or speeches by the Secretary-General and other NATO officials. However, this begs the question as to how large the share of documents is that is not intended for the public. There are some indications that NATO has become more willing in recent years to make publicly available information that would have been classified as secret in earlier times. Notably, the Strategic Concepts of 1991 and 1999 were the first NATO strategy documents to be published since the founding of the alliance. Nevertheless, until the present day, the secrecy policy of NATO appears to be highly restrictive and persistently shaped by the legacy of the Cold War. This point is hard to prove, though, because NATO refuses to disclose the rules that define its confidentiality practices, even though the official document stating these rules is not formally classified.[14] In other words, NATO claims the right to 'second-order secrecy' (secrecy about the principles guiding secrecy) – a claim that stands in need of special justification, even if withholding sensitive political or military information from the public ('first-order secrecy') is granted as legitimate under certain conditions. As critics point out, this policy does not only compromise the democratic accountability of NATO: since member governments are likewise bound by these rules, they have negative repercussions on domestic democracy as well (Roberts 2002/2003).

Moreover, NATO does not provide NGOs with *access* to deliberation. NGOs are not allowed to attend meetings of the NAC or its committees;

they are not entitled to extend the agenda of NATO bodies by items they consider worth debating or to seek to influence NATO consultations by providing participating officials and representatives with their own documentation. NGO representatives do not have access to NATO premises and so are deprived of the opportunity to lobby state representatives and NATO staff members directly. NATO has not established an accreditation procedure for NGOs. Nor has it created a special division or bureau responsible for maintaining ties with NGOs. There is, however, a liaison office for the Interallied Confederation of Reserve Officers (*Conféderation Interalliée des Officiers de Réserve* – CIOR), which is described in the *NATO Handbook* as a 'non-political, non-governmental, non-profit-making' organization, whose 'principal objectives include working to support the policies of NATO and to assist in the achievement of the Alliance's objectives' (NATO 2001: 384). Consequently, the CIOR hardly qualifies as a civil society organization in the sense of this volume: rather than acting as an independent and critical counterpart to NATO, it serves – however voluntarily – as an instrument of the organization.

The same holds for the Association of Atlantic Treaty Organizations (ATA), another non-governmental organization that is closely linked to NATO. According to the *NATO Handbook*, the ATA is an umbrella organization bringing together 'national voluntary and non-governmental organisations in each of the Alliance's 19 member states to support the activities of NATO and promote the objectives of the North Atlantic Treaty' (NATO 2001: 378). Only one association in each country is entitled to membership in the ATA (which, for several years, has also been accepting associations from partner countries as associate or observer members). Leadership of the national member organizations usually consists of political and military elites, such as members of parliament and high-ranking officers. Thus, the ATA and its members are clearly not grass-roots organizations seeking to give voice to ordinary citizens or specific stakeholders. Rather, they should be seen as part of NATO's public diplomacy efforts aiming to reinforce societal understanding and support for its mission and policies.

There is a certain amount of co-operation in policy implementation, when NATO engages in crisis management or post-conflict peace building such as in the former Yugoslavia or Afghanistan and its commanders and troops meet humanitarian and developmental NGOs in the field. In such situations, both military and civil society actors have incentives to seek a minimum of co-ordination by exchanging limited information about the activities each side intends to undertake in the near future

('deconfliction'). However, such co-operation – which is hampered by divergent attitudes, roles, modes of operation and organizational cultures – is largely ad hoc and does not reflect agreed upon principles and procedures or joint advance planning. In NATO circles, the need for improved co-ordination with civil actors (including NGOs) in complex peace missions is now increasingly recognized (Ganser 2007), and the above-mentioned conference at NATO headquarters may be seen as evidence of this. But, up to this point, such advances are few and far between and it is unclear whether they herald the beginning of a process that leads NATO eventually to recognize NGOs as legitimate interlocutors who deserve to be listened to when NATO bodies consider and select policy options.[15]

The OSCE and organized civil society

Emerging from the Conference on Security and Cooperation in Europe (CSCE), the OSCE is a regional arrangement according to Article 52 of the United Nations Charter 'dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action'. It has also been characterized as a 'cooperative security institution' to mark the fact that its members have chosen to exclude peace enforcement from its purview (Peters 1997). Encompassing all European states, the successor states of the Soviet Union as well as Canada and the USA, the OSCE is the largest regional security organization worldwide, currently with 56 participating states. The OSCE's relationship with NGOs is a special one for several reasons. During the Cold War, the CSCE helped civil rights groups to form and to survive in communist states by providing them with international legitimacy (Brett 1994: 359) – groups that contributed to the collapse of real existing socialism and thus indirectly to the breakdown of the political underpinnings of the CSCE (Thomas 2001). The OSCE is committed to an approach to security that highlights the importance of liberal democracy as a foundation for peace and therefore actively promotes the formation of a strong civil society in its member states (in particular, those in transition from communist rule) (Flynn and Farrell 1999). Finally, the OSCE arguably provides NGOs with more extensive opportunities for participation than any other security organization (Tudyka 1997: 97). As a result, NGOs can operate to some extent as the normatively desired 'transmission belt' between international policymakers and the citizenry envisioned by Steffek and Nanz. In the words of a Czechoslovakian diplomat, NGOs are appreciated 'as a link between

the realities of life and the process of international negotiations and standard setting, as a source of information and necessary feedback' (quoted in Brett 1994: 369). In the following section, I describe the arrangements for civil society consultation within the OSCE against the background of the evolving functions and institutional structures of the organization.

Functions, institutional attributes, and decision-making arrangements of the OSCE

Both a product and an promoter of détente, the CSCE, which brought together the members of NATO and the Warsaw Pact as well as most neutral and non-aligned states in Europe, was convened in 1973 to negotiate a set of mutually acceptable rules of the game for the peaceful management of the East–West conflict. These rules were laid down in the Helsinki Final Act of 1975, which reflected a complex package deal establishing and confirming principles for appropriate state conduct in the issue areas of political and military relations (basket I); economic, scientific and environmental co-operation (basket II); and human rights and humanitarian affairs (basket III). Thus, the CSCE was based on a wide conception of security right from the beginning. Since the participants agreed to continue their dialogue at so-called 'follow-up conferences', with the mandate to review the progress achieved on the implementation of these obligations and to add or clarify standards of behaviour, the CSCE turned into a 'process'. This regime provided the participating states with a forum for consultation and negotiation that proved most valuable when a 'Second Cold War' (Halliday 1983) put an end to détente in the early 1980s.

With the end of the East–West confrontation, the political and ideological environment of the CSCE changed radically. Once set up to deal with a situation marked by deep disagreement about the nature of legitimate political and economic order, the CSCE was now composed of states that shared the commitment to the principles, values and ideational underpinnings of liberalism; that is, they accepted the normative superiority of human rights, pluralist democracy, the rule of law and market economy as well as the idea that these domestic institutions are linked to international peace (Fukuyama 1989). Thus, in the 'Charter of Paris for a New Europe' of November 1990, the former adversaries not only solemnly declared the end of their long-lasting antagonism, they also expressed their conviction 'that in order to strengthen peace and security among our States, the advancement of democracy, and respect

for and effective exercise of human rights, are indispensable'.[16] This new consensus about basic political values notwithstanding, the participating states did not come to regard the CSCE as obsolete and redundant. Even under the new conditions, pan-European security co-operation remained important for several reasons. Although democratic rule, effective human rights and welfare based on a viable market economy were now general aspirations, it would take an unknown amount of time for them to be put into practice throughout the region. Moreover, the transition to societies based on political and economic freedom generated new insecurity and a significant potential for domestic as well as inter-state conflict by encouraging secessionist movements and increasing economic inequality and, as a result, political instability (Mansfield and Snyder 1996). Hence, international collaboration continued to be desirable, both for speeding up the process of democratization and for managing the risks involved in this process.

If the new agreement on political and economic essentials did not remove the demand for effective security co-operation, it certainly made it easier for states to meet this demand by engaging in extensive institutional reform (Rittberger and Zürn 1990). In a series of historic meetings between 1989 and 1992, and driven by alarming events such as escalating crisis in Yugoslavia, the participating states of the CSCE not only agreed on various amendments, re-interpretations and refinements of the code of conduct they had created in the Cold War period, they also established a set of institutions to enable the CSCE – or, as it was now called, the OSCE[17] – to fulfil the security functions regarded as vital for meeting the challenges of the new era. While many of the key attributes of the former CSCE remained in place – such as the underlying broad concept of security reflected in the three 'baskets' (now usually called 'dimensions' or 'activities') – and the OSCE continued to serve as a forum for consultation and negotiation, important operative tasks were added to its purview: dispute settlement, confidence building, early warning and conflict prevention, peace keeping, facilitating economic and environmental co-operation, promotion of human rights, assistance in legal reform, protection of minorities, and the advancement of democracy were now part and parcel of the OSCE's mission (Peters 1996; 1997; Flynn and Farrell 1999: 514–23).

The institutional arrangement entrusted with these tasks is complex and includes political, administrative, parliamentary, judicial and other components (Evers et al. 2005, ch. 5; Schlotter 2002; Tudyka 1997).[18] Negotiation and decision-making takes place in several hierarchically ordered bodies. Summits of the heads of state or government, the latest

of which was convened in Istanbul in 1999, define the goals, priorities and responsibilities of the OSCE and decide upon changes in its institutional make-up. They are preceded by more extensive review meetings, which continue the stocktaking and norm-developing functions of the former follow-up conferences. The central decision-making body in the period between two summits is the Ministerial Council (MC), composed of the OSCE ministers of foreign affairs: the MC, which meets once a year, governs the activities of the OSCE organs and institutions. Finally, the OSCE ambassadors at Vienna meet at least once a week in the Permanent Council (PC) – the 'main regular decision-making body'[19] of the OSCE – to debate and publish declarations relating to current issues of concern to the OSCE and also to take decisions on operative measures, such as the establishment of observer 'missions of long duration' in OSCE countries. The PC is complemented by the Economic Forum and the Forum for Security Cooperation bearing special responsibilities for economic and military aspects of security. Decisions in these bodies require consensus, although in some areas this rule is suspended permitting decisions against the will of individual members (excluding action on the territory of the dissenting state).

The MC annually appoints one of its members the Chairman-in-Office (CiO) of the OSCE. The CiO is the highest executive organ as well as the formal representative of the OSCE. The CiO, who (or whose representative) chairs the PC, shapes the current agenda of the OSCE and is responsible for co-ordinating the work of its institutions. The CiO can take action in the areas of conflict prevention or crisis management by putting together ad hoc steering groups or nominating and dispatching personal representatives with a specific mandate. The CiO is assisted by the Secretary-General, the head of the OSCE secretariat in Vienna. The secretariat includes the Conflict Prevention Centre (CPC), which implements and provides administrative support to the OSCE's long-term observer and fact-finding missions active in the fields of early warning, conflict prevention, peacekeeping and post-conflict peace building. Operative institutions of the OSCE that report to the CiO and the PC and receive support from the secretariat include the Office for Democratic Institutions and Human Rights (ODIHR) in Warsaw, the High Commissioner on National Minorities (HCNM) based in The Hague and the Representative on Freedom of the Media in Vienna.

While the HCNM is an instrument of impartial preventive diplomacy to help avoid minority issues escalating into threats to international peace rather than a protector of group rights, the ODIHR is the organizational unit in charge of the so-called human dimension of security. Its

tasks include the promotion of democracy, the rule of law and respect for human rights throughout the OSCE region, although the focus of its activities is on Eastern Europe and the former Soviet republics. The office engages in the observation, and sometimes even the organization, of elections and provides technical assistance in support of democratic and legal reform. In addition, it monitors member states' compliance with the obligations they have undertaken as part of the human dimension of the OSCE. For this purpose, it collects and disseminates information by organizing seminars, conferences and expert meetings. As part of its democratization mission, the ODIHR seeks to strengthen civil society in post-communist states and maintains close ties with local NGOs, especially in the context of OSCE missions of long duration.

Arrangements for NGO participation in the OSCE

The years between 1989 and 1992 were not only the period in which the 'institutionalization' of the OSCE took place; the organization's relationship with NGOs was redefined as well (Brett 1994; Grönick 1993). Up to this point, the CSCE had provided (an often precarious) legitimacy to NGOs. The prime beneficiaries were groups in socialist countries such as 'Charter 77' in Czechoslovakia, which had the courage to insist on the 'respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief' as acknowledged in Principle VII of the Helsinki Final Act.[20] Now, it gradually opened up to both local and international NGOs, and invited them to participate in its proceedings (Tudyka 2002). Thus, in the 'Charter of Paris' the member states declared:

> We recall the major role that non-governmental organizations, religious and other groups and individuals have played in the achievement of the objectives of the CSCE and will further facilitate their activities for the implementation of the CSCE commitments by the participating States. These organizations, groups and individuals must be involved in an appropriate way in the activities and new structures of the CSCE in order to fulfil their important tasks.[21]

Most of the basic rules structuring this 'involvement' were negotiated in the following two years and given authoritative expression in chapter IV, sections 14–16 of the final document of the 1992 Helsinki summit 'The Challenge of Change'. With some minor modifications this normative framework for OSCE–NGO relations is still in place today.[22]

These rules provide NGOs with broad, though not unlimited *access* to the OSCE's policy-making and policy implementation, especially but not exclusively in the human dimension. In the Helsinki document, the participating states pledge to 'make open to NGOs all plenary meetings of review conferences, ODIHR seminars, workshops and meetings, the … Economic Forum, and human rights implementation meetings, as well as other expert meetings', adding that 'each meeting may decide to open some other sessions to attendance by NGOs'. Being 'made open' implies that NGOs have a right to speak in and to submit written documents to these meetings – and that they are encouraged to do so. Moreover, the clause stating that meetings may choose to extend participation opportunities for NGOs to further sessions has often been activated in practice. For example, since the Budapest summit in 1994, NGOs are permitted to attend the meetings of the working group on issues concerning the human dimension – which is significant, since working groups are much more likely to engage in a sustained and focused exchange of arguments than plenary sessions.

Other agreements included in the document similarly underline the fact that the OSCE regards NGOs as legitimate and valuable interlocutors. Thus, the governments 'instruct Directors of CSCE institutions and Executive Secretaries of CSCE meetings to designate an "NGO liaison person" from among their staff'. Among the OSCE institutions the parties had in mind here, it is the ODIHR that has become most important for NGOs. Its NGO and Democratic Governance Unit serves as the main interface between NGOs and the organization, although every OSCE institution (including the OSCE field missions) has its own NGO point of contact or liaison officer. In Helsinki in 1992, member states not only agreed to alleviate access to OSCE institutions, but also agreed to make similar provisions with regard to themselves. Thus, they pledged to 'designate, as appropriate, one member of their Foreign Ministries and a member of their delegations to CSCE meetings to be responsible for NGO liaison', and they undertook to 'facilitate during CSCE meetings informal discussion meetings between representatives of participating States and of NGOs'. Given this clear recognition of NGOs as sources of views relevant to the tasks of the organization, it may come as a surprise that there is no accreditation procedure for NGOs in the OSCE (although NGOs who wish to participate in a specific meeting are expected to register with the secretariat beforehand) (Tudyka 2002). This lacuna is therefore best understood as an indication of the OSCE's openness to NGOs rather than as a sign of an uncertain status of NGOs vis-à-vis the organization. Indeed, since the Moscow Meeting on Compliance

with the Human Dimension in 1991, the OSCE has based its relationship with NGOs on a principle of 'self-definition' recognizing 'as NGOs those who declare themselves as such according to existing national procedures' (quoted in Brett 1994: 367), excluding only persons or groups practising, or publicly endorsing, terrorism or violence.

Involvement in the OSCE of NGOs is most extensive, and arguably most consequential in the implementation of the commitments states have undertaken in the human dimension of security (Glover 1995). Conversely, most NGOs participating in review meetings provide services or voice concerns related to this OSCE 'activity' (Tudyka 2002). NGOs such as Human Rights Watch or Amnesty International are active and essential participants in the various meetings that the ODIHR organizes on a regular basis, including Human Dimension Implementation Meetings and Human Dimension Seminars.[23] In these meetings, NGOs are invited to participate in working groups and informal sessions as well; that is, in settings that allow for genuine discussion of obstacles to the improvement of human rights in the OSCE area. NGOs contribute extensively and 'on an equal footing with the governmental delegations' (Brett 1994: 375) by drawing attention to shortcomings of the implementation of human rights commitments in individual countries and by offering expert advice. In addition, NGOs are acknowledged and used as important sources of information and first-hand knowledge of local circumstances by the OSCE's operative institutions. Thus, in order to be able to fulfil his conflict prevention mission, the HCNM is empowered to collect and receive information about national minorities from a broad variety of sources including NGOs; he is, indeed, obliged to regularly contact local NGOs on his visits to countries or regions of concern. Similarly, missions of long duration as a matter of course reach out to local NGOs in order to benefit from their acquaintance with the political and social conditions on the ground (Brett 1994: 377; Tudyka 2002).

In fact, most field activities of the OSCE in the closely connected areas of democratization and conflict prevention involve NGOs in one way or another (OSCE/ODIHR 2000). Owing to the assumption that NGOs have an essential role to play in the construction and preservation of democratic institutions and a political culture conducive to respect for human rights, local NGOs figure as both products and partners of OSCE programmes and projects. Usually acting in tandem with the relevant OSCE missions, the ODIHR provides technical assistance to NGOs, supports them in networking with other advocacy groups in the region, and organizes meetings in which government authorities and NGOs exchange views on issues of concern to human rights activists. In

addition, the ODIHR co-operates with experienced local NGOs in variably sized projects relating to human rights training, capacity building and the raising of awareness in order to target politicians, administrators, journalists, ordinary citizens or the broad public. The OSCE does not provide steady funding for NGOs, although the ODIHR has a budget for supporting small 'grass-roots projects', which missions formulate and conduct together with local NGOs:[24] joint OSCE–NGO projects are subsequently evaluated by both partners. Some international NGOs, such as the International Helsinki Federation for Human Rights, engage in similar norm-teaching and education projects, acting, however, on their own behalf and not as agents of the OSCE (Rhodes 1997).

Having said all this, NGO participation in the OSCE is clearly not unlimited. For all its openness, the OSCE is an intergovernmental organization, and NGOs do not have the right to take part in political decision-making: neither are they empowered to vote in or veto a decision by the MC or the PC, nor do they have a say when it comes to determining the agenda of these bodies. They must be content with using other, less direct and more uncertain channels of influence on political deliberations in Vienna: they can lobby the permanent OSCE delegations or use their regular meetings with the Secretary-General to seek to draw the attention of the CiO and the PC to issues that, in their view, require action by the organization and their members.

Decision-making by the political organs of the OSCE is not very *transparent*, either. Decisions are published on the OSCE website (together with a wealth of other information on the organization and its activities), but decision-making itself takes place in secrecy. This holds for MC meetings in particular, even though some sessions are open to the public.[25] Meeting exclusively in closed session until recently, the PC can now be attended by groups (which may include NGOs) in the context of the regular visitor programme. However, this new policy did not result in a significant gain in transparency. Discussion of sensitive issues has simply shifted to other settings in which confidentiality is upheld: either the Preparatory Committee of the PC or informal meetings (Merlingen and Mujic 2003: 273–4). Moreover, negotiation texts and draft decisions are usually unavailable until they formally become a decision. While the majority of OSCE documents are public and easily accessible via the organization's website, this does not apply to documents submitted by delegations, which are more often than not restricted. Finally, there are no fixed declassification deadlines. Rather, it is entirely up to the author of the document (for example, national delegations) to decide whether and when it will be made publicly available.[26]

Explaining the difference: a rationalist first cut

Although there are limits to the participation of NGOs in the OSCE, and although NATO has recently begun to gesture towards a very cautious opening up to NGOs, striking differences remain in the extent to which the two security organizations involve NGOs in their processes relating to policy-preparation, policy-making, and policy implementation. While NATO, so far, has eschewed arranging for regular and sustained consultation with NGOs, the OSCE has provided NGOs with extensive opportunities for making their voices heard in its proceedings and operations since the early 1990s. Moreover, it seems that these opportunities did make a difference to the OSCE's policies, at least occasionally, suggesting a modicum of responsiveness to the arguments of NGOs (Andersen 2001). The conclusion seems to be warranted, therefore, that the OSCE comes much closer to the ideal of a democratic international organization – as envisioned by the deliberative theory of transnational democracy – than NATO, however large the remaining distance may be.

But how can this variance be accounted for? In the remainder of this chapter, I argue that a promising approach builds on rationalist and functional reasoning and proposes to analyse the inclusion of NGOs in the policy-making of IOs as a market-like 'exchange of resources'. The scope of this argument is a limited one in two respects: first, I do not claim to present an encompassing explanation (or one that comes anywhere near to this elusive goal); second, lack of space does not permit a full elaboration of this account. What I hope to show, however, is that this approach gives us a plausible first cut at the problem. Moreover, due to its grounding in a larger research programme, the resource exchange perspective is applicable in a straightforward manner to other cases, and yields additional testable hypotheses to guide further research.[27] The resource exchange perspective assumes that organizations, including IOs and NGOs, are (or can be fruitfully modelled as) goal-oriented, strategically minded actors that are sensitive to costs. Organizations attempt to structure their interactions with other organizations so as to maximize their chances of survival, which depends on their being perceived as successful or effective by members and sponsors. From the point of view of IOs, providing NGOs with access to their decision-making and operation is not intrinsically valuable but, rather, costly and risky. Having to deal with more actors complicates negotiations, increases co-ordination costs, encroaches upon the autonomy of the IO (and its members), and may even make it more difficult for the IO to achieve its goals (such as when participating NGOs do not feel

bound to formal or informal rules of confidentiality). Given these costs and risks, IOs will not open up to NGO participation and influence 'for free'. They will not grant meaningful opportunities to participate to NGOs unless they receive something in return that is at least as valuable to them as the foregone portions of transparency, autonomy and so on. Therefore, NGOs need to have some sort of resources at their disposal that they may 'exchange' for access to the IO in question. The image of a market comes to mind: IOs have a 'demand' for certain 'goods', which NGOs are willing to 'supply' if the 'price' – paid in the 'currency' of opportunities to participate – is right.

A general hypothesis of the resource exchange perspective is that (all other things equal) opportunities for NGOs to participate will be more extensive the scarcer are the resource(s) that NGOs control, and the greater they are consequently in demand with the IO(s) in question. More specific hypotheses refer to the nature of the 'tradable' resources that NGOs have at their disposal and to the factors that determine their scarcity. Authors drawing on the resource exchange approach usually list three broad categories of NGO resources: legitimacy, knowledge and personnel. Legitimacy is the belief on the part of the norm addressees of the IO that its policies deserve to be supported for normative reasons. The legitimacy provided by NGOs is transferred to IOs via co-optation. When the IO's constituency perceives trusted NGOs as having been involved in IO decision-making, the IO and its policies will partake in their credibility (or will find their legitimacy less under attack because NGOs will find it more difficult to discredit those policies from outside).[28] Knowledge is a shorthand for all kinds of relevant information, including acquaintance with general and specific descriptive facts and cause-and-effect relationships. Legitimacy, knowledge, and motivated and experienced personnel are resources, because they improve the ability of the IO to achieve its goals – increasing security for its members, protecting the environment, enhancing the respect for human rights, and so on.

At the same time, these goals – or, more broadly speaking, the functions of the IO or the nature of the tasks with which it is entrusted – help to determine the degree of scarcity of these resources or, in the market metaphor, the position of the 'demand curve'. The idea here is that the nature of some tasks is such that they can be accomplished much more effectively with resources that NGOs can offer, whereas the performing of other functions stands to gain much less from this input. Appropriately fleshed-out, this assumption yields testable hypotheses about the varying openness to NGO participation in different issue areas

of international politics. For example, we should expect NGO involvement to be comparatively extensive in environmental politics, where uncertainty about cause-and-effect relationships is widespread, putting a premium on the knowledge that epistemic communities can feed into the process. Similarly, IOs active in the field of human rights should be comparatively open to NGOs, given that transnational NGO networks can make decisive contributions to the monitoring of governments' compliance with human rights commitments. Note, however, that these hypotheses (as most social science hypotheses) include an implicit ceteris paribus assumption. There are other independent variables that need to be taken into account, particularly when it comes to explaining individual cases rather than broad trends.

One is the resource endowment of the IO under consideration. States do not generally equip the IOs they create with adequate means for fulfilling their tasks, and even IOs operating in the same issue area may be more, or less, generously provided with money or personnel by their principals (for the field of international security, see Mayer and Weinlich 2007). The corresponding hypothesis is that, all other things equal, better equipped IOs are less likely to provide NGOs with extensive opportunities for getting involved in organizational policy-making. Finally, in some cases and for some purposes, the usual typology of international issue areas – including security, welfare, environment and human rights – will prove too crude to ground a variable-based functional explanation of NGO participation in IOs and a more fine-grained analysis of functions (and resources) will be needed. As indicated at the beginning of this chapter, security is a case in point for, as we have seen, it turned out to be a weak predictor of IO openness to NGOs, at least for the two cases at hand.

NATO and the OSCE are both security organizations, but they belong to different sub-types. While NATO is an alliance with exclusive membership established to organize the collective self-defence of Western democracies against common threats to their security, the OSCE is an inclusive and risk-oriented 'security management institution' designed to prevent the emergence or aggravation of security dilemmas among its members (Wallander and Keohane 1999: 28). This functional difference gives us some mileage but falls short of a satisfactory explanation. One difficulty with an explanation based on this typology is that it is not obvious what the causal mechanisms are that translate these differences in purpose into varying degrees of openness to NGOs. One might argue that these two functions give rise to different organizational practices that predispose the IOs either for or against a favourable attitude

towards transparency, heterogeneity of views and interests, and inclusiveness in general. It could be said that this organizational culture works either in favour of or against a willingness to open up to other kinds of actors, including NGOs. But whether or not this argument (which rests on different premises than the resource exchange perspective) is regarded as providing the desired causal link, it fails to explain why the CSCE was tightly closed to NGOs before 1989, when it was already a 'security management institution', and why NATO has not perceptibly opened up to NGOs in the 1990s, even though it approached the ideal-type of the security management institution (Wallander and Keohane 1999: 46–7).

A more promising avenue is to pay attention to the more specific security functions that NATO and the OSCE have come to perform in the post-Cold War world. Although both organizations emphasize and respond to the increased importance of diffuse 'risks' at the expense of more clearly localizable 'threats', and they both acknowledge and take into account the importance of domestic sources of conflict – such as authoritarianism and disrespect for individual and minority rights – their strategies and roles are quite different. Although NATO fought a war in defence of basic human rights in Kosovo and fosters democratic civil–military relations in the context of its Partnership for Peace programme and Membership Action Plan, it is much less in the business of human rights promotion and democratization than the OSCE. Also, while both the OSCE and NATO are engaged in crisis management, it is only NATO that is capable of robust and coercive military intervention, whereas the OSCE has increasingly specialized in providing services in the area of conflict prevention, peacekeeping and post-conflict peace building.

As we have seen, however, the latter goals and activities, which form the bulk of the present undertakings of the OSCE, can be significantly furthered by drawing on resources, such as knowledge and personnel, at the disposal of like-minded NGOs. In addition, its members wanted the OSCE to be a 'lean' organization with a budget that is only a fraction of NATO's, for example. Hence, the OSCE cannot buy external expertise at will but, instead, depends on the voluntary co-operation of non-state actors such as NGOs. Or, rather, by the lights of the resource exchange perspective, it *can* 'buy' it, but it has to use a different currency than money – opportunities for participation in its policy-making. This dependency applies in particular to the 'activity' that has increasingly occupied centre stage since the early 1990s, and where most NGOs participating in OSCE meetings and operations make their contribution – the human dimension of security.

At the same time, few NGOs would seem to control resources that NATO is short of and needs in order to pursue its military and political functions successfully. However, what about legitimacy? Should NATO not welcome all the legitimacy it can get in order to bolster its standing with a public that is often suspicious about the desirability and appropriateness of military solutions to conflicts? The question is, however, whether the costs of making a co-optation strategy work are likely to be outweighed by the benefits. There seems to be a dilemma here. If NATO admits (publicly) meaningful participation of NGOs, its autonomy is likely to be curtailed to an intolerable degree; if, on the other hand, NGO participation is perceived by the public as having no consequences for NATO policies, this will only undermine the credibility of the NGOs co-opted and, hence, the rationale for co-opting them in the first place.[29]

Notes

1. I wish to thank Monika Tocha, Nino Jordan and, most of all, Tim Flink for excellent research assistance, Sebastian Mayer for important insights and helpful comments, and the editors of this volume for their patience and encouragement.
2. In this chapter, I use the term 'non-governmental organization' instead of 'civil society organization' because the international organizations under study here refer only to NGOs.
3. Security organizations can be defined as international governmental organizations 'designed to protect the territorial integrity of states from the adverse use of military force; to guard states' autonomy from the political effects of the threat of such force; and to prevent the emergence of situations that could endanger states' vital interests as they define them' (Wallander et al. 1999: 2).
4. In security governance, the 'democratic deficit' of world politics is given additional weight by liberal international relations theory, which links peace to the democratic accountability of policy-making elites (Doyle 1997: Part II).
5. A fourth indicator for access to deliberation proposed in the Introduction – the involvement in formal dispute settlement of NGOs – has proven irrelevant for the cases at hand. While there is no such institution in NATO, the participating states of the OSCE established a Court of Conciliation and Arbitration in 1995. This court, however, has been inactive ever since due to the lack of cases brought before it. Its rules of procedure do not provide for a role for NGOs (http://www.osce.org/documents/cca/1997/02/4120_en.pdf – last accessed on 12 May 2007).
6. Not only was Germany viewed with suspicion by its neighbours, the relationship between Greece and Turkey was marked by mistrust and latent security competition.
7. In 1966, France withdrew from NATO's integrated military structure.
8. Many of these and other institutional attributes of NATO can be interpreted as functional responses to co-operation problems that typically burden military alliances. For example, military integration alleviates fears of *abandonment*,

the consensus rule helps to reduce the risk of *entrapment* (that is, being entangled in a conflict that another member has provoked), and the procedures for setting, and monitoring compliance with, defence goals make it more difficult for members to *freeride* on the efforts of others (Snyder 1984; Theiler 1997).

9. According to institutionalists, NATO's survival can, at least in part, be put down to the fact that it had always been more than an exclusive alliance confronting a common enemy, serving at the same time as an inclusive security management institution with procedures for ameliorating security dilemmas among its members. These procedures proved to be assets that could be made to work under the altered conditions as well (Wallander and Keohane 1999; Wallander 2000).
10. 'Combined, joined task forces' refers to mobile, multinational and multiservice commands that are put together for, and tailored to the needs of, specific military missions. Participating forces may include contributions made by non-members under the auspices of NATO's 'Partnership for Peace' programme (see below).
11. Accordingly, NATO's latest Strategic Concept of 1999 restates collective defence as the core purpose of the organization.
12. http://www.nato.int/docu/update/2004/11-november/e1129a.htm – last accessed on 28 April 2007.
13. http://www.nato.int/issues/faq/index.html#C2 – last accessed on 27 April 2007.
14. This document is mentioned but not reproduced or summarized on NATO's website (http://www.nato.int/archives/policy.htm – last accessed on 27 April 2007).
15. In a speech delivered to the German foreign policy think tank *Deutsche Gesellschaft für Auswärtige Politik* two years ago, the Secretary-General made passing reference to NATO's 'dialogue with NGOs', announcing its intensification in the future, but he did not elaborate on precisely what this meant (http://www.nato.int/docu/speech/2005/s050511c.htm – last accessed on 28 April 2007). In any case, the only NGOs mentioned so far in the voluminous *NATO Handbook* (whose web version was last updated in 2003) are the CIOR and the ATA, and the continually updated 'NATO Topics' (http://www.nato. int/issues/index.html – last accessed on 28 April 2007) do not even include the keywords 'civil society' or 'non-governmental organization'.
16. http://www.osce.org/documents/mcs/1990/11/4045_en.pdf – last accessed on 5 May 2007.
17. At the Budapest summit in 1994, the participating states of the CSCE decided to rename the security co-operation arrangement in order to reflect the far-reaching reforms that they had agreed upon since 1989 marking the transition from a 'regime' to an 'organization' (for this distinction, see Keohane 1989: 3–4).
18. See also http://www.osce.org/about/13509.html – last accessed on 7 May 2007. For analyses of the individual components of the OSCE's institutional makeup, see the *OSCE Yearbook* published annually by the Institute for Peace Research and Security Policy at the University of Hamburg.
19. http://www.osce.org/pc/ – last accessed on 9 May 2007.
20. http://www.osce.org/documents/mcs/1975/08/4044_en.pdf – last accessed on 9 May 2007.

21. http://www.osce.org/documents/mcs/1990/11/4045_en.pdf – last accessed on 9 May 2007.
22. http://www.osce.org/documents/mcs/1992/07/4046_en.pdf – last accessed on 9 May 2007. Note that 'authoritative' does not mean legally binding. In general, the OSCE prefers political to legal commitments.
23. These meetings lack decision-making power but make 'informal recommendations' to the MC and the PC. The main difference between implementation meetings and seminars is that the latter focus on norm teaching rather than compliance monitoring and, in addition, are designed to give more room for an exchange of ideas.
24. Not acting as a donor, the OSCE may be less guilty of the charges many observers made against the international community of having seriously compromised its democratization and peace-building efforts in places such as Bosnia and Kosovo by creating perverse incentives for local groups (Belloni 2001; McMahon 2004/2005; Mertus 2004).
25. For example, the relevant provisions for the 2005 MC in Ljubljana read as follows: 'The opening and concluding sessions will be open to NGOs, the press and the public. All the other sessions, *with the exception of those dealing with agenda items which are subject to discussion and possible decision*, will be broadcast live in all six OSCE languages to the Media Centre and the NGO Centre by closed-circuit television' [my emphasis]. (http://194.8.63.155/documents/pc/2005/10/16776_en.pdf – last accessed on 12 May 2007).
26. Communication by OSCE press officer.
27. The resource exchange perspective is rooted in organization theory (Pfeffer and Salancik 2003; Schreyögg 2003). The more immediate inspiration for the model outlined in this chapter comes from Nölke (2000) and, in particular, Brühl (2003).
28. The market metaphor must not be taken literally. 'Transfer' does not mean that the 'supplier' of legitimacy necessarily loses some of the resource due to the transaction. The same qualification applies to the other resources.
29. Apparently, NATO attempts to take care of its legitimacy with the public through the NATO Parliamentary Assembly (see the descriptions and mission statements in chapter 16 of the *NATO Handbook* and on the website of the NATO PA, which echo many of the ideas built into the 'transmission belt' model developed in the Introduction [http://www.nato.int/docu/handbook/2001/hb1601.htm; http://www.nato-pa.int/ – last accessed on 15 May 2007]). Moreover, it should not be overlooked that NATO's immediate constituency are the member states and, here, the organization seems to enjoy a fairly robust legitimacy. This appears to be less true for the OSCE, which is increasingly coming under attack from some of its Eastern members, including Russia, who charge the ODIHR with displaying a biased attitude towards their efforts at achieving democratization – a development that may ultimately backlash on the role that NGOs are currently allowed to play in the implementation of commitments to the human dimension.

7

Democratic Aspiration Meets Political Reality: Participation of Organized Civil Society in Selected European Policy Processes

Dawid Friedrich

From the very beginning of European integration, the European Commission has been the one institution eager to consult external interests and experts. Besides its constant need for expertise, the Commission's chronic understaffing attracted it to the idea of gaining diverse stakeholders as allies for its legislative proposals. This inclusion of interest organizations was meant to serve at least three purposes: first, a *functional purpose*, to increase the effectiveness of policy-making; and, second, an *instrumental purpose*, to gain public support – that is, social legitimacy for its own work, as well as for the integration process as such. Third, in the aftermath of the Maastricht Treaty (1993) and its defeat in the first Danish referendum, an additional *normative purpose* became prominent and important for the whole European Union (EU), not only for the European Commission. Many EU policy-makers felt that the permissive consensus among the European citizenry about the integration process was faltering: a heated political and scientific debate about the EU's deficit in democratic legitimacy has since been taking place.

One result of this debate are considerations for increasing inclusion of the European civil society voice – possibly by improving accessibility and transparency in the EU's policy-making processes – and more structured consultation procedures, so that the rationale could complement or even replace the existing informal practices of interest representation.

Such thinking implies that the participation of civil society organizations (CSOs) potentially contributes to closing the gap between the EU and its citizenry, thus 'bringing the Union closer to its people'.

The EU did not need to start these efforts from scratch: integration history had already seen increasing institutionalization and regulation of channels of (formal) participation that accompanied informal and unregulated lobbying. This included, for instance, the access of firms to the European Court of Justice (ECJ) in the 1970s, or the adoption of transparency rules by the European institutions in the early 1990s. In the last few years, this process has gained momentum in the governance debate that surrounded the European Commission's Governance White Paper (2001), and has eventually been included as a clause on 'Participatory Democracy' in the draft constitutional treaty (Article I-47).

However, the effects of such top-down efforts to improve transparency and accessibility on the actual work of CSOs in 'Brussels' remain largely in the dark, as has their actual gain with regard to democracy. How viable are the emerging formal participation structures that the EU provides, vis-à-vis classical lobbying? Also, what happens when the democratic aspirations of civil society participation meet political reality – that is, how significant are the participation patterns for European democracy, from a normative point of view?

Against this background, this chapter first examines the indicators of *access*, *transparency* and *inclusion*, as introduced in Chapter 1, from an empirical-analytical as well as a normative perspective. The chapter begins with an analysis of the formal participation regime in these dimensions, briefly describing their historical development and then judging their contribution to European democracy. Subsequently, policy area specificities and the *responsiveness* of concrete policy processes towards the input of CSOs are exemplarily analysed in two different policy areas – migration and environment.

This research approach differs from existing literature in its emphasis on the normative content of the participation of CSOs[1] in European governance processes. Whereas much empirical research focuses particularly on the participatory patterns of new modes of governance in social policies (for example, de la Porte and Nanz 2004; de la Porte and Pochet 2005; Friedrich 2006), this chapter assumes that the potential of CSOs to function as a 'transmission belt' between the citizenry and supra- and international level policy processes (Nanz and Steffek 2004 and the Chapter 1 in this volume) would still remain normatively fragmentary were it solely applied to new modes of governance. Instead, it should be extended to European policy-making in general. Only when

the participation of CSOs becomes a routine for 'hard law' policy processes, can it become conducive to democratic governance in the EU.

Both selected policy areas are not predominantly subject to new governance modes. The area of migration is a very dynamic, rather young, policy area at EU level, in which substantial legislation has been put forward in recent years. Environmental policies belong to the most established policy fields in European integration. These policy fields have been chosen for reasons of the variation in their status in EU integration, both in time and in their legal aspect. Environmental policy has, for a long time, belonged to the EU's First supranational Pillar, while migration belongs to the more recent intergovernmental Third Pillar. The indicators of access, transparency and inclusion are examined in their general application to the policy field, whereas responsiveness is assessed by examining a crucial policy process in each area from recent years. For migration, the case of the Directive on Family Reunification is assessed while, for the environment, the Regulation on the Registration, Evaluation and Accreditation of Chemicals (REACH) is analysed. The empirical analysis is based on a document analysis and 16 semi-structured interviews with non-governmental organization (NGO) representatives and members of the European Commission, the European Parliament and the Council, which were conducted in June and July 2005.

Evolution and the state of the art of the EU's formal participatory regime: a normative assessment

Brussels and its European quarter is known as an 'insiders' town', where people regularly meet in a 'cocktail circuit' (Lahusen 2004: 57), so that a flow of continuing discussion among public and private actors is established. CSOs are an element of this circuit, and it can be assumed that these occasions are valuable to them as a means to give voice to their concerns. However, from the normative stance adopted in this volume, these informal contacts do not enhance the democratic quality of European policy-making processes, as they do not guarantee the free and equal participation of all stakeholders. Thus, the analysis of the indicators needs to be sensitive with regard to the evolution of a formal participatory regime in policy processes.

Access to policy-making processes

This indicator portrays the institutionalized repertoire that the European Union offers CSOs that wish to partake in policy-making

processes. Unlike other international organizations, the EU has no general formal accreditation scheme for CSOs that explicates their rights of participation. Instead, the European Commission, as the most important interlocutor for CSOs, stipulates that it 'wants to maintain a dialogue which is as open as possible'.[2] Rather than a conditionality approach for CSO involvement, the Commission favours a self-regulatory model. However, this lack of explicit *conditions* for access comes together with a lack of explicit *rights* for access. Unlike the United Nations (UN),[3] the European Commission favours a decentralized approach and states that its 'different services are responsible for their own mechanisms of dialogue and consultation' and rejects 'an over-legalistic approach [that] would be incompatible with the need for timely delivery of policy' (European Commission 2002: 10).[4]

However, as discussed in more detail in the Chapter 6, there are some provisions that shape the relationship between CSOs and the Commission. First, there is the 'civil dialogue' initiative of the late 1990s, which was established by the Director-General of Employment and Social Affairs in co-operation with the Platform of European Social NGOs. Later, the Commission's White Paper on European Governance (European Commission 2001), in particular, aimed at enhancing the importance of civil society in the European decision-making processes. However, based on the interviews conducted, I agree with Pauline Cullen that '[t]he only tangible results from these initiatives were a Commission website with a registration system, and the use of Internet portals as cyber or virtual consultations' (Cullen 2005: 6) – referring to the online database CONECCS ('Consultation, the European Commission and Civil Society')[5] and the internet consultation scheme 'Interactive Policy-Making' (IPM). Although the Commission hopes that Commission staff will use these means in order to identify an appropriate mixture of partners for consultation, its de facto usage apparently stays behind this goal. Up to now, both CONECCS and the IPM are relatively unknown among both CSO representatives and civil servants, and there is no structured intra-institutional strategy for disseminating relevant information.[6] Only further, detailed research can show whether this website will remain what it currently is – that is, a voluntary, non-conditional database for information that has failed to improve the de facto consultation procedures (as Cullen suggests) – or whether it will develop into an incremental foundation for a system of 'access leagues', as Greenwood and Halpin argue (2005: 5).

The European Parliament (EP) does not provide for structured contacts with CSOs, but has well-developed informal contacts with

CSOs, and, as Smismans states, 'is seen as very receptive to the demands of the NGO sector' (2002: 18). My interviews yielded a similar response, although interviewees emphasised that, in order to gain access to the EP building, CSOs must be registered and issued with a maximum of four permanent entrance permits per organization. This rather recent restriction to access, in an attempt to tighten security in the EP, has triggered much unease among CSOs, and there are discussions in progress to improve this scheme. The (European) Council is lagging behind in its effort to become more open and accessible to CSOs, both formally and informally. CSOs have no formal consultative status, and there is no framework in place for relations between them and the Council.[7, 8]

For the time being, the participation of CSOs has to be characterized as 'participation by grace and favour', meaning that the extent of the participation hinges largely upon the discretion of individual civil servants. Thus, the democratic character of the existing structures for civil society's *access to deliberative policy-making processes* is, from a normative perspective, relatively limited.

Transparency: access to documentation

Regulation 1049/2001 EC, which came into force in December 2001, lays down the principles of and limits to access to the documents of the European Parliament, the Commission and the Council of the European Union. This regulation, which followed the inclusion of Article 255 of the Treaty of Amsterdam and addresses transparency, obliges the institutions to report annually on the implementation of the reports. Comitology, however, is not included. The constitutional treaty would substantially improve transparency, not only in terms of access to documents, but also in terms of conducting the work of the institutions as openly as possible. Both the EP and Council would be obliged to meet in public when deliberating and adopting legislation (Bignami 2003). However, in a preliminary analysis, after being in force for two years, the European Citizen Action Service complained that 'at the very most, the Institutions fulfilled the minimal requirements' (Ferguson 2003: 1) and that refusal rates for access to documents were actually rising.[9]

The interviews revealed notable satisfaction with the accessibility of documents; in particular, improvements in internet access were mentioned. However, the lack of transparency in the Council's working procedures was frequently mentioned: interviewees would welcome positions of the individual member states being made visible; that is, if

the footnote-papers of the Council working groups could also be made accessible. Other statements indicate that it would be significant to effective participation if the procedures were made more transparent. For CSOs, it would be as important as 'access to documents' to obtain 'access to the agendas' of the European institutions in an early stage, so that they could gain time to prepare themselves and to develop positions in co-operation with their national sections. Nevertheless, although CSOs are still not on an equal footing with the European institutions, the EU's transparency regime as a whole – 'after a long, bitter set of negotiations' (Bignami 2003: 11) – seems to be, to some degree, conducive to the democratic participation of civil society.

Inclusion of all voices

The extent to which the EU engages (financially) in supporting the CSOs of vulnerable groups and the overall CSO 'landscape' is the benchmark for the indicator of 'inclusion'. In accordance with this volume's normative position, 'inclusion' is crucial for the fair and equal participation of *all* stakeholders. Far-reaching consultative rights for an exclusive group of selected organizations would be normatively insufficient. Inclusion is particularly important for the concerns of vulnerable or voiceless groups that cannot afford (or are unable) to set up an office in Brussels, or lack the modern telecommunication resources needed to make use of e-governance. The European Commission provides a somewhat complicated set of budget guidelines from which NGOs can receive financial support. With some exceptions, funds depend on whether the organization can meet the requirement of co-financing. The amounts of funding, their purpose and the procedures vary across policy areas. Even the Commission can only estimate that approximately €1,000 million is allocated per year (European Commission 2000). Consequently, in recent years, there has been a debate about possible changes in the financing structure, which, however, could be detrimental to smaller NGOs (Smismans 2002).[10]

In summary, one can say that the European Commission, at a general level, makes some effort to enable civil society activities at European level, but that these efforts lack transparency. They favour well-established NGOs with a high reputation and expertise, so that, as several interviewees made clear, the functionary can expect not only 'opinions' and 'unrealistic wishes', but also 'competent' aid and 'technical expertise'. Moreover, budget lines pursue the EU's policy goals and potentially

exclude a number of CSOs that follow a different agenda. In the area of human rights, for instance, the current focus on anti-discrimination policies excludes other themes (similarly, Cullen 2005). Hence, the existing EU practice of supporting CSOs does not guarantee broad inclusion, although, at the same time, it is not fundamentally detrimental to the inclusion of stakeholders, either.

Some methodological remarks

Against this background, the two cases of legal migration and chemical policy will be assessed in order to illuminate the pattern of CSO participation in concrete policy processes. The indicator of responsiveness, in particular, is only researchable by analyzing a concrete example, and was measured by applying computer-supported content analyses of the influence of CSOs in both policy processes. It should be stressed that it is not the aim of this research to present and analyze the content of the two items of legislation in an encompassing way,[11] but, rather, to trace whether, and how, the arguments of CSOs found their way into the draft directive over time. This approach differs from impact assessments, which focus on the outcome – the final legislation. My approach assumes that, during the years of deliberations and negotiations, certain topics might well have been discussed and temporarily included in a draft proposal only, perhaps, to be excluded in a later stage of the process. Thus, in order to account for changes over time, the decision-making processes were split into four periods, taking the different major official publications (White Paper, different stages of the legislative proposal, the final directive) as reference documents. I then collected all the available CSO documents that dealt with the directives, resulting in 48 CSO documents in the case of migration and 121 in the case of REACH.[12] In each case, I identified, on the basis of document and literature analysis, the topics that were of key importance to the CSOs, and developed an appropriate coding scheme. Using a computer programme, I analyzed the CSO documents vis-à-vis the respective official document of the directive, in order to detect whether themes, or even concrete CSO wording, can be found in the official documents.

In the following two sections, before the four indicators for participatory democracy are assessed, I will give a brief overview of the policy fields and the content in the directives, with the aim of exploring the specificities of the policy fields.

Participation in the EU's migration policy

Migration policy in the European Union

The area of migration is a relatively young policy field and constitutes one of the most dynamic areas of EU integration of recent years. In the early days of European integration, collaboration on migration issues only took place horizontally, between nation-states; that is, on a purely intergovernmental basis outside the realm of the European institutions. As Guiraudon (2000, 2001, 2003) has convincingly demonstrated, particularly since the early 1980s, the national ministers of the Interior have used the European level to avoid national veto points in order to pursue their security-led agenda of restricting migration. Accordingly, their policy style was secretive, rather than open. Since the Single European Act (1987), however, functional spillovers from the internal market programme (concerning the free movement of persons), as well as the Schengen regime, have required closer co-operation. As a result, the Maastricht Treaty (1992) established a Third Pillar on matters of police and judicial co-operation. As the resulting policy-making procedures of 'formal intergovernmentalism' (Geddes 2003: 136) proved to be inefficient, the Amsterdam Treaty (1999) endorsed significant procedural changes in the decision-making rules of the EU's Asylum and Migration Policy. Most of its provisions were transferred from the intergovernmental Third Pillar to the supranational Pillar, so that now, after a five-year transition period, horizontal co-operation complemented by an increasingly strong vertical dimension of supranational competences has become prominent.[13]

After the end of the transitional period on 1 May 2004, and after an additional unanimous decision by the Council to bypass unanimity and the consultation procedure in all fields except legal migration by 1 April 2005, qualified majority voting in the Council and co-decision with the EP have recently become the rule (see Peers 2004, 2005). The secretive tradition of policy-making is now being challenged by the more recent changes in both the procedures and in the primary law, which are now part of a strong supranational framework within a structure of 'intensive transgovernmentalism' (Wallace 2000: 33). Legal migration, however, has remained in the intergovernmental Third Pillar.

In addition to the procedural developments, there has been considerable political support for furthering European integration in this policy field. In October 1999, the Special European Council on Justice and Home Affairs (in Tampere, Finland) gave migration policies considerable

political momentum by setting the goal of constructing an 'Area of Freedom, Security and Justice' across the Union. However, a prominently held view among observers is that migration policies are dominated by a security agenda, with the repressive 'fortress Europe' looming in the background (see Huysmans 2000). Other voices, however, interpret migration policies as 'a potentially progressive source of post-national rights' (Geddes 2003: 26) that may adopt a 'citizenship paradigm' (Guiraudon 1998: 11) that includes political and civic rights for migrants at EU level (see, for instance, Geddes 2000; Kastoryano 1998, 2003). In fact, should it transpire that migrants' voices – or 'third-country nationals', to use EU parlance – were heard in EU policy-making processes, this would indicate that the EU was moving towards a post-national polity.

The empirical case: the directive on family reunification

Council Directive 2003/86/EC on 'the right to family reunification for third-country nationals', the flagship directive in legal migration, aims to regulate the main type of legal immigration of third-country nationals (Boeles 2001: 61). Moreover, as the Commission repeatedly argues in its legislative proposals, uniting families is important for the wellbeing and eventual integration of third-country nationals already residing lawfully in the EU. This combination of economic considerations and human rights concerns was the driving force for the European Union to issue a directive on family reunification.

The directive was decided on the basis of both the new provisions in the Amsterdam Treaty and the aims specified by the Tampere programme. The legal basis of this directive is Article 63 (3), (4) of the EC Treaty, from which Denmark, the UK and Ireland have opted out. Decision-making is based on Article 67 of the EC Treaty, including unanimity voting and mere consultation of/with the EP, which also remains the legal basis for legal migration after the end of the five-year transition period towards qualified majority voting (QMV), as agreed in Tampere. Only two months after Tampere, in December 1999, after having consulted CSOs, the Commission published the first proposal of the Family Reunification Directive (COM(1999) 638 final). However, since there had hardly been any progress in the Council, the Commission presented an amended proposal (COM(2000) 624 final) in October 2000, which took the proposed amendments of the EP into account (Boeles 2001). Notwithstanding this, the Council negotiations remained thorny and the Laeken Council, in December 2001, asked the Commission to

redraft the proposal again. The redraft was issued in May 2002 (COM(2002) 225 final) (see Peers 2002a, 2002b,s 2003a), thus ending the deadlock in the Council[14] and enabling the Justice and Home Affairs Council to reach an agreement on the directive in February 2003.

The directive was finally adopted in September 2003, though under politically problematical circumstances. When agreeing upon the directive in February, the governments of the 15 member states did not wait to consult the European Parliament which, in its report issued in April 2003, included substantial reservations about the provisions of the directive. Although the directive should have come into force in October 2005, its final destiny remains open. In December 2004, the European Parliament took action against the Council at the European Court of Justice (Case C-540/03)[15] to withdraw certain elements with particular regard to underage children that allegedly contradict the European Human Rights Convention. This move, which was very much welcomed by several CSOs, suggests severe disagreements among the participating actors, and is a first sign of low responsiveness, particularly of the Council, to CSO concern. The EP's appeal to the ECJ might be considered to be a success for CSOs, many of whom called at the EP in order to take legal action after the adoption of the directive.

CSOs in the EU's migration policy and in family reunification

Given the newness of migration policies at European level, it comes as no surprise that there are only a few CSOs in Brussels that focus solely on migration issues.[16] Of the 34 organizations in the field of 'justice and home affairs' (JHA) currently listed on the Commission website (CONECCS), only ten are, more or less, closely involved in migration issues (including police unions). The rest are industrial associations, such as the Association of European Producers of Steel for Packaging (APEAL), or other non-economic groups interested in other aspects of JHA, such as the European Humanist Federation (EHF). Public interest CSOs are mainly concerned with the subjects of integration, the human rights situation of refugees and asylum-seekers and, thus, the awareness of the growing importance of European – level migration policies among national CSOs increases only gradually (Migration Policy Group 2002). Nevertheless, there are some organizations that operate quite actively on specific migration issues. Among them are Church based agencies, such as the Churches' Commission for Migrants in Europe (CCME) or Caritas Europa, the European Network Against Racism (ENAR) and the European Council on Refugees and Exiles (ECRE), which are prominent,

outspoken agents on migration issues, among others. Of some importance for the co-operation and co-ordination of migration NGOs is the UNHCR's initiative for a regular, but loosely organized, Migration and Asylum NGO, which has established a migration sub-group currently organized by the Migration Policy Group. In addition, a few other organizations deal with migrants' interests if the special interests of the organizations are concerned. The European Union sections of the International Lesbian and Gay Association (ILGA) and Save the Children show the diversity of actors active in this field. Finally, expert organizations, such as the Immigration Law Practitioners' Association (ILPA) or Statewatch's European Monitoring and Documentation Centre (SEMDOC) offer expertise, circulate policy proposals and comment critically on the EU's migration policies.

It should be noted that migrants themselves are not directly represented at EU level, although, since the mid-1980s, the EP has financially supported migrants' associations in order to further their co-ordination among themselves and better to integrate them into Europe (Kastoryano 1998: 8ff.). At the beginning of the 1990s, with the support of the European Commission, the European Migrants' Forum was established 'with a mandate to deal with the position of third-country nationals within the European Union' (Niessen 2002: 81). The Migrants' Forum was structured alongside the nationality criterion. It fought for the political and legal rights of migrants so that they would be equal to those of European citizens. Due to internal problems, as well as managerial and financial irregularities, this Forum lost the support of the Commission and eventually ceased to exist. Moreover, the European Migrants' Forum lost its appeal to annul the Commission's decision from July 2001 to terminate the financial support at the Court of First Instance.[17] Currently, there is only loose talk in Brussels for a renewed initiative (Geddes 2000).[18] Although it is remarkable that the EU does not use EU citizenship to exclude non-EU citizens from 'soft' forms of participation, further reaching expectations that the EU's migration regime might be a source for a post-national polity (for example, Kastoryano 1998, 2003) cannot be supported empirically.

In the case of the Directive on Family Reunification, there have been intensive informal contacts between the CSOs, on the one hand, and the Commission and the EP, on the other. If at all, the Council was usually only approached via the member state level by national CSO members. In contrast, the unit for legal migration of the then Directorate General (DG) Justice and Home Affairs prepared informal discussion papers on certain issues of family reunification and used them for

an early consultation with CSOs on 8 October 1999 (see also Niessen 2001: 422), even before the Tampere European Council presented the Tampere Programme. It should be noted that a consultation very early in a policy process is both quite common and quite effective for CSOs, as the analysis of responsiveness will show.

Was the policy process in the case of family reunification responsive to CSOs' input?

For CSOs,[19] the following topics on family reunification were of key importance, and provided the basis for the analysis coding scheme:

The legal status of the sponsor; that is, the migrant within the EU who wishes to be reunified with her/his family
The material conditions that the sponsor has to fulfil (for example, the provision of 'sufficient' resources, accommodation, health insurance, and so on)
The family members eligible to migrate (for example, nucleus family as opposed to an extended family concept)
Legal and socio-economic rights for the family members after migrating (inter alia access to employment, granting of an independent residence status, and so on)
Non-discrimination between third-country nationals and EU citizens
The relationship of the directive vis-à-vis existing national law (the degree of harmonization, flexibilization clauses, and so on).

In short, against the background of the lengthy and thorny decision-making process, it comes as no surprise that the intake of CSO concerns was minimal. Even more, the analysis over time shows a gradual exclusion of issues that were important for CSOs. At the beginning, the Commission wanted to achieve an encompassing directive concerning all instances of family reunion; that is, for third-country nationals with long-term residence status, for Geneva Convention refugees, for those with subsidiary forms of protection, and for EU citizens with non-EU family members. It adopted an encompassing definition of family that did not distinguish between married, unmarried or same-sex partners, and granted them socio-economic rights comparable to those of EU citizens. The comments of all CSOs on the early two drafts – particularly the first, drafted in 1999 – were very positive, because the Commission was receptive during the early consultation that took place before the first proposal. In contrast, the scope of the second amended proposal

(2002) was considerably restricted in all these areas. For instance, persons with subsidiary forms of protection and EU citizens were excluded from the directive, married and unmarried partners are now treated separately, and the accession of the latter is no longer obligatory for the member states. Having seen their stakes disappear over time, all CSOs were united in their disagreement over the new proposal and over the final directive, as exemplified in the following statement by the European Co-ordination for Foreigners' Fight to Family Life (COORDEUROP):

> The Coordination can no longer ask associations to support the new proposal as it did for the two previous ones. On the contrary, it expresses its complete disapproval of a step backward and calls on associations and organisations of the civil society to persuade the representatives and governments of their countries to oppose its adoption. With regard to family reunification, it would be better to have no European directive than to have one that endorses violations of the right to family life perpetrated by certain member states. (COORDEUROP 2002)

One major CSO 'success' needs to be mentioned, however. Although they were generally satisfied with the second amended proposal, CSOs already anticipated that the proposal would end up with minimum standards. As a result, they argued for flexibilization – which would allow the member states the discretion to deviate positively from the minimum standards of the proposal – and for a standstill clause. The latter would avoid a race-to-the-bottom by forbidding the member states to lower their existing standards. Eventually, after the long and thorny negotiations in the Council that followed the second proposal, the Commission seemed to realize that its aim of real harmonization was not achievable, and abandoned its resistance to have greater flexibility and a standstill clause included in the directive. However, it included a deadline clause in the second amended proposal of 2002, which required many flexible clauses to be revisited within two years of the directive coming into force.

Participation in the EU's environmental policy

Environmental policy in the European Union

Today, EU environmental policy 'adds up to considerably *more* than the sum of national environmental policies' (Jordan 2005: 2). It represents a complex system of multilevel governance that offers many opportunities to public and private actors, and entails a substantial legislative corpus

that 'contributes significantly to the view of the Union as a "regulatory state"' (Sbragia 1998: 241). Throughout the history of environmental policy integration, impulses from the global sphere and from the role of the 'leader' states – such as Denmark, the Netherlands and Germany – pushed the environment into becoming a major policy area in the EU with high regulative standards (Jordan 2005; Sbragia 2000). Similar to the situation in migration policies, national ministers – often rather marginalized at home – made use of the European level in order to increase their importance (Sbragia 1998). In 1973, stimulated by a UN conference the previous year, the co-ordinated European environmental policy began with the European Commission's first Environmental Action Programme. In these early years, the environmental policy's reputation as 'low politics' was conducive to its silent progress and to its role of strengthening political integration (Jordan 2005). It was only with the Single European Act (1987) that environmental policy received a clear legal basis (see Hildebrand 2005). Moreover, the strategy of issue linkages between environmental and single market issues (see Lenschow 2005), in order to use QMV, further advanced legislation. The treaty reforms of Maastricht (1993) and Amsterdam (1999) expanded QMV to environmental policy and upgraded it to a general principle of the EU. However, in recent years, environmental concerns have been put increasingly on the defensive, and new policy initiatives – such as the Lisbon Strategy – are dominated by economic reasoning.

Nevertheless, the environmental policy evolved from a sectoral theme into a horizontal issue in which general principles – in particular, the principles of sustainability and of precaution – are supposed to be respected across all EU policies. On the one hand, this mainstreaming strengthens the environment's weight: on the other, these general principles are in danger of conceptual overstretching. As the REACH case clearly exemplifies, despite being part of everybody's rhetoric, political support for the precautionary principle remains, at best, opaque and undifferentiated. Moreover, environmental policy increasingly lost the secrecy of 'low politics', where policy processes are the primary realm of expertocratic procedures and few actors. Hence, the success story of environmental policy integration has stalled, and it is legislation such as REACH that will show whether the EU will remain one of the most advanced environmental policy regimes of the world.

The empirical case: the REACH Regulation

'No data – no market'. Everybody unfamiliar with chemical policy would think that this is the uncontested and existing principle for the

marketing of chemicals; however, it is not. The current EU system, which is based on the implementation of the 'Sixth amendment of Directive 67/548/EEC on the classification, packaging and labelling of dangerous substances' in 1981, introduces the obligations of pre-market testing, hazard assessment and notification procedures only for *new* (post-1981) chemicals. Currently, of about 100,000 listed substances in European chemical registers, approximately 30,000 are of commercial significance. However, only about 2,500 chemicals were introduced on the market *after* 1981, which means that the majority of chemicals have not yet undergone a registration and hazard assessment procedure.[20] Moreover, the existing chemical regime in the EU is somewhat complex, so the chemicals industry has an interest in establishing a comprehensive, harmonized European chemical regime. Chemical policy has, so far, mainly been motivated by economic – in particular, trade – concerns and only marginally by environmental or consumer protection (Lenschow 2005: 307). REACH, the planned directive on Regulation, Evaluation and Authorisation of Chemicals, is supposed to establish a coherent, integrated regime to European chemicals.

Pushed by Scandinavian countries and the Netherlands (Pesendorfer 2006), in December 1998 the EU Council acknowledged the necessity to work on an integrated and coherent approach to the EU's chemicals policy that adequately reflects the principles of precaution and sustainability. In June 1999, the Environment Council[21] took a step forward by giving a clear mandate to the Commission to take the appropriate measures. Consequently, on 24/25 February 1999, the Commission held a stakeholder brainstorming workshop entitled 'On the development of a future chemicals strategy for the European Union' in Brussels, and, in February 2001, published a White Paper on the future of chemical policy (COM(2001) 88 final). In this White Paper, the following aims for a chemical regime were expressed:

Protection of human health and the environment
Maintenance and enhancement of the competitiveness of the EU chemicals industry
Prevent fragmentation of the internal market
Increased transparency for both consumers and industry
Promotion of non-animal testing
Conformity with EU international obligations under the WTO.

All (both existing and new) chemicals should be registered and evaluated, and an authorization scheme should be established for chemicals

of very high concern – such as carcinogenic, mutagenic or bioaccumulative substances – which includes the possibility of restriction and substitution of chemicals.

In October 2003, after extensive consultations that encompassed an eight-week online consultation, several conferences and public hearings, and a series of impact assessments throughout the summer of 2003, the Commission published its draft proposal (COM(2003) 644 final) and passed it to the European Parliament. Two years later, after considerable procedural tactics and substantial contestation, the EP, under the co-decision procedure, agreed on a significantly amended draft version in its first reading in November 2005 (Council 2005). Only a month later, the Council achieved a political agreement on REACH (EP 2005).

CSOs in the EU's environmental policy and in REACH[22]

Parallel to the growth of European environmental policy in the mid-1980s, environmentally oriented civil society actors became more visible in Brussels. Representing NGOs, the big four – the European Environmental Bureau (EEB), Greenpeace, the World Wildlife Fund (WWF) and Friends of the Earth (FoE) – became important actors. Representing business, organizations such as the European Chemical Industry Council (CEFIC), the European Association of Chemical Distributors (FECC) and the Union of Industrial and Employers' Confederations of Europe (UNICE) had already been active at early stages of European integration. The CONECCS database currently lists 137 organizations in the field of the environment, of which only 12 directly deal with environmental concerns, the others being predominantly business associations. Today, the environmentally oriented CSOs are very well established and co-ordinated as 'Green 10'[23] at European level. According to the interviews, this co-ordination works well, which shows the importance of CSOs bundling forces, distributing tasks and co-ordinating action in order to compensate for their lack of resources when compared to business interests. For instance, in the REACH process, the environmentalist CSOs often co-authored their position papers and activities, including their contribution to the online consultation.

Although, in principle, the same 'rules of the game' concerning the indicators of access and transparency also apply to environmental policy as previously discussed, developments at global level could stimulate the EU's environmental policy to become a forerunner for a participatory governance regime. In 1998, the Aarhus Convention was agreed by

the United Nations Economic Commission for Europe (UNECE) and foresees access to information, public participation in decision-making and justice in environmental matters. On 17 February 2005, the EU ratified a watered-down version of the convention, which excluded access to certain types of documents and, above all, denied NGOs access to the European Court of Justice.[24]

In the REACH process, as Table 7.1 shows, the European institutions and the stakeholders have been very actively engaging in numerous dialogical activities. Moreover, the Commission initiated the 'REACH Implementation Projects' (RIPs), and – as proposed by CEFIC – launched the programme 'Strategic Partnerships on REACH Testing' (SPORT) with industry, trade unions and the member states. Besides these occasions, CSOs such as the European Trade Union Confederation (ETUC) or the EEB organized several major conferences to promote dialogue between all stakeholders, and countless smaller receptions, information meetings and other informal contacts also took place. Environmental groups sought to gain public visibility through international campaigns such as the WWF's DETOX-Campaign.[25] All in all, although the informal contacts

Table 7.1 Overview of crucial official participative activities during the REACH process

Date	**Type of activity**
1999	The European Commission organized a conference with 150 stakeholders.
2001, 2 April	The European Commission organized a second stakeholder conference on the Chemicals White Paper.
2003, 7 May–10 July	The Commission published a very detailed document as reference document for the internet consultation. Internet Consultation, 7 May until, 10 July 2003.
2003, 16 October	Stakeholders' briefing organized by the Commission on its impact assessment study.
2005, 19 January	Joint Public Hearing on 'The new REACH legislation', organized by the EP's Committee on the Environment, Public Health and Food Safety; Committee on Industry, Research and Energy and Committee on Internal Market and Consumer Protection.*

Note: *The three parliamentary committees could not agree on a common programme for the hearing. Eventually, every committee organized its own panel with its own like-minded experts so that real dialogue between the different stakeholders was by and large avoided.

between the stakeholders and the decision-makers were of significance, one can also say that the Commission made an effort to render the formal policy formulation process open. In particular, the Internet consultation via the IPM Platform resulted in more than 6,300 contributions and, as the interviews revealed, influenced the first draft legislation – in favour of business concerns. The restrictive questionnaire that focused on technical questions was criticized as favouring business actors by avoiding a fundamental debate about the core principles and aims of REACH, such as the precautionary principle.

Despite the Commission's efforts to create an accessible, transparent and inclusive policy process, REACH shows how a mixture of *formal* – albeit technical – consultation exercises and *informal* policy-making practices has created asymmetric access to policy processes. It is resource intensive to establish and maintain close contacts with the European institutions and to provide highly technical advice (personnel, financial, expertise, and so on), but non-business CSOs usually suffer from a lack of resources. Consequently, these actors tend to focus on their 'natural allies' in DG Environment and the Members of the EP's Environmental Committee. Moreover, it is not only this resource asymmetry among the business and non-business CSOs in informal participatory patterns that accounts for different strategies. While business CSOs try to be involved in policy-making without publicity, non-business concerns actively seek to increase their visibility by stimulating public debates. In addition, the political salience of the different concerns of the various stakeholders is asymmetrically attributed, in that business concerns echo considerably stronger in the policy process than environmental concerns, as the next section will show.

Was the policy process in the case of REACH responsive to CSOs' input?

REACH affects industry, consumers, workers and the environment. Consequently, the coding scheme for the analysis was based on the key concerns of the CSOs,[26] as was visible in their contributions.

Given this section's limited space, it concentrates only on the major tendencies of the analysis. As Table 7.2 shows, the Commission showed significant willingness to listen to the concerns of stakeholders, and the majority of CSOs were satisfied with the White Paper. Business concerns were less satisfied, and failed to see a balance between the environmental and economic aspects. However, in the course of the process and the reshuffle of competences in favour of business concerns in the European institutions, the environmental and consumer concerns found

Table 7.2 Principles guiding the analysis

Economic concerns	*Competitiveness* (costs involved; bureaucracy; transparency (duty of sharing and publishing data); scope of directive; risk-based approach)
	Innovation (authorization: substitution of chemicals; loss of substances; R & D) *Trade* (WTO compatibility; relation domestic producers vs importers)
Consumer and worker concerns	*Precautionary principle* (scope of directive; minimizing at workplace and at consumption; transparency (labelling of products); hazard-based approach*
Environmental concerns	*Animal testing* *Precautionary principle* (see, above, authorization regime)
Procedural issues	*Role of Agency* (burden of proof; degree of harmonization; risk *vs* volume based approach; relation to existing legislation)

Note: *The industry's risk based approach implies a tiered approach to registration and risk assessment. This means that there are different stages of assessment intensity according to the risk of the chemical – and not according to the substance's intrinsic hazards or the volume of yearly production (volume based approach). CEFIC argues that this minimizes animal testing (which it will) because it would make tests of non-risky substances superfluous. However, environmental and consumer CSOs consistently asked how one could know the risks of substances before comprehensive testing? A hazard based approach would be more appropriate to the precautionary principle.

themselves increasingly on the defensive and some CSOs seem to have given up on many issues; for example, the inclusion of lower tonnages for registration and the establishment of a hazard-based approach even in the registration and evaluation processes. Instead, they concentrated on key issues; in particular, on a quality criterion in the registration process and, above all, on the authorization scheme that should, according to them, include the phasing out of chemicals of very high concern and their mandatory substitution. Without this, so the argument goes, the precautionary principle would not be respected at all and no substantial improvement in relation to the existing legislation would be achieved. Contrary to this, the business CSOs succeeded in avoiding a substantial application of the precautionary principle. Instead of a hazard approach to registration, a risk based approach was introduced and substitution was only made optional in the authorization stage.

By analyzing the documents in more detail, it was striking to see that the discussion became more and more polarized. The same arguments are put forward again and again, and many indications suggest not only that the actors tend not to listen to each other, but also that they even tend not to listen to the results of impact studies. In particular, the environmental NGOs make their claims visible and their approach is based on argument and the giving of reasons. However, business stakeholders apply a mixed strategy: they engage less openly in discussions, and rely much more on their direct access to important official players in the process and place much trust in their lobbying capabilities. One part of the strategy of the business associations and conservative/liberal Members of the EP was to prolong the legislative process – with they did with success. Due to this tactic, it was the newly elected EP that had to deal with REACH, which not only led to a further delay of one and a half years, but also to the watering-down of measures, because the new EP is more conservative and business-friendly than its predecessor. Furthermore, business CSOs profited from the procedural changes that strengthened business concerns both in the Commission and the Council. One can only speculate whether these changes were more important for shaping the directive's content than was the business argumentation.

Conclusion

The aim of this chapter was to examine whether the EU's discourse concerning participation has contributed to the establishment of a participatory regime in European policy-making; that is, whether EU policy-making makes systematic use of the normative potential of civil society participation. Although both the policy areas analyzed are, *in principle*, subject to the same, somewhat unspecific, EU rules for access and transparency,[27] the analysis of the cases revealed that, *in practice*, participatory activities vary in due course of the process. In the early stages of both processes, the European Commission tried to act inclusively by inviting stakeholders to discussions on the prospective legislation. However, as soon as the official legislative process between the EU institutions began, the cases began to deviate from each other. In (legal) migration policy, where the intergovernmental rules of unanimity prevailed, member states showed no willingness to listen to civil society. In contrast, the moment the Council entered the stage, it dominated the process and CSOs' efforts to make themselves heard remained peripheral to the process. Although the Council's Working Group on Chemicals

was central for negotiating the draft legislation, even in REACH, the member states were forced by the co-decision procedure not to shut their doors to the voices of stakeholders. In REACH, CSOs had considerably more access than in migration policy, not least because the members of the EP do not have huge bureaucracies at their disposal and thus have greater need to rely on external expertise.

In addition to these policy process characteristics, policy field specific characteristics also influence the participation of CSOs. In migration policy, the analyzed data give strong reasons to suggest that the securitization of migration policies has increased since 11 September 2001, overshadowing the possible needs for economic migration (beyond high-skilled labour) and human rights concerns. Apparently, this development shifts the balance of power even more to the disadvantage of most CSOs' priority issues. In contrast to migration, environmental policy is an established policy area in the EU's supranational First Pillar and the general political will for integration is undisputed. However, the current dominance of economic perspectives in the EU seems to strengthen the dominance of economic voices to the disadvantage of other concerns. The considerably greater divergence among CSOs' concerns in environmental policy is reflected in the different strategies for obtaining access to the policy process. Economic CSOs apply both public and more secretive strategies, whereas human rights, environmental and consumer CSOs tend to rely more on argumentation and to strive for publicity.

The results suggest that a relatively restricted number of well-organized CSOs has benefited from the partial opening-up of policy processes. One could now easily argue that European policy-making processes make only limited use of the normative potential of CSOs. However, the area of environmental policy, in particular, suggests that 'hard law' policy processes have not been totally unaffected by the lively discourse on CSO participation in recent years. Means of e-governance are also in use, which somewhat de-territorializes consultation and participation, without, however, (yet) having the ability to balance the disadvantages of 'silent' concerns, such as environmental issues. Online consultations do not substitute efforts to support inclusion of these concerns actively. Hence, the existing EU practice of supporting CSOs does not guarantee broad inclusion, although it is not fundamentally detrimental to the inclusion of stakeholders, either.

In summary, the development of a participatory infrastructure did not keep up with the pace of the participation discourse. An eventual ratification of the constitutional treaty could substantially accelerate this

process. The constitutional treaty's Title VI includes Article I 47 on 'participatory democracy', which would establish a clear connection between civil society participation and democratic governance in the EU. In addition, this article would oblige *all* European institutions – that is, even the Council – to be transparent and open to consultation, similar to the Aarhus Convention, whose effect beyond environmental policy remains to be seen. Currently, the participation of CSOs in the EU's policy-making processes is dependent on the legal basis of the issue area in question and, thus, the involvement of the EU institutions (the role of the Commission is stronger in First Pillar issues than in Second or Third Pillar issues, for instance), the coincidence of CSOs meeting interested civil servants in either the Commission and/or in the national executives, and the general 'volonté politique' of the member states to integrate the respective policy area and to abandon their tradition of secrecy.

However, doubts can be raised as to whether a systematic transposition from discursive to practical civil society participation is – at the end of the day – the goal of technocrats in the European Commission, the executive in the Council and many member states. Indeed, we should ask ourselves what the consequence of democratizing participation would be? It would mean greater public visibility and discourse about policy aims and means; it would mean greater awareness and greater mobilization of citizens. It would also mean a politicization of EU policy-making, thus making political steering by expertise, technocracy and bureaucrats behind closed doors more difficult, and European policy-making a truly thorny task, one that would require considerable effort in both arguing and persuasion.

Appendix

List of CSOs included in the analysis

Family reunification

Churches' Commission for Migrants in Europe (CCME)
Commission of the Bishops' Conferences of the European Community
European Citizens' Action Service (ECAS)
European Co-ordination for Foreigners' Right to Family Life (COORDEUROP)
European Council on Refugees and Exiles (ECRE)
European Network Against Racism (ENAR)
December 18

Human Rights Watch (HRW)
United Nations High Commissioner for Refugees (UNHCR)[28]
Immigration Law Practitioners' Association (ILPA)
International Lesbian and Gay Association (ILGA-Europe)
Migration Policy Group (MPG)
Platform of European Social NGOs
Save the Children
Statewatch
Union of Industrial and Employer's Confederations of Europe (UNICE)

REACH

The Green 10

Birdlife International (European Community Office)
CEE Bankwatch Network
Climate Action Network Europe (CAN-E)
European Environmental Bureau (EEB)
European Federation for Transport and Environment (T&E)
EPHA Environment Network (EEN)
Friends of the Earth Europe (FoEE)
Greenpeace EC-Unit
International Friends of Nature (IFN)
WWF European Policy Office (WWF-EPO).

Other CSOs

European Apparel and Textile Organisation (EURATEX)
European Association of Chemical Distributors (FECC)
European Chemical Industry Council (CEFIC)
European Community of Consumer Co-operatives (EUROCOOP)
European Consumers Organisation (BEUC)
European Chemical Employers' Group (ECEG)
European Mine, Chemical and Energy Workers' Federation (EMCEF)
European Trade Union Confederation (ETUC)
European Trade Union Institute (ETUI)
Standing Committee of European Doctors (CPME)
Union of Industrial and Employer's Confederations of Europe (UNICE)

Notes

1. A civil society organization is defined here as a non-governmental, non-profit organization that pursues its clearly stated purposes in a non-violent way

(see Chapter 1 by Steffek and Nanz, and endnote 4 of Nanz and Steffek 2005).On the usage of the term 'civil society' in European institutions, see Smismans (2002).

2. See http://europa.eu.int/comm/civil_society/
3. See http://www.un.org/dpi/ngosection/index.html
4. The Social Dialogue and the Economic and Social Committee are treaty-based provisions for consultation that are outside the scope of this chapter.
5. http://europa.eu.int/comm/civil_society/coneccs/index.htm
6. For instance, within the Commission, knowledge dissemination about IPM depends solely on the small IPM unit within DG Internal Market (interviews with IPM personnel).
7. An exception to this rule is the contacts of the Social Platform. In 2000, the Portuguese Presidency invited the Platform to an informal Social Affairs Council Meeting and provided the participants with speaking rights (Alhadeff 2002). These meetings were repeated until the Presidencies of Italy and Greece stopped this invitation. The British Presidency in 2005 promised, however, to re-establish these meetings.
8. In a decision from 21 December 2005, the Council announced that it would open those of its meetings to CSOs that concern issues under co-decision. However, the European Ombudsman criticized this move as insufficient and urged the Council to open its doors to all meetings where concrete policy measures are discussed (Press Release no. 2, 2006).
9. European Commission: from 19 per cent in 1999 to over 33 per cent in 2002; Council: from 16 per cent in 1999 to almost 29 per cent in 2002 (for documents that were released wholly), see (Ferguson 2003: 4).
10. European Citizen Action Service, 'The Financial Relationship between NGOs and the European Commission', Brussels: ECAS, 2004.
11. In the case of family reunification, with a view to human rights, this has been covered from a legal perspective in an excellent, detailed way by van der Velde (2003); see also Peers (2003a, 2003b). REACH is too young for detailed analysis. For an early overview about the process, see (Pesendorfer 2006).
12. I did not include every contribution of the more than 6300 submitted to an online consultation in 2003; most of them are from individual firms and, thus, are not captured by the definition of civil society.
13. See Article 67 EC Treaty and the Protocol and Declaration on this Article (annexed to the Nice Treaty), which required unanimous voting in the Council, mere consultation with the EP and a shared right to policy initiation between the Commission and the Council (Alegre et al. 2005).
14. Not least due to Germany, which had blocked any progress so far because of its pending new immigration law. After the matter was finally decided, Germany stopped its obstructive attitude in the Council (see interview in the German Permanent Representation, June 2005).
15. Published in the *Official Journal* (2004/C 47/35).
16. Migration Policy Group, 'Engaging Stakeholders in the Emerging EU Debates on Migration', Brussels, 2002.
17. See Case T-217/01, decision (2003/C 146/70) of 9 April 2003.
18. Also e-mail communication with CCME (7 July 2005).
19. See Appendix for a list of the CSOs.

20. According to the Commission, 'existing substances amount to more than 99% of the total volume of all substances on the market, and are not subject to the same testing requirements' (European Commission 2003), 'Proposal for a Regulation of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)', establishing a European Chemicals Agency and amending Directive 1999/45/EC and Regulation EC COM(2003) 644 final as the 'new' substances. However, numbers vary in documents, which shows the insufficient data available.
21. During the Italian Presidency (in the latter half of 2003), and – according to interviews – apparently not debated beforehand by Prime Minister Berlusconi, the Competitiveness Council became responsible for REACH, instead of the Environmental Council. However, Germany and Denmark decided to send their Environmental Ministers to Council meetings on REACH. Moreover, within the other European institutions, responsibility for REACH was contested. In the Commission, DG Environment was originally responsible, and produced the White Paper in 2001, although it also shares responsibility with DG Enterprise and Industry. Moreover, after a fierce battle in the EP, the Environmental Committee remained the leading committee, while the other committees, such as the Competitiveness Committee, received the right to bring their own amendments to the plenary sessions. For a useful description of the early stages of the REACH process, see Pesendorfer (2006).
22. In addition to participation in policy processes, in December 2004, the European Commission recognized the European Social Dialogue in chemical policy between the European Mine, Chemical and Energy Workers' Foundation and the European Chemical Employers' Group. An emphasis in the agreed work programme is the European legislation on Chemicals Policy. A joint declaration of the Social Partners ECEG and EMCEF was compiled on REACH, which was then adopted in its 3rd Social Dialogue Plenary session on 15 September 2005. One major aim is information sharing with the new member states.
23. See Appendix for members of the Green 10. Many of them receive Commission funding to secure their operations.
24. See the relevant legislation under the Aarhus Convention, Council of the European Union (2003), 'Directive of the European Parliament and of the Council on Public Access to Environmental Information', and repealing Council Directive 90/313/EEC; Council of the European Union (2003), 'Directive of the European Parliament and of the Council Providing for Public Participation in respect of the Drawing Up of Certain Plans and Programmes relating to the Environment and Amending with regard to Public Participation and Access to Justice Council Directives 85/337/EEC and 96/61/EC, at http://europa.eu.int/comm/environment/aarhus/. An early legal analysis of the relationship between the Aarhus Convention and the EU is provided by Rodenhoff (2002).
25. http://detox.panda.org/
26. See the Appendix for a list of the CSOs. The Copenhagen Charter of October 2000, issued by major environmental NGOs, has been signed by more than 100 organizations.

27. It is too early to gauge the influence of the Aarhus Convention.
28. Please note: I included the UNHCR in this list because it pursues policy and advocacy aims that are comparable to the other CSOs. Moreover, the UNHCR, Brussels Office, organizes an informal network of NGOs working on migration policies.

8

Participatory Strategies in the Regulation of GMO Products in the EU

Maria Paola Ferretti[1]

This chapter explores a potential 'democratization of risk' by examining the participatory strategies of the European Food Safety Agency's Panel on the Regulation of Genetically Modified Organisms (GMO Panel). It examines the extent to which organized civil society and concerned citizens have the opportunity to influence decisions on the regulation of genetically modified organisms (GMOs) in the European Union (EU). It considers the conditions of access and transparency that prevail in the current procedures of risk assessment and, by analyzing the documentary record of some recent cases, probes into the responsiveness of the European Food Safety Agency (EFSA) and the European Commission to people's concerns as expressed through the institutional channels for participation.

Risk governance is a nodal point for exploring the tensions between the need to address technical difficulties, which seems to require experts, and the democratic commitment to finding public rules and processes that are transparent and open to the appraisal and scrutiny of citizens. The issue is often put in terms of a 'democratization of risk', which points to the idea that people should have their say with regard to what risks they are willing to take, and what risks they wish to submit to regulatory procedures. Moreover, questions of how risk can be mitigated and distributed across the population should be subject to democratic assessment (Shrader-Frechette 1991). The EFSA and, in particular, its GMO Panel are part of a new European approach to consumer safety that aims to meet the demand for sound and independent scientific advice by means of risk assessment, whilst the more political tasks

of risk management and communication are left to member states and the Commission.

The food scandals of the 1990s were seen by many as evidence that, in European risk regulation, the judgements of the appointed experts served the interests of the meat industry, rather than those of consumers, and that science was biased, not very transparent, and was, therefore, a legitimate object of scepticism (Medina Ortega 1997). As a means of remedy, the Commission's White Paper on Food Safety[2] of 2000 states the intention to 'promote dialogue with consumers to encourage their involvement in food safety policy' (p. 12). Accordingly, a commitment to greater civic participation, transparency and openness was put forward so as to give consumer interests a new centrality and restore consumer trust (Hood et al. 2003; James et al. 1999: 14; Vogel 2001: 16). But to what extent are the European institutions for risk regulation able to fulfil this promise?

This chapter focuses on the initiatives enacted for democratic inclusion in the first months of the activities of the EFSA's GMO Panel. It asks what form and purpose(s) strategies for democratic inclusion and participation take in this context. This analysis is carried out by means of a content analysis of: (i) the minutes of two of the public consultations organized by the GMO Panel to date: the first concerned the drafting of a guidance document on risk assessment concerning genetically modified (GM) plants, while the second concerned the general surveillance of genetically modified crops; and (ii) consumer comments, made at the invitation of the Commission, on a selection of notifications about deliberate field trials and the placing of genetically modified organisms on the market. The analysis reveals who the participants are, their concerns and expectations, and the shortcomings of the procedures in place.

It emerges that the model of participation in use here is that of giving 'due consideration' to all interested parties.[3] In its ideal-typical version, this model aims to create a forum in which all the interested parties have the right to participate. The institution, or agency, in charge of this participatory practice acts as a neutral arbiter among the various interests at stake. It shapes the agenda, and presents a case (such as the approval of the authorization for marketing a certain product) based on the facts, evidence and arguments in support of it. A document illustrating the agency's position is submitted to the various stakeholders, who are, in turn, invited to contribute with facts and evidence in order to defend their own argument, and in order to support and, on occasion, to rebut that of the agency or of other stakeholders. The agency is

committed to give 'due consideration' to all opinions, and to comment and explain its course of action by providing impartial reasons for its decisions (McGarity 1990). Whatever decision is the outcome, there will be winners and losers, rather than a conciliatory solution, even though both the winners and the losers are presented with reasons to accept it.

The advantage of this model is its efficiency. It does not require the direct involvement of the parties in the decision-making process, albeit only in the phase of gathering information and illustrating reasons for or against a certain proposal. It leaves the agency with the task of appraising the evidence and arguments brought to the forum and, ultimately, of deciding what should count as sound evidence and argument. The disadvantage of this model is that the agency can always be subject to the accusation that not all points of view have been given fair consideration, and it is quite difficult to prove the impartiality of the decision. As we shall see in the remainder of this chapter, this makes it particularly difficult to transfer the model into institutional practice. In particular, the asymmetry of information among the interested parties should be avoided, so that none of the parties – and only the agency – dominates the decision-making process. Also, in order to dispel all suspicion that the process is unfair to some and that there is no adequate responsiveness, detailed rules are necessary so as to specify what evidence of due consideration the agency should present to the participants.

EFSA, the GMO Panel and public participation

The European Food Safety Authority was established in 2002 (Regulation 2002/178/EC) as an independent scientific agency, funded by the European Community. The tasks of the EFSA include scientific advice on questions relating either directly or indirectly to food and feed safety, animal health and plant protection, and nutrition. Provisionally based in Brussels, the EFSA is progressively transferring to its official site in Parma, Italy. The GMO Panel deals with questions of novel biotechnology products as defined in Directives 2001/18/EC (regulating the deliberate release of GMOs into the environment) and 2003/1829/EC (regulating GM food and feed). Among other tasks, the Panel provides advice to the Commission with regard to risk assessment, and communicates with the public. The Panel includes some 21 members of various nationalities and various fields of expertise, including agronomy, biochemistry, genetics and toxicology.

Application for authorizing GMO products

The procedure for authorizing the placing of GMOs, as such or as a component product, on the market, following Directive 2001/18/EC (Part C), establishes that the company intending to market a product in the EU should apply to the competent authority of its member state. The application (also known as notification) must be compiled in accordance with the standard requirements listed in Article 13 of the afore-mentioned directive. The competent authority assesses the notification and issues an opinion in the form of an assessment report. In the event of a favourable opinion, the report is forwarded to the competent authorities of the other member states and to the Commission, and a summary is made public via a website (http://gmoinfo.jrc.it, hereafter Gmoinfo) provided by the Joint Research Centre (JRC) of the Commission. When no objections are raised by the member states against the competent authority's assessment report, the authorization for marketing throughout the EU is granted. If objections are made, a procedure of conciliation is initiated by the member states, the Commission and the applicant, with the aim of resolving the outstanding disagreements. When divergences are persistent, the Commission asks the EFSA for an opinion. Based on this opinion, the Commission presents a draft decision to the Regulatory Committee in Brussels, made up of the representatives of the member states. The Committee is asked for an opinion under qualified majority voting. When a favourable opinion is expressed, the Commission adopts the decision. When the measures envisaged are not in accordance with the opinion of the Committee, or no opinion is delivered, the Commission submits the issue to the Council of Ministers for approval (or rejection) under qualified majority voting. When the Council reaches a consensual opinion, the proposed measures have to be approved by the Commission. In cases where the Council cannot reach a decision within three months by qualified majority, 'the proposed legal act shall be adopted by the Commission' (Directive 2003/1829), and the outcomes are published in the Official Journal of the European Union.

A similar, but not identical, procedure concerns the authorization for GMO food and feed products, under Regulation 2003/1829/EC. Applications must also be submitted to one of the competent national authorities, which must acknowledge receipt of the application and inform the EFSA, the Commission, and the other competent national authorities within 14 days. A summary of the application dossier is made publicly available on the EFSA website. The EFSA is responsible for

the assessment of the application materials, and covers both environmental risk and health safety assessment. Its opinion is made available to the public, who can make comments to the Commission's Directorate General for Health and Consumer Affairs (DG SANCO). The Commission, on the basis of the EFSA opinion, must issue a decision within three months. The Commission's decision has to be approved through a qualified majority by the Standing Committee on Food Chain, made up of representatives of the member states and chaired by DG SANCO.

Public comments

Concerning the field trials under Directive 18/2001/EC on the deliberate release of genetically modified organisms into the environment, public comments are managed by the JRC on behalf of the Directorate General for the Environment, through the Gmoinfo website, which has the aim of establishing a link between the public and competent authorities. Citizens can send their comments in writing within 30 days of publication. Comments can be made both after the publication of the summary notification (SNIF) or after the publication of the assessment report made by the competent authority.

The JRC is responsible for collecting the comments in a dossier which is then forwarded to the competent authorities and to the Commission. Comments are not translated, nor summarized, and no reply is given to the sender. Member states may take the comments into consideration during their assessment. However, the legislation does not specify any procedure in order to substantiate the principle of 'due consideration'. First, there is no specification of whether the comments should be considered by the competent authority in charge of the notification, or whether each member state should respond to the comments originating from its own nationals. As a matter of practicality, it has been understood that each member state will answer the comments of its own citizens, so as to avoid problems with translation. However, some of the national authorities have interpreted this as the responsibility to react only to comments originating from their own nationals (see, for example, SNIF C/NL/04/02 discussed below).

The activities on the Gmoinfo website are advertised through a mailing list of voluntary subscribers, which, at the time of writing, has about 1,000 addresses, which represent various kinds of organizations and people from a variety of professions, countries, age groups and social backgrounds.[4] Although there are no statistics available on the

comments received, we know that SNIF C/BE/96/01 (Oilseed Rape), among the first published in 2003, received almost 50 comments. Similarly, some of the summary notification SNIF C/GB/03/M5/3 (Rice); SNIF C/ES/01/01 and C/ES/04/01 (both Maize) received a substantial number of comments. It should, however, be noted that the trends indicate a diminishing quantity of comments received for each newly published SNIF, which suggests a decline in the enthusiasm of the public. Furthermore, comments increasingly originate from associations rather than from private citizens and are increasingly technical, which suggests that, even if the participation is open to all, the fact remains that only specialized actors have the actual competence to interact with the institutions. These trends will be discussed at a greater length later in this chapter.

A separate procedure was implemented for public comments on the EFSA's opinions on applications under Regulation 2003/1829, concerning food and feed. Whenever an 'overall final opinion' is published on the EFSA website, the report is copied to a special page on the GM Food and Feed Unit's (DG SANCO) website where, through a special form, comments can be sent to the Commission and simultaneously made available to the public. At the time of writing, there was no link from the EFSA webpage to the SANCO webpage, which makes access difficult for inexperienced users. Comments are sent via the Internet in a set format to the Commission, and are collected in a document which is also accessible from the same webpage. In this way, comments can be read both by the competent authorities and by the public. The comments received so far (which refer to one single opinion of the EFSA) have only originated from environmentalist non-governmental organizations (NGOs) and other associations with the specific mission of scrutinizing the regulation and authorization processes for GMOs in Europe, such as the British Gene Watch and the Italian Consiglio dei Diritti Genetici. These non-profit organizations have the mission of facilitating public participation, and of overcoming the obstacles to the actual engagement of people with questions relating to GMOs; namely, the difficulty of collecting the necessary information from the various European Institutions involved (DG Environment, DG SANCO, EFSA, and so on), of translating the technicalities of the official documents into a widely accessible language, and of voicing the potential dissatisfaction of citizens about the ways in which the institutionalized spaces for participation are managed.

Increasingly, NGOs act as a critical interlocutor between governmental agencies and industry (Ansell et al. 2003). In the case of GMOs, this

seems particularly evident. These groups are present at many levels in the EU institutions (such as lobbying and public consultations) and in the media. The window provided by DG SANCO represents a further forum for NGOs to inform citizens and make their work as critical interlocutors of the institutions known to the general public, offering themselves as mediators between the technicalities of the language of science and the people's receptivity to GMO issues. This specific role can, in part, be explained by the complexity of the topic, but also by the specific institutionalized strategies of participation in place. The next sections present some cases of participatory procedures, in an attempt to isolate the factors that can give us an indication of how effective these methods are in bringing citizens closer to the institutions that regulate biotechnology.

Florigene Moonlight: the indeterminacy of due consideration

In September 2004, Florigene Limited (Australia) applied – under Directive 2001/18/EC – to the competent authority of the Netherlands for permission to import and market 'Florigene Moonlight' carnations, which is a variety of carnation with modified flower colour and contains a herbicide-resistant gene, in the EU (C/NL/04/02). The scope of the notification does not include authorization for the consumption or cultivation of 'Florigene Moonlight' in Europe, which has, however, already been in continuous commercial production in Australia, Ecuador and Colombia for a few years now. The applicant specified that the product was intended for ornamental use only. It would be sold on the flower market, and the importation of cut flowers bears no risk of gene dispersal by seed formation or pollen spreading, and will not enter human or animal food chains. The Dutch competent authority judged all risk to the environment and to human health to be negligible.

The Netherland's assessment reports are among the few in existence in the EU, which include an account of the public comments received through the Gmoinfo website. Indeed, most competent authorities simply do not include any section on public comments in their assessment reports. With regard to 'Florigene Moonlight', six comments were sent from four different member states (the Netherlands, Italy, the UK and Belgium). As was explained above, the Directive does not specify which competent authority is expected to give 'due consideration' to citizens' comments. In its assessment report, the national authority addressed only the three comments that originated from the Netherlands, and

specified that the other comments should be addressed by the relevant competent authorities in their national assessment. This, however, is an interpretation of the Directive that is not supported by any official document but, rather, as stated above, is a procedure developed from the practical need to avoid language barriers, even though most comments are issued in English. In fact, there is no evidence that the competent authorities of the respective member states addressed the comments from their nationals on 'Florigene Moonlight'.[5]

The three 'Dutch' comments, for which the national authority feels responsible, are addressed in the assessment report, and are dismissed on the basis that the objections raised go beyond the scope of Directive 2001/18/EC. However, it is interesting to take a closer look at the concerns expressed by consumers.[6] Two of the comments asked whether it was worth running *any* risk in order to have, say, carnations of a different colour. In the words of one commentator on summary notification C/NL/04/02: 'Are you crazy? As if nature is not beautiful enough'. Another comment, sent after the publication of the assessment report, asked whether there were no more urgent tasks for scientists to address other than modifying the colour of flowers. Although these comments are dismissed as 'ideological' in the reply provided by the national authority, it seems plausible to read them as expressing an evaluation of risk versus benefits, and conclude that even the minimum risk is not worth taking to have carnations of a different colour. And whom can we deem as foolish for thinking so?

In the same vein, another comment suggests that GM products should only be used in cases of necessity and when there are no available alternatives, and the 'modification of flower colour is not a legitimate ground'. In other words, the rationale for producing and marketing GMO products should be that there is a need for them, and that they cannot be produced with conventional techniques. For those who make comment, GMOs always seem to be, in principle, more risky than conventional products, and good grounds for preferring them to conventional products should be shown in order to justify the risk imposed, via authorization, on the population. This can be easily read as a criticism of the principle of substantial equivalence, which, according to the Food and Agriculture Organization (FAO) and the World Health Organization (WHO),

> embodies the concept that, if a new food or food component is found to be substantially equivalent to an existing food or food component, it can be treated in the same manner with regard to safety (i.e., the

> food or food component can be concluded to be as safe as the conventional food or food component). (FAO/WHO 1996: 4)

This principle has been the object of various scientific controversies, which have mainly pointed to the absence of an appropriate definition of the concept of equivalence (Millstone et al.1999).

The competent authority of the Netherlands is correct in stating that all these concerns fall outside the standards set by Directive 2001/18/EC. However, this raises doubts about the capacity of the participation mechanism to comprehend what people take to be a risk, and the relevant considerations in regulating it. In fact, there is no institutionalized procedure that channels these comments towards other forums where they can be discussed for what they are; namely, the ideas that lay people have of GMOs and their applications. However, it is probable that there is something of value, at least for the sake of risk communication and management, to be learnt from these comments, however naïve they may seem at first sight.

Nevertheless, it seems to be a waste of resources to solicit comments that will, in all probability, be ignored or quickly dismissed. To this, it must be added that the competent authority can always reply to comments by stating that the objections raised have been appropriately taken into consideration in the process of risk assessment, and that the interviewed key informants are positive of the fact that public comment has been taken seriously by the agencies involved. However, there is no way for the public to verify whether this has actually occurred, since no formal requirement to explain how comments have been taken into consideration actually exists. To the citizens' objections to the possible dispersal of 'Florigene Moonlight' genes or pollen into the environment, the national authority replied that the question had already been raised and no relevant risk had been identified. Of particular curiosity is the objection of one citizen that the notification should be transposed for authorization under the stricter criteria of Regulation 2003/1829/EC, because it cannot be excluded that carnations used as food garnish will not be eaten by accident. Moreover, the comment continues, it cannot be excluded that creative cooks will not introduce carnations into new dishes. Once again, the position of the national authority is that carnations are not food according to the definition of Regulation 2002/178/EC and the probability of accidental consumption is considered to be negligible.

The most structured and, arguably, most compelling arguments seem to be those that originate not from the lay public, but from associations

that are able to recruit scientists with the competence to assess the reports. As stated in the previous sections, it is mainly through organizations that can make their expertise available to the public that it is possible to exercise critical scrutiny of the work of the competent national agencies. However, even with the assistance of scientists outside the institutional framework, meaningful participation is a hard task. The reports published by these NGOs (on this notification, see, for example, Consiglio dei Diritti Genetici 2005) highlight the limits to the scientific work that can be performed on a summary notification that lacks important technical details, including a bibliography. In other words, summary reports are too technical to be accessible to lay people, and insufficiently detailed to allow for a sound scientific appraisal by independent scientists.

The NGOs involved in making participation effective lament the fact that no feedback is sent to the people and organizations that issue comments, no evidence is offered of due consideration, and it is no wonder that the number of comments received is declining (Consiglio dei Diritti Genetici 2005). It seems that, once we look into specific practices of public participation, we see that EU legislation requires participation, but that its indeterminacy makes it rather impracticable or ineffective, and it is legitimate to ask whether it is worth our while to receive and collect comments from the public if we do not know what to do with them.

MON 863: the distribution of information

In Summer of 2002, Monsanto submitted an application for the registration of the genetically modified MON 863 to the German authorities (Robert Koch Institut). This is a variant of Maize (Zea mays) that has been genetically modified in order to produce pesticide. MON 863 produces the toxin CryBb1 (different from the toxin produced by MON 810 and other GM maize varieties already authorized) which is meant to protect the crop from the rootworm pest. The application included a 90 day sub-chronic study on rodents conducted by a third party, subsequently updated to fulfil the requirement of the European authorities.[7]

Two separate applications were presented for the importation of MON 863 maize (excluding cultivation) under Directive 90/220/EEC and under the novel food and novel food ingredients Regulation 97/258/EC (now replaced by Regulation 2003/1829/EC). The procedure for authorization followed two separate scientific assessments. The German authorities considered the information provided to be incomplete, and

only after the submission of the requested documents was a summary of the application document published on the Gmoinfo website. Germany forwarded an evaluation of the MON 863 dossier to the Commission, expressing some reservations about the possible adverse effects of an antibiotic resistance marker gene (npII) contained in the product. As part of the member state review of the dossier assessment, the French authority (Commission du Génie Biomoléculaire, CGB) expressed some concerns, echoed by the press, about the safety of the product emerging from the result of the rat studies. In response, in May 2004 Monsanto provided a supplementary analysis of selected findings.[8] Moreover, the applicant released a further study on the rat feeding test in August 2004.[9]

Given the discordant evaluations of the national competent authorities, the EFSA was required to give two separate opinions on the products, one on the application for importation and the second for food and feed. However, a single risk assessment was provided for both opinions, as both application dossiers, to a large extent, cover the same material and issues. Concerning both applications, the Panel expressed a favourable opinion on MON 863 in April 2004, concluding that, on the basis of the documents provided, the product was unlikely to cause adverse effects on human and animal health or to the environment, and that the information provided by the applicant satisfactorily addressed the outstanding questions of the national authorities.

In September 2004, the Regulatory Committee discussed a draft Commission decision on the authorization to place the GM maize on the market. Following discussions concerning the German authorities' evaluation of the rat study reviewed by the EFSA Panel, the European Commission decided to postpone the vote on MON 863 maize, and the EFSA was asked to reconsider the case of MON 863 in the light of this new evaluation. The subject of the disagreement was the statistical relevance of some of the rat study results. After scientific revaluation, the EFSA concluded that the new evidence provided did not change the outcome of the previous assessment and, in October 2004, the EFSA reconfirmed its opinion, according to which there is no concern as to the safety of the product, and the nutritional properties of these maize lines are taken not to be different from those of conventional maize.

While the member states were called to express an opinion on the case, in the spring of 2005, the attention of the public was newly drawn by the media to some statistical results in Monsanto's rat study, from which allegedly significant differences emerge between control and treated rats. The British newspaper *The Independent* revealed that an

internal scientific report of the US-based company contains data on kidney malformations and damages to the immune system observed in rats fed with the crop. A massive mobilization of public opinion and environmentalist NGOs followed.

Monsanto's representatives argue that the variations revealed by the study are not statistically significant and, in response to public concerns, say that MON 863 is not a new product, and that there are no records of health problems associated with the consumption of the product. Moreover, they stated that it has already been accepted as being safe as conventional maize by various food authorities in the world, including the USA and Canada.

The debate about the safety of MON 863 was exacerbated by Monsanto's refusal to make public the complete study results on grounds of trade secrecy. Under the pressure of environmentalist NGOs led by Greenpeace, the German authorities required Monsanto to make the document available on the basis of Article 25 of Directive 2001/18/EC, according to which risk assessment in environmental and health matters should be open to public scrutiny. Monsanto appealed against the decision to disclose the document but, in June 2005, the higher administrative court in Münster ordered the release of the study. The Regulatory Committee could not reach a qualified voting decision, and the Commission submitted its proposal to the Council. Since on the expiring of the period laid down by Directive 2001/18/EC the Council had neither adopted the proposed measures, nor expressed its opposition to them, on 8 August 2005 the Commission adopted the Decision 2005/608/CE favourable to the placing on the market of MON 863.

This case raises some important questions on the role that the applicant companies play in the authorization process. Some (Fishkin 1991) consider participation to be a remedy to the hegemony that some groups have in the decision-making process. In particular, it is the EFSA's remit to involve consumers so as to defend their interests more effectively. However, the case of MON 863 is particularly instructive in that it gives us to understand that, despite the participatory mechanism in place, there is a wide information gap between the applicant and the other actors involved, including the authority that should act as an arbitrator in conflicting interests. The documents upon which the parties should take their respective positions are not provided by the competent authority, but are instead supplied in the form of the application materials submitted by the applicant. As a result, even if industry accountability is often regarded as a route to the fair share of the burdens of regulation, the applicant nevertheless has the resources and the

epistemic authority to lead the public debate – and ultimately the regulative process, too.

In the case of MON 863, no independent studies of toxicity have been made, apart from those sponsored – and, to some degree, interpreted – by Monsanto. Paradoxically, from all the actors, it is companies that are in the best position to test their products, since they can employ scientists of excellence and have access to vast resources. However, they are also in a position to conceal data and information. In fact, the quality and organization of the information submitted to the competent authorities is selected by the applicant. Although the EFSA and the national authorities are in a position to request additional information on the application dossier, or to object to the information provided, time limits and the right to commercial secrecy often prevent a thorough investigation of all the possible elements that might prove negative for the application.

In support of the argument of the substantial equivalence of their product to its traditional counterpart, Monsanto representatives resorted to the positive opinion expressed by several regulatory authorities and scientific committees from other parts of the world. Thus, the applicant is also in a position to bring to its aid parties that are not directly interested in the regulation process, but who can, nevertheless, give evidence in its favour. The arguments of national authorities, NGOs and lay people are weighed against the work of the other scientific committees that have previously assessed the case, whilst all proofs of the safety of the product are controlled by the applicant. Hence, the decision process relies predominantly on the applicant's sources of information and, as a result, the issues are not decided by the participant public, nor by the EFSA or the national agencies; instead, the whole process is lead by the company, which shapes the agenda.

In deliberative practices, access to information is a crucial factor (see Chapter 1 in this volume by Steffek and Nanz) and the case of GMO regulation is a seminal example of the difficulty to achieve a dialogue that is balanced in terms of information between the parties. The model of due consideration, by giving more power to the actor that prepares the documents to be subjected to public assessment, shows us how power accrues to certain actors by virtue of asymmetry of information.

Public consultations: who can participate?

Along with its scientific advisory task in the authorization procedures for GMO products, in which public participation is regulated in terms of

'due consideration' for public comments, the EFSA has used other forms of public consultation on matters of more general interest; such as the drafting of a guidance document on risk assessment concerning GM plants, which was the object of the first public consultation organized by the EFSA, and on the general surveillance of genetically modified crops, which was the theme of a series of stakeholder workshops.[10]

The EFSA and the GMO Panel called for a consultation with the interested parties before the final adoption of the guidance document on GM plants, which was published on the EFSA website on 7 April 2004. The document was intended to provide guidance for the assessment of genetically modified plants, and to replace the documents produced on the same topic on 6–7 March 2003, concerning plants and/or derived food and feed. For the sake of efficiency, the interested parties were invited to submit their written comments via the Internet in the four weeks following publication. The promise was that 'the outcome of this consultation will be taken into account during the final adoption of the guidance document' (EFSA 2004). Thus, once again, the model in place was that of 'due consideration'. Additionally, on 25 May 2004, a day-long stakeholder meeting was held in Brussels that attracted some 80 delegates from various organizations, including non-governmental organizations and industry associations, the member states and the Commission (EFSA 2004).

The object of the guidance document is the scientific assessment of the safety of GMOs and their possible impact on the environment. In his presentation, Harry Kuiper, the head of the GMO Panel, stated that 'the Authority makes every effort to involve stakeholders as much as possible' (EFSA 2004). However, one obvious restriction to stakeholder participation is the topic at issue in this document. On this occasion, the consultation was strictly linked to scientific methodologies for risk assessment, and issues such as socio-economic or ethical concerns, as well as questions of risk governance, were explicitly excluded. This is why the 38 contributors were all experts from different fields (agronomy, biochemistry, genetics and toxicology) with different affiliations (NGOs, universities, industry and governmental bodies) or independent experts. The nature of this topic requires specific scientific expertise in order to be discussed, and, as the minutes document, in the register of delegates classified under the title of 'general public' there were, in fact, only experts who did not represent any institution or organization.

The minutes of this consultation are public and the stakeholders' comments are reported to have emphasized the importance of synergy and the standardization of risk regulation through the EU, as well as the

importance of toxicology and allergenicity studies. One of the most debated questions was that of Post Market Environmental Monitoring,[11] which was the topic of the second consultation. A series of three workshops was organized from September 2004 to January 2005 on the general surveillance of genetically modified crops (EFSA 2005). Different stakeholders, including representatives of applicant firms, environmental organizations and institutes, and government delegates were invited to discuss the rationale and general framework for general surveillance as a component of Post Market Environmental Monitoring. At the end of each workshop, a list of priorities for further discussion and consideration were identified. From the workshop minutes (available on the EFSA's webpages), [12] it emerges that, although there were some divergent views about some specific methodological questions, there was a widespread general agreement on the main issues at stake, such as the preference for a wide range of general surveillance involving a multiplicity of parameters in an experimental- and hypothesis-based approach.

Interestingly, the annexes to the minutes of the workshop held on 4 December 2004, to which environmental groups were invited, reveals a much less consensual output. In their written comments, both Greenpeace and Friends of the Earth point out the limits of the workshop in capturing divergences of opinion, and providing a meaningful means for consultation. Greenpeace complained that the workshop was mainly conducted in a lecture style, with presentations from the EFSA representatives and little space for discussing or presenting rival opinions. Friends of the Earth criticized the current standards of stakeholder involvement, and pointed out that the involvement of stakeholders in general surveillance was important, but that their exclusion from specific monitoring issues reduced the credibility of the consultation process. They also criticized the fact that the minutes presented suggest some general agreement where agreement had not, in fact, been achieved. Alan Gray, a former member of the Winfrith Technology Centre (UK), also suggested that his view on what he regarded as the political and intellectual dishonesty of the whole general surveillance enterprise (versus case-specific monitoring) was not reflected in the minutes.[13] It is unfortunate that there are no public records of other stakeholders' views on the merits of the consultation process, as they may have expressed a more favourable opinion. However, the contrast between the workshop minutes and the written comments in the three annexes is quite striking. The violent opposition to some of the ongoing practices and proposed practices of surveillance and monitoring was reduced to mild differences of opinion on methodological

details, and the general impression was one of unconditional consent. From the minutes, it seems that the participation mechanism is used as a means for forging agreement, rather than for voicing disagreement.

From the documents considered, it emerges that the deep controversies that were expressed elsewhere on GM products were, then, silenced during these consultations, or that such consultations were not designed to address or record these doubts, complaints and criticisms. Indeed, if we look at the comments of the same stakeholders in the first months of the activity of the EFSA, as recorded by the NGOs and associations themselves in their position documents (published on the organizations' websites), we can observe a picture that is very different from the one that is emerging in the institutional space for participation provided by the EFSA. The tone is much more adversarial, the critique harsher, and the quest for more effective ways to voice consumer concerns is much more explicit than emerges from the minutes of the public consultations produced by the EFSA.

The report by Friends of the Earth Europe, entitled 'Throwing Caution to the Wind' (November 2004), presents a harsh critique of the 'political' use of the GMO Panel opinion, which is said to reflect the interests of industry rather than those of consumers. According to the report, there seems to be no evidence that the pluralism of opinions and the uncertainty implicit in most of the cases considered by EFSA has been addressed. This is despite the commitment of the Commission to clarify the grounds of the divergence of opinions, to find a shared solution for contentious issues, and to produce publicly available documents that cite the relevant data and proposed solutions. Moreover, Friends of the Earth judge the scientific opinion issued by the GMO Panel as 'favourable to the biotech industry' (Friends of the Earth 2004: 3), and denounce the fact that most members of the Panel had previously been employed or had previously acted as consultants for biotech companies. This tone is echoed in several reports prepared by other environmentalist NGOs, such as Gene Watch (2003) and Greenpeace (2004).

Environmentalist NGOs operate as critical interlocutors of both the industry and the public agencies in two ways. On the one hand, they act through institutional channels, in dialogue with the institutions; on the other, they operate in fierce opposition to these institutions and bring protest to the street and to the media. By organizing and bringing media attention to the destruction of GM crops, and even by facing highly publicized trials for their demonstrative acts of eco-vandalism, some NGOs have created powerful channels to get themselves heard,

channels that are, arguably, more successful amongst the public than the institutions themselves (Kettnaker 2001).

Conclusion

The case for public participation in risk regulation can be made for democratic and functional reasons. Some authors have presented evidence from environmental risk regulation, which indicates that citizens accept regulations more easily if they have the impression that their own concerns have been treated fairly in the process of rule-making (Thompson and Rayner 1998). However, functional reasons sometimes exceed democratic reasons. Sometimes, giving the *impression* that a decision is the result of a process of public deliberation becomes more important than the deliberation itself, and it may be a way to avoid a more open debate at political level. It seems that the frustration generated by the under-specified requirement of 'due consideration' and the creation of an appearance of consensus in situations in which differences of opinion remain, can foster disaffection with institutions rather than enhance allegiance (Simon 1999). Leaving a window for public comments hidden between the many webpages of the many bodies that contribute to the regulation of risk concerning GMOs, is but lip service to the participatory ideal expressed in the programmatic documents and White Papers. Moreover, the NGOs involved lament a lack of responsiveness on the part of the institutions to the points raised by the public. Under these circumstances, it is no wonder that dissent is voiced through alternative channels, such as boycotts and other demonstrative acts that attract the attention of the media and are thus able to have an impact. The strong opposition of the European public to GM products is, to a great extent, a sign of the success of these communication strategies (Bernauer 2003: 73–80).

Some theorists of deliberative democracy inform us that public participation allows people to express their opinions and listen to the concerns of others, and hopefully also to see the reasons that inform the decision-making process (Fishkin 1991; Levison 1992). From the data on risk regulation in the EU presented here, it is difficult to judge to what extent the practices in place contribute to this ideal. One the one hand, public consultations and workshops, as well as the publication of official documents, undoubtedly represent a great opportunity for the exercise of an informed citizenship. Remarkable efforts have also been made to improve transparency. Although a good deal of information is protected by commercial secrecy, most documents and information can be obtained or accessed via the Internet. On the other hand, the reasons that

inform decisions in risk assessments are very often based on technicalities that are difficult for lay people to understand and appraise. This explains the tepid participation of the lay public. The people who can actually participate are those who are already well informed on the topic, or are independent associations and organizations with the self-appointed role of acting as an interface between the institutions and citizens.

In conclusion, positive and valuable efforts are made to involve stakeholders in the activities of the EFSA. However, participation is not the magic with which to bridge the democratic gap. As has been observed, the technicalities of the subject in question precludes access to some. In public consultations as much as in public comments, only independent scientists or organizations have the necessary expertise to interact with the institutions. In particular, NGOs critical of biotechnology seem to occupy the windows available for public participation. Most people need other channels for participation, which, perhaps, are away from technical agencies and closer to the places where the political choices occur, and where 'what people think' can make the difference.

If, as some observers have suggested, Europe needs to overcome the diffidence of the public towards GMOs (Bernauer 2003), it seems that other means of communication and information should be devised so as to reach wider audiences. For example, proactive communication on the work of appointed scientists and on the minority opinions that have been taken into consideration could be made available through the websites already set up for this purpose. The authors of the White Paper on Food Safety have great expectations for a new policy of risk regulation that can bring the institutions closer to the consumer. The challenge is now to find out which institutional models can best meet this goal, as the strategies currently in place do not seem to fare particularly well.

Notes

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2. White Paper on Food Safety COM(1999) 719 final, http://ec.europa.eu/comm/dgs/health_consumer/library/pub/pub06_en.pdf (accessed on 3 November 2005).

3. McGarity (1990), in his taxonomy of participatory practices, identifies six public participation models: the exclusionary model; the confrontational model, the adversarial model; the due consideration model; the mediation model; and the advisory committee model.
4. The information contained in this section was kindly provided in an interview by Guy van den Eede of the Biotechnology and GMOs Unit of the JCR.
5. This statement is based on the fact that, concerning the UK in the minutes of the meeting of ACRE (Advisory Committee on Release to the Environment, which was responsible for giving an opinion on the summary notification), there is no mention of the public comments. Moreover, in an interview, a representative of an Italian NGO that had issued a comment confirmed that there was no evidence that the competent authorities (Autorità Nazionale Competente sugli OGM, Ministero dell'Ambiente) had taken the points that they had raised into consideration. The Consiglio dei Diritti Genetici wrote an open letter to the European competent authorities expressing this precise concern regarding 'due consideration' in October 2005.
6. The selection of this case is, in part, due to the fact that it was the only notification for which I could obtain the full-length comments both to the summary notification and to the assessment report from the Commission. I wish to thank Bénédicte Vroye of DG Environment for making these comments available to me.
7. 'Thirteen-week Dietary Sub-chronic Comparison Study with MON 863 Corn in Rats Preceded by a 1-Week Baseline Food Consumption Determination with PMI Certified Rodent Diet #5002', (OECD Protocol 408), Covance Laboratories Study no. 6103-293, issued 17 December 2002.
8. 'Supplemental Analysis of Selected Findings on the Rat 90-Day Feeding Study with MON 863 Maize', Report MSL-18175; B.G. Hammond. and D.P. Ward, Monsanto Co., USA, 24 May 2004.
9. 'Retrospective Evaluation of Renal Tissues and Data from Monsanto Co. Study CV-2000-260 (MSL 18175): a 13-Week Rat Feeding Study with MON 863 Corn' (Covance Laboratories Study no. 6103-293).
10. The Commission has adopted a communication entitled 'Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission', (COM(2002) 704 final, adopted by the Commission on 11 December 2002) to promote a greater transparency and openness of the consultation processes.
11. Post Market Environmental Monitoring investigates the presence of GM crop or food in the environment, either released for field trials or in the market-place (Taylor and Tick 2003). This may, for example, involve monitoring consumption patterns of GM foods and matching them to data on diseases and birth defects (Bakshi 2003). The surveillance programme also requires a reliable traceability system.
12. http://www.efsa.eu.int/science/gmo/gmo_consultations/732_en.html (accessed on 3 November 2005)
13. http://www.efsa.eu.int/science/gmo/gmo_consultations/732/outcome2d workshop1. pdf (accessed on 3 November 2005)

9

Assessing the Legitimacy of European Regional Policy: The Interplay of Civil Society and State Actors in Sweden and Germany

Jan-Hendrik Kamlage[1]

According to the Treaty of Rome, solidarity among both the peoples and the member states of the united Europe was a major motive for the introduction of a European regional policy with a redistributive and egalitarian character.[2] This policy aims to counterbalance the neo-liberal measures of the European single market by reducing the economic disparities among the prosperous and economically less favoured regions of the Union by means of financial aid.[3] One third of the European budget is currently designated to regional policy, which indicates its significance for social and economic integration. The decision to introduce active redistribution between the European member states was made by statesmen. However, recent referenda have shown that the solidarity of the people and their support for European policies, politics and polity cannot be taken for granted.

As the doubts about the European project increase in the minds of an ever more critical public, the social foundations of cohesion policy come under threat. In addition, national governments have come to defend their national interests more assertively in recent years (Hooghe and Marks 2001). The conflicts over the distribution of financial aid under the British presidency in 2004 and 2005 perfectly indicate both this tendency and the eroding solidarity among the states. The repeated calls by some member states for budgetary austerity has also put the

Commission under pressure to propose reforms of its regional policy (European Commission 2004; Hooghe and Marks 2001; Tarschys 2003). Moreover, the reforms[4] of the regional policy for the coming structural funds period (2007–13) face some formidable challenges: this is because structural funds not only have to deal with increasing demands for financial support due to enlargement,[5] but also with the poor macro-economic development of the European Union (EU) in recent years.

How does the European Union try to ensure public support for its cohesion policy? On the one hand, the policy is justified by output-oriented arguments, which emphasize the EU's capacity to solve problems effectively. European regional policy is supposed to reduce regional economic disparities within the Union more effectively than national policies. On the other hand, the EU strives to create input-oriented legitimacy through open, transparent and decentralized governance processes, with the participation of civil society. In doing so, the Commission attempts to bridge the gap between Brussels and the Union's citizens (Héritier 1999).

Both strategies intertwine and overlap in two central principles of European regional policy. First, the principle of subsidiarity aims to increase the regional embeddedness, visibility and, thereby, accountability of the policy.[6] With regard to this, the EU decentralized European regional policy and vested the regional political level with far-reaching competencies regarding the institutional design and settings, formulation, operation, management and evaluation of the structural funds programmes. Thus, a huge variety of different programmes and settings can be found at regional level; these also depend on national governmental traditions and the characteristics of the national political systems (for national governmental traditions, see Hall and Soskice 2001).[7]

Second, there is the principle of partnership, which strives towards the participation of regional stakeholders in the operational stages of the policy. The basic aims related to the inclusion of stakeholders are to mobilize regional civil society networks for the policy's objectives and to facilitate public support for the policy. Regional actors, including civil society organizations[8] (CSOs), are invited to participate in the structural funds processes. CSOs are assumed to anchor the policy in society. First, they should disseminate information about the policy within society (bridge function) in order to stimulate public opinion and the formation of public will with regard to regional policy in a positive manner. Secondly, CSOs should add substantive input in order to increase the general quality of the funding policy and, thus, contribute to the

policy's output legitimacy; that is, effective problem solving (Scharpf 2003, 2004).

With regard to the organization of the policy process, European regional policy has a twofold nature: it is basically a supranational policy, but major parts of its operation and implementation take place at regional (sub-national) political level and involve a multitude of national and regional actors (Bache 1999).[9] At regional level, the policy is conducted within non-hierarchical steering committees, the 'Monitoring Committees' (MCs).[10] Ideally, these committees are based on the organizational principles of voluntary participation, persuasion, mutual learning, dialogue and co-operation. Thus, the institutional features of the MCs should help to introduce a space for deliberative processes – that is, interaction based on argument by reason and persuasion from free and equal actors – into European regional policy's governance processes (Joerges and Neyer 1997b; see also Chapter 1 in this volume by Steffek and Nanz). In practice, however, a huge variety of institutional realizations of the partnership model can be found, whose shape depends on the legal framework, political systems and governance traditions in the respective member states (see, for example, Tavistock Institute and ECOTEC 1999).

This chapter summarizes the results of a comparative empirical assessment of the partnership principle as realized in two European regions. The proceedings of two MCs were investigated in Norra Norrland (Sweden) and in Mecklenburg-Vorpommern (Germany), with a focus on the inclusion of CSOs. Hence, the study addresses the question of whether the existing regional policy committees already fit the deliberative ideal (Gehring 2003). To what extent do processes of decision-making in the MCs meet the normative demands of legitimate governance measured by standards of deliberative democracy? To assess this, a set of four criteria for the empirical evaluation of the MCs has been adopted, based on the criteria outlined in Chapter 1:

1. The inclusion of relevant stakeholders and their concerns into the policy processes;
2. Access to deliberative settings;
3. Transparency and preparation of information material;
4. Responsiveness to concerns voiced by CSOs.

The findings presented in this chapter are based on empirical research that followed the logic of a small-n comparison (Ebbinghaus 2003). The MCs of Mecklenburg-Vorpommern and Norra Norrland were both

supposed to provide quite favourable conditions for CSO participation (*Bundesvorstand Deutscher Gewerkschaftsbund* 2001; Kamlage 2003; Tavistock Institute and ECOTEC 1999). The study is based on an in-depth analysis of the institutional settings, procedures, processes and actors of the MCs, and on structured interviews with the experts, state and non-state actors active in these processes. In addition, the minutes of the MC meetings have been taken into account whenever necessary in order to double-check certain aspects mentioned in the interviews. The research was oriented towards the identification of factors that explain variation in outcomes with regard to the evaluated deliberative standards between these cases. The usual suspects in this regard are the respective political culture, governmental traditions, differences in institutional set up, capacities of the actors, and actor constellations, to name but a few (Falke 1996; Gehring 2003; Majone 1998). The comparative analysis shows that strong differences persist between the two examined regions with regard to the design of the deliberative institutional settings, mode of governance, and interaction between civil society and governmental actors. In particular, the findings indicate that the distinct Swedish political culture and governance tradition provides fairly favourable conditions for political deliberation. Quite surprisingly, given the generally favourable institutional conditions, the role and impact of CSOs remained limited in both MCs. It will be argued that the major reasons for this can be found in certain characteristics of the policy field and in capabilities that are absent in CSOs, which both the cases have in common.

The chapter is organized as follows. First, the basic aims, institutional framework and political processes of European regional policy will be outlined on a somewhat general level. Second, the political processes and institutional settings of the regional political level will be sketched out, with a focus on the two cases under examination. Third, the results of the empirical assessment of political processes regarding its capacity to fulfil the deliberative standards will be presented. The chapter closes with some conclusions drawn on the basis of the empirical analysis.

Objectives, institutional framework and processes of European regional policy

Within the programming period 2000–06, the European Union designated 213 billion euros of its budget to the structural instruments for the 15 member states (European Commission 2005). A further 44 billion euros of financial support were directed towards the new member states

during this period. The overall sum of financial support of the funds amounts to 257 billion euros, which represent approximately 37 per cent of the whole EU budget. The money available for spending is divided on the basis of different thematic and territorial objectives. Most relevant for the purpose of this work is the territorially based Objective 1 domain, which not only covers 70 per cent of the funding available, but is also targeted at 22 per cent of the Union's population (European Commission 2005). The Objective 1 instrument aims to help regions that are lagging behind socially and economically to catch up with the average socio-economic conditions of the Union's regions. In this context, the economically backward regions receive funding for measures that promote the development of basic infrastructure, human resources, environmental protection, tourism, science, information technology, and communication, to name but a few thematic areas of investment.

European regional policy is one of the typical policy fields of the EU's multi-level architecture (Hooghe and Marks 2001). The policy distributes competences and tasks not only among diverse actors, but also among different political levels. The division of labour among the predominant actors can be summarized as follows: the Commission, in co-operation with the European Parliament and the Council, first defines the overall goals and determines the general budget for European regional policy. Then, it works out a general framework and procedural guidelines[11] in order to achieve the goals set and, finally, it monitors the results of the funded measures. The member states and regions, however, are free to act within these defined parameters in order to develop and conduct the implementation, operation and enforcement at regional political level. This primarily includes the development of regional development plans or single programming documents (SPDs),[12] strategies, design and establishment of authorities and institutional settings,[13] as well as the selection of the partners for the implementation, management and evaluation of the programmes, by taking the Commission's procedural and thematic guidelines and objectives into account. Civil society actors can play an important role within the process of programme planning, preparation, operational management and monitoring of EU politics at regional political level. The manner in which they perform their roles depends upon the member state's constitutional structure, as well as on the traditions of its administrative and industrial relations (Smismans 2002: 21).

Hence, partnership has a twofold meaning in European regional policy. On the one hand, there is the *vertical* partnership between the EU, the member states in question and the regions and, on the other

hand, there is a *horizontal* partnership with the national and local stakeholders of the regional policy. The focus of this chapter is only on the horizontal partnership, which takes place within the MCs at regional political level. However, partnership is a rather vague term that offers some scope for interpretation. The Commission defines partnership as:

> close consultation … between the Commission and the Member State, together with the authorities and bodies designated by the Member State within the framework of its national rules and current practises, namely:
>
> the regional and local authorities and other competent public authorities,
> the economic and social partners,
> any other relevant competent bodies within the framework. (Article 8, Regulation 1260/99)

The very principle of partnership in the context of structural funds was introduced in the 1988 reforms, which were strengthened and expanded in 1993, and again in 1999 (Bache 1999). Gradually, the membership of the horizontal partnership has been widened. Since 1993, the social and economic partners have been included, followed by the so-called other relevant competent state bodies in 1999. The 1999 reform of structural funds opened the door for civil society actors to become part of the policy as well (Sutcliffe 2000). The expansion of partnership – and the inclusion of CSOs, in particular – are connected to the specific purposes and expectations of the Commission. In general, partnership is considered to be a major remedy for the lack of the legitimacy, accountability and effectiveness of European governance; it brought the promise of an increase in the quality of democratic governance (European Commission 2001).

Horizontal partnership is dominated by the member states. According to Regulation 1260/99, they are free to determine and designate the bodies and members of the partnership. This includes defining the role and status of CSOs within the framework of structural funds operation at regional level, according to national rules and current practices (Article 8, Regulation 1260/99). Thus, the members of the horizontal partnership – namely, the representatives of civil society – vary considerably among both the member states and the programmes (Tavistock Institute and ECOTEC 1999).

Comparative analysis: the partnership model in Mecklenburg-Vorpommern and Norra Norrland

Institutional framework, processes and members at regional political level

Germany is a federal state whose regions (*Länder*) are vested with strong legislative and legitimizing powers (Scharpf 1994). However, the regional government and the federal government are co-operatively intertwined with regard to certain competences and institutions (*Kooperativer Föderalismus*) (Scharpf 1994: 13; see also Ast 2000). After World War II, Germany developed a corporatist tradition, characterized by somewhat conflictual relations among the social partners, which is channelled by strong common institutions, rules and organizations. This 'German model' is known as *korporatistische Konfliktpartnerschaft* (Streeck 2005).

Both structural funds policy and the bodies of partnership are located in the *Länder*, and are implemented by the regional governments.[14] As a result, it is the regional governments that are the driving force and predominant actors of regional policy in Germany. All the relevant bodies, functions and decisions are designated by the government of the *Land* and performed at regional political level. This includes all phases of the policy cycle (planning and preparation, operational management, monitoring and the evaluation of the programmes) and all relevant bodies, such as the MC, Managing Authority (MA), and Paying Authority (PA). However, the institutional set up of the operation of structural funds varies to a certain degree among the German *Länder*. Mecklenburg-Vorpommern, for instance, has integrated all the relevant bodies into its existing governmental framework. The MA is a subsection of the Ministry of Economic Affairs and is responsible for major parts of the funds' operation. It appoints the head of the MC and its further tasks include the collection of data, the organization of the operation of the Funds, the implementation of the projects, the enforcement of the obligations for publicity, the organization and attendance of the MC, and its role as co-ordinator among all the relevant partners. Of particular interest is the fact that the MA is responsible for dealing with the partners, by providing them with information and advising them during the preparation of the programme and the operation phase. Unlike other German regions, Mecklenburg-Vorpommern does not maintain a particular secretariat responsible for the assistance of the partners or for the co-ordination of the operations (*Landesregierung Mecklenburg-Vorpommern* 2006).[15] CSOs participate in the selection of projects for financial support, which is conducted by the MC. Thus, the

decisions on both the supported projects and the final distribution of financial aid are subject to deliberations in the MC.

Sweden, by contrast, is a unitary state with only a few regional institutions.[16] It does not have a distinct regional political level with salient governmental competencies (Peterson 1994). Sweden has a long history of corporatist governance, and it is clear that the partnership model in regional policy is highly influenced by this long tradition (Blom-Hansen 2000; Peterson 1994). According to Olson, Sweden represents a unique case of 'encompassing' interest organizations. In a nutshell, he argues that the 'encompassed' interest organizations exercise their influence in corporatist exchanges with the state (Olson 1990). This corporatist mode of governance has a long tradition and equally deep historical roots in Swedish society. It is an essential factor for the gaining of a deeper understanding of the Swedish state, and its interplays between civil society actors and governmental institutions. The actors seek to find consensus, in particular to avoid open conflict, and explicit efforts are undertaken to mitigate tensions between competing interests via formalized representational mechanisms. All kinds of organized interests can be recognized, provided that they make effective claims and display a significant constituency, and demonstrate that they can conduct themselves in accordance with the above-described norms. Organization is, therefore, central to this system, and is essential in order to have an impact on the policy process in Sweden. As a consequence, the Swedish horizontal partnerships in European regional policy are also embedded in a framework of social partnerships characterized by a distinct co-operative ethos, which shapes the behaviour and work of both the actors and the institutional configuration of the partnership model.

In contrast with Mecklenburg-Vorpommern, a congruent territorial area with particular governmental institutions and bodies that correspond with the EU regions of the structural funds does not exist in Sweden. In practice, the European region of Norra Norrland is composed of two different counties in North Sweden. However, the government in Stockholm is the driving force and the main institution in charge of the structural funds partnership in Sweden, and it is assisted by a group of different public governmental bodies that are responsible for operational work. The Ministry of Economic Affairs appoints the members and nominates the head of the MC; furthermore, it takes the leading role in co-ordinating the operation and the top-level negotiations with the Commission.

In contrast to Mecklenburg-Vorpommern, the implementation of European regional policy not only involves public and private institutions,

but also two different political levels of the Swedish state – local and central. An important public actor is NUTEK, which is the National Board for Industrial and Technical Development. It functions as a secretariat at central political level, and has predominantly administrative functions regarding co-ordination and operational management. NUTEK is responsible for the MC and the partners in particular, whose responsibility includes giving advice, the distribution of information and the co-ordination of the partners during the preparation of the programme and its operational phase. NUTEK functions as a type of advisor and administrator for the Ministry of Economic Affairs, and acts as an intermediate between the relevant partners and the other bodies in charge of operating the policy. In doing so, it maintains close contact with the regional MA, the Programme Management Committee (*Strukturfondsdelegationen*) and the European Commission. Moreover, it organizes the meetings of the MC and assists in steering it.

The Managing Authority is located at county level as part of the county administration.[17] It is in charge of collecting data, organizing the operation of the Funds, management of the projects, enforcement of the EU obligations for publicity and assisting the decision group. The Programme Management Committee is another organization that is active in the domain of Swedish regional policy. It is an administrative body of the state, and is primarily in charge of the final selection of projects. The body is located at county level and is entirely composed of local politicians.[18] From this it follows that, unlike Mecklenburg-Vorpommern, the MC and, and as a consequence, the CSOs are excluded from the final decision regarding the distribution of financial support to concrete local projects.

Overall, the organization of European regional policy strongly reflects the different governmental traditions of Germany and Sweden. In Sweden, the organization of regional policy is more sophisticated than in Mecklenburg-Vorpommern, in the sense that more different public agencies and actors are jointly engaged in the implementation of the processes, and that the division of labour among these organizations is more developed. The CSOs benefit from this, due to the fact that special assistance structures are available to the members of the MC. However, in Norra Norrland, the members are excluded from the final selection of projects. In contrast to Norra Norrland, the organization in Mecklenburg-Vorpommern is strongly centralized and integrated into the structures of regional government. However, special institutions and bodies to assist the CSOs are lacking in Mecklenburg-Vorpommern. In contrast to the Swedish region, the MC and, as a consequence, the CSOs

have a say in the selection of projects, which can give rise to conflicts of interest.

Who is in and who is not?: the inclusion of civil society

The criterion of inclusion refers to the normative requirement that everyone who is affected by a decision should – ideally – be included in the process of deliberative decision-making (Habermas 1992: 370; Payne and Samhat 2004). In practice, however, due to the pragmatic demands of effective decision-making, a reasonable and balanced selection of stakeholders and their concerns should be pursued (Jachtenfuchs 1998). Instead of comprehensive inclusion, transparent accreditation procedures, including reasonable criteria for the access of CSOs, can be considered as normatively satisfying. The decentralized organization of European regional policy and its soft coordination by abstract guidelines offers some room for variation with regard to the representation of different stakeholders within the committees. The selected cases confirm this initial assumption to a certain extent.

The MC in Mecklenburg-Vorpommern, for instance, is comprised of 33 members, one of which is the head of the committee assigned by the government. With regard to the state, there are 14 representatives of different public administrational bodies, including several ministries. The composition of the MC reflects the German regional government structures (*Landesregierung*) to a large extent. With respect to this, the regional government holds a clear majority in the MC, while the federal government (*Bundesregierung*) only sends one representative. The other regional members are the Association of Municipalities and the Association of Counties. Finally, the EU sends representatives from the European Commission and from the European Investment Bank to the MC.

The civil society representatives comprise the social and economic partners and 'other relevant partners'. While the former category entails different business and interest organizations (the Chambers of Commerce and Craftsmanship, the Association of Enterprises, the Association of Labour Unions), the latter category comprises a variety of CSOs. These include environmental organizations, the Church, the Association of Farmers, the Fishery Association and the League of Associations of Welfare Care, to name but a few. No evidence has been found that any organizations that wanted to become members of the body had been subject to exclusion. However, it was problematic that there are no

formal accreditation procedures by which to regulate the inclusion of stakeholders in a well-defined and reasonable manner.[19] Consequently, there is some space left for the *Landesregierung* to favour certain interest groups and organizations.

The Swedish situation revealed a slightly wider range of different state and non-state actors compared to the German case. In total, the MC in Norra Norrland has 30 members, 12 of which represent civil society, while 14 other members represent different public and administrative bodies of the Swedish state. Representatives of the European Commission and the European Investment Bank represent the EU in this body. The state representatives comprise a variety of different actors and institutions that cover a multitude of institutions from Sweden's central and regional organizational political landscape. Members include different ministries of the central government, some central state agencies, county agencies, as well as municipalities and their associations. The civil society representatives also revealed a surprisingly large variety of organizations and actors. In the last period of Fund operation, some Labour unions and the Federation of Private Enterprises had a seat in the body. In contrast to the German situation, the Swedish MC included different types of social movement organizations that aim to stimulate and facilitate regional development within their region. These included, for example, the Popular Movements Council for Rural Development, as well as the Association of Co-operative Development. Again, clear procedures and criteria regulating the stakeholders' inclusion are absent.

Apparently, in both cases, governmental actors are able to maintain their position as gatekeepers to the MCs. In Sweden, the Ministry of Economic Affairs represents central government, while in Germany, it is the *Landesregierung* that is represented by the regional Ministry of Economic Affairs. The MCs that were examined reveal some differences with regard to the composition of their bodies, which reflects the different government traditions and organizational landscape of the countries. Although the results indicate that the MCs are composed of the most relevant stakeholders and their concerns, it is nevertheless transparent that accreditation procedures are still absent.

Information policy and transparency in the domain of European regional policy

Transparency of governmental proceedings and institutional settings is normatively important for various reasons. First, the transparency of

decision-making procedures for the general public and the deliberators is considered to be essential in order to develop trust and confidence in the conduct of democratic procedures. Second, reliable, equal and comprehensive access to information is a significant structural precondition for deliberation, and the active and effective participation of CSOs (Habermas 1992: 370; Payne and Samhat 2004). Unequal access or biased distribution of information might, in the end, lead to communicative inequalities that favour certain claims and actors (Habermas 1992). Hence, comprehensive and well-edited information is needed in order to facilitate the effective participation of CSOs.

In Mecklenburg-Vorpommern, the public has access to all general information concerning the operation of structural funds via the Internet. This includes access to the relevant EU regulations, the programming documents, and the different reports about the results of implementation[20] (*Landesregierung Mecklenburg-Vorpommern* 2003). However, the minutes and other materials that relate to the committee meetings are generally not accessible by the public. In addition, the committee holds its meetings behind closed doors. Other institutional actors or private persons who are not members of the committee are not admitted to observe the meetings.[21]

The study of the MC revealed that all the relevant general information was available for CSOs in Mecklenburg-Vorpommern. This includes not only significant background information on the structural funds operation, but also many documents and the data necessary for active participation within the regular meetings of the committee. The most essential documents were delivered via routine distribution lists to the partners, while others were only accessible on request. The delivery of information only upon request is problematic because CSOs would have to know in advance that certain documents actually existed. In the conducted interviews, some members of the MC made the criticism that the information policy lacked transparency, that the information provided was too extensive and that it was presented or edited in a complicated manner. Moreover, some partners complained that information and proposals for the MC meetings were submitted at very short notice, sometimes immediately before the meetings. As a consequence, there were inequalities between the governmental actors and the CSOs, which affected CSO capacity to take part in deliberation. At times, the partners were not able to take a decision because of a lack of knowledge of the issue at stake. These events led to serious tension and conflicts between civil society partners and the governmental body responsible. This was particularly true for the beginning of the structural funds period.

However, according to the partners concerned, some of these problems were remedied during the period of the programme.

With regard to access to relevant information and documents in Sweden, the results were comparable to those in Germany. The analysis of the Swedish MC showed that CSOs possess comprehensive access to all relevant information. Full access is available not only to background information, but also to documents and data relating to the committee meetings. Routine distribution of material via the Internet was also found in the Swedish case. All other relevant information was accessible on request, assuming that the partners knew of its existence. Conflicts concerning the information policy of the governmental bodies were not observed. The interviewed members of the MC were generally satisfied with the editing and preparation of the distributed information material. The general public in Sweden has access to all framework documents via the Internet. Other information related to the regular MC meetings was distributed on request, provided that people knew of its availability. Although Sweden adopted a Freedom of Information Act to guarantee that every citizen has the right of access to public affairs, the MC meetings in Norra Norland are not open to the general public.

To sum up, both MCs provide their members with comprehensive information on the operation of structural funds. In both cases, the general public only has access to some background information on the funds. There is a general tendency to withhold information on meetings and on upcoming decisions from the public. Arguably, such a lack of public control might favour the lobbying and influence-seeking strategies of certain non-state-actors active in the MCs.

Civil society access to institutional settings of regional policy

The normative criterion of stakeholder access primarily refers to the conditions under which civil society actors can participate in deliberation and decision-making. Normatively, it is claimed that CSOs have equal opportunities to participate in deliberation (Habermas 1992:383). This case study scrutinized the operations of structural funds in this respect.[22] The notion of access refers to the status and rights that civil society actors have within the MCs, which is regulated by the respective rules of procedure. In the case of Mecklenburg-Vorpommern, all actors, including representatives of CSOs, had the same formal status within the committee. All partners are considered as full members with regard to their rights and duties. This includes the right to speak at

meetings and the right to vote. CSOs, as other members, may also put forward proposals or add topics to the committee's agenda. With regard to voting procedures, it is important to note that the committee decides by majority voting. The state actors in the MC have a structural majority vis-à-vis the representatives of civil society.[23] If state actors cooperate, they are always able to decide on contested issues as they think fit, and against the will of CSOs. With regard to the access to different operational stages of the programming cycle, the interviewed members of the MC in Mecklenburg-Vorpommern often highlighted that they were formally involved in all the relevant operational phases concerned with the planning, operation and monitoring of the programmes. Moreover, the CSOs were invited to hand in proposals during the preparation phase of the regional development plans.

With regard to membership status of CSOs, regulations in the Swedish MC are comparable to those of the German MC. All Swedish CSO members had the same status as all other members of the committee. This basically included the right to vote, the right to speak, to add proposals, and to propose topics for the agenda of future meetings. However, the voting procedures applied in Sweden are quite different from those found in Mecklenburg-Vorpommern. The MC of Norra Norrland does not decide by majority voting. Instead, the committee takes decisions by consensus. Thus, the civil society partners could potentially block all decisions taken in the MC. In addition, the interview partners often agreed that they were formally involved in all the relevant operational stages regarding the planning, operation and monitoring of the programmes. The civil society actors stated that they were regularly consulted during the preparation phase of the SPDs. First, they had the opportunity to hand in comments and proposals for the programming documents to the responsible county authorities. Second, the ministries and state agencies at central political level offered various types of formal consultations (hearings, meetings and formal delivery of statements). These consultation procedures were generally open to the public and were not particularly designated to the members of the MC.

Overall, there are no particular problems for CSOs to gain an equal membership status in the committees, or to take part in all relevant policy processes. However, with regard to the modes of decision-making, the Swedish MC operates by consensus, whereas the MC in Mecklenburg-Vorpommern decides by majority voting. Hence, unlike their German counterparts, CSOs in Sweden possess significant veto powers in the MC.

Responsiveness of the governmental actors and factors limiting participation

Generally speaking, the criterion of responsiveness reflects the extent to which governmental structures respond to the preferences and arguments put forward by citizens during deliberative processes. In other words, it characterizes the extent to which the concerns or arguments voiced by CSOs in deliberations can be traced, first, in the decision-making process, and, second, in the respective outputs of such bodies. In the case study, additional context factors and conditions, which might have impacted upon the degree of influence of CSOs on the deliberation's output, were examined. These factors included the orientation of the participants towards the common goal, the degree of mutual trust amongst the actors, the working atmosphere within the MC, and the organizational capacities and resources of the CSOs.

The interviews conducted with members of the MC in Mecklenburg-Vorpommern and other experts in structural funds policy reveal that the impact of civil society actors is considered to be low: according to the MC members, structural funds policy is dominated by state actors. In this context, the majority of CSO representatives stressed that their proposals and statements have often not been taken into account by the government. Some CSOs had the general impression that the responsible governmental bodies were not seriously interested in the participation of civil society actors. According to the CSO representatives, this was particularly the case at the beginning of the programme, although the situation did improve in due course. Additionally, some smaller organizations stated that they did not have sufficient resources in terms of time, money and staff to secure appropriate participation. The complex, and often technical, nature of regional policy exacerbates these problems to some extent. Some of the CSO partners also highlighted that they perceived only a limited functional and thematic overlap between their core activities and the work of the committee, particularly when compared to other actors at the MC.

In contrast to some smaller CSOs, the social and economic partners successfully obtained the assistance of the Managing Authority in order to guarantee a more appropriate form of participation. The unions, the Chambers of Commerce and the Association of Enterprises received financial support for the hiring of qualified staff to represent them in the MC and to support their related activities. The respective project was called BUSS (*Beratungsprojekt zur Unterstützung der Sozialpartner bei der Planung, Begleitung und Bewertung der Strukturfonds in Mecklenburg-Vorpommern*) and was financed by money from structural

funds, which designated the operation of the Funds to administrative assistance under the regulation title of technical assistance (*Bundesvorstand Deutscher Gewerkschaftsbund* 2001: 32). The consequence of this additional funding for the social partners was an imbalanced representation of claims and interests among civil society actors.

The majority of interviewees in Mecklenburg-Vorpommern described the relations among MC members as basically constructive and oriented towards the common goal. The organizations of the social and economic partners, which can commit ample resources and networks, stressed that they had a relationship of trust with the governmental actors and the MA responsible. In contrast to this, smaller organizations – in particular, those with limited resources – argued that there was a lack of trust in their relationship with the governmental actors. However, all the actors stated that their relationship developed, generally for the better, over time. The majority of partners stressed that there was agreement with regard to the objectives of the MC, while some organizations, such as the environmental CSOs, argued that this was not the case.

The findings in the Swedish case are quite similar with regard to the issue of the responsiveness of the governmental actors to CSO claims. According to the interviewees, Swedish structural funds policy is predominantly influenced and governed by state actors. All the MC members interviewed agreed that the actual impact of the civil society partners was very limited. The additional analysis of the documents confirmed these statements with regard to the role of CSOs. Proposals from and the active participation of CSOs during the committee meetings were rare. Furthermore, state actors dominated the discussions, most proposals being drafted by them.

Some of the CSOs active in Norra Norland also stressed that they had a general lack of resources to ensure appropriate participation in the MC. Similar to the MC of Mecklenburg-Vorpommern, this predominantly relates to a lack of funding and qualified staff working in the domain of regional policy. According to some Swedish civil society partners, the complex, and often technical, nature of the policy field makes the situation more difficult, and limits appropriate participation. A clear majority of the actors stated that they generally trusted each other and that conflicts with other MC members did not occur in the body. These impressions are confirmed by an analysis of the committee minutes, in which no serious conflict could be identified during the current programme period. In addition, a large majority of MC members stressed that they all shared common goals within European regional

policy, and that the working atmosphere within the body was considered to be constructive and goal oriented.

Generally speaking, CSOs were found to have only very little impact on the operation of European regional policy in both cases. The Swedish case is characterized by predominantly trustful relationships among the actors, a high common goal orientation and an absence of open conflicts among the actors. In contrast to Norra Norland, a significant proportion of smaller CSOs in Mecklenburg-Vorpommern felt excluded and ignored by the governmental actors responsible. These CSO actors characterized the relationships among the members in the MC as being partly distrustful, and reported a lack of orientation towards the common goal, which led to regular conflicts occurring in the MC. Moreover, the representation in Mecklenburg-Vorpommern was found to be unbalanced, as certain interest groups received additional funding for their activities.

Conclusion

The empirical analysis of European regional policy in Norra Norland and Mecklenburg-Vorpommern has revealed considerable differences between the two cases with regard to institutional settings, the mode of governance, and the interplay between CSOs and state actors within the committees. Both cases clearly reflect the political culture and governmental traditions of the respective countries to a large extent. The examined cases follow two basic patterns. On the one hand, there is the trust-based Swedish model of partnership, and, on the other, there is the strategic acting model of partnership found in Mecklenburg-Vorpommern. These two rough labels cover a diversity of different dimensions that are characteristic for the examined cases.

The Swedish model of partnership entails a specific co-operative ethos that includes a high level of trust, a good atmosphere, fair and open debate, and an absence of serious conflicts among the members of the MC. The institutional design of the Swedish MC is clearly shaped by this co-operative ethos. It features full participation rights and access to information for the civil society partners, a consensus mode of decision-making, and a secretariat to assist the partners. This leads to almost all the actors of the MC feeling accepted and included. In addition, the members of the Swedish committee stated that they shared a common understanding of their tasks within structural funds policy. Interest based bargaining occurred only rarely, while arguing based on giving reasons and the use of persuasion was often observed within the Swedish deliberation.

The strategic acting model of partnership is characterized by the occurrence of conflicts, and semi-trustful relations within the MC. A common understanding of the MC's goals and problems is not shared among all of its members. In Mecklenburg-Vorpommern, some non-state actors felt excluded from the operation and believed that their concerns and arguments were not seriously considered within the committee. Interest based bargaining occurred regularly in deliberation, although some argument based on giving reason was also observed. The social and economic partners were privileged in the committee, thus giving rise to concern about possible imbalances among civil society actors. The institutional design of the MC in Mecklenburg-Vorpommern also reflects the strategic orientation of the participants. Decisions are taken by majority voting, and governmental actors have a strategic majority within the committee.

I will now highlight the main findings of the two case studies with regard to the criteria for democratic participatory processes that were outlined at the beginning of this chapter.

Inclusion The MCs examined reveal some differences with regard to the composition of their bodies, which reflects the different government traditions and the organizational landscape of the countries. The results indicate that the MCs are composed of the most relevant stakeholders in the field of regional policy. Nevertheless, it appears to be problematic that there is still an absence of transparent accreditation procedures. In both cases, the government representatives have the privilege of acting as gatekeepers to the MCs. In Mecklenburg-Vorpommern, an imbalance among civil society actors was created when financial support was provided exclusively to the social partners.

Access The results indicate quite favourable conditions for the participation of CSOs in the MCs. In both cases, civil society actors possessed equal status, including all the relevant participation rights within the MCs. Moreover, the partners were formally and de facto involved in all significant actions of structural funds operation. However, interesting differences emerged between the MCs with regard to the mode of decision-making. In Norra Norland, the members decide by consensus, whereas in Mecklenburg-Vorpommern the mode of decision-making is by majority voting. As a consequence, the Swedish CSOs have strong veto powers at their disposition (Tsebelis 2002). Every organization of the committee – and there are many – is able to block upcoming decisions within the committee. In Mecklenburg-Vorpommern, by contrast, the governmental actors hold a majority of votes within the committee. It can be concluded that the Swedish institutional setting

with its requirement of consensus favours decisions based on the giving of reasons and the use of persuasion.

Transparency Generally speaking, civil society actors had comprehensive access to all the relevant information in both cases. In Mecklenburg-Vorpommern, however, some non-state actors were disadvantaged due to sluggish dissemination of information by the government. Some of the problems with regard to the distribution of information were, however, solved within the period, which indicates learning processes among the actors with regard to policy (de la Porte and Nanz 2004).

In both cases, the general public has access to the relevant framework documents and to general information regarding structural funds policy. Nevertheless, the MCs themselves generally operate behind closed doors. Both cases fail to fulfil all the standards of transparency and, arguably, a lack of public control might favour lobbying strategies in the MCs. It can be concluded that meetings should be open to the general public and all the related information should be disclosed.

Responsiveness Despite favourable conditions for participation, all the partners in Germany and in Sweden consider their role and its impact within the programmes to be very limited. Significant differences between the cases occurred with regard to the level of trust and orientation towards common goals. The members of the Swedish MC reported a higher level of trust and common understanding among the actors, which, in turn, explains the absence of open conflict in the MC. Consequently, Elander (2005) highlights that, in the Swedish context, 'regional partnership agreements may have created an atmosphere of learning and co-operation that might be fruitful for the future'. In contrast, the operation in Mecklenburg-Vorpommern often revealed conflictual relations between the civil society actors and the governmental authorities.

What are the limiting conditions and factors that can prevent us from assuming that deliberative bodies in the context of European regional policy can be considered to be fully legitimate from a deliberative democratic point of view? Arguably, the problems of the legitimacy of the MCs are neither a consequence of a lack of inclusion of stakeholders, nor of insufficient access to deliberative settings and processes on the part of the CSOs, nor of restricted participatory rights of the organizations in the committees. Instead, the problems with regard to the evaluated criteria pointed to a lack of transparency towards the general public and the limited impact of the CSOs in the MCs. The particularly low impact of smaller CSOs arose from limited functional overlap between the core activities of most organizations and the tasks of the MCs. Only

a few organizations, such as the social and economic partners, consider regional development issues to be the core domain of their work. The complex – and often technical – nature of European regional policy, and the lack of both the capability and the expertise of the CSOs active in the MCs, gave rise to aggravating situations in this regard.

The crucial question with regard to the democratic quality of governance processes in the MCs is whether the interactions among the actors in the committees are oriented towards understanding rather than mere compromise (*verständigungsorientiertes Handeln*). Theoretically, understanding is reached by argumentative consensus based on rationally justified arguments (Habermas 1981; Risse 2004). The high degree of common goal orientation and the absence of exclusion and conflicts in the Swedish committee can lead us to assume that Swedish MCs feature a higher level of communicative action than their German counterparts. Thus, the distinct Swedish political culture and corporatist tradition provides favourable conditions for deliberative governance processes.

Notes

1. I am grateful for the support that I received in Patrizia Nanz's and Jens Steffek's research project entitled 'Legitimation and Participation in International Organizations' and in Tom Burns' and Marcus Carson's project of the Swedish section of the project CIVGOV (Organized Civil Society and European Governance).
2. The Preamble of the Treaty of Rome emphasizes the need 'to strengthen the unity of their [the member states'] economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions'.
3. European regional policy consists of different structural funds designated to specific topics and purposes. These are: the European Social Fund (ESF), the European Agricultural Guidance and Guarantee Fund (EAGGF), the European Regional Development Fund (ERDF) and the Financial Instrument for Fisheries Guidance (FIFG), (European Commission 2005).
4. In February 2004, the European Commission presented its proposals for the reform of cohesion policy for the period 2007–13: 'A New Partnership for Cohesion: Convergence, Competitiveness, and Co-operation' (European Commission 2004).
5. In 2004, ten new member countries joined the EU. Their accession resulted in growing regional disparities amongst the states of the Union. The distribution of financial aid therefore has to undergo major changes. The Commission Report stresses: 'The recent enlargement to 25 member states, with Bulgaria and Romania also set to join the Union in 2007, has dramatically increased disparity levels across the EU. The new member states have markedly lower levels of income per head and employment rates than other EU countries' (European Commission 2004: 3).

6. Mau offers some indications that the Union's concept relies on the potentially successful strategies to stimulate public support. His findings reveal that – contrary to conventional wisdom – public support for the integration does not primarily depend on people's rational calculation of gains and losses resulting from the integration processes. Instead, other factors such as the visibility of European policy, public debate on European issues, and the general level of knowledge of the Union seem to have more impact on peoples' perception of the EU and its policies (Mau 2005: 306 et seq.).
7. Roberts states: 'Although designed as a single unified package of policies and rules applicable across the entire EC, the principles and regulations that govern the operation of structural funds allow individual member states and regions considerable latitude both in terms of the design and detailed planning of proposed regional development programmes, and in the implementation and management of approved programmes' (Roberts 2003:1).
8. With respect to this, the project's definition of CSOs covers social partners as well as other non-state actors within the MCs.
9. There is an ongoing debate on the question as to whether the Regional Policy is predominantly characterized by its supranational or intergovernmental features – or whether it even has attained a multi-level character (Bache 1999; Benz and Eberlein 1999; Conzelmann 1998; Sutcliffe 2000).
10. The MC is the body of partnership, in which all partners designated by the member state come together regularly to supervize and monitor each regional programme (Article 35, Paragraph 1, Regulation 1260/99).
11. The Commission's general guidelines are laid out in different regulations and working papers. The most relevant documents are: (i) Council Regulation (EC) No. 1260/99 of 21 June 1999 laying down general provisions on the structural funds; (ii) Commission Regulation (EC) No. 1159/2000 of 30 May 2000 on information and publicity measures to be carried out by the member states concerning assistance from the structural funds; (iii) Commission Working Paper No. 8, 'Roles and Responsibilities of the Different Actors in the Mid-Term Evaluation of Structural Funds Programmes, 2000–2006'.
12. Regulation 1260/99 explains that the term 'development plan' means 'the analysis of the situation prepared by a member state in the light of the objectives referred in the Article 1 and the priority needs for attaining those objectives, together with the strategy, the planned action priorities, their specific goals and the related financial resources' (Article 9, Regulation 1260/99). Following their preparation at national and regional level, the regional plans and strategies were, and still are, subject to a lengthy process of negotiation, the outcome of which is the formulation of a document known as a Community Support Framework (CSF) or Single Programming Documents (SPDs) (Roberts 2003: 8).
13. Each member state is obliged to establish a managing authority at the level where the programme is implemented. The Regulation points out: 'Whereas there should be a single managing authority for each assistance, with defined responsibilities; whereas these responsibilities should primarily include collecting data on outcomes and reporting this data to the Commission ensuring sound financial implementation, organising evaluations and complying with obligations relating to publicity and Community law' (Article 1, Paragraph 47, Regulation 1260/99). Similar obligations exist for the Paying Authority and the Monitoring Committee.

14. One exception is the Community Support Framework (CSF), which is a type of umbrella programme situated at the national political level of Germany. It is composed of the Objective 1 '*Länder*' and the federal government in order to create a general framework programme for all German Objective 1 regions. The programme includes common targets and overall strategies for all regions. The CSF is chaired by the *Bundesregierung* (Federal Government); for detailed information about the Community Support Framework, see Article 18, Regulation 1260/99.
15. Bache (1999) highlights the significance of such secretariats serving the members of the MCs to facilitate good relations among the actors and the overall quality of the policy (p. 36 et seq.).
16. The counties in Sweden have minor political influence; they are primarily responsible for health care, regional traffic, transit planning and co-ordinating functions, whereas the municipalities are basically in charge of housing, long-term care services, primary and secondary education, social welfare, child care, and cultural and recreational activities and facilities. Thus, municipalities have a stronger position in the political system than the counties (Svenska Kommunförbundet 2003:1 et seq.).
17. The County Administrative Boards (*Länsstyrelse*) are the central government's regional institutions (Peterson 1994).
18. In order to get a complete list of all actors, see the homepage of the region Norra Norrland, http://www.bd.lst.se/publishedObjects/10001248/SFD.pdf (accessed 12 May 2005).
19. After the Committee is established, the MC itself decides upon its membership. The body decides by means of consensus on this issue.
20. The information available on structural funds and for the MC can roughly be divided into two basic categories. The first category could be described as providing *general information* about the objectives, organizational framework, the EU regulations, reports about the results of the implementation, in other words: *background documents*. The member state or regional level is obliged to generate and provide a system of various programming documents, reports and evaluations (prepared by expert evaluators who might be external, for example, in Germany and Sweden, or internal, for example, in the United Kingdom) as soon as they are available to the members of the MC (Articles 17, 18, 19, 36, 37, 41, 42, Regulation 1260/99). The second category consists of documents that are used in the process of decision-making in the meetings of the committee. These documents are mainly statements or proposals of the members of the committee, draft decisions, timetables and negotiation texts.
21. The general obligations and procedural rules are, inter alia, laid out in the Rules of Procedures 2002 of the MC in Mecklenburg-Vorpommern.
22. The procedural stages of structural funds policy are: (i) the planning and preparation of regional development programmes; (ii) the operational management; and (iii) the monitoring and evaluation of the policy.
23. The numerous members of the MC have been pooled into groups endowed with the right to vote in the MC. Every group has to appoint one representative for each group. Following this, the Chambers of Commerce and Association of Companies appoint one speaker; the environment organization have one, farmer and fishery associations have one, trade unions also

have one, the church and the League of Association of Welfare Care constitute one group with one vote, as well as the Association of Municipalities and Association of Counties, and finally the official representative for gender equality of Mecklenburg-Vorpommern had one vote, too. To sum up, on the partners' side there are seven votes in total, whereas the group of public administrational and governmental bodies has an equal proportion. Their votes are distributed in the following way: the regional ministries have six votes, while the central governmental representatives have one vote. The MC decides with a majority of the votes of the members. In the case of deadlock, the decisive vote goes to the head of the committee, who is appointed by the regional government (see the MC's Rules of Procedure in *Landesregierung Mecklenburg-Vorpommern* 2002).

10

CSOs and the Democratization of International Governance: Prospects and Problems

Claudia Kissling and Jens Steffek

In the first chapter of this book, we outlined why and how civil society participation may contribute to the democratic legitimacy of governance beyond the nation-state. If one takes the ideal of deliberative democracy as a starting point, as we did, a very important argument can be made for including CSOs in political deliberation and in decision-making at international level. Organized civil society may serve as a 'transmission belt' between a global citizenry and international organizations, creating a new avenue for the concerns and interests of citizens to reach the venues of global or European policy-making. Hence, the presence of organized civil society may widen the range of arguments and concerns present in political deliberation quite significantly. As it bypasses the traditional diplomatic channels of governmental representation, the participation of civil society may establish an additional and more direct link between decision-makers and their transnational constituency.

However, this account of a democratizing potential inherent in civil society participation was primarily derived from theoretical reasoning. The aim of the empirical studies presented in this volume was to describe the conditions under which organized civil society currently participates in European and global governance, and to explore to what extent the existing conditions are conducive to the emergence of democratically legitimate governance beyond the nation-state. Quite clearly, a mere collection of empirical data, even if methodologically sophisticated, does not speak for itself. The data needs to be related appropriately to the normative questions that we formulated. To achieve this, we operationalized the democratic quality of participatory arrangements by formulating four indicators, which guided all the empirical investigations presented in this volume, although the emphasis was placed differently according to the circumstances of the respective cases.

The task of this concluding discussion is to view the results of our empirical studies together, and to provide a preliminary answer to the guiding question of this volume. Should we regard civil society participation as a cure for the democratic deficit of European and global governance? The first two chapters presented an overview of the participatory arrangements in place in more than 30 European and international organizations (IOs). Thereafter, Chapters 3 to 9 elaborated on in-depth case studies at global as well as at European level. At global level, Dany examined the World Summit on Information Society (WSIS); Thomann, the International Labour Organization (ILO); Steffek and Ehling, the World Trade Organization (WTO); and Mayer, the North Atlantic Treaty Organization (NATO) and the Organization for Security and Co-operation in Europe (OSCE). At European level, Friedrich reflected on the general policies of the European Union (EU) in relation to CSO integration in its policy-making processes and compared two issue areas of European governance – asylum and migration policy, and environmental policy. This was supplemented by Ferretti's analysis of the participatory strategies of the European Food Safety Agency's (EFSA) Panel on the Regulation of Genetically Modified Organisms (GMO Panel), and the final chapter by Kamlage explored the EU's regional policy with regard to structural funds and its administration through national monitoring committees.

With a view to the emergent patterns of civil society participation, three general conclusions can be drawn. First, our results provide evidence of an *increasingly formalized participation* of CSOs in international and regional organizations. By the year 2005, almost all the institutions of European and global governance under study here consulted with organized civil society in some way or other. Second, as Kissling observed from a legal point of view, contrary to what many international lawyers think, newly established organizations or regimes generally grant NGO status, and the majority of IOs have significantly enriched and intensified the palette of rights accorded to non-state actors over the past 15 years. This even holds true for areas in which one might not expect intense interaction of IOs with civil society – for example, the implementation of policies. The study on European regional policy has demonstrated how such interaction takes place in the decentralized management of EU structural funds. More notably, increased co-operation with CSOs can also be found within a policy field which has, to date, been judged to be highly secretive – international security. In this respect, the increasingly co-operative attitude of the OSCE seems to reflect a trend towards a 'softer' human security policy, which has repercussions at the level of participatory arrangements for civil society.

A second observation concerns the increasing willingness of international organizations to turn to CSO participation in order to confront the external criticism of their perceived missing legitimacy. This is another reason why IOs more readily resort to formal participatory procedures for CSOs since these are highly visible to the public. The WTO, as demonstrated by Steffek and Ehling in Chapter 5, testifies, in an exemplary manner, to this commencing of IO readiness to open up by disclosing their documents and making their information policy more transparent. Kissling goes even further and circumscribes the legal status attributed to non-state actors in a quantitatively and qualitatively intensified manner as a minimum safeguard clause aimed at overcoming the deficit in legitimacy of international organizations.

Third, evidence can be found that CSOs become increasingly pertinent as interlocutors between an international organization and the public at large. This principally applies to cases in which highly technical decisions are taken by IOs. Ferretti offers such an example in Chapter 8. At the GMO Panel of EFSA, a clear lack of expertise on the part of ordinary people precludes their ability to challenge a pending decision and thus prevents meaningful participation – even if this were technically possible. Only CSOs are able to address issues relating to genetically modified organisms in the appropriate language and, thus, function as an important intermediator, channelling citizens' interests into the respective policy process. Friedrich makes a further case in Chapter 7, with regard to the EU's REACH process. Environmentalist CSOs are critically needed to counter-balance the predominance of business associations engaging in the EU consultation process with non-state actors. In this context, a further observation can be made. Consultation of civil society increasingly takes place through web-based mechanisms, at least at European level. The choice of this technically highly developed tool may have advantages for the Commission as well as for the users, but it may, in turn, have negative repercussions on the inclusion of all interests and concerns affected by a decision. Although the number of Internet users is growing rapidly, some age groups and segments of the population are still virtually excluded from the web.

We now turn to the potential of the examined participatory arrangements for the democratization of international decision-making. As outlined in Chapter 1, the authors of the empirical chapters juxtapose their respective empirical findings to a set of theory-guided criteria. These are designed to assess the capacity of an international organization or regime to bring about free, informed and inclusive deliberation – and, hence, a high level of democratic quality. The four indicators are

(i) access to deliberation; (ii) transparency and access to information; (iii) responsiveness to stakeholder concerns; and (iv) the inclusion of all citizens or groups presumably affected by a decision. Whereas we are able to map the first two criteria – access and transparency – in a comparable way for 32 organizations/regimes, and provide the reader with the aggregate results in Chapters 1 and 2, in the matters of responsiveness and inclusion, we have had to rely on the results of the in-depth case studies undertaken in Chapters 3 to 9. In the following, we summarize the findings by drawing some overall conclusions, indicator by indicator.

Access to deliberation

As for the criterion of access to deliberation, our findings suggest that admission of CSOs to decision-making bodies is increasingly regulated. About half of the organizations under study use formal accreditation procedures for consulting with civil society. However, CSO access remains limited, in so far as governments seem to protect the core area of intergovernmental decision-making. The most striking example of this is described by Mayer in Chapter 6 – namely, NATO, in which no institutionalized consultation whatsoever takes place with civil society. This corresponds to the traditional picture of secretive decision-making in the security field. Chapter 7 by Friedrich provides another example. The European Union mainly excludes CSOs from intergovernmental settings, such as the Council. As Friedrich puts it, 'the participation of CSOs in the EU's policy-making processes is dependent on the legal basis of the issue area in question and, thus, the involvement of the EU institutions (the role of the Commission is stronger in First Pillar issues than in Second or Third Pillar issues, for instance), the coincidence of CSOs meeting interested civil servants in either the Commission and/or in the national executives, and the general 'volonté politique' of the member states to integrate the respective policy area and to abandon their tradition of secrecy' (p. 161).

The WTO, as illustrated by Steffek and Ehling in Chapter 5, also testifies to the continuing protection of this intergovernmental core, in that it denies access to its intergovernmental negotiation process. This conveys the impression that governments are extremely reluctant to surrender their privileged position as the sole international decision-makers, and often react to challenges from the outside only by opening at the margins. A special case in this context is the ILO, as pointed out by Thomann in Chapter 4. In the ILO, the established partners of

governments – namely, the social partners (employers' and workers' organizations) – work on an even footing with governments in the 'tripartite' decision-making process. These privileged partners have vigorously forestalled the introduction of 'quadripartism' within the ILO that would result from associating more closely with CSOs. Hence, the situation at the ILO is a perfect example of how parts of civil society (when closely connected to a governmental forum) defend their privileges. In their struggle against any new voices being included, they may even fall into the trap of co-optation by governments. Thomann, thus, takes up the cudgels for more NGO participation and representation within the ILO. A last finding which may illustrate the limited willingness of governments to renounce control and decision-making power is the declining affinity of newly founded organizations to introduce legal person status to CSOs throughout the last 15 years (see Chapter 2 by Kissling). This status would bestow them with the capacity to bring claims against an IO before an international court or administrative instances.

Transparency and access to information

In contrast to the enduring limits to CSO access, improvements with regard to transparency and access to information can be found in most organizations. Generally speaking, transparency is the criterion that comes out best in our analysis. Advances in information technology have provided a new tool for making the policies of IOs more visible to the public, mainly through websites and electronic newsletters (see, for the WTO, Chapter 5 by Steffek and Ehling). In some cases, however, CSOs still struggle to get hold of crucial documents, as testified by the case of EU structural policy portrayed by Kamlage in Chapter 10. This is aggravated by the problems that CSOs experience caused by their need for considerable resources in order to process the information provided by IOs. Many CSOs are, in fact, grappling with a lack of expertise and qualified personnel. Quite clearly, the more technical an *issue* of international governance is, the more expertise is needed to participate successfully (see, for the case of EFSA, Chapter 8 by Ferretti). The more complex and time-consuming a *decision-making procedure* is, the more human and material resources are necessary to follow the deliberative process (see, for an example, the EU's REACH case, in Chapter 7 by Friedrich).

Responsiveness to stakeholder concerns

The responsiveness of IOs to stakeholder concerns was one of the two criteria that could only be investigated through in-depth case studies of

single policy-processes. In particular, Chapters 3, 5, 7, 8 and 9 provide us with insights into the responsiveness of governmental decision-makers towards the concerns presented by CSOs. Our case studies show that responsiveness is surprisingly low even under the most favourable circumstances, such as those offered by the WSIS. As Dany argued in Chapter 3, the responsiveness of the WSIS process 'depended less on the influence of the CSO arguments, and more on the interests of governments, the structure of the problems discussed and on the stage in the preparatory process in which the CSO arguments were negotiated' (p. 67). In fact, when it came to the decision-making stage, CSO arguments that had been formerly accepted were often dismissed again. Another example is highlighted by Ferretti in Chapter 8, who reports a striking lack of responsiveness by EFSA. CSOs lamented this and turned to alternative channels in order to make their arguments heard. Public campaigning, in turn, fired strong opposition by the European public towards GMOs.

The case studies thus illustrate the fact that power asymmetries between states and non-state actors endure, and negatively affect responsiveness to civil society arguments. It still depends on the goodwill of the governmental actors involved whether CSOs are able to influence the course of deliberations significantly. This, once again, confirms our ideas on a persisting intergovernmental core of decision-making (Steffek and Kissling 2006). Given the significance of the responsiveness for the democratizing force of participatory arrangements, future research should explore the conditions under which responsiveness to civil society's arguments is likely. A possible research design could build upon some of the hypotheses suggested by Dany in Chapter 3.

Inclusion

Finally, the criterion of the inclusion of all the citizens presumably affected by a certain decision is meant to give equal influence also to marginalized groups. The results of our analysis, especially of the in-depth case studies, show that, in most cases, a clear bias towards 'strong' CSOs exists. This group includes well-funded and well-staffed CSOs, such as industry and business associations in the cases of the WTO and the EU REACH consultation process (see Chapter 5 by Steffek and Ehling and Chapter 7 by Friedrich). In the WTO case, industry associations, at times, performed even better than the representatives of the governments of developing countries. Such findings hint at major asymmetries within organized civil society. First, there are sectoral asymmetries between CSOs, with industry organizations being better able to exert influence. Second, there are geographical asymmetries. CSOs from

industrialized countries are in a more favourable position than those from developing countries, which are usually less well equipped with crucial resources. Such structural imbalances might even worsen as soon as e-governance begins to play a role, as testified by the REACH case (see Chapter 7 by Friedrich).

In addition, whenever civil society participation is highly formalized and certain partners become privileged, a problem of co-optation may arise. This may lead to the formation of alliances between governments and established partners against any new voices to be included. Such tendencies were detected in the ILO with regard to the social partners, as described above. They were also observed in EU regional policy in which governmental actors function as 'gatekeepers' to the monitoring committees and are, in principle, able to favour certain social and economic partners. As Kamlage shows for the monitoring committee in Mecklenburg-Vorpommern, the established social partners managed to tap public resources in order to facilitate their participation in the process (see Chapter 9).

There is only one case in which we found explicit strategies of 'empowerment' to secure the inclusion of marginalized groups. At the WSIS, the (intergovernmental) International Telecommunication Union (ITU) provided for a restricted number of fellowships, designed to facilitate participation by civil society representatives from the least developed countries (LDCs), and especially women, in both the Preparatory Conferences and the World Summit. However, the sum allocated to this purpose was not even utilized to its full extent. Moreover, as Dany states, Euro-centrism and gender inequality may also be rooted in organized civil society itself, which seems to marginalize certain voices (see Chapter 3).

Deficits of existing participatory arrangements

To sum up, none of the cases under study here fulfils the standards of a high democratic quality of participatory arrangements for civil society, as measured by our four criteria. The best results were found for the indicator of transparency. In all other dimensions, current participatory arrangements have major shortcomings. The lack of responsiveness to the arguments brought forward by civil society appears particularly troubling from a normative point of view. As explained in Chapter 1, the very idea of democratizing international governance via civil society participation rests on the presumption that arguments voiced by non-state actors will be heard and debated in international negotiation. The

existing participatory arrangements have achieved very little in this respect.

Equally disconcerting are the exclusionary tendencies that we found in many participatory settings. Democratic theory requires that all citizens affected by a rule have equal opportunities to influence the course of political deliberation. In many arenas, however, well-organized and well-funded groups, such as industry associations, and even the social partners, have a clear advantage. Marginalized groups, in particular, when they come from the least developed countries, are heavily under-represented in international political settings. Quite often, advocacy groups from the industrialized North have come to speak on their behalf. This empathetic practice is honourable, but paternalism always seems to be lurking in the background. The global asymmetries in wealth, power and technical expertise that characterize international politics at governmental level can also be found within the realm of organized civil society. It would be unrealistic to expect that international organizations themselves resolve such profound problems of inequality, which are deeply rooted in socio-economic underdevelopment. Nevertheless, some basic measures to facilitate participation, such as the 'fellowships' that we found in the case of WSIS, would not be beyond their reach.

Another issue that has repercussions on the democratic quality of participatory arrangements is their capacity to spawn deliberation, as opposed to mere bargaining. Rigorous empirical studies on the quality of deliberation (such as Steiner et al. 2005) are based on *verbatim* records of political debates. As many of the organizations under study here do not collect *verbatim* records, it has not been feasible to check systematically the deliberative character of the political negotiations under the prevailing conditions of civil society participation. However, some authors found indication that the participatory practices that they studied were not particularly conducive to political dialogue. They have serious doubts about the basic question of whether deliberation really takes place in these participatory settings, or whether CSO participation simply works as a means to improve the tarnished reputation of the relevant international organization (see, in particular, Chapters 3 and 7).

In some cases, the reason for a lack of responsiveness can be found in the very design of participatory arrangements: for example, outreach meetings at the WTO – such as public symposia – are not attended by many national delegates. As stated in Chapter 5, their capacity to create a dialogue between organized civil society and governmental decision-makers is limited. CSOs have often displayed their anger about

participatory practices that do not lead to real political dialogue (see Chapters 5 and 8). As a consequence, they carry their dissent to other political forums and to the public at large. Instead of searching for dialogue within international organizations or regimes, they take their campaigns to the media and onto the streets. We can conclude from the evidence presented in this book that the participatory practices in international organizations need to be improved if the existing potentials for democratizing international decision-making are to be realized. In the remainder of this chapter, we will outline how the detected shortcomings and deficits of participatory arrangements should be tackled in future academic research.

Avenues for future research

It resulted from the case studies that international organizations and governmental delegates are responsible for many – but certainly not all – deficits in the democratic quality of participatory arrangements. The exclusion of marginalized groups, for instance, is an issue that should concern CSOs as much as IOs. In a similar vein, the reluctance to engage in political dialogue can be found not only among IO staff and state delegates, but also among the representatives of civil society. They are, after all, strategically minded political actors, just as their governmental counterparts. Thus, there is little reason to believe a priori that the activities of CSOs automatically contribute to a democratization of global governance. Future research on the potentially democratizing effects of civil society participation in international governance should, therefore, shift its focus from IOs to CSOs. In what follows, we sketch out some topics that deserve closer scrutiny.

First, we need to analyze whether it is really justified to regard CSOs as the transmitters of the interests of citizens. In the transmission belt model presented in the introductory chapter, we have relied on this assumption. However, recent scholarly work has raised some doubts about the role of CSOs as mediators between global institutions and a transnational constituency of citizens (Edwards 2000; Hirsch 2003; Johns 2003; Peeters 2003). Drawing on evidence on contested World Bank development projects, Mallaby (2004) even went as far as to accuse CSOs of disregarding the interests of the local populations they claim to represent. With a view to the internal formulation of policy priorities in non-governmental organizations, Warleigh (2001) found that input by members or supporters into decision-making was usually minimal

(p. 631). Thus, the ability and willingness of CSOs to involve their members or supporters needs to be put to the empirical test. The focus of such an inquiry should be based on the way that CSOs deal with their own constituency of members, supporters or whoever they claim to speak for. Their internal decision-making and definition of political priorities should also be scrutinized.

A related problem is the increasing professionalization of many CSOs and their close collaboration with governments and IOs. Such close contacts may lead to a loss of independence, or even to co-optation. Some have argued that accreditation requirements and privileged partnerships between IOs and CSOs may compromise the capacity of CSOs to act as an independent voice in international politics (Greenwood and Halpin 2005; Niggli and Rothenbühler 2003). Moreover, for some CSOs, projects implemented with, or on behalf of, IOs have become a considerable source of funding. Such financial dependencies may jeopardize the independence of CSOs even further. They may also give rise to pathologies known to both bureaucratic organizations and the military, such as the systematic overstating of the successes of activities 'on the ground' in order to secure funding for future projects (Cooley and Ron 2002). The idea of an independent civil society is completely turned on its head when IOs found CSOs to support their political goals, as Martens (2001) has reported for UNESCO.

Such critical remarks on the role of CSOs as (not so) independent voices in world politics suggest a new avenue for research into CSO participation in European and global governance. In future research, we should carefully examine the consequences of the organizational and financial links between CSOs and IOs or governments. A third, equally important topic for future research is the role of CSOs in the creation of a transnational public sphere. In our normative model, we have symbolized this potential function of CSOs as the lateral ramifications of the vertical transmission belt, which principally connects political deliberation in IOs and informal regimes to the global citizenry. The idea is that CSOs not only inform IOs about the (changing) values and interests among the citizens for whom they speak, but that they also feed information about global policies and their possible alternatives into the mass media. The added value, from a theoretical point of view, would be that by addressing the media, information and critical counter-expertise could reach citizens beyond the community of CSO supporters. However, to date, there are few empirical studies that have investigated the role of CSOs in creating a transnational public sphere.

Most studies analyze the extent to which reporting and commentary in the mass media covers European or international issues (Brüggemann et al. 2006). Yet, we still know very little about the relative importance of CSO sources for the media and the concrete interactions between CSOs and journalists. Therefore, this nexus should also be a precise target for future empirical studies.

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