HOLDING PROFESSIONALS ACCOUNTABLE: THE CHALLENGE OF PRIVATIZED INTERNATIONAL STANDARD SETTING IN ACCOUNTING AND ARCHITECTURE SERVICE SECTORS

DAVID LIVSHIZ[1]

INTRODUCTION

Professional services have traditionally been self-regulated by the private sector, with only occasional interference from governments – local and federal. Private sector regulation is not unique to the professional services sector; rather it is the default way in which products are regulated in the United States.[2] The translocation of the regulatory development into the international arena, however, has put a strain on the legitimacy of these self-regulatory efforts. The lack of effective public participation, combined with the decreased efficacy of traditional accountability mechanisms used to police private regulatory actors has created an accountability deficit where international private sector standard setting bodies (SSB) are not accountable to the public interest on whose behalf they seek to regulate.[3] In demonstrating the accountability deficit of private sector standard setting in the sphere of professional services I look at two examples of private sector standard setting in the accounting and architecture industries.[4]

I. DOMESTIC REGULATION OF PROFESSIONS:

Throughout the twentieth century the regulation of professional services in the United States was largely in the hands of the professionals themselves. As such, professional organizations drew on authority delegated to them by state and federal governments and developed a complex system of regulating professional conduct. Once developed, the standards were enforced through the domestic legal and regulatory systems.

A. Holding Private Regulatory Actors Accountable

---

[1] Contact: dlivshiz(at)gmail(dot)com. This is a draft copy of a paper presented at the Second Annual Conference at Global Administrative Law in Viterbo, Italy. **Please do not quote or cite without the author's written permission**.

[2] Tim Buthe, *Products Standards and Standardization in the United States*, in PRODUCT STANDARDS IN TRANSATLANTIC TRADE AND INVESTMETN: DOMESTIC AND INTERNATIONAL PRACTICES AND INSTITUTIONS (2004).

[3] For the purposes of this paper I adopt the responsiveness definition of accountability as articulated by Mashaw. Jerry L. Mashaw, *Structuring a "Dense Complexity": Accountability and the Project of Administrative Law*, ISSUES IN LEGAL SCHOLARSHIP, Art. 4 (2005). While there are other formulations of this concept and how best to provide for it, they are all based on the notion that accountability requires the responsiveness of one actor to another. See notably Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EU. J. INT'L L. 247 (2006); Ruth W. Grant and Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005).

[4] The choice of industry is not accidental, rather they are selected because they offer the clearest example of self-regulation being done internationally, and their standards are endorsed by the WTO, or are likely to be endorsed in the near future.

In the United States the accountability of private sector regulatory policy development is accomplished through the careful use of the implicit threat of government re-regulation, tort litigation, and the power of the market itself to discipline market actors. Together, these three methods combine to form an equilibrium of sorts, allowing them to hold the self-regulating industry accountable. Each of these mechanisms works in different ways, and is only partially able to promote accountability of the self-regulated industry to the public interest at large.

1. Market Regulation

In the free spirited and competitive economy that characterizes the United States, the method of accountability most favored is the market. The idea is that market incentives will force industry actors to develop the right amount of protection for public interests, because failure to do so will result in consumers substituting away from the industry. As one scholar has conclusively demonstrated, furniture makers worked with third party certifiers to ensure that they were procuring wood from environmentally friendly loggers in reaction to perceived consumer desires.[5] Similar regimes have developed in other consumer driven areas as diverse as coffee production,[6] and athletic apparel.[7] While the success of these programs in eliminating the negative externalities they are designed to address is questionable,[8] it is clear that the industry was motivated to act in response to consumer pressure.[9] Alternatively, shareholder activism may also provide for market based accountability.[10] While the idea of market accountability of private regulatory actors is not without its critics,[11] it has proven to be at least partially effective at regulating private sector regulatory actors.

2. Tort Litigation

---

[5] Errol Meidinger, *The Administrative Law of Global Public Private Regulation: The Case of Forestry*, 17 EU. J. INT'L L. 47 (2006).
[6] Tad Mutersbaugh, *Ethical Trade and Certified Organic Coffee Implications of Rules –based Agricultural Product Certification for Mexican Producer Households and Villages*, 12 TRANSNT'L L. & CONTEMPORARY PROBS. 89 (2002).
[7] Cynthia Estlund, *Rebuilding the Law of the Workplace in the Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005).
[8] Haufler, Public Role, *supra* note X, at 72 – 76.
[9] Id. at 58 – 64.
[10] Peer Zumbansen, *The Transnational Law of Corporate Governance and Labor Rights*, (CLPE Research Paper 7/2005, 2005). See also Haufler, Public Role, *supra* note X, at 23 – 24 (discussing the increased prevalence of shareholder activism).
[11] JOSEPH E. STIGLITZ, THE ROARING NINETIES: A NEW HISTORY OF THE WORLD'S MOST PROSPEROUS DECADE 134 (2003). Some critics, for example, argue that the market can only serve as an accountability check when consumers have adequate information which is unlikely to happen in a wide variety of areas, particularly when the risks are hidden, the end consumers are not aware who the initial producers are, or when products are heterogenous and are not easily substitutable.

In the self-regulated regulatory system a significant role is entrusted to the system of tort litigation. The threat of tort litigation and substantial jury verdicts, punitive and otherwise, is therefore able to keep the industry accountable to stakeholders at large. It is the threat of litigation that motivates major producers to issue recalls, in an effort to avoid a litigation backlash once the problem is discovered by the consumers themselves. So powerful is the impact of consumer litigation that it has been described as the "one big stick" keeping accountants accountable to public interest.[12] Similarly, litigation has been successful at keeping architects accountable to broader public interests.[13] Litigation, however, is not always sufficient to ensure industry accountability.

Industry standards play a substantial role in the ability of the tort system to keep industry regulators accountable. Legally, compliance with an industry standard is not likely to insulate a producer from liability[14] a failure to comply will almost surely result in liability.[15] Moreover, in practice, evidence of compliance with an industry standard is not irrelevant. The hermeneutics of litigation are such that a defendant who is able to show that it complied with the relevant industry standard is likely to win the support of the jury.[16] As evidence of compliance with industry-developed standards is probative, it is likely to be admitted into evidence, and can therefore influence the jury's deliberation.[17]

3. Government Intervention

The third method of holding private standard setters accountable is both perhaps the least visible and the most powerful. In the American federalist system most regulation, including most regulation of professional services, is handled at the state level. The federalist system, therefore, gives the state governments a substantial role to play in keeping industry accountable to the public at large. As such, a substantial market failure is likely to result in the intervention of state regulatory authorities, and in cases of particular importance even the federal ones.[18] One example is the intervention of the federal government in the regulation of accountants after the Enron/WorldCom scandals. Faced with a popular outcry, the SEC changed the way in which the

[12] Stiglitz, Roaring Nineties, *supra* note X, at 136.
[13] Reinemann v. Stewart's Ice Cream Compnay, Inc., 238 A.D. 2d. 845 (1997). See also Tower Bldg. Restoration, Inc. v. 20 E. 94th St. Apt. Corp., 7 A.D. 3d 407 (2004).
[14] *The T.J. Hooper*, 60 F. 2d 737 (2d Cir. 1932).
[15] RICHARD EPSTEIN, TORTS, 136 (1999).
[16] Bimberg v. Norther Pacific Ry., 14 N.W. 2d 410, 413 (Minn. 1944).
[17] Epstein, *supra* note X, at 136.
[18] Haufler, Public Role, *supra* note 106.

private sector standard setting agency was funded, attempting to make its work product more legitimate. Even without market failure, pressure from consumers advocates may prompt the government to enter the regulatory framework in the favor of public interest stakeholders.[19]

It is also important to note that the three accountability mechanisms are not exclusive and can work together. Government intervention does not have to be such as to make private standard setting accountable, rather the government can put its thumb on the scale in order to put limits on private standard setters, or alternatively empower public interest stakeholders.

While no one method was always effective, different methods were effective most of the time, creating an environment where industry was largely allowed to self-regulate and was policed through the varying methods. This equilibrium based system of accountability, however, is under increasing tension as the development of regulatory standards in the area of professional services is increasingly moving into the international arena.

II. IMPACT OF INTERNATIONAL STANDARDS ON DOMESTIC REGULATORY POLICIES

In the past countries have proven willing to adopt international standards in lieu of domestically adopted ones. The professions which are self regulated are particularly welcoming of international standards that they themselves negotiate. Failure to implement these standards has reputational costs, and may hurt the ability of the profession in question to do business abroad. International SSB are akin to regulatory networks and are made up of like minded professionals from different countries. As such, domestic regulators participating in international negotiations owe dual allegiances – one to the domestic constituency they represent internationally, and a second to the international network whose work they implement domestically.[20] They are thus likely to face pressure to adopt the internationally developed agreement in order to remain in good standing in the international organization. Increasingly, the advent of the GATS, has also motivated countries to adopt international standards for fear of WTO litigation.

While there are, at present, few international standards regulating the practice of professional services, those that do exist have become fairly influential. In the case of accounting, signatory countries including the United States have implemented their

[19] In effect this accountability mechanism is merely the traditional fire alarm method of holding agents accountable. See Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

[20] Slaughter, *supra* note X, at 171 - 181. See also Richard B. Stewart, *US Administrative Law: A Model for Global Administrative Law* 68 L. & CONTEMPORARY PROBLEMS 63, 78 (2005).

commitments under the accounting disciplines.[21] In recent years, even the United States has actively begun working towards obtaining convergence between the FASB and IASB standards.[22] In doing so, the US has already introduced several reforms into its domestic regulatory system, and will likely continue doing so in the future.[23]

Still, in the United States, regulatory reform is not a one way road. Rather, in an effort to obtain US support, the IASB has agreed to implement several changes as well.[24] Smaller countries, however, have not been extended the same flexibility, causing some to refer to the dominance of international standards as the modern form of colonialism.[25] Greece, for example, liberalized its domestic regulations in the accountancy sector in 1992. After a change of government, which campaigned on the promise to reverse some of the earlier liberalization initiatives, it attempted to roll back some of the 1992 reforms.[26] Faced with the prospect of WTO litigation, the Greeks backed down.[27]

Likewise, internationally developed accounting and architecture standards are becoming increasingly important. The standards developed by the UIA have been adopted by many countries worldwide, including in Eastern Europe where countries adopted UIA standards as they transitioned to capitalism in the 1990s.[28] Moreover, the UIA is currently negotiating international standards in architecture contracting which it expects to be widely applied.

At present we have little information about the role that international standards in the services sector will play on domestic regulations. What little information we do have, however, all points in the same direction. International standards, once negotiated, and particularly when incorporated into the machinery of the GATS agreement are likely to be adopted domestically, often in the face of domestic opposition. Moreover, this trend is likely to continue in the future, particularly as there is an increasing willingness to integrate international standards into future GATS disciplines. Ongoing negotiations have demonstrated that international standards will play a substantial role in the newly reconstituted GATS. Initially, the adoption of the *Disciplines on*

[21] Robert H. Herz and Kimberley R. Petrone, *International Convergence of Accounting standards – Perspectives from the FASB on Challenges and Opportunities*, 25 NW. J. INT'L L. & BUS. 631 (2005).
[22] See also IASB Interview, *supra* note X.
[23] First Time Application of International Financial Reporting Standards, 70 Fed. Reg. 20674 (Apr. 20, 2005) (to be codified as 17 CFR Part 249). IASB Interview, *supra* note X.
[24] IASB Interview, *supra* note X.
[25] Constantinos V. Caramanis, *The Interplay Between Professional Groups, the State, and Supranational Agents: Pax Americana in the Age of Globalization*, 27 ACCOUNTING, ORGANIZATIONS AND SOCIETY 379, 401 – 404 (2002).
[26] Id.
[27] Id. See also Arnold, *supra* note X, at X.
[28] Scheeler Interview, *supra* note X.

the Domestic Regulation in the Accountancy Sectors, which place international standards into a critical position, offers a window into the role that international standards may play in the regulation of professional services.[29] Moreover, states are increasingly expressing an interest to develop accounting like disciplines for other sectors, including architecture, engineering and legal services and several states have suggested incorporating international standards into broader horizontal disciplines.[30] In sum, it is increasingly likely that international standards developed by private sector actors will have a major role in the regulation of international trade in services in the upcoming years, making the understanding of the institutions that develop such standards of critical importance. It is to this question that we now turn, by looking at two examples the IASB and the UIA.

1. International Standards in Accounting – the International Accounting Standards Board

Despite the fact that accounting standards are often described as a choice between different technicalities, there is an increasing realization that a choice of accounting standards can have substantial impact.[31] Indeed, increasingly there is a realization that the choice of standards can be as much of a political choice as it is a technical one.[32] It is because of this political nature of accounting standards that the IASB has come under fire for being driven by corporate and not societal interests.[33]

Unlike many other sectors of professional services, accountants have long been interested in developing global standards in accounting. Today, the International Accounting Standards Board is tasked with the development of international accounting standards.[34] Recently

[29] World Trade Organization, *Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/64 (Dec. 17, 1998) [hereinafter Accounting Disciplines].
[30] See e.g. WTO Council for Trade in Services, *Communication from Australia: Negotiating Proposal for Architectural Services*, S/CSS/W/63 (May 28, 2001). Working Party on Domestic Regulation, Domestic Regulation: Preparation for the Sixth Ministerial Conference, JOB(05)/___, Oct. 25, 2005.
[31] International Accounting Standards, 65 Fed. Reg. 8896, 8900 (to be codified as 17 C.F.R.§§ 230 and 240), Feb. 23, 2000. The choice of accounting standards is so influential that some companies, like Porsche, have chosen to forgo raising money on American capital markets rather then adopt GAAP. Ian P. Dewing and Peter O. Russell, *Accounting, Auditing and Corporate Governance of European Listed Countries: EU Policy Development Before and After Enron*, 42 J. COMM. MKT. STUD. 289, 307 (2004).
[32] Scheppel, *supra* note X, at 28**.**
[33] Patricia Arnold, *Disciplining Domestic Regulation: The World Trade Organization and the Market for Professional Services*, 30 ACCOUNTING, ORGANIZATIONS AND SOCIETY 299 (2005).
[34] KRISTINA TAMM HALLSTROM, ORGANIZING INTERNATIOAL STANDARDIZATION: ISO AND THE IASC IN QUEST OF AUTHORITY 75 (2004).

reorganized, the IASB has grown in importance in recent years as an increasing number of countries now adopt standards developed by the IASB.[35]

In creating the IASB, particular efforts were made to address some of these legitimacy challenges. In particular, efforts were made to make the Board more diverse, a due process procedure was implemented, and an attempt was made to make the board financially independent. While partially successful and an improvement on its predecessor, the IASB has been unable to fully resolve these legitimacy challenges, leaving it open to criticism.[36]

The IASB[37] has sole jurisdiction over the development of international standards. The board, which is made up of 14 individuals, operates on a majority basis, meaning that 9 votes are required for the standard to be adopted. Responding to concerns that the IASC was overly tilted towards the interest of the accounting firms, the IASB is designed to take account of different constituencies. Five of the board members should have a background as auditors, three as prepares, and three as users of financial statements. Additionally, one spot is reserved for academics to represent constituencies not otherwise represented.[38] These allocations, however, are guidelines – not binding law.

While more diverse then the earlier IASC, the new IASB still fails to adequately take into account the different competing interests that are impacted by the IASB standards. Initially, the board had a very difficult time recruiting users to serve on it.[39] Unlike auditors, corporate controllers, and prepares – users of accounting standards (often financial analysts) face at least two unique challenges. First, they would be required to take a substantial pay cut to do so. Second, unlike corporate controllers, auditors, or traditional accountants, a user who gives up his normal practice to work at the IASB may find the practice gone when his tenure at the IASB – normally limited to a few years – concludes.

The challenges are further compounded by the increasing diversity of users of accounting standards. Traditionally, users were thought to be institutional investors and financial analysts;

---

[35] Today standards developed by the IASB are already used in over 90 countries world wide, including the European Union. Sir David Tweedie, *Setting a Global Standard: The Case for Accounting Convergence*, 25 NW. J. INT'L L. & BUS. 589 (2005).

[36] Arnold, *supra* note X; James Perry and Andreas Noelke, *International Accounting Standard Setting: A Network Approach*, 7 BUSINESS AND POLITICS ___ (2005); Walter Mattli and Tim Buthe, *Global Governance: Lessons from a national Model of Setting Standards in Accounting*, 68. L. & CONTEMPORARY PROBLEMS 225 (2005) [hereinafter Mattli and Buthe, *Global Governance*]

[37] For a detailed elaboration on the IASB process see Mattli and Buthe, *Global Governance*, at 250 – 253.

[38] INT'L ACCOUNTING STANDARDS COUNCIL, IASC FOUNDATION CONSTITUTION, ¶21 (Jul. 2005) [hereinafter IASC Constitution].

[39] Hallstrom, *supra* note X, at 128.

these interests were then represented through investment associations who catered to the needs of such sophisticated players. In recent years, however, more and more ordinary people have begun investing in the stock market. These people are not professional investors, but rather rely on publicly available data to make their investment decisions, and could be substantially impacted by accounting standards but are not represented on the IASB.[40]

Furthermore, the interests of the broader public are not represented on the IASB. Theoretically, it is possible that these interests may be represented by the academic on the board. However, academics can only fulfill this role if they come from a background that allows them to act as representatives of the public on the whole. At the IASB, however, this is not necessarily the case. In 2005 two academics served on the board of the IASB both of whom had corporate backgrounds.[41] In any case, having a single representative on a board of fourteen is hardly sufficient to insure that the board considers all interests adequately. In fact, research increasingly shows that the interests of one group – the financial industry – may be dominating the IASB discussions.[42] The lack of a public interest advocate on the board is particularly troubling to some as the internationalization of the standard setting process often undermines the work of domestic public interest advocates.[43] The lack of adequate representation of public interests on the IASB has caused the IASB to be seen by some as illegitimate and unaccountable.

A second problem facing the IASB is its source of funds. In conducting its work the IASB receives substantial financial support from the industry that it aims to regulate. Traditionally, the IASC has been funded by voluntary contributions from private stakeholders, such as accounting firms and big businesses.[44] As part of the 2001 reforms, an attempt was made to diversify the IASB funding in an effort to make its work product seem more legitimate.[45] These reforms, however, were not ultimately successful as the primary source of funds for the

[40] While the number of such people is rapidly growing in the "ownership economy" the point should not be overstated. While small scale investors do have interests different from large scale institutional accountants and analysts, these are partially protected through the use of proprietary research programs. These research reports are prepared by sophisticated analysts and then sold to ordinary investors. As such, the concerns of ordinary investors are at least somewhat ameliorated. ISBA Interview, *supra* note X.
[41] INT'L ACCOUNTING STANDARDS BD., STRUCTURE *available at http://www.iasb.org/about/iasb.asp.*
[42] James Perry and Andreas Noelke, *International Accounting Standard Setting: A Network Approach*, 7 BUSINESS AND POLITICS ___ (2005) ("it is highly unlikely that a qualified majority can be formed against the votes of the IASB members coming from the major accounting firms, the largest group" represented on the IASB").
[43] Telephone interview with Patricia Arnold (Mar. 16, 2006).
[44] Hallstrom, *supra* note X, at 90-91.
[45] Id. at 130-131.

IASB remains the industry itself leaving concerns that the IASB is biased towards its financial contributors unresolved.[46]

While the IASB faces some legitimacy challenges, these should be kept in perspective. Unlike many other organizations now getting involved in the development of international standards, the IASB (or its predecessors) have been around for several decades. As such, it has had an opportunity to learn, and has sought to minimize legitimacy concerns. In other professional service sectors, however, organizations are new, have yet to experience the magnifying glass of legitimacy, and as such face an even greater legitimacy deficit.

2. Architecture – The International Union of Architects

In the architecture sector the task of developing international standards falls to the International Union of Architects (UIA). The UIA is a newcomer to the international standards arena. Founded in 1948, and headquartered in Paris, the UIA has a small secretariat and has traditionally focused on helping architects from different countries liaise with each other.[47] Membership in the UIA is limited to national professional societies of architects and the organization functions by consensus, with leadership bodies within the organization being democratically elected.[48]

The UIA first began working on international standards in the mid 1990s when it established a Professional Practice Commission, which was first headed by the AIA and then later was jointly led by the AIA and the professional society of Chinese Architects.[49] A first draft of the standards on the practice of architecture was prepared and submitted to national delegations in 1996, and based on their responses a final draft was prepared for the tri-annual meeting of the UIA in 1999.[50] Unlike the work of the IASB, meetings of the UIA were closed to the public and are seen merely as meetings of national experts. The accord, which was designed to be purely voluntary, has been adopted by a significant number of UIA member associations.[51]

---

[46] Mattli and Buthe, *Global Governance*, *supra* note X, at 254.
[47] In many ways the UIA resembles a common professional transnational network. ANNE MARIE SLAUGHTER, A NEW WORLD ORDER (2004).
[48] International Union of Architects, UIA: A Democratically Structured Body *available at http://www.uia-architectes.org/texte/england/Menu-1/2-structure.html*.
[49] Interview with James Scheeler, Resident Fellow for International Relations at the American Institute of Architects (Feb. 6, 2006) [hereinafter Scheeler Interview].
[50] UIA Accord on Recommended International Standards of Professionalism in Architectural Practice, June 28, 1999.
[51] Keunee Interivew.

Funded by contributions from national societies, the UIA can be considered an international private industry association that, through its development of international standards, has now become involved in the global governance project. While the UIA has largely stayed off the radar screens of organizations critiquing global governance for a lack of accountability this is unlikely to remain the case if architecture disciplines are adopted by the WTO. The development of binding or even semi-binding international standards is likely to upset various constituencies, causing UIA's legitimacy to come under question.[52] As such legitimacy deficits can be avoided if stakeholders participate in the regulatory process; we now examine what role there is for public participation in international SSB working in the professional services sector.

3. Public Participation in International SSB

The degree to which stakeholders are able to participate in the work of SSB depends on the extent to which the organization perceives itself as being involved in regulatory decision making. The more authority the organization demands, the more likely it will provide for some form of public participation in order to minimize the legitimacy deficit.

The IASB, cognizant of its regulatory power and wanting to maximize its legitimacy, has adopted comprehensive due process procedures. The IASB due process procedures, modeled on those used by the FASB, are designed ensure that all interested stakeholders are able to participate in the development of regulatory standards. Accordingly, the IASC constitution provides that most meetings of the IASB and associated bodies are open to the public,[53] that draft standards, working papers, and other regulatory initiatives are posted on the IASB website and comments are solicited from interested stakeholders.[54] Furthermore, the IASB makes an effort to justify its standards, going so far as to respond to comments offered by stakeholders during the working paper and draft standards stages.[55]

To conclude from this, however, that the IASB has adequate due process procedures would be equivalent to judging a book by its cover. While there is plenty of evidence to indicate that accounting firms, investment banks, large corporations, and associated trade associations

[52] Architects insist that there is no danger of UIA standards becoming binding as they are only adopted at the discretion of national regulators. Scheeler Interview, *supra* note X; Keunee Interview, *supra* note X. This however may not be at the control of the architects, or their industry association. Once incorporated into the WTO there is no way of ensuring that the standards don't become de-facto binding, or at the least difficult to defect from, in the context of WTO litigation.

[53] IASC Constitution, *supra* note X, at ¶ 31(e). For a more detailed explanation see INT'L ACCOUNTING STANDARDS BOARD, IASB'S OPERATING PROCEDURES *available at* www.iasb.org/about/due_process.asp [IASB, Due Process].

[54] IASC Constitution, *supra* note X, at ¶ 30 – 31; see also IASB, Due Process.

[55] IASB Interview, *supra* note X.

actively participate in the standard setting process, it is also clear that some parts of society have chosen not to participate. Despite receiving over 9,000 comments on over twenty draft standards, working papers and other initiatives, the IASB has not received any comments from unions, consumer groups, or other public interest organizations.[56] While this would not be shocking if the IASB was involved in areas of little interest to such groups, to date the IASB has addressed issues of substantial importance to such groups including questions of pension obligations and employee benefits.[57] Even more incisive is the fact that public interest organizations failed to file comments when the IASB was considering the structure of its deliberative process.[58]

The decision of organizations representing public interest shareholders to opt out of the process is not surprising. Industry representatives insist that the reason for a lack of public participation is the expense required to participate in the work of the IASB.[59] This, however, can only explain part of the story. Large unions, as major institutional investors, have a vested interest in the work of the IASB, and likely have the technical sophistication needed to participate in the IASB work.[60] Additionally, there are academic accountants who posses the relevant expertise and may be able to assist such organizations.[61] A different explanation for a lack of public interest participation is giving by public interest advocates who argue that absent judicial review of IASB deliberations, there is little incentive to participate as their views will not really be considered.[62]

Whatever the challenges to effective public participation in relatively formal and long-established international SSB, these pale in comparison to the impediments to public participation in relatively informal institutions like the UIA where there are no opportunities for stakeholder input at all.[63]

---

[56] Perry and Noelke, *supra* note X.
[57] Id.
[58] While over fifty organizations submitted comments, not one came from an organization concerned with representing the views of the public at large. INT'L ACCOUNTING STANDARDS BD., IASB DELIBERATIVE PROCESS (Mar. 24, 2004) *available at* www.iasb.org.
[59] Arnold Interview, *supra* note X.
[60] In fact, even IASB members concede that they may, in fact, be ideal constituents to recruit to sit as users representatives on the IASB. IASB Interview, *supra* note X.
[61] Arnold Interview, *supra* note X. In the United Kingdom, for example, working through an NGO Professor Sikka has been able to influence the process of standard development in the accountancy sector. Id.
[62] Interview with Marry Bottari, Director, Harmonization Project, Public Citizen, Conducted on February 9, 2006.
[63] Scheeler Interview, *supra* note X.

Within the UIA only members of national professional associations are invited to participate. During the negotiations on the UIA Accord on International Standards, the UIA did not even consider inviting NGOs and other interested stakeholders to participate in the process.[64] Rather, it was assumed that since the accord would be adopted domestically, if at all, interested stakeholders would be able to effectively participate at that point.

III. ACCOUNTABILITY AT THE INTERNATIONAL LEVEL

We know examine whether organizations involved in international standard development can be held accountable. To date, Ruth Grant and Robert Keohane have produced the most comprehensive catalogue of accountability models in international governance.[65] Grant and Keohane identify seven discrete accountability mechanisms that operate in world politics;[66] of these, four mechanisms heavily rely on the principal agent theory and three rely on participation (though not public participation) to provide accountability.[67] The question is whether any of these mechanisms are likely to provide for sufficient accountability of private standard-setting organizations.

The answer is, absent public participation in these organizations, not very. First, let us consider the four types of accountability described by Grant and Keohane that are based on the delegation theory: hierarchical, supervisory, fiscal and legal.[68] None of these is likely to produce much accountability from private sector international SSB, as it is not clear that the principle agent model applies well to these institutions. As these initiatives are not dependent on government funding, fiscal accountability is not particularly helpful. Similarly, as these are private initiatives it is highly doubtful that their work would be subject to review by legal institutions – domestic or international.[69] Hierarchical accountability is aimed at the individuals who work within international organizations, and would not be applicable in this context as the private nature of the institution makes it impossible for a member state to punish individual members of the institution. The last method of accountability based on a model of delegation

[64] Id. However, the UIA was cognizant that its work may impact trade regulation and subsequent trade negotiations, and made efforts to keep the USTR and the WTO aware of the progress of the negotiations.
[65] Grant and Keohane, *supra* note 8. Grant and Keohane build on Keohane's previous work with Joseph Nye which previews many of the points Grant and Keohane make. See Robert O. Keohane and Joseph S. Nye Jr., GOVERNANCE, *supra* note X.
[66] Grant and Keohane, *supra* note 8, at 35.
[67] Id. at 36.
[68] Grant and Keohnae, *supra* note 8, at 36.
[69] While some commentators have argued that absent procedural reforms, domestic courts are likely to undertake review of international regulatory decisions sua sponte, Richard B. Stewart, *US Administrative Law: A Model for Global Administrative Law*, 68 L. & CONTEMPORARY PROBLEMS 63 (2005), to date this has not happened.

offered by Grant and Keohane is a model of supervisory accountability. At this point I would like to withhold the discussion of accountability through supervision, though I will return to it in the pages that follow.

Having considered delegation-based models of accountability suggested by Grant and Keohane I now turn to the participation-based models of accountability. These too prove unsuccessful upon closer review in the context of the development of private international regulatory standards. To begin, market accountability is not likely to be successful under the present circumstances.[70] Moreover, peer competition and accountability are also unavailable in the context of international regulatory standards. Initially, it is clear that competition based accountability is particularly ineffective in holding private SSB accountable because in most cases SSB, and the networks they are made up of, actively try to avoid competition.[71] Moreover, a WTO endorsement of a particular SSB is likely to make competition between SSB impossible as it will put one organization in a privileged position.

Moreover, public reputational accountability is also unlikely to be effective in the context of international regulatory standards. Public reputational accountability applies in situations where "reputation, widely and publicly known, provides a mechanism for accountability."[72] This, however, does not apply in the regulatory context. International regulatory bureaucracies, such as the UIA or the IASB, are not well known and therefore do not have public reputation as a major asset. Finally, it is important to note that institutions can have different reputations with different constituencies. Companies like Nike are concerned with their reputation in the eyes of consumers who purchase their products. International regulatory institutions, such as the UIA or the IASC however, are concerned with their reputation among the technocrats. This means that whatever effect reputational accountability does have, it would not be an effective tool at holding these institutions accountable to the public at large.

Lastly, there is the question of supervisory accountability. Of the seven accountability mechanisms suggested by Grant and Keohane this shows the most promise in the realm of international standard-setting bodies. For example, the WTO could refuse to recognize the work

[70] See supra *notes* XX – XX and accompanying text.
[71] Raymund Werle, *Institutional Aspects of Standardization – Jurisdictional Conflicts and the Choice of Standardization Organization*, 8 J. EU. PUB. POL. 392, 401 – 403 (2001).
[72] Grant and Keohane, *supra* note 8, at 37. A good example of reputational accountability is Nike. Confronted with an image of using sweatshop labor, Nike was forced to change its behavior by fear of market pressure hoping to avoid gaining a reputation as a company that endorsed sweatshops. Haufler, *supra* note 49, at 60-65.

of a particular organization if it found the organization to be biased in its development of standards. This, however, is doubtful. The WTO is not in a position to evaluate the substantive work of SSB, be they private or intergovernmental as it is unlikely to be able to afford the expansive technical expertise doing so would require. The WTO could however suggest a minimal procedural process that an SSB must follow in the development of these standards, as it has recently done in the case of the TBT agreement.[73] However, if the costs of monitoring international standard-setting organizations were decreased, supervisory accountability might offer the best option of checking the discretion of these organizations. Effective public participation by creating motivated effective monitors of these organizations can lower the costs of supervision making supervisory accountability possible. Without it, however, supervisory accountability is unlikely to offer an effective solution to the legitimacy deficit currently faced by international standard-setting organizations.

IV. ACCOUNTABILITY AT THE DOMESTIC LEVEL

Nor is there accountability to the public at the level of domestic implementation. Domestically, private sector standard setters are held accountable through a carefully calibrated equilibrium of threat of government re-regulation, tort litigation, and marketplace competition.[74] However, when the regulatory process is transferred into the international arena these methods of accountability cease being effective, as the information necessary to make these models work is difficult for stakeholders to attain.[75]

The driving force of domestic accountability of self-regulatory regimes in the United States is the always present threat of government intervention and the nationalization of regulatory policy development.[76] Afraid of government intervention, self-regulated industries are motivated to take account of competing interest and take the interest of a broadly dispersed public into account when regulatory standards are developed.[77] This motivation, however, is substantially decreased when the regulatory process is transplanted into the international arena. Initially, the threat of government intervention assumes the ability of injured shareholders to

[73] WTO Committee on Technical Barriers to Trade, Decisions and Recommendations Adopted by the Committee Since 1 January 1995, G/TBT/1/Rev. 8, 26 – 29 (May 23, 2002).
[74] See *supra* notes XX – XX and accompanying text.
[75] Robert O. Keohane and Joseph S. Nye, Jr., *Redefining Accountability for Global Governance* in GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION 400 – 402 (Miles Kahler and David A. Lake, eds., 2003).
[76] Haufler, *A Public Role*, *supra* note X, at 105 – 107.
[77] Id.

make a compelling case to the legislature that the interests of the self-regulated constituency are being given preference over the public interest at large. This, however, is highly unlikely when the standards are developed intentionally. Not only is some international standard development work done behind closed doors or through informal networks, even when the meetings are open public interest stakeholders may lack the resources needed to attend.[78]

A second reason why the state is unlikely to interfere with the international regulatory process is the economic consequences of doing so. Any attempt to set aside international standards in favor of tougher domestic ones is likely to have an impact on the international market, potentially causing foreign producers to be disadvantaged. If this should happen, it is likely that the state might find its own exports targeted in retaliation.[79] While a state may be motivated to risk retaliation in particularly politically salient case like Enron, the threshold for government intervention is likely to be substantially higher when economic consequences are involved.

Moreover, a state or local government attempt to intervene in the international standard setting arena may be seen as an interference with the foreign affairs power of the federal government. In the United States, the Supreme Court has ruled that the power over foreign affairs is exclusively reserved to the federal government.[80] A state's invalidation of an international standard which causes the United States to be in violation of the GATS agreement, is likely to be deemed an infringement by the state on the exclusive foreign affairs power.[81]

Furthermore, state intervention into the international regulatory arena may be found to be in violation of the constitution even without the invocation of the relatively rare dormant foreign affairs power. Rather, the Court can, as it has shown a preference to do recently, invalidate such state action on the ground of it being pre-empted by a federal policy of foreign affairs.[82]

Similarly, the efficacy of litigation in tort against service provides, a traditional way of holding suppliers accountable, is substantially reduced when the development of regulatory risk evaluation policy is taken into the international arena. For several reasons international

---

[78] Bottari Interivew, *supra* note X.

[79] For example, after the American steel tariffs were declared in violation of WTO law in 2003 the European Union stated that it would target the products of particular states. Tobias Buck, *EU Set to Raise Stakes in Trade Clash with US Retaliatory Sanctions*, FIN. TIMES, Apr. 29, 2004 at 8. For an extended treatment of this phenomena see Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L. J. 649, 692 – 95 (2002).

[80] Zschernig v. Miller, 389 U.S. 567 (1968).

[81] Nat'l Foreign Trade Council v. Natsios, 181 F. 3d 38, 54 (1st Cir. 1999) (affirmed on other grounds).

[82] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

standards will often be less protective of stakeholders than those adopted by private standard-setting actors domestically. First, international standards are a product of compromise,[83] and it is probable that the compromise level of protection agreed upon will be less than that which would have been adopted domestically. Second, domestic private standard-setting actors will be amenable to such changes, as they are likely to feel less restrained by the prospect of government intervention into the regulatory arena when they are acting internationally.[84]

As mentioned above, courts are unlikely to second guess technical standards created by experts, particularly in the absence of evidence of obvious bad faith[85] and instead look to due process to see that stakeholders have been able to participate in the regulatory development process.[86] Internationally, however, such participation may be impossible. Provisions such as those of the IASB are likely to satisfy the Court's requirements, even if the participation they provide for is illusory.[87] In the meantime, evidence that a service (or goods) provider complied with the international regulatory safety standard is likely to make a substantial impression on the jury, making recovery difficult, if not unlikely. Additionally, a state courts refusal to give deference to international standards, especially when it gives deference to domestic standards, may well face a similar constitutional difficult than is presented by a state's regulatory intervention disfavoring such a standard.[88]

Nor is the marketplace a good candidate to ensure accountability of international SSB. While market based accountability is sometimes possible,[89] it is unlikely to be effective in the context of international standard setting activity in the service sector.[90] Initially, service providers are not susceptible to shareholder accountability as they are usually provided by limited liability partnerships and do not have a corporate form.

---

[83] Krish, *supra* note X, at 263.
[84] See *supra* notes XX – XX.
[85] Advincula v. United Blood Services, 678 NE 2d 1009, 1028 (Ill. 1997) (noting that the default position of due care when in compliance with a regulatory standard can be overcome when accompanied by proof that the standard itself was negligent).
[86] Schepel, *supra* note X, at 346..
[87] Moreover, the court may accept the argument of the standard setter that shareholders had the ability to participate at the domestic level, even if they were not able to do so internationally.
[88] See *supra* notes XX – XX.
[89] VIRGINIA HAUFLER, A PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF REGULATION IN A GLOBAL ECONOMY 60-61 (2001); Errol Meidinger, *The Administrative Law of Private/Public Global Forestry Regulation*, 2005 (unpublished draft, on file with author).
[90] *But see* Haufler, *Globalization and Industry Self-Regulation*, *supra* note X, at 234 (arguing that NGOs can increase the cost of doing business even for international organizations).

Nor are the more traditional market based accountability approaches likely to be very effective. Market accountability presumes market competition – the ability of shareholders to switch from one service provider to another as a way of punishing low performing providers. This, however, may not be possible in the service sector context. Because final consumers of the service tend to be several market steps away from the service providers they are poor candidates to hold the service provider accountable, particularly if the defects of the service are not immediately apparent.[91] For example, in the accountancy sector the final users of services are often have little leverage with which to force corporations paying for accounting services to adopt one form of accounting over another. Moreover, users face a substantial collective action problem making collective action difficult. Unlike the forestry sector, increased social responsibility was driven by retailers who wanted to appease consumers.[92] In accounting, however, consumers do not purchase the information they receive and therefore have a difficult time leveraging their market power. Moreover, the defect may be so hidden that even sophisticated consumers of the information are unable to detect it.[93] Similarly, in the architecture sector, those who suffer from inadequate regulatory protection are not the same actors who purchase architecture services and are therefore unlikely to be able to influence market decisions. Moreover, due to the long periods of time necessary for building defects to become known, the service supplier need not be concerned about the damage done since the negative reputation, which is critical to market pressure, may not develop for decades.[94] Additionally, in the accounting sector at least market incentives may actually hurt public interests as managers will be driven to succeed in the short term without regard to long term company health.[95] Lastly, market accountability is unlikely to work unless a competing regulatory standard emerges, which is unlikely to happen once one institutional actor is endorsed by the WTO.[96]

Overall, it seems unlikely that public interest shareholders would be able to hold standard setters accountable at the domestic level.

V. PUBLIC PARTICIPATION: WHAT DOES IT DO, AND HOW CAN IT BE DONE

[91] Dieter Kerwer, *Holding Global Regulators Accountable: The Case of Credit Rating Agencies*, 18 GOVERNANCE 453 (2005).
[92] Meidinger, *supra* note X, at 4-5.
[93] Enron offers an excellent example of such difficult. Enron's accounting practices, while bordering on fraudulent were not seen as such by ordinary stakeholders who lacked the sophistication to discern the danger.
[94] Asbestos provides an appropriate example.
[95] Perry and Noelka, *supra* note X.
[96] See *supra* notes XX – XX.

For reasons of space I can not offer a detailed solution to the accountability deficit I describe above. By way of conclusion, however, let me offer a few modest thoughts that may prove useful. Effective public participation in the work of private international SSBs in the area of services may have the potential of reducing the accountability deficit. Allowing public interest shareholders to participate in the regulatory process will empower them to act as a third party monitor that can make other forms of accountability discussed above possible including supervisory accountability.[97] A further instrumental advantage of public participation is that when structured well public participation has the ability of informing the SSB of issues they would otherwise be unaware, thereby improving its quality of its work.[98] While public participation will not be able to fully resolve the accountability deficit, indeed, administrative law can rarely do that, public participation may offer a net increase in the accountability of private international SSB's to the public.[99]

Such public participation guarantees can be introduced through a WTO imposed code of conduct,[100] or through the refusal of the WTO AB to recognize the work of private SSBs that fail to provide for adequate due process procedures.[101]

Additionally, several public interest organizations indicated that public participation alone will not produce accountability as long as international SSB are privately funded through voluntary donations the organization will be beholden to those who provide its funds.[102] A possible way to ameliorate these concerns is to provide an alternative source of funding for standard setting activities, or to change the nature of the funding for such efforts from voluntary to mandatory as was done by the SEC with regards to the FASB in the aftermath of the accounting scandals at Enron and World Com.

---

[97] David A. Lake and Mathew D. McCubbins, *The Logic of Delegation to International Organization*, in DELEGATING AND AGENCY IN INTERNATIONAL ORGANIZATIONS (David A. Lake, et al., eds. 2006).
[98] Magill, *Images*, *supra* note X, at 3.
[99] Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167 (2000).
[100] See e.g. WTO Committee on Technical Barriers to Trade, *Decisions and Recommendations Adopted by the Committee Since 1 January 1995*, 26 – 29 G/TBT/1/Rev.8 (May 23, 2002).
[101] Livermore, *supra* note X; Joanne Scott, *International Trade and Environmental Governance: Related Rules (and Standards) in the EU and the WTO*, 15 Eu. J. Int'l L 307, 349 – 351 (2004).
[102] Bottari Interview, *supra* note X.