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Corporations and the Making of Public Standards in International Law

The Case of China in the International Telecommunication Union

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3.1 INTRODUCTION

The present contribution has been inspired by a recent regulatory battle in a specialized agency of the United Nations (UN),[1] the International Telecommunications Union (ITU). The theme is particularly rich to illustrate some fundamental questions underlying the relationship between private and public actors and standards in international law, in particular, issues of corporate capture, democratic legitimacy and accountability, and human rights. It is also, from another point of view, a fascinating tale about the rise of China within the UN system; about how Chinese technology corporations are actively proposing new international standards on a number of issues, including a new internet protocol and rules on facial recognition, through international regulatory agencies like the ITU; and how Western governments, including the European Union (EU) and its Member States, have rallied to counter the Chinese offensive.[2] While their actions are officially inspired by concerns for the protection of personal data and the privacy of individuals – in other words, by human rights – there are other matters at stake, including the question of corporate influence in public standard-setting bodies, the coherence

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[1] UN specialized agencies are autonomous international organizations established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields that are brought into relationship with the UN through agreements concluded with the latter's Economic and Social Council (ECOSOC) and approved by the UN General Assembly: see, together with a list of such agencies, J. Wouters, C. Ryngaert, T. Ruys and G. De Baere, *International Law: A European Perspective* (2018), at 290–291.

[2] On the role of the EU in the ITU until ten years ago, see J. Shahin, The European Union's Performance in the International Telecommunication Union (2011) 33:6 *Journal of European Integration* 683.

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with existing standards, and, last but not least – and not within the purview of this contribution – the preservation of Western normative dominance.[3]

We start with situating the recent regulatory battles in the ITU (Section 3.2) and delve subsequently in the other issues: corporate influence in public standard-setting bodies (Section 3.3), democratic legitimacy and accountability (Section 3.4), and human rights (Section 3.5).

3.2 THE BATTLE FOR FACIAL RECOGNITION STANDARDS AND A NEW INTERNET PROTOCOL AT THE ITU

3.2.1 *China's Choice for the ITU*

The ITU is one of the oldest global regulatory agencies.[4] Originally founded as the International Telegraph Union in 1865 to promote cooperation among international telegraphy networks, the ITU has contributed for more than 150 years to the connectivity, interoperability, and standardization of telecommunications, from the use of the Morse code to satellite communications. As a UN specialized agency since 1947, it has evolved into a unique platform for global public–private partnerships and has firmly embraced the corporate sector and other stakeholders, proudly announcing on its website that its "global membership includes 193 Member States as well as some 900 corporations, universities, and international and regional organizations."[5] More accurately, there are two types of members: 193 Member States and the 900 "Sector Members." Since 1994, Sector Members are allowed to formally participate in the decision-making processes of the ITU and since 1998 they are recognized as having formal rights of participation under the ITU Constitution.[6] The ITU has three sectors: Radiocommunication (ITU-R), Telecommunication Standardization (ITU-T), and Telecommunication Development (ITU-D). Corporations or organizations may become a member of one or more sectors and may join as a Sector Member or Associate.[7] Importantly, much of the regulatory

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[3]   In that sense, much of what is studied in this contribution resembles a game of "great powers." For the thesis that great powers remain the primary actors writing the rules that regulate the global economy, see D. W. Drezner, *All Politics Is Global: Explaining International Regulatory Regimes* (2007), at 5. The same author, in his conclusion, predicted that "China has a clear incentive to develop new technology standards" but that "the United States and European Union will be anticipating future attempts at standards creation," at 219.

[4]   The ITU is sometimes referred to as "the world's oldest international organization," although that is debatable. See, nevertheless, in that sense D. Westphal, International Telecommunication Union (ITU) (2014) *Max Planck Encyclopedia of International Law* para 1; G. A. Codding Jr., The International Telecommunications Union: 130 Years of Telecommunications Regulation (1995) 23 *Denver Journal of International Law and Policy* 501.

[5]   www.itu.int/en/about/Pages/default.aspx.

[6]   See I. Walden, International Regulatory Law, in *Telecommunications Law and Regulation* (Ian Walden ed., 2018) 791, at 807–808.

[7]   www.itu.int/en/myitu/Membership.

dynamics in the ITU starts in "Study Groups," which are renewed every four years. Each of these Study Groups, in which "thousands of experts representing government, industry and academia" participate, is responsible for progressing ITU work in a specific field of the ITU's mandate; they develop the technical basis for ITU agreements, standards, and reports. The mandates and leadership teams of each Sector's Study Groups are decided by the Sector's respective governing bodies, that is, the Radiocommunication Assembly (RA), the World Telecommunication Standardization Assembly (WTSA), and the World Telecommunication Development Conference (WTDC).[8] It has been observed by members of delegations to the ITU that ITU standards – which typically take around two years to be developed – "are increasingly written by companies, rather than governments".[9]

It is in this context that China has displayed a remarkable drive to shape international standards, reflecting "long-standing concerns that Chinese representatives were not at the table to help set the rules of the game for the global Internet."[10] The country is known for sending the largest delegation to the ITU's Study Groups, including Huawei and other state-owned enterprises. Huawei itself is said to have introduced some 2,000 new standard proposals to ITU Study Groups on topics such as 5G, cybersecurity, and artificial intelligence.[11] More in particular, since the autumn of 2019, through quite a number of its technology corporations, China has been pushing two initiatives in the ITU: (i) a new standard for facial recognition and (ii) a new Internet Protocol ("New IP"). It was the *Financial Times* that disclosed on December 1, 2019, that a battle was looming within the ITU regarding the shaping of facial recognition standards.[12] The newspaper reported that

> Chinese technology companies are shaping new facial recognition standards at the UN . . . as they try to open up new markets in the developing world for their cutting-edge technologies. Companies such as ZTE, Dahua and China Telecom are among those proposing new international standards – specifications aimed at creating universally consistent technology – in the UN's International Telecommunications Union (ITU) for facial recognition, video monitoring, city and vehicle surveillance.

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[8] www.itu.int/en/mediacentre/backgrounders/Pages/itu-study-groups.aspx.

[9] C. Burt, Standards for Biometric Surveillance Being Drafted for ITU by Chinese Businesses, December 2, 2019, www.biometricupdate.com/201912/standards-for-biometric-surveillance-being-drafted-for-itu-by-chinese-businesses.

[10] J. Ding, P. Triolo and S. Sacks, Chinese Interests Take a Big Seat at the AI Governance Table, June 20, 2018, www.newamerica.org/cybersecurity-initiative/digichina/blog/chinese-interests-take-big-seat-ai-governance-table/.

[11] K. Cordell, The International Telecommunication Union: The Most Important UN Agency You Have Never Heard Of, Center for Strategic & International Studies (CSIS), December 14, 2020.

[12] A. Gross, M. Murgia, and Y. Yang, Chinese Tech Groups Shaping UN Facial Recognition Standards, *Financial Times*, December 1, 2019, www.ft.com/content/c3555a3c-0d3e-11ea-b2d6-9bf4d1957a67.

Another *Financial Times* article, of March 2020, discusses China's attempts since September 2019 to convince ITU delegates of the need to construct an alternative form of the Internet. It explains why the ITU has been chosen for these two initiatives. As a global organization of 193 Member States and one of the oldest specialized agencies of the UN, it is seen as the de facto standards body for telecoms networks:

> Standards produced there legitimise new technologies and systems in the eyes of certain governments – particularly those in the developing world who don't participate in other internet bodies. Ultimately, they give a commercial edge to the companies who have built the tech they are based upon.[13]

It is said that African states in particular tend to follow ITU standards as they do not have the resources to develop standards themselves.[14] Moreover, such standards "are commonly adopted as policy by developing nations in Africa, the Middle East and Asia, where the Chinese government has agreed to supply infrastructure and surveillance tech under its 'Belt and Road Initiative'" (BRI).[15] Chinese corporations – particularly Huawei, Hikvision, Dahua, and ZTE – supply AI surveillance technology in sixty-three countries, thirty-six of which have signed up to the BRI.[16] It is also known that Chinese corporations are supplying surveillance infrastructure to countries in Africa, including Angola, South Africa, Uganda, and Zimbabwe.[17] It has been observed that

> while European and North American businesses participate heavily in the standards bodies such as the Internet Engineering Task Force (IETF), the Institute of Electrical and Electronics Engineers (IEEE), and the 3rd Generation Partnership Project (3GPP), the ITU gives China a chance to leverage its influence in Africa, the Middle East and Asia, where ITU standards are often adopted as policy.[18]

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[13] M. Murgia and A. Gross, Inside China's Controversial Mission to Reinvent the Internet, *Financial Times*, March 27, 2020, www.ft.com/content/ba94c2bc-6e27-11ea-9bca-bf503995cd6f.

[14] R. Wingfield, as quoted in T. Parker, Leaked Documents Show State-Owned Chinese Companies Are Shaping Global UN Facial Recognition Standards, December 1, 2019, https://reclaimthenet.org/china-un-facial-recognition/

[15] Gross, Murgia, and Yang, *supra* note 12.

[16] S. Feldstein, The Global Expansion of AI Surveillance, Carnegie Endowment for International Peace Working Paper, September 2019, at 8 https://carnegieendowment.org/files/WP-Feldstein-AISurveillance_final1.pdf.

[17] Avisian, Chinese Facial Recognition Technology Makes Play for Global Acceptance, March 31, 2020, www.secureidnews.com/news-item/chinese-facial-recognition-technology-makes-play-for-global-acceptance/ It has been observed that biometric data are being used by Chinese technology corporations to train their algorithms for improved results: Chris White, 'Chinese Companies Use Zimbabweans As Guinea Pigs To Identify Black Faces', The National Interest, 3 December 2019, https://nationalinterest.org/blog/buzz/chinese-companies-use-zimbabweans-guinea-pigs-identify-black-faces-report-101447.

[18] Burt, *supra* note 9.

While it is often thought that standard-setting organizations like the ITU, the International Organization for Standardization (ISO), or the Electrotechnical Commission (IEC) operate on a mere technical basis with a view to reaching worldwide interoperability, it has been highlighted that their decision-making processes are more political than expected.[19] It is clear that the Chinese government – notably through the upcoming China Standards 2035 strategy[20] – is pursuing a strategy of increasing influence in international organizations, particularly throughout the UN system,[21] and that it is linking this to the offensive interests of its business enterprises, especially in technologically advanced sectors involving 5G, facial recognition, blockchain,[22] and AI. China has recently spread its influence rapidly in the most important organizations for technical standards: Zhao Houlin was secretary-general of the ITU from 2015 to 2022;[23] Shu Yinbiao is president of IEC since 2020; and Zhang Xiaogang was president of ISO from 2015 to 2018.[24]

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[19] On the politicization of UN specialized agencies, see already in the early 1980s, V.-Y. Ghebaly, The Politicisation of UN Specialised Agencies: A Preliminary Analysis (1985) 14:3 *Millenium: Journal of International Studies* 317.

[20] For a relativizing analysis, see N. Wilson, *China Standards 2035 and the Plan for World Domination: Don't Believe China's Hype*, June 3, 2020, www.cfr.org/blog/china-standards-2035-and-plan-world-domination-dont-believe-chinas-hype.

[21] At the time of writing, three UN specialized agencies were led by a Chinese national: the ITU, the UN Food and Agriculture Organization (FAO), and the UN Industrial Development Organization (UNIDO): see T. Cheng-Chia and A. H. Yang, How China Is Remaking the UN In Its Own Image, *The Diplomat*, April 9, 2020, https://thediplomat.com/2020/04/how-china-is-remaking-the-un-in-its-own-image/. The International Civil Aviation Organization (ICAO) was led by a Chinese national from 2015 until 2021, when the Colombian Juan Carlos Salazar Gómez took over on August 1, 2021. In 2020, China lost the contest for the election of a new director-general at the World Intellectual Property Organization (WIPO): see B. Glosserman, China Loses a Skirmish in Fight for Global Influence, *Japan Times*, March 9, 2020, www.japantimes.co.jp/opinion/2020/03/09/commentary/world-commentary/china-loses-skirmish-fight-global-influence/.

[22] In September 2020, the ITU approved new basic standards on financial applications for blockchain, developed by the People's Bank of China, the China Academy of Information and Communications Technology, and Huawei, the first Chinese-developed international standard on blockchain for finance approved globally: E. Gkritsi, China Sets Global Blockchain Standards, Canaan Is Alive: Blockheads, September 8, 2020, https://technode.com/2020/09/08/blockheads-china-sets-global-blockchain-standards-and-canaan-is-alive/?utm_source=TechNode+English&utm_campaign=947b98a299-EMAIL_CAMPAIGN_2020_06_03_04_13_COPY_01&utm_medium=email&utm_term=0_c785f26769–947b98a299–111988938&mc_cid=947b98a299&mc_eid=978e88078f.

[23] For a recent interview with Xinhua, see Interview: China Active Contributor to UN, Says ITU Chief, October 18, 2021, www.news.cn/english/2021-10/18/c_1310253049.htm. From 1 January 2023, the secretary-general of ITU is Doreen Bogdan-Martin, who had been supported by the United States, an American citizen: M. L. Viña, N. Picarsic, and E. de La Bruyère, Biden Takes First Step in Countering China through UN Elections, Foundation for Defense of Democracies (FDD), Policy Brief, 7 April 2021.

[24] For the rapid institutional rise of China in the ISO since 2007, see J. Kynge and N. Liu, From AI to Facial Recognition: How China Is Setting the Rules in New Tech, *Financial Times*, October 7, 2020, www.ft.com/content/188d86df-6e82-47eb-a134-2e1e45c777b6. While not delivering the president currently, China seems to keep its influence in the ISO: see C.

3.2.2 *China's New IP proposal*

In September 2019, Huawei Technologies Co. Ltd. (China), China Mobile Communications Corporation, China Unicom, and the Chinese Ministry of Industry and Information Technology proposed to the Telecommunication Standardization Advisory Group (TSAG) of the ITU to study the radical idea of a New IP, that would replace the current TCP/IP (Transmission Control Protocol and Internet Protocol).[25] In its proposal, Huawei asserted that the current IP is unsuited for the development of new digital applications, for which the development of a new protocol is needed. It therefore suggested the Study Groups of ITU-T to start a further long-term research in the then ongoing (2017–2020) and the next (2021–2025) study period.

In the meetings of the TSAG from February 10 to 14, 2020, this proposal (which has been given the new title "New Vertical Communication Networks") encountered critical reactions from Dutch and United Kingdom internet registries. They argued that internet protocols have been developed in a "bottom up" manner and that relevant work is taking place in the Internet Research Task Force (IRTF) and in the IETF.

In the course of 2020, discussions took place in various ITU-T Study Groups, as they are the ones preparing proposals for new study questions to be decided at the WTSA meeting that was scheduled to take place in Hyderabad, India, from March 1 to 9, 2022.[26] The Chinese New IP proposal was discussed in Study Group (SG) 11 ("protocols and test specifications") and SG 13 ("future networks"). The United Kingdom, the EU, and its Member States objected to the proposal for a variety of reasons. They saw no evidence that the current standardization setting had failed in developing new internet functionalities nor that foreseeable requirements, such as those linked to the development of AI, Augmented and Virtual Reality, or Internet of Things (IoT), risked being insufficiently addressed. They also expressed their preference that new protocols and standards be discussed in the relevant Standards Development Organizations (SDOs)[27], in particular in the IETF, where the decision-making process is transparent, bottom-up, and open to all stakeholders (including industry, civil society, and academia), rather than in the ITU, where

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Paris, Latest ISO President Has Ties to China, Too, June 4, 2020, www.oxebridge.com/emma/latest-iso-president-has-ties-to-china-too/.

[25] See New IP, Shaping Future Network: Propose to Initiate the Discussion of Strategy Transformation for ITU-T, TSAG C-83, Geneva, September 23–27, 2019. See also the White Paper: Towards a New Internet for the Year 2030 and Beyond, www.itu.int/en/ITU-T/study groups/2017-2020/13/Documents/Internet_2030%20.pdf.

[26] The meeting was initially scheduled for November 2020 but has been delayed because of the COVID-19 pandemic.

[27] Such SDOs include the IETF, the European Telecommunications Standards Institute (ETSI), the World Wide Web Consortium (W3C), and the 3GPP. In addition, there is the aforementioned IRTF, which focuses on long-term research issues.

decision-making is top-down, intergovernmental, and does not involve all stakehold-ers. Duplicating work at the ITU could lead to higher costs and undermine interoperability. They also expressed the concern that implementing the Chinese proposal for a top-down, incumbent-controlled internet would bring a high risk of fragmentation of the global internet into locally controlled intranets, of decreased network resilience, and could seriously harm the openness of the global internet. This would not be in line with the European vision for the Internet, which is one of a single, open, neutral, free, and un-fragmented network, supporting permissionless innovation, privacy, and user empowerment.[28]

At an ad hoc meeting of SG 13 on December 11, 2020, around 100 Chinese participants participated, strengthened by Burundi, which on behalf of ten African countries expressed support for the Chinese proposals. They encountered fierce resistance by all EU Member States, the United States, the United Kingdom, Canada, and Japan. At the next plenary meeting of SG 13, it was found that there was no consensus for the project, and the discussion was ended.

3.2.3 *China Telecom's Proposal for Standards on Facial Recognition*

China Telecom introduced a proposal for a new "framework standard" through a document entitled "Requirements for face recognition application in visual surveil-lance" in ITU SG 16 ("multimedia"). Already in the spring of 2020, the European Commission raised a number of important concerns. The draft recommendation foresees the use of face recognition for a wide variety of use cases, for both public and private bodies, for example, to confirm the identity of a suspect, for police checks of identity cards, for criminal fugitives, transport, entertainment, employee attendance, trajectory tracking, etc. However, it does not contain any safeguards for the protection of personal data and privacy of individuals. From a European perspective, such a lack of safeguards is very problematic regarding its compability with the EU's General Data Protection Regulation (GDPR).[29] As the draft recom-mendation cannot be implemented within the EU (and more broadly the European Economic Area, EEA) and could have a negative impact on transfers of personal data of European to third countries that implement this standard, the Commission

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[28] The EU and its Member States support the multi-stakeholder model for internet governance, including for the development of internet standards and protocols: see Council Conclusions on Internet Governance of November 27, 2014 (16200/14, limité): "The Council of the European Union ... invites Member States and the Commission to ... foster the multi-stakeholder model of Internet governance including for the core Internet discussions, decisions and bodies through: ... cooperation alongside other stakeholders with entities in charge of Internet protocol and other information technology specifications whose decisions may have significant public policy implications."

[29] Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC, O.J. 2016 L119/1.

strongly submitted that it should be considered under the ITU's Traditional Approval Process (TAP), which applies to all recommendations with policy or regulatory implications, rather than through the Alternative Approval Process (AAP) proposed by China.

The Commission's concerns, expressed at a virtual meeting of SG 16 in April 2020, were shared by the United States, Canada, and Australia, which also highlighted the very political implications of the draft recommendation and questioned the mandate of the ITU to adopt norms in this field. In a later contribution, Romania added to the concerns by pointing to the specific risks for fundamental rights of facial recognition techniques, arguing that ethical boundaries and principles needed to be defined, setting clear criteria and limits, before standardization could take place. It also referred to serious concerns expressed by other UN entities, such as the Office of the UN High Commissioner for Human Rights,[30] pointing to the fact that the ITU is part of the UN family and its values. We will come back to this latter point (Section 3.5).

At the meeting of SG16 of December 14–16, 2000, China Telecom pushed again for the Study Group to consider the proposal and accept the new standard. Twenty EU Member States, the Commission, the United Kingdom, Canada, the United States, Australia, and Japan mobilized and expressed their disagreement. Interestingly, the meeting was chaired by a staff member of China Telecom, who seems to have had difficulties accepting the lack of consensus.

3.2.4 *Interim Evaluation*

As is clear from the above, the two Chinese proposals concerned have, for the time being, been blocked in the ITU context by a mobilization of Western countries. The latter have become alarmed by China's tactics, consisting of having Chinese corporations launching at first sight technical proposals in ITU Study Groups that, seemingly, are aimed at pushing through China's vision on new technologies and the Internet. It can be expected that China will learn from the recent experience and will seek to fine-tune its strategy and approach. The massive investment of resources, including human resources – compare the presence of 100 Chinese participants at SG 13 in December 2020 – the involvement of lobbyists and chairs of Study Groups, and concerted outreach to developing countries, especially in Africa, have made a deep impression on China's Western counterparts. However, in spite of concerted opposition of Western countries, it can be expected that China and the Chinese corporations and experts concerned will reiterate their

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[30] United Nations High Commissioner for Human Rights, Impact of New Technologies on the Promotion and Protection of Human Rights in the Context of Assemblies, including Peaceful Protests, June 24, 2020, A/HRC/44/24, www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/Documents/A_HRC_44_24_AEV.docx.

proposals – possibly with some minor modifications – at future ITU meetings, capitalizing on their strong presence and influence over other delegations.

3.3 CORPORATE INFLUENCE IN PUBLIC STANDARD-SETTING BODIES

The developments detailed in Section 3.2 may raise eyebrows from the viewpoint of the integrity of the standard-setting process in international organizations.[31] How can it be that corporate actors, such as powerful Chinese tech giants, have such an impact in the standardization work of the ITU? To be fair, there has always been a huge corporate role – directly or indirectly, openly or discretely – in the elaboration of technical standards by international organizations. Büthe and Mattli have observed that the key to successfully setting standards in such organizations is that governments and business corporations from their countries (often through domestic standard-setting bodies) "speak with a single voice."[32] For a long time, these organizations have been used by Western countries to exert and perpetuate their normative influence.[33] While the close intertwinement between the Chinese government and Chinese businesses may work particularly in China's advantage, Western countries have also been teaming up with their businesses. In essence, China presents a case of what Büthe and Mattli call high "institutional complementarity":

> firms operating in a hierarchical and coordinated domestic system are likely to win because their system fits more naturally with the global structure, where a single regulator is the clear focal point. Such a domestic system enables a country's stakeholders to speak with a single voice and in a timely fashion on the global stage …. High institutional complementarity implies that the interaction between domestic and global institutions is smooth and easy, yielding decisive strategic benefits to the firm in terms of effective interest representation in global rule-making and timely information.[34]

Nevertheless, the question arises whether decision-making processes in public international organizations should not provide for a number of safeguards in this respect. The UN and other multilateral organizations and processes have been accused of "corporate capture" in a number of instances. The latter concept includes not just policy and legislative interference by corporations but also "revolving door" practices where corporate employees act as (or are part of a team of)

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[31] See J. Baron and O. Kanevskaia, "Global Rivalry Over Leadership in ICT Standardization: SDO Governance Amid Changing Patterns of Participation" in this volume (Chapter 14).

[32] See T. Büthe and W. Mattli, *The New Global Rulers. The Privatization of Regulation in the World Economy* (2011), 12–13.

[33] See FreedomLab, *The New Power of Technical Standards,* September 25, 2020, https://free domlab.org/the-new-power-of-technical-standards/.

[34] Büthe and Mattli, *supra* note 32, at 13.

government representatives in multilateral processes and forms of economic diplomacy where States prioritize corporate interests.[35] Cynically, such corporate capture has apparently also been nurtured by the

> growing dependence of multilateral institutions on private funding, product of governments' failure to pay their ordinary contributions to multilateral institutions, their earmarking of funds for issues that advance their (and their corporations') interests and falling tax revenues/public funding during the era of neoliberalism.[36]

The problem is definitely more widespread than the ITU, and it is not within the purview of the present contribution to come up with overarching suggestions to tackle it. It is nevertheless interesting to point to recent work of the OECD in this respect, which has engaged in a thorough exercise to map best practices in the standard-setting work of international organizations (IOs), including regarding stakeholder engagement.[37] The 2021 OECD report "Compendium of International Organisations' Practices: Working towards More Effective International Instruments" acknowledges that such engagement constitutes a valuable tool to make international instruments more trusted, implemented and complied with, and to strengthen their ownership. However, it adds to this:

> many IOs continue to face significant challenges in engaging with relevant stakeholders in a meaningful and inclusive manner, and reconciling transparency and effectiveness of discussions in the development of international instruments. Stakeholder engagement can be resource intensive, and IO staff may encounter difficulties in investing the necessary time and human capital . . .. Like in domestic rulemaking, there is a risk of capture of the engagement process by those who have sufficient resources to exert influence.[38]

While the OECD report contains valuable examples of the practice of various international organizations regarding their engagement with stakeholders, both of a non-decisional and decisional nature, it concludes that, "despite the undeniable efforts of a large majority of IOs to engage more systematically with stakeholders, their practices in terms of mechanisms, openness and frequency of consultation vary widely from one organisation to another" and that "few IOs have developed a whole of organisation policy or strategy for stakeholder engagement to date, mapping their stakeholders and defining objectives and key steps to engage them and manage

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[35] ESCR-Net Corporate Accountability Working Group, *Corporate Capture at the United Nations*, February 11, 2021, at 2. For interesting considerations on corporate capture in the work of the Codex Alimentarius Commission, see J. Braithwaite and P. Drahos, *Global Business Regulation* (2000), at 408, 417, and 516.

[36] ESCR-Net Corporate Accountability Working Group, *supra* note 35.

[37] OECD, Compendium of International Organisations' Practices: Working Towards More Effective International Instruments, Paris, 2021.

[38] OECD, Compendium of International Organisations' Practices, 80.

risks."[39] It looks like the ITU is in urgent need of such a "whole of organization strategy." This can not only help avoiding cases of capture but also strengthening the legitimacy of new standards, as Buhmann has righthly argued:

> the inclusion of non-state actors that are the potential holders of new duties, whether (soft law) responsibilities or (hard law) obligations, offers a risk of capture if the process is not carefully designed and managed, but also a possibility for support and output legitimacy, if it is well designed and managed. Participation in a process is important for participants to perceive their needs and concerns addressed, but participation must be equalized in regard to access and power in order to avoid the risk of capture and illegitimacy due to or actual or perceived imbalance.[40]

3.4 DEMOCRATIC LEGITIMACY AND ACCOUNTABILITY

It has almost become an evergreen to raise the question of the democratic legitimacy of international standard-setting processes, both within intergovernmental organizations and within private rulemaking bodies.[41] But the examples above of recent regulatory battles in the ITU, in which Chinese technology corporations with the support of China have aggressively tried to have new international standards accepted on internet protocol and facial recognition must touch a raw nerve with democracy watchdogs, from parliamentarians to journalists.

In the more general debate on the legitimacy of international standards, a traditional distinction has been made between "input legitimacy" and "output legitimacy."[42] This contribution will not enter into that discussion but submits that nowadays legitimacy should be preferably understood as "democratic legitimacy"

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[39] Ibid., at 91 and 93, respectively.

[40] K. Buhmann, Collaborative Regulation: Preventing Regulatory Capture in Multi-Stakeholder Processes for Developing Norms for Sustainability Conduct in *Sustainability and Law* (V. Mauerhofer et al. eds., 2020), 295 at 305.

[41] See *inter alia* A. Marx, E. Bécault, and J. Wouters, Private Standards in Forestry: Assessing the Legitimacy and Effectiveness of the Forest Stewardship Council, in *Private Standards and Global Governance. Economic, Legal and Political Perspectives* (A. Marx, J. Swinnen, M. Maertens, and J. Wouters eds., 2012), 60; N. Hachez and J. Wouters, A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GlobalG.A.P. (2011) 14 *Journal of International Economic Law* 677. This section builds in particular on the latter article.

[42] "Input legitimacy" rests on the fact that the norm reflects the preferences of the people, while "output legitimacy" is based on the contents and effects of the norm as promoting the general interest. It has been argued that a lack of input legitimacy, resulting from a democratic deficit, may be compensated for by a high degree of output legitimacy: see F. Scharpf, *Governing in Europe – Effective and Democratic?* (1999), 6ff. While the present author does not fully agree with this, the discussion exceeds the limits of this contribution. See also the considerations on "cognitive legitimacy" and "moral legitimacy" for the assessment of voluntary sustainability standards in P. Haack and A. Rasche, The Legitimacy of Sustainability Standards: A Paradox Perspective (2021) 2 *Organization Theory* 1, at 5.

and that the democratic character of a norm makes it legitimate.[43] Democracy is indeed considered a most important framework of analysis for assessing the legitimacy of a norm – whether global or local, public or private.[44]

As argued in an earlier publication,[45] democracy may be successfully conceived at the global level by promoting a link between regulation and public deliberations rather than relying on fixed social, institutional, or procedural preconditions.[46] This democratic link can be fruitfully thought of in terms of public accountability. Where regulatory authority is exercised by a governing entity and not by the people directly – as is the case when international organizations or private bodies issue global standards – democracy is ultimately concerned with the connection of such governing entity with the group of people that it intends to govern.[47] This democratic connection can be achieved through mechanisms of public accountability. The democratic character of a governing entity and of the rules it produces is a function of its accountability to the "public."[48]

This raises the following questions in relation to ITU standards: (i) what is the "public" and what is its role? and (ii) what does "accountability" concretely mean?

As to the public, it is submitted that, in a global context, it should not so much be considered as a "global demos" but rather in a deliberative-democratic sense, which

[43] See, for example, R. Keohane, Global Governance and Democratic Accountability, in *Taming Globalization: Frontiers of Governance* (David Held and M. Koenig-Archibugi ed., 2003), 130: "We live in a democratic era, and I share the widespread belief that rules are only legitimate if they conform to broadly democratic principles, appropriately adapted for the context.' David Held also argued that there is a 'growing recognition of democracy as the fundamental standard of political legitimacy which finds entrenchment in the Universal Declaration of Human Rights and regional treaties": Cosmopolitanism: Ideas, Realities and Deficits, in *Governing Globalization: Power, Authority and Global Governance* (D. Held and A. McGrew eds., 2002), 315.

[44] See *inter alia* S. Bernstein, Legitimacy in Global Environmental Governance 1 (2005) *Journal of International Law & International Relations* 139; S. Bernstein and B. Cashore, Can Non-state Global Governance Be Legitimate? An analytical framework 1 (2007) *Regulation & Governance* 347, at 353ff.; G. De Búrca, Developing Democracy beyond the State (2008) 46 *Columbia Journal of Transnational Law* 221; K. Dingwerth, *The New Transnationalism: Private Transnational Governance and Its Democratic Legitimacy* (2007).

[45] Hachez and Wouters, *supra* note 41.

[46] See also S. Wheatley, Democratic Governance beyond the State: The Legitimacy of Non-state Actors as Standard Setters, in *Non-State Actors as Standard Setters* (A. Peters, L. Koechlin, T. Förster, and G. F. Zinkernagel eds., 2009), 226–227.

[47] See P. Nanz and J. Steffek, Global Governance, Participation and the Public Sphere 39 (2004) *Government and Opposition* 314: "The idea of democratic legitimacy is that the citizens decide for themselves the content of the laws that organize and regulate their political association. Separating the process of rule-making from politically accountable institutions, global governance is argued to suffer a massive 'democratic deficit.'"

[48] See, e.g., T. Risse, Transnational Governance and Legitimacy, in *Governance and Democracy: Comparing National, European and International Experiences* (A. Benz and Y. Papadopoulos eds., 2006), 183, at 184: "In democratic systems, a social order is legitimate because the rulers are accountable to their citizens, who can participate in rule-making through representatives and can punish them by voting them out of office."

must not necessarily be territorially defined or linked with particular nation-states but may be approached from a more functional point of view. The relevant public associated with a governing entity and its norms may be identified in relation to a particular issue, on the basis of an "affected" criterion.[49] A public in relation to a particular issue would encompass the circle of persons affected by that issue and by its being regulated, which are often called "stakeholders." In an area such as internet protocol and facial recognition, such public will be extremely wide: it includes internet users of all kinds, both individual citizens, businesses and other private actors, as well as governmental actors, consumers, producers, and so on. The enormous size of the so-defined public leads to important problems of identification, representativeness, or feasibility in designing democratic governance processes.[50] Whereas those problems are real, they are not insoluble (especially in regard of the progress of information technologies), and in any case, they should not be used as excuses to disregard the public's entitlement to democratic accountability in global governance.[51]

Turning to "accountability," it has often been exclusively considered in a retrospective dimension, where it designates a relationship in which an actor – in our case the general public – may require that another – for example, a governing entity – render account of its activities and impose a cost on them as the case may be. In the democratic discourse, such views of accountability emphasize the control exercised by the public on governing entities.[52] In democratic societies, the people must be able to control those who govern them,[53] and this may be achieved in many ways, following different channels.[54] This view of accountability is retrospective because it logically presupposes that the governing entity has already acted, or

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[49] See J.-A. Scholte, Reconstructing Contemporary Democracy (2008) 15 *Indiana Journal of Global Legal Studies* 305, at 309; De Búrca, *supra* note 44, at 248ff.

[50] See Risse, *supra* note 48, at 185 and 193, who does not exclude a priori that the concrete accountability mechanisms available to the internal and external stakeholders be differentiated (notably for reasons of practicability) as long as they stay effective.

[51] In this regard, see Wheatley, *supra* note 46, at 232–233.

[52] See examples of such conceptions in R. Grant and R. Keohane, Accountability and Abuses of Power in World Politics (2005) 99:1 *American Political Science Review* 29: "*Accountability*, as we use the term, implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met." (emphasis in original). See also M. Bovens, Analysing and Assessing Public Accountability: A Conceptual Framework 13 (2005) *European Law Journal* 447, at 450, according to whom accountability is "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences."

[53] See M. Kahler, Defining Accountability Up: the Global Economic Multilaterals (2004) 39 *Government and Opposition* 133.

[54] In this regard, Grant and Kehoane (*supra* note 52, at 36) identify seven "accountability mechanisms" in world politics: hierarchical, supervisory, fiscal, legal, market, peer, and public-reputational.

issued, and/or implemented norms before control may be exercised, and it tends to be sanctions- and redress-oriented.[55] However, for the purposes of this contribution, a more extensive view of accountability is advanced, by adding a prospective dimension to the retrospective one. While the retrospective conception focuses on the governing entity "rendering account" of its activities to the public, the prospective dimension insists on the necessity for the governing entity to "take into account" the preferences, interests, and concerns of the public in making government decisions and issuing public norms, through appropriate means. This side of accountability emphasizes the responsiveness that a governing entity must show to the public's concerns.[56] It is most effectively achieved by means of mechanisms of inclusive participation,[57] which can take many forms, such as voting procedures to adopt particular rules (directly or through representatives) or public notice and comment procedures prior to making a decision.

In light of the foregoing, public accountability in democratic governance can be defined as the relationship of a governing entity to its public according to which the former must allow inclusive participation of the latter in its governing activities, in order to take account of the public's preferences in making government decisions, as well as the relationship according to which the public is entitled to control and sanction a posteriori the governing entity for the way it has conducted its government functions (rule-making, rule-implementation, rule-enforcement, rule-interpretation). If such an accountability relationship is effective between the governing entity and the public, the norms issued by the governing entity for the purpose of regulating issues of concern to the public should approximate what is called "democratic" and hence have good chances of being viewed as legitimate.

Again, trying to operationalize responsiveness and control in very technical global governance regimes such as ITU standards on internet protocol and facial recognition may lead to practical problems given the sheer size and diversity of the public. In this respect, much attention is presently given to the incremental formation of a

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[55] Control may, however, take a more continued form, for example, as a constant monitoring is established to oversee in real time the activities of an agent, notably to pre-empt dysfunctions and create learning curves. See J. Wouters, N. Hachez, and P. Schmitt, Managerial Accountability: What Impact on International Organisations' Autonomy?, in *International Organisations and the Idea of Autonomy* (R. Collins and N. White eds., 2011), 230.

[56] R. Mulgan, "Accountability": An Ever-Expanding Concept? (2000) 78 *Public Administration* 555, at 566ff.

[57] See Nanz and Steffek, *supra* note 47, at 315: the deliberative theory of politics "claims that democratic legitimation can be generated by means of deliberation between a variety of social actors (e.g. government officials from different national communities, scientific experts, NGOs, etc). Political decisions are reached through a deliberative process where participants scrutinize heterogeneous interests and justify their positions in view of the common good of a given constituency. In [those authors' view], any bestowal of democratic legitimacy on global governance must ultimately depend on the creation of an appropriate public sphere, i.e., an institutionalized arena for (deliberative) political participation beyond the limits of national boundaries."

vibrant and variegated "global civil society," for the explicit purpose of participating in the governing of the global public space.[58] In various domains, global civil society organizations, most importantly nongovernmental organizations (NGOs), have been quite successful in generating debate and in participating in the establishment of truly global sets of norms, either of a public or private nature.[59] The question is, however, the extent to which, and the ways to find out whether, such civil society organizations, through their participation in, and oversight of, global public deliberations, effectively represent the public at large.

Accountability, to function effectively, also needs other supporting principles to be put in place. Transparency is one of them and can be defined as the level of access enjoyed by the relevant public to information about, from, or concerning the governing entity and its activities. Without access of the public to such information, participation will be meaningless, and control will be curtailed.[60] This is why transparency is a major stake in struggles for increased accountability in global governance, even though it should not be understood as a component of the notion of accountability itself, as is sometimes done, but rather as an enabler of accountability.[61] Another principle that is crucial for deliberation in global governance, as well as for retrospective control thereof, is that of stating the reasons for making a government decision.[62] Stating reasons allows shedding light on the deliberative dynamics, and on the arguments at play, and makes the control of the norm and of the governing entity more objective.[63]

The considerations developed above may be considered rather abstract. It is submitted, though, that they are essential in order to ensure the democratic legitimacy of global standard-setting practices, whether of an intergovernmental or private

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[58] For an analysis of prospects for increasing the participation of a global public in transnational law-making through the use of ICT platforms, see K. Buhmann and S. Azizi, Towards the Participation of a Global Public in Transnational Law-Making? Everyday ICT Platforms as Legitimacy Opportunities for Bottom-Up Governance, in *Transnationalisation and Legal Actors. Legitimacy in Question* (B. L. Kristiansen, K. Mitkidis, L. Munkholm, L. Neumann, and C. Pelaudeix eds., 2019), 112.

[59] See how civil society and more particularly international NGOs play a role in global norm-formation: M. Finnemore and K. Sikkink, International Norm Dynamics and Political Change (1998) 52 *International Organization* 887, at 896ff. For an account of NGO participation in UN proceedings, see N. Hachez, The Relations between the United Nations and Civil Society (2008) 5 *International Organizations Law Review* 49.

[60] For a study of the interplay between transparency and accountability, see T. Hale, Transparency, Accountability and Global Governance (2008) 18 *Global Governance* 73.

[61] On transparency as an enabler of accountability, see T. Hale and A.-M. Slaughter, Transparency: Possibilities and Limitations (2006) 30 *The Fletcher Forum of World Affairs* 153.

[62] This is already considered a general principle of administrative law in traditional domestic or international administrative settings. See, e.g., in EU law, D.-U. Galetta, H. C. H. Hofmann, O. M. Puigpelat, and J. Ziller, The General Principles of EU Administrative Procedural Law, European Parliament, 2015, at 20.

[63] See Risse, *supra* note 48, at 214, who articulates the procedural requirements that have to be met by private governing entities to ensure democratic legitimacy: transparency, deliberative quality, responsiveness and reliability, responsibility and accountability, and congruence.

nature. It will require further in-depth research to apply them to, and effectuate them practically in, the ITU and other SDOs. As the recent developments in the ITU detailed in Section 3.2 narrate, there is a great practical need to do this.

3.5 HUMAN RIGHTS

While traditionally, the ITU's work stood far off from human rights,[64] it has been rightly observed that in recent years, as the organization has become increasingly involved in internet governance and online communications, the link between its decisions and the human rights of end users have become much more obvious.[65] However, an important concern about ITU standard-setting processes is that they do not involve a human rights screening:

> There are virtually no human rights, consumer protection, or data protection experts present in ITU standards meetings so many of the technologies that threaten privacy and freedom of expression remain unchallenged in these spaces . . .. When it comes to facial recognition [these standards are] extremely dangerous from a human rights perspective.[66]

For that reason, it has been asserted that

> the ITU, as a technical standards setting body, is not an appropriate forum for discussing privacy, which is ultimately a human rights issue. Other bodies have far greater expertise on privacy, and a much clearer mandate to discuss it: the UN Human Rights Council, Human Rights Committee and Special Rapporteurs, to name but three. If the ITU were to start determining what national laws, policies and regulations related to privacy looked like, this would be a real cause for concern, particularly given the restrictions on the rights to privacy that exist in many of the states which make up the ITU.[67]

As Romania indicated in the discussions regarding China Telecom's proposal for a new standard on facial recognition (Section 3.2.3), as part of the UN family, the ITU should uphold the fundamental values of the UN, including the respect and promotion of human rights. There is a strong legal argument to support this thesis.

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[64] Interestingly, the ITU describes its core mission very much in a fundamental rights way: it is stated that "it is committed to connecting all the world's people – wherever they live and whatever their means. Through our work, we protect and support everyone's fundamental right to communicate," see www.un.org/en/about-us/un-system and www.itu.int/en/about/Pages/overview.aspx.

[65] R. Wingfield, Spotlight on the ITU #1: Why Human Rights Defenders Should Care About the ITU, *Global Partners Digital*, March 15, 2017, www.gp-digital.org/spotlight-on-the-itu-1-why-human-rights-defenders-should-care-about-the-itu/.

[66] Mehwish Ansari, as quoted in Parker, *supra* note 14.

[67] R. Wingfield, Spotlight on the ITU #3: WTDC 2017 – And Why the ITU Needs to Change, *Global Partners Digital*, November 13, 2017, www.gp-digital.org/spotlight-on-the-itu-3-why-the-itu-needs-to-change/.

In 1947, the UN and the ITU concluded a cooperation agreement, which made the latter a specialized agency of the former. Article IV of this agreement explicitly obliges the ITU to allow for the submission of formal recommendations from the UN "having regard to the obligation of the United Nations to promote the objectives set forth in Article 55 of the Charter" and to enter into consultation with the UN on such recommendations.[68] In Article 55(c) of the UN Charter, the UN is tasked to promote "universal respect for, and observance of, human rights and fundamental freedoms for all." One may submit that the ITU, as a member of the UN family, is bound to respect and promote human rights but also that there may be a case for the UN's ECOSOC to develop recommendations about the need for integrating human rights concerns in all regulatory processes in UN specialized agencies, including the ITU, with possibly an important consultative role for the UN High Commissioner for Human Rights.

3.6 CONCLUDING REMARKS

If it had not been for the *Financial Times'* repeated coverage (Section 3.2), the larger public and academia would probably not have heard about the recent regulatory battles regarding standards for facial recognition and internet protocol that have been going on in the ITU. This finding by itself is rather worrying: global normative power plays are taking place in UN agencies on issues that deeply affect the daily lives of peoples around the world, and most of us are not even aware of it. In this chapter, we situated these recent regulatory battles in the ITU and developed a number of reflections regarding the need to scrutinize the risk of corporate capture, the need to better safeguard democratic legitimacy and accountability, and the need for a stronger scrutiny of such regulatory processes from a human rights point of view.

It is said that the EU and its Member States have recently decided to upgrade their capacity and representation in ITU meetings, having been alarmed by the initiatives of China and Chinese corporations. It is one of the lesser known fallouts of Brexit, as in the past the EU relied strongly on the United Kingdom's participation in ITU bodies. All of this constitutes a wake-up call. Apart from a deeper and more proactive engagement by Western governments in the work of the ITU, there is clearly a need for a much wider reflection on how to enhance the democratic legitimacy and accountability of its regulatory processes and on a more critical engagement with the role that powerful corporations play within those processes, whether or not in sync with their national governments.

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[68] Article IV(1) and (2) of the Agreement between the United Nations and the International Telecommunications Union.