U.S. administrative law: a model for global administrative law?*

Direito administrativo dos Estados Unidos: um modelo para o direito administrativo global?

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ABSTRACT

This article examines the potential for drawing on U.S. administrative law in the development of a global administrative law to secure greater accountability for the growing exercise of regulatory authority by international or transnational governmental decision-makers in a wide variety of fields. It discusses how U.S. administrative law and practice might form one useful point of departure for developing both "top down" and "bottom up" approaches for understanding and further developing

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global administrative law. A global administrative law must, of course, draw on legal principles and practices from many domestic and regional legal systems and traditions, as well as sources in international law. Accordingly, the U.S.-based perspective offered in this article is only one of many that must be considered.

KEYWORDS

U.S. administrative law — global administrative law — global regulatory regimes

RESUMO

Este artigo examina o potencial de utilização do direito administrativo dos EUA no desenvolvimento de um direito administrativo global para garantir maior responsabilidade pelo crescente exercício da autoridade regulatória por parte dos tomadores de decisão governamentais internacionais ou transnacionais em uma ampla variedade de campos. Ele discute como o direito e a prática administrativos dos EUA podem constituir um ponto de partida útil para o desenvolvimento de abordagens "top down" e "bottom up" para compreender e desenvolver o direito administrativo global. Um direito administrativo global deve, é claro, basear-se em princípios e práticas jurídicas de muitos sistemas e tradições jurídicas nacionais e regionais, bem como em fontes do direito internacional. Dessa forma, a perspectiva baseada nos EUA oferecida neste artigo é apenas uma das muitas que devem ser consideradas.

PALAVRAS-CHAVE

direito administrativo dos EUA — direito administrativo global — regimes regulatórios globais

I

Introduction

This article examines the potential for drawing on U.S. administrative law in the development of a global administrative law[1] to secure greater accountability for the growing exercise of regulatory authority by international or transnational governmental decisionmakers in a wide variety of fields. U.S. administrative law and practice might form one useful point of departure for developing both "top down" and "bottom up" approaches to understanding and further developing global administrative law. A global administrative law must, of course, draw on legal principles and practices from many domestic and regional legal systems and traditions, as well as from sources in international law. Accordingly, the U.S.-based perspective offered in this article is only one of many that must be considered.

The past several decades have witnessed an explosive development of a great variety of international economic and social regulatory regimes.[2] These regimes have been created in response to the rise of a global market economy (itself constructed through private and public international law regimes), the consequences of economic, social, environmental, informational, and other forms of interdependence, and the perceived inadequacies of purely national solutions in the problems generated by those consequences. These regulatory regimes encompass a wide variety of subject areas, including trade; finance and banking; environment, health, and safety; pharmaceuticals; transportation and communications; conditions on financial assistance; human

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1 The term international administrative law has in recent decades been limited to administrative rules, procedures, and tribunals relating to the staff of international organizations. *See* CF. Amerasinghe, The Law of the International Civil Service As Applied by International Administrative Tribunals, p. 103-09 (1988). Earlier in the twentieth century, a broader conception of international administration and administrative law was recognized. *See* Paul S. Reinsch, *International Administrative Law and National Sovereignty*, 3 AM. J. INT'L L. 1 (1909); Pierre Kazansky, *Théorie de l'administration internationale*, 9 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 353 (1902).

2 Some of these global regulatory regimes are bilateral. Others are multilateral, including some of regional and some of global scope. Further, as developed below, some of these regimes are established by treaties to which states are parties, while others consist of networks or other cooperative arrangements among domestic officials responsible for a given area of regulation, and still others are private or hybrid public-private in character. This article refers generically to all these different types of regimes as global regulatory regimes.

rights; and unlawful or undesirable activities. These regimes respond to the failures of both markets and of decentralized national systems of regulation to secure important economic and social values. They also often include bodies that are administrative in character and that make regulatory decisions and create regulatory law that is domestically implemented. As Kingsbury, Krisch and Stewart explain in "The Emergence of Global Administrative Law,"[3] the traditional paradigms of international law and of administrative law at the domestic level cannot adequately account for or address these new global regulatory regimes, which are creating a new field of global administration and administrative law.

How can these global regulatory regimes be made accountable to the actors or publics whose interests they are supposed to serve? This is the question being addressed by new, emerging forms of global administrative law. Putting the issue in terms of accountability immediately raises the questions of to whom account is due, and by what means.[4] One approach is to ensure that administrative decisionmakers implementing a global regulatory regime—which can include domestic administrative officials implementing global regulatory norms as well as officials at the global level—are faithful to that regime and the states that have established it. Another is accountability to those ultimately subject to regulation, including private individuals and entities, business firms, and in some cases NGOs, in order to ensure that their rights are secured and their interests respected. A third approach is accountability to the broader publics, either domestic or global, that are protected or otherwise affected by the regime. It must also be borne in mind that administrative law is only one means among many others that can be deployed to promote accountability and help to ensure that global regulatory regimes in fact serve their justificatory ends raising the question of its appropriate role in relation to other mechanisms.[5]

Further, what should the normative ambition of global administrative law be? Should it aim to ensure the smooth and effective instrumental functioning of global regulatory regimes? Should it ensure that administrative agents are faithful to their principals, however defined? Should it seek to protect the rights of private actors? Should it secure the interests of relevant domestic or

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[3] Kingsbury, Krisch & Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (Summer/Autumn) [hereinafter Kingsbury, Hrisch & Stewart].

[4] *See* Ruth Grant and Robert Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM POL. SCI. REV. 29 (2005); Kingsbury, Krisch & Stewart, *supra* note 3, at 27-42.

[5] *See id*.

global publics? Based on a broader conception of its role, what is the relation between global administrative law and the much debated question whether, and to what extent, governance at the global level can be conceived and realized on a democratic basis?

A. *Three Basic Types of International Regulatory Regimes*

For purposes of this article, three basic types of international regulatory regimes can be distinguished:

Treaty-based international regulatory regimes are established by treaties or other agreements among nations that establish and oversee implementation of international regulatory standards. These regimes often include a secretariat and other institutional features of an international intergovernmental organization. Examples include trade regimes like NAFTA and the WTO, environmental regimes such as the Montreal Protocol (regulating stratospheric ozone depleting chemicals), the World Bank and the International Monetary Fund, and the various U.N. organizations.

Transnational regulatory networks are developed by national regulatory officials responsible for specific areas of domestic regulation. These officials communicate and meet informally, and may agree to uniform or harmonized regulatory standards and practices in order to reduce barriers to trade and commerce created by differing national regulations. They also address transnational regulatory problems, including those posed by multinational enterprises operating across many jurisdictions, that exceed purely domestic capabilities.[6] Having agreed to such standards or practices with their counterparts in other countries, these officials then adopt and implement them in their capacities as domestic regulatory officials. In addition to or as an alternative to agreement on common regulatory standards, such officials may pool information and discuss and coordinate regulatory policies and enforcement practices. These global regulatory networks have emerged in areas such as antitrust, banking, securities, telecommunications,

[6] For an introduction to global regulatory networks, *see* ANN-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347 (2000-2001); *see also* David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281 (1998).

chemicals regulation, taxation, and transportation safety. For example, national regulators might agree to accept each other's product regulatory standards as mutually equivalent, or pool information and coordinate antitrust measures to address the practices of multinational firms.

Another form of international regulatory cooperation consists of *mutual recognition agreements and cooperative regulatory equivalence determinations* by regulators in different countries with different regulatory requirements. Under mutual recognition agreements, which are typically bilateral in character, regulators in one country accept the product or service regulatory certification procedures or standards of another country as equivalent to or compatible with their own, in exchange for similar recognition of their own measures.[7] Pursuant to such agreements, products or services originating in one country and complying with its regulatory requirements can enter or be provided in the host country without being subjected to its separate, additional regulatory requirements, to the extent provided by the agreement. Mutual recognition can include the jurisdictions' differing mechanisms for determining (including through certification procedures) conformance with applicable regulatory standards and/or the standards themselves; the former currently predominate.[8]

As an alternative to entering into more or less formal agreements providing for mutual recognition, regulators in different countries can follow more informal methods of cooperation under which a regulatory agency accepts regulatory conformity determinations by an agency in another as equivalent to its own in the expectation of reciprocal treatment.[9] These forms of actively managed, horizontal regulatory cooperation between administrative agencies in different areas are being used increasingly to address technical barriers to trade and differences in environmental, health, safety, and other regulatory standards and promote trade by reducing or eliminating need for multiple

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7 *See* Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes—The Dilemmas of Accountability, Rights and Democracy Beyond the State*, 68 L. & CONTEMP. PROBS. 263 (Summer/Autumn 2005).

8 *See* Kalypso Nicolaidis & Rebecca Steffenson, Managed Mutual Recognition in the Transatlan tic Marketplace, in TRANSATLANTIC ECONOMIC RELATIONS 4, 5 (Mark Pollack & Gregory Shaffer, eds., 2005).

9 *See, e.g.*, Australia's Meat Safety Enhancement Program (MSEP), 64 Fed. Reg. 30299 (June 7, 1999) [hereinafter Australian Meat] (finding Australia's system of meat inspection equivalent); Francesca Bignami, *The Challenge of Cooperative Regulatory Relations after Enlargement*, *in* LAW AND GOVERNANCE IN AN ENLARGED EUROPEAN UNION 97 (George A. Bermann & Katharina Pistor, eds., 2004).

regulatory approvals for internationally traded products and services.[10] The use of such arrangements with respect to services is currently limited but is expected to grow.[11]

In practice, the distinction between treaty-based and network regulatory regimes is not always clear-cut. Formal international regimes often provide a forum for informal networking among domestic regulatory officials. Some regulatory networks function through their own international organizations (which, however, are generally not treaty-based), although others are loose-knit and highly informal. Likewise, practice might often blur the distinction between adoption of common standards by informal networks of domestic government regulators and mutual recognition arrangements and equivalence practices by such regulators. In principle, mutual recognition agreements and other cooperative regulatory equivalence practices are a way of accommodating different substantive regulatory standards and conformity determination methods in different countries, but they might evolve toward harmonization of standards and methods.

Non-state actors, including business and NGO representatives, participate in varying degrees in these three different types of global regulatory arrangements. In addition, the weaknesses of global government and the perceived need for regulatory harmonization have stimulated the development at the global level of private standard setting and regulatory organizations, such as the International Standards Organization, organized primarily or exclusively by business, and hybrid private-public regulatory regimes involving businesses, NGOs, and in some cases states or international organizations.[12] While these global organizations often use administrative law tools to bolster their operation and legitimacy, they are beyond the scope of this article. Nor does this article address another important element of global

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[10] Gregory Shaffer, *Reconciling Trade and Regulatory Goals: The Prospects and Limits of New Approaches to Transatlantic Governance Through Mutual Recognition and Safe Harbor Agreements*, 9 COLUM. J. EUR. L. 29, 50-54 (2002) (discussing this phenomenon within the context of the U.S.-E.U. mutual recognition agreements); Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards*, 50 U. KAN. L. REV. 823 (2002) [hereinafter *Accountable Governance*]; Linda Horton, *Mutual Recognition Agreements and Harmonization*, 29 SETON HALL L. Rev. 692 (1998).

[11] Kalypso Nicolaidis, *Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals*, *in* THE PRINCIPLE OF MUTUAL RECOGNITION IN THE EUROPEAN INTEGRATION PROCESS, 4 (Fiorella Kostoris and Padoa Schioppa eds., 2005) [hereinafter Nicolaidis, *Human Faces*].

[12] *See* Kingsbury, Krisch & Stewart, *supra* note 3, at 16.

administrative law: the development by international authorities, such as the WTO Dispute Settlement Body and international investment treaty tribunals of administrative law, of requirements that governments must follow in domestic regulatory decisions with external consequences.[13]

B. *Vertical and Horizontal Linkages Within Global Regulatory Regimes*

Both formal treaty-based regimes and global regulatory networks operate through two-way vertical linkages between the domestic and international levels.

First, domestic officials represent their governments at the global level. In formal regimes, a national delegation might involve representation of several ministries or departments, often headed by a foreign ministry official, structured through established protocols of supervision and review by the represented government.[14] In global regulatory networks and the establishment of mutual recognition regimes, the representation process is typically far less structured and officials might represent only their own agency, affording them much greater freedom of action. In addition to acting as representatives of their respective governments in these various settings, officials also function as members of the global regime, and might develop a personal stake in its success.

Second, measures agreed at the global level are typically implemented through domestic regulatory regimes rather than directly by regulation of non-state actors by the global regime. Subject to a few but perhaps growing number of exceptions, treaty-based regimes lack authority directly to regulate the conduct of non-state actors.[15] But, under a "statutory-adjudicatory" model of regulatory governance,[16] such regimes generate norms, including norms

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[13] *See id.* at 44; Sabino Cassese, *Global Standards for National Administrative Procedure*, 68 L. & CONTEMP. PROBS. 109 (Summer/Autumn 2005).

[14] Business and NGO representatives may also participate, both as members of delegations or as observers in international negotiation sessions. *See* David A. Wirth, *Public Participation in International Processes: Environmental Case Studies at the National and International Levels*, 1 COLO. J. INT'L ENVTL. L. & POL'Y 1, 18-22 (1996). Such participation is rarer in the case of informal regulatory networks.

[15] Some of the exceptions are discussed in *infra* Section III.

[16] *See* Daniel Tarullo, *Law and Governance in a Global Economy*, 93 AM. SOC INT'L L. PROCEEDINGS 105, 109-11 (1999).

generated by regime administrative bodies; international law makes these norms legally binding on party states or creates other strong incentives for their domestic implementation.

Informal regulatory networks lack direct coercive regulatory authority over non-state actors, and the measures agreed to are not legally binding on states. Implementation at the domestic level of policies and measures agreed to by networks depends on and can generally be accomplished by the initiative of the relevant participating national officials, often through the exercise of their existing administrative authority, without the need for legislation or action by other government authorities. This "regulatory convergence" model of governance typically operates without any formal transmission of legal provisions or decisions from the international to the domestic level.[17] Thus, the network of central bank governors forming the Basle Committee on Banking Supervision agreed on new capital requirements for banks; the participating government officials then followed these harmonized measures in exercising their domestic administrative regulatory authority.[18]

Horizontal arrangements for regulatory harmonization or cooperation through mutual recognition and equivalence determination arrangements follow a different approach. Each participating domestic actor, in regulating products and services originating in another country, accepts or defers to their compliance with the other's procedures and standards as satisfying its own requirements in light of memorialized or more informal mutual agreements or other indicia of expected reciprocity.[19]

C. *Transparency and Opportunities for Access and Participation*

Both treaty-based regimes and global regulatory networks typically function against the background of traditional diplomatic norms of confidentiality in negotiation. The transaction costs and other impediments

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17 *Id.* at 109.

18 *See* Zaring, *supra* note 6, at 283-84.

19 Whereas, normally, mutual recognition agreements will be negotiated between governments, recent research indicates that in some areas such agreements will only be possible when at least one of the parties is a private professional association. Nicolaidis & Steffenson, *supra* note 8, at 13. This is particularly true in the services sector, in which individual professions are regulated on sub-national levels, therefore making a government-to-government agreement difficult to reach. *Id.*

to successful negotiations are already high, especially for multilateral agreements, even if negotiations are confidential. Transparency could aggravate these impediments. For example, confidentiality has been thought justified on the need to prevent threats to successful negotiations by domestic interest groups who might mobilize to block, for example, trade liberalization. In the case of regulatory agreements, these agreements for confidentiality are reinforced by the premise that the issues involved are often technical and appropriately resolved by experts.

Treaty-based regimes, however, operate in significant part through formal, public legal acts, and typically make decisions through established rules and processes, promoting transparency. Non-state actors, including business and NGO representatives, may be part of national delegations and in many treaty-based, international regulatory regimes enjoy observer status, allowing them to monitor negotiations and participate at an informal level. Networks and horizontal coordination arrangements, by contrast, operate much more informally, and their decisions and decisionmaking processes are generally significantly less transparent. In considering the potential application of administrative law mechanisms to global regulatory regimes, it is thus important to understand what factors favor the use of either formal, treaty-based regimes or more informal arrangements to address particular types of regulatory problems.

D. Issues of Control, Accountability, Participation, and Responsiveness: Domestic and Global Perspectives

The dramatic growth of powerful global regulatory regimes poses important governance issues of control, accountability, participation, and responsiveness. These questions can be viewed from either a domestic or a global perspective.

From the domestic perspective, the three different types of international regulatory regimes described above have been attacked in the United States and elsewhere on the ground that they result in important changes in domestic law without being adequately subject to the domestic systems of political and legal accountability and control that would apply to purely domestic regulatory measures. While treaties require ratification, treaty-based regimes increasingly adopt regulatory measures through subsidiary lawmaking authorities, including the conference of the parties, administrative bodies,

and dispute settlement bodies. Further, new regulatory norms adopted by international regulatory regimes, whether treaty-based or network, can often be implemented by executive branch agencies under their existing statutory authorities without the need for new legislation. Implementation of global regulatory norms by domestic agencies through rulemaking or adjudication might in some cases be subject to domestic administrative law procedures and judicial review, but the underlying norm was adopted through supranational processes that are often not.[20] Some binding international norms adopted by treaty-based regimes might allow no or only limited discretion in domestic implementation, short-circuiting the role of domestic administrative law. In other cases, especially in horizontal methods of regulatory cooperation, domestic implementation is accomplished though informal determinations or exercises of enforcement discretion that are not subject to procedural requirements and, especially in the case of enforcement discretion, are also not ordinarily subject to judicial review.[21] Moreover, even when domestic administrative law disciplines are applicable, they generally apply only to domestic implementation and not to the global component, which is often by far the more important in terms of the regulatory outcome.

Critics accordingly contend that the norms, policies, and practices adopted by global regulatory regimes are not subject to adequate political, public, and legal accountability. The criticisms have both procedural and substantive components and focus on either domestic or global level implications. Regarding procedure, treaty-based regimes like the WTO and the IMF have been widely attacked for imposing measures generated by secret processes without opportunity for participation and review by affected domestic interests. The displacement of domestic processes of regulatory accountability is most obvious in the case of international treaty-based regimes whose norms are domestically binding or that must be incorporated in domestic law. While less salient, similar displacement effects from the decisions of regulatory networks and horizontal cooperative regimes is also increasingly under fire.[22]

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[20] *See* Eleanor Kinney, *The Emerging Field of International Administrative Law: Its Content and Potential*, 54 ADMIN. L. REV. 415, 425-32 (2002).

[21] *See* Linda Horton, *supra* note 10, at 710-25; Sidney Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, 54 ADM. L. REV. 435, 440-46 (2002) [hereinafter *International Trade Agreements*].

[22] Lori M. Wallach, *Accountable Governance*, *supra* note 10, at 832-35 (critiquing the use of mutual recognition agreements and equivalency determination and providing examples of several potential problems that their use may cause). For an activist critique of mutual recognition agreements as a strategy for harmonization, *see* TRANS-ATL. CONSUMER DIALOGUE,

Examples include the decision by the U.S. Department of Agriculture (USDA) to grant equivalency status to the Australian Meat Safety Enhancement Program,[23] and the U.S. Food and Drug Administration's (FDA) decision to issue equivalence determinations under the U.S.-E.U. Mutual Recognition Agreement (MRA) on pharmaceuticals without allowing for stakeholder input.[24]

Process-based criticisms of the domestic impact of international regulation are joined with a substantive attack—that the absence of adequate mechanisms of transparency, accountability, and control enables well-organized industrial and financial interests to "capture" the two-level, global and domestic regulatory decisionmaking process to the detriment of the environment, consumers, workers, and general social values and interests. Thus, "[i]nternational negotiations sometimes enable government leaders to do what they privately wish to do, but are powerless to do domestically."[25] The vehement criticism by environmental and other NGOs in the United States and abroad of regulatory decisions by WTO and NAFTA tribunals, the IMF, the World Bank, and other international bodies is a virtual replay of Ralph Nade's attacks on U.S. federal regulatory agencies in the 1960s. Indeed, Nader is still around, making criticisms of the WTO that are virtually the same as those he levied against the

Federal Trade Commission thirty-five years ago.[26] Some analysts have gone so far as to argue that the rise of global regulation amounts to a fundamental alteration of the constitutional and governmental system in the United States by creating a largely unaccountable "international branch" of the federal government that presents challenges comparable to those posed by the New Deal regulatory state.[27]

TACD BRIEFING PAPER ON MUTUAL RECOGNITION AGREEMENTS (MRAs) (2001) (on file with Law & Contemp. Probs.), *available* at http://www.tacd.org/db_files/files/files-270-filetag.doc (last visited Mar. 21, 2005).

23 Australian Meat, *supra* note 9; *see* Wallach, *Accountable Governance*, *supra* note 10, at 842-43.

24 *See* Wallach, *Accountable Governance*, *supra* note 10, at 853-54.

25 Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 457 (1988), *quoted in* Zaring, *supra* note 6, at 321. *See generally* Gregory Shaffer, *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future*, 24 FORDHAM INT'L L.J. 608, 609 n. 5 (2000).

26 *See* Lori Wallach & Michelle Sforza, WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY ix (1999) (preface by Ralph Nader attacking "an autocratic system of international governance that favors corporate interests").

27 Chantal Thomas, *Constitutional Change and International Government*, 52 HASTINGS L.J. 1 (2000).

Other critics focus on the deficiencies of governance at the level of the global regulatory regime, rather than on the weakening or circumvention of domestic mechanisms of political and legal control and accountability. They make both process and substantive criticisms similar to those levied by their domestically oriented counterparts. Process-based criticism tends to focus on the secrecy of international and transnational regulatory decisional processes and the lack of adequate opportunity for effective access to information, participation and input in global regulatory decisionmaking on the part of affected global or domestic publics, including the interests of environmentalists, workers, consumers, developing countries, and indigenous peoples. Associated substantive criticisms are that the international regulatory process is dominated by well-organized economic interests and powerful countries like the United States, often resulting in inadequate regulatory protection and economic injustice.[28]

These dangers are acknowledged by students of global regulatory governance.[29] They find that these arrangements, by making regulation a multijurisdictional, two-level or horizontal game, generate serious information asymmetries, create significant agency costs, and increase the severity of the collective action problems faced by unorganized "public" interests, thereby serving to "filter" such interests and thus systematically disadvantage "larger and politically weak groups" such as workers, the poor, the uneducated, or the vulnerable.[30]

E. Potential Administrative Law Responses

One means of addressing these problems is the development of more effective and appropriate systems of administrative law to discipline and to hold accountable international regulatory decisionmaking and its domestic implementation.

One approach is the "bottom up" approach, extending the reach of domestic administrative law to assert more effective control and review with

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[28] *See, e.g.,* Wallach, *Accountable Governance*, *supra* note 10, at 828.

[29] *See, e.g.,* Putnam, *supra* note 25; Shapiro, *International Trade Agreements*, *supra* note 21; Slaughter, *The Accountability of Government Networks*, *supra* note 6.

[30] *See* Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institution*, 68 L. & CONTEMP. PROBS. 319 (Summer/Autumn 2005).

respect to the supranational elements of domestic regulation. Thus, U.S. courts dealing with domestic agency decisions implementing global regulatory norms and policies might seek to extend the administrative law procedural requirements and techniques of judicial review applicable to purely domestic measures to include the participation of U.S. regulatory officials in the global development of the standards or other measures adopted domestically. For example, they might require U.S. regulators to afford public notice and comment before entering into global regulatory discussions and negotiations. U.S. agencies might be required to include a summary of the global regulatory discussions and decisions in the notice of a proposed new rule implementing a global regulatory norm and to provide an analysis and justification of the agencies' role in those global discussions and decisions in the final decision. Much more boldly, domestic courts might refuse to recognize the decisions or norms of global regulatory regimes reached through decisionmaking processes that did not satisfy basic standards of regulatory due process. Other participating nations might impose similar requirements, which might coalesce and ripen into transnational administrative law.

Alternatively, under a "top down" approach, a treaty-based regime or even a network or horizontal regulatory regime would adopt decisionmaking procedures to promote greater transparency and opportunities for participation and input from affected interests and would establish reviewing bodies or other mechanisms to promote accountability with respect to international or transnational regulatory decisions. Especially in this context, we would need to liberate ourselves from a court-centered conception of administrative law. International practice has already begun to generate a variety of different approaches: the World Bank inspection panel,[31] the procedures of the NAFTA Commission for Environmental Cooperation,[32] and the inclusion of NGOs in decisionmaking by the Codex Alimentarius Commission on international food safety standards and under the Convention on International Trade in Endangered Species.[33]

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[31] *See generally* Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553 (1994).

[32] *See generally* Sarah Richardson, *Sovereignty, Trade, and the Environment – The North American Agreement on Environmental Cooperation*, 24 CAN.-U.S. L.J. 183 (1998); Gillian Dale, *III. NAFTA: Commission for Environmental Cooperation*, 1996 COLO. J. INT'L ENVTL. L. & POL'Y 26 (1996).

[33] For discussions regarding NGO participation at Codex Alimentarius meetings, *see* Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards*, 50 U. KAN. L. REV. 823, 836-38 (2002); Robert F. Housman, *Democratizing International Trade Decisionmaking*, 27 CORNELL INT'L L.J. 699, 718-20 (1994).

In assessing the potential for these and other strategies,[34] we must frankly recognize the challenge in developing administrative law mechanisms for global regulation that will fulfill the negative (power checking) or affirmative (power directing) functions that administrative law serves in a wholly domestic setting. Domestically, regulatory agencies generally operate at only one remove from elected legislatures and in the shadow of review by independent courts. International regulatory networks and organizations operate at much greater remove from elected legislatures, and reviewing courts are generally absent. There are good reasons for traditional diplomatic norms of secrecy and confidentiality negotiation and for the use of informal models of global regulatory governance. Moreover, in many global regulatory regimes regulatory functions have not (yet) crystallized into distinct administrative bodies that could be more readily governed by administrative law.

II

U.S. Administrative Law

In the United States and other liberal democratic industrialized nations, administrative regulation is itself regulated by administrative law. It defines the structural position of administrative agencies within the governmental system, specifies the decisional procedures that they must follow, and determines the availability and scope of review of their actions by the independent judiciary. It furnishes a common set of principles and procedures that cut horizontally across the many different substantive fields of administration and regulation. In the United States, the system of federal administrative law has evolved significantly over the past forty years.[35]

For discussions regarding NGO participation in the context of other international treaties and organizations, *see* Daniel Vice, Note, *Implementation of Biodiversity Treaties: Monitoring, Fact-Finding, and Dispute Resolution*, 29 N.Y.U. J. INT'L L. & POL'Y 577, 616-9 (1997); Kal Raustiala, Note, *The "Participatory Revolution" in International Environmental Law*, 21 Harv. ENVTL. L. Rev. 537, 547-48 (1997).

[34] The E.U. comitology process provides another institutional model that might be adopted to the global context. *See generally* EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS (Christian Joerges & Ellen Vos, eds., 1999).

[35] *See* Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 448-51 (2003).

A. Basic Elements of U.S. Federal Administrative

The system of administration in the United States, like that in many Euro pean and other nations, has certain structural elements that are fundamental: (1) an elected legislative body that enacts statutes and delegates their implementation to executive officials; (2) an administrative body—a discrete, responsible decisionmaking entity, subordinate to and deriving authority from the legislature, that implements the relevant law through adjudication, rulemaking, or other forms of administrative decision; (3) an independent court or a tribunal that reviews the agency decisions for conformance with the terms of the statutory delegation and other applicable legal requirements; and (4) decisional transparency including public access to government records.[36]

The four basic components of U.S. federal administrative law are contained in the Administrative Procedure Act (APA): procedural requirements for agency decisionmaking, threshold requirements for the availability of judicial review, principles defining the scope of judicial review, and provisions regarding public access to agency information.[37]

The APA provides two basic types of procedures for agency decisionmaking: notice and comment rulemaking, and formal adjudication through trial-type hearings. These procedures generate an administrative record that serves as the exclusive basis for agency decision and judicial review. They, together with the Freedom of Information Act, provide transparency by generating extensive, publicly available records of the factual, analytic, and policy positions of the agency and of outside parties as well as the basis for the agency's decision.[38]

The APA authorizes courts to review four basic types of issues: the agency's compliance with applicable procedural requirements; the sufficiency of the record evidence to support agency factual determinations; whether the agency's action is in conformity with applicable constitutional and statutory authorizations, requirements, and limitations, and other applicable law; and whether the agency's exercise of discretion pursuant to governing law is

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[36] *See* Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. GLOBAL L. STUDIES 369, 370-76 (2001); Stewart, *Administrative Law in the Twenty-First Century*, *supra* note 35.

[37] 5 U.S.C §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 7521 (2004).

[38] *See* STEPHEN BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN AND MATTHEW SPITZER, ADMINISTRATIVE LAW AND REGULATORY POLICY 652-60, 685-99, 872-86 (5th ed. 2001) [hereinafter BREYER & STEWART].

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[39]

B. *The Traditional Model of Administrative Law and Subsequent Developments*

The core of administrative law in the United States has focused on securing the rule of law, respecting private rights, and protecting the liberty and property of citizens by ensuring, through procedural requirements and judicial review, that agencies act within constitutional limitations and the bounds of the statutory authority delegated by the legislature.[40] The traditional subject of administrative law is government issuance or enforcement of an order imposing regulatory requirements or liabilities on a specific person. Here the function of administrative law is primarily negative: to prevent unlawful or arbitrary administrative exercise of coercive power against private persons. This is to *ensure accountability for the legality* of administrative decisions. This function is rooted in principles of democratic self-government: the liberty or property of citizens should be subject to restriction by government only when the citizenry has authorized such restrictions through the processes of electoral representation and subject to the constitutional limitations and procedures adopted by the citizenry.[41]

In recent decades, U.S. administrative law has assumed a broader scope and function through the development of an interest-representation model of administrative law. It has developed new and more inclusive procedural requirements and has promoted transparency in administrative decisionmaking, including rulemaking. It has expanded the right to participate in agency decisionmaking procedures and the scope of judicial review to include a broad range of affected social and economic interests beyond those regulated. The scope of judicial review has been expanded to include, in addition, substantial review of agencies' exercise of policy discretion. Here administrative law has assumed the affirmative task of ensuring that

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[39] U.S.C. § 706 (2)(A) (2004).

[40] *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1671-76 (1975) [hereinafter Stewart, *Reformation*]; Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1203 (1982).

[41] *See* Stewart, *Reformation*, *supra* note 40, at 1672-73.

regulatory agencies exercise their policymaking discretion in a manner that is informed and responsive to the wide range of social and economic interests and values affected by their decisions, including the beneficiaries of regulatory programs as well as those subject to regulatory controls and sanctions.[42] The functions of administrative law go beyond the core of ensuring legal accountability to the broader goal *of promoting responsiveness and securing accountability to social interests and values*.

The interest representation model implicitly recognizes the inherent limitations of an administrative law limited to a conception of democracy based solely on electoral representation. The extent of power exercised by administrative agencies and the breadth of the discretion that they enjoy under many statutory delegations means that the system of electoral representation can afford only a limited degree of accountability for their decisions. Broad statutory delegations enable agencies to escape any such tight agent-principal link and leave them with a large residual discretion that, on the traditional model, is not legally accountable. The interest-representation model seeks to fill this gap by creating a surrogate process of representation through legal procedures rather than through electoral mechanisms and to expand the scope of judicial review to include close scrutiny of agency exercises of discretion. Because of the heavy emphasis placed by reviewing courts on the requirement that agencies address and respond to the material submissions of all participating interests and provide a reasoned justification for the balance struck among them, this aspect of administrative law reflects a deliberative conception of democracy.

The judiciary is the vital cockpit in administering this conception. For example, in applying the "arbitrary and capricious" standard of review of agency discretion, the courts do not substitute their own judgment regarding sound policy for those of the agency. Instead, they seek to promote a form of dialogic rationality in the administrative process by requiring the agency to articulate and justify its exercises of power by reference to legally relevant public norms invoked by outside parties and the agency itself, and by examining the sufficiency of the agencies' responses to the data, analysis, and comments submitted by outside parties and the justifications that it gives for its policy choices.[43]

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[42] *See id.* at 1711-60; Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 636-43 (2000).

[43] *See* BREYER & STEWART, *supra* note 38, at 415-88.

III

"Bottom Up" Approaches to Developing a Global Administrative Law

A global administrative law can also be created from the "bottom up" through application of domestic administrative law to the decisions of three types of global regulatory regimes—international treaty-based regimes, transnational regulatory networks, and horizontal arrangements for mutual recognition and cooperative equivalence determinations. The U.S. model of administrative law provides an example. One possibility is to apply U.S. administrative law directly to decisions or other actions by global regulatory regimes. Another is to apply administrative law disciplines to domestic implementation of global regulatory norms. A third is to apply such disciplines to the participation by U.S. administrative officials in the decisionmaking of global regulatory regimes.

A. Application of U.S. Administrative Law Directly to Actions of International Regulatory Regimes

As previously noted, global regulatory regimes generally do not have authority to determine or enforce requirements or liabilities directly against individuals or other non-state actors. But instances of such authority are likely to grow as international regulation intensifies, as analogous experience with direct regulation in the E.U. suggests. A current example is the Executive Board of the Clean Development Mechanism (CDM) under the Kyoto Protocol, which determines whether energy or other projects to reduce greenhouse gases emissions that are undertaken by project sponsors in developing countries but financed by, among others, firms in developed countries are eligible to receive commercially valuable GHG emissions reduction credits. If this and similar market-based global regulatory systems are to succeed, they must provide investors with a degree of legal certainty, including timely resolution of disputes. Although the determinations of the CDM Executive Board have vital consequences for project developers and investors, they are afforded no

procedural rights at the Board level and no opportunity for review of Board decisions by an independent tribunal.[44]

Another example is the U.N. Security Council 1267 Committee, established and authorized by the U.N. Security Council to list persons determined to be engaged in financing international terrorism. The Security Council resolution establishing the committee obligates U.N. member states to freeze the assets of listed persons. There is no procedure available before the committee whereby persons listed have the right to challenge the correctness of a listing, although such persons listed have challenged domestic asset freezes implementing the listings in domestic courts.[45] As a third example, the U.N. High Commissioner for Refugees (UNCR) makes determinations about refugee status of individuals without an established system of procedural rights for claimants and administers camps for refugees, who have complained of sexual abuse and other serious wrongdoing by UNCR employees and contractors, without an established mechanism for redress.[46]

In the absence of any effective remedy at the level of the global regime, domestic courts in the United States and other countries might seek to review the legality, procedural and/or substantive, of international regulatory and other administrative decisions that directly affect specific persons. While the U.N. and other international organizations and their officials regularly plead official immunity when sued in domestic courts, if such organizations themselves fail to provide effective accountability for seriously erroneous, arbitrary, or abusive decisions or actions by their officials and employees, domestic courts might start to chip away at immunity.[47]

If a claimant brought suit in a U.S. federal court, the boldest possibility would be for courts to hold that the international regulatory regime is a *de facto* federal agency to which effective decisionmaking power has been delegated by

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[44] *See* Ernestine E. Meijer, *The Clean Development Mechanism: Loss in a "Win-Win" Instrument* (unpublished article, on file with the author).

[45] *See* David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 L. & CONTEMP. PROBS. 127 (Summer/Autumn 2005).

[46] Mark Pallis, The Operation of UNHCR's Accountability Mechanisms (unpublished manu script, on file with author).

[47] Frederick Rawski, *To Waive or Not to Waive: Immunity and Accountability in UN Peacekeeping Operations*, 18 CONN. J. INT'L L. 103 (2002) (discussing recent moves by the United Nations to limit the use of immunity when serious breach of law is alleged); Jennifer Murray, Note, *Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina*, 34 COLUM. HUM. RTS. L. Rev. 475 (2003) (discussing the abuse of the immunity doctrine by U.N. personnel involved in peacekeeping missions).

treaty or otherwise, so that the procedural and other requirements of the APA apply directly to that regime.[48] Such a step would be so deeply inconsistent with the reluctance of courts to intrude on the conduct by the Executive of foreign affairs that it has no practical chance of adoption. Nonetheless, without relying on the APA, federal courts could apply constitutional requirements of procedural due process and other generally applicable principles of administrative law to review decisions of global authorities that directly and adversely affect individual persons, and provide relief through injunctions and declaratory judgments.

Tort remedies are another possible mechanism of review and redress. Tort claims have, for example, been asserted in India against asserted negligence by UNICEF employees in the distribution and administration of vaccines, which assertedly caused medical injuries to those receiving the vaccines.[49]

If domestic courts began to review and provide remedies against decisions of global regulatory regimes, the regimes would have strong incentives to develop effective internal systems of administrative law in order to defend or deter such initiatives. For example, athletes have brought domestic court actions against anti-doping and other disciplinary decisions by international sports federations. In response, the sports federations have developed a fairly elaborate system of procedural rights for athletes charged with wrongdoing and review by an independent tribunal. Thus, "bottom up" review by domestic courts might stimulate "top down" administrative law initiatives by global regimes.

B. Application of U.S. Administrative Law to Domestic Implementation of International Regulatory Norms

Federal regulatory officials regularly serve on U.S. delegations to treaty-based regimes, participate in transnational regulatory networks, or negotiate mutual recognition arrangements. Subsequently, they implement the

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[48] A court would have to conclude that the global authority was an "agency" for purposes of the APA, which defines "agency" as "each authority of the government of the United States." 5 U.S.C. § 551(1) (2004).

[49] UNICEF: Court Finds UNICEF and Government Responsible for Child Deaths in Assam, ACR WEEKLY NEWSLETTER (Asia Human Rights Commission, Hong Kong, China), Nov. 12, 2003, (on file with Law & Contemp. Probs.), *available at* http://acr.hrschool.org/mainfile.php/0153/242/ (last visited Apr. 7, 2005).

resulting global regime norms and arrangements at the domestic level. For example, in order to carry out their obligations under the WTO Agreement on Sanitary and Phytosanitary Measures, federal agencies increasingly adopt international standards as the basis for food safety regulations.[50] Alternatively, implementation of global regulatory norms takes the form of enforcement or other adjudicatory decisions in individual cases. For example, under international regulatory regimes of mutual recognition or equivalency, the FDA often decides whether to authorize or take enforcement action against the import of a medical device product that complies with domestic regulatory requirements in the exporting state, based on a determination of whether those requirements are equivalent to those in the United States.[51]

United States administrative officials thus have both an "external" and an "internal" role; they are part of both national and global systems of regulatory government.[52] A critical issue is the extent to which procedural requirements and judicial review of domestic implementation might reach back to consider the development and basis of the global regulatory norms that are being implemented. The officials participating in the adoption of a global regulatory norm will most likely be strongly committed to its implementation, and the justifications given by an agency for its domestic decision might be rationalizations of a fait accompli. Unless the record considered by the court and the reasons given by the agency encompass the global elements of decisionmaking, domestic administrative law might provide little in the way of meaningful accountability.

In addressing these issues, one should ask whether U.S. agency decisions that implement international agreements should be subject to the same

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[50] David Livshiz, *SPS, International Standards, Domestic Implementation, and Public Participation: Can the Stars Align?* 7-8 (Jan. 2, 2005) (unpublished manuscript, on file with author). For examples *see* Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities, 70 Fed. Reg. 460, 505-06 (Jan. 4, 2005) (justifying the risk assessment for the proposed regulation as complying with the requirements demanded by the Codex and OIE); Bromoxynil, Diclofop-methyl, Dicofol, Diquat, Etridiazole, et al.; Proposed Tolerance Actions, 69 Fed. Reg. 47051, 47055 (Aug. 4, 2004) (to be codified as 40 C.F.R. pt. 180) (justifying a change in regulations to make them compliant with standards developed by Codex).

[51] Livshiz, *supra* note 50, at 12-14. For examples *see* Australian Meat, *supra* note 9 (finding Australia's system of meat inspection equivalent); Mutual Recognition of Pharmaceutical Good Manufacturing Practice Inspection Reports, Medical Device Quality System Audit Reports, and Certain Medical Device Product Evaluation Reports Between the United States and the European Community, 63 Fed. Reg. 60122 (Nov. 6, 1998) (to be codified at 21 C.F.R. pt. 26) (providing for mutual recognition of good manufacturing practice (GMP) inspection reports for pharmaceuticals provided by signatory countries).

[52] SLAUGHTER, A NEW WORLD ORDER, *supra* note 6, at 171-81.

procedural requirements and principles regarding the availability and scope of judicial review as similar regulatory decisions that are purely domestic in character. There are three possible answers to this question. Decisions implementing international agreements might be subject to the same requirements as purely domestic decisions ("parity"). They might be subject to fewer requirements ("parity minus"). Or, they might be subject to greater requirements ("parity plus").

1. The Paradigm of Parity

Subject to a limited statutory exception in the case of notice-and-comment rulemaking procedures, discussed below, nothing in the APA indicates that domestic agency actions in implementing global norms are exempt from APA requirements or subject to a lesser standard of judicial review than comparable purely domestic decisions. While the APA provides wholesale exemptions from all of its provisions for certain military functions,[53] no similar exemptions apply to agency actions relating to foreign affairs.

The paradigm of parity holds that agency decisions implementing global regulatory norms should be subject to the same administrative law procedures, requirements, and review on the same basis as equivalent, purely domestic agency actions. There are a number of court decisions that reflect this approach: *United States v. Decker*,[54] upholding, in the context of a criminal prosecution, the judicial reviewability of U.S. fishing regulations issued pursuant to the International Pacific Salmon Fisheries Convention; *Bethlehem Steel Corp. v. United States*,[55] holding that U.S. agency suspension of countervailing subsidies investigation pursuant to U.S.-Korean agreement is subject to notice and comment rulemaking; and, although subsequently reversed by the Supreme Court, *Public Citizen v. Department of Transportation*,[56] in which the Ninth Circuit Court of Appeals held that the Department of Transportation was required to prepare an Environmental Impact Statement and conduct a Clean Air Act conformity determination in issuing regulations that would permit Mexican motor carriers to operate in the United States.

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53 *See* 5 U.S.C § 551(F), (G) (2004).
54 600 F.2d 733 (9th Cir. 1979).
55 140 F. Supp. 2d 1354 (Ct. Int'l Trade 2001).
56 316 F.3d 1002 (9th Cir. 2003), *rev'd* 541 U.S. 752 (2004). For a discussion of the Supreme Court's reasoning, *see infra* text accompanying note 82.

Under a parity paradigm, some forms of agency implementation of international decisions will not be subject to procedural requirements or judicial review because equivalent, purely domestic decisions are not. For example, under the APA, an administrative decision whether to initiate enforcement proceedings in a given case is not judicially reviewable when relevant statutes (as is generally the case) do not specify any requirements or criteria for such decisions; in such cases, enforcement decisions are deemed to have been "committed to agency discretion by law."[57] Thus, decisions by the FDA or USD A not to take enforcement action against imported products in connection with international mutual recognition and other regulatory equivalence arrangements will generally not be subject to judicial review unless the arrangement has been formalized in a regulation or other measure that is legally binding on the agency and the agency's action is claimed to violate it.[58] Similarly, agency guidance and similar policy documents that do not purport to have the force of law are generally not subject to notice and comment rulemaking requirements or, in many cases, to judicial review. Thus, agency use of such documents or other informal means to implement global regulatory norms or cooperative arrangements will likewise not be subject to those disciplines.

Further, under a parity paradigm, the facts and circumstances involved in the development of the global regulatory norms that the agency is implementing and the agency's role in their development might not be subject to review. In reviewing agency rules, courts generally limit themselves to the record generated after rulemaking has been formally noticed and initiated by the agency. Prior informal discussions between the agency and interested persons, which might play a decisive role in shaping the proposed and final rule, are generally not part of the relevant record before the court and are thus not considered by it.[59] Similarly, the informal background of licensing or enforcement decisions by agencies is generally not accessible or considered on judicial review. Given this precedent, courts following a paradigm of parity might very well refuse to delve into global events that occurred before the initiation of domestic decisionmaking processes by the agency, leaving out what is often the most crucial part.

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[57] *See* 5 U.S.C. § 701(a)(2) (2004); Heckler v. Chaney, 470 U.S. 821 (1985).

[58] When the decision is to enforce, the importer, of course, will generally have a right of review on the merits but not of the decision to take the enforcement action as such.

[59] Home Box Office Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977) (stating that contacts received prior to the issuance of formal notice of proposed rulemaking need not necessarily be disclosed).

The parity paradigm is also restricted by the APA provision exempting "foreign affairs functions" from the notice and comment procedures otherwise applicable to rulemaking and the trial-type hearing requirements otherwise applicable to formal adjudication.[60] The legislative background indicates that this exemption should be limited to those matters that "so affect relations with other governments that, for example, public [agency decisionmaking processes] would clearly provoke undesirable international consequences."[61] Courts have nonetheless tended to interpret it fairly broadly to cover the implementation of international economic and regulatory agreements.[62] But in the Uruguay Round Agreement Act, Congress restored parity in the specific, politically salient context of agency responses to decisions by the WTO Dispute Settlement Body finding U.S. regulations to be contrary to WTO Uruguay Round Agreements. Before modifying such a regulation, the relevant agency must provide public notice and opportunity for comment and justify any change in relation to the comments received. In addition, the USTR must consult with specified congressional committees and obtain the views of relevant private sector advisory committees.[63]

2. The Paradigm of Parity Minus

This approach holds that domestic administrative decisions should not be subject to the same procedural requirements or to the same availability and scope of judicial review as purely domestic decisions. Its rationale is that excessive legalization and procedural formality will compromise confidentiality in international negotiations and otherwise impair the ability of the executive to conclude and promptly implement international agreements. Prompt and efficient implementation is necessary to secure the credibility of the executive in international negotiations. Also, opportunities for delay through procedural formalities or judicial review will enable domestic economic interests to block or delay implementation of international

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60 5 U.S.C. §§ 553(a)(1), 554(a)(4) (2004).

61 U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act, 26 (1947) (on file with Law & Contemp. Probs.), *available at* http://www.oalj.dol.gov/public/apa/refrnc/agtc.htm (last visited Apr. 7, 2005).

62 *See* C. Jeffrey Tribbels, *Delineating the Foreign Affairs Function in the Age of Globalization*, 23 SUFFOLK TRANSNAT'L L. REV 389, 395-97 (1999).

63 *See* 19 U.S.C. § 3533(g)(1) (2004).

agreements that benefit the country and impair cooperative relations with other nations. Since the executive can, as a general matter, conduct and conclude international agreements without being subject to the constraints of domestic administrative law, it should also enjoy significant flexibility when taking the domestic steps necessary to implement these agreements.

This paradigm finds support in a number of court decisions. For example, in *Jensen v. National Marine Fisheries Service (NOAA)*,[64] the Ninth Circuit held that a challenge by U.S. fishing boats to regulations issued by the International Pacific Halibut Commission and approved by the Secretary of State (who was delegated such authority by the President) were not subject to judicial review on the ground that presidential action in the field of foreign affairs is committed to agency discretion by law.[65] Similarly, *International Brotherhood of Teamsters v. Pena*[66] invoked the "foreign affairs function" exemption in the APA rulemaking provisions to reject a claim by U.S. truck drivers that the Department of Transportation was required to follow notice and comment procedures in issuing regulations authorizing Mexican truck drivers to drive in the United States based on driver licensing equivalency. The court's ruling might well have been influenced by a perception that liberalization in trade and services is generally beneficial and by a reluctance to provide opponents with procedural weapons to fight it.[67]

The paradigm of "parity minus" is also reflected in *Public Citizen v. United States Trade Representative (USTR)*[68] holding that USTR was not required to prepare an Environmental Impact Statement for the negotiation of NAFTA on the ground that there would be no final agency action unless and until the negotiations were successfully concluded. At that point, the agreement would be submitted by the President to Congress for approval, an action that is also not subject to judicial review, with the result that judicial review is not available at any stage. Likewise, *Public Citizen v. Kantor* held that the USTR's

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64 512 F.2d 1189 (9th Cir. 1975).

65 The court invoked *Chicago & Southern Air Lines v. Civil Aeronautics Bd.*, 333 U.S. 103 (1948), which held that determinations by the CAB and the President's determination of international airline route service authorizations and recommendations by the CAB regarding such awards were not subject to judicial review. *Id.* at 1190; *see also* Z. & F. Assets Realization Co. v. Hull, 311 U.S. 470 (1941) (holding that decisions by Secretaries of Treasury and State to certify awards pursuant to determinations of U.S.-German Mixed Claims Commission are not subject to judicial review).

66 17 F.3d 1478 (D.C. Cir. 1994).

67 *See* Judith L. Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603 (2000); Benvenisti, *supra* note 30.

68 976 F.2d 916 (D.C. Cir. 1992).

negotiation of the GATT Uruguay Round was not subject to judicial review under the APA.[69] And in *Public Citizen v. Department of Transportation (DOT)*,[70] the Supreme Court held that in issuing regulations implementing NAFTA and relevant federal statutes to authorize operation of Mexican trucks in the United States, DOT was not required to conduct an Environmental Impact Statement (EIS) and make a Clean Air Act conformity determination. The Court reasoned that the combination of NAFTA obligations and relevant federal statutes left DOT with no choice but to grant the authorization; hence an EIS and a conformity determination were unnecessary. This decision makes clear how global regulatory norms can short-circuit otherwise applicable domestic administrative law processes.

3. The Paradigm of Parity Plus

A third approach would subject domestic administrative decisions implementing international regulatory norms to more demanding administrative law discipline than equivalent purely domestic actions. The basic justification would be that the norms being implemented were chosen through global decisionmaking processes that are more remote, opaque, and closed than equivalent, purely domestic processes and therefore less subject to political and other mechanisms of accountability, justifying more demanding accountability through administrative law as a compensating corrective.[71] Thus, global regulatory decisionmaking often occurs in distant locations such as Basel or Geneva. Transnational "club" mechanisms in global regulatory regimes make it very difficult for concerned interests in the United States, and especially for less well-organized consumer, environmental, and other "public" interests, to acquire the information and to organize effectively in order to influence such decisions. Also, U.S. administrative officials may use informal negotiations and coordinated regulatory policy initiatives with regulators in other countries to enhance their own independence from otherwise applicable U.S. domestic political checks.[72]

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69 864 F. Supp. 208 (D.D.C. 1994).
70 541 U.S. 752 (2004).
71 *See* Wirth, *supra* note 14.
72 *See* Zaring, *supra* note 6.

How might "parity plus" be implemented within the scope of the procedural and judicial review requirements of the APA in order to offset these systemic factors? A key objective would be to enhance the transparency of the facts, analyses, and considerations that underlie global regulatory decisions in order to expose them to public scrutiny and contestation and to enable courts to apply requirements of reasoned justification, based on an adequate record, for the regulatory choices made.[73] The operating premise is that open deliberations and transparency tend to "level the playing field," alleviate information asymmetries, and check the influence of narrow interest groups in favor of broader but less well-organized constituencies.[74]

In order to implement "parity plus," procedural requirements and judicial review would be directed not only at a federal agency's implementation of the global norm, but would extend to the norm itself and the process of its adoption, even in cases in which analogous earlier stage agency decisionmaking in the purely domestic context would not be subject to such disciplines. Thus, in cases in which domestic implementation involves formal adjudication or notice and comment rulemaking, courts might require the agency to submit for the record evidentiary materials on the global decisionmaking and its stated reasons why the international norms in question were adopted. The agency might be required to explain why the relevant agency officials agreed, in their "external" capacity as participants in the global decisional process, to the norms adopted and what commitments they made regarding domestic U.S. implementation. The Freedom of Information Act (FOIA) might also be used to obtain discovery of agency records relevant to the international negotiations.[75] The justification for these steps would be that they are necessary in order for a court adequately to review the agency's domestic decision by enabling it to take into account the underlying global norms, circumstances, and considerations. Also, the enhanced transparency resulting from such steps could energize legislative and other political oversight.

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[73] The extent of need for such measures will presumably vary depending on the extent of transparency and accessibility of the international regulatory regime, including whether it is a network or more formal treaty-based regime; these variations may influence the degree of intrusiveness in courts' application of hard look review.

[74] Benvenisti, *supra* note 30, at 323-24.

[75] FOIA provides a "deliberative privilege" exemption that might be invoked by the government to withhold records pertaining to global regulatory matters from disclosure. It also provides an exemption for matters that are "specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy" and properly classified under that order. 5 U.S.C. § 552(b)(1), (5) (2004).

The government, of course, would strongly resist any such initiative as an unwarranted interference with the Executive's conduct of foreign relations and with needed informality and confidentiality in international negotiations.

A parity plus approach would reject the limitations on the availability of judicial review and agency procedures adopted by the courts following a parity minus approach, and the scope of review would extend significantly beyond that applied by courts under a parity paradigm. In many cases doctrines of reviewability and ripeness would have to be relaxed in order for a court to undertake review of the global components of agency decisions. No court has yet taken this path. But the ever-increasing importance of global regulation, growing criticism of both the procedural and substantive elements of global regulatory decisionmaking, and the concomitant erosion of domestic political and legal mechanisms of accountability might well lead the courts to take the initiative, much as they did in the 1960s in response to similar criticisms of domestic regulatory decisionmaking.

C. *Extending U.S. Administrative Law to U.S. Participation in International Regulatory Regime Decisionmaking*

A potential supplement or alternative to the steps outlined above would be to extend federal administrative law disciplines directly to agency officials' participation in global regulatory decisionmaking, whether through treaty-based regimes, regulatory networks, or transnational cooperation regarding mutual recognition or regulatory equivalency. Even an ambitious approach to judicial review of domestic implementation of global regulatory norms would not allow the public to have notice of, to comment on, or to have an opportunity to participate or influence the decisional process at the global level where the controlling decisions are often made.[76]

One possibility for achieving this goal would be for courts to treat federal agency officials participating in international regulatory decisionmaking as an agency for APA purposes and to hold that they are therefore subject to APA procedural requirements and judicial review with respect to such

[76] Federal agencies entering into international regulatory agreements with counterparts must clear these agreements with the State Department and notify Congress pursuant to the Case-Zablocki Act, but this notification occurs only after the agreement has been concluded. *See* Horton, *supra* note 10, at 713.

participation. The APA and general principles of federal administrative law, however, afford little or no purchase for such an initiative. Judicial deference to the Executive's conduct of foreign affairs is a major additional obstacle. Thus, as previously discussed, federal administrative agencies have great latitude to consult informally with other governmental or private parties and develop rulemaking options and proposals before undertaking the public comment process. Similar principles apply to agency licensing and enforcement decisions. Furthermore, APA law would normally fail to provide a basis for obtaining immediate judicial review of an agency's international-level decision to agree to a regulatory norm. Even if informal agreement by high agency officials to an international norm were regarded as an agency decision, litigants could generally not satisfy requirements of standing and ripeness prior to adoption of a domestic implementing measure that adversely affects them.

Accordingly, new statutes or executive initiatives would be needed in order to extend domestic administrative law disciplines to agency participation in international regulatory decisionmaking. Although there is little prospect of extending judicial review directly to global regulatory decisions, procedural requirements for agency participation in international regulatory negotiations have already been adopted in certain instances, including the following:

1. Notice and Opportunity for Comment in Advance of Agency Participation in International Regulatory Negotiations

The FDA and USD A are subject to a statutory requirement to notify the public about international "sanitary or phytosanitary standards under consideration or planned for consideration."[77] Other agencies, including the USTR and the Department of Commerce, have from time to time, as a matter of agency practice, likewise provided public notice of international regulatory harmonization activities.[78] These opportunities for public input into the U.S. position in international regulatory negotiations often include public meetings at which participants are informed of the U.S. negotiating position and provide comments to agency officials.[79] Thus, before entering into active negotiations

[77] 19 U.S.C. § 2578(c)(1) (2004).
[78] *See* Shapiro, *International Trade Agreements*, *supra* note 21, at 443-44.
[79] *See* Livshiz, *supra* note 50, at 15.

on the Montreal Protocol, the Department of State and the Environmental Protection Agency (EPA) published a detailed program in the Federal Register and invited public comments. They also issued an environmental impact statement.[80] The executive branch also provided Federal Register notice of its intent to negotiate NAFTA and held public hearings.[81] It did not, however, issue a environmental impact statement.

In the aftermath of unsuccessful efforts by NGOs to judicially challenge the failure of the federal government to prepare environmental impact statements on the negotiation of the NAFTA and Uruguay Round agreements,[82] President Clinton issued Executive Order 13,141 which directs the USTR to prepare an environmental review for the negotiation of comprehensive multilateral trade rounds, bilateral or plurilateral free trade agreements, and trade agreements in natural resource sectors. The scope of such reviews was expanded in the Bipartisan Trade Promotion Authority Act of 2002, which requires similar reviews of the impact of trade agreements on U.S. employment and labor markets.[83]

2. Participation of NGO and Business Representatives in International Negotiations

Non-governmental representatives, including representatives of business and NGOs, are often included as members of the U.S. delegation to international regulatory regime negotiations, including those at the Organization for Economic Cooperation and Development (OECD) and

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80 Wirth, *supra* note 14, at 25.

81 *Id.*

82 *See*, *e.g.*, Public Citizen v. U.S. Trade Representative, 970 F.2d 916 (1992), discussed *supra* text accompanying note 56.

83 19 U.S.C. § 3802(c) (2004). Nevertheless, it is not immediately clear what impact such new measures will have, particularly since neither the congressional legislation nor the executive order provides for judicial review and since the executive order explicitly disallows it. Exec. Order No. 13141, 64 Fed. Reg. 63169, 63170 (Nov. 16, 1999). The American Bar Association has recognized the need for additional steps to provide greater transparency in connection with international negotiations on regulatory harmonization and has recommended that the President encourage federal agencies to provide notice and opportunity for comment with respect to negotiation activities, to establish advisory committees in connection with such negotiations, and to make documents available under FOIA with respect to each significant international regulatory harmonization activity in which it is engaged.

the Codex Alimentarius Commission.[84] They might also participate by virtue of membership on USTR advisory committees.[85] Additionally, the Transatlantic Business and Consumer dialogues, established as part of the 1995 New Transatlantic Agenda, have provided businesses and NGOs with opportunities to consult with government negotiators on issues of transatlantic policymaking.[86]

3. Measures to Provide Negotiation Transparency

The EPA has freely made OECD documentation available to non-governmental representatives participating in U.S. delegations to the regulatory harmonization negotiations held by the OECD Chemicals Group, notwithstanding the "restricted" status of the documents; this practice has, however, not been applied to other aspects of OECD's work in regulatory harmonization.[87]

The application of these various types of measures is uneven, and there is no consistent overall federal government policy or practice. Moreover, they are generally limited to international negotiations in the context of treaty-based regimes and have little or no application to more informal regulatory networks and cooperative arrangements regarding mutual recognition and equivalency. Non-governmental actors, and especially NGOs, often find that the opportunities for participation have limited value. Often the issues presented are highly technical. As a result, many NGOs lack the capacity to participate effectively, which helps to explain the low levels of NGO attendance at meetings and of submitted comments on U.S. negotiating positions.[88] NGOs also tend to view the meetings and other procedural opportunities such as notice and opportunity for comment as cosmetic in character. This view might be changed if agency officials were required to respond to the comments submitted and publicly justify the negotiating positions that they

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[84] *See*, *e.g.*, International Standard-Setting Activities, Codex Alimentarius Commission; Duties of United States Delegates and Delegation Members Including Non-Government Members, 63 Fed. Reg. 7118 (Feb. 12, 1998).

[85] *See* Wirth, *supra* note 14, at 25.

[86] *See* TRAN. ATL. BUS. DIALOGUE, ABOUT THE TABD, *available at* http://www.tabd.com/about; TRAN. ATL. CONSUMER DIALOGUE, ABOUT TACD (on file with Law & Contemp. Probs.), *available at* http://www.tacd.org/about/about.htm (last visited Apr. 7, 2005).

[87] *See* Wirth, *supra* note 14, at 25.

[88] *See* Livshiz, *supra* note 50, at 20.

ultimately take. However, the statutory and executive initiatives described above do not impose such requirements.

Also, business and union groups enjoy preferential or disproportionate access to some international negotiations by virtue of their membership on agency advisory committees.[89] Often there might be one representative for each industry while consumer groups are left with a single representative. The costs of traveling to and participating in distant fora is also a barrier for many NGOs. Even when nongovernmental actors are members of delegations or have other participation opportunities, they could be effectively shut out of high level negotiations between principals or otherwise marginalized.[90]

Notwithstanding their limitations, wide adoption of such measures could have a significant effect in promoting transparency with respect to U.S. federal agencies' participation in global regulatory decisionmaking. They could also be expected to have an influence on subsequent judicial review of domestic implementing measures by providing potential litigants with additional information and insight regarding the global regulatory background and facilitating expansion of the administrative record and the range of factors considered by reviewing courts. It is, of course, quite possible that non-state actors based in other countries could seek to take advantage of these measures, including opportunity for comment and subsequent judicial review.[91] That could be an important first step in the development of a genuinely cosmopolitan administrative law.

The limitations of such efforts in dealing with the more informal modes of global regulatory decisionmaking must, however, be emphasized. Extension of U.S. administrative law to U.S. officials' participation in global regulatory decisionmaking might be strongly resisted by other nations. They might fear that such initiatives would undermine the informality, confidentiality, and efficiency of international negotiations, and enhance U.S. leverage in international negotiations. Developing countries might fear that such

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89 *Id*.

90 *See*, *e.g.*, Press Release, Trans Atl. Consumer Dialogue, U.S.—EU Summit Puts Business CEOs Ahead of Consumer Groups (June 23, 2004) (on file with Law & Contemp. Probs.), *available at* http://www.tacd.org/press/?id=39 (last visited Mar. 21, 2005) (announcing a boycott of a summit of the Transatlantic Economic Partnership by TACD when business groups were offered a meeting with Presidents of the United States and the European Council, but consumer groups were denied a similar meeting).

91 *Cf.* Cable & Wireless P.L.C. v. FCC, 166 F.3d 1224 (D.C, Cir 1999) (entertaining but rejecting on the merits a claim by foreign telecommunications carrier that FCC regulations implementing as WTO agreement had legally impermissible extraterritorial effects on foreign carriers).

measures would provide additional and unwelcome influence for northern NGOs.

On the other hand, such initiatives, especially if matched by similar initiatives from the E.U. and other major jurisdictions, could prod the adoption by global regulatory regimes of administrative law mechanisms in order to preempt, fend off, or manage the impact of different, uncoordinated domestic administrative law requirements, as suggested by the experience with international sports federations discussed previously.

IV

"Top Down" Approaches to Development of Global Administrative

An alternative to "bottom up" is to construct new administrative law mechanisms directly at the level of global regulatory regimes. Fully implementing a U.S.-style system of administrative law through such a "top down" approach would require global institutional structures with distinct legislative, administrative, and independent reviewing bodies. Such a structure involves a considerably higher degree of institutional differentiation and legalization than currently exists. It might also require substantial precision in legal norms that are binding within the regime.[92] A few treaty-based regimes exhibit these characteristics, but most do not. Regulatory networks are typically not characterized by significant institutional differentiation, although some network regimes have developed committee structures and may evolve further.[93] Arrangements among national regulators for mutual recognition and other forms of equivalency cooperation among national regulators generally do not involve any distinct transnational institutional structures. Accordingly, the development of a global

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[92] For discussion of delegation, precision, and binding quality as the defining characteristics of legalization of international regimes, *see* Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401 (2000).

[93] *See* David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 U. CHI. INT'L L.J. 17-19 (2005). For example, the International Organization of Securities Commissions ("ISOCO") has a fairly well-developed committee structure. *See* http://www.iosco.org/about.cfm?whereami=page2 (last visited Mar. 21, 2005).

administrative law resembling the U.S. model will ultimately depend on whether there is considerable further development of institutional differentiation and legalization in global regulatory regimes. If informal regulatory networks or horizontal methods of regulatory cooperation have advantages that enable them to acquire a greater role in global regulation than more legalized treaty-based or network regimes,[94] the development of global administrative law might be correspondingly hindered.

A. Types of Global Regulatory Regime

A number of treaty-based regulatory regimes are institutionally differentiated and relatively highly legalized.[95] The administrative and reviewing components and functions in such regimes can be conceptualized in more than one way, with varying implications for the current states and for future development of administrative law at the global regime level.

1. International Treaty-Based Regimes that Directly Regulate Non-State Actors

Only a few international regimes currently exercise direct regulatory authority over non-state actors through the decisions of administrative bodies exercising regulatory authority. One example is the CDM Executive Board, which determines the eligibility of projects under the Clean Development Mechanism (CDM) and the greenhouse gas (GHG) emission reduction credits to which they are entitled. Another is the Security Council's 1267 Committee listing decisions.[96] A third is the determination by UNCHR of individuals' refugee status. At present, none of these regimes provides affected persons with procedural rights similar to those afforded under domestic administrative law in the U.S. or many other nations, and none provides for review by an independent tribunal of the administrative decisions in question.

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[94] SLAUGHTER, A NEW WORLD ORDER, *supra* note 6, at 171-94 (discussing the advantages offered by informal networks of regulators).

[95] I am grateful to Ernestine Meijer for identifying and summarizing many of the regimes discussed in this subsection.

[96] Although member states must implement freezes of listed persons' assets, implementation in many states is automatic, making the effective impact of committee listing decisions direct.

The intensification of international regulation is likely to result in more regimes exercising direct administrative regulatory authority over non-state actors, which will increase pressures for the development of procedural and reviewing mechanisms to protect the rights and interests of those regulated.

2. International Treaty-Based Regimes that Regulate through Member State Compliance or Implementation

In most cases, the regulatory norms adopted by international regimes are implemented through member state laws and administrative decisions that are in turn applied to domestic non-state actors. There are several different ways of conceptualizing the applicability of administrative law disciplines to such an arrangement. In one conceptualization, the individual member states are the regulated entities. In another, the regulated entities are the domestic non-state actors, and the individual member states are the administrative bodies responsible for implementing the global regulatory program through controls on the non-state actors. Some international regulatory regimes, including a number of international human rights regimes and the IMF and World Bank, are aimed exclusively or primarily at the conduct of states. But many other international regulatory regimes are aimed at both the conduct of states *and* the conduct of non-state actors. They can be analyzed under either conception. The discussion that follows provides examples of the application of each conception, including a number of regimes discussed under both.

a. States as the regulated entities. Under this conception, the legislative body is the group of states that ratify the regime treaty, which is the legislation for the regime and binds states that are parties. The regulated entities are the individual state parties responsible for implementing the norms thus adopted. In order to develop a U.S.-style administrative law under this conceptualization, the regime would have to include not only the legislative body, but a distinct administrative body with the power to adopt or apply regime norms that are binding on member states. In addition, it would have to have a distinct independent reviewing body that determines the conformance of the decisions of the administrative body with the regime's legislative norms, including both substantive and procedural requirements.[97]

[97] These administrative bodies act on the basis of powers conferred to them and on the basis of procedural rules adopted by legislative bodies authorizing them to create, extinguish,

A substantial number of regimes have two out of these three bodies, but only a few have all three.

(1) Regimes with independent, norm-generating administrative bodies

(a) Adoption of subsidiary regulatory norms by a majority of regime state parties. Muddying the distinction between legislative and administrative is the circumstance that in many regimes the COP, besides being the official legislative body responsible for the treaty and amendments to it, fulfills functions that can, in the context of international law, be regarded as administrative in character because it involves the creation of subsidiary norms without following the procedures, such as ratification, required for treaty law. In some cases, states that are members of treaty-based international organizations fulfill this role as well. For example, under the London Convention,[98] the Bonn Convention,[99] the Basel Convention,[100] and CITES,[101] the COP has the power to amend, by majority decision, annexes to the treaties that specify in greater detail the regulatory obligations of parties. Unlike amendment to the treaties, these annex amendments do not need ratification of the parties in order to enter into force.[102]

Under the Montreal Protocol, the Meeting of the Parties (MOP), operating by two-thirds majority vote, has the authority to modify the Protocol's regulatory requirements, which are binding on Parties.[103] For example,

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modify and apply primary rules that establish the substantive norms of conduct required of the regulated entities. The distinction between primary and secondary rules is developed in H.L.A. HART, THE CONCEPT OF LAW (1994); *see also* Kenneth W. Abbott et al, *supra* note 92.

98 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, art. 15, para. 2, 26 U.S.T. 2403, 1046 U.N.T.S. 120. For reasons noted above, some of the regimes discussed in this subsection can also be fruitfully analyzed under the alternative conception, which regards states as administrative agencies and non-state actors as the regulated entities; this conception is discussed *infra*, Section IV.2.

99 Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, art. 11, 1990 U.K.T.S. No. 87.

100 Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, art. 18, S. Treaty Doc. No. 102-5 (1991), 28 I.L.M. 657.

101 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, art. 15, 27 U.S.T. 1087, 993 U.N.T.S. 243.

102 State Parties having objections to the amendments can generally make reservations to them. Not making objections is considered as consent.

103 Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 19, 1987, art. 2, paras. 9(c), 10(b), S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 293.

"adjustments"[104] made to the Protocol by the MOP in 1990 and 1992 determined that production and consumption of CFCs should be phased out completely by 1996. Similar far-reaching changes have subsequently been adopted for regulation of other ozone-depleting substances listed in the various annexes to the Protocol.[105] Similarly, a majority of the states that are members of the International Civil Aviation Organization (ICAO) can modify regulatory requirements that are binding on all members under the Chicago Convention on International Civil Aviation.[106] Amendment procedures like those found in the Montreal Protocol and ICAO generally deal with subjects considered technical in nature or that require frequent adjustment of regulatory norms due to changes in information and circumstance (or both). Such measures, however, often have major practical consequences.

In the Bretton Woods organizations, the member states or their representatives can act by other than unanimous vote to modify otherwise applicable treaty norms or adopt binding subsidiary norms. Thus, three--quarters of the WTO member states can grant, for a limited term, exemptions from the disciplines of WTO Agreements.[107] The World Bank and the IMF generate subsidiary regulatory norms through decisions by representatives of member nations—the Bank's Board of Directors and the IMF's Managing Directors—who decide through a system of weighted voting based on the member states' financial contributions. Another example is the Codex Alimentarius Commission, which consists of representatives of Member Nations and Associate Members of FAO or WHO.[108] Acting by majority vote, the Commission issues food standards to protect consumer health and to ensure fair business practices. The procedure for adopting standards includes an extensive role for expert committees.

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[104] *Id.*, art. 2, para. 9

[105] Unlike the London, Bonn, Basel and CITES Conventions, these "adjustments" are binding to the State parties to the Protocol, without a possibility to object to them. *See* Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623 (2000).

[106] Convention on International Civil Aviation, December 7, 1944, art. 90 *juncto* art. 54(1), 61 Stat. 1180; T.I.A.S. 1591, 15 U.N.T.S. 295.

[107] Marrakesh Agreement Establishing the World Trade Organization, opened for signature Apr. 15, 1994, 33 I.L.M. 1144 (1994), Art. IX (3).

[108] Established by a resolution of the Food and Agriculture Organization (Eleventh Session of the Conference of FAO in 1961) and a resolution of the World Health Organization (Sixteenth World Health Assembly in 1963). *See* "The Codex system: FAO, WHO and the Codex Alimentarius Commission" (on file with Law & Contemp. Probs., *available at* http://www.fao.org/documents/show_cdr.asp?urlJile=/docrep/w9114e/W9114e04.htm (last visited Mar. 21, 2005).

(b) Adoption of binding subsidiary norms by purely administrative bodies. The Clean Development Mechanism (CDM) Executive Board Protocol is an example of a treaty regime authority that more closely approximates the domestic law conception of an administrative body.[109] The Board engages in subsidiary lawmaking through both rulemaking and adjudication. It approves the methodologies used in specific CDM projects, takes decisions on accreditation of CDM operational entities, decides on the registration of a project under CDM and on the issuance of Certified Emission Reductions (CERs) for projects.[110] These decisions not only have binding consequences for participating states but also for private parties, as discussed above.

Another example of a purely administrative body exercising legally binding authority is provided by the Office International des Epizooties (OIE), an international regulatory organization concerned with animal diseases and their spread and responsible for issuing and administering the Animal Health Code. The OIE is governed by an International Committee, composed of technical representatives appointed by each of the participating States.[111] The OIE has specialist Commissions on a number of animal diseases, among which is the OIE Foot and Mouth Disease and Other Epizootics Commission, composed of six experts.[112] This Commission makes the initial decision to grant a country a "foot and mouth disease (FMD) free" status,[113] although its decision has to be ratified by the International Committee. Such decisions have enormous consequences for a country's trade in animals and animal products.

The administrative managements of the World Bank and the IMF adopt, impose, and police conditions on loans and other forms of financial assistance to member states that have important regulatory impacts on those states. These country-specific conditions are in principle legally enforceable

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[109] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, U.N. Doc. FCCC/CP/197/L.7/Add. 1, *reprinted in* 37 I.L.M. 22 (1998) (entered into force February 16, 2005), art. 12.

[110] Articles 5, 36, and 65 of the CDM Modalities and Procedures. *See* Report of the Conference of the Parties on Its Seventh Session, Held at Marrakesh, 29 October to 10 November 2001, Addendum, Part Two: Action Taken by the Conference of the Parties, U.N. Doc. FCCC/CP/2001/13/Add.2 (Jan. 21, 2002) [hereinafter Conference Report].

[111] Organic Statutes of the Office International des Epizooties ("OIE"), art. 6 (appendix to the International Agreement establishing the OIE, January 25, 1924).

[112] Established on the basis of the General Rules of the OIE, May 24, 1973, art. 18.

[113] The different categories of "disease free" are laid down in the Animal Health Code, ch. 2.1.1 (on file with Law & Contemp. Probs.), *available at* http://www.oie.int/eng/normes/mcode/en_chapitre_2.Ll.htm (last visited Mar. 21, 2005).

by the Bank and Fund. The Bank has also adopted guidelines relating to environmental and social issues that apply to all grants; compliance with these conditions is subject to review by the Bank's Inspection Panel.

Similarly, the listing of persons determined to be financing international terrorism by the U.N. Security Council 1267 Committee is another example of an administrative body whose decisions have binding authority. U.N. member states are obligated to freeze the assets of persons listed and take other specified steps to assist the work of the committee. In this case, the administrative decisions effectively bind listed individuals as well as member states. Similarly, the UNHCR's adjudication of individuals' refugee status has legally binding implications for U.N. member states' treatment of such individuals as well as the individuals.

(c) Other administrative bodies. In addition, a number of treaty-based regimes have subsidiary bodies that develop detailed procedures and protocols for implementing international regulatory treaties, which are not legally binding as such, but are either subsequently adopted as binding by the COP or function as non-binding but highly influential guidance for implementation by member states. These institutions represent an intermediate stage of institutional differentiation that might eventually ripen into authority to adopt binding norms.[114] Examples of such institutions are the Methodology Panel and the Accreditation Panel established by the CDM Executive Board,[115] the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation under the U.N. Framework Convention on Climate Change,[116] and the Scientific Council of the Bonn Convention on migratory species.[117]

(2) Regimes with reviewing bodies but no administrative bodies. Although in form a system of tribunals for resolving controversies between states, the WTO Dispute Settlement Body, and especially its Appellate Body, increasingly function as a regulatory administrative body with the aim of constructing a fully articulated trade regulatory system and supervising its implementation

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[114] In respect of the role of science, *see also* Note, *The CITES Fort Lauderdale Criteria: The Uses and Limits of Science in International Conservation Decision Making*, 114 HARV. L. REV. 1769 (2001).

[115] Pursuant to Article 18 of the CDM Modalities and Procedures. *See* Conference Report, *supra* note 110.

[116] Framework Convention on Climate Change, concluded May 29, 1992, art. 10, U.N. Doc. No. A/AC.237/18(Part II)/Add.l, 31 I.L.M. 849. Both technical bodies play a role in reviewing the reports submitted by Annex I Member Parties under Article 12 of the Convention. *Id*.

[117] Article VIII of the Bonn Convention, *supra* note 99.

by member states.[118] The Appellate Body's hesitant provision for amicus briefs submitted by non-state actors in order to obtain information and views of non-state actors within the trade regulatory regime,[119] and its development of administrative law requirements for member state implementation of WTO agreements,[120] reflect this function.

Other prominent examples of regimes with strong reviewing tribunals in this category can be found in human rights treaties with an individual complaints clause. Under these treaties, individuals subject to actions of member state can obtain review of those actions by international tribunals with the power to determine whether they comply with regime norms. The European Convention on Human Rights, for example, authorizes the European Court on Human Rights to make decisions, binding on member states, on behalf of any person non-governmental organization, or group of individuals claiming to be the victim of a violation of one of the human rights in the Convention or the protocols thereto.[121] The court's decisions have profoundly important regulatory impacts on the practices of member states and, in many cases, of business firms and other private actors regulated by those states.

The International Covenant on Civil and Political Rights has an optional protocol[122] under which a State allows the Human Rights Committee to consider complaints of individuals under its jurisdiction who claim to be victims of a violation by that State of one or more of the rights set forth in the Covenant. A total of 104 States have ratified this optional protocol.[123] The

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[118] *See* John T. Soma & Eric K. Wiengarten, *Multinational Economic Network Effects and the Need for an International Antitrust Response from the World Trade Organization: A Case Study in Broadcast-Media and News Corporation*, 21 U. PA. J. INT'L ECON. L. 41, 127 (2000) (referring to the WTO as an "international trade regulatory body" that is embodied in the authority given to the dispute resolution mechanism).

[119] WTO Appellate Body, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (98-000), para. 9 (Oct. 12, 1998).

[120] *See* Sabino Cassese, *Global Standards For National Administrative Procedure*, 68 L. & CONTEMP. PROBS. 109 (Summer/Autumn 2005); Giacinto della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, 9 EUROPEAN PUBLIC LAW 563 (2003).

[121] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 34, 46, Nov. 4, 1950, 213 U.N.T.S. 222, E.T.S. 5, amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118.

[122] G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966.

[123] *See* United Nations High Commissioner on Human Rights report "Status of ratifications of the principal international human rights treaties" (on file with Law & Contemp. Probs.), *available at* http://www.unhchr.ch/pdf/report.pdf (last visited Mar. 21, 2005).

recommendations of the Committee are not binding on the State Party but may have normative force. Similar provisions on individual complaints exist under the Convention on the Elimination of Racial Discrimination[124] and the Convention against Torture.[125] A somewhat different approach to reviewing member state compliance with an international human rights regime is found in the Inter-American Court of Human Rights. Aggrieved individuals or groups must first apply to an administrative body, the Inter-American Commission of Human Rights, which is the sole body that can bring claims before the Court. The Commission investigates applications and has discretion to decide which claims to prosecute before the Court. Decisions are binding on states that have ratified the convention.

Another important example of independent review of non-compliance by State Parties is the investor protection provisions of NAFTA's Chapter 11, which authorize investors of a NAFTA Party to bring claims before arbitral tribunals against another NAFTA Party asserting violations of NAFTA's Chapter 11, Part A (including provisions on national treatment of investors).[126] Tribunal decisions are binding on the parties and enforceable within the domestic legal context of the State Party against whom the claim was brought.[127] Similar arrangements are provided in many bilateral treaties. These decisions will have increasingly important impacts on domestic regulation and administrative law.

(3) Regimes with both administrative and reviewing bodies. Separate independent regime bodies with authority to review the decisions of subsidiary norm-generating administrative bodies within the same regime have emerged only recently. There are only a few examples of such arrangements, but their number might grow with the intensification of global regulation and demands by affected non-state actors for administrative law protections and methods for securing greater accountability for the decision of global regulatory administrative bodies.

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[124] International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), 20 U.N. GAOR, Supp. No. 14, art. 14, U.N. Doc. A/6014 (1966).

[125] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 22, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 113.

[126] North American Free Trade Agreement, Dec. 17, 1992, arts. 1102-1106, 1110, 32 I.L.M.642 [hereinafter NAFTA]. *See generally* GREENING NAFTA, THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION (David L. Markell & John Knox eds., 2003).

[127] *Id*., art. 1135, para. l.

The most notable example is the World Bank Inspection Panel, which reviews whether Bank-funded projects conform to the Bank's environmental and social guidelines.[128] Originally adopted as a technique of control by the Board of Executive Directors of the Bank's management and as a tool of internal administration, the Panel mechanism has developed into a more or less independent reviewing forum that can be invoked by NGOs and other non-governmental actors. In a formal sense, the Panel's powers are limited. It needs Bank authorization to investigate a case, and its findings and recommendations are not binding. However, the Panel report, the management's recommendations, and the Board's decision must be made publicly known. These circumstances can generate strong pressures for the Bank's management and Board to follow the Panel's recommendations.[129] The International Finance Corporation has considered the adoption of a similar system.[130]

A second example of an independent body reviewing decisions of subsidiary administrative decisionmaking entities is the Seabed Disputes Chamber (SDC) of the International Tribunal for the Law of the Sea (ITLOS).[131] The SDC has jurisdiction with respect to different types of seabed-related disputes involving various parties, including states, state enterprises, and private firms and individuals. In these disputes, the SDC applies the United Nations Convention on the Law of the Sea (UNCLOS); other international law compatible with UNCLOS; rules, regulations, and procedures of the Authority adopted in accordance with UNCLOS; and the terms of contracts concerning activities in the area in matters relating to those contracts. Its decisions are binding and domestically enforceable.[132]

b. Individual member states as implementing administrative agencies; non-state actors as regulated entities. An alternative conceptualization of global

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[128] *See generally* DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL (Dana Clark, Jonathan Fox & Kay Treakle eds., 2003) [hereinafter DEMANDING ACCOUNTABILITY]; David Hunter, *Using the World Bank Inspection Panel to Defend the Interests of Project-affected People*, 4 CHI. J. INT'L L. 201 (2003); Ellen Hey, *The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship*, 2 HOFSTRA L. & POL'Y Symposium 61 (1997).

[129] DEMANDING ACCOUNTABILITY, *supra* note 128, at 178-82.

[130] INT'L FIN. CORP., COMPLIANCE ADVISOR OMBUDSMAN, 2004 (on file with Law & Contemp. Probs.), *available at* http://www.cao-ombudsman.org (last visited Apr. 7, 2005).

[131] Bernard H. *Oxman, Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT'L L. 277, 287-88 (2001). *See generally* on UNCLOS, ITLOS and jurisdiction, John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. 109 (1998).

[132] Convention on the Law of the Sea, Dec. 10, 1982, arts. 293, 33, 39, 1833 U.N.T.S. 387, *reprinted in* 21 I.L.M. 1261.

regulatory regimes with a relatively high degree of institutional differentiation and legalization is that the regime member states collectively compromise the legislative body, the members states individually are the administrative bodies responsible for implementing regime norms, the firms and other non-governmental entities subject to regulation by member states are the regulated entities, and the regime dispute settlement tribunal is the reviewing body that determines compliance with regime norms by the implementing member states, regarded as administrative bodies.

This model can be applied to regimes, like the WTO, that lack a regime-level administrative body but have strong regime-level tribunals and that aim to establish a sound regulatory system for private market actors. But it can also be applied to regimes, like the Kyoto Protocol's CDM, that also have regime-level administrative bodies. Such regimes accordingly have a two-level administrative structure, including both a regime-level body like the Executive Board, and the implementing member-states, who are bound by the norms adopted by the regime-level administrative body. This arrangement is analogous to that of the E.U., in which member states implement E.U. regulations subject to the supervision of the Commission and the Court of Justice, and to systems of "cooperative federalism" in the United States, under which states implement federal environmental, social service, and other regulatory programs under the supervision of federal administrative authorities and courts.

The conception that non-state actors are the regulated entities presents an evolution of international regulation away from a state-centric mode and towards a conception of global regulation of market actors, with states serving an intermediate position. Examples of such regimes include the WTO, the Montreal Protocol, and the Kyoto Protocol.

The WTO Dispute Settlement Body (DSB)—and especially the Appellate Body—has increasingly defined its role as promoting the sound and consistent regulation of the international trade regime. The DSB understands that the ultimate subjects of trade regulation are market economic actors, and that its role is to promote open and even-handed competition and predictability in the collective regulatory trade fabric (woven out of individual member state decisionmaking procedures and measures and out of WTO law), consistent with appropriate regard for member state latitude in domestic policies. DSB proceedings initiated by member states are formally the adjudication of disputes between states; but functionally, in many instances, they are the occasion for the DSB to exercise this supervisory and reviewing role over

the implementation of the WTO trade regulatory regime. Further, there are emerging signs that the DSB regards member states as administrative agencies within this system. In order to promote an even-handed and predictable system of international trade regulation, the DSB has required member states that adopt trade-restrictive regulatory measures to adopt administrative law disciplines, including providing decisional transparency, opportunity for affected private parties to be heard, and reasoned justifications for decisions made.[133] These rulings very much resemble those of U.S. courts reviewing administrative agency decisions. The reformation of regulatory decisionmaking by domestic administrative agencies through global administrative law disciplines will be further intensified with implementation of the TRIPS and GATS agreements.

The Kyoto Protocol is another example of a regime that is substantially oriented towards regulation of market actors, who play an explicit, implementing role in the CDM and who will play an important role in the other flexibility mechanisms, especially emissions allowance trading. In order to secure effective regulatory implementation by Annex I Parties, the COP/MOP has established a compliance mechanism by creating a regime-level administrative body, the Compliance Committee, consisting of a facultative branch and an enforcement branch.[134] The enforcement branch can review member state compliance and thereby secure the environmental and economic integrity of global emissions trading systems in which private actors will play an important role.

The Montreal Protocol similarly aims at effective regulation of private market actors; among other matters, it addresses issues of industrial rationalization in ozone-depleting substances (ODS) production and ODS trade-related issues.[135] The Protocol was one of the first environmental regimes that included an institutionalized compliance mechanism involving a regime-level body of an administrative nature, the Implementation Committee, which has the authority to decide on compliance measures and potential sanctions, although in practice it has tended to follow a cooperative, facilitative approach to dealing with countries' compliance difficulties.

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[133] *See* Sabino Cassese, *supra* note 120; Giacinto della Cananea, *supra* note 120.

[134] Conference of the Parties Decision 24/CP.7 "Procedures and mechanisms relating to compliance under the Kyoto Protocol," in Report of the Conference of the Parties on Its Seventh Session, Held at Marrakesh, 29 October to 10 November 2001, Addendum, Part Two: Action Taken by the Conference of the Parties, Vol. 3, U.N. Doc. FCCC/CP/2001/13/Add.3 (Jan. 21, 2002).

[135] On the Montreal Protocol and non-compliance, *see* Markus Ehrmann, *Procedures of Compliance Control in International Environmental Treaties*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 377 (2002).

Under the three above regimes, non-compliance proceedings are initiated by State Parties, although under the Kyoto and Montreal Protocols, regime-level administrative authorities can also initiate compliance proceedings. Enforcement by States is not inconsistent with a conception of the regimes in which private market actors are the subjects of regulation; compliant Member States and their firms have a strong economic interest in correcting non--compliance by other member states in order to protect their own firms against unfair competition from firms in non-compliant states.

The International Labor Organization provides for initiation of non-compliance proceedings by private market actors against member States that fail to implement ILO norms. An industrial association of employers or workers can file a complaint with the International Labor Office that a Member State has failed to secure the effective observance within its jurisdiction of an ILO Convention to which it is a party. The ILO Governing Body in its turn may communicate this representation to the government against which the complaint is made and invite that government to make a statement on the subject. If the government does not produce a statement within a reasonable time or if the statement is not deemed to be satisfactory by the Governing Body, this Body has the right to publish the representation and the statement, if any, made in reply to it.[136]

3. Complex Regimes

A number of the regimes discussed above have such a high degree of institutional differentiation and legalization that they can be classified as complex regimes; such regimes are most likely to exhibit the characteristics of delegation and norm specificity and authority that are favorable to the development of U.S.-style administrative law at the regime level.

One form of complexity is found in regimes whose regulatory norms (1) include subsidiary norms adopted by the member states (often by majority vote) or by regime-level administrative bodies, and (2) govern the conduct of individual member states but are also implemented by member states with the objective of regulating private sector actors.[137] This arrangement combines

[136] Constitution of the International Labor Organization, June 28, 1919, arts. 24, 25, 49, Stat. 2712, 15 U.N.T.S. 35.

[137] Still another potential conception is to view regime tribunals as the administrative bodies generating subsidiary norms that bind member states or regulated firms. It is possible to

the two conceptions of international regulatory regimes set forth above: those that directly regulate non-state actors and those that regulate member state conduct.[138] Examples of such arrangements include the Montreal Protocol, the Kyoto Protocol, the OIE, the World Bank, the LOS seabed regime, and possibly the ILO. When the WTO DSB is regarded as an administrative authority, the WTO can also be included.

In addition, some of these regimes provide for a further degree of institutional differentiation and legalization by establishing a regime-level reviewing body that can review either the adoption of subsidiary norms by regime administrative bodies or compliance by individual member states with regime norms (both primary and subsidiary), or both. Examples of such tribunals include the World Bank Inspection Panel and the compliance institutions established under the Montreal Protocol and Kyoto Protocol. This is also the legal institutional model generally followed for E.C. regulation. A still greater degree of complexity is provided by global regimes with the power to directly regulate private market actors as well as the conduct of member states and to use them as administrative bodies to implement regulation of private market actors. Combining these arrangements with a regime-level reviewing tribunal results in the greatest degree of institutional differentiation and legalization.

This is the model followed in the United States under "cooperative federalism" programs in which, for example, states exercise delegated authority to implement federal environmental statutes by regulating private actors; in doing so, they must follow requirements adopted by the federal EPA and thus be subject to review by federal courts. Regulated actors are also subject to direct enforcement actions by EPA. The international regulatory regime that most closely approximates this model is the Kyoto Protocol. The CDM Executive Board is already exercising the power to develop and apply subsidiary norms that bind member states and private actors, and the Subsidiary Bodies for Implementation and Technical Assistance are approaching this function. The development of Kyoto Protocol regime compliance mechanisms are likely to include a tribunal that will review not only compliance by member states but also by private market actors, as well

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view powerful regime tribunals such as the DSB in this fashion. But this conception leaves no conceptual or institutional space for a separate reviewing tribunal, unless a general international court with jurisdiction to review the decisions of the various tribunals of individual regimes were to emerge.

138 *See supra* Part IV.A.1-2.

as the generation of subsidiary norms by regime administrative bodies. Because the success of global emissions trading markets is essential to the success of the regulatory scheme, the regime and states participating in it will have strong incentives to develop the necessary institutional means of meeting the need of market actors for legal predictability and swift resolution of disputes.

Another element of complexity is the extent to which global regulatory regimes have sought to transform domestic administrative law in order to ensure more effective implementation by domestic administrative agencies of the global regulatory system. Professors Cassese and della Cananea have shown how the WTO DSB is developing a body of requirements for Member State decisionmaking in domestic trade-related regulatory administration that amounts to a globalized system of administrative law at the domestic level.[139] These developments will intensify as TRIPS and GATS are fully implemented. These systems of administrative law are designed and required to ensure effective implementation of global regulatory regime norms in member states with the objective of effective and consistent regulation of public and private market actors. Similar systems of administrative law to assure proper implementation are found in the development of an E.U. administrative law applicable to member states and in "cooperative federalism" arrangements in the United States. Such systems are likely to emerge under other intentional regulatory regimes, such as the Kyoto Protocol or its equivalent, that rely on statutory-adjudicatory strategies to achieve effective and uniform regulation of global market actors.

A final element of complexity is created when several international regulatory regimes deal in a linked way with the same area. Examples include the WTO, Codex, and IOE in the context of food and plant safety regulation. Another is the interaction of the WTO and TRIPS, the Food and Agriculture Organization, the World Intellectual Property Organization, and the Consultative Group on International Agricultural Research in dealing with plant genetic resources.[140] Such complex regimes exhibit arrangements of functions and authorities that are partially shared and partially independent, creating a global version of separation of powers; the implications for the development of administrative law have yet to be addressed.

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[139] *See* Sabino Cassese, *supra* note 120; Giacinto della Cananea, *supra* note 120.

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

These various elements of complexity make out a large and important field for further research. A systematic comparative analysis of the most important international regulatory regimes, using typologies like those advanced in this article, would be of great value in considering the potential for a global administrative law as well as for the study of global regulatory institutions more generally.

B. Implications of Regime Structure for Development Administrative Law at the Global Regulatory Regime Level

1. Administrative Law Elements in Different Global Regulatory Regimes: Emerging Patterns

The basic elements of administrative law include transparency and access to information; participation in administrative decisionmaking through the submission of information, analysis, and views; a requirement of a reasoned decision by the administrative decisionmaker; review of the decision for legality by an independent tribunal; and the application of the reviewing body of certain substantive principles such as means-ends rationality and proportionality. U.S. administrative law presents these elements in an especially strong form.[141]

As might be expected, the adoption of administrative law elements tends to be significantly greater in complex treaty-based regulatory regimes that are relatively highly institutionally differentiated and legalized, and that have well-developed administrative bodies. The extent of the regime's impact on private market actors and the extent of NGO activity also appear to be important factors. There has been a considerable development of international NGOs in the past fifteen years as they have lobbied for greater transparency and participation in global regulatory regimes. Also, domestic NGOs in the U.S. and elsewhere, frustrated by the limited availability and efficacy of opportunities to influence global regulation through domestic

[141] *See supra*, Part II. It is far beyond the scope of this article to catalogue or analyze the extent to which these various elements of administrative law have been adopted within various global regulatory regimes. These questions are part of the research agenda of the NYU Project on Global Administrative Law (on file with Law & Contemp. Probs.). *See* http://www.iilj.org/global_adlaw/index.html (last visited Mar. 21, 2005).

political and administrative law mechanisms, have begun to focus on issues of transparency, participation, and review at the global regulatory regime level. NGO attention at the global level has, however, been selective. For example, the World Bank, the WTO, and the Codex are among the regimes that have been targeted for reform, whereas relatively little attention has been paid to other perhaps equally important regimes, such as the IMF and banking regulation.

Participation through established procedures in regime administrative decisionmaking is considerably advanced in some relatively complex treaty-based international regulatory regimes with strong, norm-generating administrative authorities, such as the Codex, OIE, the Montreal Protocol, and the Kyoto Protocol. The decisions of these regimes is of great importance and interest both to multinational businesses and to NGOs, who have lobbied strongly for transparency and participation. Transparency and participation have been extensively developed under CITES, which has been a strong focus of environmental NGO energies. However, none of these regimes has developed a reviewing body analogous to courts or administrative tribunals within domestic systems. Thus, the OIE, Codex, and CITES have no reviewing body. The Montreal Protocol non-compliance mechanism assists and prods member states to achieve compliance. The non-compliance mechanisms under the Kyoto Protocol are still being constructed and no reviewing function has emerged within the CDM, although there will be strong pressures to develop one.

The Codex provides a good example of experience with the development of greater transparency and participation over the past fifteen years. Founded in 1962 by the Food and Agricultural Organization (FAO) and the World Health Organization (WHO), the Codex is responsible for developing and adopting food safety standards that relate to human health. Until the adoption of the Sanitary and Phytosanitary Standards (SPS) Agreement in 1994, Codex was largely hidden from public scrutiny as the standards it adopted were non-binding. Because of the non-binding nature of its work, the Codex did not arouse much attention from stakeholders or the media,[142] and was primarily a technocratic forum dominated by government experts. The Codex's relative

[142] However, Codex did provide opportunities for certain stakeholders to participate in its work. *See* Codex Alimentarius Commission, NGO Participation (on file with Law & Contemp. Probs.), *available at* http://www.codexaliment arius.net/ngo_participation.stm (last visited Mar. 21, 2005) [hereinafter NGO Participation].

anonymity ended with the implementation of the SPS Agreement, which gave WTO member states strong incentives to adopt Codex standards as a "safe harbor" against WTO challenge.[143] This stimulated increased interest by NGOs in the work of the Codex. Several NGOs applied for and received observer status, while others were able to place their representatives as parts of national delegations in order to influence regulatory decisions by Codex administrative bodies.[144]

In other regimes, including the World Bank, human rights bodies, and the ILO, non-state actors have the ability to invoke reviewing body procedures. In the case of the ILO and the human rights regimes, review is directed to compliance by member states. The human rights regimes lack developed administrative authorities, while the ILO follows a corporatist model, which is probably not conducive to the development of administrative law on the U.S. model. In the case of the World Bank, review is directed at compliance by the administrative arm of the bank itself, which is a strong body with the ability to adopt and implement subsidiary norms. This creates a situation favorable to the further development of administrative law.

In parallel with the development of the Inspection Panel, the Bank has also taken steps to promote transparency and to develop opportunities for participation through consultation with respect to both general Bank policies and major Bank-funded development projects; the interaction between these participation opportunities and the availability of review through the Inspection Panel, however, has yet to be systematically examined. The Bank thus represents a relatively highly advanced stage of administrative law, although still short of incorporating all of the elements of a U.S. model. It is striking that the state of administrative law at the IMF, a sister Bretton Woods institution with a quite similar governance structure, should still be so rudimentary. The extent to which this disparity is due to the differences in the subjects regulated by the two institutions or other factors is still to be adequately examined.[145]

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[143] Terence P. Stewart & David S. Johanson, *The SPS Agreement of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics*, 26 SYRACUSE J. INT'L L. & COM. 27, 41-43 (1998).

[144] Livshiz, *supra* note 50, at 4, 21.

[145] For discussion of the state of accountability mechanisms at the IMF and World Bank, *see* Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 HARV. HUM. RTS. J. 205 (2002); John W. Head, *Seven Deadly Sins: An Assessment of Criticisms Aimed at the International Monetary Fund*, 52 KAN. L. REV. 521 (2004); John W. Head, *For Richer or*

The WTO is an example of a treaty-based regime that lacks an administrative body with authority to generate and implement subsidiary norms; instead, this function is carried out exclusively by the DSB. As discussed above, the DSB has, perhaps inevitably, given the absence of a strong WTO administrative body, increasingly assumed functions that are regulatory and administrative in character. Thus, the Appellate Body has sought to use the resolution of particular disputes regarding member state compliance to develop systemic norms and procedures to govern the trade regulatory regime, including the development of a global administrative law for member state authorities whose decisions are regulated by WTO law. Inevitably, NGOs (and to a much lesser extent business interests, who often feel that they are adequately represented through their governments) have sought increased transparency and rights of participation in order to be able to monitor and influence the discharge by the DSB of these administrative functions. But because the DSB is in form a tribunal, this effort has focused on the submission of amicus briefs, which have been strongly resisted by developing countries fearful of disproportionate "northern" NGO influence on DSB decisions.[146] Dispute settlement tribunals established under NAFTA Chapter 11 and bilateral investment treaties addressing regulatory expropriation claims by investors have come under similar pressures from NGOs, who have sought greater transparency in their decisional processes and the right to intervene arid submit amicus briefs, as these bodies increasingly assume functions that are administrative in character, including the development of an administrative law for domestic regulators.[147]

Other treaty-based global regulatory regimes follow a state-centric model of governance with only limited administrative law elements, even in those regimes that have developed administrative bodies with significant functions. Examples include the IMF and the Security Council 1267 Committee. This is also true of many global regulatory networks, including those dealing with anti-trust/competition law, debt relief for developing countries (Paris Club),

For Poorer: Assessing the Criticisms Directed at Multilateral Development Banks, 52 U. KAN. L. REV. 241 (2004); Ngaire Woods, *Making the IMF and the World Bank More Accountable*, 11 INT'L AFFAIRS 83 (2001).

146 Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, 24 FORDHAM INT'L L.J. 173, 214-15 (2000); Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 348-53 (1996).

147 *See*, e.g., Fulvio Fracassi, *Confidentiality and NAFTA Chapter II Arbitrations*, 2 CHI. J. INT'L L. 213 (2001).

and money laundering (Financial Action Task Force). But other regulatory networks have begun to develop significant elements of transparency and participation. For example, the Basel Committee, which deals with bank regulation, adopted its original capital adequacy requirements through an entirely closed "club" process. But in developing the second version of these requirements, it established a website on which drafts and background materials were posted and requested comments.[148] ISOCO, the international club of securities regulators, is following a similar path.[149] The international system of cooperation in chemicals regulation has developed an elaborate governance system involving a plethora of expert committees that also provides avenues for participation by NGOs, such as those concerned with use of animals for testing.[150] These developments appear to be attributable to a desire on the part of the regime members to boost their legitimacy with outside constituencies, obtain information and feedback to improve the quality of their regulatory efforts, or a combination of both. Thus far, however, similar institutional differentiation or the development of administrative law elements has not occurred or has occurred only to a quite limited degree in regimes of horizontal cooperation for mutual recognition or regulatory equivalency determinations.

2. Administrative Law Lite?

The preceding overview confirms that development of a U.S.-style administrative law at the level of international regulatory regimes requires a relatively high degree of institutional differentiation, legalization, and complexity, which is often but not always associated with a statutory--regulatory approach to regulation. The most favorable condition for the adoption of most administrative law elements appears to be when a global regulatory organization has administrative bodies with important norm--generating power and an independent reviewing body, as is the case with the World Bank, although there has been significant development of administrative law elements in bodies, such as the Codex, that lack an independent review function.

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148 *See* Zaring, *supra* note 93, at 28-32.

149 *See id*. at 18-20

150 *See* James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 L. & CONTEMP. PROBS. 189 (Summer/Autumn 2005).

Another hospitable condition for the development of administrative law is provided by domestic administrative authorities that implement regulatory law developed or implemented by global administrative bodies or tribunals, especially when there are domestic systems of independent review. This provides the institutional preconditions for global institution requirements that domestic governments adopt global administrative law elements to ensure effective and faithful implementation of global regulatory law. Here the WTO and its DSB are taking the lead under agreements such as SPS, TRIPS, and GATS, although investor protection treaty tribunals and the World Bank (through "good government" initiatives) are also beginning to have a similar impact.

Yet even the most fully developed systems of administrative law in global regulatory institutions, such as the World Bank or Codex, do not include all of the administrative law elements in the state of development found in the U.S. or other advanced countries. Significant administrative law developments are found in many treaty-based regimes and some regulatory networks, but almost always without independent reviewing authority. The state of administrative law in other treaty-based regimes, regulatory networks, and in all or almost all regimes of horizontal mutual recognition or equivalency cooperation is generally rudimentary at best. The independent reviewing courts that play an essential role in administrative law in the United States and Europe and other advanced countries are generally absent.

Traditionally in international law, states have been most reluctant to establish strong independent tribunals to review state compliance with treaty regime norms; the WTO, UNCLOS and certain human rights tribunals are among the conspicuous exceptions. The reasons for this reluctance apply with less force to independent mechanisms of review of the decisions of regime-level administrative authorities, as opposed to member states, yet there is a dearth of such re viewing bodies. Thus, for most global regimes for the foreseeable future, administrative law will probably have to be built without the presence of strong reviewing courts or similar bodies.

In these circumstances, can some subset of the elements and functions of U.S.-style administrative law that do not require a strong, independent reviewing authority be successfully applied to less institutionally differentiated global regulatory regimes? These elements include arrangements for public access to information and other mechanisms to promote decisional transparency on the part of regimes' decisionmaking institutions, including legislative and administrative bodies and reviewing bodies; notice and

opportunity for public comment and input of decisions by such institutions; and other mechanisms for participation in regime decisionmaking, as through attendance at meetings in which decisions are discussed or taken and through membership on advisory or even decisionmaking bodies. These mechanisms might provide a substantial degree of informal responsiveness to those domestic or global economic and social interests that are organized and are able to take advantage of the opportunities provided by these mechanisms to monitor and influence regime-level decisions.

But they will not provide strong assurances of legality accountability, and indeed might even undermine legality, as the U.S. experience with regulatory negotiation suggests.[151]

From a U.S. perspective, such an approach represents, at best, "administrative law lite." By elevating accountability to interests over accountability for legality, it inverts the order of development and of priorities in U.S. administrative law, which gives precedence to assuring agency compliance with the Constitution, statutes, and the agency's own regulations over review of the exercise of discretion.[152] Indeed, it is questionable whether mechanisms that do not provide assurances of legality can properly be regarded as administrative *law*; arguably they can at most be regarded as tools of administrative governance. Beyond relying on courts to ensure the legality of administrative action, the United States has in recent decades placed a high value on the authority of judges to engage in "hard look" reviews of the exercise of agency discretion and to ensure reasoned justification for agency policy choices in relation to affected social interests and underlying facts and analysis. Other procedural and institutional mechanisms alone have not been thought sufficient to secure the goal of deliberative democracy in the context of administrative regulation. Yet, as previously noted, in the international institutional context, states have generally been quite unwilling to create and cede to other bodies the power to make authoritative determinations of legality or to review the exercise of discretion by regime bodies with subsidiary norm-creating authority.

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[151] *See* William Funk, When *Smoke Gets in Your Eyes, Regulation, Negotiation and The Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55 (1987).

[152] This priority order is reflected in judicial decisions on reviewability. Courts are much more reluctant to find that an agency action is not reviewable when it is challenged as violating the Constitution or a statutory requirement or limitation than when it is challenged on abuse of discretion grounds.

Is would be exceedingly parochial to think that there can be no genuine system of administrative law without the sort of judicial review that has been the centerpiece of U.S. and, increasingly, European models of administrative law. Indeed, the growth of relatively informal network-based approaches to regulation at the domestic level in the United States are posing a serious challenge to traditional models of administrative law built on command and control strategies of regulation.[153] Similar issues are arising in Europe. Conceptions of administrative law built solely on accountability to social interests and values through mechanisms of transparency and participation without strong reviewing tribunals have, however, yet to be developed. Nonetheless, as Grant and Keohane remind us, there are many mechanisms of accountability other than law that can be applied to global regimes, including hierarchical, supervisory, fiscal, market, peer and public reputational accountability.[154] It is quite possible that a combination of elements of transparency and participation, when combined with other mechanisms of accountability, can function successfully without independent legal review.

3. Prospects for Further Development of Administrative Law in Global Regulatory Regimes

The experience in industrialized countries indicates that the need for institutional specialization, including the use of both administrative and reviewing bodies, generally increases as the intensity of regulation increases. Growing global regulatory density will require the elaboration of more detailed norms and implementing arrangements. It also requires constant information-gathering, analysis, and evaluation of the performance of existing regulatory arrangements and the ability to make necessary changes to improve performance in a timely manner. Hence, legislative bodies create and delegate authority to subsidiary administrative bodies to elaborate, update, and implement regulatory norms. Such delegations in turn invite the creation of specialized reviewing bodies to police conformance by administrative bodies with the terms of the delegation and promote impartial and reasonably predictable administration.

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[153] *See* Stewart, *supra* note 35.
[154] *See* Grant & Keohane, *supra* note 4.

Experience in Europe and the United States suggests that the need for institutional differentiation and legalization of regulatory administration is especially great in two-level jurisdictional systems when it is thought necessary to have a system of regulation at the higher level in order to address problems of decentralized regulation by many lower level jurisdictions and to assure a regulatory "level playing field" among private firms competing in a common market. There are reasons for thinking that this same functional and institutional logic will operate at the global level in addressing problems like climate change, food, and chemical safety, and many other areas of regulation. If so, we might expect increasing institutional differentiation and legalization in global regulatory regimes, and a concomitant growth in global administrative law at both the global and domestic levels.

The experience in the United States and the European Union, however, might not necessarily translate inexorably or uniformly into the global context, which has very different political and institutional features. In this context, more informal methods of cooperation in achieving common objectives, including through regulatory networks and transnational cooperation between regulators in individual countries on equivalency and other issues, might often have functional superiority or be the best that can achieved within the overall political structural context of international relations. As already noted, these less formal regimes are not as favorable to development of administrative law. Moreover, private and hybrid public-private regulatory organizations and networks are coming to play an important role in setting global technical standards for products and services, developing labeling and regulatory programs to ensure that forest products, apparel, coffee, and other products meet consumers' environmental and labor concerns, and regulating services in areas such as accounting. Theses regimes, and their domestic counterparts, also present a deep challenge to domestic systems of administrative law developed in a statutory-adjudicatory context.[155]

The considerations influencing global regulatory institutional arrangements and the adoption of administrative law elements are political as well as functional. One must therefore examine, in the context of different types international regulatory regimes, the incentives faced by states in deciding whether to delegate authority for and thereby lose a degree of control over the adoption and content and application of regime norms.

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[155] *See* Stewart, *supra* note 35.

The role and the incentives of non-state actors with respect to such decisions are also critically important in many contexts.[156] Although these issues have been studied extensively in the domestic context in the United States and, to a more limited but growing extent in Europe,[157] social science research is just beginning to address them at the level of international regimes.

V

Conclusion

This article has examined the potential applications of administrative law disciplines—in particular of U.S.-style administrative law—to global regulatory regimes, considering both a "bottom up" and a "top down" approach. The extent and intensity of global regulation and the development of global administrative functions and institutions will continue to grow. This development will inevitably result in greater demands for administrative law mechanisms of accountability for the decisions of global regulatory regimes. Unless those regimes move more rapidly than they have in the past to adopt such mechanisms at the regime level, we are likely to witness the extension, by one means or another, of domestic administrative law disciplines of judicial review, of participation and transparency, of reasoned decision requirements, and of other administrative law elements to their decisions. These developments, or their threat, will help stimulate the further development of administrative law within global regulatory bodies. At the same time, some global regulatory regimes will continue the process of developing administrative law requirements for domestic decisionmaking by states that are members of the global regulatory regimes. Such steps will likely have a reciprocal influence back on the development of administrative law at the international regime level. It will be increasingly difficult for global regulatory bodies to resist administrative law disciplines that they themselves impose on member states.

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156 *See* Benvenisti, *supra* note.

157 *See* Francesca Bignami, *Creating Rights in the Age of Global Governance: Mental Maps and Strategic Interests in Europe*, 11 COLUM. J. EUR. L. (2005).

The development of global administrative law, however, is by no means an inevitably forward process. Because administrative law as traditionally understood, especially in the United States and other advanced countries, depends on a relatively high degree of institutional differentiation and legalization, a critical question is the extent to which international regulatory institutions will develop in the direction of greater complexity and legalization. Will there be increasing use of more ambitious and penetrating statutory-adjudicatory systems of regulation, which are likely to bring in its train a system of administrative law that bears some resemblance to those in advanced industrial societies? Or will we see a continuing proliferation of relatively informal regulatory networks and horizontal methods of regulatory cooperation and accommodation, as well as private and private-public regulatory mechanisms that will be less hospitable to administrative law institutions based on traditional domestic models? And, what are the incentives of states and powerful non-state actors regarding the development of global administrative law in different areas of regulations?

A final issue is the potential linkage, if any, between global administrative law and democracy.[158] A system of electorally based representative democracy at the global level is at present far beyond reach. Nor does a consociational conception of democracy at the global level based on civil society entities seem viable. Nonetheless, the development of a global administrative law, including through "bottom up" as well as "top down" approaches, could work to strengthen representative democracy at the national level by making global regulatory decisions and institutions more visible and subject to effective scrutiny and review within domestic political systems, and thereby promote the accountability of international regulatory decisionmakers through those systems.[159] Systems of global administrative law might also support the development of deliberative democracy at the level of global regulatory regimes, although the elements of such a conception as well as the conditions of its effective realization have yet to be adequately developed.

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[158] *See* Robert Howse, *Transatlantic Regulatory Cooperation and the Problem of Democracy, in* TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS, 469 (George A. Bermann, Matthias Herdegen, & Peter L. Lindseth eds., 2000).

[159] SLAUGHTER, A NEW WORLD ORDER, *supra* note 6, at 231-37.