

# GLOBAL STANDARDS FOR NATIONAL ADMINISTRATIVE PROCEDURE

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## I

### INTRODUCTION

In 1989, the United States imposed an embargo on the importation of shrimp from countries that used fishing methods harmful to marine turtles. The shrimp were not a protected endangered species, but the marine turtles were. The embargo was thus motivated by the rightful concern to protect an animal species from extinction. Claiming this embargo to be a violation of Article XI of the General Agreement on Tariffs and Trade 1994 (GATT 1994), which provided for the general elimination of quantitative restrictions on trade, India, Malaysia, Pakistan, and Thailand commenced proceedings on the basis of the Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO).

In *United States—Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp–Turtle)*,<sup>1</sup> the WTO Appellate Body concluded that Section 609 of Public Law 101-162<sup>2</sup> “has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO . . . [:]”<sup>3</sup>

[W]ith respect to neither type of certification under Section 609(b)(2) is there a transparent, predictable certification process that is followed by the competent United States government officials. The certification processes under Section 609 consist principally of administrative *ex parte* inquiry or verification by staff of the Office of Marine Conservation in the Department of State with staff of the United States Na-

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1. WTO Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Doc. No. 98-3899 (Oct. 12, 1998) [hereinafter *Shrimp–Turtle*].

2. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 988 (1989) (codified at 16 U.S.C. § 1537 (2000)).

3. *Shrimp–Turtle*, *supra* note 1, at 55 ¶ 186.

tional Marine Fisheries Service. With respect to both types of certification, there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision, whether of acceptance or rejection, is rendered on applications for either type of certification, whether under Section 609(b)(2)(A) and (B) or under Section 609(b)(2)(C). Countries which are granted certification are included in a list of approved applications published in the Federal Register; however, they are not notified specifically. Countries whose applications are denied also do not receive notice of such denial (other than by omission from the list of approved applications) or of the reasons for the denial. No procedure for review of, or appeal from, a denial of an application is provided.<sup>4</sup>

This decision was made pursuant to Article XX of the GATT 1994, according to which “such measures are not [to be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade . . . .”<sup>5</sup> It follows that for states to respect the prohibition on arbitrary discrimination between countries where the same conditions prevail, as required by the GATT norm, they must respect the principle of due process. Though usually established by national laws, the principle of due process also can enter national administrative law through another door: by being established at the international level and then applied at the national one.

The *Shrimp–Turtle* case concerning the U.S. import prohibition is not the only case in which an international treaty or international organization imposed procedural principles upon state administrations.<sup>6</sup> This article will examine some of these principles and evaluate the way they operate in the global context.

This topic illustrates the degree to which global law penetrates national legal systems by dictating principles and criteria that national administrations must respect and that private actors may wield in their own interest. Though belonging to different national legal systems, these rules are nevertheless subject to the global system. We have come to expect and accept international organizations that set *substantive* standards (establishing, for example, legal levels of pollution or limiting the genetic manipulation of agricultural products), so it is easy to argue that national administrations ought to respect global substantive goals, standards, and criteria. More interesting, however, are examples of *procedural*

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4. *Id.* at 54 ¶ 180 (citations omitted). Many have commented upon this decision. See, e.g., R. Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment*, 27 COLUM. J. ENVTL. L. 491 (2002).

5. General Agreement on Tariffs and Trade, Art. XX, Oct. 30, 1947, 55 U.N.T.S. 194, 262, available at [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf) (last visited Feb. 23, 2005) [hereinafter GATT] (incorporated into General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 190 [hereinafter GATT 1994]).

6. See G. della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, 9 EUR. PUB. L. 563-78 (2003) (identifying and discussing two trends: an increasing Europeanization of administrative procedures and a globalization of administrative procedures due to the influence of new international organizations).

principles and criteria. These usually are established at the national level, by courts or laws like the U.S. Administrative Procedure Act (APA)<sup>7</sup> or equivalent laws in Spain, Germany, and Italy.<sup>8</sup> It is more difficult to affirm that national administrations ought also to respect global constraints regarding the procedural aspects of their activity and to recognize that global standards effectively limit the purely national scope of administrative laws and increase the degree to which national administrations are subject to the rule of law, both national and global. This difficulty arises in part because recognizing such duties as those of consultation, transparency, due process, and judicial review means recognizing globally established private rights against national public administrations, the exercise of which cannot be limited to just national citizens, as is generally the case with nationally established procedural rights. The global legal order grants the rights of consultation and intervention in national administrative procedures to the citizens of other states as well as nationals, as will be seen in greater detail below.

Global procedural standards are particularly sophisticated in the area of trade in services. It cannot be said for this area that the opening of national frontiers by global law—and the concomitant procedural constraints—have been driven by the interests of multinational corporations and the most developed nations. Rather, the rule of law and the principles of participation, transparency, due process, and judicial review, well developed in most domestic laws, provide “rules of the game” that do not necessarily favor those constituencies.

After a preliminary discussion of administrative law as state law, this article identifies the global regulatory regime characterized by permanent rules and briefly describes the characteristics common to different instruments in this system. It then turns to the peculiarities of this global regime, organizing them into four categories: the regulators, the regulated, the regulatory process, and the legal status of the rules. Three aspects respecting the regulators are analyzed: (1) regulation set forth by international treaties and regulation set forth by secondary regulators, like the committees of international organizations; (2) the schism between the authors of the regulation and the authorities overseeing national compliance with it; and (3) the disintegration of the states produced by singling out national authorities that act as partners with the international authorities. As for the regulated, this article considers the regulations’ “vertical” effect between international organizations and states and their “horizontal” effect between the states themselves, as well as other relationships between states and interested parties established by the international legal order. In the discussion of the regulatory process, itself, this article examines the peculiarity of

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7. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2000)).

8. See Ley de Procedimiento Administrativo (B.O.E. 18.07.1958); *Verwaltungsverfahrensgesetz*, v. 25.5.1976 (BGBl. I S.1253); *Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*, Law no. 241 of Aug. 7, 1990 (It.), *Gazzetta Ufficiale della Repubblica Italiana* (Gazz. Uff.) No. 192 (Aug. 18, 1990), respectively.

voluntary, self-imposed mutual recognition and the characteristics of the notice and comment procedure as applied to interstate relations and to the relations between states and private parties. Finally, in considering the legal status of these international administrative measures, this article examines both their non-binding character and the source of their effectiveness.

This article does not consider the ways in which domestic legal systems react in their contact with international administrative law; thus, it does not address whether the institutions governed by this law are altered and adapted to the national context, whether international institutions spread as contagious infections, or whether national legal systems instead resist and reject international norms (and at what cost). Neither does it consider whether global principles and standards conflict with national ones, creating potential asymmetries between sectors governed only by national law and those tied to global law. Finally, this paper does not consider whether the national application of global (and thus non-indigenous) procedural principles is merely ritualistic, slows down state action, or benefits the particular groups that make instrumental use of it.

## II

### ADMINISTRATIVE LAW AS STATE LAW

Historically, administrative law has sprung from national states. Public administrations belong to a national community, and they depend structurally on national, or state, governments. Because of the principle of legality, these administrations are subjected to laws and regulated by them. Administrative law is thus fundamentally state law.

History thus suggests the impossibility of international administrative law, because public administrations are exclusively national phenomena. And history suggests the impossibility of global governance of national administrative laws, because only within the state can there be an administration that enjoys a monopoly of executive power, and only within the state can there be the authority versus liberty dialectic that characterizes administrative law.<sup>9</sup> A global system governing national administrative law cannot exist, in short, because administrative governance finds its source exclusively in national law. As Otto Mayer, one of the founders of German administrative law, observed, the national public power is the lord in its own domain, to the exclusion of all others; therefore, the action of a foreign power on the territory of a foreign state can be considered valid only in exceptional situations.<sup>10</sup> If international obligations exist, they must pass through the filters of national law, which transform them into national rules.

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9. This formulation comes from D. Donati, and is cited and discussed in STEFANO BATTINI, *AMMINISTRAZIONI SENZA STATO: PROFILI DI DIRITTO AMMINISTRATIVO INTERNAZIONALE* 31 (2003).

10. 4 OTTO MAYER, *LE DROIT ADMINISTRATIF ALLEMAND* 354 (1906).

Two developments have called this traditional perspective into question. The first is the rise of an international administrative law tied to global administrations rather than to the state. The second is the rise of global rules declared by treaties or international organizations, but addressed to states and private actors. These international norms penetrate domestic legal systems, thus having an effect on national administrative laws.

These two developments are distinct, but related. The first, which will not be analyzed here, are the global limits placed on national administrations by international bodies, which operate according to a non-state law (and also, in part, according to treaties). Of particular interest here, however, is the second development, which represents an intrusion of global rules on national administrations. It is important to understand how the interference of the global with the national occurs, whether it corresponds to the practices of other international legal systems, and whether international regulatory forms resemble national ones.

### III

#### INTERNATIONAL REGULATION

There are many different kinds of international administrative norms. These norms can have either an ad hoc character or a permanent one. An example of ad hoc norms is the World Bank Operational Policies, which require a public consultation on the environmental assessment of projects proposed for Bank financing.<sup>11</sup> Under these policies, national law is obliged to respect the principle of private participation in administrative proceedings. A national administration that disregards this norm cannot obtain financing.

Even more interesting are the permanent norms. Four of these, examined here, all follow the same model. They are set forth in the following legal instruments: the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement),<sup>12</sup> the Agreement on Technical Barriers to Trade (TBT Agreement),<sup>13</sup> the General Agreement on Trade in Services (GATS),<sup>14</sup> and the Principles for Food Import and Export Inspection and Certification

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11. See BATTINI, *supra* note 9, at 262.

12. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 59 (1999), 1867 U.N.T.S. 493, available at [http://www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm) (last visited Feb. 20, 2005) [hereinafter SPS Agreement].

13. Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 121 (1999), 1868 U.N.T.S. 120, available at [http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt.pdf](http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf) (last visited Feb. 20, 2005) [hereinafter TBT Agreement].

14. General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, available at [http://www.wto.org/english/docs\\_e/legal\\_e/26-gats.pdf](http://www.wto.org/english/docs_e/legal_e/26-gats.pdf) (last visited Feb. 20, 2005) [hereinafter GATS].

(FIEIC).<sup>15</sup> The first three instruments belong to the legal system of the WTO,<sup>16</sup> while the fourth was adopted by the Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission.<sup>17</sup>

Although varying in their details, these four instruments present common characteristics: First, the norms in these instruments are aimed at ensuring the balancing of conflicting interests. They seek to guarantee free trade, but also to protect health and consumer interests. The SPS Agreement seeks to reconcile free trade with the sanitary and phytosanitary measures necessary to protect human, animal, and plant health. The TBT Agreement seeks to balance the needs of international commerce with the safety of products and processes, because excessively and unjustifiably complex national rules governing products, processes, and methods of production might discriminate against foreign products.<sup>18</sup> The GATS seeks to limit the professional requirements one must meet and procedures one must follow to practice a profession, in order to prevent such rules from operating as barriers to the free circulation of services. The FIEIC seeks to facilitate international trade in foodstuffs while ensuring adequate protection of consumer health. All these instruments aim at preventing restrictions on trade in goods and services through disguised barriers, like health or technical requirements, which would favor national products and impede the importation of foreign ones.

Second, these instruments establish a link—and require a balance—among collective public interests, one of which is international trade. The four instruments considered here are just some of the many existing “linkages,” or “trade ands,” because the pervasiveness of trade connects it with a host of other con-

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15. Principles for Food Import and Export Inspection and Certification System, Doc. No. CAC/GL 20-1995, in CODEX ALIMENTARIUS COMM'N, FOOD IMPORT AND EXPORT INSPECTION AND CERTIFICATION SYSTEM—COMBINED TEXTS 1 (2000), available at [http://www.fao.org/documents/show\\_cdr.asp?url\\_file=/DOCREP/005/X4489E/x4489e02.htm](http://www.fao.org/documents/show_cdr.asp?url_file=/DOCREP/005/X4489E/x4489e02.htm) (on file with Law & Contemp. Probs.) [hereinafter FIEIC].

16. On the WTO, see JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (2d ed. 1997); ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW (2002); PAOLO PICONE & ALDO LIGUSTRO, DIRITTO DELL'ORGANIZZAZIONE MONDIALE DEL COMMERCIO (2002); GABRIELLA VENTURINI, L'ORGANIZZAZIONE MONDIALE DEL COMMERCIO (2000); THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? (J.H.H. Weiler ed., 2000) [hereinafter THE EU, THE WTO AND THE NAFTA]. On the WTO's dispute settlement systems, see ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT (1997); 11 STUDIES IN TRANSNATIONAL ECONOMIC LAW: INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM (Ernst-Ulrich Petersmann ed. 1997).

17. The Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization (WHO) created the Codex Alimentarius Commission in 1963 to develop food standards, guidelines, and related texts such as codes of practice under the Joint FAO/WHO Food Standards Programme. FAO/WHO Food Standards, *Codex Alimentarius*, at [http://www.codexalimentarius.net/web/index\\_en.jsp](http://www.codexalimentarius.net/web/index_en.jsp) (last visited Feb. 21, 2005) (on file with Law & Contemp. Probs.).

18. On the balancing relative to the TBT agreement, see WTO Appellate Body, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, Doc. No. 01-1157 (March 12, 2001).

cerns, such as the environment, employment, competition, corporate law, foreign investments, development, immigration policy, and poverty.<sup>19</sup>

Third, these instruments contain five types of common provisions, which relate to transparency, harmonization, equivalence, consultation, and control procedures. To ensure transparency, these instruments require national administrations to publish their requirements promptly so they can be made known to other national administrations and interested parties. A reasonable period should be allowed before a new requirement takes effect in order to allow producers in exporting countries to adapt their products or methods of production. To the same end, Members must establish enquiry points to provide information to other states or to private actors. There are some variations in how the agreements discussed here implement this norm, however. For example, some instruments require Members to supply requested documents to nationals of other Members at the same price, while others require Members to provide information and assistance.<sup>20</sup>

Fourth, to ensure harmonization, these instruments encourage national administrations to base their measures on international standards, guidelines, or recommendations.<sup>21</sup> These norms are formally non-binding, but measures based on them are presumed to be consistent with the relevant international provisions of the treaties. Standards, guidelines, and recommendations are not set forth by the agreements themselves. Instead, they are issued by other international organizations in which the Member States are required to participate. Examples of such international organizations include the Codex Alimentarius Commission, the International Office of Epizootics, the International Plant Protection Convention, the International Standard Organization (ISO), and the International Electrotechnical Commission (IEC).

Fifth, to ensure equivalency, all four agreements provide that Members should accept the measures of other states as equivalent if the exporting state objectively demonstrates that its measures achieve the importing state's level of protection. The obligation to demonstrate equivalence rests with the exporting country. The Member States also may sign bilateral and multilateral agreements on the recognition of the equivalence of specified measures.<sup>22</sup>

If no international standards, guidelines, or recommendations exist, or if a national measure does not respect the international standard, guideline, or rec-

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19. See generally BATTINI, *supra* note 9, at 236–37; John H. Jackson, *Afterword: The Linkage Problem – Comments on Five Texts*, 96 AM. J. INT'L L. 118 (2002) (commenting on how the five articles in the issue addressed “the problem of linkage between ‘nontrade’ subjects and the World Trade Organization” and making some general observations on the subject); Martin Nettesheim, *Legitimizing the WTO: the dispute settlement process as formalized arbitration*, 53 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 711, 716, 719, 722–24 (2003).

20. GATS pt. II, art. III; SPS Agreement annex B, ¶¶ 1–3; TBT Agreement art. 2, ¶ 11 and arts. 10, 12; FIEIC, *supra* note 15, at 3–4, ¶¶ 14–17.

21. GATS pt. II, art. VI, ¶ 5(b); SPS Agreement art. 4; TBT Agreement art. 2, ¶ 4 and art. 5; FIEIC, *supra* note 15, at 3, ¶ 12.

22. GATS pt. II, art. VII; SPS Agreement art. 4, ¶ 2; TBT Agreement art. 2, § 7; FIEIC, *supra* note 15, at 3, ¶ 13.

ommendation, the Member shall follow a procedure of notification and consultation that involves publishing a notice of the measure to enable interested Members to become acquainted with it, notifying other Members of the products to be covered by the regulation, providing other Members with copies of the proposed regulation, and allowing other Members reasonable time to make comments, discuss them upon request, and take the comments and the results of the discussion into account.<sup>23</sup> In the case of sanitary and phytosanitary measures, for example, a state may choose a higher level of protection, but it must demonstrate that this is justified and does not result in arbitrary discrimination.

Finally, these four international agreements set forth restrictions on national procedures of certification and control. National procedures must respect the following principles: equivalence of assessment and control procedures for imported and domestic products, expedient execution of the procedures (without undue delays) and the avoidance of undue delay in considering an application, no overly burdensome requirements, confidentiality, reasonableness and proportionality, and a procedure for reviewing decisions.<sup>24</sup>

#### IV

#### THE REGULATORS

The body of legal rules summarized here derives both from international agreements and from decisions of the collegial bodies established by the agreements themselves.<sup>25</sup> The distinction between the agreements and the collegial bodies they create is important because standards derived from interstate agreements—that is, agreements between states—disciplining state administration are acts of self-restraint undertaken by the states themselves. By contrast, standards established by the collegial bodies of international organizations represent an external limitation, even if state representatives belong to these bodies. This distinction is not only formal, but also substantial. Interstate agree-

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23. SPS Agreement annex B, ¶ 5; TBT Agreement art. 2, ¶ 9; FIEIC, *supra* note 15, at 3-4, ¶ 15; WTO Council for Trade in Services, Disciplines on Domestic Regulation in the Accountancy Sector, S/L/64, Doc. No. 98-5140 (Dec. 17, 1998) (see the section on “Transparency”).

24. GATS pt. II, art. VI; SPS Agreement annex C; TBT Agreement art. 5, ¶¶ 1-3; FIEIC, *supra* note 15, at 4, ¶ 19. There is abundant literature on the SPS, TBT, and GATS cited in PICONE & LIGUSTRO, *supra* note 16. See also CHRISTOPHER ARUP, THE NEW WORLD TRADE ORGANIZATION AGREEMENTS—GLOBALIZING LAW THROUGH SERVICES AND INTELLECTUAL PROPERTY (2000); ALAN O. SYKES, PRODUCT STANDARDS FOR INTERNATIONALLY INTEGRATED GOODS MARKETS (1995); J.P. Trachtman, *Lessons for the GATS from Existing WTO Rules on Domestic Regulation*, in DOMESTIC REGULATION & SERVICE TRADE LIBERALIZATION 57 (Aaditya Mattoo & Pierre Sauvé eds., 2003); Margareta Djordjevic, *Domestic Regulation and Free Trade in Services—A Balancing Act*, 29 LEGAL ISSUES ECON. INTEGRATION 305 (2002); 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 (1998).

25. These bodies include the Committee on Sanitary and Phytosanitary Measures, regulated by SPS art. 12 and art. 5, ¶ 5; the Committee on Technical Barriers to Trade, regulated by TBT art. 13; the Council for Trade in Services, regulated by GATS arts. XXIV and VI, ¶ 4; the Codex Alimentarius Commission; and the Committee on Import/Export Inspection and Certification Systems.

ments are the work of national governments and the legislative bodies that ratify them. The collegial organs of international organizations, by contrast, are made up of national civil servants.

The Committee on Sanitary and Phytosanitary Measures is one such collegial body. Adopting guidelines in June 2000 envisaged by Article 5, Paragraph 5 of the SPS Agreement for applying the concept of the appropriate level of protection, it declared that new measures must be based on a comparison with the previous ones, with national measures addressing analogous risks, with measures adopted by international bodies, and with measures adopted in other countries and based on technical opinions.<sup>26</sup> The Committee on Technical Barriers to Trade, another example of these collegial bodies, has established norms for the implementation of articles<sup>27</sup> concerning transparency and notification obligations, recommending that Members designate the government authority or agency that will examine comments, acknowledge receipt of the comments, specify the ways in which the comments will be taken into account, and provide further information when necessary.<sup>28</sup> A third example, the Council for Trade in Services, adopted disciplines<sup>29</sup> intended to facilitate the liberalization of trade in accounting services by ensuring that domestic laws do not constitute unnecessary barriers to such trade. Under these disciplines, Members are required to designate a national administrative authority, notify other Members of new measures, and establish professional licensing criteria and predetermined qualification requirements that are publicly available, objective, proportional, and reasonable.<sup>30</sup> In international law, as is common in European law, these committees are made up of national bureaucrats rather than government representatives. They function as clearinghouses for national interests, as connecting bodies, and as centers of secondary rulemaking.

International agreements do not themselves fix the standards, guidelines, and recommendations to which the Members are invited to conform, nor do they entrust this job to the bodies constituted by the agreements themselves; instead, they route this job to other international bodies, using a connection technique known as “borrowing regimes.” There is, therefore, a schism between the regulators on the one hand, and the authors of the regulation on the other. In the context of the WTO, it has been observed that,

on the one hand, the WTO avails itself of the Codex Commission’s work for the harmonization of national regulations likely to prejudice free international trade; that is the interest protected by that organization. On the other hand, the Codex Commission, in order to guarantee the safety of foodstuffs, borrows from the greater institutional effectiveness of the WTO system: its standards are not in themselves binding

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26. WTO Committee on Sanitary and Phytosanitary Measures, Guidelines to further the practical implementation of Article 5.5, G/SPS/15, Doc. No. 00-2955 (July 18, 2000).

27. TBT Agreement art. 2, ¶ 9–10; art. 3, ¶ 2; art. 5, ¶¶ 6–7; and art. 7, ¶ 2

28. WTO SECRETARIAT, TRANSPARENCY PROVISIONS OF THE TBT AGREEMENT (2002), available at [http://www.wto.org/english/tratop\\_e/tbt\\_e/booklet\\_transparency\\_e.doc](http://www.wto.org/english/tratop_e/tbt_e/booklet_transparency_e.doc).

29. Disciplines on Domestic Regulation in the Accountancy Sector [hereinafter Disciplines] in GATS art. VI, ¶ 4.

30. WTO Council for Trade in Services, *supra* note 23.

upon States, but the degree of their observance has markedly increased owing to the application of these standards by the dispute resolution bodies of the WTO.<sup>31</sup>

The WTO stands at the heart of the system. Through the medium of trade, the WTO ultimately regulates—or, better yet, lends its regulatory force to—different authorities to implement rules regarding very diverse sectors, such as the environment, agriculture, plants, health, and food safety. There is, in this sense, a certain resemblance between the WTO and the European Union (E.U.): both revolve around the circulation of goods and services (though the E.U. also protects the free circulation of persons and businesses). Both ultimately penetrate other sectors in order to balance competing and conflicting interests. The process of E.U. transformation from a sectoral authority into a general public authority is, however, substantially more advanced.<sup>32</sup>

The agreements require that the Members designate a government authority responsible for performing the activity subject to international obligations<sup>33</sup> or designate an enquiry point.<sup>34</sup> In this way, the state is substantially disaggregated: the designated national office becomes the body of reference for the international organization. The paradigm of the state as a unit is thus cast aside and the internal administrative organization of the state takes on an increased international importance.<sup>35</sup>

## V

### THE REGULATED

The second noteworthy aspect of this international regulation lies in how it operates. It has a vertical effect, in the sense that it penetrates within the state, circumventing national legislation in order to address national public administrations directly. This is the product of harmonization. International regulation is not directed solely at states, however. It is also addressed to sub-state entities and even to private ones. The TBT Agreement, for example, concerns

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31. Stefano Battini, *Il sistema istituzionale internazionale. Dalla frammentazione alla connessione*, 12 RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 969, 986 (2002) (quotation translated for use in this article); see also Armin von Bogdandy, *Legitimacy of International Economic Governance: Interpretative Approaches to WTO Law and the Prospects of its Proceduralization*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS: NEW CHALLENGES FOR THE INTERNATIONAL LEGAL ORDER 103, 109 (Stefan Griller ed., 2003); Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT' L. 28, 50-55 (2002). Borrowing regimes is a widespread phenomenon: for example, the International Monetary Fund and the World Bank lend their own power to the rules and criteria established by the Basel Committee, asking that national administrations apply them and verify their observance.

32. On the difference between the WTO and the E.U., see von Bogdandy, *supra* note 31, at 122-26.

33. See, e.g., SPS Agreement, Annex B, ¶ 10.

34. See, e.g., SPS Agreement, Annex B, ¶ 3 and TBT Agreement, art. 10, ¶ 1. The latter states, "Each Member, shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members."

35. On this, see BATTINI, *supra* note 9, at 211. See generally Sabino Cassese, *Relations Between International Organizations and National Administrations*, in XIXTH INTERNATIONAL CONGRESS OF ADMINISTRATIVE SCIENCES, BERLIN (WEST) 1983: PROCEEDINGS 159, 177-80 (1983) (examining the international role of domestic bureaucracies).

not only central governments but also the local governments and non-governmental bodies that establish technical rules. The Agreement regulates the preparation, adoption, and application of technical regulations and procedures for the assessment of conformity by central government bodies<sup>36</sup> and local government and non-governmental bodies.<sup>37</sup> The Member States must ensure that local governments and non-governmental bodies comply with requirements established by the TBT, but addressed directly to the sub-state bodies.

International regulation also produces a horizontal effect, in the sense that it requires a kind of dialogue between states. This dialogue unfolds in two different ways. First, national public administrations are required to compare continuously their own and other countries' measures. Second, national public administrations are encouraged to enter into equivalence or mutual recognition agreements. Global regulation thus not only imposes itself vertically on states, but it also requires States to open themselves up reciprocally—laterally, as it were—respecting procedural rules in their relations.

This twofold effect, vertical and horizontal, and the relationship between international organizations and states, also can be seen in the E.U. Here, too, harmonization is required from on high and is accompanied by mutual recognition.

Differences between international and European administrative law nevertheless abound. Whether in the vertical or the horizontal sense, global regulation is addressed to national public administrations. But private parties, active within states, also are increasingly interested in it. They participate in the processes of legislation, administration, and adjudication. One example of private participation in the legislative process is the Disciplines. The International Federation of Accountants (IFAC) and national organizations like the National Council of Accountants and Business Consultants in Italy have played an important role in promoting, preparing, and developing global standards, first in the Working Party on Domestic Regulation, then in the Council for Trade in Services.<sup>38</sup> National organizations (be they public or private, as dictated by the national law governing professional organizations) and (private) international organizations have thus taken part in the process of the formation of substantive global law. One example of the administrative process allowing and accepting private participation is the TBT, according to which, "Each Member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members."<sup>39</sup> Another example of private participation is in adjudication—American companies

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36. TBT Agreement arts. 2, 5.

37. TBT Agreement arts. 3, 7-8.

38. On the role of the IFAC, see Claude Trollet & John Hegarty, *Regulatory Reform and Trade Liberalization in Accountancy Services*, in DOMESTIC REGULATION & SERVICE TRADE LIBERALIZATION, *supra* note 24, at 147. Information on the role of the Italian National Council of Accountants and Business Consultants was obtained by direct research of the Council's archives.

39. TBT Agreement art. 10, ¶ 1.

working with U.S. public authorities “to challenge foreign trade barriers before the WTO legal system.”<sup>40</sup>

Despite such examples, one view of the global legal system is that it leaves no place for private actors. According to that view, private actors stand in a legal relationship to the states alone, and the states must mediate their relationship to the global legal system. That view considers the global and domestic legal orders to be two separate systems, existing upon different levels, in which there would be no unmediated relations between private actors and global organizations.

However, legal relationships do exist between the infrastatal and the global levels, however difficult and incomplete they might still be. It is thus foreseeable that when, for example, the Disciplines are complete and have been incorporated into the GATS, accountants from one country, acting through their own national authorities, will be able to contest the legitimacy of the behavior of public authorities in another country (for example, charging that they violated the duty of transparency) before the judicial bodies of the WTO. This will create a triangle consisting of an accountant in one country (acting through his own national authority), the global judicial authority, and the public authority of the other country.

## VI

### THE REGULATORY PROCESS

The third noteworthy aspect of international regulation has to do with the regulatory process. State obligations deriving from international regulation are addressed to procedures—obligations such as consultation and discussion, respect for the principles of reasonableness and proportionality, and the duty to give a response within a fixed period. By requiring national legal systems to respect the procedural obligations of consultation, transparency, reasonableness, and proportionality, the global system thus imports legal principles into national systems, and thereby “denationalizes” the relevant areas or sectors.<sup>41</sup>

The regulatory process at the international level also incorporates the practice of mutual recognition. This is a widespread practice that overcomes the

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40. GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIP IN WTO LITIGATION* 5 (2003).

41. Because “the Appellate Body proceduralizes the substantive WTO obligations,” it has extended “basic elements of the democratic principle and the rule of law to aliens.” *See* von Bogdandy, *supra* note 31, at 128, 132. The phenomenon of proceduralizing substantive obligations is also evident in other cases, like in the Poverty Reduction Strategies of the World Bank and International Monetary Fund. These two organizations grant loans to low-income countries on the condition that national programs are prepared with the participation of government and administrative bodies, as well as interested parties such as civil society organizations, minorities, unions, and research institutes, and that the results of such participation be taken into account in preparation of the programs. *See* The World Bank Group, *Topics in Development, Poverty, Poverty Reduction Strategies*, at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPRS/0,,menuPK:384207~pagePK:149018~piPK:149093~theSitePK:384201,00.html> (last visited Mar. 27, 2005) (on file with Law & Contemp. Probs.).

dualism between international and domestic law by enabling a national authority to make decisions that have direct effects in other national legal systems. In the E.U., where the principle of mutual recognition originated before spreading to international law,<sup>42</sup> it was developed by the European Court of Justice (ECJ), while at the global level, it is the outcome of interstate accords and is thus a matter of voluntary consent.

The notice and comment procedure also has been borrowed from other legal systems, this time from national ones. Still, even this is very different from the analogous procedures practiced in domestic legal systems. In fact, at the national level, the actor who notifies, receives comments, and decides is a state authority and is superior to the commenting party. Transposed into international law, the procedure is structurally similar, but functionally different. At the international level, it is a state that listens to another state,<sup>43</sup> and there is no higher authority that decides. International law is inspired by domestic administrative law, but the function of the institution, transplanted into a different context, changes. The notice and comment procedure becomes an instrument of consultation and debate among equals subject to no higher authority.

Finally, the public arena phenomenon manifests itself in the global legal space as well as in the national one. There are multiple levels of government (that is, international organizations and national administrations) in potential conflict with each other, as well as interested parties that can exploit the differences between the regulators by playing off one against the other.<sup>44</sup>

## VII

### THE LEGAL STATUS OF THE RULES

The rules created by international organs in furtherance of the treaties are defined in different ways through disciplines, guidelines, and standards.<sup>45</sup> These rules do not create direct, legally binding obligations on the states.<sup>46</sup> For some

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42. Alberto Alemanno, *Gli accordi di reciproco riconoscimento di conformità dei prodotti tra regole OMC ed esperienza europea*, 17 DIRITTO DEL COMMERCIO INTERNAZIONALE 379 (2003).

43. But note the arguments of the previous paragraph on the growing participation of private actors.

44. Sabino Cassese, *L'arena pubblica. Nuovi paradigmi per lo Stato*, in LA CRISI DELLO STATO 74 (2002).

45. See, e.g., GATS pt. II, art. VI, ¶ 4 (disciplines); SPS Agreement art. 5, ¶ 5 (guidelines); TBT Agreement art. 2 (standards).

46. The question of the direct application of norms and of their higher status has been discussed with respect to the norms contained in the WTO Agreement, not with reference to secondary norms. See, e.g., Armin von Bogdandy, *Legal Equality, Legal Certainty, and Subsidiarity in Transnational Economic Law—Decentralized Application of Art. 81.3 EC and WTO Law: Why and Why Not*, in EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION, STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUS-DIETER EHLERMANN 13 (Armin von Bogdandy et al. eds., 2002) [hereinafter EUROPEAN INTEGRATION] (concluding that the direct applicability of WTO law is undesirable “because of the total lack of mechanisms which provide for legal equality between competitors from different jurisdictions and which guarantee legal security”); Jacques H. J. Bourgeois, *The European Court of Justice and the WTO: Problems and Challenges*, in THE EU, THE WTO AND THE NAFTA, *supra* note 16, at 71-123 (exploring the question why WTO law raises specific problems and

of these rules, the relevant international organization debated the question of their legal status and decided not to make them binding. For example, the international rules governing accountants, set forth on the basis of “Additional Commitments” in Article XVIII of the GATS, are binding only when they are voluntarily inscribed in a Member’s schedule. Currently, the Working Party on Domestic Regulation is trying to extend this regime to other professions. At the end of this process, the “disciplines on domestic regulations” should become an annex to the GATS and thus assume a binding character.<sup>47</sup>

Still, it cannot be said that global standards will have no effect until they are incorporated into an international treaty. The example of the Disciplines for services, adopted in the context of the GATS, is illuminating. First, the standstill provision found in GATS Article VI, Paragraph 5, in fact applies to them. Even before the Disciplines become enforced, Member States that have assumed “specific commitments”<sup>48</sup> may not apply domestic standards that “nullify or impair [the Disciplines].”<sup>49</sup> Second, there is no need to incorporate the Dis-

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challenges for the European Court of Justice); JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 297-366 (2000) (examining the effect of treaties in domestic law in the United States and setting forth a policy analysis of the status of treaties in domestic legal systems).

47. See GATS pt. IV, art. XX, ¶ 3 (providing that “[s]chedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof”). There has been far-reaching discussion of developing GATS Disciplines on the domestic regulation of services. For an understanding of the issues involved, see the Papers Presented at the “*Workshop on Domestic Regulation*” organized by the WTO Working Party on Domestic Regulation (Mar. 29–30, 2004), at [http://www.wto.org/english/tratop\\_e/serv\\_e/workshop\\_march04\\_e/workshop\\_programme\\_march04\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/workshop_march04_e/workshop_programme_march04_e.htm) (papers on file with Law & Contemp. Probs.); WTO Working Party on Domestic Regulation, *Report on the Meeting held on 30 September 2003: Note by the Secretariat*, S/WPDR/M/23, Doc. No. 03-6313 (Nov. 27, 2003); WTO Working Party on Domestic Regulation, *Communication from the European Community and Its Member States: Proposal for Disciplines on Licensing Procedures*, S/WPDR/W/25, Doc. No. 03-3734 (July 10, 2003); WTO Working Party on Domestic Regulation, *Communication from Singapore: GATS Article VI:5 and its relation to the future Article VI:4 Disciplines*, JOB(03)/113 (June 11, 2003) (on file with Law & Contemp. Probs.); WTO Working Party on Domestic Regulation, *Communication from the European Communities and Their Member States: Applicability of the Disciplines on Domestic Regulation in the Accountancy Sector to Other Professional Services*, S/WPDR/W/5, Doc. No. 00-2053 (May 19, 2000); WTO Council for Trade in Services, *Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services: Note by the Secretariat*, S/C/W/96, Doc. No. 99-0769 (Mar. 1, 1999); WTO Council for Trade in Services, *Decision on Disciplines Relating to the Accountancy Sector: Adopted by the Council for Trade in Services on 14 December 1998*, S/L/63, Doc. No. 98-5102 (Dec. 15, 1998); WTO Working Party on Professional Services, *Report to the Council for Trade in Services on the Development of Disciplines on Domestic Regulation in the Accountancy Sector*, S/WPPS/4, Doc. No. 98-4965 (Dec. 10, 1998); European Commission, Directorate General I, *Note to the Member States: GATS Working Party on Professional Services Draft Disciplines on Domestic Regulation in the Accountancy Sector*, DGI/M/1/FLM D(98) (Jan. 22, 1998) (on file with Law & Contemp. Probs.).

48. MARKUS KRAJEWSKI, *NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES: THE LEGAL IMPACT OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) ON NATIONAL REGULATORY AUTONOMY* 45 (2003) (explaining that WTO members have market access commitments that prohibit them from “maintain[ing] certain specified restrictions of market access” and national treatment commitments that require them to “treat foreign services and service suppliers no less favourable than their own like services and suppliers” in “those service sectors which a WTO member specifically committed to these disciplines in its Schedule of Specific Commitments”).

49. See *id.* at 117-19 (discussing non-violation and impairment of specific commitments, and explaining that a Member that brings a non-violation nullification and impairment complaint must “estab-

ciplines into the treaty. Mutual recognition agreements have been created between developed countries for already internationalized professionals like architects, accountants, and engineers. These agreements are based on “common international standards” as set forth by Article VI, Paragraph 5, of the GATS.<sup>50</sup> Third, the doctrine of consistent interpretation must be applied: when domestic law lends itself to multiple interpretations, it ought to be interpreted so as to conform to international law.<sup>51</sup>

The decisions of international bodies have direct legal consequences, even before they are incorporated into international treaties.<sup>52</sup> Thus, global standards produce their effects in different and more complicated ways than national standards do. For example, international law techniques for enforcing decisions differ from domestic ones in providing for a retaliation mechanism that functions as an ultimate rule of the global legal system.<sup>53</sup> So although the WTO system borrows rules from other international systems (such as the Food and Agriculture Organization of the United Nations (FAO), World Health Organization (WHO), Codex Alimentarius, etc.), it also lends those rules muscle, so that they are effectively respected.

## VIII

### CONCLUSION

The parts of the global legal system examined here appear as a network of sectoral governments. These governments, however, are not separate, but rather reinforce each other mutually. They do not make up a structural unit, but they do become a functional one, thanks to mutual ties and the division of labor between standardization bodies and bodies charged with imposing standards.

In the global legal system one can see the use of many forms otherwise specific to states and supranational bodies like the EU: regulators, committees, harmonization, and consultation procedures. These forms rarely appear in the global legal order in the same way as in national or mature supranational sys-

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lish that a benefit it could have reasonably expected to accrue to it under a specific commitment of another member was nullified and impaired through the application of a measure”); *see also id.* at 151-53 (discussing the impact of the disciplines on domestic regulations found in GATS Article VI, Para. 5).

50. But only for a limited set of countries.

51. *See generally* Thomas Cottier, *A Theory of Direct Effect in Global Law*, in *EUROPEAN INTEGRATION*, *supra* note 46, at 99, 109-10 (discussing the doctrine of consistent interpretation). The doctrine of consistent interpretation is a principle that is applied by judges to treaties and common law. It is not clear why the domestic legal order, in the face of many possible interpretations, should not also conform to non binding international rules, especially when one considers that “WTO law is influenced by Anglo-American legislation which . . . has a tradition of explicit and detailed regulation. As a practical matter, these texts thus can often assist in interpreting broad and open textured language in domestic law.” *Id.*

52. As noted, non-binding standards often gain binding force through borrowing and enforcement by way of the WTO.

53. In the WTO, the offended state may, following the dispute resolution procedure set forth in Articles 21-23 of the DSU, take countermeasures in the form of tariffs so as to penalize the exports of the condemned country and obtain compensation for the losses incurred by the violation.

tems. Here the regulator is not unitary, as in the states, but split in two: one body sets the rule and another imposes it. Harmonization is encouraged, but not imposed from on high, as in the E.U. The consultation procedures are carried out by actors in a position of equality, while in domestic law, the state authority that hears the views of the “administered” before making its decision is superior to them.

Why do these different institutions not correspond to their national or European models? Perhaps because they are transformed by the different context.

[W]e will have occasion to stress the importance, when transposing concepts of administrative law to the international sphere, of evaluating with prudence and circumspection the extent to which they are fully applicable at a particular stage of development, with due regard to the contrast between the infancy of international organisation and the maturity of the modern State.<sup>54</sup>

It is not just that national and global administrative law are developed to a greater or lesser degree. There are also some important qualitative differences between the two.<sup>55</sup> First, national administrative laws rotate around a single pole—the state or the national government—even if in federal or regional states many authorities may establish primary rules. Global administrative law, by contrast, is multi-polar. It lacks a hierarchically superior power similar to the power of the central state, which prevails over the other powers in the domestic legal system. The global administrative law system is characterized by sectoral authorities, and sometimes just sectoral networks of national authorities. It is also for this reason that here it is better to speak of “governance” than “government” or “regimes.”

Second, the various authorities of the global legal system have developed differently than states have. A strong lawmaking power exists in both systems, and there are many legal prescriptions in the global legal system. But the executive power is weak at the global level, because (for various reasons) sectoral enforcement is carried out by, or delegated to, state executive powers or their offices. There are judicial authorities at the global (for example, the WTO) and the supranational (for example, the EU) levels, and their development is directly related to the influence of the global system over national legal systems.<sup>56</sup>

That executive powers in the global system are underdeveloped creates a third kind of difference between global and state administrative law: the former is characterized by an “indirect rule” that consists of national authorities carrying out the functions belonging in fact to the global system. This enables the global system—in a way similar to the EU—to be effective using just a modestly sized administration of its own. But it also creates—as in the EU—serious en-

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54. C. WILFRED JENKS, *THE PROPER LAW OF INTERNATIONAL ORGANISATIONS* XL (1962).

55. On global administrative law, see generally Eleanor D. Kinney, *The Emerging Field of International Administrative Law: Its Content and Potential*, 54 ADMIN. L. REV. 415 (2002).

56. This can be seen by comparing the E.U. with Mercosur, for example.

forcement problems. A modest administration means having limited tools to guarantee enforcement.

Finally, the global legal system is of a mixed or composite character, as it is made up of both a state and an “ultra-state” dimension. The latter, functioning as a kind of common law, not only requires national laws to conform to it, but also enables them to communicate with each other. This communication takes place in two ways: (1) through the circulation of capital, goods, and services (and, to a lesser degree, businesses and persons); and (2) by the state legal system’s opening up to recognize other legal orders. Both of these ways enable a choice of the most favorable law and may lead to regulatory competition. The communication between different legal systems, made possible by the consolidation of higher and common rules, does not, however, unfold in a regular, symmetrical way: there are important differences between sectors, goods, and objectives.

The above analysis leads to two final points. The first has to do with the distinction between domestic and international law. The second concerns the functions of these two kinds of law in relation to private parties.

International law has long been dominated by a dualistic conception of its separation from domestic law. The states, the only subjects of international law, functioned as a screen dividing the one kind of law from the other.<sup>57</sup> The examples considered in this article belie this conception. The power of state intermediation is in fact attenuated. The state itself, in acting, must respect the standards established at the international level.

The authority of domestic administrative law is imperative. It imposes itself on the public, issues orders, grants permission, and establishes obligations. From this comes the characterization of substantive administrative law as the point of equilibrium between state authority and individual liberty. The authority of international administrative law functions differently. It does not set limits upon individuals, but rather upon states. It is a higher law that imposes procedural obligations upon national authorities. Its function is the inverse of domestic administration. International administrative law serves to widen, rather than to narrow, the sphere of private liberty by limiting the action of the state.<sup>58</sup>

This reversal in the function of international administrative law, compared to its domestic counterpart, requires a reconsideration of the principles that ground the two systems, taking care not to apply them mechanically in extrane-

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57. On this distinction, see BATTINI, *supra* note 9, at 4–5, 10.

58. John H. Jackson has noted that “[t]he basic purpose of the General Agreement [on Tariffs and Trade] is to constrain governments from imposing or continuing a variety of measures which restrain or distort international trade.” JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS* 290 (3d ed., 1995). National administrative law also imposes limits on the public administration (for example, the duty to provide a hearing and judicial review). But these limits serve to constrain the executive power of the administration, which is its primary function.

ous contexts. Values and rules that have one meaning domestically assume another one internationally. It is enough to give two examples, concerning accountability and participation.

Accountability serves to protect individual liberties. The national administration is asked to respect the law (the principle of legality) because the law comes from the legislature. Citizens elect the legislature, and in so doing, consent to the limits imposed upon them by the public administration. The legislature and its laws thus protect citizens against the executive power, which limits their sphere of activity. At the international level, this conceptual order does not hold. Here, in fact, there is no executive power; the public authority functions to enrich the sphere of private liberty, and the procedural standards of international bodies are carried out against states in order to keep them at bay.

An analogous observation can be made for participation. This assumes a different significance in the international arena. In domestic law, it is private actors who participate, and this participation has two connected purposes: to ensure the cooperation of citizens in the decisionmaking process and to give them voice in order to protect them in their relations with the public power. In international administrative law, the situation is different. Here, it is the state that is generally called on to participate,<sup>59</sup> and it participates not as a defendant but as a vindicator of rights. Therefore, the international community must listen to the point of view of each state if it wants to maintain general collective control over states' actions. Finally, in international administrative law there is no higher authority that decides after the consultation, because the decision is remanded to bilateral or multilateral collective decisionmaking.<sup>60</sup>

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59. But, as noted above, private actors are playing a greater role.

60. This is part of the larger issue of democracy and law in global governance. See generally Alfred C. Aman, Jr., *Globalization, Democracy and the Need for a New Administrative Law*, 10 *IND. J. GLOBAL LEGAL STUD.* 125 (2003); Armin von Bogdandy, *Demokratie, Globalisierung, Zukunft des Völkerrechts – eine Bestandsaufnahme*, 63 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 853 (2002); J.H.H. Weiler, *THE RULE OF LAWYERS AND THE ETHOS OF DIPLOMATS, REFLECTIONS ON THE INTERNAL AND EXTERNAL LEGITIMACY OF WTO DISPUTE SETTLEMENT*, Harvard, Jean Monnet Working Paper No. 9/00, available at <http://www.jeanmonnet-program.org/papers/00/000901.html> (last visited Apr. 19, 2005) (on file with Law & Contemp. Probs.).