

Omnilateralism and Partial International Communities:
Contributions of the Emerging Global Administrative Law

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いう法の支配に役割を果たすためには、まだ課題が残っている。この点で、一事不再理の原則が ICTY 及び ICC と国内裁判所とは差別的に適用されることを明らかにしたが、国際的な裁判機関が国内裁判所よりも優れているという前提は当然のものと考えられるべきではない。例えば、大多数の国において被疑者の人権侵害など手続に瑕疵がある場合に救済手続が整備されているのに対して、国際的な刑事裁判機関ではそのような人権救済の配慮に欠けると言える。国際的な刑事裁判機関の場においても人権の保障と恣意的権力の抑制をいかに実現するか意識的に考える必要性がある。

【付記】 本稿は国際法学会春季大会（2004年5月9日）の報告に加筆・修正を加えたものである。

Omnilateralism and Partial International Communities : Contributions of the Emerging Global Administrative Law

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Omnilateralism is both promise and peril for international law, yet it is seldom analyzed. While the issues traversed in current debates on unilateralism and multilateralism are important, there is also a pressing need to face the challenges of omnilateralism and international community. This article examines some contributions the emerging global administrative law might make to achieving the promise, and mitigating the perils, of omnilateralism in transnational governance.

1) Murry and Ida Becker Professor of Law, Director, Institute for International Law and Justice, New York University Law School. This is a revised version of a paper presented at the Japanese Society of International Law meeting in Hiroshima, May 2004. The author thanks the participants at that meeting for their comments, and Saeko Kawashima and Chia Lehnardt for assistance with Japanese and German sources. The research was supported by the Filomen d'Agostino and Max E. Greenberg Research Fund at NYU Law School. The discussion of global administrative law here draws heavily on joint work with Richard B. Stewart, and with Nico Krisch and others, in the NYU Law School Institute for International Law and Justice's research project on global administrative law. A series of working papers and an extensive bibliography are available on the project website, reached via www.ijl.org. One set of papers from this project appears in *Law and Contemporary Problems*, vol. 68 (2005).

In discussing original acquisition in *Rechtslehre (The Science of Right)*, Immanuel Kant drew a useful three-fold distinction:²⁾

'any thing external is acquired by a certain free exercise of will that is either unilateral, as the act of a single will (*facto*), or bilateral [or multilateral], as the act of two [or several] wills (*pacto*), or omnilateral, as the act of all the wills of a community together (*lege*).'

Kant's discussion of original acquisition of property was not framed as a theory of community, nor was it part of his discussion of international relations in *Perpetual Peace* and other works. Nevertheless, this three-fold distinction may be adapted to shed light on some perennial problems relating to 'international community' as a legal idea.³⁾ For Kant, omnilateralism was made possible by the formation of a civil state. Pending the formation of the civil state, the obligations of individuals were not the same as they might be in a civil state, but each individual was obliged to act in ways that would not impair the eventual realization of the civil state. Departing from Kant to transpose this idea into the very different conditions of contemporary global governance, it is suggested that, while there is not and will not be an international community of general competence comparable to a civil state, there exist many partial international communities capable of operating omnilaterally within their special domains of competence. Global administrative law is concerned with the realization of the promise of these partial international communities, and with helping police their boundaries to avoid the perils of overreaching and delegitimation.

This paper argues in Part I that a body of global administrative law is under construction, and that this growing body of law is better analyzed as part of the new *jus gentium* rather than being analyzed simply under the traditional international law model of *jus inter gentes*. In Part II it is argued that the emerging global administrative law

2) Immanuel Kant, *Rechtslehre* (1796), translated as *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as The Science of Right* (transl. W. Hastie; Edinburgh: T. & T. Clark, 1887), quotation at p. 84 (italicizations and capitalization omitted.)

3) The term 'omnilateralism' seems to be little used in the international law literature. For recent works on international community, see Andreas Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2003), and the literature there cited. See also the contributions by Edward Kwakwa, Andreas Paulus, Martti Koskeniemi, Steven Ratner, and Volker Rittberger, in Michael Byers and Georg Nolte eds., *United States Hegemony and the Foundations of International Law* (2003).

may help build legitimate and useful *partial* international communities with omnilateral competence in specialist areas of global governance, and may help also to ensure that these partial communities do not overreach and claim omnilateral competences they do not have. Part II suggests that the roles global administrative law may play in building and delimiting partial international communities in specialist areas vary, depending whether the dominant dynamic in a particular area of governance is inter-state pluralism, inter-state solidarism, or transnational cosmopolitanism. The Conclusion briefly notes some normative objections to the idea of global administrative law, but suggests that, on balance, global administrative law could offer a way to better utilize the possibilities, and better minimize the hazards, of omnilateralism, the act of all the wills of a community together.

Part I. The Sources, Practice and Nature of Global Administrative Law

Global administrative law refers broadly to the mechanisms, principles, practices and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make.⁴⁾ The category of global administrative bodies includes intergovernmental institutions, informal inter-governmental networks, national governmental institutions when acting in distributed transnational administration, hybrid public-private bodies engaged in transnational administration, and (most contentiously) purely private bodies performing public roles in transnational administration.

This concept of global administrative law builds upon at least three ideas advanced in a flourishing literature in this field over the period from approximately 1860 until 1940. The first is the key insight that transnational governance might usefully be analyzed as administration, and that distinctive legal principles of administration might be applied to it, an idea developed particularly in the work of Lorenz von Stein.⁵⁾ Second is the

4) Benedict Kingsbury, Nico Krisch, and Richard Stewart, *The Emergence of Global Administrative Law*, *Law and Contemporary Problems* 68 (2005).

5) Lorenz von Stein, *Einige Bemerkungen über das internationale Verwaltungsrecht*, *Jahrbuch für*

bifurcated approach to definition that follows from this insight: it begins by defining international administration, then defines as international administrative law the law applicable to such administration.⁶⁾ Third is the idea that 'administration' includes the making of specific decisions and of general but subsidiary rules. In many national legal systems, the process of administration is distinguished sharply from the process of legislating, and rule-making is understood as part of legislation and therefore outside the scope of administrative law. However, the increasing importance of the subsidiary rule-making activities of national and transnational administrative bodies (bodies other than national legislatures and inter-state treaty-making bodies), the desirability of addressing these activities in rules on participation, transparency, review, and accountability, and the long experience of addressing such activities by administrative law methods in the US and other legal systems, now warrant the inclusion of these subsidiary rule-making activities in the purview of global administrative law.

As Professor Soji Yamamoto observed in a leading analysis of the structure of ideas in this field,⁷⁾ two enduring approaches to the law of transnational administration were charted by legal scholars in the late 19th and early 20th century. One focused on national administrative law, the other on a liberal individual-oriented conception of international society.

Works of German-influenced public lawyers were of particular importance in integrating transnational administration into a general (but mainly national) political and legal theory of public law and administration.⁸⁾ Representative of a group of scholars

\Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich 6 (1882), p. 395.

6) Paul Négulesco, *Principes du droit international administratif*, Recueil des Cours 51 (1935), p. 579.

This bifurcated approach is exemplified by the *Wörterbuch des Völkerrechts und der Diplomatie* (Karl Strupp, ed., vol. 1, 1924), with the entry by Strupp himself on *Internationale Verwaltungsgemeinschaften* (pp. 573-77) followed by Karl Neumeyer's entry on *Internationales Verwaltungsrecht: Völkerrechtliche Grundlagen* (pp. 577-81).

7) Soji Yamamoto, *Kokusai gyoseiho no sonritsu kiban* (The Positive Basis of International Administrative Law), *Kokusaiho Gaiko Zasshi* (The Journal of International Law and Diplomacy) 76: 5 (1969), pp. 1-66 (pp. 529-94 of continuous volume pagination).

8) Cf the discussions of the implications for international law of different German, French, and English traditions of public law, in Martti Koskenniemi, *The Gentle Civilizer* (2002). For valuable histories of German public law, see Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* (1988-), vols 1 and 2 of which are available in English translation: *Public Law in Germany, 1800-1914* (2001); and *A History of Public Law in Germany, 1914-1945* (2004). A

who focused on addressing transnational governance through the administrative law structures of the various states was Karl Neumeyer. He argued that international administrative law operated as a 'conflict of laws' arrangement to manage relations between these national systems. He recognized, however, that autonomous administrative entities other than states might also exist, and he applied the conflict of laws model to them also.⁹⁾ This remains an important idea. The growing network of arrangements for mutual recognition of national standards and of national conformity assessments for goods and services, with complex accommodations among different national and private bodies, can be understood as a modern instantiation of a conflict of laws approach.¹⁰⁾ Yet international law now goes further, increasingly requiring that national administrative law include particular principles and procedures that are not simply conflict of laws rules.¹¹⁾

Representative of another group of scholars, influenced by a commitment to the individual as moral subject and in some cases by French solidarism, was Georges Scelle.

contemporary German public law approach to international administration is applied in Christian Tietje, *Internationalisiertes Verwaltungshandeln* (2001).

9) Karl Neumeyer argued that international administrative law includes rules limiting the administrative activities of states and other autonomous entities vis-à-vis other such entities, and on the influence that the administration of one entity could exert on the administration of another. He saw international administrative law as part of international private law, and hence as part of the legal orders of states and other autonomously administered entities. For him, this established also its relationship with public international law. His approach is set out concisely in Karl Neumeyer, *Internationales Verwaltungsrecht: Völkerrechtliche Grundlagen*, in Karl Strupp ed., *Wörterbuch des Völkerrechts und der Diplomatie*, vol. 1 (1924), at p. 577. For more expansive treatment see Karl Neumeyer, *Internationales Verwaltungsrecht*, 4 vols. (1910-36); Otto Mayer, *Deutsches Verwaltungsrecht* (1896); and Donato Donati, *I trattati internazionali nel diritto costituzionale* (1906).

10) For an overview of mutual recognition and equivalency determinations, see Kalypso Nicolaidis and Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, *Law and Contemporary Problems* 68 (2005).

11) The WTO Appellate Body's formulation of criteria required for national administrative procedures where a member state seeks to rely on exceptions contained in Article XX of GATT will be discussed below. Other examples include the effects of the General Agreement on Trade in Services (GATS), of the WTO's Government Procurement Agreement, and of bilateral trade and investment treaties such as the United States-Chile Free Trade Agreement, June 6, 2003, *International Legal Materials* 42 (2003), p. 1026. See also Robert Howse and Elisabeth Tuerk, *The WTO Impact on Internal Regulations: A Case Study of the Canada-EC Asbestos Dispute*, in Grainne de Burca and Joanna Scott eds, *The EU and the WTO: Legal and Constitutional Issues* (2002), p. 283.

He focused on the possibilities of administrative law in regulating the work of state institutions as agents for international society, as well as regulating the administrative structures of international society that were produced by inter-state relations.¹²⁾ This group carried forward the ideas of 19th century liberal public lawyers such as Robert von Mohl on the integration of individuals and groups into an understanding of the reasons and obligations of states.¹³⁾

The present paper seeks to draw on ideas from both of these established approaches in proposing a concept of global administrative law. It attempts a different theoretical task from that undertaken by Professor Yamamoto, who sought:¹⁴⁾

'to clarify the autonomous and positive basis of international administrative law. Here we define the law of this kind as a legal norm inhering in the existing international communities, which realizes continuously *service public international* established by multilateral administrative treaties and influences variously the national administrations through the administrative actions of international institutions.'

The present paper does not seek to elucidate the autonomous and positive basis of this body of law, but instead seeks to integrate normative practices of an administrative law character from many diverse sites, and to assess the functional implications for partial international communities of this emerging set of principles. The concept of global administrative law that is presented here responds to rapidly changing patterns of transnational governance, and also to some changes in prevailing theories of states, markets, and administration, changes which are often lumped under the amorphous label 'globalization'.¹⁵⁾ This field of law is described as 'global' rather than 'international' to

12) Georges Scelle, *Théorie du gouvernement international*, *Annuaire de l'Institut international de droit public* (1935), pp. 41-112. The foundations of Scelle's approach are more fully sketched in the first two volumes of his *Précis de droit des gens* (1932 and 1934)—these include a sustained discussion of the double role of national governmental agencies as both national actors and administrators of international action. He had intended to write a third volume on international administrative law. See Scelle, *1 Précis de droit des gens* 69 (1932).

13) *Staatsrecht, Völkerrecht und Politik*, 1. Band, *Staatsrecht und Völkerrecht* (1860), pp. 579-636. chapter on 'Die Pflege der internationalen Gemeinschaft als Aufgabe des Völkerrechts' ('The maintenance of the international community as a function of public international law').

14) Soji Yamamoto, *The Positive Basis of International Administrative Law*, English summary, *Kokusaiho Gaiko Zasshi* 76: 5 (1969), p. 152 (p. 680 of continuous volume pagination).

15) For an inventory of recent developments in the legal arrangements of transnational or global

reflect the inclusion within it of normative practices, and normative sources, that are not encompassed within standard conceptions of 'international law'.

A. Transnational Governance and Limits to the Reach of National Administrative Law

Until recently, many scholars have continued to hold the view that implementation of international rules and decisions—and thus the real administration of international law—is generally performed by states. In this view, national administrative law rather than any international law of administration is generally controlling, except for *recondite* matters such as the rights of staff of international organizations who can appeal to bodies such as the United Nations Administrative Tribunal. But the evolution of transnational governance has made such a view increasingly difficult to sustain. Three examples illustrate the increasingly wide range of administrative practices which national administrative law does not adequately reach, but for which some administrative law is required:

1. Internationally-Created Property and Markets. The effort to mobilize markets to make international environmental protection more cost-effective is resulting in the direct intergovernmental creation of regulated property rights held by private persons. An example is the Clean Development Mechanism (CDM), set up under the Kyoto Protocol to the UN Framework Convention on Climate Change. Under the CDM Modalities and Procedures, the 10-member Executive Board has the tasks of deciding on registration of particular projects by private parties, and on the issuance of Certified Emission Reductions (CERs).¹⁶⁾ For example, a Dutch corporation undertaking a Greenhouse Gas emissions reduction project in Indonesia may find that the Executive Board refuses to accept the project, and thus does not issue internationally-tradable CERs. Such a decision has major financial consequences for the corporation and perhaps for Indonesia and the Netherlands, but review proceedings in national courts

¹⁵⁾ administration, see Stefano Battini, *Amministrazioni senza Stato: profili di diritto amministrativo internazionale* (2003).

¹⁶⁾ United Nations Framework Convention on Climate Change, Executive Board of the Clean Development Mechanism, *Clarifications To Facilitate The Implementation Of The Procedures For Review As Referred To In Paragraph 41 Of The CDM Modalities And Procedures* (EB16, Annex 5, adopted October 22, 2004), available at <http://cdm.unfccc.int/EB/Meetings/016/eb16repan5.pdf> [visited Feb 20, 2005].

are most unlikely to be effective because they cannot compel the Executive Board to issue CERs.¹⁷⁾

2. International Certification and Warnings. These actions by intergovernmental bodies can have tremendous economic consequences. For example, travel advisory warnings by the World Health Organization concerning SARS, in say Toronto, are highly relevant to insurance and liability issues for employers and conference organizers.¹⁸⁾ But these people have no formal input into the WHO's decision, nor any compensatory remedy if the WHO makes a negligent mistake.¹⁹⁾

3. International Standards. The International Standards Organization (ISO), which consists of one national standard-setting body from each participating country, has set over 13, 000 standards, including many with important environmental implications. This work is done mainly through 180 technical committees, 550 sub-committees, and 2000 working groups, which altogether involve over 40,000 people. While each country is in theory free to apply or not apply a particular ISO standard, the effect of WTO law is to insulate from challenge those national standards that are based on ISO standards, and to place considerable burdens of justification on countries that choose to set their own standards instead.²⁰⁾ In addition, corporations exporting to other markets or needing complementarity with other products often find it cheaper to pay the cost of changing their production to the ISO standard rather than hold out, even if

17) This is a hypothetical example, but compare the objections by several NGOs to the Dutch government's proposal to seek CDM registration of the Wayang Windu geothermal plant project in Java, Indonesia. The objectors argued that the plant was being built anyway, and was a 'business-as-usual' project that did not meet the requirement of 'additionality'. Letter from the Climate Action Network Europe, et al, to the CDM Executive Board, March 18, 2003, available at: <http://www.climnet.org/EUenergy/FGases/EB%20letter%2017%20march%202003.pdf> (visited February 20, 2005).

18) See generally David Fidler, *SARS: Governance and the Globalization of Disease* (New York: Palgrave, 2004.)

19) Karel Wellens, *Remedies Against International Organisations* (2002); August Reinisch, *International Organizations before National Courts* (2000).

20) ISO standards do not have the express recognition in GATT, GATS, or the Technical Barriers to Trade (TBT) Agreement that the standards of the Codex Alimentarius Commission and other bodies receive in the Sanitary and Phytosanitary Standards (SPS) Agreement. ISO standards are nevertheless important in TBT Agreement practice. Legal tests used in assessing national standards for consistency with international standards under Article 3 (1) of the SPS Agreement are evolving—see e.g. the decision of the WTO Appellate Body, *European Communities: Trade Description of Sardines*, WT/DS231/AB/R (Sep. 26, 2002).

their national government is willing to resist the ISO standard. Recent research shows that European standard-setting organizations are better adapted to influence the ISO process than are US ones, so more US than European corporations have to pay the costs of changing when a new ISO standard is produced.²¹⁾

These three examples of transnational governance illustrate the growing range of situations in which extra-national administrative law is clearly necessary. Even more prevalent are situations in which national administrative law may be applied, but is insufficient or may have disruptive effects because of its engagement with only part of the governance process. The difficulties confronting national courts engaged in administrative law review of decisions of their own governments relating to transnational or international governance are evident in cases relating to national implementation of UN Security Council Resolutions 1267 and 1373. These resolutions establish lists of persons suspected of financing terrorist activities, whose assets states are required to freeze. Individuals whose assets had been frozen litigated in Canadian courts²²⁾ and in the Court of First Instance of the European Union,²³⁾ confronting these courts with the dilemma of either acquiescing in possible unfairness to individuals, or of ordering governments to act inconsistently with a binding Security Council resolution. These cases were eventually resolved by the governments concerned obtaining Security Council delisting of the individuals. They also prompted modification of Security Council

21) Walter Mattli & Tim Büthe. Setting International Standards: Technological Rationality or Primacy of Power?, *World Politics* 56 (2003), p. 1.

22) The Liban Hussein case, concerning a Somali immigrant to Canada whose Barakaat North America money transfer business was initially suspected by US authorities of involvement in terrorist financing. After various proceedings in Canadian courts and the discontinuance of government proceedings against him, the applicant was eventually removed from the Security Council list. For discussion of this case, see David Dyzenhaus, *The Rule of (Administrative) Law in International Law, Law and Contemporary Problems* 68 (2005).

23) *Abdirisak Aden and Others v. Council and Commission (Case T-306/01)*, a case concerning Swedish nationals of Somali origin connected with Al Barakaat. After inconclusive preliminary rulings in the European Court of First Instance, the Swedish government eventually obtained agreement in the Security Council 1267 committee to deletion of Abdirisak Aden from the Security Council list. See UN Press Release SC/7490- of 27 August 2002. See also the challenge to EU Regulations relating to dealings with the Taliban and Afghanistan, in *Omar Mohammed Othman v. Council and Commission (Case T-318/01)*.

procedures to enable governments to trigger consideration of delisting more easily. But enduring concerns about such cases became an impediment to an effective system of Security Council listing, and highlighted the need for transnational listing arrangements to incorporate national review mechanisms open to affected individuals. In other areas of global governance, it is to be expected that national courts will increasingly be urged to undertake judicial review of the forum state's actions in participating in, or in implementing, a transnational rule or decision.²⁴⁾ In some circumstances, national courts may seek to undertake direct judicial review of proceedings in a transnational governance body over which they have jurisdiction (especially a non-immune private body such as an international sports federation), or indirect evaluation of the proceedings of a transnational governance body in cases between other parties in which one party relies on the rules or decisions of the transnational body. Actual or threatened scrutiny by national courts, or by other national review institutions, often has a beneficial effect in spurring the reform of the administrative procedures of transnational governance bodies, but such scrutiny may also have chilling or disruptive effects.²⁵⁾

B. Sources and Principles of Global Administrative Law

It is uncontroversial that the sources of global administrative law include applicable

24) For example, a US Court of Appeals held in *United States v. Decker*, 600 F. 2d 733 (9th Cir., 1979), that US fishing regulations issued pursuant to the International Pacific Salmon Fisheries Convention were subject to judicial review, in the special context of a criminal prosecution under the regulations. Richard Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, *Law and Contemporary Problems* 68 (2005), canvasses three possible approaches US administrative law might take in addressing US governmental administrative actions that relate to international agreements or international standards: these actions might be subject to the same requirements as purely domestic US governmental actions are (parity), to weaker requirements (parity minus), or to stronger requirements (parity plus). The question of which approach to take is still open in US law. Controversies about such US governmental administrative actions are proliferating, and are likely to be addressed by US courts with increasing frequency. These controversies often relate to food safety, environmental policies, and business competitiveness issues: for example, the dispute about US acceptance of the substantive equivalence to US meat inspection standards of Australia's Meat Safety Enhancement Program (MSEP), 64 Fed. Reg. 30, 299 (June 7, 1999).

25) On the impact of pressure from Italian courts, and from a select committee of the UK House of Lords, on procedural reforms in the European Commission's conduct of competition law proceedings, see Francesca Bignami, *Creating Rights in the Age of Global Governance: Mental Maps and Strategic Interests in Europe*, *Columbia Journal of European Law* 11 (2005).

treaties, some rules of customary international law, and authoritative decisions of intergovernmental organizations. It is argued here that the sources also include practices in many different fora that exert a normative pull in the operation of intergovernmental and transnational governance. But whose practices count for this purpose? And what general principles of practice are emerging in this agglomeration? Although scholarly research and contestation on the sources and the principles of global administrative law has not yet developed sufficiently to answer these questions with confidence, some functional sources and associated principles may be listed by way of preliminary indication.²⁶⁾

1. Principles drawn from national administrative law, such as.

When administrative agencies make general rules, they must:

- notify potentially interested persons and invite their comments;
- consider any comments received; and
- provide reasoned responses.

When agencies take decisions affecting particular persons, they must:

- provide an opportunity to comment and in some cases a hearing;
- issue decisions without undue delay;
- state the reasons on which decisions are based; and
- provide a structure for review or appeal.

2. Principles of the WTO agreements, such as requirements that a member state setting standards for product safety or plant health that might affect international trade must:

- ensure the standards are transparent;
- establish national enquiry points to provide information to other states and to private parties;
- base national standards on 'international standards', which may themselves

26) Useful studies include Giacinto Della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law*, *European Public Law* 9 (2003), p. 563; Sabino Cassese, *European Administrative Proceedings*, *Law & Contemporary Problems* 68 (2005); Sabino Cassese, *Global Standards for National Administrative Procedure*, *Law and Contemporary Problems* 68 (2005); Eduardo Chiti, *Administrative Proceedings Involving European Agencies*, *Law & Contemporary Problems* 68 (2005); Richard Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, *Law and Contemporary Problems* 68 (2005).

be set by private or mixed bodies such as the Codex Alimentarius or the International Standards Organization ;

- recognize other states' standards as equivalent where so proven, and accept products conforming to these equivalent standards ;
- follow a notice and comment procedure in setting standards ; and
- conform to requirements of reasonableness, proportionality, confidentiality, and fair process in certification and control proceedings for foreign products.

3. Principles in international environmental treaties and in the practice of agencies such as the World Bank, for matters such as :

- environmental impact assessment ;
- prior informed consent in hazardous waste shipment ;
- notification of dangers ; and
- access to environmental information.

More fragmentary but significant normative practice is already evident, and may be expect to develop further, in the practice of many other bodies, such as :

4. Intergovernmental agencies whose actions affect private parties directly.

Principles of review and accountability have developed somewhat, although often with much more remaining to be done, for example in :

- the work of the World Bank Inspection Panel;²⁷⁾
- UNHCR investigation of abuses of refugees by UNHCR staff in refugee camps in West Africa, where local courts were not in a position to ensure accountability (although the results of the UNHCR/UN process were limited) ;
- investigation of wrongful actions of UN peacekeeping forces in the Democratic Republic of the Congo and elsewhere, and efforts in the UN to develop best practice guidelines and stronger disciplinary and enforcement structures ; and
- increasing commitment to prior consultation with potentially affected communities before some projects are financed by international

27) For NGO perspectives on several cases considered by the Inspection Panel, see Dana Clark, Jonathan Fox, and Kay Treakle eds., *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel* (2003).

development banks.

5. Non-governmental agencies whose actions affect private parties directly.

Some non-governmental agencies have impressive administrative codes and review mechanisms. An example is the International Olympic Committee's drugs code under the supervision of the World Anti-Doping Agency, which includes procedural protections and a review structure to adjudicate complaints by athletes that they have been unfairly banned from competition, culminating in appeals to the International Court of Arbitration for Sport.²⁸⁾ But most NGOs providing certification services, for example certifying or refusing to certify 'fair trade' coffee or 'sustainably managed' timber, do not have robust participation procedures or accountability mechanisms. NGOs conducting field operations (for example, administering refugee camps under contract to states or to the UNHCR) are also very uneven in the adequacy of their participation, control, and accountability structures. Private military firms, which by 2004 had 30,000 contract personnel in Iraq alone, often operate in poorly regulated environments and without adequate accountability to those they affect. Large corporations increasingly adopt voluntary codes, in some cases with more-or-less independent monitoring institutions and internal compliance procedures, but frequently remain effectively unaccountable on many issues. Assessment and development of codes of practice, fair procedures, and review mechanisms in these and many other areas of non-governmental administration is an important area of practice and research.

C. Return of the *Jus Gentium*?

The complexity, and the rapid evolution, of patterns of transnational governance threatens to overwhelm the traditional *jus inter gentes* inter-state agreement model as the way of understanding international law in this area. Transnational governance now ranges from regulation-by-non-regulation (*laissez-faire*), through formal self-regulation (e.g. industry associations), hybrid private-private regulation (e.g. business-NGO partnerships in the Fair Labor Association), hybrid public-private regulation (e.g. in the Codex Alimentarius on food standards), mutual recognition of national laws and

28) Arbitral decisions of the ICAS are generally enforceable in national law, in similar fashion to international commercial arbitration awards; and national courts tend to accord a lot of deference to these specialist arbitral bodies provided the procedures they apply are fair.

accompanying horizontal accountability (as with some product design and professional qualifications standards), network governance by state officials (e.g. the Basel Committee of central bankers), inter-governmental organizations with significant but indirect powers (e.g. the power of a committee of the International Office of Epizootics (OIE) to certify a country free of foot-and-mouth disease), and inter-governmental organizations with direct governance powers (as with international administration in Kosovo). A legal commonality can be imposed on this diverse practice through the idea that the various mechanisms for accountability, for participation, and for the strengthening or eroding of legitimacy in these different governance structures, are evolving not simply in parallel but in increasingly interconnected ways that represent an emerging global administrative law.

This global administrative law is practiced at multiple sites, with some hierarchy of norms and authority, and some inter-site precedent and borrowing of principles, but considerable contextual variation. It is influenced by treaties and fundamental customary international law rules, but it goes much beyond these sources and sometimes moves away from them. Its shared sets of norms and practices are in some cases regarded as obligatory. But they are also meshed with other sources of obligation applicable to that site—sources which may include the national law of the place, the constituent instrument and regulations of the norm-applying institution, contracts establishing private rights, or norms of general international law.

If this is not strictly *jus inter gentes*, is it international law at all? It is proposed that this body of normative practice can be understood as international law, under a model not of *jus inter gentes*, but of *jus gentium*.²⁹⁾

29) *Jus gentium* can mean many different things. The reference here is to the conception found in Hugo Grotius, *De Jure Belli ac Pacis* (1625). See generally Benedict Kingsbury, *A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull*, *Quinnipiac Law Review* 17 (1997), at pp. 11-18. See also the discussion of Grotius's use of concepts such as *imperium*, *dominium civile*, and *dominium privatum*, and of the absence of the systematic modern distinction between public authority and private right, in Masaharu Yanagihara, *Imperium and Dominion*, in Yasuaki Onuma (ed.), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (1993), at pp. 169-72. Several different proposals to integrate a wider body of normative practice than that subsumed in traditional *jus inter gentes* analysis have been made—see e.g. Philip Jessup, *Transnational Law* (1956). The theoretical grounding, and the theoretical implications, of such proposals were not always fully developed. It is proposed in separate papers to present a detailed account of the theoretical underpinnings of the approach proposed here.

Confronting a comparable puzzle of how to address practice that did not fit standard categories, Robert von Mohl's approach early in the modern development of law on transnational administration was to propose a set of principles, not formally derived or traced to specific sources, but simply described as 'philosophical law'.³⁰⁾ Such an imprecise theoretical structure is no longer sufficient. Some modern scholars have sought to revive natural law approaches, applicable to all by virtue of common reason or common humanity. The *jus gentium* model as proposed here, however, focuses on normative elements inherent in law itself, supplemented and extended by practice and dialogue between sites.

What are the costs of ceasing to confine international law to a *jus inter gentes* model? Normative arguments for seeking to analyze global administrative law within the terms of an orthodox sources-based account of international law—a *jus inter gentes* model—are strong. Adherence to a positivist sources-based conception of international law may be the best way to maintain legal predictability and to sustain rule of law values in international relations.³¹⁾ It may be preferable to retain a unified view of an international legal system than to countenance the deformatization and the mosaic pattern that a *jus gentium* approach may imply. In accordance with such a view, an attempt might be made to enlarge the rubric of 'general principles of law' in the ICJ Statute so as to accommodate the principles of global administrative law. Such a project faces two practical obstacles that, while not insuperable, will not easily be overcome. First, the sources of global administrative law are more diverse, its content much fuller, and its scope more comprehensive, than the propositions the ICJ has hitherto endorsed in its very limited jurisprudence of 'general principles of law.' Second, the status of 'general principles' would imply that the principles of global administrative law all enjoy the hierarchical status of international law vis-à-vis other normative systems, such as national law. Practice is a long way from this at present. Principles are applied, but often without a strong sense of hierarchical obligation or even of formal sources. Although the arguments to confine the concept of international law to the *jus inter gentes* have

30) Staatsrecht, Völkerrecht und Politik, 1. Band (1860), esp. pp. 593-99.

31) This argument is explored in Benedict Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law,' in Michael Stolleis and Masaharu Yanagihara eds., *East Asian and European Perspectives on International Law* (2003), pp. 139-77.

many attractions, and the *jus inter gentes* model may be renovated in the future to catch up with the rapidly changing practice of governance, on balance it seems desirable to extend the concept of international law, if possible, so as to encompass a presently-operable model that can accommodate many of the most important patterns of governance that actually exist.

This *jus gentium* that is growing so quickly in response to globalization does not for the most part consist of norms on substantive issues. There is too much controversy about key values, too many different approaches among nations and interest groups, for a community embodying the wills of all really to decide on substantive views and bind the dissenters. Substantive norms are limited mainly to narrow fields in which a partial international community exists, or to groupings like the European Union. In the absence of agreement on substance, the new *jus gentium* is primarily procedural.

The WTO Appellate Body's decisions in the *Shrimp-Turtle* case illustrate this *jus gentium* in operation. In the first decision (October 1998), the Appellate Body held that shrimp from India and several other states had been improperly excluded from US markets. The administrative procedures followed by the US, in applying its turtle-protecting legislation, constituted 'arbitrary and unjustifiable discrimination between Members', and hence the US was precluded from defending its turtle-protecting measures under the GATT Article XX exceptions. The Appellate Body pointed out that the US procedure for certifying the shrimp industries of particular states as meeting turtle-protecting standards provided:³²⁾

- no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it...
- no formal written, reasoned decision, whether of acceptance or rejection...
- [no notification of such decisions, and]
- no procedure for review of, or appeal from, a denial.'

In light of proceedings leading to this adverse decision,³³⁾ the US amended its administrative

32) United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Appellate Body, 12 Oct 1998, (1999) 38 ILLM 121, para 180.

33) US Department of State, Notice of Proposed Revisions to Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 14, 481 (March 25, 1999). This document includes the State Department's response to the Appellate Body's above-quoted comments: '[T]he proposed revisions to the'

procedures, and the measures were held WTO-compliant in the second Appellate Body ruling.³⁴⁾ Three points about this case are of importance for present purposes:

1. The administrative principles articulated by the Appellate Body are only to a limited extent written in WTO treaties. The Appellate Body borrowed these administrative principles from a combination of national administrative law (especially US law), European Union law, and many different treaties.
2. The effect of this decision is to press WTO member states to amend their national administrative law to conform to international law requirements, providing procedural rights both to foreign states and to affected private actors in the market.

guidelines institute a broad range of procedural changes in the manner in which the Department of State will make certification decisions under Section 609. The intention is to create a more transparent and predictable process for reviewing foreign programs and for making decisions on certifications and other related matters. The proposed revisions ensure that the governments of harvesting nations will be notified on a timely basis of all pending and final decisions and are provided a meaningful opportunity to be heard and to present any additional information relevant to the certification decision. The governments of harvesting nations that are not granted a certification shall receive a full explanation of the reasons that the certification was denied. Steps that the government must take to receive a certification in the future shall be clearly identified....' For the version of the guidelines brought into operation, see Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36, 946 (July 8, 1999). These guidelines had largely been formulated in a 1998 version, issued before the WTO Appellate Body report. In a brief to the US Supreme Court arguing (successfully) in support of a Court of Appeals decision upholding these guidelines against challenges by environmental NGOs, the U.S. Department of Justice asserted: "Petitioners claim... that the court of appeals' decision and State Department regulations improperly subordinate domestic law to international pressures. That is incorrect. In particular, the State Department did not... reach its interpretation of Section 609 (b) (1) based on pressure resulting from the decision of the World Trade Organization (WTO) Appellate Body. The State Department's determination that Section 609 (b) (1)'s embargo applies only to shrimp caught with certain technologies (61 Fed. Reg. at 17, 342) was first issued before any international challenge was filed... the 1998 Guidelines were not issued in anticipation of the WTO Appellate Body's report, but rather were issued after the Federal Circuit vacated an earlier Court of International Trade ruling setting aside the State Department's 1996 Guidelines." *Turtle Island Restoration Network v. Evans*, Brief For The Federal Respondents In Opposition, Supreme Court of the United States No. 02-700, March 2003. While the U.S. was explaining in the international proceedings in the WTO how the concerns of the Appellate Body had been carefully met, in the national adjudication it emphasized the national legislation and internal State Department interpretations and policies as the sources for action.

34) WTO Appellate Body Report: United States-Import Prohibition Of Certain Shrimp and Shrimp Products-Recourse to Article 21.5 of the DSU by Malaysia, AB-2001-4, WT/DS58/AB/RW, Adopted by Dispute Settlement Body, 21 November 2001.

3. The Appellate Body tried in its first decision to avoid deciding the trade-environment values conflict on substantive grounds, and instead shifted the focus to procedural fairness. This technique was partly an acknowledgement of value pluralism, and partly an effort to bolster the WTO's own legitimacy among various influential constituencies whose substantive interests conflict.

Part II. Partial International Communities and Roles of Global Administrative Law under Conditions of Pluralism, Solidarism, or Cosmopolitanism

The rising global demands for what Kant calls omnilateral action by a community—action going beyond unilateralism and bilateralism or multilateralism—come at a time when there is *no general 'international community'* in the strong sense of a collectivity capable of acting across the gamut of major policy issues, with its decisions accepted as legitimate and authoritative expressions by the dissenters and the losers—that is, a community unifying the wills of all.³⁵⁾ Instead, there is a growing *proliferation of partial international communities*. The members of these communities accept that on a special topic, and within specific limits, the partial community can act for the wills of them all. This multiplicity of partial communities can play a valuable role in governance. But it also involves dangers and problems, including the risks of:

- overreaching, by trying to do more than the members have accepted, or trying to act in ways that affect the interests of non-members who may not have been consulted and may have no ability to call the community to account; and
- underachieving, because important governance needs cannot be met by communities whose membership or competence is too narrow or who lack

35) Some consider that the United Nations may potentially express and catalyze such a community. See e.g. the discussion in Hauke Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (Jeffrey Flynn transl. forthcoming 2005). But, as Habermas put it: 'the political culture of a world society lacks the common ethical-political dimension that would be necessary for a corresponding global community—and its identity formation. Jürgen Habermas, *The Postnational Constellation and the Future of Democracy*, in Habermas, *The Postnational Constellation: Political Essays* (Max Pensky transl., 2001), at pp. 108-9.

wider legitimacy.

Global administrative law is potentially a resource, to overcome some problems associated with omnilateralism in these partial 'international communities', and to help further to build these strands of governance and knit them together. Determining how valuable a resource it may be requires further conceptual analysis, empirical research, and normative debate among scholars and practitioners in different parts of the world. Among the many conceptual issues requiring further study are several touching on the degree to which global administrative law should be concerned with substantive rather than simply procedural questions: the proper sources of power and the jurisdictional limits on particular bodies; the degree to which review mechanisms should address the substantive rationality and even the merits of decisions, rather than simply addressing procedural correctness; the obligations of administrative bodies in relation to the general legal system rather than simply in relation to legal instruments specifically placed within their jurisdiction; and the connections between global administrative law and the law concerning responsibility of states and of international organizations, including connections relating to procedural participation and to the imposition and administration of remedies. The myriad issues requiring empirical research include investigation of the application of global administrative law in relation to criminal tribunals—for example, studies of the International Criminal Court and other comparable tribunals as regulatory bodies rather than simply as producers of judicial decisions—and investigation of the roles of global administrative law in relation to security issues, intelligence, and other areas of high politics, in which national tribunals often show deference, but in which transnational governance or jurisdictional holes may already be used as a means to circumvent such national controls as do exist. Normative debates must address questions of who wins and who loses from the development of global administrative law—this development has thus far been dominated by practice and scholarship in the OECD states, particularly North Atlantic states, but other practices and ideas are beginning to find greater voice.³⁶⁾

36) Antony Anghie et al. eds., *The Third World and International Order: Law, Politics, and Globalization* (2003); B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, *European Journal of International Law* 15 (2004), pp. 1-38; Anne Orford, *The Gift of Formalism*, *European Journal of International Law* 15 (2004), pp. 179-96.

As analysis of the roles played by global administrative law is refined, specification of the meaning of 'partial international communities' will eventually be required. This will require a choice, or perhaps a blending, between an empirical conception of community which depends upon density of interactions within networks,³⁷⁾ a normative approach which seeks to promote community where (and only where) preconditions such as commonality of values or a sense of shared fate exist,³⁸⁾ and an institutional approach which correlates communities with existing institutions. Notwithstanding its normative problems, an institutional approach to the specification of partial international communities has many advantages for the purposes of global administrative law. It is difficult to apply administrative law approaches outside highly institutionalized settings, although these settings do not need to be analogues of the national models in which there is a strong institutional differentiation between the general rulemakers (the legislature), the administrative agencies, and independent review mechanisms such as courts. Even in national law, administrative law principles require much adaptation to apply to informal network governance. In transnational networks and other arrangements with deliberately low levels of institutionalization, administrative law faces great challenges. In practice, rising demands for participation, transparency and accountability often result in increasing the formality or at least the scrutability of the institutions, thereby making them more amenable to administrative law control.³⁹⁾ One of the hazards of an approach which predicates the existence of a partial international community on formal institutionalization is that it may generate pressures or incentives toward formalization, and even toward isomorphism, which destroy the informality or idiosyncratic forms that are seen by many participants as attributes of their communities.

Whereas studies by administrative lawyers tend to begin with the well-theorized

37) See e.g. Karl Deutsch, *Political Community at the International Level: Problems of Definition and Measurement* (1954); Karl Deutsch et al., *Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience* (1957).

38) See e.g. Melissa Williams, *Citizenship as Identity, Citizenship as Shared Fate, and the Functions of Multicultural Education*, in Kevin McDonough and Walter Feinberg eds., *Education and Citizenship in Liberal-Democratic Societies: Teaching for Cosmopolitan Values and Collective Identities* (2003), p. 207.

39) For rich materials on comparable issues within the EU, see e.g. Renaud Dehousse, *Regulation by Network in the European Community: The Role of European Agencies*, *Journal of European Public Policy* 4 (1997), p. 246; and Giandomenico Majone and Antonio La Spina, *Lo Stato regolatore* (2000).

understanding of the functions of national administrative law, and then consider how these functions might be achieved in transnational governance, it is necessary to complement those studies by beginning with the standpoint of international law and politics, and considering what functions may be played by the emerging global administrative law under different conditions of international politics. The English School of International Relations theory provides one heuristic for distinguishing among different views of international politics, and hence for beginning the process of categorizing the diverse situations in which partial international communities operate.⁴⁰⁾ Employing English School categories, it is suggested that partial international communities act in very different ways depending whether the legal and political dynamics of international governance on a particular issue are predominantly: inter-state pluralism; inter-state solidarism; or transnational cosmopolitanism. (These are not simply objective descriptions of the state of affairs: they are characterizations that reflect the basic orientations of the participants and of those who happen to be writing about the issues.) The roles that may be played by global administrative law vary with these categories.

A. Inter-State Pluralism

Traditional international law, with its characteristic concept of opposability,⁴¹⁾ is pluralistic. For example, Japan's argument that resolutions of the International Whaling Commission (IWC) defining restrictions on scientific research whaling are not in themselves opposable to Japan, is an argument that international law can not resolve the impasse on whaling unless there is some underlying agreement in a treaty or other legally effective action.⁴²⁾ Inter-state pluralism faces challenges, as in the IWC, but it

40) For explanation of these English School categories as used here, see e.g. Kai Alderson and Andrew Hurrell eds., *Hedley Bull on International Society* (2000); Andrew Hurrell, *International Law and the Making and Unmaking of Boundaries*, in Allen Buchanan and Margaret Moore eds., *States, Nations, and Borders* (2003), p. 275; and Benedict Kingsbury, *People and Boundaries: An 'Internationalized Public Law' Approach*, in *States, Nations, and Borders*, p. 298.

41) Soji Yamamoto, *Ippoteki Kokunaisochi no Kokusaiho-keisei-kino* (The Function of Unilateral Domestic Measures in International Lawmaking), *Jochi Hogaku Ronshu* (Sophia Law Review) 33 (1991), pp. 47-86; Shinya Murase, *Unilateral Measures and the Concept of Opposability in International Law*, *Thesaurus Acroasium* 28 (1999), pp. 397-454.

42) For background on Japanese government positions on these issues, see Atsuko Kanehara. ↗

continues to be the preponderant mode in many areas of international law. The contribution of global administrative law to pluralistic areas of law is primarily at the level of institutions. Where joint management is required, as with whales, or where gains could be captured by inter-state cooperation, global administrative law can play useful roles. It can help ensure that full information is available, that all interests are heard, that scientific committees and advisory bodies give reasons for decisions, that states adversely affected by a particular decision have opportunities to seek review. One important administrative device for balancing pluralism with market interdependence is mutual recognition of different national regulatory standards meeting agreed criteria. An effective 'partial international community' can be very useful where the international collective action problem is not simply one of co-ordination (where an agreement is virtually self-enforcing), but is one of collaboration (in which individual actors have incentives to defect from an established set of norms, but can be dissuaded from doing so by sanctions or the operation of social norms and expectations). In such collective action cases, a 'partial international community', in which members have confidence because of fair procedures, can be a useful heuristic in which to embed the agreed decision.

B. Inter-State Solidarity

In a deeper solidarist conception of international legal order, the 'international community' is an inter-state community committed to a far-reaching set of globally accepted values. Almost all agree that international law does now encompass rules in subject areas in which truly-universal omnilateralism is possible because of consensus on core values, as in norms against genocide. But consensus is seldom attainable on strong institutions which may in practice be essential to the speedy operationalization of these norms. Thus Judge Guillaume's critique of universal jurisdiction in national courts for crimes against humanity, that this would 'encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined "international community"'.⁴³⁾ In the absence of strong institutions with agreed decision powers,

⁴³⁾ Japanese Practices Concerning the Regulation of Whaling, Japanese Annual of International Law 46 (2003), pp. 127-48.

⁴³⁾ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International

international governance is increasingly accomplished by informal networks. The idea of some Habermasians⁴⁴⁾ that a 'public' can be constituted by any group participating in a common discourse seems actually to operate in subject areas of international law in which expertise is so specialized, and the shared identity of these specialists is so strong transnationally, that the specialists come to think of themselves as 'the international community' acting omnilaterally for their technocratic purposes.⁴⁵⁾ These technocratic 'publics' function successfully so long as the technocrats can avoid wider politics or being called to account by outside critics. The Organization for Economic Cooperation and Development (OECD) Mutual Acceptance of Data system for cross-recognition of laboratory test results for chemicals works in this way—they face the politically volatile issue of animal rights and animal welfare in product testing, but many animal welfare NGOs support the OECD process because it cuts down needless repetition of tests in different countries.⁴⁶⁾ However, these networks are always at risk of overreaching, or of challenges to their legitimacy.

In practice, the solidarist approach is often extended beyond true universal agreement, to subject areas in which non-compliance by a minority with norms favored by a majority imposes costs (externalities) on the majority that are too great to permit the minority position to continue. 'Majority' here sometimes means a numerical majority. Other times it means the holders of the majority of power. In either case the 'majority'

↘Court of Justice, 14 February 2002, Separate Opinion of President Guillaume, para 15.

44) Cf debates on the argument for a multiplicity of publics made in Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in Craig Calhoun ed., *Habermas and the Public Sphere* (1992), pp. 109-43.

45) This formation of technocratic communities is not, of course, what critical theorists hope might be achieved in efforts to transform weak publics, which have communicative power but no decisive administrative power, into strong publics whose public deliberations are coupled quite tightly with legally effective decisions. For a statement of a more hopeful and critical position, see e.g. Hauke Brunkhorst, *Globalising Democracy Without a State: Weak Public, Strong Public*, *Global Constitutionalism*, Millennium 31 (2002), pp. 675-90.

46) See the OECD's 1981 Decision on the Mutual Acceptance of Data (MAD) in the Assessment of Chemicals [C (81)30 (Final)], and the associated Test Guidelines and Principles of Good Laboratory Practice (GLP); OECD 1989 Decision-Recommendation on Compliance with Good Laboratory Practice [C (89)87 (Final)]; and OECD 1997 Decision on the Adherence of Non-Member Countries to the Council Acts related to the Mutual Acceptance of Data in the Assessment of Chemicals [C (97)114/Final]. These are discussed in James Salzman's paper on the OECD, *Law and Contemporary Problems* 68 (2005).

may try to act through international institutions and frame its demand in omnilateral terms, provided the distribution of power makes this possible. Such purported omnilateralism may reduce the external and internal cost of 'coercing' or 'buying off' the minority. The 'multilateralism' of the EU and like-minded states is sometimes framed as the voice of 'the international community' for this reason, e.g. in relation to the Kyoto Protocol or the Landmines Convention. Some arguments for the existence of a particular rule of customary international law have a similar quality when the proponents, echoing Grotius, base themselves on a survey of the practice and views not of 'all' states but of the 'better' states.⁴⁷⁾ Arguments for special privileges for a community of democratic states (for example, a privilege to have weapons of mass destruction prohibited to other states) may also have this character.

Deciding whether a particular issue is better addressed through the lens of pluralism or solidarism involves very hard analysis. Each has normative justifications, each has costs and benefits. Global administrative law is not expected to resolve a basic values conflict, for example the question whether killing whales is or is not a legitimate activity. But it may help with procedures for more manageable questions, such as whether an Antarctic Whale Sanctuary or an ecosystem approach is better having regard to the criteria, reasons, and interests involved. In helping with procedures it may make the outcome more legitimate and more widely accepted.

Put more conceptually, global administrative law can contribute in helping to control the uncertain borders, where an effective institution that is a partial international community is tempted to extend its competence, or is struggling with defining its approach to issues that are partly within its competence and partly outside. For example, on some narrow trade issues, the WTO probably is a partial community—in certain areas the Appellate Body does seem to unite the wills of all states, including even the losers in these decisions.⁴⁸⁾ But problems arise where it purports to *extend* its reach

47) Hugo Grotius, *De Jure Belli ac Pacis* (1646 edn), I. 1. xii, who argues for a focus on the practice not necessarily of all nations, but of those nations 'more advanced, in civilization' or 'in a sound condition.'

48) On the importance of the expansive ability of member states to initiate or intervene in WTO adjudicative proceedings, by comparison with more limited approaches to standing and intervention in the ICJ, see Yuji Iwasawa, *WTO Dispute Settlement as Judicial Supervision*, *Journal of International Economic Law* 5 (2002), pp. 287-305.

to non-state interests who are not adequately represented, or to a minority of small but specially affected states who cannot block an adverse ruling imposing an interpretation they never consented to.⁴⁹⁾ In the Shrimp-Turtle cases, the Appellate Body tried to use administrative law to help with these problems. The Appellate Body recognized that structures protecting the participation of affected interests, including third-party participation, could increase support for, and the reach of, the process. The implication of this holding is that a better developed body of global administrative law might offer a way forward in the vexed trade-environment debate, and in 'trade-and...' debates more generally. Whether taking this route would lead to significant differences in substantive outcomes is an open question requiring further investigation.

C. Transnational Cosmopolitanism

The third and most far-reaching of the three categories of issues and approaches are those which are not dominated by states, but are in some way cosmopolitan. These involve issues which are not susceptible to adequate treatment by the decisions of states alone—that is, issues for what Habermas calls the post-national constellation— including issues in which the involvement of individuals and groups goes beyond any national identity and interests, where they perhaps feel part of a transnational public.⁵⁰⁾

Global markets are one form of cosmopolitanism. They create a demand for forms of community other than state and local community, in order to enhance participation and accountability, and hence increase the legitimacy of the legal structures of market governance that already exist or are rapidly emerging. Globalization has generated considerable wealth, but has corresponded with increased inequality in many societies, reduced or static social welfare provision and labour protection as states compete with each other to reduce costs, and higher exposure of people to job loss and destabilizing volatility. Without a base in social bargains, no set of substantive norms on globalization reflecting the wills of all can be forthcoming.⁵¹⁾ But this lack of support is troubling to

49) See e.g. Joanne Scott, *International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO*, 15 EJIL 307 (2004).

50) For work on the political theory of transnational citizenship, see e.g. Michael Waller and Andrew Linklater eds., *Political Loyalty and the Nation-State* (2003).

51) John Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, in David Held and Mathias Koenig-Archibugi eds., *Taming Globalization: Frontiers of Governance* (2003), p. 93.

global corporations, and to some leading corporations in developing countries, whose future profits are threatened by sick or under-educated workforces, consumer boycotts, and risks of state re-regulation following social protests. An example is the rapidly growing privatization of formerly state-run urban water supplies. The main foreign investors in this sector around the world (a handful of British and French companies) have increasingly tried to establish community service offices, consumer disputes tribunals, and local stakeholder partnerships, to reduce social protest and thus increase willingness of consumers to pay charges.⁵²⁾ That is, domestically they have been using administrative law techniques to widen participation and accountability, in order to make their own positions more legitimate and durable. But transnationally, the interests of consumers and local communities are not yet well represented: for example, the ICSID arbitral tribunal in the ongoing *Aguas del Tunari v. Bolivia* case under the Netherlands-Bolivia Bilateral Investment Treaty refused to accept amicus briefs or any direct involvement of NGOs and people from the city of Cochibamba where the water services privatization, riots, and subsequent renationalization had occurred.⁵³⁾ The water companies involved in this case (including Bechtel from the US), who seem to have objected to NGO and public involvement in the proceedings, are not the main global water companies. It might be argued that the main global water companies, as repeat players, would be better off with an operational global administrative law that generates and involves a partial global community, in order to buttress rather than undermine the legitimacy of international arbitral settlements in this sector. This analysis is speculative, but it indicates the need for further research on the potential implications of different configurations of global administrative law for corporate strategies and even for

52) Bronwen Morgan, *Social Protest against Privatization of Water*, in Marie-Claire Cordonier Segger and Christopher Weeramantry eds., *Sustainable Development Law: Principles, Practices and Prospects* (2004).

53) *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3. See letter of January 29, 2003 from David Caron, President of the Tribunal, to Martin Wagner, Earthjustice International Program, at http://www.law.berkeley.edu/faculty/ddcaron/Documents/ICSID%20Arbitrations/ARB-02-3_NGO_Petition_ICSID_Response_2003.pdf (visited Feb 18, 2005). A group of Argentine civil society organizations filed a comparable petition with the International Centre for the Settlement of Investment Disputes (ICSID) seeking to intervene in another ICSID water services arbitration relating to water supply in the greater Buenos Aires region: *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19.

the definition of corporate objectives.

Conclusion

International governance lacks a democratic community capable of resolving core distributional and values conflicts.⁵⁴⁾ It often lacks a highly institutionalized structure. Global administrative law thus lacks crucial foundations on which national administrative law is built in strong states.⁵⁵⁾ Global administrative law must perform first-order functions—helping to make community, not simply helping an existing community to operate its administration. This may well be asking too much. The effort may result merely in adding legitimacy and longevity to unjust distributions and ill-functioning institutions. But these limitations are unavoidable in the world of the possible rather than the ideal. It is suggested that, on balance, global administrative law may potentially provide a valuable way forward in helping meet some of the justified demands for international community and overcoming some of the severe problems currently associated with omnilateralism.

54) See further Ruth Grant and Robert Keohane, *Accountability and Abuses of Power in World Politics*, *American Political Science Review* (forthcoming, 2005), available as IILJ Working Paper 2004/7, www.iilj.org.

55) Cf the discussion of the normative goals and preconditions for national administrative law in Eberhard Schmidt-Aßmann, *Das Allgemeine Verwaltungsrecht als Ordnungsidee* (2d ed., 2004).