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The Emergence of Global Administrative Law

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The Emergence of Global Administrative Law

Benedict Kingsbury^{*}, *Nico Krisch*^{**} & *Richard B. Stewart*^{***}

Abstract

This article, a distillation of findings from the NYU Global Administrative Law Research Project, considers the emergence and the potential further development of administrative law mechanisms to promote greater accountability in decision-making in the rapidly proliferating variety of global regulatory mechanisms. These include formal treaty-based international organizations (such as the WTO, the Security Council, the World Bank, the Climate Change regime, etc), informal intergovernmental networks of domestic regulatory officials (such as the Basel Committee of national bank regulators), domestic authorities implementing global regulatory law, and hybrid public-private and purely private transnational regulatory regimes. The subjects of such global regulatory systems include individuals, firms and other economic actors, states, and occasionally NGOs. These systems and subjects, we argue, are part of a single, if multifaceted global administrative space distinct from the domains of international law and domestic administrative law.

We define global administrative law as consisting of the principles, procedures, and review mechanisms that are emerging to govern decision-making and regulatory rulemaking by these bodies. We identify a number of structural mechanisms that have arisen to develop and apply global administrative law. They include, at the domestic level, courts and legislatures reviewing domestic implementation of global standards and national officials' participation in global administrative decisions. They also include mechanisms developed at the global level for governance of international and transnational regulatory bodies as well as states' implementation of global law. We examine the sources and content of the various doctrinal principles and requirements that have been developed and enforced by these mechanisms (such as transparency, participation, reasoned decision-making, review, and substantive standards such as proportionality).

We next consider the normative foundations of global administrative law, including intra-regime control, the protection of the rights of individuals and of economic actors or of the rights of states, and securing democracy with respect to global regulation. We examine these normative foundations in relation to three conceptions of international ordering -- pluralist, solidarist, and cosmopolitan -- and in relation to North-South differences. We then consider different strategies for constructing global administrative law, including bottom-up approaches that seek to extend domestic administrative law to global regulatory decisions and top-down approaches that develop new administrative law mechanisms at the global level. We also examine the positive political theory of global administrative law. We conclude that the field of global administrative law is an important emerging phenomenon, distinct from international law and from domestic administrative law, which deserves systematic study and development.

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Table of Contents

I. Introduction: The Unnoticed Rise of Global Administrative Law	4
II. The Structure of the Global Administrative Space.....	7
A. Five Types of Global Administration	8
B. The Subjects of Global Administration: States, Individuals, Corporations, NGOs, Other Collectivities	10
C. A Distinct Global Administrative Space?	12
III. The Emerging Global Administrative Law.....	14
A. The Scope of Global Administrative Law	14
B. Sources of Global Administrative Law	16
C. Institutional Mechanisms for the Application and Development of Global Administrative Law.....	18
1. Domestic Institutions as Checks on Global Administration	18
2. Internal Mechanisms Adopted by Global Institutions for Participation and Accountability	20
3. Global Disciplines on Distributed Administration.....	22
D. Doctrinal Features of Global Administrative Law: Emerging Principles and Requirements	24
IV. The Normative Bases of Global Administrative Law.....	28
A. Different Patterns of International Ordering and Different Normative Conceptions of Global Administrative Law	29
B. Intra-Regime Accountability	30
C. Protecting Rights	31
D. Implementing Democracy	34
E. Who is Shaping Global Administrative Law?.....	37
V. Strategies and Theories of Institutional Design	39
A. Strategies and Pathways for the Development of Global Administrative Law.....	39
VI. The Positive Political Theory of Global Administrative Law	46
VII. Conclusion: Future Directions in Global Administrative Law.....	47

I. Introduction: The Unnoticed Rise of Global Administrative Law

Emerging patterns of global governance are being shaped by a little-noticed but important and growing body of global administrative law. This body of law is not at present unified – indeed, it is not yet an organized field of scholarship or of practice. The Global Administrative Law Research Project at New York University School of Law¹ is an effort to systematize studies in diverse national, transnational and international settings that relate to the administrative law of global governance. Using ideas developed in the first phases of this project, in this article we begin the task of identifying, amongst these assorted practices, some patterns of commonality and connection that are sufficiently deep and far-reaching as to constitute, we believe, an embryonic field of global administrative law. We point to some factors encouraging the development of common approaches and to mechanisms of learning, borrowing, and cross-reference that are contributing to a degree of integration in this field. We also note some major constraints and enduring reasons for non-convergence. We begin to assess the normative case for and against promotion of a unified field of global administrative law, and for and against some specific positions within it. This paper draws upon publications by project contributors and others in this area,² and seeks to carry this collective enterprise forward, but the results remain preliminary.

Underlying the emergence of global administrative law is the vast increase in various forms of transgovernmental regulation and administration to address the consequences of globalized interdependency in such fields as security, the conditions on development and financial assistance to developing countries, environmental protection, banking and other forms of financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labor standards, and cross-border movements of populations including refugees. Increasingly, these consequences can not be effectively addressed by separate national regulatory and administrative measures. As a result, various transnational systems of regulation or regulatory cooperation have been established through international treaties and more informal intergovernmental networks of cooperation, shifting many regulatory decisions from the national to the global level. Further, much of the detail and implementation of such regulation is determined by transnational administrative bodies –

¹ Research Project on Global Administrative Law, NYU School of Law Institute for International Law and Justice in conjunction with the Center on Environmental and Land Use Law. Working papers and project documents appear on the project website, reached via www.iilj.org. This website also includes links to project partners, and to other research projects around the world in related areas. We thank for ideas and for specific comments the many faculty, visiting fellows, and students participating in this project, as well as participants at the Japan Society of International Law Hiroshima Conference, at an NYU Law School faculty workshop, and at an NYU-Oxford Global Law Institute project workshop at Merton College, Oxford University, where ideas in this draft were presented.

international organizations or more informal groups of officials that are administrative in function and are not directly subject to control by national governments or domestic legal systems or, in the case of treaty-based regimes, the states party to the treaty. These regulatory decisions may be implemented directly against private parties by the global regime or, more commonly, through implementing measures at the national level.

This situation has created an accountability deficit with respect to the growing exercise of transnational regulatory power, which has begun to stimulate two different types of responses: the attempted extension of domestic administrative law to intergovernmental regulatory decisions that affect a nation; and the development of new mechanisms of administrative law at the global level to address decisions and rules made within the intergovernmental regimes. A somewhat different but related issue arises where regulatory decisions by a domestic authority adversely impact other states, or designated categories of individuals or organizations, and are challenged as contrary to that government's obligations under an international regime to which it is a party. Here one response has been the development by intergovernmental regimes of administrative law standards and mechanisms to which national administrations must conform in order to assure their compliance and accountability with respect to the international regime. In order to boost their legitimacy and effectiveness, a number of hybrid public-private and purely private standard setting and other regulatory bodies have also begun to adopt administrative law decision making procedures and practices.

These practices lead us to define global administrative law as comprising the structures, procedures and normative standards for regulatory decision-making including transparency, participation, and review, and the rule-governed mechanisms for implementing these standards, that are applicable to formal intergovernmental regulatory bodies; to informal intergovernmental regulatory networks, to regulatory decisions of national governments where these are part of or constrained by an international intergovernmental regime; and to hybrid public-private or private transnational bodies. In proposing such a definition, we are also proposing that much of global governance can be understood and analyzed as administrative action: rule-making, administrative adjudication between competing interests, and other forms of regulatory and administrative decision and management. Domestic law presumes a shared sense of what constitutes administrative action, even though it may be defined primarily in the negative -- as state acts that are not legislative or judicial -- and even though the boundaries between these categories are blurred at the margins.³ Beyond the domain of the state, no such agreed functional differentiation prevails; the institutional

² An extensive bibliography will soon be available on the project website.

³ On the German example, *cf.* HARTMUT MAURER, *ALLGEMEINES VERWALTUNGSRECHT* (14th ed., 2002).

landscape is much more variegated than in domestic settings. Yet many of the international institutions and regimes that engage in “global governance” perform functions that most national public lawyers would regard as having a genuinely administrative character: they operate below the level of highly publicized diplomatic conferences and treaty-making, but in fact regulate and manage vast sectors of economic and social life through specific decisions and rule-making. Conceptually it may be possible in international governance to distinguish administrative action from legislation in the form of treaties, and from adjudication in the form of episodic dispute settlement between states or other disputing parties. As in the domestic setting, administrative action at the global level has both legislative and adjudicatory elements. It includes rule-making, not in the form of treaties negotiated by states but standards and other norms of general applicability adopted by subsidiary bodies. Some forms of global administrative decision-making are closely connected with dispute settlement, not least because quasi-judicial organs such as the WTO Dispute Settlement Body also perform important regulatory oversight functions with respect to the implementation of the global trade regime. It also includes a broad range of informal decisions in the course of overseeing and implementing international regulatory regimes. As a matter of provisional delineation, we may identify global administrative action as all rule-making and adjudications or other decisions of particular matters that are neither treaty-making nor simple dispute settlement between disputing parties.⁴

In this article, we seek to develop an approach to global administrative action by delineating and elaborating what we believe is a nascent field of global administrative law. We survey major issues and challenges in this nascent field, and begin to sketch elements of a research agenda for its further development. We organize the paper by exploring, seriatim, five kinds of questions that are central to current practice and further work: *structural* (what are the basic structural patterns of global administration, and how is variance among them shaping these developments?), *methodological and empirical* (the scope and sources of global administrative law and the mechanisms of accountability and doctrinal principles that are currently in place or emerging in practice), *normative* (how can we justify and defend a call for such mechanisms?), *institutional design issues* (how should such mechanisms be designed in order to ensure accountability without unduly compromising efficacy?), and *positive political theory* questions (how can we explain the emergence and design of such mechanisms, and which factors may be conducive to their success?).

⁴ See Richard B. Stewart, *U.S. Administrative Law: A Resource for Global Administrative Law?*, available at http://www.law.nyu.edu/kingsburyb/spring04/globalization/stewart_012604.pdf.

II. The Structure of the Global Administrative Space

The conceptualization of global administrative law presumes the existence of global or transnational administration. We argue that enough global or transnational administration exists that it is now possible to identify a multifaceted ‘global administrative space’, a concept to which we will return shortly, populated by several distinct types of regulatory administrative institutions and various types of entities that are the subjects of regulation, including not only states but also individuals, firms, and NGOs. But this view is certainly contested. Many international lawyers still adhere to the classical view in which administration is confined to the sphere of the state or exceptional interstate entities with a high level of integration, such as the European Union. In this view, which is complemented by the almost exclusively domestic focus of administrative lawyers, international action might coordinate and assist domestic administration, but given the lack of international executive power and capacity, does not constitute administrative action itself. This view, however, is contradicted by the rapid growth of international and transnational regulatory regimes with administrative components and functions. The densest regulatory regimes have arisen in the sphere of economic regulation: the OECD, the administration and the committees of the WTO, the committees of the G-7/G-8, structures of antitrust cooperation,⁵ and financial regulation performed by, among others, the IMF, the Basle Committee⁶ and the OECD’s Financial Action Task Force. Environmental regulation is partly the work of non-environmental administrative bodies such as the World Bank, and the OECD, and the WTO, but increasingly far-reaching regulatory structures are being established in specialized regimes such as the prospective emissions trading scheme and the Clean Development Mechanism in the Kyoto Protocol. Administrative action is visible in international security, including in the work of the UN Security Council and its committees, and in related fields such as nuclear energy regulation (the IAEA) or the supervision mechanism of the Chemical Weapons Convention. Reflection on these illustrations immediately indicates that the extraordinarily varied landscape of global administration results not simply from the highly varied regulatory subject areas and correlative functional differentiations among institutions, but also from the multi-layered character of the administration of global governance. In this section we seek to provide some conceptual tools for organizing these diverse phenomena by identifying the different structures and subjects of global administration and positing the notion of a global administrative space.

⁵ On antitrust see Eleanor Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT’L L. 911 (2003).

⁶ See David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT’L L.J. 281 (1998). See also David Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, IILJ Working Paper 2004/6.

A. Five Types of Global Administration

Five main types of globalized administrative regulation are distinguishable: administration by formal international organizations; administration based on collective action by transnational networks of governmental officials; distributed administration conducted by national regulators under treaty regimes, mutual recognition arrangements or cooperative standards; administration by hybrid intergovernmental-private arrangements; and administration by private institutions with regulatory functions. In practice, many of these layers overlap or combine, but we propose this array of ideal types to facilitate further inquiry.

In *international administration*, formal inter-governmental organizations established by treaty or executive agreement are the main administrative actors. A central example is the UN Security Council and its committees, which adopt subsidiary legislation, take binding decisions related to particular countries (mostly in the form of sanctions), and even act directly upon individuals through targeted sanctions and the associated listing of persons deemed to be responsible for threats to international peace. Similarly, the United Nations High Commissioner for Refugees has assumed numerous regulatory and other administrative tasks, such as conducting refugee status determinations and administering refugee camps in many countries. Other examples include the World Health Organization assessing global health risks and issuing warnings, the Financial Action Task Force assessing policies against money-laundering and sanctioning violations by specific states of the standards it has adopted, the compliance mechanisms of the Montreal Protocol under which subsidiary bodies of an administrative character deal with non-compliance by Parties to the Protocol, and the World Bank setting standards for 'good governance' for specific developing countries as a condition for financial aid.

Transnational network administration, by contrast, is characterized by the absence of a central decision-making structure and the dominance of informal cooperation among state regulators. This horizontal form of administration can, but need not, take place in a treaty framework. For example, the Basle Committee brings together the heads of various central banks outside of any treaty structure in an informal network, and results in non-binding but highly effective coordination of policies on matters such as capital adequacy requirements for banks. As a very different example, under specific circumstances WTO law requires the mutual recognition of regulatory rules and decisions among member states and thus establishes a highly legalized form of horizontal cooperation, through which regulatory acts of one state automatically gain validity in another.⁷

⁷ See Sidney Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, 54 ADMIN. L. REV. 435 (2002).

In *distributed administration*, domestic regulatory agencies act as part of the global administrative space: they take decisions on issues of concern to other jurisdictions or globally. An example is in the exercise of extraterritorial regulatory jurisdiction, in which one state seeks to regulate activity primarily occurring elsewhere. In some circumstances, such regulation is subject to substantive limitations and even procedural requirements established internationally, as has become evident in the rulings of the WTO Dispute Settlement Body in the Shrimp/Turtle case. But even domestic administration without immediate extraterritorial effects may be part of the global administrative space, especially where it is charged with the implementation of the rules of an international regime. Thus, for example, national environmental regulators concerned with biodiversity conservation or greenhouse gas emissions are today part of a global administration as well as part of a purely national one: they are responsible for implementing international environmental law for the achievement of common objectives, and their decisions are thus of concern to governments (and publics) in other states as well as to the international environmental regime that they are implementing.

A fourth type of global administration is *hybrid intergovernmental-private administration*. Bodies that combine private and governmental actors take many different forms, and are increasingly significant. An example is the Codex Alimentarius Commission, which adopts standards on food safety through a decisional process that includes participation by non-governmental actors as well as government representatives, and produces standards that gain a quasi-mandatory effect via the SPS Agreement under WTO law. Another example is the Internet address protocol regulatory body, the Internet Corporation for Assigned Names and Numbers (ICANN), was established as a non-governmental body, but government representatives have become increasingly involved and considerable powers have been allocated to ICANN's Governmental Advisory Committee since the 2002 reforms.

Fifth and finally, many regulatory functions are carried out by *private* bodies.⁸ For example, the private International Standardization Organization (ISO) has adopted over 13,000 standards that harmonize product and process rules around the world. On a smaller scale, NGOs have come to develop standards and certification mechanisms for internationally traded products, for example fair-trade coffee and sustainably harvested timber. Business organizations have set up rules and regulatory regimes in numerous industries, ranging from the Society for Worldwide Interstate Financial Telecommunications (SWIFT) system for letters of credit, to Fair Labor Association standards for sports apparel production. In national law, such private bodies are typically treated as clubs rather than administrators,

⁸ See generally THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002).

unless they exercise public power by explicit delegation. But in the global sphere, due to the lack of international public institutions, they often have greater power and importance. Their acts may not be much different in kind from many non-binding intergovernmental public norms, and may often be more effective. We cautiously suggest that the margins of the field of global administration may be extended to the activities of some of these non-governmental bodies. The ISO provides a good example, as not only do its decisions have major economic impacts, but they are also used in regulatory decisions by treaty-based authorities such as the WTO. An example of a private regulatory body that is less connected with state or inter-state action is the World Anti-Doping Agency, an organization connected with the International Olympic Committee, which applies careful due process standards in dealing with athletes suspected of using banned substances, culminating in the review system of the private International Court of Arbitration for Sport. We believe it is desirable to study such bodies as part of global administration, and to trace similarities as well as differences in mechanisms of accountability developed for public and private bodies.

B. The Subjects of Global Administration: States, Individuals, Corporations, NGOs, Other Collectivities

Breaking down the domestic/international dichotomy may have further repercussions in the way we think about the *subjects* of global administration. Traditionally understood, the subjects of international law are states. Correlatively, global governance is the governance of states' behavior with respect to other states. Increasingly however, regulatory programs agreed to at the international level by states are effectuated through measures taken by governments at the domestic level that regulate private conduct. Coordinated regulation of private conduct is often the very purpose of the international scheme in fields such as regulation of pollution or financial practices. In classical theory the domestic regulatory measures are the implementation by states of their international obligations. Private actors and the effects on them are formally addressed only in the implementation stage, and that is solely a domestic matter. But the real addressees of such global regulatory regimes are now increasingly the same as in domestic law: namely, individuals (as both moral agents and economic and social actors),⁹ and collective entities in regulated spheres including corporations and in some cases NGOs.

This characterization is most powerful where international bodies make decisions that have direct legal consequences for individuals or firms without any intervening role for national government action. Examples include certification of CDM projects by the Kyoto

Protocol Clean Development Mechanism, UNCHR determinations of individuals' refugee status, and certification of NGOs by UN agencies as representatives authorized to participate in their procedures. The notion that private actors are the subjects of global regulation is also evident in much of the regulatory governance accomplished through networks, where the national regulatory officials perform both an international-level role, deciding collectively with counterparts on regulatory requirements applicable to private firms (e.g. commercial banks), and a domestic-level role in implementing and enforcing those same norms with respect to the regulated firms within their jurisdiction. This is even more evident in the case of private governance arrangements such as ISO, where most standards are addressed not to states, but to private firms.

In other situations the aim of the international regime is to achieve desired changes in private conduct, by imposing regulatory obligations on states and their supervising the manner in which states regulate the private actors subject to their jurisdiction. These arrangements are similar to models of multi-level governance that have been developed to understand the European Union and the “European administrative space”.¹⁰ Examples include the Convention on International Trade in Endangered Species (CITES), the Montreal Protocol on ozone layer depletion, the Basel Convention on hazardous wastes, and the International Labour Organization (ILO). The international administrative bodies responsible for promoting and supervising implementation often play a major regulatory role, outside and contrary to the classical theory. In many instances, the administrative bodies in question have increasingly assumed a mixed public-private governance structure in which firms and NGOs participate along with representatives of states; this approach is most fully developed in the tripartite governance structure of the ILO based on national delegations representing governments, employers, and labor.

In yet other areas, states are the primary subjects of global regulation, which is undertaken to protect or benefit distinct groups of individuals, private market actors, or social interests. Example include the “good governance” and rule of law standards or the environmental standards imposed by agencies such as the World Bank as conditions for financial assistance to developing countries (including requirements for environmental impact assessments for development projects).

Finally, in some areas of regulatory administration, such as international security, the classical view that global governance is directed at the behavior of governments towards other governments, rather than at private actors, still has great force, although even here the

⁹ See Stewart, *supra* note 4; and the focus on individuals as the ultimate subjects of legal regulation in the work of liberal international lawyers in the 1920s, such as J.L. Brierly.

growing privatization of international security activities, including for example the growing use of private contractors to carry out traditional state functions in situations such as the military occupation of Iraq is beginning to erode the classical view.¹¹

These various examples suggest that differences in the subjects of global administrative regimes – in some cases individuals or firms, in others both states and market actors, in others states with distinct groups of individuals, market actors, NGOs, or social interests as the beneficiaries, and in still others states alone - may depend on differences in the subject area, the objectives of regulation and the functional characteristics of the regulatory problem. This is a significant issue for future research.

C. A Distinct Global Administrative Space?

This brief survey of structures and examples indicates that important regulatory functions are no longer exclusively domestic in character and have become to a very significant degree transnational and global. Especially in the area of rule-making, genuinely international action as well as action by national regulators in networks of global coordination supplements and often determines domestic action, penetrating deeply into domestic regulatory programs and decisions. Further, in more and more cases global decisions directly affect individuals or firms, as for example in UN Security Council decisions on sanctions and anti-terrorism measures, in UNHCR activities, in the Clean Development Mechanism under the Kyoto Protocol, or in the quasi-automatic incorporation in domestic law of decisions by the Financial Action Task Force.

Yet this does not conclusively answer the question of whether a distinct global administrative space is inevitable, or whether it is still possible and indeed preferable to maintain the classical dichotomy between an administrative space in national polities and inter-state coordination in global governance. It is true that the global and the domestic remain politically and operationally separate for many purposes. Nonetheless, the two realms are already closely intertwined in many areas of regulation and administration. The rise of regulatory programs at the global level and their penetration of domestic counterparts means that the decisions of domestic administrators are increasingly constrained by substantive and

¹⁰ See Martin Shapiro, *The Institutionalization of European Administrative Space*, in THE INSTITUTIONALIZATION OF EUROPE (Alec Stone Sweet et al. eds., 2001); and DER EUROPÄISCHE VERWALTUNGSRAUM (Heinrich Siedentopf ed., 2004).

¹¹ See James Cockayne, *The Governance of International Security* (unpublished manuscript, on file with the authors); Anna Leander, *Conditional Legitimacy, Reinterpreted Monopolies: Globalisation and the Evolving State Monopoly on Legitimate Violence*, COPRI Working Paper 2002/10, at <http://www.copri.dk/publications/Wp/WP%202002/10-2002.pdf>; Elke Krahmman, *Private Firms and the New Security Governance*, 5 CONFLICT, SECURITY AND DEVELOPMENT (forthcoming 2005); Peter W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 521 (2004).

procedural norms established at the global level; the formal need for domestic implementation then does no longer provide for meaningful independence of the domestic from the international realm. At the same time, the global administrative bodies making those decisions enjoy too much de facto independence and discretion to be regarded as mere agents of states. Weighing the significance and trajectory of this interconnectedness is a matter of appreciation, on which views differ. In our view, international lawyers can no longer credibly argue that there are no real democracy or legitimacy deficits in global administrative governance because global regulatory bodies answer to states, and the governments of those states answer to their voters and courts. National administrative lawyers can no longer insist that adequate accountability for global regulatory governance can always be achieved through the application of domestic administrative law requirements to domestic governmental regulatory decisions. We argue that current circumstances call for recognition of a global administrative space, distinct from the space of inter-state relations governed by international law and the domestic regulatory space governed by domestic administrative law, although encompassing elements of each.

This multifaceted administrative space incorporates the five different types of international or transnational administrative bodies described above, which interact in complex ways; the various subjects of global regulation that we have identified, including States, individuals, firms, and in some instances NGOs; and groups or representatives of both domestic and global social and economic interests who are affected by or otherwise have a stake in global regulatory governance. This space is characterized by distinct features and dynamics that call for independent positive and normative study and theorizing. These efforts must necessarily build on, but at the same time transcend, both traditional international law, and domestic administrative law. The relative autonomy and distinct character of this global administrative space, and its increasingly powerful decision-making bodies, lead us to argue for the recognition and further development of new and distinct principles and mechanisms of accountability through a global administrative law that is beginning to govern this space and the decisions of the various international and transnational administrative bodies that populate it. The practical result of such developments is that lawyers representing governments, firms, individuals, and NGOs concerned with a growing proportion of regulatory decisions will have to become familiar with the institutions and activities within the global administrative space and participate in the building of a global administrative law to help govern that space.

Our espousal of the notion of a global administrative space is the product of observation, but it inevitably has potential political and other normative implications. On the one hand, casting global governance in administrative terms might lead to its stabilization and

legitimation in ways that privilege current powerholders and reinforce the dominance of Northern and Western concepts of law and sound governance. On the other hand, it might also create a platform for critique. As the extent of global administrative government becomes obvious (and framing global regulation in traditional terms of administration regulation exposes its character and extent more clearly than the use of vague terms such as governance),¹² the more resistance and reform may find points of focus. Thus, from the perspective of smaller developing countries, global regulatory institutions including the WTO, IMF, World Bank, and UN Security Council may already appear to be endeavoring to “administer” them at the bidding of the industrialized countries, which are generally subject to far less intrusive external regulation. Confronting these issues in administrative terms may highlight the need to devise strategies for remedying unfairness associated with such inequalities.

III. The Emerging Global Administrative Law

In this section, we first provide a provisional definition of the scope of global administrative law. We then discuss the methodological sources for building this law. Finally, we outline the different institutional mechanisms through which global administrative law is currently being applied and developed, and the doctrinal principles and tools that are emerging to govern the global administrative space identified in the previous section.

A. The Scope of Global Administrative Law

Understanding global governance as administration allows us to recast many standard concerns about the legitimacy of international institutions in a more specific and focused way. It provides useful critical distance on general – and often overly broad¹³ – claims about democratic deficits in these institutions, and shifts attention to the equivalents in the global context of the several accountability mechanisms for administrative decision-making, including administrative law, that in domestic systems operate alongside, although not independently from, classical democratic procedures such as elections and parliamentary and presidential control. This inquiry usefully highlights the extent to which mechanisms of procedural participation and review that are taken for granted in domestic administrative action are lacking on the global level. At the same time it invites development of institutional

¹² See Michel Foucault, *Governmentality*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 87 (Graham Burchell et al. eds., 1991); Christian Joerges, *The Turn to Transnational Governance and its Legitimacy Problems: The Examples of Standardization and Food Safety*, available at <http://www.law.nyu.edu/kingsburyb/spring04/globalization>.

procedures, principles, and remedies with objectives short of building a full-fledged (and at present illusory) global democracy.

In this light, global administrative law includes, as one component, the longstanding field of “international administrative law”, a term used mainly to denote the rules, procedures and institutions through which international organizations deal with employment disputes and other internal matters. It could also include, as another component, “international administrative law” in the less commonly used sense of the body of national rules that govern the effects in that state’s legal order of foreign state’s administrative acts.¹⁴ But our conception of global administrative law is much broader. It effectively covers all the rules and procedures that help ensure the accountability of global administration, and it focuses in particular on administrative structures, on transparency, on participatory elements in the administrative procedure, and on mechanisms of review.

The project of global administrative law is, in its constructive aspect, to identify, design, and help build transnational and global structures to fulfill functions at least somewhat comparable to those administrative law fulfills domestically, and to reform domestic administrative law to enable it to deal with the increasingly global character of regulation. Definitions of administrative law in continental Europe are usually taxonomical rather than normative, treating the subject as covering all rules binding on administrative actors, except for those of a constitutional nature.¹⁵ If seen in this same taxonomical way, the field of global administrative law could encompass the totality of global rules governing administrative action by the five different types of administrative bodies set forth above. This would include the substantive law that defines the powers and limits of regulators – for example, human rights treaties and case law defining the conditions under which state organs can interfere with individual liberties.¹⁶ However, conceiving the field in such broad terms would likely generate an unmanageable research agenda at this early stage in its development, and would obfuscate the normative commitments entailed in work on global administrative law, commitments which must be explicitly formulated in order to be tested and contested. The focus of the field of global administrative law is not, therefore, the

¹³ See Andrew Moravcsik, *Is there a ‘Democratic Deficit’ in World Politics? A Framework for Analysis*, 39 GOVERNMENT AND OPPOSITION 336 (2004).

¹⁴ See Paul Négulesco, *Principes du droit international administratif*, 51 RECUEIL DES COURS 579 (1935).

¹⁵ See generally Maurer, *supra* note 3. The study of domestic administrative law is illuminating also in building understanding of the possible normative implications and the political function of this body of law. Historically, the political function has by no means been the same in different political systems: in the 19th century, administrative law came about in different ways and for different reasons in democratic systems such as the United Kingdom or the United States than in monarchical settings, as were prevalent in much of continental Europe. These origins and their different attitudes towards the executive branch still have repercussions today, and more inquiry into the diverse traditions of administrative law is needed in order to get a richer sense of their different legacies.

¹⁶ For a similarly broad approach, see CHRISTIAN TIETJE, *INTERNATIONALISIERTES VERWALTUNGSHANDELN* (2001).

specific content of substantive rules, but rather the operation of existing or possible principles, procedural rules and reviewing and other mechanisms relating to accountability, transparency, participation, and assurance of legality in global governance.

B. Sources of Global Administrative Law

The formal sources of global administrative law include the classical sources of public international law – treaties, custom, and general principles – but it is unlikely that these sources are sufficient to account for the origins and authority of the normative practice already existing in the field. Only rarely do treaties directly address issues of administrative law. Insofar as they spell out principles of administrative procedure, they are usually addressed to and binding on states, not international institutions or intergovernmental government networks. Customary international law is still generally understood as being formed primarily by state action, and thus for the time being does not fully incorporate relevant practice of non-state actors, such as global administrative bodies. Finally, the use of ‘general principles of law’ as a source of international law has been limited, mainly to internal needs of international institutions or to norms on which there exists a high degree of worldwide convergence. The acceptance of general principles in the practice of formal international law has been low, and is unlikely quickly to be extended to the diverse and fragmented contexts of global administration.

It may be that a better account of the legal sources of existing normative practice in global administration could be grounded in a revived version of *ius gentium* that could encompass norms emerging among a wide variety of actors and in very diverse settings, rather than any kind of *ius inter gentes* built upon agreements among states. This approach would mirror to some extent law-making procedures in other fields of law beyond the state, such as the *lex mercatoria*, based on the practices of commercial actors worldwide.¹⁷ Yet the foundations for possible development of a *ius gentium* of a global administration are still uncertain. If it is proposed to reflect not a natural law approach but one founded upon practice, uncertainty remains about which practices would actually count, what legal status the resulting norms would have, and whom the resulting norms would bind. The fact that general principles of law require such a high convergence of legal systems reflects a strong commitment to inclusiveness, and to preventing impositions by one group of states on the rest. The *ius gentium*, however attractive a category it may be for global administrative law, will have to face this challenge too.

¹⁷ See, e.g., GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997).

Yet even among the traditional sources of public international law, there may be room for development of norms relevant to global administrative law. In the case of treaty law, it might be possible to adapt the approach developed by the European Court of Human Rights in dealing with the problem that the European Convention on Human Rights does not formally bind intergovernmental organizations or the European Union. The court requires states parties which are member states of such institutions, when conferring powers on them, to ensure a level of protection within these institutions equivalent to that provided by the ECHR. Applying such an approach more broadly would supply at least a basic set of standards for global administrative bodies, but it would not solve problems of how to transplant or adapt rich sets of domestic norms to transnational and inter-state institutions, much less hybrid private-public or purely private bodies.

A final problem of sources concerns the status of domestic law. Domestic law is a controlling source of law for domestic administration, and thus for national administrative agencies, implementing global law and/or acting as a part of global administrative structures. Domestic courts may also provide a forum for redress when global administrative bodies act directly upon private parties: through these means, domestic law can help ensure accountability of global administration; and a subtle architecture of accountability centered on domestic mechanisms might be a means to reflect the varying normative commitments of each national society and thus accommodate diversity.¹⁸ Yet domestic mechanisms established and operated according to local predilections may not meet the functional needs for a degree of global commonality in principles and mechanisms, and for responsiveness to the particular features of specific global administrative regimes. Conflicts between domestic law, particularly constitutional law, and these global needs may be difficult to resolve except by pragmatic temporary accommodations. Not enough practice yet exists to determine how the regular and robust application of domestic law to national participation in transnational or global administrative bodies or directly to decisions of such bodies would affect the functioning of these bodies.¹⁹ If all their participants were subject to diverse national requirements, procedural as well as substantive, the bodies might have great difficulty operationalizing the commonality necessary for effective regulation and management.

¹⁸ See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

¹⁹ See Stewart, *supra* note 4. On the application of US environmental impact assessment procedures to US ratification of NAFTA and the WTO Uruguay Round agreements, see Matthew Porterfield, *Public Citizen v. United States Trade Representative: The (Con)Fusion of APA Standing and the Merits Under NEPA*, 19 HARV. ENVTL. L. REV. 157 (1995); and James Salzman, *Seattle's Legacy and Environmental Reviews of Trade Agreements*, 31 ENVTL. L. 501 (2001). On the balance to be struck in administrative law proceedings in US courts, between upholding international law rules and according deference to a US government agency where the agency's action is in conflict with a WTO ruling, see Jane A. Restani & Ira Bloom, Essay, *Interpreting International Trade Statutes: Is the Charming Betsy Sinking?*, 24 FORDHAM INT'L L.J. 1533 (2001). They argue that the courts should be more deferential to the agency if the agency has followed notice-and-comment procedures or other due process safeguards.

Varying domestic controls might also hamper the ability of domestic regulatory officials to participate effectively in their roles as participants in and implementing of global regulatory decision-making. Since the traditional dualist separation between the domestic and the international is not sustainable in the integrated global administrative space, the relationship between these requires both continuous pragmatic readjustment, and deeper re-theorizing.

Even if agreement were reached on what the formal sources of global administrative law are, in terms of either traditional international law or a revived *ius gentium* approach, it is unlikely that a definitive and detailed body of rules and principles governing global administration could presently be formulated even in relation to formal intergovernmental arrangements. Written intergovernmental instruments concerning such norms are scattered and relatively sparse, the practices of global administrative bodies are fragmented, and formal domestic norms vary considerably even if some convergence is occurring. Hybrid and private global regulatory arrangements are not directly subject to many of these rules and principles, and the status of the emerging administrative legal principles and practices in relation to such hybrid and private systems is largely undetermined. Moreover, under a *ius gentium* approach, disagreement is inevitable as to whose practices to count and whose not to count for the emergence of a rule, and as to how much consistent practice might be necessary to generate a strong pull for adhesion. Should the adoption (or non-adoption) of accountability mechanisms in an international institution count more towards (or against) a new norm than adoption (or non-adoption) in an informal inter-governmental network or in a hybrid institution with private participation? We cannot enter on these myriad questions of methodology here, but merely note them as issues requiring considerable future work.

C. Institutional Mechanisms for the Application and Development of Global Administrative Law

In this subsection we provide, as a starting point for further research, a provisional taxonomy of types of institutional mechanisms through which global administrative law is currently emerging. We focus on three types of mechanisms: domestic institutional mechanisms used to check global administrative action; mechanisms adopted by transnational and international bodies to provide checks on their own work; and mechanisms constituted by the disciplines defined by global rules and institutions on the operation of distributed governance by states, hybrid governance, and private governance.

1. Domestic Institutions as Checks on Global Administration

Given the absence of genuinely international accountability mechanisms in most global administrative regimes, domestic institutions have often taken the lead in trying to check the

global administration. This is most obvious in attempts of domestic courts to establish their jurisdiction over the action of international institutions. Thus, in a landmark decision in 2000, the Bosnian Constitutional Court decided that it could review certain decisions by the Office of the High Representative in Bosnia. Although the High Representative derived his powers from the 1995 Dayton Agreement – the peace treaty after the Bosnian war, endorsed by the Security Council – and an annex to the Agreement which provided that the High Representative was the final arbiter, the Constitutional Court held that when acting as a de facto domestic rather than international official, the High Representative was not above the constitution and his acts could be reviewed accordingly.²⁰ In another variant of this approach, individuals in Europe have brought actions in domestic courts challenging EU regulations implementing UN Security Council sanctions. In one of these cases, three Swedish citizens of Somali descent argued that they had been targeted by the Council mistakenly and without due process, and that the implementing EU regulations were accordingly unlawful. The Court rejected their application for provisional relief on narrow grounds, but reserved judgment on the merits. Soon thereafter, the Security Council's sanctions committee decided to strike two of the claimants from the list and to establish a general procedure, in which individuals can – through a national government – present a demand to be de-listed and their reasons for it.²¹

These two examples of court involvement in checking international institutions at the behest of litigants asserting violations of their individual procedural and substantive rights in many ways resemble efforts since the 1970s by domestic courts in several European countries to reign in the activities of the European Communities.²² They are also analogous to decisions of the European Court of Human Rights recognizing limits to the delegation of powers to international organizations in order to safeguard individual rights. In various decisions, the Court has recognized that states parties to the European Convention on Human Rights will often not be able to ensure the full extent of Convention protection when they participate in international organizations, but it has insisted that they ensure a roughly equivalent standard. On this basis it has, for example, qualified participation of member

²⁰ See Carsten Stahn, *International Territorial Administration in the Former Yugoslavia: Origins, Developments and Challenges Ahead*, 61 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 107, 158-9, 167-171 (2001).

²¹ See Per Cramér, *Recent Swedish Experiences with Targeted UN Sanctions: The Erosion of Trust in the Security Council*, in REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 85 (Erika de Wet & André Nollkaemper eds., 2003); David Dyzenhaus, *Accountability and the Idea of an International Legal Order*, IILJ Working Paper 2005/1, available at http://www.iilj.org/global_adlaw/pdfs/Dyzenhaus_IILJ2005_1.pdf.

²² See Mattias Kumm, *Who is the Final Arbiter of Constitutionality in Europe?*, 36 COMMON MARKET LAW REVIEW 351 (1999).

states in the European Union,²³ and indicated limiting considerations for states granting immunity to the European Space Agency in national courts.²⁴

On a more conventional basis, domestic courts have reviewed decisions of global administrative bodies of a private character – here, the rules of private international law apply, including rules reflecting domestic public policy, and domestic courts may be presumptively willing to exercise jurisdiction. For example, the international sports regime of the IOC and the related International Court of Arbitration for Sport has had to convince domestic courts that their decisions in doping matters meet standards of due process in order to have them recognized in domestic law.²⁵

Courts are by no means the only domestic institutions used to make global administration more accountable. In the US, for example, statutes require that certain federal regulatory officials afford notice and comment when participating in international standard-setting on certain topics – here, the participation in administrative proceedings is moved into a phase usually considered as preparatory, in order to ensure that the participation is in time to potentially affect international negotiations among regulators resulting in decisions which will later be implemented in or will powerfully influence domestic regulatory law.²⁶ Likewise, parliaments have in some cases begun to extend their oversight over administrative action to participation by national officials in global administrative networks. Thus the US Congress requires reports from US regulatory agencies before they agree to recommendations of financial regulatory groups, such as the Basle Committee.²⁷ And the British House of Commons has insisted on UNHCR investigations into allegations of misconduct.²⁸

Thus far, however, these several types of efforts are quite episodic and fragmented, often driven by particular controversies, so that a coherent pattern in the use of domestic institutions to check administration by transnational and international bodies is not yet in place.

2. Internal Mechanisms Adopted by Global Institutions for Participation and Accountability

Public and governmental criticism and challenges from domestic institutions, as well as efforts by participating states and the managers of global administrative bodies to strengthen

²³ In *Matthews v. United Kingdom*, 28 Eur. H.R. Rep. 361 (1999), the European Court of Human Rights affirmed the continuing responsibility of states parties to the European Convention on Human Rights where they transfer competences to an international organization (in this case, the European Communities) not directly bound by the Convention.

²⁴ *Waite and Kennedy v. Germany*, 30 Eur. H.R. Rep. 261 (1999).

²⁵ See Alec van Vaerenbergh, *Regulatory Features and Administrative Law Dimensions of the Olympic Movement's Anti-Doping Regime* (unpublished manuscript, on file with the authors).

²⁶ See Stewart, *supra* note 4.

²⁷ See Zaring, *Informal Procedure*, *supra* note 6.

²⁸ See Mark Pallis, *The Operation of UNHCR's Accountability Mechanisms* (unpublished manuscript, on file with the authors).

internal controls over their operation, have led global administrative bodies to institute their own accountability mechanisms. The establishment by the Security Council of a limited administrative procedure for the listing and de-listing of individuals targeted by UN sanctions illustrates the trend. Even though this procedure, adopted in part in response to domestic court review of domestic implementation of listing decisions is in many respects highly problematic from the viewpoint of effectively protecting individual rights, it at least introduces some requirements for reasoned decision-making and review into the work of Security Council committees, which usually consider themselves purely political bodies, in no way comparable to administrative agencies.²⁹

An innovative genre of more robust administrative mechanisms is exemplified by the World Bank Inspection Panel. The Panel procedure was initially established mainly to improve compliance of World Bank staff with internal directives, such as the Bank guidelines to ensure that Bank-funded projects are environmentally sound, and thereby to ensure control of the Board over the day-to-day administration. Subsequently, individuals and groups were allowed to challenge World Bank projects before the Panel. The Panel only has the power of issuing reports and recommendations, and can not halt or modify non-conforming projects. Moreover, the grounds for such challenges are limited to allegations of non-compliance with the World Bank's own policies and thus do not extend to international law in general, but this limitation has frayed on occasion, and might turn out not to be sustainable. The Inspection Panel has opened an inroad for aggrieved individuals and groups to make their complaints heard and considered within the institutional framework of an international organization. The model has been adopted in several regional development banks.³⁰

Some intergovernmental networks have also moved to establish greater procedural transparency and participation, a striking development for regulatory networks whose informality is often their main advantage. For example, the Basle Committee of central banks has opened the process leading up to the drafting of a new Basle Capital Accord, with comments invited from interested parties.³¹ Similar developments have taken place within the OECD after the need for greater procedural legitimacy of its work was highlighted by the failure of the Multilateral Agreement for Investment. In some areas of its work the OECD has now instituted notice-and-comment procedures, and has encouraged broader public participation directly or through mechanisms in each of the member states.³² Another

²⁹ See Peter Guthrie, paper forthcoming in ANNUAL SURVEY OF AMERICAN LAW (on file with the authors).

³⁰ See DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL (Dana Clark et al. eds., 2003); THE INSPECTION PANEL OF THE WORLD BANK: A DIFFERENT COMPLAINTS PROCEDURE (Gudmundur Alfredsson & Rolf Ring eds., 2001).

³¹ See Zaring, *Informal Procedure*, *supra* note 6.

³² See James Salzman, *Accountability and Participation in OECD Regulation: Environment, Business and Laboratory Standards*, available at <http://www.law.nyu.edu/kingsburyb/spring04/globalization>.

organization with a notice-and-comment procedure is the Office of International Epizootics, which develops standards for animal health applicable under the SPS Agreement. The Financial Action Task Force established by the G-7 has invited outside input in its rule-making efforts and also allows for comments by governments of jurisdictions that are under consideration for inclusion in its list of non-cooperating countries and territories and are thus subject to some form of sanction.³³

The objective of strengthening participation in global administration has increasingly been pursued, although with contested results, by the direct inclusion of NGOs in decision-making processes, for example within the Codex Alimentarius Commission.³⁴ NGOs have also formed more-or-less cooperative regulatory governance partnerships with corporations. On certain labor and environmental standards, for example, corporations have sought to integrate NGOs into what had previously been purely self-regulatory structures, in order to enhance the legitimacy of the standards and certification mechanisms established by these structures.³⁵ In some instances these arrangements assume a hybrid character, operating under the aegis of international administrative bodies such as UN agencies.³⁶

3. Global Disciplines on Distributed Administration

The third mechanism of the emerging global administrative law establishes checks for coordinated domestic administration, or, in the terminology introduced above, for the distributed element in global administration. In order to ensure that domestic regulators act as participants in the global regime rather than merely as national actors, intergovernmental agencies have promoted global norms not only to govern the substance of domestic regulation, but also the decisional procedures followed by domestic regulatory agencies when applying a global norm or when subject to its strictures. In effect, these procedural requirements place domestic regulatory bodies and officials in an additional role as agents of the relevant global regime, and seek to make them in some way responsible for compliance with it.³⁷ These requirements are designed to protect the interests of other states, or of individuals and firms subject to regulation, or of broader social and economic interests

³³ See <http://www1.oecd.org/fatf/>.

³⁴ See CODEX ALIMENTARIUS COMMISSION, ALINORM 03/25/3: REPORT OF THE EVALUATION OF THE CODEX ALIMENTARIUS AND OTHER FAO AND WHO FOOD STANDARDS WORK (2002).

³⁵ See Matthew Howard, *The Fair Labor Association Regime: Regulation and Accountability under Codes of Conduct in the Apparel & Athletic Footwear Industries* (unpublished manuscript, on file with the authors). See also HARM SCHEPEL, *THE CONSTITUTION OF PRIVATE GOVERNANCE. PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS* (2004).

³⁶ See John Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, in TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE 1 (David Held & Mathias Koenig-Archibugi eds., 2003).

³⁷ Slaughter discusses the dual national and global roles of national public officials in *A NEW WORLD ORDER*, *supra* note 18.

affected by it, by providing them with procedural means to ensure the fidelity of domestic regulators to global administrative norms designed to protect their rights or concerns.

A striking effort to promote forum state protection of the interests of affected foreign states is the first WTO Appellate Body ruling in the Shrimp/Turtle case. In order for process-based import restrictions to be admissible under GATT, the Appellate Body ruled, prior multilateral negotiations on such restrictions were necessary and the countries affected were entitled to some form of due process as well as consideration of their interests and local circumstances in specific decisions formulating and applying such restrictions taken by US administrative authorities.³⁸ Here, international norms require domestic administrative procedure to refocus its pursuit of accountability: in order to help ensure that domestic regulators take account not only of the relevant national constituency, but also to some extent of a global one.

Other elements of WTO law, especially the GATS, also require changes in domestic administrative procedures. For example, in the telecommunications sector, the model of independent regulatory agencies has been introduced; here the procedure mainly serves to better implement the substantive goals behind global telecommunications regulation.³⁹ This is also the rationale behind the far-reaching judicial review established under investment treaties and the ICSID system, and also under NAFTA. Under such mechanisms, investors can challenge administrative action in the host state before international arbitral tribunals if they believe that their rights under the respective investment treaty have been violated. Increasingly, decisions of these tribunals have extended procedural as well as substantive limitations on domestic regulators. This gives investors a very powerful tool, probably not always balanced by sufficient representation of other and public interests. Central review of domestic administrations by regional and global bodies also occurs under human rights treaties. Using rights-based criteria, the European Court of Human Rights scrutinizes domestic administration for its conformity with the European Convention on Human Rights, and it has also developed a rich jurisprudence on domestic administrative procedures, especially on domestic review mechanisms.⁴⁰

For many developing countries, probably the most influential examples in this category are the Bretton Woods institutions. The World Bank's policies on good governance, whether designated as 'advice' or as conditions of financial aid to developing countries, have

³⁸ See Giacinto Della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, 9 EUROPEAN PUBLIC LAW 563 (2003). See also Sabino Cassese, *Shrimps, Turtles and Procedure: Global Standards for National Administrations*, IILJ Working Paper 2004/4, available at http://www.iilj.org/global_adlaw/pdfs/Cassese_IILJ2004_4.pdf.

³⁹ MARKUS KRAJEWSKI, NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES 164-178 (2003).

⁴⁰ See Henri Labayle et al., *Droit administratif et Convention européenne des droits de l'homme*, 11 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 1172 (1995).

generated extensive codes of principles and rules for the organization and procedures of domestic administration, ranging from measures to combat corruption to practices of greater transparency and procedural guarantees for market actors.⁴¹ Given the dependence of many countries on aid, these World Bank norms have effectively transformed, or are in the process of transforming, domestic administration in large parts of the world. Comparable conditions imposed by the IMF on financial assistance to developing countries have had similar effects.

D. Doctrinal Features of Global Administrative Law: Emerging Principles and Requirements

Global administrative law comprises, in addition to its variety of institutional mechanisms, some basic legal principles and requirements of both a procedural and substantive character. Given the fragmentation of practice in global administration and the limited state of integrated knowledge about it, we cannot here venture claims about the doctrinal elements governing this field as a whole. But some candidates can be preliminarily identified, even though their reach may at present be limited. It will be a central task for further research to show the extent to which these and other elements are in fact reflected in global administrative practice, and the extent to which they could be applied or adapted to areas of international or transnational regulation where administrative law is currently rudimentary or non-existent.

Procedural Participation. In domestic settings, the right of affected individuals to have their views and relevant information considered before a decision is taken is one of the classical elements of administrative law. Versions of such a principle are increasingly applied in global administrative governance, as a few examples illustrate. As regards administrative action by one state affecting another, the WTO Appellate Body's first decision in the Shrimp/Turtle case observed that the US had provided none of the states whose exports of shrimp products to the US had been curtailed by domestic US administrative regulations with "formal opportunity to be heard, or to respond to any arguments that may be made against it," and required the US to provide mechanisms for procedural participation.⁴² As regards administrative action by an intergovernmental body affecting particular states, even non-member states have been provided an opportunity for comment before they are placed on a list of non-compliant states by the Financial Action Task Force.⁴³ As regards individuals, an opportunity to be heard is emphasized in the IOC's recent World Anti-Doping Code; here

⁴¹ See Ngaire Woods & Amrita Narlikar, *Governance and the Limits of Accountability: The WTO, the IMF and the World Bank*, 53 INTERNATIONAL SOCIAL SCIENCE JOURNAL 569 (2001).

⁴² WT/DS58/RW, *United States — Import Prohibition of Shrimp and Shrimp Products*, Panel Report, para. 3.180 *et seq.* (1996).

⁴³ See <http://www1.oecd.org/fatf/>.

normative principles of administrative law are applied to constraining administrative decision-making in a private institutional setting.⁴⁴ In contrast, in the context of UN Security Council economic sanctions against states that will affect individuals and groups living there or doing business there, no structure has been established for participation by such potentially affected groups prior to a sanctions decision, although in the special case of people listed for asset-freezing under anti-terrorism resolutions a limited form of subsequent challenge and review has been instituted.

Participation in global administrative proceedings has not been confined to individuals or states targeted by decisions. In the area of standard-setting and rule-making, several bodies, such as the Codex Alimentarius Commission, have sought to include in their work NGOs representing affected social and economic interests.⁴⁵ Domestic regulators, too, have begun to give notice of proposed standards being considered in global negotiations in which they participate, and are sometimes required to do so by the legislature.⁴⁶ However, participation rights in rule-making have been afforded in only a limited number of instances and areas.

Reasoned Decisions. The requirement of reasons for administrative decisions, including responses to the major arguments made by the parties or commenters, has been extended from domestic law into some global and regional institutions. The international practice outside of adjudicatory tribunals is relatively thin, partly because the number of decisions by global administrative agencies directly affecting particular persons is still limited, although growing. The Shrimp/Turtle decision is of central importance in establishing principles of reasoned decision-making for global administrative regulation, as is the Security Council's decision to require, at least internally, some kind of justification by the proposing country before an individual is included in the list of targets. Similarly, in the global anti-doping regime, a written, reasoned decision has been made a requirement for measures against a particular athlete. In the area of rule-making, however, it does not seem to have become a practice of global administrative bodies to give reasons, though some organizations provide them in order to strengthen the acceptability of their actions to affected interests. The Basel Committee, for example, has established a web-based dialogic process in developing its new capital adequacy requirements for banks; drafts are posted, comment invited, and reasons given by the Committee in connection with new and revised drafts.

Review. An entitlement to have a decision of a domestic administrative body affecting one's rights reviewed by a court or other independent tribunal is among the most widely

⁴⁴ See Van Vaerenbergh, *supra* note 25.

⁴⁵ Steve Suppan, *Consumers International's Decision-Making in the Global Market. Codex Briefing Paper* (2004), available at <http://www.tradeobservatory.org/library.cfm?RefID=36988>.

⁴⁶ See Stewart, *supra* note 4. Zaring, *Informal Procedure*, *supra* note 6, discusses legislative proposals in the US Congress that would require reporting to Congress before agreeing to the adoption of Recommendations in the Basel Committee on Banking Supervision.

accepted features of domestic administrative law, and this is to some extent mirrored in global administration. An entitlement to review by national authorities was mentioned by the WTO Appellate Body in its first Shrimp/Turtle decision. Acceptance of the importance of a power of affected persons to obtain a review is reflected in the establishment of the World Bank Inspection Panel, and also in the right of appeal to the Court of Arbitration for Sport from doping decisions. Some international human rights instruments treat access to a court to challenge detrimental decisions as a human right, as for example Article 14 of the ICCPR and Articles 6 and 13 of the ECHR (although each of these provisions circumscribes its operation in various ways). In several cases, the European human rights bodies have confirmed the importance of this right in relation to administrative decisions by intergovernmental bodies. Under both Article 6 and Article 13 of the ECHR, states parties must ensure an equivalent standard in the international organizations of which they are members of. With regard to staff employment issues, most international organizations have established review mechanisms, often involving independent tribunals. How far a right of review is accepted in different governance areas, with what limitations, and what institutional mechanisms it encompasses, are all unresolved questions. In several important areas, despite strong calls for effective review mechanisms, review mechanisms have not been instituted: the Security Council has failed to establish an independent body to scrutinize its sanctions decisions; the UNHCR has so far only accepted internal mechanisms of supervision; and even in the transitional administration of territories such as Bosnia, Kosovo, or East Timor, international organizations have not been willing to accept a right of individuals to obtain review of their actions of the intergovernmental agencies before courts or other independent bodies with greater powers than ombudsmen.

Substantive Standards: Proportionality, Means-Ends Rationality, Avoidance of Unnecessarily Restrictive Means, Legitimate Expectations. Especially where individual rights are placed at the forefront, global administrative law might be expected to embody substantive standards for administrative action, like those applied in a domestic context, such as proportionality, rational relation between means and ends, use of less restrictive means, or legitimate expectations. Proportionality is a central issue in the jurisprudence of some international human rights regimes: in the ECHR, for example, interference with many individual rights can be justified, but only if the interference is proportionate to the legitimate public objective pursued. The proportionality principle is reflected also in some national court decisions on global governance, such as a German court decision critical of a ruling by an international sports federation in a doping case because it imposed disproportionate

sanctions.⁴⁷ Similarly, restrictions on the general rules of free trade under the GATT are only allowed if they meet certain requirements designed to ensure a rational fit between means and ends, and employ means that are not more trade-restrictive than reasonably necessary to accomplish the relevant regulatory objective. Yet in many other areas of global administration, the application of such requirements has so far been minimal.⁴⁸

Exceptions: Immunities. With regard to the immunity of foreign states, national courts have long taken account of competing interests of private parties, in particular by excluding purely commercial activities from the realm of immunity and thus allowing, for example, for the enforcement of contracts. The law on immunities of international organizations in national courts has not yet integrated such a range of competing values, although there are fragmentary signs of the beginnings of a shift in this direction. In *Waite and Kennedy v. Germany*,⁴⁹ applicants to the European Court of Human Rights complained of a German court decision refusing to reach the merits of the applicants' labour law claim against the European Space Agency (ESA) on the ground that the ESA as an inter-governmental organization enjoyed immunity from suit under German law. The ECHR held that the German court decision did not violate Article 6 § 1 (right of access to a tribunal) of the European Convention on Human Rights. However, the European Court applied a test of proportionality, and weighed in the balance the possibility of internal remedies for the applicants within the ESA, as well as possible remedies against private firms contracting to supply the applicants' labour to the ESA.⁵⁰ This approach of balancing of human rights claims against immunity claims creates pressures for such agencies to adopt adequate alternative procedures for vindication of human rights. In a later case, *Fogarty v United Kingdom*,⁵¹ the European Court concluded that:

"measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in article 6(1). Just as the right of access to court is an inherent part of the fair trial guarantee in that article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity".⁵²

⁴⁷ *Krabbe v. IAAF et al.*, Oberlandesgericht Munich, 17 May 1995, cited in GABRIELLE KAUFMANN-KOHLER, ANTONIO RAGOZZI & GIORGIO MALINVERNI, LEGAL OPINION ON THE CONFORMITY OF CERTAIN PROVISIONS OF THE DRAFT WORLD ANTI-DOPING CODE WITH COMMONLY ACCEPTED PRINCIPLES OF INTERNATIONAL LAW, nrs. 32, 121 (2003), available at <http://www.wada-ama.org/en/t2.asp?p=43334>. The Court awarded athlete Krabbe DM 1.2 million in damages.

⁴⁸ For a useful overview, see ENZO CANNIZZARO, IL PRINCIPIO DELLA PROPOPORZIONALITÀ NELL'ORDINAMENTO INTERNAZIONALE (2000).

⁴⁹ 30 Eur. H.R. Rep. 261 (1999).

⁵⁰ *Id.*, at 287-8, paras. 68 and 69.

⁵¹ 34 Eur. H.R. Rep. 302 (2001).

⁵² *Id.*, at 314, para. 36.

This suggests that public international law entails some restrictions on remedial protections for human rights, but the reference to the proportionality concept suggests that traditional immunities may no longer be absolute.⁵³

Exceptions: Special Regimes for Certain Issue Areas? In national administrative law, not all mechanisms of accountability apply to the whole range of domestic administrative actors. Exceptions, or at least lower standards, commonly apply, for instance, to matters of national security and to the decisions of central banks. Careful consideration is needed as to the extent to which such exceptions ought to be replicated in global administration. In security matters, the Security Council sanctions regime has established minimal standards for participation, reason-giving and review, but it has not entirely brushed aside the demands for these mechanisms. As regards central banks, their cooperation with each other does not seem to operate in a very different way from networks in other areas of intergovernmental regulation. In the related area of bank supervision, the Basle Committee has already made significant efforts at broader participation, and national legislatures have begun to press for reports from the national participants in various intergovernmental regulatory regimes before these participants agree to any new recommendation. Reflecting the enormous variations across different global governance arrangements, the current practice is highly variegated. Even in a single organization with multiple areas of competence such as the OECD, different standards of procedural openness prevail in different issue areas, often reflecting the respective cultures in the different issue areas prevalent in national administrations.⁵⁴

IV. The Normative Bases of Global Administrative Law

The prior section provided an analysis of the sources of global administrative law, the several different types of institutional mechanisms through which it is being developed and applied, and the emerging doctrinal principles and requirements that can be identified in practice. Participants in either the study or the construction of a global administrative law also recognize that these are normative projects, and not simply a taxonomical exercise or the promulgation of practical technical solutions to well-defined and accepted problems posed by global regulatory administration. Accordingly, in this section we examine the potential normative foundations of global administrative law.

⁵³ See also Iain Cameron, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, 72 *NORDIC JOURNAL OF INTERNATIONAL LAW* 159 (2003).

⁵⁴ See Salzman, *supra* note 32; Dyzenhaus, *supra* note 21.

A. Different Patterns of International Ordering and Different Normative
Conceptions of Global Administrative Law

Different patterns of international ordering sustain different (sometimes mutually incompatible) normative frameworks for global administrative law, as well as for classical international law and for international institutionalization generally. Some traction on these varying patterns may be obtained by employing the terminology of the English School of international relations, which distinguishes three different patterns of international ordering: patterns of pluralism, solidarism, or cosmopolitanism. Inter-state pluralism is the typical pattern of traditional international law, with treaties and international institutions and international administration limited to areas of agreement between states, so that major value conflicts are not resolved, and powers of implementation are usually retained by each individual state rather than centralized. Inter-state solidarism envisages deepening powers for international institutions and global administration based on shared values, with cooperation still based on inter-state bargaining but with states committed to upholding the global administration system and the various decisions that it produces, even where these conflict with short-term interest calculations. Cosmopolitanism envisages global governance that is not essentially the result of inter-state bargaining, but draws also from cross-border networks of civil society actors, private regulatory and media institutions, and markets. These three patterns are simplified ideal types. Elements of each of them appear somewhere in the mix of international practice on most issues. But typically, one or other of these models is understood by the participants as predominating and as shaping the major dynamics of particular issue areas. Thus arms control and disarmament is traditionally a highly pluralist field, the International Criminal Court is a solidarist project, and the governance of global sports issues is primarily cosmopolitan. These conditions of international order are not so much objective descriptions as statements of the understandings of the participants, whose approaches and interactions are shaped by what they understand the prevailing dynamic to be.

These different models of international ordering can be juxtaposed to three different types of normative conceptions of the role of global administrative law: internal administrative accountability, protection of private rights or the rights of the states, and promotion of democracy.⁵⁵ The first normative conception for global administrative law, chronologically in terms of the evolutionary development of national administrative law and practically in terms of the needs of global administration, views its role as securing the accountability of the subordinate or peripheral components of an administrative regime to the legitimating center (whether legislative or executive), especially through ensuring the legality

of administrative action. This conception focuses on organizational and political functions and regime integrity rather than any specific substantive normativity, making it potentially amenable to translation into an international order, such as a pluralist one, that lacks a strong consensus on substantive norms. The second normative conception is liberal, rights-oriented: administrative law protects the rights of individuals and other civil society actors, mainly through their participation in administrative procedures and the availability of review to ensure the legality of the decision. It may also be extended to protection of the rights of states. The third conception views the role of global administrative law as promoting democracy. National administrative law in many countries has a democratic component: it ensures the accountability of administrators to parliament by ensuring their compliance with statutes and to broader economic and social constituencies through public participation in administrative decision-making procedures.

B. Intra-Regime Accountability

The first conception of global administrative law is the normatively least demanding of the three: it takes a given order for granted and merely seeks to ensure that the various components and agents within that order perform their appointed roles and conform to the internal law of the regime. On this basis, the justification for administrative law is merely functional: it is an instrument to uphold and secure the cohesion and sound functioning of an institutional order that is justified independently.

Any global administrative regime depends for its functioning on the coordinated action of different components and actors, both international/transnational and domestic, and it thus requires mechanisms to ensure that each of them performs their assigned roles in accordance with norms of the regime. These mechanisms will usually imply some way of policing the limits of delegation and compliance with rules emanating from the center. The World Bank Inspection Panel can be analyzed in this way, as a means for the Board to control management and as a means for central management to control operational managers. The WTO Dispute Settlement Body operates to some extent as a mechanism to assert and help enforce rules of the global regime against distributed, domestic administrations. The emergence of European rules on member state administrative procedures has been understood in this way, too: rules allowing for participation in and judicial review of member state administrative decisions, have the result that European law can more readily be asserted and

⁵⁵ On similar normative conceptions behind domestic administrative law, *see* EBERHARD SCHMIDT-ABMANN, *DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSDIEE* (2d ed., 2004).

enforced against recalcitrant domestic regulators.⁵⁶ This element of global administration to some extent mirrors domestic mechanisms such as the oversight exercised by the U.S. Office of Management and Budget (OMB) over federal agencies, but it also reflects an important strand in the development of administrative law in many European countries in the 19th century.

In the global order, especially under a pluralist conception, states can be regarded as the center and thus as having a vital interest in policing the limits of any delegation to global administration. Domestic mechanisms, including administrative law mechanisms, for control of transnational or intergovernmental organizations can perform this policing function insofar as they use the terms of any delegation as the basis for tests of legality. A similar role could be played by international bodies reviewing the action of international organizations. Few such reviewing bodies function on a global level: the major general instance of review remains the episodic jurisprudence of the International Court of Justice on the legality of acts of international organizations, a jurisprudence which continues to leave some issues unresolved, including most prominently the capacity to review Security Council action by reference to the UN Charter or other rules of international law.⁵⁷ In the European Union, such review is a function of the European Court of Justice, though one it performs only reluctantly.

An approach to global administrative law that emphasises legality, and focuses on review as a means of control by the central actors over subordinate or peripheral agencies and actors, is adaptable to different views of international order, and thus may be suited to a wide variety of forms of global administration. It fits into very dense institutional forms of international administration on a cosmopolitan basis as well as into forms of close cooperation in solidarist orders, i.e. among states sharing a strong common set of values. But it has an important function also in pluralist systems, in which common administrative institutions are merely intended to solve collaboration or coordination problems. In all of them, the definitions of center and subordinate or periphery, and of delegation and supervision, will vary. But they all have to face problems of internal regime accountability and control, and administrative law can contribute useful approaches to such problems.

C. Protecting Rights

The second strand of normative goals for global administrative law – the protection of rights – makes stronger normative presuppositions, but is still suited to several different conceptions

⁵⁶ See, e.g., JOHANNES MASING, DIE MOBILISIERUNG DES BÜRGERS FÜR DIE DURCHSETZUNG DES RECHTS (1997).

of international order if the notion of rights is understood broadly. In all administrative law conceptions, the rights in question will ordinarily be those held by the direct subjects of regulation, be these states, individuals, firms, or in some cases NGOs. As in domestic administrative law, the possibility also exists of third party rights belonging to persons or groups more indirectly affected by regulatory decisions.

The most common rights-based justification of the need for a global administrative law is based on a conception of *individual rights* and the associated idea of the rule of law. Administrative infringement of individual rights – whether through the imposition of sanctions, liabilities, disadvantageous determinations of status, denials of required licensing approvals, or otherwise -- generally requires a prior hearing for the affected person, specific justifying reasons, and the possibility of review by an independent body. Under such an approach, it is presumed to be irrelevant who interferes with rights: whether it is a domestic regulator or an international administrative body does not matter.⁵⁸ This line of justification seems to underlie several emerging bodies of practice in global administrative law, especially in cases in which global administration directly acts upon individuals. Thus, the demand that the Security Council grant some form of due process to individuals listed as sanctions targets reflects the idea of rights protection, as does the insistence of national courts on due process when they comment on the transnational anti-doping regime. National constitutional courts in their interactions with the European Court of Justice over the protection of fundamental rights in the European Communities have likewise insisted on the centrality of individual rights protection.

Yet advocating global administrative law on grounds of individual rights protection presupposes a priority of liberal values, to be realized perhaps in a cosmopolitan global society which is based on the centrality of the individual. But such a conception is possible even in a non-cosmopolitanist but solidarist international society with a strong emphasis on human rights, and some argue that with the emergence of human rights in universal international law, the international society has reached such a stage today. If global society has indeed reached such a stage, the construction of a global administrative law on such premises would be uncontroversial; only the interpretation of individual rights and rule of law might be contested.⁵⁹ But in a pluralist international society, in which human rights are not protected at all or only minimally protected, the social basis for a global administrative law based on individual rights is largely absent. The problem of individual rights in such an order is particularly pressing because states with a strong liberal foundation will hardly be content

⁵⁷ See Jose E. Alvarez, *Judging the Security Council*, 90 A.J.I.L. 1 (1996); B. Martenczuk, *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?*, 10 E.J.I.L. 517 (1999).

⁵⁸ See Dyzenhaus, *supra* note 21.

⁵⁹ *Ibid.*

with a global administration that does not respect basic rule-of-law principles, yet other states may well object to administrative law measures to protect individual rights especially as applied to domestic administrations. Once regulation of, and even the provision of, important governmental functions becomes transnational or international, the problem of diverse social orders in different nations and regions becomes central: since none of the participating states can demand that its own ideas should exclusively govern global institutions, these institutions must appear potentially threatening to every state's own way of organizing the state and society. In a pluralist order, this problem is acute, because the differences among social orders are high; in a solidarist order, its salience will depend on the degree of disagreement over the interpretation of common values.

Similar conflicts and difficulties have already arisen with respect to administrative law measures to protect the *economic rights* and interests of firms and other economic actors in the global market economy; these measures represent a different facet of liberal values. Examples include investor protection measures and arbitral remedies in investment treaties. A successful investor claim under NAFTA of expropriation by Mexican environmental regulations, and a pending arbitral claim by a multinational water service company against Bolivia for the cancellation of its franchise, have sparked wide controversy.⁶⁰ The enforcement in WTO member states by multinational firms of intellectual property rights pursuant to TRIPS is creating similar controversies.

Yet a rights-based account of global administrative law can also take a different path: it can base itself on the *rights of states*. In this approach, tools of administrative law would protect states' rights, and they could serve, for example, to ensure that administrative actors do not overstep their powers vis-à-vis third states, or that they do not exceed their competences vis-à-vis member states. This approach can be based on the need to police the competences of administrative actors. It might be expressed in procedures aimed at enforcing jurisdictional rules: to some extent, mechanisms of classical international dispute settlement perform this function, but so also does dispute settlement in the WTO, insofar as it provides protections against the exercise of over-reaching jurisdiction by national regulators. The Shrimp/Turtle decisions, which grant rights of participation in foreign administrative proceedings to states, might fall into this category.⁶¹ Other specific mechanisms have also emerged, as for example the attempts by the Financial Action Task Force to consult with non-member states before taking measures against them.⁶² As to the policing of competences in a vertical rather than horizontal way, debates about review of the Security Council and of EU

⁶⁰ See *Metalclad Corp. v. Mexico*, NAFTA/ICSID (AF), 40 I.L.M. 55 (2001); *Aguas del Tunari S.A. v. Republic of Bolivia*, Case No. ARB/02/3, pending before the ICSID Tribunal.

⁶¹ See Cassese, *supra* note 38.

⁶² See <http://www1.oecd.org/fatf/>.

action indicate possible pathways. From the perspective of rights, such review appears to be less the policing of a delegation of powers than it is the protection of states' rights from encroachment; although both dimensions will often be present.

A states-rights approach to global administrative law could be built on a conception of a pluralist international order, granting rights to states as a means for accommodating diversity and providing limitations on collective action necessary to enlist participation by states. From some states' perspective, these rights would be based on collectivist theories; for others, they could ultimately be derived from individuals' rights. Framed this way, a conception of global administrative law based on states' rights might be rather limited, but might be well suited to a pluralist order. Even in cosmopolitan or solidarist orders with strong common values and a commitment to human rights, states' rights might be useful in order to organize the representation of individuals or social and economic group interests on the global level. They are then comparable to rights of local entities or states in a federal system: as expressions of both administrative utility and of cultural diversity within the greater entity. In a solidarist or cosmopolitan society, such a framing can easily coexist with a justification on the basis of individual rights, as it usually does in federal systems or in the European Union.

D. Implementing Democracy

The third strand, normatively the most demanding, would define the need and possibilities of, and assess the performance of, global administrative law by reference to democratic ideals. This conception of the normative function of global administrative law can be interpreted in a variety of ways.

Some proponents emphasize the ways in which domestic administrative law serves democracy by ensuring administrative adherence to parliamentary statutes and through transparency and the participation of the public in administrative rulemaking. These ways may vary depending on the legal systems involved: for example, among public participation requirements, US administrative law emphasizes judicially-enforced obligations of agencies adequately to consider the various social and economic interests affected by their decisions, and to provide a reasoned justification for the policy choices that they make. Such justification has to include responses to the views and comments submitted by representatives of those interests through the public participation mechanisms. This judicialized conception of public participation however, finds only limited expression in many other national systems. Variations between national democratic systems in the means of operationalizing democratic control are connected to different ways of managing the discretion which effective administration requires, including through parliamentary controls or executive

controls, such as the use of centralized systems using cost-benefit analysis, reliance on experts, and administrative law procedures and judicial review. Despite these differences, however, administrative law in all these jurisdictions is centrally concerned with ensuring democracy.

Some would have global administrative law serve these same functions for administration that operates transnationally or internationally. This idea of a democratic role for global administrative law is easily stated, but it faces a number of serious problems of definition and implementation. First, there are doubts that international society today sufficiently agrees on democratic standards to use them as the foundation for a common, global administration. Second, the domestic model of administrative law is founded on a particular institutional structure, based on a central democratic law-making body and the laws that it enacts. A similar system of representative democracy is today advocated by some⁶³, but usually regarded as illusionary or even dangerous. Independent reviewing courts, which are central to domestic administrative law, are also lacking at the global level. Thus, a global administrative law would have to be built on very different grounds: it would either have to democratize international law-making so that ensuring the legality of administrative action would promote democratic accountability; or it would have to construct administrative procedures that can shoulder the democratic burden alone.⁶⁴ So far, however, both options face the fundamental problem that convincing democratic theories for the global sphere are still lacking. If electoral or other models of direct representation fail, most of what is left is recommendations for different forms of participatory or deliberative democracy⁶⁵, and these have hardly resolved the problems of defining “the public” that is supposed to govern or be represented globally,⁶⁶ or of designing the mechanisms by which global participation or deliberation can indeed occur.⁶⁷ Forms of democratic experimentalism, perhaps suited to the European Union,⁶⁸ usually need to be embedded, at least to some extent, in an otherwise stable and well-developed environment of democratic institutions. And, while deliberation in regulatory institutions without more may provide good results,⁶⁹ it is unlikely to provide the

⁶³ See Richard Falk & Andrew Strauss, *Toward Global Parliament*, 80 FOREIGN AFFAIRS 212 (2001).

⁶⁴ For a similar problem in the EU context, see Renaud Dehousse, *Beyond Representative Democracy: Constitutionalism in a Polycentric Polity*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 135 (Joseph H.H. Weiler & Marlene Wind eds., 2003).

⁶⁵ See TRANSATLANTIC REGULATORY COOPERATION (George A. Bermann et al. eds., 2000).

⁶⁶ See the critique in Ruth Grant & Robert Keohane, *Accountability and Abuses of Power in World Politics*, IILJ Working Paper 2004/7, available at http://www.iilj.org/global_adlaw/pdfs/Keohane_IILJ2004_7.pdf.

⁶⁷ See, e.g., JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION* (Max Pensky trans. & ed., 2001).

⁶⁸ See Charles Sabel, *Open Coordination and EU Governance: Towards Pragmatic Constitutionalism* (unpublished manuscript, on file with the authors).

⁶⁹ See Joerges, *supra* note 12.

coupling with the public that will be necessary to give it democratic credentials.⁷⁰ Such forms of deliberative technocracy might suffice if global regulatory administration did not involve major distributional choices and conflicts.⁷¹ But as global regulatory administration intensifies, important distributional issues are becoming more and more evident, and more widely contested, in many fields. Not surprisingly, then, the question of a democratic theory for global administration is one of those most in need of a convincing answer, and the most unlikely to get one anytime soon.

Yet a democracy-enhancing conception of global administrative law might not depend on a full-fledged democratic theory for the global level. In this regard, Anne-Marie Slaughter has suggested that many problems of democratic accountability could be solved if global administration were to operate mainly in the form of government networks, in which the participating national officials could be made democratically accountable to their respective publics through domestic institutions.⁷² She reasons that securing such accountability to domestic publics is likely to be easier in the case of networks than formal treaty based international organizations, which have far greater effective autonomy. Pursuit of such accountability entails strengthening domestic mechanisms, including extension and development of domestic administrative law mechanisms to govern the participation of national officials in global administrative decision-making. This strategy might indeed enhance a certain brand of democratic legitimacy, but its effectiveness in doing so will probably be limited in important ways by the practical dynamics of decision-making in intergovernmental networks. Further, given that global administration operates through a number of other important types of institutions in addition to intergovernmental networks, this strategy would provide only a partial solution. Finally, and most fundamental, while such a strategy is well-suited to a pluralist pattern of international ordering because it ties accountability for global decision-making back to the separate legal and political institutions of each participating state, by the same token it is not well adapted and may actually work against the realization of solidarist or cosmopolitan conceptions of international administration.

Perhaps, then, it would be advisable for global administrative law to pursue a less ambitious and more pragmatic approach. It could, for example, recognize that under current circumstances, no satisfactory democratic basis for global administration is available but that global administrative structures are nevertheless required to deal with problems national

⁷⁰ See the relevant critique in Martin Shapiro, *'Deliberative', 'Independent' Technocracy v. Democratic Politics: Will the Global Echo the EU?*, IILJ Working Paper 2004/5, available at http://www.iilj.org/global_adlaw/pdfs/Shapiro_IILJ2004_5.pdf.

⁷¹ On the lack of salience of many areas of EU regulation in this context, see Andrew Moravcsik, *supra* note 13, at 25-26; FRITZ SCHARPF, *GOVERNING EUROPE. EFFECTIVE AND DEMOCRATIC?* (1999).

⁷² See Slaughter, *supra* note 18.

democracies are unable to solve on their own. In this non-ideal situation, global administrative law might take pragmatic steps towards a stronger inclusion of affected social and economic interests through mechanisms of participation and review open to NGOs, business firms, and other civil society actors as well as states and international organizations. Yet it has to remain aware of the fact that such steps fall short of representation of the public on a basis equivalent to domestic electoral mechanisms and will thus not be able to justify the exercise of administrative authority on a fully democratic basis. And for each step, the construction of a global administrative law with democratic goals would have to reassess the costs and benefits of broad-based participation, thus integrating practical experience in the gradual development of public accountability.

Under a still more limited approach, global administrative law should set itself altogether more modest goals than democratizing global administration. A focus on the other justificatory roles discussed previously – controlling the periphery to ensure the integral function of a regime, protecting rights – could achieve real progress by building meaningful and effective mechanisms of accountability to control abuses of power and secure rule-of-law values. Accordingly, the better course, at least for the moment, might be to bracket questions of democracy, and focus on attaining more limited but nonetheless important objectives.⁷³

E. Who is Shaping Global Administrative Law?

Many of the emerging mechanisms of global administrative law stem from Northern and Western initiatives, and any attempt at justifying the need for such a body of law must thus face the challenge of intellectual and political bias. This challenge can come in two forms, one of which concerns the underlying normative ideals.

The models of administrative law used in this essay and throughout the project are of European and American origin, and are closely connected with the rise of the liberal state and the expansion of its regulatory and administrative activities in the late 19th and early 20th centuries. Thus, transferring these models to the global administrative space may seem to imply a liberal order for that sphere, at the expense of alternative ways of ordering society that exist especially in Asia and Africa. The preceding sections have sought to make more explicit the normative bases of global administrative law. Not all of them are connected to a liberal model of society. Approaches focused on intra-regime control and protecting states' rights might just as well apply in a non-liberal order. However, in order to justify a more demanding conception of global administrative law (and one more congenial to democratic

⁷³ See Grant & Keohane, *supra* note 66.

views), it is unlikely that reliance solely on these two approaches will suffice; instead, justifications must probably be based, in one way or the other, on individual and economic rights and democracy, reflecting in some measure solidarist or cosmopolitan conceptions of international ordering. Yet even a limited form of such reconceptualization could face political challenges: an international order based on individual or economic rights may be too close to Western, liberal conceptions to be universally acceptable. Emphasizing the organizing role of state sovereignty may be superior in coping with the challenge of diversity.⁷⁴

A principal challenge will thus consist in learning about and determining the extent to which common conceptions of individual or economic rights and democracy can serve as a basis for global administrative law; it may be that more demanding conceptions of supranational administrative law will have to be limited to administrative bodies operating in regions or sectors that share a sufficient extent of common values.⁷⁵ On the other hand, it will be necessary to inquire into alternative conceptions of administrative law in other models of society, which may be operationalized in institutions similar to those of Western administrative law, even if they have a different normative basis. In this case, global administrative law might be built not so much on a coherent normative system, but rather on some kind of “overlapping consensus”. The extent to which this may be possible is a question requiring further research and vigorous debate.

A second challenge may focus on the current international institutional order that global administrative law seeks to build upon and improve. In a radical form of critique, the current institutions of global governance can be seen as “imperial” institutions, furthering the goals and stabilizing the dominance of Northern industrialized countries at the expense of the South, and of the dominant capitalist classes at the expense of subaltern people.⁷⁶ Suppose this charge were correct – and it is certainly plausible – what would this mean for global administrative law? Defenders would probably argue that global administrative law seeks to improve current institutions and by making them more accountable might lay the seeds for a future empowerment of those currently underrepresented and excluded. Critics, however, might claim that the strategy of global administrative law is far too limited; that even if it succeeds, it would only scratch the surface of the current institutional injustice. Moreover, it would at the same time help legitimate the current order and thus stabilize it, whereas radical change is actually needed. This would recall the classical and intractable debates between reformers and revolutionists, in which both sides are probably in some way right. But it

⁷⁴ See Benedict Kingsbury, *Sovereignty and Inequality*, 9 E.J.I.L. 599 (1998).

⁷⁵ For a proposal in this sense, see JÜRGEN HABERMAS, *DER GESPALTENE WESTEN* (2004).

⁷⁶ See Bhupinder Singh Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 E.J.I.L. 1 (2004).

would also point to the need for thinking, within the project of global administrative law, about distributional issues and ways of greater accountability of global administration to those who are the most excluded today. Most initiatives currently proposed would have the effect of increasing accountability towards Northern populations, market actors, social interests, and states. Increasing the ability of such actors to hold global governance to account may aggravate the cleavages currently existing in the world. In order to address the really central problems of accountability, global administrative law might have to devise ways to empower and include people and their representatives from the South. From this perspective, a more effective participation of the developing world in global administrative structures might be more urgent than implementing yet another path of influence for the affluent parts of the world.

V. Strategies and Theories of Institutional Design

The construction of a global administrative law is inevitably shaped and constrained to some extent by existing institutions and principles as well as the shifting patterns of international ordering and the normative foundations outlined in the preceding parts of this essay. Within these constraints, many strategies of institutional design are possible. We note some of them here, with attention to their promise and their limits.

A. Strategies and Pathways for the Development of Global Administrative Law

Two general approaches to constructing global administrative law track the two basic approaches in the field at present: one focuses on domestic institutions, the other on international mechanisms.⁷⁷

The Bottom-Up Approach. The first, the *bottom-up approach*, attempts to ensure legality, accountability and participation in global administration through extending (and adapting) the tools of domestic administrative law. Pressures for such extension arise where it appears that transnational or global governance institutions are taking over formerly national administrative functions that were subject to domestic administrative law mechanisms of transparency, participation and review, and where these new regulatory institutions are not subject to comparable accountability mechanisms at the global level. Such pressures intensify where it appears that national regulators participating in this extranational

⁷⁷ See Stewart, *supra* note 4. For an example, see Reuven Avi-Yonah's proposal for a World Investment Organization to regulate multinational enterprises, and Merritt Fox's skeptical response: Reuven Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5 (2004); Merritt Fox, *What's So Special About Multinational Enterprises?: A Comment on Avi-Yonah*, 42 COLUM. J. OF TRANSNAT'L L. 551 (2004).

governance are perhaps even using it to shelter themselves from scrutiny and their actions from effective review at the domestic level. In order to remedy this circumvention of domestic administrative law safeguards, the bottom-up approach would apply requirements of transparency, notice-and-comment procedures and review not only to the international components of domestic administrative decisions, but also to the participation of domestic administrators in global regulatory decision-making, and it would require decision-making transparency in order to support such participation. It would allow for scrutiny of the international regulatory process in judicial review of domestic administrative action that aims at implementing international decisions, and possibly also to the positions developed by domestic officials before and even during their participation in global-level decision-making. It would also extend the review powers of domestic courts to include international decisions directly affecting individuals, with the possibility to set them aside in case they infringe upon individual rights or show procedural flaws. Different standards of procedure and review than those applying to the domestic level would be conceivable here. Thus, less demanding procedural requirements and a greater level of deference by reviewing bodies might be applied to decisions taken by national officials in the context of global decision-making than to analogous purely domestic administrative decisions because of the imperatives of confidentiality, flexibility, and speed in international negotiations. Alternatively, more rigorous requirements and less deference might be applied, on the premise that global administrative policymaking is inherently more opaque and less susceptible to informal mechanisms of participation and review than comparable domestic policy-making, and that it is not embedded in a parliamentary framework that would exercise control.⁷⁸

Since global administration, in many of its parts, is made up of domestic regulators cooperating, and since it often depends for its effectiveness on domestic implementation, such a bottom-up approach might actually be quite effective in ensuring accountability, and it might be a powerful tool to link global administration to democratic procedures. However, it also faces important limitations and problems. As noted above, this approach may be implemented rather easily in the case of global decision-making by intergovernmental networks, but it will be much more difficult to apply to formal international organizations or to hybrid or private governance arrangements. It is difficult to see how it could be applied at all to distributed administration by other states. Further, implementing this approach would require some way to order the diversity of approaches that are bound to develop when different countries establish their own procedures and thus seek to influence global administrative bodies in diverging ways. It needs to guard against the inequalities among countries that will result from the fact that the domestic institutions of powerful states will

⁷⁸ For greater detail *see* Stewart, *supra* note 4.

usually have far greater influence on global administration than those of weaker states. And it will have to deal with the question of the relevant constituency: to which public or publics should global administration be accountable? If the relevant public is global in character and different from the sum of the national publics, domestic procedures may be insufficient, at least in their traditional form. This might also be true for the application of domestic administrative law to distributed global administration: here, too, one might have to devise ways to include a broader set of interests than just the national public.

The bottom-up approach is fundamentally constrained because, while domestic administrative law systems provide valuable ideas, they are not generally applicable as direct models for understanding and problem-solving in the quite different conditions presented by global administrative space. Most domestic systems of administrative law address executive branch officers or administrative agencies (whether or not to such degree politically independent) exercising authority delegated to them by a parliamentary statute. In exercising this authority, agencies are required to follow particular procedures involving the participation of affected parties or a broader public. If a person with standing decides to contest a decision, it is subject to review by independent, mostly judicial bodies by reference to procedural and substantive legality.⁷⁹ This model does not fit easily with the structures of international law and global governance, for at least three reasons. First, its focus on the parliamentary delegation of authority faces severe problems in an international political system in which an accepted central plenary lawmaking authority is not established. Without a central democratic institution such as a parliament and without a convincing democratic theory for the global space, the democratic anchor of domestic administrative law theory does not hold global administrative law in place. Some global administrative action is based on delegation of powers by states acting collectively, but much does not flow directly from any delegation because of the general lack of direct enforcement authority by international institutions. And, where delegation does occur, it is usually not from a central democratic law-making body comparable to a parliament. Second and related, the focus on administrative decisions having binding legal effect on individuals and other non-state actors is not sufficient for systems of global governance aimed primarily (at least in the first instance) at decisions of states or based on recommendations and informal agreements, or for governance decisions of private or hybrid regulators. Third, individual participation and individual standing to obtain review are not easy to accommodate in some of the state-centered structures of international law. Therefore, global administrative law, while drawing some concepts from domestic administrative law, must start from different structural premises in order to build genuinely global mechanisms of accountability. This may imply a

different normative starting point – one that would perhaps not rely so much on justification through individual rights and democracy, but, in a pluralist conception, on firmer accountability by global administrators to international regimes and participating states or, in solidarist or cosmopolitan conceptions, to ensure accountability to the emerging international community as such. And it may involve different institutional mechanisms – mechanisms that are in some cases perhaps entirely detached from democratic foundations and represent more pragmatic means of checking the power of administrative actors.⁸⁰

But even if the goals of global administrative law should be more modest than ensuring democracy, the use of tools from domestic administrative law faces important limits, stemming mostly from the different structure of global administration: from the informality of its institutions, its multi-level character, and the strength of private actors in it.

The informality of global administration. Domestic administrative law is, despite all changes in recent decades⁸¹, still built around a core of command-and-control administration: of rules and decisions binding on private actors, emanating from a defined administrative actor. In global administration, no such core exists: most of it consists of international institutions with the power to make recommendations but not binding rules, or of regulatory networks with informal decision-making procedures and agreements. Anomalous forms of domestic administrative law – informality, networks, and cooperative structures – dominate the global level, and while in the domestic context the problems they create can perhaps remain unsolved without too much harm so long as most important regulatory programs are carried out through traditional legally binding instruments, this condition does not hold true globally. If it is unclear in which global decision-making procedures one should establish participatory rights, or against which actions one should provide for review in situations where binding instruments and decisions are absent, global administrative law cannot function properly. But these problems can also not be circumvented by returning to a binding command-and-control administration on the global level, since this would imply a much further-reaching delegation of powers to global institutions than is realistic for the near future.

The diffusion of decision-making in a multi-level system. A clear attribution of responsibility for decisions is central to domestic administrative law, as it allows organizing the accountability of a precise actor. Yet on the global level, because of the often cooperative structures of the system of multi-level governance, such responsibility is usually difficult to establish. Instead, decisions will often be attributable to domestic, foreign and international actors together: for good reason, none of them is entitled to act alone, so all of them have to

⁷⁹ See Stewart, *supra* note 4.

⁸⁰ See Grant & Keohane, *supra* note 66.

act in common. In some respects, this problem mirrors similar difficulties in the European Union; but here, too, they have not always been successfully solved.⁸²

The private element in global administration. Domestically, private actors often assume regulatory functions, but many of them under structures of delegation from public bodies, and all embedded in an order in which public bodies, both administrative and legislative, possess relatively effective means of intervention to control or correct private governance. On the global level, such a public order is largely lacking, and yet, private bodies perform far-reaching tasks, often spurred by the absence of public regulation. In these circumstances, it is quite unclear how accountability for private governance can be organized. Some global private governance organizations, such as ISO and international sports federations, have adopted certain procedures of accountability and review in order to enhance their effectiveness and legitimacy; these may find parallels in domestic administrative and private law that are so far underexplored.⁸³

All of these issues pose problems for the transposition of domestic administrative law. They point to the need for drawing more on insights from the fringes of domestic administrative law, from research into its anomalous forms, if domestic tools are to become useful for the global level. Perhaps most suggestive for administrative lawyers, however, is the prospect that the laboratories of innovation in global administrative law may generate new ideas for domestic administrative law, as many of the core problems of global administrative law are increasingly being recognized in domestic law too.

The Top-Down Approach. The second strategy for constructing global administrative law, the *top-down approach*, would operate in a more traditional international way and may thus avoid some of the problems involved in applying domestic mechanisms of administrative law to global institutions and actors. It would build accountability mechanisms at the global level: individuals, groups and states would participate in global administrative procedures; review of decisions would be performed by independent international bodies, and this would include the review of domestic decisions forming part of distributed global administration. But this would pose new difficulties: it would require legalization and institutionalization of administrative regimes that so far are characterized by strong informality, which is difficult to achieve without losing the benefits of informal modes of cooperation; and powerful states and economic actors will generally be suspicious of strongly legalized regimes, because they reduce their discretionary influence. Moreover, a top-down approach might produce far greater democratic problems than one based, at least in part, on

⁸¹ See Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U.L. REV. 437 (2003).

⁸² See, e.g., Eberhard Schmidt-Aßmann, *Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft*, 31 EUROPARECHT 270 (1996).

⁸³ But see Joerges, *supra* note 12.

accountability in domestic fora. Also, a top-down strategy for constructing global administrative law must confront many of the same difficult challenges as a bottom-up approach, including the diffusion of decision-making in a multi-level system, the often indirect effect of global administrative decisions on non-state actors and the difficulty of providing them with rights of participation and review within the state-centered orientation of many global administrative regimes, and the significant private element in global administration.

Both the bottom-up and top-down approaches to constructing global administrative law thus these approaches present significant problems. It is thus necessary to consider other possible models.

B. Beyond the Domestic Analogy? Alternative Accountability Mechanisms

Grant and Keohane point to the general dearth in global governance of mechanisms of checks and balances, to the non-delegated nature of the power of most important actors, and to the lack of a defined global public. This also raises the question of whether alternative accountability mechanisms can be crafted. Such mechanisms would go beyond the usual mechanisms of domestic administrative law: they would include forms of hierarchical, supervisory, and legal accountability, backed by pressures from markets and from peers, by financial controls, and by public reputational dynamics.⁸⁴ An added advantage of such a shift would be a broadened range of actors covered: while administrative law concepts usually focus mainly on public actors and especially on those to whom power has been delegated, these mechanisms could also be applied to private actors, such as NGOs or firms, and to states, among which are, after all, the main power-wielders in international affairs.

The approach proposed by Grant and Keohane is attractive, in particular since it points to (and seeks to overcome) serious limitations of an administrative law conception of global accountability mechanisms based on domestic models. Yet Grant and Keohane acknowledge that any system based on accountability has serious limitations; in particular, powerful states will usually be checked rather by negotiation constraints than by accountability mechanisms. Then, perhaps, there is some value in continuing to work with the particular limitations of the administrative law approach, especially since it allows us to build upon insights from the domestic realm and to bring out more clearly the structural hurdles for applying them globally; all theorizing needs to work against some background, and the one of administrative law is particularly rich and has found little attention so far from theorists of the international plane. Moreover, one can also understand the proposed alternative mechanisms as variants

on the tools of administrative law: after all, hierarchical, supervisory and legal accountability are well-known to administrative lawyers. Thus, one might think of the other mechanisms as complements that may also compensate for some of the shortcomings of administrative law tools. The object would be to develop a suite of accountability mechanisms for global administration in which administrative law would play an important part; structural linkages between administrative law and other mechanisms would have to be carefully considered and evolved.

One possible model is the dynamic experimentalist vision of *benchmarking, borrowing, innovating, monitoring, and mutual learning*, exemplified to some extent in the European Union's Open Method of Coordination.⁸⁵ In this vision, different institutions and actors on the same or different levels would not stand in clear hierarchical relationships or would exercise review on one another, but would rather operate alongside each other, seeking to obtain maximum information and ideas and cooperating as well as competing in the quest for (provisionally) best solutions. This would not have to be confined to public bodies, but could also include a wealth of private bodies engaged in global administration. Another alternative model is one of *mutual challenge and reinforcement*: different levels of participation and review would remain in an unclear relationship, allowing them to challenge the other on the basis of their own normative principles and standards. Examples would include national court challenges to international institutions such as the UN Security Council; or challenges to domestic administrative procedures by the WTO Appellate Body.⁸⁶ This could, over time, lead to a strengthening and mutual adaptation of accountability mechanisms in the different layers of global administration. In this sense, it might be seen as a provisional approach; but it might also be a more permanent feature of a global administrative space, in which notions of legitimacy and justice are likely to remain contested and divergent for a long while.

The advantages and disadvantages of such approaches have not yet been fully explored. Nor has the potential more generally of other *non-traditional tools of domestic administrative law* as sources of ideas for global regimes.⁸⁷ For example, public-private networks and economic incentive mechanisms have become prominent in domestic administration, and they may be preferable to the classical command and control tools of administrative law in a global setting characterized by a lack of traditional enforcement capacities. Yet challenges confronting these innovations within domestic systems, particularly challenges in establishing accountability to a broader public through prevailing mechanisms of administrative law, are

⁸⁴ See Grant & Keohane, *supra* note 66.

⁸⁵ See Sabel, *supra* note 68.

⁸⁶ For a parallel interpretation of developments in the EU, see Miguel Maduro, *Europe and the Constitution: What if This is as Good as it Gets?*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 74, *supra* note 64.

⁸⁷ See Stewart, *supra* note 4.

likely to be acute if they are transposed to global administration. Some other proven domestic tools for promoting official accountability, such as requiring agencies to base regulatory decisions on cost-benefit analysis, subject to administrative review by a separate body connected with the elected government leaders, or tort law, may be less exposed to these challenges if used in global administration, but will face severe problems of effectiveness.

VI. The Positive Political Theory of Global Administrative Law

The positive political theory of global administrative law, though central to understanding the emerging mechanisms and to building and applying effective institutional strategies, is so far quite underdeveloped. Identifying institutional and developmental regularities is especially difficult in this field, given the fragmented nature of international institutions and the wide variety of actors pursuing their interests through them. It will accordingly be difficult to come up with any conclusions as general as those advanced on the domestic level.⁸⁸

Reminding us of the need to stay attuned to the specificities of each regime, Eyal Benvenisti has suggested four different factors as central to the development of global administrative law: inter-state competition, domestic competition, internal competition within the respective institution, and competing values among the different actors.⁸⁹ Given that these factors will interact very differently in different settings, it will be difficult to draw from these factors any concrete regularities or even predictions of institutional development. Yet Benvenisti cautiously advances several hypotheses that will be worth further testing. Among them is the reluctance of powerful states to agree to mechanisms of global administrative law, unless the actors involved in participation and review are likely to further their own views and interests. Another is a tendency of democratic states with a strong domestic opposition to push for stronger accountability mechanisms in international institutions. And a third is an inclination of review bodies to create strong administrative rules, when the actors within the institution show a large extent of disagreement, thus opening space for independent action.

Benvenisti also hypothesizes that strong accountability mechanisms will often evolve in situations of delegation of powers. This fits nicely with the observation by Grant and Keohane that it is in delegation structures that accountability mechanisms can work best; the relationships between delegation and accountability certainly need more detailed analysis. Yet global administrative law is also emerging outside of structures of delegation, often

⁸⁸ For the domestic level, see Matthew D. McCubbins, Roger Noll, & Barry R. Weingast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995); *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999).

driven by a desire for legitimacy (or public reputation) on the part of the administrative bodies themselves. In the OECD, for example, it was out of a moment of crisis and contestation (around the Multilateral Agreement on Investment) that efforts at greater transparency and inclusion emerged. This would correspond well with Benvenisti's hypothesis that administrative law mechanisms are a function of the power relations of different actors: through moments of legitimation crisis, new actors gain power – often NGOs – which then demand inclusion through new procedures. And we can see that in areas with a strong public presence of NGOs, especially in environmental matters, mechanisms of participation are often particularly developed. In situations that are, like these, not characterized by delegation structures, another argument of Grant and Keohane becomes relevant: namely that for accountability to be realized, the standards of accountability must be spelled out as precisely as possible. This would point to an important role of substantive law: by defining the powers and limits of global administrative actors, it would make it possible for participatory procedures and review bodies to exercise more effective control.

VII. Conclusion: Future Directions in Global Administrative Law

This article has sought to provide a survey of major developments and central questions in the emerging global administrative law. Since this field is still in its infancy all of the issues we have outlined require much more research and debate – neither the structural and empirical questions, nor the doctrinal or normative issues, nor the questions concerning institutional design and construction and positive political theory, have yet received satisfactory answers. More fundamentally, there remains scope for real contestation about whether it is useful either to speak of “global administration” and “global administrative space” or to advocate “global administrative law” as a field of study.

The NYU Research Project on Global Administrative Law is engaged in collecting a broader set of data and analyses about instances of emerging global administrative law. These include cases where administrative law, or mechanisms, and rules and procedures comparable to administrative law, are used to promote transparency, participation and accountability in informal, cooperative and hybrid structures and in multi-level systems with shared responsibility in decision-making. Knowledge about this congeries of practices is dispersed among specialists in different subfields of international law, administrative law, regulation, international politics, public choice theory, and functional areas, and participants have not necessarily seen these developments as related. We hope that defining a field of

⁸⁹ See Eyal Benvenisti, *Public Choice and Global Administrative Law: Who's Afraid of Executive Discretion?*, IILJ Working Paper 2004/3, available at http://www.iilj.org/global_adlaw/pdfs/Benvenisti_IILJ2004_3.pdf.

global administrative law will help draw connections among these specialist areas of theory and practice, and will thus allow revealing parallels and contradictions that were not noticed earlier. With a wide set of case studies of practice in particular areas, coupled with efforts to develop comparative and synthetic conceptual structures and normative theories, questions about the design of and need for mechanisms of transparency, participation, review, and legality in global administration may be more fully addressed, deeper analysis of doctrinal features and divergences will be possible, and hypotheses of positive political theory can be developed and tested.

Work on the normative issues is likely both to deepen transnational and global democratic theory and to raise challenging questions about its application to specific administrative structures and to the whole project of global administrative law. Normative inquiries will also enrich operational understandings of the place of diversity, equality, and equity in global administrative law. The need for alternative approaches to the currently dominant models of global governance and of administrative law is pressing, but is just beginning to be addressed.