

THE GLOBAL REGULATORY CHALLENGE TO U.S. ADMINISTRATIVE LAW

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I. INTRODUCTION

The shift of regulatory decisionmaking from domestic to global presents a profound challenge to the systems of administrative law that the United States and other nations rely upon to secure the accountability of the administrative state. In response to the growth of worldwide economic and other interdependency, the past twenty-five years have witnessed a dramatic shift of regulatory authority from the nation state to a dizzying variety of global regulatory regimes, including international organizations, transnational networks of national regulatory officials, and private or hybrid private-public regulatory bodies. As a result, domestic systems of administrative accountability through law are being increasingly sidestepped. Global regimes not subject to these domestic disciplines adopt regulatory norms that are then implemented through domestic regulation. The global regulatory decisions also escape accountability through international law mechanisms of state consent through treaties because they are often adopted by administrative bodies that operate below or outside the treaty system. The globalization of regulation has dissolved what were once firm distinctions between decisionmaking at the international and at the domestic levels. The resulting accountability gaps have stimulated loud criticisms by non-governmental organizations (NGOs), politicians, and the media in the United States and elsewhere that global regulation has been captured by the powerful, to the detriment of environmental,

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consumer, labor, and other social interests with a resultant weakening of domestic regulatory protections.¹

This Article addresses these developments and their implications in the context of the United States. It summarizes the impact of global regulation on U.S. regulation and administrative law, the responses taken by the federal courts, Congress, and the executive, and the future challenge in developing adequate mechanisms of administrative accountability. While focusing on the United States, this Article addresses these issues in the broader context of the systems of global administrative law that are emerging to discipline regulatory decisionmaking.² Global administrative law comprises the mechanisms, principles, and practices that promote or otherwise affect the accountability of diverse global administrative bodies, in particular by ensuring that they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions made.

Importantly, the implications of globalization for U.S. administrative law run in two directions. Just as U.S. interests are concerned with the domestic impact of global regulation, foreign governments, businesses, and NGOs are concerned with the impact abroad of U.S. regulation. In this respect, U.S. regulation has a global character. Insofar as they implement global regulatory norms or take actions that affect international trade, investment, and movement of persons, U.S. agencies are themselves operating as part of the global regulatory system and thereby assume corresponding responsibilities.

1. See, e.g., Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards*, 50 U. KAN. L. REV. 823 (2002); DEBORAH JAMES, GLOBAL EXCHANGE, FREE TRADE AND THE ENVIRONMENT, <http://www.globalexchange.org/campaigns/wto/Environment.html>; OXFAM INT'L, RIGGED RULES AND DOUBLE STANDARDS: TRADE, GLOBALISATION AND THE FIGHT AGAINST POVERTY (2002), http://www.maketradefair.com/assets/english/report_english.pdf; MICHAEL ALBERT, WHAT ARE WE FOR? (2001), <http://www.globalpolicy.org/globaliz/econ/2001/0906gbz.htm>; Food First, *Food First Trade Policies*, <http://www.foodfirst.org/pubs/backgrdrs/1999/f99v5n2.html> (Fall 1999). See generally SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION (1996).

2. See generally Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (Summer/Autumn 2005) [hereinafter *Emergence of Global Administrative Law*] (explaining and discussing global administrative law).

U.S. administrative law is, accordingly, no longer solely a domestic concern or issue. For example, in several recent decisions, the World Trade Organization (WTO) Dispute Settlement Body (DSB) has held that U.S. administrative agencies are subject to and have violated international standards of regulatory due process designed to protect other states and their nationals.³ NAFTA imposes similar administrative law disciplines on U.S. agencies.⁴ The provisions in GATS for trade liberalization in services sectors pose a looming challenge to U.S. methods of professional licensing, which will have to be opened to foreign providers. Thus, the future development of U.S. administrative law and practice in response to globalization must accommodate both domestic and external interests in regulatory accountability.

The balance of trade in administrative law shows that the United States has been thus far a strong net exporter. The U.S. government, often with the strong support of U.S. business, has successfully pushed judicialization of the WTO dispute settlement process, protections for intellectual property holders and service providers in the WTO TRIPS and GATS Agreements, "rule of law" requirements in "good government" initiatives by the World Bank and IMF, and investor protection provisions in NAFTA and bilateral trade agreements. U.S.-based environmental, consumer, and other NGOs, often with the support of the U.S. government, have pushed mechanisms of transparency, participation, and review in the WTO, World Bank, NAFTA, and other global trade, financial, and regulatory regimes.

U.S. domestic regulation and administrative law, however, has until recently remained splendidly isolated from globalization. Yet U.S. autonomy is beginning to erode. As a result of regulatory harmonization and cooperation and the growth of global regulatory tribunals and other authorities, U.S. domestic regulation is increasingly shaped by global influences. Global regulatory norms and practices are increasingly important factors in decisions by U.S. administrative agencies. This

3. See Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R (Nov. 10 2003); Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 34, WT/DS58/AB/R (Oct. 12, 1998).

4. See discussion *infra*.

development is generally not resisted by U.S. regulators. To the contrary, they have generally embraced—often with strong business support—international harmonization and cooperation in order to carry out their regulatory tasks more efficiently and effectively in the context of a global economy. NGO interests, however, fear that these developments will lead to a weakening of U.S. regulatory protections. They also decry the erosion of traditional legal and political tools of regulatory accountability. Global regulatory measures are often developed by global bodies not subject to traditional mechanisms of control through elections and administrative law disciplines, including judicial review. NGOs argue that these measures are adopted without adequate transparency and opportunity for participation, leading to regulatory “capture” by powerful, well-organized economic interests. Simultaneously, the efficacy of domestic U.S. procedural and review mechanisms is eroded because regulatory standards and measures often originate outside the United States, and U.S. administrative officials are pre-committed to their domestic implementation. As a result, regulatory globalization has produced potentially serious accountability gaps in both the global and domestic contexts.

The mounting challenge of global regulation represents the third major phase in the evolution of U.S. administrative law.⁵ The first, beginning the late nineteenth century, was the development of procedural requirements for agency decision-making and mechanisms of judicial review to check agency power, prevent unlawful or arbitrary administrative action, and safeguard private ordering. The second phase began by the 1960s; it was the transformation of administrative law into an interest representation model as it extended these protections to the broader array of social and economic interests affected by regulatory decisions for the purpose of promoting the affirmative exercise of administrative power in the public welfare. At the same time, the executive adopted an administrative system of cost-benefit analysis and review to promote regulatory rationality. Now, the emerging response to globalization characterizes the third phase in this evolution. Developing suitable changes in U.S. administrative law and

5. See Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 455 (2003).

practice to deal with global regulation faces difficult obstacles. These include the diffuse, polycentric, and informal character of much of global regulatory decisionmaking and its linkages to domestic regulatory decisions, and the fact that the United States is now beginning to feel the pinch of global regulation, including regulation of domestic administration and administrative law.

Part II of this Article summarizes the different types of global regulatory regimes and their impact on U.S. administrative regulations and law. Part III considers the response of U.S. administrative law to global regulation and the impact of global administrative law norms and procedures on U.S. practice, and discusses the systemic challenges in using domestic administrative law to address accountability gaps in global regulation. Part IV concludes.

II. THE GROWTH OF GLOBAL REGULATORY SYSTEMS AND THE EROSION OF ESTABLISHED ACCOUNTABILITY MECHANISMS

Underlying the emergence of global administrative law is the vast increase in transnational regulation, which addresses the consequences of global interdependency in fields such as security, trade, investment, development assistance, environmental protection, banking and other forms of financial regulation, law enforcement, telecommunications, intellectual property, labour standards, and cross-border movements of populations including refugees. These consequences can no longer be effectively managed by separate national regulatory and administrative measures. In response, many different systems of international and transnational regulation or regulatory cooperation have been established by states, international organizations, domestic administrative officials, and multinational businesses and NGOs, producing a wide variety of global regulatory regimes. Often, the objective is to reduce barriers to international trade and investment created by divergent national regulatory standards through adoption of international standards or other means of regulatory harmonization or cooperation. In other cases, the primary goal is to close regulatory gaps created by the rise of multinational businesses, terrorists, money launderers, and others who operate across or outside national regulatory systems, and achieve cooperation

on issues of global concern such as security and communicable diseases like SARS and AIDS. The Bretton Woods Institutions and other multilateral regimes have imposed regulatory conditions on final assistance to developing countries in order to promote economic or "good government" objectives.

Many of the international institutions and regimes that engage in global regulation perform functions of administrative character; they operate below the level of highly publicized diplomatic conferences and treaty-making, but in aggregate, they regulate and manage vast sectors of economic and social life through specific decisions and rulemaking. For this analysis, five basic types of international regulatory regimes may be distinguished:⁶

First, there are international regulatory organizations that adopt and oversee implementation of international regulatory standards. These regimes are established by treaty or similar agreement among states created by other international organizations. They typically include a secretariat and a variety of other internal organs, including councils of state party representatives, specialized committees, boards, bureaus, and in some cases, dispute settlement authorities. Examples include UN bodies such as the Security Council and High Commissioner for Refugees, trade regimes like NAFTA and the WTO, the IMF and World Bank, environmental regimes like the Kyoto and Montreal Protocols, the OECD, which promotes regulatory harmonization and cooperation in a wide variety of sectors, and miscellaneous bodies such as the World Health Organization, International Atomic Energy Agency, and World Intellectual Property Organization. In many cases, the standards developed by these organizations are adopted by subsidiary administrative bodies rather than through agreement among states. These regulatory standards are then implemented domestically by participating nations, although in some cases, such as refugee status determinations by the UN, international organizations may act directly against individuals.

A second form of global regulatory regime consists of intergovernmental networks of national regulatory officials responsible for specific areas of domestic regulation, such as the Basel Committee "club" of central bank regulators. These offi-

6. See *Emergence of Global Administrative Law*, *supra* note 2, at 11-15.

cially may agree to common regulatory standards and practices or engage in less structured forms of cooperation.⁷ These officials then adopt and implement agreed-upon measures in their home states. These global regulatory networks, which in some cases are developing fairly complex institutional structures, have emerged in areas such as antitrust, banking, securities, money laundering, telecommunications, chemicals, food safety, taxation, and transportation safety.

A third type of regime, generally bilateral and horizontal in character, consists of mutual recognition agreements and regulatory equivalence determinations on the part of administrative agencies in different nations to address differences in regulatory standards and practices applicable to goods and services traded among them.⁸ Under mutual recognition, the regulators agree to accept compliance with each others' measures as satisfying their own requirements. Alternatively, an agency in the country of import may accept regulatory conformity determinations by an agency in the country of origin as equivalent to its own.⁹

Fourth, domestic administrative agencies in the United States and elsewhere that are subject to global regulatory norms function as part of the global regulatory system in fields such as trade regulation, antiterrorism, environmental protection, finance, and product safety. Global administrative law norms are emerging to ensure the accountability of these domestic agencies to global interests. For example, international arbitral tribunals operating pursuant to bilateral investment treaties and NAFTA and the WTO DSB have enforced proce-

7. For an introduction to global regulatory networks, see ANN-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) [hereinafter SLAUGHTER, *NEW WORLD ORDER*]. See also David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 *TEX. INT'L L.J.* 281 (1998). As Slaughter points out, formal international organizations such as the OECD often serve as hosts for transgovernmental networks among domestic regulatory officials. SLAUGHTER, *NEW WORLD ORDER*, *supra*, at 46.

8. See Kalypso Nicolaidis and Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, 68 *MICH. R. INT'L L.* 267 (2005); Linda Horton, *Mutual Recognition Agreements and Harmonization*, 29 *SETON HALL L. REV.* 692 (1998).

9. See, e.g., Australia's Meat Safety Enhancement Program (MSEP), 64 *Fed. Reg.* 30,299 (June 7, 1999) [hereinafter *Australian Meat*] (finding Australia's system of meat inspection equivalent).

dural as well as substantive requirements for decisionmaking by domestic regulatory agencies.¹⁰

A fifth category of global regulatory regimes consist of private regulatory standard-setting bodies, such as the International Standards Organization, and hybrid private-public bodies, such as the Forest Stewardship Council. Increasingly, global regulation involves a complex, piecemeal overlap and interplay of the norms and procedures of public, private, and hybrid public-private bodies. “Voluntary” standards often become commercially obligatory under the pressures of the market through the demands of consumers and contract partners.¹¹ While these global organizations are growing in importance and often use administrative law tools to bolster their operation and legitimacy, they are beyond the scope of this Article.

In many of these regimes, administrative law disciplines are weak or absent. A government agency that determines capital adequacy requirements for banks, runs a pollution credit trading system, or freezes the assets of suspected terrorists would typically be subject to some form of administrative law procedures for decisionmaking that would afford the right to present evidence and argument by those affected, and to review by a court. These rights do not exist for the Basel Committee, the Kyoto Protocol Clean Development Mechanism Executive Board, and the Security Council’s 1267 Al Qaeda Sanctions Committee respectively.¹² These shortcomings at the global regime level would be of less concern if the norms and decisions of these and other global bodies were subject to effective administrative law disciplines when they are implemented through domestic administrative measures, but as developed below, this is often not the case. Large, visible international organizations, such as the WTO, World Bank, and IMF have been at the forefront of accountability critiques by NGOs and others, but more informal methods of global

10. See, e.g., Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R (Nov. 10, 2003); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 34, WT/DS58/AB/R (Oct. 12, 1998).

11. On private regulatory governance generally, see HARM SCHEPEL, *THE CONSTITUTION OF PRIVATE GOVERNANCE: PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS* (2005).

12. I am indebted to Simon Chesterman for this formulation.

regulation also present serious accountability problems that may, by reason of their non-hierarchical and more informal character, be more difficult to diagnose and to remedy through administrative law measures.

A. *The Global Interweaving of International, Transnational, and Domestic Decisionmaking*

Global regulation typically does not operate on two distinct, vertically separated levels, international and domestic. Rather, it functions through a web of interactions and influences, horizontal, vertical, and diagonal, among a diverse multiplicity of different regimes and actors, resembling nothing so much as a Jackson Pollock painting. These diverse global regimes are organized along sectoral lines in specific fields of regulation, often with more than one organization in a given sector. States pool some of their tasks in international, transnational, or bilateral bodies through which domestic administrative officials responsible for a particular sector forge ongoing relationships. The watchwords are cooperation, equivalence, harmonization, standardization. The various regimes are linked by ongoing informal communication and negotiation and more established ties through inter-organization representation and participation and consultation procedures. Some global regimes, such as the WTO, borrow norms and decisions from other regimes, such as the Codex Alimentarius. The overall result is a spontaneously evolving, untidy regulatory mass without center or hierarchy. There is no clear separation of function, activity, or in many cases of personnel between global bodies and domestic agencies. They engage in joint decisionmaking, depend on each other, and often pursue common objectives. There is often no clear separation between global and domestic law. National systems of administration and law become porous; global norms penetrate them, circumventing the national legislature. Reciprocally, global regimes absorb the norms of dominant states.¹³

As a consequence of the global transformation of regulation, national regulatory officials from specific administrative agencies such as EPA, FDA, the Comptroller of the Currency,

13. See Sabino Cassese, *Global Administrative Law: An Introduction* 13-18, 20-26 (Feb. 22, 2005), available at http://www.iilj.org/global_adlaw/documents/Cassesepaper.pdf.

the Treasury, etc. play multiple roles. They operate as representatives of the United States or their agency or as members of international organizations or their subsidiary bodies. They also participate in transnational regulatory networks and horizontal regimes of bilateral cooperation. In these several capacities they participate in the development and adoption of global regulatory norms. In their domestic capacities, these same officials implement agreed-upon global regulatory norms through the decisions that they make on behalf of the administrative agencies in which they serve.¹⁴ These officials have strong practical and professional incentives to develop and subsequently implement domestically global regulatory norms in order to more efficiently and effectively regulate internationally traded products and services and transnational economic and other actors, close regulatory gaps and reduce transactions costs.

Under a hierarchical “statutory/adjudicatory” model of regulatory governance,¹⁵ norms adopted by treaty-based international organizations may be legally binding on party states, and must be formally incorporated into and implemented through domestic law. But most global regulatory norms, including many norms adopted by treaty-based regimes, are not, as a matter of either international or domestic law, legally binding on domestic agencies and officials. Further, the influence of these norms on domestic regulatory decisionmaking is typically not hierarchical or straightforward in character. Most global regulatory norms and practices are developed and have domestic influence through a more informal and variegated “regulatory convergence” approach to governance without any formal mechanism for transmission and adoption. Moreover, the processes of development, adoption, and implementation of global regulatory norms are often administrative throughout. These norms and practices are often adopted by international or transnational committees, boards, expert groups, working groups of domestic officials, and dispute settlement bodies such as the WTO DSB that have an administrative char-

14. Subject to a few but perhaps growing number of exceptions discussed below, treaty-based regimes lack authority directly to regulate the conduct of non-state actors.

15. See Daniel Tarullo, *Law and Governance in a Global Economy*, 93 AM. SOC'Y INT'L L. PROC. 105, 107 (1999).

acter. Further, they are typically implemented at the domestic level entirely by administrative agencies, generally without the need for legislative action. In the United States, for example, most relevant regulatory agencies already have statutory authority to adopt and implement global regulatory norms without the need for new legislation. They are carried out through the initiative of the very same agency officials who participated in their prior development and adoption through global regimes.¹⁶

B. *Accountability Gaps: Domestic and Global Perspectives*

The polycentric character of global regulation, its often informal and amorphous character, and the multiple overlapping roles played by national regulatory officials pose serious problems for established international and national mechanisms of political and legal accountability, which are generally directed at formal decisions taken by discrete, identified officials operating in a single institutional role. The circumstance that these global processes are often entirely administrative in character greatly attenuates the efficacy of treaty-based state consent and electoral systems of accountability. Administrative law disciplines in many global regulatory regimes are sparse at best, although some have made significant innovations.¹⁷ Global regulatory norms are generally developed in accordance with traditional diplomatic norms of negotiation confidentiality. Also, the regulatory issues involved are often technical and appropriately addressed by experts. Further, global norms are often transmitted into domestic agency decisionmaking through individual officials' initiatives or other influences rather than formal mechanisms of transposition. As a result, global regulatory norms are often adopted and implemented through diffuse, low visibility processes that resist formal accountability mechanisms.

Critics in the United States and elsewhere contend that the norms, policies, and practices adopted by global regulatory regimes are not subject to adequate political, legal, and public

16. For example, the national bank regulatory officials forming the Basel Committee on Banking Supervision agreed on new capital requirements for banks; then they adopted these requirements through their domestic administrative regulatory authority. See Zaring, *supra* note 7.

17. See *Emergence of Global Administrative Law*, *supra* note 2, at 30-32.

accountability. The criticisms have both process-based and substantive components, and may focus on either the domestic or transnational aspects of global regulation.

Regarding process and procedure at the global level: Treaty-based international regimes increasingly adopt regulatory norms and practices through subsidiary lawmaking bodies of an administrative character. Although some follow regularized decisional procedures that may allow opportunity for outside input, these procedures fall far short of the norm in well developed systems of domestic administrative law, and review by courts or other independent bodies is virtually non-existent. Moreover, many global regulatory regimes operate in a far more informal fashion. They are often dominated by national administrative officials from specialized administrative agencies operating in a given field. The resultant disaggregation of the states creates serious problems for traditional models of state control and accountability, both international and domestic.¹⁸ Treaty-based international organizations such as the WTO, World Bank, and IMF have been widely attacked for imposing measures generated by secret processes of negotiation or dispute resolution without adequate opportunity for access to information, participation and input on the part of affected global or domestic publics. These organizations, however, operate through regularized, relatively formal and transparent processes that are generally more amenable to oversight than to more informal forms of transgovernmental regulatory cooperation, which have so far received far less attention.

Regarding process and procedure at the domestic level: Critics contend that the shift of regulatory decisions to global regimes makes regulatory decisions a multi-dimensional game that enables government officials to escape domestic political accountability that would otherwise operate on their decisions. Thus, “[i]nternational negotiations sometimes enable government leaders to do what they privately wish to do, but are powerless to do domestically.”¹⁹ When it comes to implementation, global regulatory norms can often be carried out by ad-

18. See SLAUGHTER, *NEW WORLD ORDER*, *supra* note 7.

19. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 *INTL ORG.* 427, 457 (1988), *quoted in* Zaring, *supra* note 7 at 321. *See generally* Gregory Shaffer, *WTO Blue-Green Blues: The Impact of U.S.*

ministrative branch agencies under their existing statutory authorities, obviating the need for new legislation and attendant political checks. While such implementation is in many cases subject to domestic administrative law procedures and judicial review, the substantive norm was adopted through supranational processes that are not.²⁰ Further, the value of these procedures may be undermined by officials' professional and personal pre-commitment to the global norms. In other cases, especially under bilateral methods of regulatory cooperation, domestic implementation is accomplished through informal agency determinations or exercises of enforcement discretion that may not be subject to procedural requirements or, in the case of enforcement discretion, are ordinarily not subject to judicial review.²¹ Moreover, even where domestic administrative law disciplines are applicable, they generally apply only to the domestic decision and not the global component.

Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future, 24 FORDHAM INT'L L.J. 608, 609 (2000).

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

Concerns about the lack of accountability of regulatory decisionmaking by global administrative bodies is a factor leading some authors to argue that congressional statutes requiring domestic U.S. implementation of those decisions may constitute an unconstitutional delegation of legislation power to such bodies. See, e.g., Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004). They may also have influenced the recent, rather startling decision of the D.C. Circuit holding that a post-ratification decision by the conference of the parties to the Montreal Protocol adopting limitations on use of methyl bromide are not "law" that a Federal Court can apply and enforce in litigation by an environmental group claiming that EPA had unlawfully failed to follow a congressional statute requiring it to implement such decisions. See *NRDC v. EPA*, ___ F. 3d ___, 2006 WL 2472144 (D.C. Cir., Aug. 29, 2006).

21. See Horton, *supra* note 8, at 695-99; Sidney Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, 54 ADM. L. REV. 435, 441, 455 (2002) [hereinafter *International Trade Agreements*]. Examples include the decision by the U.S. Department of Agriculture to grant equivalency status to the Australian Meat Safety Enhancement Program. *Australian Meat*, *supra* note 9. See also Wallach, *supra* note 1, at 842-43. For discussion of the U.S. FDA's decision to issue equivalence determinations under the U.S./EU MRA on pharmaceuticals without allowing for stakeholders input, see *id.* at 853-54.

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Process-based concerns lead to substantive critique. Critics of regulatory globalization assert that the absence of adequate mechanisms of transparency, accountability and control helps well-organized industrial and financial interests and powerful countries to “capture” the global regulatory decisionmaking process to the detriment of the environment, consumers, workers, and other “public” values and interests, as well as the interests of developing countries.²² As a result, critics argue, domestic implementation of global regulatory standards and practices will lead to a weakening of the protections afforded by national systems of regulation.²³ Academic students of global regulatory governance find substantial merit in these critiques.²⁴ They conclude that the diffuse, polycentric, multi-level character of global regulatory decisionmaking creates serious information asymmetries and agency costs, increasing the severity of the collective action problems faced by unorganized “public” interests. These conditions operate to “filter” such interests and systematically disadvantage “larger and politically weak groups” such as workers, the poor, the uneducated, the vulnerable, and developing country interests.²⁵

22. See, e.g., Caroline Dommen, *The WTO, International Trade, and Human Rights* 2-5 (3D _ Trade – Human Rights – Equitable Economy, Working Paper), available at http://www.3dthree.org/pdf_3D/WTOmainstreamingHR; World Wildlife Federation International, Friends of the Earth International, Institute for Agriculture and Trade Policy, ActionAid, Oxfam International, and The Center for International Environmental Law; *Open Letter on Institutional Reforms at the WTO* 2-4 (Oct. 2001), available at http://www.oxfam.org/eng/pdfs/pp0110_reform_in_WTO.pdf; Oxfam International, *Harnessing Trade for Development* 2-3, 8 (Aug. 2001), available at http://www.oxfam.org/eng/pdfs/pp0108_Harnessing_trade_for_development.pdf; Oxfam Canada, *Let's Harness Trade for Development: Why Oxfam Opposes the FTAA* (2001), available at http://www.oxfam.ca/news/Peoples_Summit/Opposes_FTAA.htm.

23. See, e.g., Wallach, *supra* note 1, at 828; Ralph Nader and Lori Wallach, *GATT, NAFTA, and the Subversion of the Democratic Process*, in *THE CASE AGAINST THE GLOBAL ECONOMY: AND FOR A TURN TOWARD THE LOCAL* 92-108 (Jerry Mander and Edward Goldsmith eds., 1996); Press Release, Canadian Labour Congress, *WTO Ignoring Workers' Rights in a Race to the Bottom* (Sept. 9, 2003), available at http://www.canadianlabour.ca/index.php/septembre_03/144?language=EN.

24. See, e.g., Putnam, *supra* note 19; *International Trade Agreements*, *supra* note 21, at 457-58; Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 *IND. J. GLOBAL L STUDIES* 347, 347-48 (2001).

25. See Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions*, 68 *LAW & CONTEMP. PROBS.* 319 (Summer/Autumn 2005).

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The obverse target of concern is the disregard of global interests by domestic administrative officials when they make regulatory decisions that adversely affect international trade, investment, aliens, or intellectual property rights held by foreign entities, or otherwise pursue protectionist, or parochial policies. Here again, the critique is both process-based and substantive. The external interests adversely affected by such administrative decisions may not have adequate notice of the relevant proceedings or applicable domestic legal norms, opportunity to submit evidence or views, or means of review and redress. Substantively, decisions by domestic regulators may violate global regulatory norms established in trade and investment treaties or international human rights laws or environmental agreements.

C. *Potential Administrative Law Responses to Accountability Gaps in Global Regulation*

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

One model is the “bottom up” approach, extending domestic administrative law to assert more effective control and review with respect to the supranational elements of domestic regulation. For example, U.S. courts might seek to extend U.S. administrative law procedural requirements and judicial review to the decisions and norms of global regimes being implemented by U.S. agencies. Thus, they might refuse to recognize global regime decisions that did not satisfy basic standards of regulatory due process. Alternatively, U.S. courts might limit their review to domestic agency decisions, but insist that the administrative agency record the global decisional backgrounds, require the agency to address the global elements in its decision, and include them in its review. As a third approach, courts, Congress, or the executive might apply procedural requirements, such as public notice and opportunity for comment, to U.S. officials’ participation in global decisionmaking. Other nations might impose similar requirements, which might ripen and coalesce into a transnational administrative law for global regulation.

A second model for developing global administrative law is a “top down” approach; global regulatory regimes would themselves adopt administrative law disciplines for their decisions, including some or all of the following elements from the administrative law “tool box”: arrangements to promote organizational and decisional transparency and public access to information; notice and comment procedures and other types of opportunities for public participation in connection with decisions; a practice of reasoned decisions, including findings of fact, conclusions of law and policy, and responses to comments; decisions on an administrative record, including relevant records in the possession of the decisionmaker and a docket of outside comments; measures to address self-dealing and conflicts of interest; and review by an independent tribunal or other mechanisms.²⁶ Some global regimes have already begun to develop a variety of different accountability tools of an administrative law character, including the World Bank Inspection Panel;²⁷ the procedures of the NAFTA Commission for Environmental Cooperation;²⁸ and the inclusion of NGOs in decisionmaking by the Codex Alimentarius Commission and the Convention on International Trade in Endangered Species.²⁹

A third model of global administrative law follows an “integrative” logic through substantive principles and regulatory due process requirements applicable to decisions by domestic

26. See Daniel C. Esty, *Legitimizing Supranational Governance: The Role of Global Administrative Law* 60-72 (Yale Law Sch., Working Paper, Apr. 11, 2005), available at http://iilj.org/global_adlaw/documents/EstyPaper.pdf.

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

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

29. For discussions on NGO participation at Codex Alimentarius meetings, see Wallach, *supra* note 1, at 836-38; Robert F. Housman, *Democratizing International Trade Decisionmaking*, 27 CORNELL INT'L L.J. 699, 718-20 (1994). For discussions regarding NGO participation in the context of other international treaties and organizations, see Daniel Vice, Note, *Implementation of Biodiversity Treaties: Monitoring, Fact-Finding, and Dispute Resolution*, 29 N.Y.U. J. INT'L L. & POL. 577, 616-19 (1997); Kal Raustiala, Note, *The “Participatory Revolution” in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537, 547-48 (1997).

agencies that affect international trade and investment, aliens, and other extranational interests. The WTO, World Bank and IMF have developed such requirements for administrative decisions affecting international trade and investment. The Inter-American Court on Human Rights has held that a state must take effective administrative measures to protect the property rights of indigenous peoples.³⁰ Courts in a number of Commonwealth countries have drawn on international human rights law to overturn or limit executive decisions to deport aliens.³¹ The aim of these initiatives is to promote the representation, consideration, and protection of affected foreign or otherwise ignored interests in order to address the regulatory externalities of domestic agency decisions.³² Thus, the response of domestic administrative law to the impacts of globalization must address two quite different types of concerns: those domestic constituencies who fear that their interests have not been adequately considered in the global development and subsequent domestic administrative implementation of supranational regulatory norms; and global constituencies fearing parochial disregard of their interests by domestic administrators.

These various developments, including the “top down,” “bottom up,” and “integrative” models, have thus far been studied and discussed as separate phenomena. But, they are properly viewed as elements in the development of an emerging overall system of global administrative law, in which borrowing and mutual learning occurs.³³ Nonetheless, there are serious challenges to building administrative law mechanisms for global regulation that will fulfill the negative (power checking) or affirmative (power directing) functions that administrative law serves in a wholly domestic settings. In such set-

30. *The Case of the Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 66, at 83 (Aug. 31, 2001).

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

32. The impact of global regulation has thus far fallen most heavily on developing countries, for example through the conditions on financial assistance imposed by the World Bank and the IMF and the investor protection obligations imposed on developing countries in bilateral investment treaties with developed countries. *Emergence of Global Administrative Law*, *supra* note 2 at 27, 37.

33. See *id.* at 53-59.

tings, regulatory agencies generally operate at only one remove from elected legislatures and in the shadow of review by independent courts. Global regulatory regimes operate at much further remove from elected legislatures, and reviewing courts are generally absent. There are good reasons for traditional international negotiation norms of confidentiality and for the use of informal modes of global regulatory governance. Further, in many global regulatory regimes regulatory functions have not (yet) crystallized in distinct administrative bodies that could be readily governed by administrative law.

III. U.S. ADMINISTRATIVE LAW, GLOBAL REGULATION, AND GLOBAL ADMINISTRATIVE LAW

Global regulation is already having a discernible influence on U.S. domestic regulatory decisions. Although its effect on the United States and other OECD countries has been more limited than its impacts on developing countries, the effects are significant and growing. For example, the WTO Dispute Settlement Body (DSB) has found that a number of U.S. administrative measures contravene WTO agreements, forcing reconsideration and leading to changes in those measures.³⁴ U.S. federal regulators have supported international harmonization of regulatory standards, and adopted international standards domestically, for example in food safety. In cases where they have not followed international standards, they have, as a result of WTO obligations, provided affirmative justifications for doing so. Federal agencies are also beginning to develop mutual recognition agreements with other nations,³⁵ to grant equivalence status to their regulatory practices and determina-

34. Kristina Daugirdas, *Mediating Domestic Policy Goals and Compliance with WTO Norms*, at n.29 (April 24, 2005) (unpublished manuscript, on file with author).

35. Mutual Recognition of Pharmaceutical Good Manufacturing Practice Inspection Reports, Medical Device Quality System Audit Reports, and Certain Medical Device Product Evaluation Reports Between the United States and the European Community, 63 Fed. Reg. 60122 (Nov. 6, 1998) (to be codified at 21 C.F.R. pt. 26) (providing for mutual recognition of good manufacturing practice (GMP) inspection reports for pharmaceuticals provided by signatory countries). These are, however, a number of structural factors inhibiting broader use of such agreements. See David Livshiz, *SPS, International Standards, Domestic Implementation, and Public Participation: Can the Stars Align?*, 7-8, (January 2, 2005) (unpublished manuscript, on file with author).

tions.³⁶ For example, the FDA regularly decides whether to authorize or take enforcement action against the import of a medical device product that complies with domestic regulatory requirements in the exporting state, based on a determination on whether those requirements are equivalent to those in the United States.³⁷

Consumer and environmental interests warn that these arrangements for regulatory harmonization and cooperation will lead to a weakening of standards and undermine U.S. environmental health, safety, and consumer regulation. Although it is difficult to find hard evidence that this has actually occurred, the threat must be acknowledged.

The WTO is a frequent target.³⁸ Critics claim that the spectre of DSB rulings holding U.S. environmental, health, safety and consumer protection regulations to violate WTO free trade agreements provide strong incentives for regulatory officials to revise, repeal or not adopt important regulatory protections. The DSB process is attacked as lacking transparency, and as relying on unaccountable “trade experts” with little knowledge in the relevant regulatory fields.³⁹ As an example of the global threat to the domestic regulatory process, Public Citizen points to a 1996 WTO decision finding U.S. EPA regulation of gasoline to reduce automobile air pollution contrary to WTO trade disciplines.⁴⁰ The regulation treated foreign refiners in Venezuela and Brazil differently than U.S.

36. Livshiz, *supra* note 35, at 7-8. *See, e.g.*, Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities, 70 Fed. Reg. 460, 505-06 (Jan. 5, 2005) (justifying the risk assessment for the proposed regulation as complying with the requirements demanded by the Codex and OIE); Bromoxynil, Diclofop-methyl, Dicofol, Diquat, Etridiazole, et al.; Proposed Tolerance Actions, 69 Fed. Reg. 47,051, 47055 (Aug. 4, 2004) (to be codified at 40 C.F.R. pt. 180) (justifying a change in regulations to make them compliant with standards developed by Codex).

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37. Livshiz, *supra* note 35 at 12-14. For examples see, Australia’s Meat Safety Enhancement Program (MSEP), 64 Fed. Reg. 30, 299 (June 7, 1999) (finding Australia’s system of meat inspection equivalent to that of the United States).

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38. *See, e.g.*, LORI WALLACH AND PATRICK WOODALL, PUBLIC CITIZEN, WHOSE TRADE ORGANIZATION? A COMPREHENSIVE GUIDE TO THE WTO (2004).

39. *Id.* at 245-47.

40. *Id.* at 25-28 (referring to the DSB ruling in *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2//R (Jan. 29, 1996)).

refiners because of EPA's concern with the lack of reliable information about the regulatory baseline for foreign producers. Finding little success in challenging the regulations in the traditional domestic venues, Venezuela and Brazil challenged the regulations before the WTO and won. According to Public Citizen, this ruling led the EPA to adopt regulations the EPA had previously rejected as unenforceable against foreign producers.⁴¹ U.S. critics have also attacked WTO rulings that hold U.S. regulatory laws prohibiting the import of tuna and shrimp to be contrary to WTO agreements because of the adverse impact of foreign harvesting methods on dolphin and sea turtles, respectively. Critics argue that the logic of these rulings could also be used to challenge a domestic law which restricted the sale of products made in sweatshops or through child labor.⁴²

Critics also contend that international harmonization of regulatory standards threatens a weakening of domestic regulation.⁴³ For example, the WTO Sanitary and Phytosanitary (SPS) Agreement, gives strong incentives to member states to base food-safety measures on international standards.⁴⁴ Critics fear that international regulatory harmonization will be driven by least common-denominator or other "leveling down" pressures, resulting in a weakening of U.S. environmental, health, safety and consumer protections.⁴⁵ This substantive concern is related to a process critique: procedures for harmonization of regulatory standards are far less open to public scrutiny and participation than domestic regulatory decisional processes. Critics similarly fear that mutual recognition and regulatory equivalency arrangements will undermine domestic regulatory protections by opening U.S. borders to goods and services that have not been adequately regulated by the country of origin.⁴⁶ According to Public Citizen, the SPS Agreement led the USDA

41. WALLACH & WOODALL, *supra* note 38, at 25.

42. *Id.* at 28-36.

43. *Id.* at 55-56.

44. If states adopt international standards they enjoy a "safe harbor" against challenge under the SPS agreement but must provide affirmative justification for departures from international standards. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Art. 3(1-3) (1995), http://www.wto.org/english/docs_e/legal_e/15-sps.pdf.

45. Wallach & Woodall, *supra* note 38, at 63.

46. *Id.* at 58, 61-63.

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to weaken its standards for approving the sale of foreign inspected meat. Although the evidence for this claim is less than decisive, a risk remains.⁴⁷

The vehement criticism by U.S. environmental and other NGOs of decisions by WTO and NAFTA tribunals, the IMF, the World Bank, and other international bodies is a virtual reply of Ralph Nader's attacks on U.S. federal regulatory agencies in the 1960s. Indeed Nader is still around, making criticisms of the WTO that are virtually the same as those he levied against the Federal Trade Commission 35 years ago.⁴⁸ Some analysts have gone so far as to argue that the rise of global regulation amounts to a fundamental alteration of the constitutional and governmental system in the United States by creating a largely unaccountable "international branch" of the federal government that presents challenges comparable to those posed by the New Deal regulatory state.⁴⁹ Thus, the rise of global regulation can be regarded as posing a fundamental challenge to U.S. administrative governance similar to that posed in the 1960s by the disillusionment with the administrative process.⁵⁰

The impacts of global regulation on the United States and other developed countries as well as on developing countries will undoubtedly grow in the years ahead. Notwithstanding its global power, the U.S. will not be able to escape these impacts, in part because it is a strong proponent of the global regimes, such as the WTO, that impose such requirements on participating states. For example, the General Agreements on Trade in Services (GATS), an important trade liberalization measure pushed by the United States, will likely have far reaching ef-

47. *Id.* at 58 (pointing out that in response to the SPS Agreement and the URAA, the USDA changed regulations on imported meat. Formerly, the USDA accepted meat inspected under foreign systems that were "equal to" domestic inspection systems. Now, they approve meat inspected by systems that are "equivalent" to ours. It's not clear that this change of language has made any practical difference).

48. See LORI WALLACH & MICHELLE SFORZA, *WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY* ix (1999) (preface by Ralph Nader attacking "an autocratic system of international governance that favors corporate interests").

49. Chantal Thomas, *Constitutional Change and International Government*, 52 *HASTINGS L.J.* 1, 3-7 (2000).

50. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 29 (1990).

fects on professional licensing and regulation in the United States by requiring that the professions be opened to foreign citizens.⁵¹ The prospect of growing substantive impacts is joined with process-based concerns with accountability gaps.

The U.S. Congress shares these concerns, as reflected in the 1994 Uruguay Round Agreements Act (URAA), which approved the WTO Uruguay Round Agreements and made implementing changes to federal law. The URAA reflects a strong desire to protect U.S. regulatory autonomy. Thus, the Act directs that any provisions of the Agreements which are inconsistent with U.S. law "shall have no effect," and that approval of the Agreements gives no person a basis to challenge any U.S. law or action taken by a federal or sub-federal authority.⁵² Further, the URAA provides reports by the United States Trade Representative (USTR) to Congress on WTO activities and their effects on the United States and establishes a procedure for Congress to withdraw Congressional approval of the Agreements.⁵³ The URAA also provides special procedures for the modification of any regulation or practice of a U.S. agency found by the DSB to be inconsistent with WTO obligations.⁵⁴ These various provisions ensure that the operations of the

51. See generally GATS 2000: New Directions in Services Trade Liberalization (Pierre Sauvé & Robert M. Stern eds., 2000).

52. 19 U.S.C. § 3512(a)(1) (2000). The Act also directs that, unless the Agreements explicitly provide otherwise, the URAA is not to be construed to modify any U.S. law including environmental, health and safety laws, or the authority of the U.S. to take unilateral action in response to unfair or unreasonable trade practices. *Id.* § 3512(a)(2).

53. 19 U.S.C. § 3535 (2000). It directs the USTR to consult with appropriate congressional committees prior to any major vote taken by the WTO Ministerial Conference or General Council and to report and further consult with those committees on the outcome of the vote, its effects on U.S. interests, and the President's potential response. Similarly, the USTR is to report to and consult with the appropriate congressional committees whenever a dispute involving the United States is to be brought before the DSB. 19 U.S.C. § 3538 (2000). In addition, Section 123(a) and (b) of the URAA direct the President and the USTR to review the list of persons serving on the DSB and to seek to ensure that well-qualified experts are appointed to this roster. 19 U.S.C. § 3533(a)-(b) (2000). Furthermore, Congress has directed the USTR to lobby the WTO to adopt rules that protect against conflicts of interest among the persons serving on dispute settlement panels and in the Appellate Body. *Id.* § 3533(d).

54. These procedures, including agency notice and comment and consultation with Congress, are described below.

WTO and their effects on the U.S. are carefully monitored by Congress.

This Part considers how U.S. administrative law has already begun to respond to these accountability gaps, and what direction future initiatives may take. These include responses by the courts, Congress (as reflected for example in the URAA), and the executive. Many of the critiques of global regulation and the steps taken to meet them reflect and respond to the concerns of domestic constituencies. As noted above, global regulation also creates responsibilities on the part of U.S. administrative decisionmakers to properly consider the interests of constituencies outside the United States. Changes in U.S. administrative law to address the global elements of regulation must accordingly address the interests of both domestic and global constituencies.

This Part first addresses administrative law measures to respond to domestic concerns with the impacts of global regulation within the United States. It then discusses administrative law measures to address concerns of constituencies outside the United States with the external impacts of U.S. regulation. Next, it discusses the challenges for administrative law created by the relatively informal character of much global regulatory decisionmaking. Finally, it considers alternative strategies for building new systems of administrative law to meet these needs.

A. *Application of U.S. Domestic Administrative Law to Global Regulatory Decisions and Norms*

How might U.S. administrative law respond to the concerns of domestic constituencies with accountability gaps in regulatory decisionmaking by the first three types of global regulatory regimes discussed above—international treaty regimes and organizations, transnational regulatory networks, and bilateral arrangements for mutual recognition and other forms of regulatory cooperation—and in domestic U.S. implementation? A brief restatement of the basic elements of U.S. administrative law will provide a foundation for addressing these questions.

As framed in the Administrative Procedure Act and elaborated and enforced by the federal courts, the basic elements of U.S. administrative law are six:⁵⁵

1. Transparency: publication of agency rules, decision, procedures and policies, and public access to agency records.

2. Decisionmaking procedures: notice of proposed agency decisions and opportunity of affected or interested persons to submit evidence and argument to the decisionmaker.

3. Decision requirements: agency statements of factual findings and reasons for decisions, based on an administrative record that includes relevant agency records and submissions by affected or interested persons.

4. Availability of judicial review of final agency decisions.

5. Legality: assurance that agency decisions conform to binding legal norms, including those established by the Constitution, statute, Executive Order (if reviewable), and agency regulations and adjudicatory decisions.

6. Reasoned and responsive exercise of discretion: assurance that the agency has considered relevant alternatives and their implications and provided a reasoned justification for its choice among the alternatives, giving due account to and responding to the material evidence and arguments in the submissions of affected or interested persons.

In substantive terms, these requirements can be understood as promoting two basic accountability goals, a power-checking goal of ensuring that administrative officials follow the law (element 5), and associated values of impartiality, predictability, and consistency; and a power-directing goal of responsive regulation (element 6). The procedural elements (1-3), promote these goals by facilitating public scrutiny of and input to agency decisionmaking, promoting agency consideration of those inputs, and providing a foundation for the exercise of judicial review (element 4). The procedural elements also serve to promote these two aspects of administrative accountability through other means, for example, by facilitating

55. A further element in U.S. administrative law is the system, established by Executive Orders 12,291 and 12,866, requiring federal agencies to follow certain substantive decisionmaking principles and conduct a cost-benefit analysis, subject to review by OMB. This approach has not yet emerged as a significant element in global administrative law, although Jonathan Wiener has proposed its use.

legislative oversight and review of agency decisions,⁵⁶ and also promote participatory and other non-instrumental values.

What are the most important challenges posed in applying this system to the domestic impacts of global regulatory decisions norms and practices? Assuring legality (element 5) is generally a not a major concern. Apart from some instances, discussed below, in which judicial review of the implementing domestic agency action is not available, courts can effectively review and police U.S. agency decisions for conformity to domestic law, including the U.S. Constitution, statutes, and the agencies' own regulations (international norms are generally not directly applicable and binding on federal agencies). The more serious problems relate to the application of the procedural elements 1-3, and securing the reasoned and responsive exercise of agency discretion (element 6). These problems arise because domestic agency decision often incorporate or are significantly based upon norms generated elsewhere by global regulatory regimes. Further, the domestic agency decisionmakers may be institutionally or personally pre-committed to these norms and face strong incentives, arising from the logic of international regulatory coordination, to adopt them. Thus the effective center of decisionmaking gravity lies outside of the U.S. administrative agency and outside of the United States. This arrangement depreciates the value of the U.S. administrative law procedural requirements, which do not extend to the global elements. If global regulatory regimes do not themselves adopt administrative law practices that include these procedural elements—and, to varying degrees they do not—then the norms eventually implemented in the United States escape these disciplines. This arrangement also creates a dilemma for courts reviewing the U.S. agencies' exercise of decisionmaking discretion (element 6). That exercise of discretion has been powerfully shaped by global decisions that are not themselves subject to review by the court and, to the extent that they are made without being subject to elements 1-3, are not even knowable. The scope and efficacy of judicial review is accordingly truncated, perhaps severely. This blunting of the domestic judicial review function, together with the

56. See Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

lack of procedural disciplines on global regulatory decision-making, undermines the ability of administrative law to promote reasoned and responsive regulation.⁵⁷

How might U.S. administrative law respond to these problems? As discussed in the remainder of this section, one possibility is to apply U.S. administrative law directly to the decisions and other actions of these global regulatory regimes. A second is to develop administrative law disciplines to address more effectively the global elements involved in U.S. administrative implementation of global regulatory norms. A third is to apply such disciplines to the participation by U.S. administrative officials in the decisionmaking of global regulatory regimes.

1. *Direct Application of U.S. Administrative Law to Decisions of International Regulatory Regimes*

The strongest case for direct application of U.S. administrative law requirements—including requirements of procedural due process, reasoned administrative decisionmaking, and judicial review for legality and abuse of discretion—is where decisions of global regulatory regimes impose liabilities on or otherwise directly impact specific persons. Currently, most global regimes do not have such authority, but instances are likely to grow as international regulation intensifies. One current example is the Executive Board of the Clean Development Mechanism under the Kyoto Protocol, which determines whether privately financed projects undertaken in developing countries to reduce greenhouse gases (GHG) are eligible to receive commercially valuable GHG emissions reduction credits. Private project developers and investors are, however, afforded no procedural rights before the Board and no opportu-

57. In the purely domestic context, procedural requirements and judicial review likewise do not extend to informal communications with and influences on agency decisionmaking exerted by the executive, Congress, and the public prior to or outside the context of formal processes of rulemaking or adjudication. But these influences are the product of domestic political mechanisms and serve to promote domestic political interests. Such mechanisms operate only in an attenuated fashion or not at all with respect to global regulatory decisionmaking. For further discussion of this point, see TAN, *infra*.

nity for review of Board decisions.⁵⁸ Another example is provided by the UN Security Council 1267 Committee, which lists persons that it determines are engaged in financing international terrorism; UN member states are obligated to freeze the assets of listed persons, who are afforded no procedural rights before the Committee to challenge the correctness of its listing decisions. In the absence of any effective remedy at the level of the global regime, courts in the United States and other countries may begin to review the legality, procedural and/or substantive, of such decisions as they directly impact specific persons. Thus, persons listed by the 1267 Committee have challenged implementing domestic asset freezes in domestic courts in a number of countries, leading in some cases to the lifting of the freeze.⁵⁹

If a claimant brought such a suit in a U.S. federal court, the boldest possibility would be for the court to hold that the global regulatory regime is a de facto federal agency to which effective decisionmaking power has been delegated by treaty or executive action, so that the procedural and other requirements of the APA apply directly to that regime.⁶⁰ Such a step would be so deeply inconsistent with the courts' reluctance to interfere with the conduct by the executive of foreign affairs that it has no practical chance of adoption. Nonetheless, federal courts might, without relying on the APA, apply constitutional requirements of procedural due process and other gen-

58. See Ernestine E. Meijer, *The Clean Development Mechanism Loss: in a "win-win" Instrument* (unpublished article on file with author).

59. See Dyzenhaus, *supra* note 31.

60. A court would have to conclude that the global authority was an "agency" for purposes of the APA, which defines "agency" as "each authority of the government of the United States." 5 U.S.C. §551(1) (2005).

While UN and other international organizations and their officials regularly plead official immunity when sued in domestic courts, domestic courts may start to chip away at immunity if such organizations fail to provide effective accountability for serious errors or abuses by their officials and employees. See Frederick Rawski, *To Waive or Not to Waive: Immunity and Accountability in UN Peacekeeping Operations*, 18 CONN. J. INT'L L. 103 (2002) (discussing recent moves by the United Nations to limit the use of immunity when serious breach of law is alleged); Jennifer Murray, Note, *Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina*, 34 COLUM. HUM. RTS. L. REV. 475, 506-10 (2003) (discussing the abuse of the immunity doctrine by UN personnel involved in peace keeping missions).

erally applicable principles of administrative law to review decisions of global authorities that directly and adversely impact individual persons, and provide relief through injunctions and declaratory judgments.⁶¹

But what about the much more common situation where the decisions of global regulatory regimes are not directly applicable to or enforced against private persons but instead adopted and implemented through domestic administrative decisions that are subject to domestic administrative law requirements and judicial review? It is unlikely that domestic courts would directly review the procedures and decisions of global regimes in such cases. Instead, the courts are most likely to consider how domestic administrative law disciplines can most effectively be brought to bear on the global elements of the norms being implemented by domestic agencies. This approach is addressed in the following subsection.

2. *Application of U.S. Administrative Law to Domestic Implementation of Global Regulatory Norms*

Federal regulatory officials, as previously noted, play multiple roles in global regulatory decisionmaking. They serve on U.S. delegations to treaty regimes, serve on international boards and expert committees, participate in transnational regulatory networks, and negotiate mutual recognition arrangements. Subsequently, they implement at the domestic level the regulatory norms and practices adopted through these arrangements. U.S. administrative officials thus have both an “external” and an “internal” role. The focus in this subsection is on their internal, domestic role. Their external role is the focus of the following subsection.

When global regulatory norms are domestically implemented, a critical issue is the extent to which procedural re-

61. By way of analogy, the Bosnian Constitutional Court held that it could review certain decisions by the Office of the High Representative in Bosnia (established by the Dayton accords and endorsed by the Security Council) on the ground that the High Representative was a *de facto* domestic official and therefore his acts could be reviewed for consistency with Bosnian law. Tort remedies are another possible mechanism of review and redress. Tort claims have, for example, been asserted in India against asserted negligence by UNICEF employees in the distribution and administration of vaccines, which assertedly caused medical injuries to those receiving the vaccines.

quirements and judicial review of domestic implementation reach back to consider the development and basis of the global regulatory norms being implemented. Because of pre-commitment by agency officials, rulemaking or other procedures may have little impact on the eventual decisions and the justification given by an agency for its action may be a rationalization of a *fait accompli*. Accordingly, domestic administrative law may provide little in the way of meaningful accountability unless the record considered by the court and the reasons given by the agency encompass the global elements and the court is able to evaluate them in the context of global the entire decisionmaking process.

In addressing these issues, a fundamental question is whether U.S. agency decisions that implement norms are subject to the same procedural requirements and principles regarding the availability and scope of judicial review as similar decisions that are purely domestic in character. There are three possible answers to this question. Decisions implementing international agreements may be subject to the same requirements as purely domestic decision (“parity”). They may be subject to lesser requirements (“parity minus”). Or, they may be subject to greater requirements (“parity plus”).

Parity

Subject to a limited statutory exception in the case of notice-and-comment rulemaking procedures, discussed below, nothing in the APA indicates that domestic agency decisions in implementing global norms are exempt from APA requirements or subject to a lesser standard of judicial review than comparable purely domestic decisions. While the APA provides wholesale exemptions from all of its provisions for certain military functions,⁶² no such exemption applies to agency actions relating to foreign affairs.

Accordingly, the parity principle holds that, subject to any specific statutory provisions to the contrary, agency decisions implementing global regulatory norms should be subject to the same administrative law procedures, requirements, and scope of review as purely domestic agency actions. There are a number of court decisions that reflect this approach. See, e.g.,

62. 5 U.S.C. § 551(1)(f)-(g) (2005).

United States v. Decker,⁶³ upholding, in the context of a criminal prosecution, the judicial reviewability of fishing regulations issued pursuant to the International Pacific Salmon Fisheries Convention; Bethlehem Steel Corp. v. United States,⁶⁴ holding that U.S. agency suspension of countervailing subsidies investigation pursuant to United States-Brazil agreement is subject to notice and comment rulemaking; and Public Citizen v. DOT,⁶⁵ where the Ninth Circuit Court of Appeals held that the Department of Transportation was required to prepare an Environmental Impact Statement and conduct a Clean Air Act conformity determination in issuing regulations that would permit Mexican motor carriers to operate in the United States (as discussed below, this decision was overturned by the Supreme Court).

Even under parity, however, some forms of U.S. agency implementation of global regulatory norms will not be subject to procedural requirements or judicial review because equivalent purely domestic decisions are not. For example, under the APA, an administrative decision whether to or not to initiate enforcement proceedings in a given case is not judicially reviewable where relevant statutes (as is generally the case) do not specify any requirements or criteria for such decisions; in such cases, enforcement decisions are deemed to have been “committed to agency discretion by law.”⁶⁶ Thus, decisions by the FDA or USDA not to take enforcement action against imported products in connection with international mutual recognition and other regulatory equivalence arrangements will generally not be subject to judicial review unless the arrangement has been formalized in a regulation or other measure that is legally binding on the agency and the agency’s action is claimed to violate it.⁶⁷ Similarly, agency guidance and similar policy documents that do not purport to have the force of law are generally not subject to notice and comment rulemaking requirements or, in many cases, to judicial re-

63. 600 F.2d 733, 737-38 (9th Cir. 1979).

64. 159 F. Supp. 2d 730, 739 (Ct. Int’l Trade 2001).

65. 316 F.3d 1002, 1032 (9th Cir. 2003), *rev’d*, 541 U.S. 752 (2004).

66. 5 U.S.C. § 701(a)(2) (1994); Heckler v. Chaney, 105 S.Ct. 1649, 1655 (1985).

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

view.⁶⁸ Thus, agency use of such documents or other informal means to implement global regulatory norms or cooperative arrangements will likewise not be subject to those disciplines. As explained below, however, in a number of recent decisions the WTO DSB has held that policy guidance issued by U.S. administrative agencies is subject to DSB review for consistency with WTO Agreements; these holdings may change U.S. practice in this respect.

Further, even under a parity paradigm, the facts and circumstances involved in the development of the global regulatory norms which the agency is implementing and the agency's role in their development may not be included in the administrative record or subject to judicial review. In reviewing agency rules, for example, courts generally limit themselves to the record generated after rulemaking has been formally initiated by the agency. Prior informal discussions between the agency and interested persons, which may play a decisive role in shaping the proposed and final rule, are generally not part of the relevant record before the court and not considered by it.⁶⁹ Similarly, the informal background of licensing or enforcement decisions by agencies is generally not included in the administrative record or considered on judicial review. Given this precedent, courts following a parity approach would refuse to delve into the global decisionmaking processes that occurred before the initiation by the agency of formal domestic decisionmaking steps, leaving out what may often be the most crucial part.

The APA provides a statutory exception to parity by exempting "foreign affairs functions" from the notice and comment procedures otherwise applicable to rulemaking and the trial-type hearing requirements otherwise applicable to formal adjudication.⁷⁰ The legislative background indicates that this exemption should be limited to those matters which "so affect

68. 5 U.S.C. § 553(b)(3)(A), (d)(2) (1966) (exempting policy statements from the procedural requirements of notice and comment); 5 U.S.C. § 704 (1966) (providing for judicial review of preliminary and intermediate agency actions only given a statutory provision or the issuance of a final agency action).

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

70. 5 U.S.C. §§ 553(a)(1), 554(a)(4) (2005).

relations with other governments that . . . public [agency decisionmaking processes] would clearly provoke . . . undesirable international consequences.”⁷¹ Courts have nonetheless tended to interpret it fairly broadly to cover the implementation of international economic and regulatory agreements.⁷² But in the URAA, Congress restored parity in the specific, politically salient context of agency responses to WTO DSB decisions holding U.S. regulations to be contrary to Uruguay Round Agreements. Before modifying such a regulation, the relevant agency must provide public notice and opportunity for comment and justify any change in relation to the comments received. In addition the agency may not change the rule until after both the agency head and the USTR consult with specified congressional committees and obtain the views of relevant private sector advisory committees.⁷³

Parity minus

The principle of parity minus holds that domestic administrative decisions should not be subject to the same procedural requirements or availability and scope of judicial review as purely domestic decisions. Its rationale is that excessive legalization and procedural formality will compromise confidentiality in international negotiations and otherwise impair the ability of the executive to conclude and promptly and efficiently implement international agreements. The executive must be able to deliver prompt, reliable implementation in order to maintain negotiating credibility. Opportunities for delay through procedural formalities or judicial review will enable disaffected interests to block or delay implementation of beneficial international agreements. Since the executive can, as a general matter, conduct and conclude international agreements without being subject to the constraints of domestic administrative law, arguably it should also enjoy significant flexibility when taking the domestic steps necessary to implement these agreements.

71. Att’y Gen. Manual on the Administrative Procedure Act 26 (Dep’t of Justice 1947).

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

73. 19 U.S.C. §3533(g)(1) (2005).

This approach finds support in a number of court decisions. For example, in *Jensen v. National Marine Fisheries Service (NOAA)*,⁷⁴ the court held that a challenge by U.S. fishing interests to regulations issued by the International Pacific Halibut Commission and approved by the Secretary of State (who was delegated such authority by the President) were not subject to judicial review, on the ground that presidential action in the field of foreign affairs is committed to agency discretion by law.⁷⁵ *International Brotherhood of Teamsters v. Pena*⁷⁶ invoked the “foreign affairs function” exemption in the APA rulemaking provisions to reject a claim by U.S. truck drivers that the Department of Transportation was required to follow notice and comment procedures in issuing regulations authorizing Mexican truck drivers to drive in the United States based on determinations of driver licensing equivalency.⁷⁷ The court’s ruling may well have been influenced by a perception that liberalization in trade and services is generally beneficial and a reluctance to provide opponents with procedural weapons to fight it.

Deference to executive flexibility is also reflected in *Public Citizen v. United States Trade Representative*,⁷⁸ holding that USTR was not required to prepare an Environmental Impact Statement for the negotiation of NAFTA, on the ground that there would be no final agency action unless and until the negotiations were successfully concluded. At that point, the agreement would be submitted by the President to Congress for approval, an action that is also not subject to judicial review, with the result that judicial review is not available at any

74. 512 F.2d 1189 (9th Cir. 1975).

75. The court invoked *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948), which held that determinations by the CAB (Civil Aeronautics Board) and the President’s determination of international airline route service authorizations and recommendations by the CAB regarding such awards were not subject to judicial review. See also *Z. & F. Assets Realization Corp. v. Hull*, 311 U.S. 470 (1941) (decisions by the Secretaries of Treasury and State to certify awards pursuant to determinations of U.S.-German Mixed Claims Commission not subject to judicial review).

76. 17 F. 3d 1478, 1486 (D.C. Cir. 1994).

77. See generally Judith L. Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT’L ORG. 603 (2000); Benvenisti, *supra* note 25.

78. 970 F.2d 916, 918-19 (D.C. Cir. 1992).

stage.⁷⁹ And, in *Public Citizen v. DOT*⁸⁰ the Supreme Court held that DOT was not required to conduct an EIS and make a Clean Air Act conformity determination before issuing regulations, implementing NAFTA and relevant federal statutes, to authorize operation of Mexican trucks in the United States. The Court reasoned that the combination of NAFTA obligations and relevant federal statutes left DOT with no choice but to grant the authorization; hence an EIS and a conformity determination that would be appropriate for discretionary policy choices were unnecessary. This decision makes clear how global regulatory norms that are legally binding on the United States can short circuit otherwise applicable domestic administrative law processes.

Parity plus

A third approach would subject domestic administrative decisions implementing international regulatory norms to more demanding administrative law disciplines than equivalent purely domestic actions. The basic justification for this approach is that the norms being implemented were chosen through global decisionmaking processes that are more remote, opaque, and closed than equivalent purely domestic processes and therefore less subject to political and other mechanisms of accountability, justifying more demanding accountability through administrative law as a compensating corrective.⁸¹ Global regulatory decisionmaking often occurs in distant locations such as Basel or Geneva. Informal "club" arrangements for global regulatory decisionmaking make it very difficult for concerned interests in the United States, and especially less well-organized consumer, environmental, and other "public" interests, to acquire the information and organize effectively to influence such decisions. U.S. administrative officials may use informal negotiations with regulators in other countries to enhance their independence from otherwise ap-

79. 864 F.Supp. 208, 212 (D.D.C. 1994). See also *Public Citizen v. Kantor* (holding that the USTR's negotiation of the GATT Uruguay Round was not subject to judicial review under the APA.)

80. 541 U.S. 752 (2004).

81. See David A. Wirth, *Public Participation in International Processes: Environmental Case Studies at the National and International Levels*, 7 *COLO. J. INT'L ENVTL. L. & POL'Y* 1 (1996).

plicable domestic political checks.⁸² The chains of delegation running from Congress to regulatory decisionmaking by administrative officials are far longer and weaker in the global than in the domestic context, justifying stronger administrative law disciplines for global regulatory decisions in order to compensate.

The basic impetus for a parity plus approach is similar to that animating the development by the federal courts of an interest representation model of administrative law beginning in the 1960s: a perception that political and other extra-judicial mechanisms of accountability have failed to ensure effective agency protection of diffuse “public” interests relative to those of well-organized economic actors, and a correlative extension of administrative law mechanisms to protect such interests.⁸³

How might courts implement a parity plus approach to applying U.S. administrative law in the context of global regulation? A key objective would be to enhance the transparency of the facts, analyses, and considerations that underlie global regulatory decisions in order to expose them to public scrutiny and contestation and enable courts to apply requirements of reasoned justification, based on an adequate record, for the regulatory choices made.⁸⁴ The operating premise is that transparency and the requirement of responsive reasoning tend to “level the playing field,” alleviate information asymmetries, and check the influence of narrow interest groups in favor of broader but less well-organized constituencies.⁸⁵

In order to implement parity plus, procedural requirements and judicial review would be directed not only at a federal agency’s implementation of a global norm, but would extend to the underlying norm itself and the process of its adoption, even in cases where analogous earlier stage agency

82. See Zaring, *supra* note 7.

83. See Richard B. Stewart, *The Reformation of American Administrative Law*, 86 HARV. L. REV. 1666 (1976).

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

85. Benvenisti, *Factors Shaping the Evolution of Administrative Law*, *supra* note 25.

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decisionmaking in the purely domestic context would not be subject to such disciplines. Thus, in cases where domestic implementation involves formal adjudication or notice and comment rulemaking, courts might require the agency to submit for the record evidentiary materials on the global decision-making process and the reasons why the global norms in question were adopted. The agency might be required to explain why the relevant agency officials agreed, in their "external" capacity as participants in the global decisional process, to the norms adopted and what commitments they made regarding domestic U.S. implementation. FOIA might also be used to obtain discovery of agency records relevant to the international negotiations.⁸⁶ The justification for these steps would be that they are necessary in order to for a court adequately to review the agency's domestic decision by enabling it to take into account the underlying global norms, circumstances and considerations. Also, the enhanced transparency resulting from such steps could energize legislative and other political oversight. The executive, of course, would strongly resist any such initiative as an unwarranted interference with its conduct of foreign relations and with needed informality and confidentiality in international negotiations.

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

86. The Freedom of Information Act provides a "deliberate privilege" exemption which might be involved by the government to withhold from disclosure records pertaining to global regulatory matters. It also provides an exemption for matters that are "specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy" and properly classified under that order. *See* 5 U.S.C. §§ 552(b)(1), (5) (2004).

the 1960s in response to similar criticisms of agency regulatory decisionmaking.

Congress as well as the courts can take steps to implement a parity plus approach. Thus, in the URAA, Congress required agencies to provide notice and comment and reasoned justifications before modifying a regulation found by the DSB to contravene WTO agreements. It also provided that an agency may make such modifications only after the USTR and the agency head consult with the appropriate congressional committees on the proposed modifications. Any final rule or other modification does not take effect for 60 days, during which time specified congressional committees may take a non-binding vote to indicate agreement or disagreement with the modification. These provisions reflect that U.S. government responses to an adverse DSB ruling involve two simultaneous and intertwined processes: agency reconsideration of the measure, and USTR negotiation with the successful complaining states. The URAA provides legal and political mechanisms to promote accountability by the government officials engaged in both.

In summary, the limited number of court decisions and other initiatives on these questions have taken different approaches, providing limited support for each of the models—parity, parity minus, parity plus—but no clear trend can be discerned. Under parity or parity minus, it is doubtful that courts would do much to close the accountability gap. It is highly uncertain whether courts will adopt a parity plus approach and how far they might push it. There are, however, suggestive parallels between the present situation and the late 1960s in the United States, when courts lost faith in the performance and accountability of U.S. federal administrative agencies and adopted far-reaching innovations in administrative law, including expanded standing and participation rights and “hard look” judicial review of agency discretion. On the other hand, many of the measures needed to deal with regulatory globalization will have to come from Congress or the Executive.

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

A third approach to dealing with accountability gaps would be to extend federal administrative law disciplines directly to agency officials' participation in global regulatory decisionmaking, whether through treaty-based regimes, regulatory networks, or transnational cooperation regarding regulatory equivalency. The initiatives discussed in this subsection are primarily the province of Congress and the executive. Even an ambitious approach to judicial review of domestic implementation of global regulatory norms would most probably not allow the public to have notice of, comment on, or have an opportunity to participate or influence the decisional process at the global level where the controlling decisions are often made.⁸⁷

One unlikely possibility would be to treat federal agency officials' participation in global regulatory decisionmaking as those of their agency for APA purposes and accordingly subject them to APA procedural requirements and judicial review. The APA and general principles of federal administrative law, however, afford little or no purchase for such an initiative. Judicial deference to the executive's conduct of foreign affairs is a major additional obstacle. Where U.S. agency officials participate in a formal global regime decision by casting a vote as a representative of the U.S. government, deference to the executive and reluctance to interfere with the decisionmaking of international organizations in which other countries are represented would make courts unwilling to review the U.S. official's action. Where global regulatory norms arise out of less structured processes of deliberation and discussion, the informal character of the interaction, prior to any formal decision process, poses even more severe obstacles. Furthermore, the APA and general administrative law principles of standing and ripeness law would normally fail to countenance immediate judicial review of an agency's international-level informal discussion of or even agreement to a regulatory norm prior to adop-

87. Federal agencies entering into international regulatory agreements with counterparts must clear these agreements with the State Department and notify Congress pursuant to the Case-Zablocki Act, but this notification occurs only after the agreement has been concluded. See Horton, *supra* note 8, at 713.

tion of a domestic implementing measure that adversely affects the plaintiffs.

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

Public notice and opportunity for comment in advance of agency participation in international regulatory negotiations. Prior to entering into active negotiations on the Montreal Protocol, the Departments of State and EPA published a rather detailed program in the Federal Register and invited public comments. They also issued an environmental impact statement.⁸⁸ The executive branch also provided Federal Register notice of its intent to negotiate NAFTA and held public hearings.⁸⁹ The FDA and USDA are subject to a statutory requirement to notify the public about international "sanitary or phytosanitary standards under consideration or planned for consideration."⁹⁰ Other agencies, including USTR, and the Department of Commerce have from time to time, as a matter of agency practice, provided public notice of regulatory harmonization activities.⁹¹ These opportunities for public input to

88. Wirth, *supra* note 81, at 25.

89. *Id.* at 26.

90. 19 U.S.C. § 2578(c)(1) (2004).

91. See *International Trade Agreements*, *supra* note 21, at 443. However, the Bush administration has opposed U.S. legislation that would require notice and opportunity for public comment on proposals generated by the processes under the Stockholm Convention on Persistent Organic Pollutants to list new chemicals under the Convention. The administration objected on the remarkable ground that the legislation would unconstitutionally delegate U.S. legislative power to an international body because the timing and subject of the notice and comment process would be determined by an international body. Memorandum from William Moschella, Assistant Attorney General, United States Department of Justice, to Senator Tom Harkin (Mar. 25, 2004). The memo also argued that by requiring the administration, through the EPA, to report on the actions of an international body, the memo argued that the notice-and-comment provisions would interfere with the president's sole authority over the United States' negotiations with other countries.

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the U.S. position in international regulatory negotiations often include public meetings at which participants will be informed of the U.S. negotiating position and provide comments to agency officials.⁹²

In the aftermath of unsuccessful efforts by NGOs to judicially challenge the failure of the federal government to prepare carry out environmental impact statements on the negotiation of the NAFTA and Uruguay Round agreements,⁹³ President Clinton issued Executive Order 13,141 which directs USTR to prepare an environmental review for the negotiation of comprehensive multilateral trade rounds, bilateral or plurilateral free trade agreements, and trade agreements in natural resource sectors. The scope of such reviews was expanded in the Bipartisan Trade Promotion Authority Act of 2002, which requires similar reviews of the impact of trade agreements on U.S. employment and labor markets.⁹⁴

Participation of NGO and business representatives in international negotiations.

Non-governmental representatives, including representatives of business and NGOs, are often included as members of the U.S. delegation to international regulatory regime negotiations, including those at the OECD and the Codex.⁹⁵ They may also participate by virtue of membership on USTR advisory committees.⁹⁶ Additionally, the Transatlantic Business and Consumer dialogues, established as part of the 1995 New

92. See Livshiz, *supra* note 35, at 15

93. See, e.g., Public Citizen v. USTR, 970 F.2d 916 (1992).

94. 19 U.S.C. § 3802(c). Nevertheless, it is not immediately clear what impact such new measures will have particularly as neither the congressional legislation nor the executive order provides for judicial review, and the executive order explicitly disallows it. Exec. Order No. 13,141, 64 Fed. Reg. 63,169, 63,170 (Nov. 18, 1999). The American Bar Association has recognized the need for additional steps to provide greater transparency in connection with international negotiations on regulatory harmonization, and has recommended that the President encourage federal agencies to provide notice and opportunity for comment with respect to negotiation activities, establish advisory committees in connection with such negotiations, and make of documents available under FOIA with respect to each significant international regulatory harmonization activity in which it is engaged.

95. See, e.g., International Standard-Setting Activities, Codex Alimentarius Commission; Duties of United States Delegates and Delegation Members Including Non-Government Members, 63 Fed. Reg. 7,118 (Feb. 12, 1998).

96. See Wirth, *supra* note 81, at 28.

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Transatlantic Agenda, have provided businesses and NGOs with opportunities to consult with government negotiators on issues of transatlantic policymaking.

Measures to promote negotiation transparency. EPA has freely made OECD documentation available to non-governmental representatives participating in U.S. delegations to the regulatory harmonization negotiations held by the OECD Chemicals Group, notwithstanding the “restricted” status of the documents; this practice has, however, not been applied to other aspects of OECD’s work in regulatory harmonization.⁹⁷

In addition, as noted above, Congress in the URAA required agency notice and comment prior to revising a regulation held by the DSB to be contrary to WTO agreements, and at the same time required the USTR as well as the agency to consult with Congress. These procedures respond to the dual track process involved in the U.S. government’s response to an adverse ruling. While the DSB agency reconsiders the regulation, the USTR (with agency involvement) is simultaneously engaged in international negotiations with the complaining WTO member states.

The application of these various measures is uneven, and there is no consistent overall federal government policy or practice. Moreover, these measures are generally limited to global negotiations in the context of treaty-based regimes, and have little or no application to more informal regulatory networks and bilateral cooperative arrangements. Moreover, nongovernmental actors, and especially NGOs, often find that the opportunities for participation have limited value. Often the issues presented are highly technical. The costs of traveling to and participating in distant international fora is also a barrier for many NGOs. As a result, many NGOs lack the capacity to participate effectively, which helps to explain the low level of NGO attendance at meetings and submission of comments on U.S. negotiating positions.⁹⁸ Also, business and union groups enjoy preferential access to some global regulatory negotiations by virtue of their membership on agency advisory committees.⁹⁹ Often there may be one representative for each industry while consumer groups are left with a single

97. *Id.* at 15-19.

98. See Livshiz, *supra* note 35, at 20.

99. *Id.*

representative. Even when non-governmental actors are members of delegations or have other participation opportunities, they may be effectively shut out of high level negotiations or otherwise marginalized.¹⁰⁰ NGOs in particular tend to view the meetings and other procedural opportunities as cosmetic in character. This view may be reinforced by the fact that, under the initiatives summarized above, agency officials have no obligation to publicly justify the negotiating positions that they ultimately take or to respond to the comments submitted.

Notwithstanding their limitations, wide adoption of such measures could have a significant effect in promoting transparency and opportunity for input with respect to U.S. federal agencies' participation in global regulatory decisionmaking. They could also be expected to have an influence on subsequent judicial review of domestic implementing measures by providing potential litigants with additional information regarding the global regulatory background and facilitating expansion of the administrative record and the range of factors considered by reviewing courts. It is of course quite possible that non-state actors based in other countries could seek to take advantage of these measures, including opportunity for comment and subsequent judicial review.¹⁰¹ That could be an important step in the development of a genuinely cosmopolitan administrative law.

As discussed in subsection C, the limitations of such efforts in dealing with the more informal modes of global regulatory decisionmaking must, however, be emphasized. Also, as discussed further in subsection D, extension of U.S. administrative law to U.S. officials' participation in global regulatory decisionmaking might well be resisted strongly by other nations. On the other hand, such initiatives, especially if

100. *See, e.g.*, Press Release, Trans Atlantic Consumer Dialogue, U.S. – EU Summit Puts Bus. CEOs Ahead of Consumer Groups (June 23, 2004) (announcing a boycott of a summit of the Transatlantic Economic Partnership by TACD when business groups were offered a meeting with presidents of the United States and the European Union, but consumer groups were denied a similar meeting), *available at* <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/press.cfg&id=39>.

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

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

B. *Application of Global Administrative Law Requirements to Domestic U.S. Agency Decisionmaking*

Another aspect of the emerging global administrative law follows an integrative objective by establishing requirements and mechanisms to secure coordinated domestic administration of global regulatory norms. In order to ensure that domestic regulators act as loyal participants in global regimes rather than merely as national actors, intergovernmental authorities have adopted and enforced global norms to govern not only the substance of domestic administrative regulation, but also the decisional procedures followed. In effect, these procedural requirements make domestic regulatory bodies and officials agents of the global regime, and promote their compliance with it.¹⁰² These requirements are designed to protect the interests of other states, and foreign individuals, business firms, and social and economic interests.¹⁰³

For many developing countries, probably the most influential examples in this category are the World Bank and IMF. The World Bank's policies on good governance, whether designated as 'advice' or as conditions of financial aid to developing countries, have 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.¹⁰⁴ Given the dependence of many countries on aid, these World Bank norms have effectively transformed,

102. Slaughter discusses the dual national and global roles of national public officials in SLAUGHTER, *NEW WORLD ORDER*, *supra* note 7.

103. *See generally*, Cassese, *supra* note 14; Giacinto Della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, 9 EUR. PUB. L. 563 (2003).

104. *See* Ngaire Woods & Amrita Narlikar, *Governance and the Limits of Accountability: the WTO, the IMF, and the World Bank*, 53 INT'L SOC. SCI. J. 569 (2001).

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.

International review of domestic administrations by regional and global bodies also occurs under human rights treaties. For example, the European Court of Human Rights scrutinizes domestic administration for its conformity with the European Convention on Human Rights; it has developed a rich jurisprudence on domestic administrative procedures, especially on domestic review mechanisms.¹⁰⁵ The Inter-American Court on Human Rights has mandated government procedures to protect the rights of indigenous peoples.¹⁰⁶

There are literally hundreds of bilateral investment treaties (BITs) between developed and developing countries that give international investors the means to seek compensation awards from international arbitral tribunals for discriminatory or unfair treatment or expropriation of their property by host states. These BIT tribunals have the authority to extend procedural, as well as substantive, limitations on domestic regulators.¹⁰⁷ The bilateral arbitral process, which is generally confidential, gives investors a very powerful tool, probably not always balanced by sufficient representation of public and other interests, raising the question whether procedures should be adopted to allow the latter a role in the arbitral process.¹⁰⁸

The United States is not affected by World Bank and IMF regulatory conditions on aid, and has not acceded to the compulsory jurisdiction of international human rights tribunals. Nor has it faced challenges under the bilateral investment agreements that it has concluded with developing countries.

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

106. See Inter-Am. C.H.R., *The Case of the Mayagua (Sumo) Awas Tingui Community v. Nicaragua*, Judgment of Aug. 31, 2001.

107. See, e.g., Shane Spelisey, *Burning the Idols of Non-Arbitability: Arbitrating Administrative Law Disputes with Foreign Investors*, 12 *AM. REV. INT'L ARB.* 95, 109 (2001) (noting that most BITs authorizes tribunals to review decision of local domestic authorities).

108. See Dora Marta Gruner, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 *COLUM. J. TRANS-NAT'L L.* 923, 955-56 (2003).

It has, however, begun to encounter pressures from the WTO and from NAFTA to change its administrative decisions and procedures. For example, the WTO Appellate Body's first ruling in the *Shrimp/Turtle* case was a striking initiative applying global administrative law disciplines on U.S. agencies in order to protect affected foreign states and economic interests.¹⁰⁹ That case involved unilateral U.S. import restrictions on shrimp products based on U.S. requirements for protection of sea turtles in shrimp harvesting. The DSB ruled that in order for these restriction to be sustained under GATT, the United States was required to show: (1) prior multilateral negotiations on such restrictions as it had sought; (2) the countries affected had been consulted and provided notice and opportunity to respond; and (3) the affected countries' interests and local circumstances were taken into account by U.S. administrators when the requirements were formulated and applied.¹¹⁰ As

109. See Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 153-54, WT/DS58/AB/RW (Oct. 22, 2001).

110. The Appellate Body found the following procedural deficiencies in the U.S. process for certifying turtle protection regulatory systems in other countries as meeting U.S. requirements:

[W]ith respect to neither type of certification under Section 609(b)(2) [of US law] is there a transparent, predictable certification process that is followed by the competent United States government officials. The certification processes under Section 609 consist principally of administrative *ex parte* inquiry or verification by staff of the Office of Marine Conservation in the Department of State with staff of the United States National Marine Fisheries Service. With respect to both types of certification, there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision, whether of acceptance or rejection, is rendered on applications for either type of certification, whether under Section 609(b)(2)(A) and (B) or under Section 609(b)(2)(C). Countries which are granted certification are included in a list of approved applications published in the Federal Register; however, they are not notified specifically. Countries whose applications are denied also do not receive notice of such denial (other than by omission from the list of approved applications) or of the reasons for the denial. No procedure for review of, or appeal from, a denial of an application is provided.

12 October 1998 WT/DS58/AB/R para. 180. For commentary see, e.g., Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment*, 7 COLUM. J. ENVTL. L. 491 (2002);

one commentator has observed, “the Appellate Body proceduralizes the substantive WTO obligations” and requires states to extend “basic elements of . . . the rule of law to others.”¹¹¹

In another innovative global administrative law ruling, the WTO Appellate Body found that a proposed Policy Bulletin issued for public comment by the Department of Commerce International Trade Administration¹¹² was a government “measure” susceptible to WTO challenge and DSB review.¹¹³ Under U.S. administrative law, such policy guidance is not legally binding and generally not subject to judicial review. Under the WTO Anti-Dumping Agreement, anti-dumping measures adopted by member states must ordinarily terminate (“sunset”) after five years. The Policy Bulletin discussed the factors that the International Trade Administration would consider in extending such measures beyond five years.¹¹⁴ The Appellate Body ruled that the legal status of the document under U.S. domestic law was irrelevant and that any government document that provides for administrative guidance and creates expectations among public and private actors is a “measure” that can give rise to a finding of inconsistency with the WTO regime. Such measures can be challenged “as such,” without regard to their application in a particular case. Although the ruling arose in a challenge under the Anti-Dumping Agreement, the Appellate Body’s rationale is not limited to that agreement and can render a wide range of non-binding U.S. agency policy statements and guidance documents to WTO challenge and review. This holding is likely to provoke

Giacinto Della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, 9 EUR. PUB. L. 563, 573-76 (2003); Sabino Cassese, *European Administrative Proceedings*, 68 LAW & CONTEMP. PROBS. 21 (Winter 2004).

111. Armin von Bogdandy, *Legitimacy of International Economic Governance: Interpretive Approaches to WTO Law and the Prospects of its Proceduralization*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS – NEW CHALLENGES FOR THE INTERNATIONAL LEGAL ORDER 109 (S. Griller ed., 2003).

112. Policies Regarding the Conduct of Five-year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 Fed. Reg. 18,871 (16 April 1998) [hereinafter *Policy Bulletin*].

113. Panel Report, *United States – Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268 (Feb. 3, 2004).

114. *Policy Bulletin*, *supra* note 112, at 18872.

U.S. agencies to reconsider the use of such documents and the procedures followed in issuing them.

Other elements of WTO law also establish requirements for domestic administrative procedures. Under the WTO TBT, GATS and SPS agreements, for example, member states must maintain transparency by promptly publishing their requirements and establish inquiry points to provide information to other states or private actors. Member states are obliged to accept another member state's regulatory measures if shown to be equivalent. If a member state does not follow relevant international standards or if no such standards exist, it must follow a process of notifying and consulting with other states before adopting a standard. National procedures for certification and control must avoid discrimination against foreign products and services; be concluded promptly; make appropriate provision for business confidentiality; and provide a mechanism for review of administrative decisions. Similar requirements are established under the Codex Alimentarius Commission's Principles for Food Export and Import Inspection and Certification Systems. As these examples illustrate, global administrative law requirements applicable to domestic administrators have a horizontal as well as a vertical aspect, by requiring agencies to open themselves laterally to other states and their nationals on a reciprocal basis.¹¹⁵ In the telecommunications services sector, the model of independent regulatory agencies has been introduced under GATS in order to further the substantive goal of open access and competition.¹¹⁶ TRIPS requires member states to adopt norms, administrative procedures, and mechanisms for review and redress in order to protect intellectual property rights held by nationals of other member state. Although most of these disciplines have not yet impacted the United States, the implications of GATS for professional licensing are a looming challenge to U.S. standards and procedures for the professions.

The United States is also beginning to feel the impact of a variety of innovative global administrative law mechanisms es-

115. See SABINO CASSESE, *SHRIMPS, TURTLES AND PROCEDURE: GLOBAL STANDARDS FOR NATIONAL ADMINISTRATORS* 9-11, 15 (Inst. For Int'l Law and Justice, Global Admin. Law Series, IILJ Working Paper 2004/4).

116. MARKUS KRAJEWSKI, *NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES* 164-78 (Kluwer Law International 2003).

tablished by the North American Free Trade Agreement (NAFTA). Thus Chapter 11 of NAFTA subjects each member state to binding arbitration for claims brought by a private investor from another member state that the host state has failed to follow national treatment principles, failed to provide "fair and equitable" treatment to the investor, or has expropriated the investor's property without just compensation.¹¹⁷ Chapter 11 tribunals have subjected the decisions both of domestic courts and administrative agencies to such review.¹¹⁸

The "fair and equitable treatment" and expropriation provisions in Chapter 11 pose the greatest potential for member state liability for regulatory measures applicable to foreign investors. In *Metalclad v. Mexico*, the tribunal found a local land use regulatory decision preventing the operation of a hazardous waste disposal facility violated fair and equitable treatment and constituted an expropriation of a U.S. firm's investment in the facility.¹¹⁹ *S.D. Myers Inc. v Canada* held that a Canadian ban on export of polychlorinated biphenols (PCBs) violated fair and equitable treatment because it was an unnecessarily restrictive trade measure intended to favor Canadian industry. Although no U.S. administrative regulation has yet been found to violate Chapter 11, a number of such claims against the United States are pending before Chapter 11 tribunals. In *Methanex v. United States*, for example, a Canadian methane firm claims that a California regulation of the meth-

117. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605 (ch. 11, arts. 1102, 1105, 1110) (1993). Art. 1110 provides that "[n]o party shall directly or indirectly. . .expropriate an investment. . .or take a measure tantamount to . . .expropriation. . .except: for a public purpose; on a nondiscriminatory basis; in accordance with due process of law and Article 1105(1); and on payment of compensation. . ."

118. Claims are arbitrated under the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) and its convention, the Additional Facility Rules of the ICSID, or under the United Nations Commission for International Trade Law (UNCITRAL).

119. The Talbot tribunal states "The test is whether [the] interference . . . is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner." Interim Award, Pope & Talbot Inc. and the Government of Canada (June 26, 2000), available at <http://www.appletonlaw.com/cases/P&T-INTERIM%20AWARD.PDF>. In these and other decisions, tribunals have developed an expropriation jurisprudence that differs from U.S. takings jurisprudence. See David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651, 716-19 (2001).

ane-based fuel additive MTBE, constituted an expropriation.¹²⁰ A preliminary ruling by the tribunal invited NGO participation in the hearings by way of amici curae.¹²¹ This represents a significant global administrative law innovation in Chapter 11 proceedings and international arbitration of investment disputes generally.

A second system of supranational review of U.S. agency decisions is found in Chapter 19 of NAFTA, which authorizes a member state to bring claims against another member state challenging antidumping determinations and imposition of countervailing tariffs. Claims are heard by ad hoc binational tribunals composed of five members, each party appointing two panelists alone and one member jointly. In reviewing disputed decisions, panels apply the substantive law of the member state making the decision, thus functioning as an international reviewing body.¹²² This mechanism is a potentially significant check against anti-dumping measures adopted by the U.S. Department of Commerce and the International Trade Commission.¹²³ Chapter 19 tribunals have thus far rendered 36 decisions regarding U.S. trade measures.¹²⁴ Although relief was denied in most cases, the exercise of review over domestic

120. Other pending Chapter 11 cases include *Kenex Ltd. v. United States of America*, challenging a U.S. drug policy ban of industrial hemp and *Glamis Gold Ltd. v. United States of America*, challenging federal and California regulatory actions regarding a Canadian company's open-pit mining operations.

121. Howard Mann, *Opening the Doors, At Least a Little: Comment on the Amicus Decision in Methanex v. United States*, 10 *Reciel* 241, 243 (2001), available at http://www.iisd.org/pdf/2001/trade_reciel_methanex.pdf.

122. Although NAFTA does not provide routine appeals, it does allow for very limited review if a NAFTA panel is alleged to be guilty of (i) gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct; (ii) the panel seriously departed from a fundamental rule of procedure; or (iii) the panel manifestly exceeded its powers, authority or jurisdiction set out in Article (1904), for example by failing to apply the appropriate standard of review. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 605, 683 (ch. 19, art. 1904(13)(a)) (1993).

123. The US Department of Commerce's International Trade Administration makes dumping and subsidy determinations. 19 U.S.C. 2171(c)(1)(b). The US International Trade Commission makes injury determinations and imposes countervailing tariffs. 19 U.S.C. §§ 2251(a) - 2251(b) (2005).

124. NAFTA Secretariat, NAFTA Chapter 19 Binational Panel Decisions (USA), http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=76 (last visited November 16, 2005).

regulatory measures is significant in and of itself, and may cause regulators to modify behavior given the background pressure of international trade norms.¹²⁵

A third set of innovative administrative law measures created by NAFTA involve the North American Agreement on Environmental Cooperation (NAAEC). The NAAEC allows private parties to submit complaints to the Secretariat of the trilateral Council for Environmental Cooperation (CEC) regarding failure of any member state to enforce its environmental laws.¹²⁶ The Secretariat may recommend to the Council that it authorize the development by the Secretariat of a factual record on the asserted enforcement failures. Complaining parties may comment on the draft record. The Council may, by a two-thirds majority vote, make the record public. The resulting publicity may create incentives for states to correct enforcement failures. For example, a factual record has been developed for claims against the United States, which has been criticized for its asserted failure to enforce aspects of the Migratory Bird Treaty Act.¹²⁷ Another submission is pending

125. See Gilbert R. Winham, *NAFTA Chapter 19 and the Development of International Administrative Law*, 32 J. WORLD TRADE 65 (1998). Thus far, it appears, most of the pressure for harmonization has fallen on Mexico. *Id.* at 72-74.

126. See David L. Markell, *Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation's Citizen Submissions Process*, 30 N.C.J. INT'L L. & COM. REG. 759, 760, 763 (2004-05); ENV'T L. INST. RES. REP.: Issues Relating to Articles 14 & 15 of the North American Agreement on Environmental Cooperation, 4 (2003); Jonathan Graubart, *Giving Meaning to New Trade-Linked "Soft Law" Agreements on Social Values: A Law in Action Analysis of NAFTA's Environmental Side Agreement*, 6 UCLA J. INT'L L. & FOREIGN AFF. 425, 428-29 (2001-2002).

127. See Council for Env't Cooperation, *Instruction to the Secretariat of the Commission for the Environmental Cooperation Regarding the Assertion that the Government of the United States is Failing to Effectively Enforce the Migratory Bird Treaty Act* (SEM-99-002), C/C.01/01-06/RES/04/Final (Nov. 16, 2001) (Migratory Birds), available at <http://www.cec.org/files/pdf/COUNCIL/res-01-10.pdf>. In *Migratory Birds*, the Council refused to require the development of a factual record on allegation of broad under-enforcement, and instead limited the scope of the factual record to a few narrow instances listed in submissions as examples of enforcement failures. See David L. Markell, *Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation's Citizen Submissions Process*, 30 N.C. J. INT'L L. & COM. REG. 759, 772 (2005). The Council similarly narrowed the scope of factual records in the three other submissions not involving the US as a party that required development of a factual record. *Id.* at 769-770. The legality of

against the United States for its alleged failure to adequately enforce Clean Water Act provisions regulating mercury pollution.¹²⁸ The Council may also make recommendations to member states on environmental enforcement.

The overall impact of these various new forms of global administrative law on the United States has thus far been modest. Unlike some developing countries, the U.S. has a rather well-developed system of administrative law that is open to foreign states, citizens, and organizations. These circumstances reduce the likelihood that the United States will be found by global tribunals to have violated due process obligations to other states or their nationals. Nevertheless, as the Shrimp Turtle, Steel Safeguards, Anti-Dumping, and Methanex cases illustrate, the United States nonetheless remains vulnerable to adverse rulings finding that its administrative decisions and procedures are contrary to global norms. U.S. vulnerability is likely to increase the intensification of global regulatory harmonization. Accordingly, the time is ripe for a systematic review of U.S. administrative procedures in relation to the rise of global regulation and global administrative law norms and for an assessment of the need for measures to address deficiencies.¹²⁹

C. *Challenges Posed by the Informal Character of Global Regulatory Decisionmaking*

U.S. administrative law is focused on final, determinate, legally binding decisions by identified administrative officials or authorities. The administrative record is generally limited to the documents generated through rulemaking or adjudication, or other established agency procedures that generate a record in connection with final decisions. Judicial review is

the Council's action in narrowing the scope of the factual record recommended by the Secretariat, and requested by the submitting parties, is contested. *Id.* at 777.

128. North American Commission for Environmental Cooperation, *Coal-Fired Power Plants* (Sept. 20, 2004), available at <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=103>. Although the U.S. denies that it has failed to adequately enforce the CWA, it has also committed to reviewing the compliance of approximately 40 permits granted under the act that were cited in the submission.

129. Some developing countries have established such mechanisms in order to avoid adverse rulings by bilateral investment treaty tribunals.

typically restricted to such decisions. Behind these formal decisional documents and procedures lies a vast range of informal influences on agency decisionmaking, including influences from within the executive branch, Congress, and non-governmental actors and interests. These influences are generally not incorporated in the administrative record or considered by courts on review. These limitations reflect a range of considerations: the avoidance of excessive legalization and its burdens, the desirability of informal interaction and accommodation in the policy process, the desirability of opening bureaucratic decisionmaking to a broader array of perspectives and considerations, and the likelihood that only formal decisions are sufficiently important to justify the costs, delays and other burdens of administrative law mechanisms. The boundaries of this limited focus are of course contested and have changed over time.¹³⁰ For example, agency guidance documents and policy statements that are not legally binding are generally not subject to judicial review, but critics argue strongly that they should be reviewable when they have significant practical impact.

Although the informal influences on agency decisionmaking are not subject to administrative law disciplines, in the U.S. domestic context, other systems of accountability apply. These include the accountability of agency officials to an elected President and to an elected Congress, the system of OMB review of agency rulemaking based on cost-benefit analysis, and a relatively high degree of governmental transparency generally. Accordingly, the failure of administrative law to address informal influences on U.S. agency decisionmaking may be acceptable when they originate within the domestic political context. But where the influences operating on U.S. agency decisions originate in global decisional processes, the situation is quite different. As we have seen, these decisions are often made by bodies that are administrative in character. Any electoral accountability for their decisions is remote and tenuous at best.

130. There was once a doubt whether agency decisions on the location of federally funded highways were subject to judicial review. The reviewability of this and similar instances of "informal adjudication" was established in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1972).

Among global regulatory regimes there is a large variation in the availability and effectiveness of administrative law disciplines, but they are often quite limited, especially compared to U.S. models. For example, review of administrative decisions by independent courts or tribunals is almost totally absent. Other mechanisms of accountability and control are often weak, especially in the case of informal intergovernmental networks and bilateral forms of regulatory cooperation. Another important set of challenges is posed by the growing importance of global regulation by private and hybrid public-private bodies.¹³¹ Finally, the reception of global regulatory norms and practice into domestic U.S. regulation often does not consist of transposition through formal decisional processes but operates through more informal processes. Global norms produce domestic effects in complex ways that are difficult to capture in traditional U.S. administrative law disciplines. Thus, the growing importance and influence of global regulatory decisionmaking on domestic regulation justifiably gives rise to accountability concerns that would be much less serious in a purely domestic context.

In order to meet these accountability gaps through domestic U.S. administrative law, two basic strategies are available. As discussed in Section A.1, the U.S. could attempt unilaterally to require global regulatory regimes to follow designated decisional procedures and subject their decisions to review by U.S. courts as the price for U.S. participation in such regimes or acceptance of their decisions. This course would most probably be followed, if at all, in cases where a global regime decision directly impacts an individual and the decision was made without fair procedures or appears quite arbitrary.

Alternatively, as discussed in Sections A.2 and A.3, U.S. administrative law disciplines can remain targeted on U.S. agencies and officials, but attempt to subject the informal elements of the global decisions in which they participate to procedural requirements such as notice and comment, and to include them in the administrative record and thereby expand the scope of judicial review to include those global elements

131. For a discussion of the accountability issues presented by these regimes and how they might be addressed by new forms of administrative law, see Alfred D. Aman, Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 10 IND. J. GLOBAL LEGAL STUD. 125 (2003).

and influences. This strategy, however, immediately raises the problems of attempting to extend administrative law beyond the formal elements of administrative decisionmaking, threatening excessive legalization and chilling negotiation flexibility and informal give and take. They also run up against potential separation of powers concerns based on the President's role in foreign affairs.

These problems are, however, less severe when the extension of domestic administrative law disciplines to the global elements in regulatory decisions consist solely of procedural mechanisms like those discussed in Section A.3, rather than judicial review on an expanded administrative record, as discussed in Section A.2. These procedural mechanisms include measures to provide information to promote transparency regarding U.S. officials' participation in global decisionmaking; notice and opportunity for public comment and input on their positions; attendance at meetings where decisions regarding such positions are discussed; membership on advisory or even decisionmaking bodies or delegations to global regimes; and notification and consultation with congressional committees as provided in the URAA. These mechanisms, which do not necessarily involve judicial review, may promote a degree of informal responsiveness to those social interests and values that are able to take advantage of the opportunities provided by these mechanisms. They will not provide strong assurances of legality accountability, but, for reasons discussed previously, this is generally not a major concern in the context of domestic implementation of global regulatory norms.

These tools may include not only well established mechanisms like notice and comment, but innovative approaches that have been developed in the U.S. domestic context and in the European Union. Increasingly, domestic systems of administrative law are confronting a challenge of informality with the shift of regulatory strategy away from command and control methods and a developing "ossification" of administrative law mechanisms designed for such methods to more flexible alternatives. For example, governments have promoted various forms of agency-stakeholder networks for innovative regulatory problem-solving in order to avoid the limitations of top-down command regulation and formal administrative law procedures. Rather than attempting to dictate unilaterally the conduct of the regulated, U.S. agencies have developed a

number of strategies to enlist a variety of governmental and non-governmental actors, including business firms and non-profit organizations, in the formulation and implementation of regulatory policy.¹³² The aim is a quasi-contractual working relationship among the participants to solve regulatory problems on a coordinated basis, emphasizing flexibility, innovation, benchmarking, transparency of performance measures, and mutual learning by doing.¹³³ In the European Union, this approach is being widely used, under the title of the Open Method of Coordination (OMC), to implement social service regulatory programs in the member states.¹³⁴ It remains to be seen how such mechanisms might be developed to address accountability gaps and the challenges of informality in the context of global regulation.

Like many other issues in global administrative law, however, the challenge of informality runs in two directions. While domestic constituencies may fear the informal influence on domestic administrative regulation of global decisions and influences, global constituencies may fear the impact on them of domestic administrative policies, including those adopted by U.S. agencies in the form of administrative guidance, that are not subject to administrative law disciplines as discussed above, even though the absence of such disciplines may be acceptable in a purely domestic context because of other mechanisms of accountability for agency decisions, especially electorally-based political mechanisms. From the viewpoint of non-U.S. interests, however, these alternative mechanisms are more likely to

132. See generally Stewart, *supra* note 5; Freeman (advocating collaborative governance model of administrative law); Stewart, *supra* 83, at 60-94 (outlining use of contractual and quasi-contractual regulatory programs); Neil Gunningham & Peter Grabonsky, SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY 123-29 (1998).

133. See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 283 (1998) (offering "democratic deliberation" as model of governance "that responds to the conditions of modern life").

134. Joshua Cohen & Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, in GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS 691, 694-95 (Jonathan Zeitlin & David Trubeck eds., 2003). For a description of the Open Method of Coordination (OMC), see Caroline de la Porte & Philippe Pochet, *Introduction*, in BUILDING SOCIAL EUROPE THROUGH THE OPEN METHOD OF CO-ORDINATION 11, 13-16 (Caroline de la Porte & Philippe Pochet eds., 2002).

be a detriment than a protection because they reflect domestic interests and influences. Thus, formal administrative law mechanisms may be needed to safeguard the interests of global but not domestic constituencies. This is indeed the logic for the development of the global administrative law requirements by the WTO and other international bodies. It explains the apparent inconsistency in treating U.S. agency guidance as subject to DSB review for conformance with the requirements in WTO agreements even though such guidance is not subject to domestic judicial review. Such efforts by international authorities to extend global administrative law disciplines to informal administrative actions, however, encounters many of the same problems in extending domestic administrative law disciplines to the decisions of global regulatory decisionmakers, including the costs, delays, and other burdens of legalization.

D. *Constructing Global Administrative Law*

The task of building global administrative law has a dual aspect: to ensure that domestic interests are properly considered in global regulatory decisions and their domestic implementation, and to ensure that global interests are likewise properly considered in domestic administrative decisions.

1. *Integrating Global Interests in Domestic Administrative Decisions.*

In the U.S. context, it is relatively easy to achieve the second goal of integrating global administrative law and substantive regulatory norms and the appropriate consideration of other states and their nationals into domestic law and practice. The nation already has a highly developed system of administrative law. In most cases it is simply a question of ensuring that normal U.S. administrative law procedures are followed in decisions that affect foreign interests. In some past situations, such as the Shrimp-Turtle regulation, this was not the case. There appears to be no fundamental difficulty in extending such procedures to cover gaps that may exist. U.S. agencies operate under substantial incentives to follow regulatory norms adopted by global regulatory regimes in which the United States participates, even if not legally binding as a matter of domestic law. These incentives are not limited to avoid-

ing adverse rulings from international or NAFTA tribunals. They also include the desire of agency officials to pursue regulatory harmonization, reciprocity, and other forms of transnational cooperation in order to carry out their tasks more efficiently and effectively, although U.S. statutory requirements or political imperatives may occasionally override. Judicial review of federal agency decisions affecting foreign interests will ordinarily be available. The development of administrative law requirements for domestic administration by the WTO DSB, NAFTA tribunals, and similar bodies may lead U.S. courts to grant review of agency actions, such as issuance of policy guidance, in order to comply with such requirements when they otherwise might not. The rise of the integrative model of global administrative law may lead U.S. courts to eschew a parity minus approach, and in some cases to follow a parity plus approach when legally significant foreign interests are involved. In order for U.S. efforts to apply administrative law disciplines on global regulatory regimes to gain legitimacy, it must adhere to those disciplines in domestic administrative decisions affecting foreign interests.

A potentially important issue in achieving the integrative objectives of global administrative law is the rule of exhaustion of local remedies. Under customary international law, parties are generally required to exhaust remedies local to the jurisdiction in which a controversy has arisen before seeking recourse before an international tribunal.¹³⁵ The rule of exhaustion of local remedies could play an important role in the reception and development in national legal systems of global administrative law procedures and principles. Requiring exhaustion would force foreign parties to present both procedural and substantive claims to domestic administrative agencies before seeking redress from a global tribunal. This arrangement would help open domestic procedures to their participation and lead domestic agencies and courts to become familiar with global administrative law norms.

However, the exhaustion rule can be waived by treaty. Many bilateral investment treaties enhance investor protection

135. See *Elettronica Sicula, S.p.A. ("ELSI")* (U.S. v. Italy), 1989 15, 42 (July 20); See also *Interhandel Case* (Switz. V. U.S., 1957 I.C.J. 5, 27 (Oct. 24).

by waiving exhaustion,¹³⁶ and the ICSID arbitration rules presume waiver unless states make their participation conditional on exhaustion.¹³⁷ This approach presumably reflects that an important objective of investors in such treaties is to avoid entanglement in national legal systems. The exhaustion rule's application has also been restricted in the trade context. For example, a GATT panel rejected application of the rule for anti-dumping cases because it was not explicitly required under the 1979 Antidumping Agreement.¹³⁸ Some NAFTA tribunals have also applied waiver of local remedies in connection with review of administrative action. For example, tribunals have been willing to read an implicit waiver of the rule under Article 1121.¹³⁹ This willingness to find waiver, especially of claims based on regulatory due process and other administrative law principles, should be reconsidered with the

136. See, Mark W. Friedman, Jack J. Coe, William W. Park, Dietmar W. Prager, Steven Smith, *Developments in International Commercial Dispute Resolution in 2003*, 38 INT'L LAW. 265, 281-282 (2004). See also George M. von Mehren, Claudia T. Salomon, Aspasia A. Paroutsas, *Navigating Through Investor-State Arbitrations—An Overview of Bilateral Investment Treaty Claims*, 59 APR DISP. RESOL. J. 69, 72 (2003) (noting BITs with "op-out" provisions allowing parties to choose arbitration if local remedies are not forthcoming after a period of time).

137. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature, Mar. 18, 1965, 575 U.N.T.S. 159, 17 U.S.T. 1270. art. 26. (stating that states may condition consent to arbitration on requirement of exhaustion of local remedies).

138. Panel Report of Sept. 7, 1992 re United States—Anti-dumping Duties on Gray Portland Cement and Cement Clinker from Mexico, ADP/82, para. 5.9 (unadopted). Panels have noted that requiring exhaustion of local remedies may cause excessive delays in the adjudication of disputes, a problem of particular concern in the WTO context because remedies are solely prospective. Commentators have also sought to justify waiver on grounds that the WTO tribunals have far more expertise regarding free-trade rules than domestic courts, and that WTO agreements are often not the domestic law of the nation state in which exhaustion might be required. See Jack J. Coe, *Taking Stock of NAFTA Chapter 11 in its Tenth Year: an Interim Sketch of Selected Themes, Issues, and Methods*, VAND. J. TRANSNAT'L L. 1381, 1419. These latter considerations, however, are far less persuasive when the challenge is based on procedural shortcomings in the domestic administrative decision.

139. *Metalclad Corp. v. Mex.*, ICSID Case No. ARB/(AF)97/1 n.4 (Aug. 30, 2000), available at <http://www.worldbank.org/icsid/cases/awards.htm> (noting that Mexico's failure to contest the jurisdiction of Metalclad's claims for failure to exhaust local administrative remedies was in keeping with the tribunal's interpretation of Article 1121 as implicitly waiving the local remedies requirement).

objective of promoting the development of global administrative law by domestic regulatory bodies.

2. *Building Greater Accountability in Global Regulatory Regimes*

The first goal of global administrative law—ensuring adequate protection of domestic interests in global regulation and its domestic implementation—is far more difficult to achieve because of the more rudimentary state of administrative law in global regulatory regimes and the challenges discussed in subsection II.A and C. The options for constructing this aspect of global administrative law consist of the bottom up and top down approaches.

Bottom Up Approaches

There is a strong case for extending U.S. administrative law disciplines to global regime decisions that directly apply to U.S. citizens, by blocking the domestic legal recognition or enforcement of those decisions that do not satisfy minimum principles of regulatory due process. Courts in other nations have begun to take similar steps.¹⁴⁰ Far more difficult are cases where global norms become operative only when adopted through domestic administrative decisions that satisfy normal domestic administrative law requirements. Here “bottom, up” is likely to take a less bold form. Rather than subject global decisions directly to U.S. administrative law disciplines, the approach is to extend domestic administrative law procedures to domestic officials’ participation in global regulatory decisions and/or to attempt to include the background and basis of the global regulatory decisions in the domestic administrative record and include these elements in the court’s review. As we have seen, some steps in these directions have been taken in U.S. practice. These mechanisms can also include regular involvement and review by the legislature, as exemplified by the URAA.

This version of “bottom up” however, faces several difficulties. First, the problems of extending administrative law disciplines to the informal phases of agency decisionmaking that precede rulemaking or adjudication. Second, the impairment of executive flexibility and discretion in international ne-

140. See Dyzenhaus, *supra* note 31.

gotiations. Third, resistance from other states that U.S. initiatives of this sort represent unilateral legal imperialism and will give disproportionate influence to U.S. domestic business and NGO interests.

Nonetheless, prudent initiatives of this sort may well be justified on two basic grounds. First, they would promote greater domestic accountability for U.S. government officials' decisions and conduct regarding the development of global regulatory norms by enhancing transparency and points of access into the decisional process. Second, they would stimulate adoption by global regimes of more comprehensive and adequate systems of administrative law, including more open and accessible decisional procedures and the availability of review mechanisms. Such steps will certainly reduce the perceived need for domestic judicial forays into the global realm—for example extending the scope of the domestic administrative record and judicial review to include background global elements—and the willingness of courts to undertake them. Such initiatives should accordingly be targeted on regimes that have the most serious accountability gaps.

If domestic courts began to review and provide remedies against decisions of global regulatory regimes, the regimes would have strong incentives to develop effective internal systems of administrative law in order to defend or deter such initiatives. A strong example is provided by domestic court actions by athletes against anti-doping and other disciplinary decisions by international sports federations. In response, the sports federations have developed a fairly elaborate system of procedural rights for athletes charged with wrongdoing and review by an independent tribunal. The Security Council 1267 Committee has also made some changes in its procedures to provide greater protection to listed persons; proceedings brought in domestic courts to challenge asset freezes of listed persons may well have played a role in this initiative. Thus, "bottom up" review by domestic courts may stimulate "top down" initiatives by global regimes. Greater transparency and opportunity for public comment and other forms of decisional participation in global regimes does not, however, obviate the value of domestic arrangements for notice, opportunity for comment, and for other forms of input into domestic officials' participation in global regulatory decisionmaking. Thus, top

down and bottom up approaches should be regarded as complements, not substitutes.

As noted, other countries might well object to unilateral U.S. imposition of its administrative law system—in some respects, the most developed and legalistic in the world—to global regulatory decisionmaking. They might fear that such initiatives would undermine the informality, confidentiality, and efficiency of international negotiations, and enhance U.S. leverage in international negotiations. Developing countries as well as many global NGOs might fear that such measures would provide additional and unwelcome influence for multinationals and northern NGOs. For example, developing countries have strongly opposed efforts by the United States and NGOs to promote amicus briefs submissions to the WTO DSB.

The objection of U.S. legal imperialism would, however, be blunted to the extent that other jurisdictions began to develop similar bottom up initiatives. Domestic courts in different jurisdictions might learn and borrow from each other's experience in developing domestic remedies for accountability gaps in global regulatory regimes. An array of common or similar principles suitably adapted to different types of regulatory regimes, might gradually emerge.

However, conflicts in approaches among domestic administrative law systems may arise due to differences in legal traditions and approach. For example, the United States goes much further than most other countries in giving civil society interests generally broad rights to participate in agency decisions and obtain judicial review. Scandinavian systems make extensive use of the ombudsman. Italy and France rely on specialized tribunals such as the Conseil d'Etat and Consiglio di Stato whose members are assigned to administrative as well as judicial duties. Administrative law systems in developing countries are often far less developed. Also, it is easier to make the case that states should adhere to global substantive standards than requirements regarding their legal procedures. Global administrative law disciplines applicable to national administrative decisionmaking must accordingly make allowance for national and regional differences. Global administrative law must necessarily be a complicated system of enabling rules that mediate between global legal unity and local differentiation.

The respective roles of global and domestic tribunals in developing this law is an open question.¹⁴¹

Top Down Approaches

There are also serious challenges in the top down approach to promote the adoption of global regulatory regimes of administrative law disciplines and review systems. While traditional forms of domestic administrative law can provide valuable ideas, their relevance for global regimes is limited by the quite different institutional conditions of global administration, including the lack of a strong executive and reviewing courts. In this context as well, consideration should be given to alternatives to traditional administrative law mechanisms that have emerged in the EU and United States as well as other jurisdictions to deal with new forms of regulation not based on hierarchical command and control models. Administrative mechanisms of review based on cost-benefit analysis and comparative risk analysis are another tool that might be applied by global regimes. Ruth Grant and Bob Koehane have examined a wide array of different accountability mechanisms with respect to global administration that could overcome the limitations of traditional administrative law models.¹⁴²

A number of global regimes have already undertaken steps to develop accountability mechanisms that include administrative law elements.¹⁴³ Their reasons for doing so appear to include a desire to ward off criticism, enhance their legitimacy and acceptance of their norms, and respond to pressures from states, especially the United States and some European nations. The United States has been vigorous in seeking to export U.S. administrative law norms to other countries through the World Bank, IMF, and TRIPS. It has sought, with considerable success, to legalize the WTO dispute settlement process. The URAA directs the USTR to urge the WTO to adopt procedures that "will ensure broader application of the principle of transparency and clarification of the costs and

141. For discussion of this question in the international trade context, see Meinhard Hilf, *The Role of National Courts in International Trade Relations*, 18 MICH J. INT'L L. 321 (1996-1997).

142. Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005).

143. See generally *Emergence of Global Administrative Law*, *supra* note 2.

benefits of trade policy actions, through the observance of open and equitable procedures in trade matters” by the WTO.¹⁴⁴ These efforts are often encouraged by U.S. businesses seeking a legally predictable and secure environment for investment, trade, and transactions.

The recognition of global administrative law as a distinct emerging area of law and the systematic study of the administrative law arrangements being adopted by different global regimes should help stimulate these efforts. Developing countries may criticize or resist some of these initiatives on grounds similar to those noted in connection with bottom up initiatives: parochialism, legal imperialism, entrenchment of developed country economic and NGO interests. The contestable character of administrative law norms and mechanisms should be frankly acknowledged, as well as the interests and values of the state and non-state actors that shape institutional change. One potential response is a more structured process for the development of administrative law arrangements in different global regulatory regimes that engages the major developing countries. Another is to include non-Western systems of administrative law and practice in the study and critical development of global administrative law.¹⁴⁵

Different Types of Global Regulatory Regimes

The most favorable condition for the adoption of most of the administrative law elements are found in global regulatory regimes exhibiting a relatively high degree of institutional differentiation, legalization, and complexity, such as the World Bank, WTO, or Codex Alimentarius. Such organizations have established administrative bodies with regularized decision-making systems and procedures. Under a bottom up approach, these systems and procedures provide a focal point for the development of domestic procedures for notice and comment and other forms of public and parliamentary input and review. They also often provide a decisional record and statement of reasons that could be used by domestic courts to review global elements in domestic agency decisions. Under a

144. See 19 USC §3537 (2005).

145. For discussion of the political economy of global administrative law, see *Emergence of Global Administrative Law*, *supra* note 2, at 54-57, 67-68; Benvenisti, *supra* note 25.

top down approach, these features provide a solid foundation to build more extensive elements from the administrative law tool box. On the other hand, some of these regimes, including many U.N. agencies, continue to resist administrative law disciplines and other accountability mechanisms.

More informal global regulatory regimes, including many regulatory networks and bilateral cooperative arrangements, provide less favorable institutional conditions for the development of administrative law. Some regulatory networks of domestic officials, such as the Basel Committee and ISOCO have begun to develop a specialized committee structure, greater transparency, and public notice and comment procedures for the adoption of regulatory norms.¹⁴⁶ But substantial informality remains the norm in many networks, and most bilateral arrangements. They do not provide the institutional structures conducive to the extension of domestic administrative law disciplines to or the development of administrative law systems within these regimes.

Many critics and academics have focused on highly developed treaty-based international organizations, such as the WTO and World Bank, as the global regulatory regimes presenting the most serious accountability gaps and greatest need for administrative law safeguards.¹⁴⁷ Notwithstanding the sheer power of such regimes and the importance of their regulatory norms, they are already subject to a considerable degree of accountability through legal and other mechanisms. Less institutionalized and legalized regimes of significant importance often stand in greater need of enhanced accountability, including through administrative law. Yet the very features of such regimes resist the development of administrative law mechanisms on either a bottom up or top down basis.¹⁴⁸

146. See Zaring, *supra* note 7.

147. See Daniel C. Esty, *Toward Good Global Governance: The Role of Administrative Law*, 115 *YALE L.J.* (forthcoming 2005).

148. Private and hybrid public-private regulatory organizations and networks are coming to play an important role in setting global technical standards for products and services, developing labeling and regulatory programs to ensure that forest products, apparel, coffee, and other products meet consumers' environmental and labor concerns, and regulating services in areas such as accounting. KKS Theses regimes, and their domestic counterparts, also present a deep challenge to the development of administrative law.

Accordingly, a critical question for the development of global administrative law is the extent to which global regulatory regimes will develop in the direction of greater complexity and legalization, relying on statutory/adjudicatory systems of regulation. Such a course is likely to generate a system of administrative law that bears some resemblance to those in advanced industrial societies. Or will the trend be towards more informal regulatory networks and horizontal methods of regulatory cooperation, as well as private and private-public arrangements, that will be less hospitable to traditional administrative law disciplines? Imposing greater administrative law disciplines on more formalized regimes may lead government officials and other actors to prefer less formalized regimes that are less subject to administrative law disciplines and the attendant threat of legal “ossification.” If so, we may witness a “leakage” of decisional authority from more accountable to less accountable types of global regulatory regimes.

IV. CONCLUSION

Notwithstanding its global power, the United States will find its domestic administrative decisions increasingly influenced by a variety of global regulatory regimes. This trend does not necessarily represent a net diminution of U.S. power, for the United States has a strong stake in and considerable influence over these regimes. But it gives rise to legitimate anxiety that the waxing of global regulation will undermine established U.S. domestic as well as international political and legal accountability mechanisms, and that regulatory protection in the United States may as a result be compromised. Efforts to fill such accountability gaps have already begun. These include domestic innovations such as the URAA procedures, and adoption by global regulatory regimes of administrative law disciplines. These developments, however, are still in their infancy, and much more needs to be done. At the same time, global regulatory regimes have begun to develop and apply administrative law disciplines on domestic administrative agencies in the United States and elsewhere in order to ensure adequate consideration of foreign or global interests and fidelity to global norms.

The extent and intensity of global regulation and the development of global administrative functions and institutions

will continue to grow. This growth will inevitably result in greater demands, by both domestic and global constituencies, for application of administrative law disciplines on decision-making by global regulatory regimes. Domestic constituencies will also seek to extend and adapt domestic administrative law to promote greater accountability by domestic officials for their participation in and subsequent domestic implementation of global regime decisions. At the same time, global constituencies will seek to ensure that domestic regulatory authorities are subject to administrative law disciplines that will protect their interests. These different objectives may be variously served by bottom up, top down, or integrationist strategies for constructing global administrative law. The U.S. government, NGOs, and business interests will continue to press for wider adoption of administrative law mechanisms by global regimes, although both the objectives and targets of these different actors will often be different. Unless global regimes move more rapidly to embrace administrative law mechanisms than most of them have, we are likely to witness the extension in the United States and other developed countries of domestic administrative law disciplines to global regulatory decisions. These developments, or their threat, will help stimulate the further development of administrative law within global regulatory bodies. Impositions by global regimes of administrative law requirements on domestic administration will likely have a reciprocal influence back on the development of administrative law within global regulatory bodies, who will find it difficult within global regulatory bodies, to resist administrative law disciplines which they themselves impose on member states.

These different approaches and remedies may function as complements, may be viewed as substitutes, or may in many conflict in purpose and operation. It can not be supposed that the development of global administrative law, which will inevitably reflect the tug and pull of different conflicting interests and values, will be a smooth or harmonious process.¹⁴⁹ Developing countries and global NGOs, for example, may oppose the development of administrative law disciplines to safeguard economic interests but support their adoption in other contexts, such as development assistance conditionality. The need for confidentiality, informality, and flexibility in many aspects

149. Benvenisti, *supra* note 25.

of global decisionmaking will be a serious challenge to the extension of administrative law disciplines. Efforts to impose more extensive procedural formalities and extensive review mechanisms on relatively formalized global regimes may simply shift to serve decisionmaking into more informal and less structured channels.

A bottom up approach to promoting accountability centered on domestic mechanisms might be a means to reflect the varying normative commitments of each national society and thus accommodate diversity.¹⁵⁰ But, 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.¹⁵¹ Varying domestic controls might also hamper the ability of domestic regulatory officials to participate effectively in global regulatory decisionmaking. On the other hand, a top down approach to developing administrative law may have difficulty accommodating the range of concerns and normative commitments of different nations. It may also face serious obstacles in the general lack of strong global institutions, espe-

150. See SLAUGHTER, *supra* note 7.

151. 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); James Salzman, *Seattle's Legal 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, *Interpreting International Trade Statutes: Is the Charming Betsy Sinking?*, 24 FORDHAM INT'L L.J. 1533 (2001-2001). 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. *Id.* at 1543-45.

cially reviewing tribunals, and the difficulties in securing broad agreement on administrative law mechanisms that will involve significant resources and will disrupt settled ways of doing business, and may be seen systematically favoring certain economic and social interests.

The growing impact within the United States of global regulation and global administrative law requirements has begun to chip away at the splendid isolationism of U.S. administrative law. Global regulation and global administrative law are becoming an integral part of U.S. administrative law; their role will only continue to grow. We are still in the early stages of an evolutionary transformation that will have important consequences for U.S. administrators, businesses, NGOs, courts, and lawyers. In part because of the EU, many Europeans are far further along in appreciating and dealing with the legal implications of intensifying global regulation, including the implications for administrative law. The same is true in many developing countries, which have felt far more of the brunt of global regulatory and administrative law requirements. It is past time for Americans to wake up.