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Introduction: Global Governance and Global Administrative Law in the International Legal Order

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Globalization and the rise of global governance are transforming the structure of international law, though much of this transformation takes place beneath the surface of the international legal order and often goes unnoticed. From the perspective of classical, inter-state, consent-based international law, global governance may still appear merely as a quantitative increase in international legal instruments, sometimes coupled with stronger enforcement mechanisms and accompanied by some changes in procedures of treaty-making. Yet central pillars of the international legal order are seen from a classical perspective as increasingly challenged: the distinction between domestic and international law becomes more precarious, soft forms of rule-making are ever more widespread, the sovereign equality of states is gradually undermined, and the basis of legitimacy of international law is increasingly in doubt.

Global administrative law, the focus of this symposium issue, approaches cognate changes from a particular angle. It starts from the observation that much of global governance can be understood as regulation and administration, and that we are witnessing the emergence of a 'global administrative space': a space in which the strict dichotomy between domestic and international has largely broken down, in which administrative functions are performed in often complex interplays between officials and institutions on different levels, and in which regulation may be highly effective despite its predominantly non-binding forms. In practice, the increasing exercise of public power in these structures has given rise to serious concerns about legitimacy and accountability, prompting patterns of responses to those concerns in many areas of global governance. Accountability problems are addressed through greater transparency, through notice-and-comment procedures in rule-making, and through new avenues of judicial and administrative review, in a vast array of disparate areas, such as global banking regulation, Security Council sanctions administration, the international administration of refugees or the domestic regulation of transboundary environmental issues. Global administrative law proposes drawing together these dispersed

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practices and understand them as part of a common, growing trend towards administrative-law type mechanisms for holding global regulatory governance accountable, and to inquire into the challenges this set of issues poses to both domestic administrative law and international law.

The papers in this symposium address, often critically, the possibilities and problems of global administrative law in global governance. They cover various areas of regulation, such as government procurement, international investment, supervision of commercial banks, markets for forest products, urban water services, and export garment industries; three pieces address general issues of the democratic theory, administrative law sources, and political ordering functions of global administrative law. The papers were written as part of a broader research project at New York University Law School's Institute for International Law and Justice.¹ Initial versions were presented at NYU and at an NYU-Oxford University workshop held at Merton College; the support of these three institutions is gratefully acknowledged. As conveners of this project (jointly with Richard Stewart), we can make no claim to detachment. Not surprisingly, we see an overall picture of widespread, and growing, engagement with principles of transparency, participation, reasoned decision and review in global governance. Nonetheless, the pattern that emerges from the case studies in the project so far is by no means uniform or coherent: administrative law mechanisms and principles operate in some areas and not in others, many are not more than embryonic, and they diverge widely in their forms. At the theoretical level, the perspectives taken in the various papers in this symposium raise significant questions about both the meaning and the normative justifications of the core concept of global administrative law we have preliminarily espoused.

In this Introduction, we first outline briefly the guiding assumptions underlying the idea of a global administrative law (Section 1). In Section 2, we canvass some themes in the various papers by distilling approaches the different contributors take to the normative potential and problems of global administrative law. In Section 3, we seek to draw from the analyses presented by the contributors, who in most cases are specialists in fields of law or politics other than traditional international law, some challenges that the regulatory governance of global markets and the emergence of a global administrative space may pose to standard inter-state, consent-based models of international law.

1 The Concept of Global Administrative Law

The concept of global administrative law begins from the twin ideas that much global governance can be understood as administration, and that such administration is often organized and shaped by principles of an administrative law character.² With

¹ On the project in general, see www.iilj.org/global_adlaw, and especially the Working Paper series. Other journal symposia of the project include 68:3–4 *Law & Contemporary Problems* (2005) and 37 *NYU Journal of International Law and Politics* (2005, forthcoming) available at <http://www.iilj.org>.

² For a detailed exposition of global administrative law, see Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68:3 *Law & Contemporary Problems* (2005) 15.

the expansion of global governance, many administrative and regulatory functions are now performed in a global rather than national context, yet through a great number of different forms, ranging from binding decisions of international organizations to non-binding agreements in intergovernmental networks and to domestic administrative action in the context of global regimes. Examples include UN Security Council decisions on individual sanctions; World Bank rule-making for developing countries; the setting of standards on money laundering by the Financial Action Task Force; or domestic administrative decisions on market access of foreign products as part of the WTO regime. Many regulatory functions in global governance are also performed outside such formally public, governmental structures, namely by hybrid private-public or purely private institutions, such as ICANN, the Internet Corporation for Assigned Names and Numbers, or the International Organization for Standardization (ISO).

Despite these widely varying forms and institutions, we can observe in all these examples the exercise of recognizably administrative and regulatory functions: the setting and application of rules by bodies that are not legislative or primarily adjudicative in character.³ If similar actions were performed by a state agency, there would be little doubt as to their administrative character (except, perhaps, for the examples of private regulation). Classically, however, regarding them as administrative would have been difficult because of their international nature; the term 'administration' was closely tied to the state framework and could, at most, point to the domestic implementation of international norms.⁴ This categorical distinction, however, has today become problematic: too interwoven are the domestic and the international elements in these processes of regulation. This is most obvious for government networks in which domestic officials are engaged in both the rule-making on a global scale and the implementation on the domestic level, often without any intervening act. Likewise, when the UNHCR conducts status determination for individual refugees, the posited distinction of an international level for relations between states, and a domestic level for relations between states and individuals breaks down.⁵ And WTO dispute settlement can in many cases be regarded as another layer of judicial review of domestic administrative action. It is this interwovenness of the different spheres that leads us to regard the conglomerate of regulatory forms as part of one very variegated but recognizably 'global' administrative space.

The enmeshment of the domestic and international in governance also has important repercussions for the mechanisms through which administrative actions can be held to account. Under the classical distinction between the domestic and the international realms, international norms were agreed upon on the international level, but the state remained free to adopt them or not, as their obligatory character and effect

³ For similar characterizations, see C. Tietje, *Internationalisiertes Verwaltungshandeln* (2001); S. Battini, *Amministrazione senza stato* (2003); J. E. Alvarez, *International Organizations as Law-makers* (2005), at 244–245; D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (2005), at 14–17.

⁴ See Cassese, 'Global Standards for National Administrative Procedure', 68:3 *Law & Contemporary Problems* (2005) 109, at 112–113.

⁵ See Pallis, 'The Operation of UNHCR's Accountability Mechanisms', *IILJ Working Paper* 2005/12, available at www.iilj.org/papers/IILJ2005_12Pallis.htm.

depended on domestic ratification and implementation. Because of this freedom, domestic accountability mechanisms were thought to be (reasonably) effective: parliamentary process and administrative procedures could have a meaningful impact.⁶ The more the domestic and international processes are interwoven, however, the more this freedom breaks down, and with it the effectiveness of classical accountability mechanisms. Decisions in an intergovernmental network such as the Basel Committee for Banking Supervision, though not formally binding, commit the participating domestic officials to implementation and will thus have a strong impact on any later domestic administrative procedure. UNHCR findings on refugee status directly determine the fate of the individual refugee. And WTO dispute settlement decisions are in most cases factually decisive for domestic administrative action; the costs of non-compliance would simply be too high to allow domestic administrative processes real freedom to deviate from a WTO decision. In the global administrative space, the classical distribution of labour between the different levels has largely broken down when it comes to ensuring regulatory participation and accountability.

The resulting accountability and participation problems are beginning to be addressed, in part because of an interest of global regulatory institutions and actors in bolstering their legitimacy in the face of growing political challenges. In many areas of global governance, and in highly variegated forms, mechanisms are emerging that seek to enhance participate the accountability of global regulatory decision-making. The structural similarities between many of these disparate phenomena are striking: they testify to a growing trend of building mechanisms analogous to domestic administrative law systems to the global level; transparency, participation, and review are central among them. This trend is reflected, for instance, in the Inspection Panel set up by the World Bank to ensure its compliance with internal policies; in notice-and-comment procedures adopted by international standard-setters such as the the OECD;⁷ in the inclusion of NGOs in regulatory bodies like the Codex Alimentarius Commission; or in rules about foreign participation in domestic administrative procedures as set out in the Aarhus Convention. We argue that this is a general trend of practice toward a global administrative law.

Whether pursuit of accountability, participation and transparency is desirable in particular cases involves far-reaching issues (see below). Accountability can dissipate effectiveness, participation can result in capture by special interests, transparency can mean populism triumphs over justice. Institutional design is important: there may be robust accountability but to the wrong people or on the wrong topics. Bracketing such issues in descriptive terms global administrative law as we understand it encompasses the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality and legality, and by providing

⁶ But see also Benvenisti, 'Exit and Voice in the Age of Globalization', 98 *Michigan Law Review* (1999) 167.

⁷ See Salzman, 'Decentralized Administrative Law in the Organization for Economic Cooperation and Development', 68:3 *Law & Contemporary Problems* (2005) 189.

effective review of the rules and decisions these bodies make. We describe this field of law as 'global' rather than 'international' to reflect the enmeshment of domestic and international regulation, the inclusion of a large array of informal institutional arrangements (many involving prominent roles for non-state actors), and the foundation of the field in normative practices, and normative sources, that are not fully encompassed within standard conceptions of international law.

2 The Normative Potential and Problems of Global Administrative Law

The papers in this symposium approach the idea of global administrative law from widely varying perspectives, but they all shed light on a number of core normative issues. Does global administrative law produce normatively positive outcomes, and for whom? What are the normative grounds for deciding whether the pursuit of global administrative law approaches to global governance is desirable or undesirable in particular cases? Is it desirable to pursue global administrative law as an integrated agenda, an abstraction calculated to spill over and make unpredictable connections between one case or place and another apparently quite different case or place? And is the administrative law model adequate in the circumstances of global politics and society? It is beyond our capacities at this stage to give confident general answers; the contributions to this issue all contribute to a response, but they paint a complex picture.

A Enhancing the Accountability of Global Governance

Several papers regard the rise of global administrative law mechanisms as generally furthering important normative goals, especially enhancing the accountability of global governance. In their paper on the Basel Committee on Banking Supervision, Michael Barr and Geoff Miller take an essentially utilitarian stance in assessing the work of the Committee.⁸ In their view, the coordination of national banking regulation is necessary to avert crises in the highly integrated global financial system; this coordination cannot realistically be undertaken other than by negotiation among the leading national regulators; and the Basel process for achieving this has been improved by the gradual adoption in it of global administrative law mechanisms. They acknowledge problems, but argue that the general effect of these mechanisms has been the formulation of better banking standards, and the blocking or modification of some normatively undesirable initiatives. For instance, they note that national and international notice-and-comment processes have led to the modification of proposals for the Basel II Accord on capital adequacy that might have damaged lending to small businesses; and they document the functional efficiency in many countries of the arrangements for variable applicability ultimately built into the Accord. Barr and Miller also see the increased information and participation in the Basel Committee as

⁸ Barr and Miller, 'Global Administrative Law: The View from Basel', in this issue [15–46].

inherently valuable in bolstering accountability and legitimacy, and they point in particular to the beneficial effects of interlocking accountability mechanisms on the domestic and international planes. Yet they recognize that broadening participation as such might not lead to sufficient inclusiveness: as regards developing countries, more than mere notice-and-comment procedures might be called for, especially given that Basel standards have a particularly strong impact on these countries as compliance with them is often a requirement for lending by the international financial institutions.

Errol Meidinger also sees a broadly positive result of the use of global administrative law in his study of forestry standard-setting and certification.⁹ He traces an iterative process in the development of this decentralized regulatory regime, involving NGO campaigns and consumer boycotts, a multiplicity of private standard-setting initiatives by groupings with a spectrum of orientations from industrialist to environmentalist, pulls exerted in these different directions on state regulators and professional forestry experts, then some convergence as the groups realize they need to align more closely with each other's work. He notes also a slow striking of balances, between globally-framed standards that work for global markets but may not be responsive to different local forest and social conditions, and firm-level or national-level standards that may allow too much play to opportunism and local power dynamics. Notice-and-comment procedures in rule-making as well as contestation of particular instances of certification have contributed to a stronger inclusiveness of the regulatory regime complex, and Meidinger's normative assessment in terms of accountability has a generally positive tendency. But actual responsiveness to a broad range of interests is in large part due to the competition between different regimes rather than formalized participation procedures, highlighting the complex political circumstances for making global administrative law effective.

A broader and more explicitly normative and theoretical defence of building a global administrative law can be found in the paper by Terry Macdonald and Kate Macdonald who see it as part of a solution to the problems of democratic accountability where electoral mechanisms are not available.¹⁰ They identify a need for accountability wherever a responsible power-wielder has such an impact on the autonomy and equality of individuals in the affected population that democratic regulation is warranted. Such accountability cannot be electoral if the power-wielder is neither directly elected nor delegated by an elected actor with whom it shares the same public constituency. They propose two core requirements for non-electoral democratic accountability: public transparency, by which they mean mechanisms enabling relevant publics to know what is being done with public power; and the capacity of the affected public to disempower political agents, by sanctions where necessary. They use these criteria both to interpret existing practices in the garment industry (focused particularly on workers in Nicaragua in factories owned by Taiwan businesses selling

⁹ Meidinger, 'The Administrative Law of Global Private-Public Regulation: The Case of Forestry', in this issue [47–87].

¹⁰ Macdonald and Macdonald, 'Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry', in this issue [89–119].

to US brand retailers), and to propose ways in which accountability might be reshaped and further developed. They point out that any such accountability depends both on a clear specification of roles and responsibilities and on industry-specific modalities, and that the disempowerment of commercial agents of public power in this industry faces serious hurdles, including gaps between NGO-led sanctions campaigns in the US and the knowledge and interests of current or prospective workers and unions in Nicaragua. Thus, Macdonald and Macdonald see the development of non-electoral accountability as normatively desirable, and the non-electoral accountability mechanisms they propose might be adaptable to a broad range of institutional settings; but they point also to the great challenges to its realization in the specific context of the export garment industry.

B The Boundaries of Global Administrative Law

The paper by Macdonald and Macdonald also raises serious questions about the boundaries of global administrative law. On the one hand, it asks whether any distinction between administrative law and public law in general is warranted in a context in which the distinction between government (based directly on electoral legitimacy) and administrative actors (resting on a more indirect basis of legitimacy) has broken down. But more broadly, the paper suggests that it might be useful to look to private law rather than public law for inspiration. Private law might have stronger resources for holding decentralized private actors accountable – actors who should be held accountable because, on the global plane, they exercise ‘public power’. This brings up the question whether any distinction between public and private law should be maintained in the global order, recalling similar debates in domestic legal orders.

Gus Van Harten and Martin Loughlin, in their paper on investment arbitration as global administrative law, insist on the distinction.¹¹ They express doubt that ‘the rule-making powers or regulatory practices of international organizations possess such authority as to constitute a distinct system of administrative law’, but they see value in describing in public law terms international mechanisms that check state administrative action. Having developed rapidly since the 1990s, investment arbitration appears as a powerful tool to constrain domestic regulation, in particular because it allows individuals to initiate review of state action without a need to exhaust local remedies and with the possibility to claim damages and directly enforce awards in national courts. It is also distinct from international commercial arbitration in that it is aimed at the exercise of the state’s public authority rather than merely a state’s acts of a private character. For Van Harten and Loughlin, using the lens of administrative law highlights the commonalities of investment arbitration with domestic mechanisms of judicial review, and it brings out significant tensions in the structure of arbitral procedures with an origin in private, commercial contexts;

¹¹ Van Harten and Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’, in this issue [121–150].

for example, it raises doubts as to the adequacy of a system relying on arbitrators with few safeguards of independence and impartiality. The administrative law lens also allows foregrounding genuinely public law questions, especially those relating to the justification of review and the constitution of the quasi-judicial bodies involved, but also the role of public concerns in judicial processes. Van Harten and Loughlin do not take a stance as to the desirability of administrative law mechanisms in global governance, but their approach points to potential insights from adopting a distinct administrative law perspective on it.

C Limits to Universality

A number of contributions to this symposium regard the growth of global administrative law with considerable caution and are particularly guarded as to the universal applicability of some of its elements. Christopher McCrudden and Stuart Gross, for example, see considerable complexity in the case they study, of the interplay of WTO government procurement rules and local dynamics in Malaysia.¹² The global administrative law demand for transparency in government procurement, and for mechanisms by which unsuccessful foreign bidders could challenge a contract award in local courts or administrative proceedings, has been resisted by the Malaysian government, which sees such demands as a threat to its bumiputera policy that overtly favours ethnic Malays in government contracting. This policy has been part of a social bargain in which ethnic Chinese Malaysians have retained a significant economic position, but have not enjoyed full political equality. Whether the government contracting practices have in fact been beneficial to most Malays, or to the country, are not questions for which there is an agreed metric on which to base an answer. Such contracting has been a major part of the political patronage system, and has been associated with corruption and gross inefficiency; but peninsula Malaysia has also enjoyed substantial prosperity, a general if uneven rise in most socio-economic indicators, and no major recurrence of the terrifying race riots of the late 1960s. Whether the gains to Malaysia from embracing transparency and review would outweigh the possible losses is a high-stakes question with no obvious answer. The Malaysian government insists that the decision rests with the domestic political system, but, as McCrudden and Gross point out, international pressure on countries to change their procurement practices is strong. It is now very difficult for a state to join the WTO as a new member without also being required to join the ‘voluntary’ plurilateral WTO Government Procurement Agreement, and Malaysia lobbied hard against negotiation even of a ‘Transparency in Government Procurement’ Agreement in the WTO, for fear of a package deal requiring adherence to it. The case is complex but it attests that there might be good reasons for rejecting such principles as transparency and review in particular circumstances, and that global administrative law can at most make a very attenuated claim to universal reach.

¹² McCrudden and Gross, ‘WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study’, in this issue [151–185].

Carol Harlow takes the exploration of the potential reach of global administrative law a step further and seeks to uncover the sources and traditions underlying it.¹³ She identifies four potential sources: procedural principles as they have emerged in national administrative law systems; rule of law values as promoted by proponents of free trade and economic liberalism; good governance values as pursued by the Bretton Woods institutions; and human rights values, in particular due process. Given the divergent emphases in these different strands as well as among national traditions, she finds it difficult to identify a sufficiently general set of administrative law principles that could form the heart of a global administrative law. Moreover, she points out, administrative law in its modern form is essentially a Western construct, dependent on particular constitutional backgrounds, and extending it to the universal level – though perhaps feasible – risks not only neglecting other value systems but also benefiting particular economically powerful actors rather than the citizenry as a whole. Especially in the socio-economic situation of developing countries, rights to seek review of government action may eventually benefit only those who can afford the ‘skilful in-house lawyers’ necessary to use them.

D Leaving Space for Politics?

Harlow’s paper also raises another fundamental concern about global administrative law, namely that it might shrink the space for politics in favour of juridified mechanisms, limiting democracy and establishing a juristocracy instead. A related point returns in Bronwen Morgan’s paper on transnational water services regulation.¹⁴ Morgan sees regulation in this area as shaped by an iterative process of interaction between protest or politics (which she describes as informal) and the legal sphere (which she describes as formal). She emphasizes that multinational water services companies can be targets or utilizers of this formal law and of its interactions with politics; equally, water consumers and their organizations mix formal and informal strategies for participation and voice. Global water companies may prefer administrative fora in which their own participation far surpasses that of consumer groups, such as bilateral investment treaty arbitrations, ISO standard-setting, or regulatory-negotiation arrangements with national government regulators. By contrast, consumer groups have greater difficulty in switching between domestic and international levels; they may prefer economic and social rights processes, and collective legal actions such as *amparo* proceedings, which may tip the balance their way. Forms of administrative law have unequal effects. And as she notes: ‘global administrative law is increasingly about challenging or routinizing the power to have the last word on setting the rules of the game’. Yet this implies that disruption rather than routinization might often be necessary to achieve normatively important goals, and that the orderly processes of administrative law alone may not produce satisfactory outcomes, even if results

¹³ Harlow, ‘Global Administrative Law: The Quest for Principles and Values’, in this issue [187–214].

¹⁴ Morgan, ‘Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law’, in this issue [215–246].

achieved by disruption eventually need to be embedded in legal forms in order to be stabilized. She argues that is the unsettled landscape of global regulatory governance, and in particular from the perspective of citizens of developing countries all too often marginalized in its fora, leaving space for unruly politics rather than fixed procedures might remain essential.

Space for politics is also a central theme in the concluding article in this symposium essay, that by Nico Krisch on the ‘pluralism of global administrative law’.¹⁵ Krisch sees the shape of accountability mechanisms in global governance centrally determined by a contest of different constituencies – national, international and cosmopolitan – over who should be entitled to control regulatory outcomes. This contest results in a pluralism of procedures and regimes that seek to establish accountability through mutual challenge, but do not constitute an overarching, hierarchically ordered scheme as in domestic administrative law systems; instead, none of the constituencies fully controls regulatory outcomes, but each can equally contest them. Krisch traces the operation of such a pluralist model in the governance of international trade in genetically modified organisms, examining the interplay between the dynamics and rules of the World Trade Organization, the Cartagena Protocol on Biosafety and European Union law. He argues that a pluralist, heterarchical model might be more adequate to the context of global governance than frameworks of a more constitutionalist character, as it can refrain from deciding important questions of principle (who should have ultimate authority?) and instead focus on practical accommodation and approximation between different competing constituencies and their visions. In this approach, too, space is kept open and procedures are not fully institutionalized in order to reflect the openness and fluidity of hierarchy and authority in current global politics; in contrast, further constitutionalization would appear likely to stabilize and legitimize an order which is socially far from settled and in which continuous transformation remains a central task. Accountability mechanisms modelled on domestic administrative law may have an uneasy place in these more fluid settings, and in building a global administrative law, we might have to have recourse to alternative forms.

3 Challenges for Classical Models of International Law

Global governance does not fit easily into the structures of classical, inter-state, consent-based models of international law; too much of it operates outside the traditional binding forms of law. Yet the increasing institutionalization and exercise of regulatory functions in a global space changes the environment of these traditional forms and eventually must have repercussions on the conceptualization of the international legal order. It is true that the challenges posed by administrative elements of international cooperation have attracted waves of attention in earlier periods, especially in the early 20th century, without in the end transforming the general understanding

¹⁵ Krisch, ‘The Pluralism of Global Administrative Law’, in this issue [247–278].

of international law.¹⁶ Nevertheless, features of global regulatory governance and global administrative law now spur a rethinking of orthodox ideas of international legal order: the distinction between domestic and international law, the legitimacy basis of international law, the sovereign equality of states, and the doctrine of sources.

The blurred distinction between domestic and international law. In the global administrative space, the line that separates the domestic and the international orders is often indistinct. Regulators come together in global institutions and set standards that they then implement in their domestic capacity; and individuals or private entities are often the real addressees of such global standards and follow them even where no formal legal implementing act has been undertaken by the regulator. Individuals or private entities are in some cases directly subject to binding international decisions; and domestic courts are perhaps beginning to assert stronger powers of review over global regulatory action. Thus, the ordering functions performed by the domestic/international dichotomy in international law may become attenuated.

The questioning of the legitimacy of international law. The separation between domestic and international law has long been a means for limiting the legitimacy demands on international law. States could organize their domestic institutions according to their various, widely diverging visions of political order; and the international order could, in abstract principle, rest on the consent of the various states.¹⁷ Once the national and the transnational or international get enmeshed, however, this division of labour is hard to maintain. The role of consent dwindles as domestic ratification and implementation lose importance in global regulation.¹⁸ And since the global order increasingly performs traditional state functions, individual state governments and mobilized groups seek to have the exercise of these functions governed by their own ideas of political justice. On most specific issues, no single domestic model will fully determine the shape of the global order. Carol Harlow's discussion of differences between administrative law traditions points to the likelihood of future struggles to meld hybrid approaches, comparable in technical terms to recent efforts to craft law for international criminal tribunals, but reaching far more deeply into socio-economic life and engaging with many more regulatory regimes.

The attenuation of sovereign equality. The rise of global administrative law poses problems for many developing countries. In traditional international law-making through treaties and custom, sovereign equality reconciles a formal equality of status with the ubiquity of power disparities. When global institutions exercise far-reaching regulatory functions, however, this reconciliation becomes precarious; the more powerful actors are reflected in formal as well as informal institutional rules.¹⁹ This inequality is magnified by the incorporation of one institution's 'non-binding' rules

¹⁶ See Kingsbury, Krisch, and Stewart, *supra* note 2, at 19–20.

¹⁷ See Kingsbury, 'Sovereignty and Inequality', 9 *EJIL* (1998) 599.

¹⁸ See also Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', 64 *ZaöRV* (2004) 547.

¹⁹ See also Chimni, 'International Institutions Today: An Imperial Global State in the Making', 15 *EJIL* (2004) 1.

into the mandatory rules of another; and by the reach of many institutions beyond their own members, as with the Financial Action Task Force's acts directed explicitly at changing practices of non-member states.²⁰ This inequality could be mitigated to some extent by rights to participation and review of the affected states, but real equality is unlikely to be ensured by these means, as Barr and Miller note with respect to the Basel Committee.²¹

New sources and subjects in international law. The rules of global regulation and global administrative law flow to a considerable extent from sources not usually recognized as sources of international law. Transparency, participation and review are often based on principles derived largely from institutional practices or intra-institutional rules. Many relevant rules and practices are generated primarily in public-private or purely private structures of transnational regulation, as Errol Meidinger's work on forest standards shows. Combined with other 'non-binding' sources produced by inter-governmental processes, such rules and practices may in many cases be relevant material for an international legal tribunal when it is required to take a decision. National administrative agencies and judicial bodies play important roles in articulating new or extended principles, as illustrated in this symposium in Nico Krisch's discussion of challenges to binding Security Council listings of individuals under anti-terrorism resolutions, and in Bronwen Morgan's discussion of consumer rights in litigation with water companies.²² International law doctrines of sources centred on Article 38 of the International Court of Justice Statute do not address these forms very well. In rare cases, practices may be widespread enough to form the basis of general principles of law, but in most instances, international lawyers will regard them as falling outside international law. But as such non-standard forms of rule-making become so influential, and indeed prevalent in some areas, it is unsatisfactory to have no better analysis of them than 'non-law'.²³ At the same time, many questions about their status emerge: Can they be encompassed in a refurbished modern concept of *jus gentium*?²⁴ Does it matter that they may have a weaker basis of legitimacy because of their weaker roots in domestic procedures and their frequent lack of general acceptance? Likewise, what status should be accorded to the *mélange* of actors producing such norms? This can hardly be confined to a formal discussion of their personality in international law; nor can they be consigned simply the unexplored realm of the informal, relevant only to sociology, political science or economics.

²⁰ See also Krisch, 'More Equal Than the Rest? Hierarchy, Equality and US Predominance in International Law', in M. Byers and G. Nolte (eds), *United States Hegemony and the Foundations of International Law* (2003) 135, at 149–159.

²¹ See also Chimni, 'Cooption and Resistance: Two Faces of Global Administrative Law', *IILJ Working Paper* 2005/16, available at www.iilj.org/papers/2005.16Chimni.htm.

²² For an early emphasis on the roots of 'international administrative law' in both domestic public law and international law, see Négulesco, 'Principes du droit international administratif', 51 *RdC* (1935) 579, at 592–599.

²³ See also Alvarez, *supra* note 3, 588–601.

²⁴ See Kingsbury, 'Omnilateralism and Partial International Communities: Contributions of the Emerging Global Administrative Law', 104 *Journal of International Law and Diplomacy* (2005) 98. See also Kingsbury, Krisch and Stewart, *supra* note 2, 29–31.

Towards a global public law? Given these challenges, it is improbable that a traditional vision of international law as essentially a contractual order of equal states is even theoretically operable; all the more so if, under the contractual paradigm, forms of rule-making other than treaty and custom can only be treated as either delegation or non-law. Given the diversity of forms of law and processes of rule-making, the importance of various sorts of institutions in them, and the increasingly blurred line between the domestic and the international, it is necessary to inquire whether a new global public law is emerging. Some argue that all forms of law-making and regulation in global governance are exercises of public power, and seek to theorize their status, effects and limits on the basis that any exercise of public power demands a particular public justification, whether or not it produces binding law or decisions. Others doubt that the core concepts of public law are adequate for complex and variegated global regulatory regimes of the kinds addressed in many of these papers. Work on global administrative law, of the sort represented in this symposium, may provide one foundation for this wider inquiry.