# LEGITIMACY AND ACCOUNTABILITY IN GLOBAL REGULATORY GOVERNANCE: THE EMERGING GLOBAL ADMINISTRATIVE LAW AND THE DESIGN AND OPERATION OF ADMINISTRATIVE TRIBUNALS OF INTERNATIONAL ORGANIZATIONS

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## I. INTRODUCTION

Much global regulatory governance - in fields as diverse as trade and investment, financial and economic regulation, environment and labor, intellectual property, international security, and human rights, as well as the internal management of international organizations - can now be understood as administration. The shift of regulatory authority and activity from domestic to global bodies has outstripped traditional domestic and international law mechanisms to ensure that regulatory decision makers are accountable and responsive to those who are affected by their decisions. In response to these deficits, regulatory decision making by global bodies is increasingly being held to norms of an administrative law character, including requirements of transparency, participation, reasoned decision and decisional review, with a view to ensuring greater accountability and responsiveness.

The rise of administrative law-type principles and mechanisms to channel and discipline global regulatory decision making is the focus of the Global Administrative Law Project at NYU School of Law[1]. The project, which engages academics and practitioners in North America, Europe, Latin America, Africa, Asia, and the Pacific region[2], seeks to study this burgeoning

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1 See BENEDICT KINGSBURY / NICO KRISCH / RICHARD B. STEWART, The Emergence of Global Administrative Law, 68 *Law and Contemporary Problems* (2005) 15. NYU Law School Institute for International Law and Justice's research project on global administrative law has a website, including a series of working papers and extensive bibliographies as well as links to papers from other scholars around the world, reached via www.iilj.org. Sets of papers from this project have appeared in several journal symposia, including: BENEDICT KINGSBURY / NICO KRISCH / RICHARD B. STEWART / JONATHAN WIENER (eds), The Emergence of Global Administrative Law, *Law and Contemporary Problems*, Vol. 68:3-4 (Summer-Autumn 2005), pp. 1-385; NICO KRISCH / BENEDICT KINGSBURY (eds), Global Governance and Global Administrative Law in the International Legal Order, *European Journal of International Law* vol. 17 (2006), pp. 1-278; and the Global Administrative Law symposium in *NYU Journal of International Law and Politics*, Vol. 37:4 (2005). See also *Global Administrative Law: Cases, Materials, Issues*, edited by S. CASSESE *et al*. (second edition 2008), published by the Institute for Research on Public Administration and the Institute for International Law and Justice (http://www.iilj.org/GAL/GALCasebook.asp).

2 Global regulatory regimes, especially in areas like trade, investment, and finance, often disproportionately burden developing countries, who at the same time often lack the capacities effectively to participate in or otherwise

field of practice and theory systematically, with a view to analyzing its elements and shaping its inevitable future development so as to help realize such potential as it offers for justice and effectiveness in global regulatory governance. More than 100 papers mapping and analyzing these phenomena have now been written under the auspices of the project. Although the landscape is highly variegated, the overall picture these papers present is of the formation of a thickly populated global administrative space, and the development of principles and practices that may be termed Global Administrative Law.

This paper highlights some implications of analyzing administrative tribunals of international organizations (including appeals boards, appeals tribunals and the like) as part of the administration of global governance and in particular as contributors to, and subjects of, the emerging global administrative law. These administrative tribunals reach their decisions by reference to such sources as: staff employment contracts; staff rules and regulations; internal orders, circulars, handbooks and practices of the organization; the constituent instruments of the relevant organization and of the specific tribunal; and a somewhat open-ended range of other sources including, in particular, general principles of law[3]. Through their decisions on the use of these sources and their interpretations of particular principles they are producers of global administrative law materials. These materials are directly relevant to claimants and to the administration of the institutions each tribunal directly regulates; they are also relevant to other institutions and tribunals (indirectly) through the development of a *corpus juris* among different international organizations; and they have a wider impact in helping shape and refine concepts of general legal importance such as due process[4], discrimination[5], reviewability of discretionary decisions[6], a duty of care toward staff[7], and publicness. At the same time, these tribunals are

influence the governance of such regimes and promote greater accountability to their interests. The Global Administrative Law Project engages with academics, government officials and practitioners in developing countries and promotes research and writing on global administrative law from a developing country perspective. Jointly with leading law schools and research institutes in Asia, Africa and Latin America, it has convened conferences in Buenos Aires, New Delhi and Cape Town, with further projects planned in Beijing, Singapore and Abu Dhabi. Publications and reports from these initiatives are at www.iilj.org/GAL.

3 On this range of sources see *e.g.* World Bank Administrative Tribunal Decision No. 1, *de Merode* (1981), esp. paras 18-30 (this case related to issues on salary adjustment and tax reimbursement that precipitated the creation of this Administrative Tribunal, and related to well over 800 affected employees); and Asian Development Bank Administrative Tribunal Decision No. 1, *Lindsey* (18 December 1992).

4 See *e.g. Sokoloff*, UNAT Judgment No 1246 (22 July 2005), discussed by KIRSTEN BAXTER / SPYRIDON FLOGAITIS in this volume; and "*D*", WBAT Decision No. 304 (2003), discussed by ROBERT GORMAN, Due Process in Misconduct Cases, unpublished paper World Bank Administrative Tribunal Colloquium on International Administrative Tribunals and the Rule of Law (27 March 2007).

5 On sex discrimination see *e.g. Mendaro*, WBAT Decision No. 26 (4 September 1985), treating the prohibiton of discrimination on grounds of sex as a general principle of law; to be contrasted with *Mullan*, UNAT Judgment No. 162 (10 October 1972), refusing to overturn a staff rule treating dependent husbands less favorably than dependent wives. On same-sex domestic partnerships and marriages, see *Adrian*, UNAT Judgment No. 1183 (30 September 2004), and ILOAT Judgment No. 2549 ("*AHRC-J*", 12 July 2006) - for a critique of Tribunal lawmaking getting ahead in these cases of many member states and the political bodies of the organizations, see AGUSTÍN GORDILLO, The Administrative Law of International Organizations: Checks and Balances in Law Making - The Case of Discrimination, *European Review of Public Law* 18 (2006), pp. 289-312. For a careful analysis of discrimination on other less publicly controversial grounds, see "*R*", IMFAT Judgment No. 2002-1 (5 March 2002).

6 MICHEL GENTOT, Review of Discretionary Power by International Administrative Tribunals; and NICOLAS VALTICOS, Checks Exerted by Administrative Tribunals over the Discretionary Powers of International

themselves exercising public power in global governance, and thus they are increasingly subject to demands that the organizational design (matters such as appointment of members, enforceability of orders, and appeals) and the operations of these tribunals (fair hearings, reasoned judgments, etc.) conform to emerging standards of global administrative law. Moreover, while the jurisdiction of these tribunals is typically limited to matters concerning the staff of the particular organization involved, their design, jurisprudence and experience have implications for other initiatives to broaden the accountability of intergovernmental organizations, particularly to third parties these organizations may harm.

The next section of this paper sets out in more detail the case for viewing much global governance as administration, and the basic elements of the global administrative law approach. The subsequent sections briefly explore a few of the ways in which a global administrative law approach may help international organizations, and specifically international administrative tribunals, to meet effectively some current challenges of legitimacy and accountability.

## II. GLOBAL REGULATORY BODIES AND THE DEVELOPMENT OF GLOBAL ADMINISTRATIVE LAW

### *Global Regulatory Bodies*

The consequences of worldwide economic integration, transboundary environmental spillovers, cross-border movements of populations, and other phenomena of globalization 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. The growing density of international and transnational regulation enables us to identify a multifaceted "global administrative space" populated by several distinct types of regulatory administrative institutions and various types of entities that are the subject of regulation, including not only states but firms, NGOs and individuals. Increasingly, the ultimate aim of global regimes is to regulate the conduct of private actors rather than states; private actors also play a major role in influencing the decisions of these regimes.

The regulatory bodies subject to the new global administrative law fall into two basic categories: international or transnational public and private bodies on the one hand, and domestic administrative bodies whose decisions have significant external regulatory impacts on the other.

*Intergovernmental and transnational regulatory authorities* can be classified into four basic types.

The first group consists of *formal intergovernmental organizations*, often established by treaties, that adopt and implement regulatory standards in a variety of areas. They typically

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Organizations; both presented at the World Bank Administrative Tribunal 20th Anniversary Conference, Paris, April 2001.

7 *Grasshoff*, ILOAT Judgment No. 402 (24 April 1980); *Bares*, ADBAT Decision No. 5 (31 March 1995); *Mwangi*, UNAT Judgment No. 1125 (25 July 2003); *Durand*, UNAT Judgment No. 1202 (19 August 2005). Several earlier cases are reviewed in the *Durand* Judgment. See also BRIGITTE STERN, The Law Applied by International Administrative Tribunals, unpublished paper World Bank Administrative Tribunal Colloquium on International Administrative Tribunals and the Rule of Law (27 March 2007).

include a secretariat and a variety of other internal organs of an administrative character 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. These regulatory standards are often 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, including antitrust, banking, securities, money laundering, telecommunications, chemicals, food safety, taxation, and transportation safety. These officials may agree to common regulatory standards and practices which they then implement domestically[8]. Many such networks are developing fairly complex institutional structures with significant administrative components.

The third group is that of *hybrid intergovernmental-private bodies*, composed of both public and private actors - a form that is becoming increasingly significant in contemporary governance. Examples include the Codex Alimentarius Commission, the Internet Corporation for Assigned Names and Numbers (ICANN), and the World Anti-Doping Agency. These bodies often have significant administrative components, including expert committees for developing and steering the implementation of regulatory norms.

The fourth type of global regulators consists of private *bodies exercising public governance functions*. The International Standards Organization, for example, has adopted over 13,000 standards that harmonize product specifications and process rules around the world. ISO has adopted elaborate administrative structures and procedures for the development of standards. Many NGOs have developed product certification programs, for example in the fields of sustainable timber and fair-trade coffee. Such "voluntary" standards often become commercially obligatory under the pressures of the market through the demands of consumers and contract partners[9].

*Domestic administrative agencies* whose regulatory decisions significantly affect other countries or their citizens are increasingly subject to both substantive and procedural regulatory norms adopted by global bodies such as the WTO, the Security Council 1267 Committee, the Financial Action Task Force, and international arbitral tribunals operating pursuant to bilateral investment treaties and NAFTA. Global administrative law norms are emerging to ensure the accountability of these domestic agencies to global interests in fields such as trade regulation, investment, antiterrorism, environmental protection, finance, and product safety. Examples include administrative law requirements imposed on the US by the WTO Appellate Body in its

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8 For an introduction to global regulatory networks, see ANNE-MARIE SLAUGHTER, A New World Order (2004); and ANNE-MARIE SLAUGHTER / DAVID ZARING, Networking Goes International: An Update, *Annual Review of Law and Social Sciences* 2 (Dec. 2006), p. 211.

9 On private regulatory governance generally, see HARM SCHEPEL, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (2005).

*Shrimp/Turtle* decision[10], and standards set by the World Bank's good governance indicators, which often condition design and operation of national administrative agencies.

While the classification of regulatory bodies as intergovernmental or transnational, on the one hand and domestic on the other is analytically convenient, global regulation typically does not operate on two distinct, vertically separated levels. Rather, regulation in global administrative space is highly fragmented. Different regimes are organized along sectoral lines in specific fields of regulation, often with more than one organization in a given sector[11]. Global regulation functions through a web of interactions and influences, horizontal, vertical, and diagonal, among a diverse multiplicity of different regimes, subjects, and actors. These include international organizations, transnational networks of government officials, and various private and hybrid transnational bodies, domestic agencies, and international and domestic business firms, trade associations and NGOs. The various global regulatory regimes are linked by ongoing informal communication and negotiation and more established ties through inter-organization representation and participation and consultation procedures that may promote cooperation, equivalence, and harmonization. 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. National systems of administration and law become porous; global norms flow into them, often circumventing the national legislature. Reciprocally, global regimes absorb norms of dominant states and influential societies[12].

*Critiques of Globalized Regulatory Administration*

In the traditional conception, states consent through treaties or other agreements to regulatory norms which they then implement domestically. The processes of state consent and state implementation are in turn subject to domestic mechanisms of political and legal accountability. The rise of the highly variegated, polycentric system of global regulation sketched above has completely outstripped the ability of these traditional conceptions and mechanisms to control and legitimate regulatory decisions. Even in the case of treaty-based international organizations, much norm creation and implementation is carried out by subsidiary bodies of an administrative character that operate informally with a considerable degree of autonomy. Other global regulatory bodies - including networks of domestic officials and private and hybrid bodies - operate wholly outside the traditional international law conception and are either not subject to domestic political and legal accountability mechanisms at all, or only to a very limited degree. The globalization of regulation has dissolved what were once firm distinctions between decision

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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*, WT/DS58/AB/R (Oct. 12, 1998), paragraph 180.

11 For a political economy analysis of the factors that explain the fragmented character of global regulation, see EYAL BENVENISTI / GEORGE DOWNS, The Empire's New Clothes: Political Economy and the Fragmentation of International Law, *Stanford Law Review* 60 (2007), p. 595.

12 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.

making at the international and at the domestic levels. Global regulatory norms are often adopted and implemented through diffuse, low visibility processes. The resulting accountability gaps have stimulated sharp criticisms by non-governmental organizations (NGOs), politicians, and the media that global regulation has been captured by the wealthy and powerful, to the detriment of developing countries and environmental, consumer, labor, and other social interests. The "capture" of global regulatory decision making, it is claimed, has in turn led to a weakening of domestic regulatory protections[13].

The problems of legitimacy raised by this shift of power and authority to extra-state processes and norms are graphic and unresolved. So too are the problems of configuring suitable democracy-respecting but functionally effective relationships between national institutions (including national and sub-national administrative agencies and courts) and extra-national or private institutions of global governance.

### *The Rise of Global Administrative Law*

National experience shows that administrative law can both check and steer the exercise of government power. This is accomplished by protecting individuals against unauthorized or arbitrary exercises of official power, and by promoting administrative responsiveness to broader public interests, including in the adoption and implementation of general norms as well as in decisions on particular matters. These elements form an integral part of democratic systems and, more generally, ensure a basic form of accountability of public power. Because of very significant differences in institutional and political conditions, domestic systems of administrative law cannot simply be transposed to the exercise of public power by global regulatory bodies. Nonetheless, accumulating experience shows that administrative law mechanisms for transparency, participation, reasoned decision and review, in appropriately modified form, can serve to promote greater accountability and responsiveness by global regulatory bodies to the various interests impacted by their decisions.

Recasting global governance as administration, to include all forms of law making other than treaties or other international agreements on the one hand and episodic dispute settlement on the other has a number of important advantages. Firstly, it allows us to develop a more rigorous conceptual schema of the various institutional structures and relations involved in the notoriously slippery notion of global governance. Secondly, it allows us to refocus the question of accountability in the more precise terms of administrative law, providing us with a set of basic tools for transparency, participation, reason-giving and review that can be adapted for use in the global setting. Thirdly, it allows us to draw on the experiences of both national administrative law and public international law, without being hamstrung by the conceptual and jurisdictional limitations of either in addressing global regulation.

Administrative law mechanisms are indeed emerging in many different areas of global regulatory governance in response to the deficits in accountability and responsiveness discussed above. They are reflected in the decisions of domestic courts in reviewing Security Council

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[13] 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.

sanctions against individuals; in the Inspection Panel set up by the World Bank to ensure its own compliance with its internal policies; in notice-and-comment procedures adopted by international standard-setters such as the Basel Committee or the OECD; in the inclusion of NGOs in regulatory bodies like the Codex Alimentarius Commission; in rules about foreign participation in domestic administrative procedures as set out in the Aarhus Convention; in the review of domestic administrative procedures and decisions by international panels in the WTO context; and in the work of international administrative tribunals and other mechanisms of accountability in international organizations. The pattern that emerges from these and other, often embryonic mechanisms is not yet coherent: such mechanisms and principles operate in some areas and not in others, and diverge widely in their forms. Yet the overall picture is of widespread, and growing, commitment both to principles of transparency, participation, reasoned decision and review in global governance.

*Procedural participation* constitutes, in the domestic setting at least, one of the classical elements of administrative law; and some aspects of it are being steadily transposed to the realm of global governance. For example, the WTO Appellate Body held in the *Shrimp/Turtle* case that the US had failed to provide any of the states whose exports of shrimp products to the US had been adversely affected by its domestic administrative regulations with any "formal opportunity to be heard, or to respond to any arguments that may be made against it"[14], and required the US to amend its administrative procedures in order to allow for such procedural participation. Instruments as diverse as the Aarhus Convention and the WADA Code require that national administrative authorities provide such participation rights. Many intergovernmental and transnational administrative bodies have sought to enable some forms of participation in their own regulatory activity for civil society actors and affected economic and social interests: the Basel Committee, for example, established during the development of its Basel II regulations a notice-and-comment procedure through which banks and other interested parties could participate in the formation of the standards; the International Civil Aviation Organization allows for significant participation in its own standard-setting function, for industry interests at least, through the International Air Transport Association; and the Codex Alimentarius Commission likewise provides for NGO participation in its norm generation procedures. This spread of procedural participation is far from being either uniform (in that a vast range of different participatory roles and powers are involved in different contexts) or complete. For example, claims that due process requires that the Security Council's program for listing suspected terrorist financiers afford those subject to listing an opportunity directly or indirectly to be heard are unresolved.

*Transparency and access to information* are absolutely crucial to the promotion of accountability, and to the exercise of meaningful participation and review. A wide range of international organizations, from the WTO to the OECD to the World Bank have taken significant steps to make documents and records of proceedings available to the public in response to widespread criticisms of secretive decision-making practices. Many regulatory networks, including the Basel Committee, the IOSCO, and the hybrid networks dealing with certification of sustainable forestry practices, have created websites that furnish considerable detail on internal procedures and on the information on which decisions have been based. Domestic administrative authorities are increasingly subject to global regulatory requirements of

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[14] *Shrimp/Turtle* (1998), *op. cit.*, para. 180.

transparency, such as those imposed by the Aarhus Convention concerning environmental regulation or the WTO requirements for trade regulation. Transparency is also a key element in the World Bank's work on the indicators of good governance, which strongly influence the Bank's decisions on the granting of development aid.

The requirement to provide *reasoned decisions* for administrative action, including responses to arguments raised by the interested parties, is another that has seen considerable - and growing - expansion from domestic administrative law to the global setting. As with transparency, it is often a crucial factor in rendering meaningful any accountability mechanisms. Again, the Aarhus Convention provides one good example of this, with numerous different articles mandating that all administrative decisions in a number of different contexts must be accompanied by a written statement of reasons. The *Shrimp/Turtle* decision and subsequent case law has also established this as a central principle of the WTO regime as applied to domestic administrative authorities. Providing reasons for the adoption of regulatory standards is a common practice in many global regulatory bodies, including the Codex Alimentarius, Basel II, and numerous others. In many cases states and other entities are not obliged to adopt or implement such standards; in these circumstances, giving reasons may be critical to ensuring acceptance and use of the standards. A different example is the UNHCR's requirements for refugee status determinations, which provide that all applicants should receive a written decision with a statement of reasons for the disposition.

The *right to review* of administrative decisions is a bedrock of domestic administrative law. Its development in global regulatory governance has been very patchy which is unsurprising, given the paucity until recent years of tribunals with regularized review jurisdiction within the international legal order. Administrative tribunals for staff of international organizations have long been a special case, but specialized reviewing bodies are becoming increasingly common in other areas. These include examples as diverse as the World Bank Inspection Panel and the Court of Arbitration for Sport. Global regulatory norms and decisions may also be subject to various forms of review by standing international courts and tribunals with more general jurisdiction, and by domestic courts. Review may take place in a different form when one global body, such as the WTO Appellate Body, decides whether and how much legal significance to accord to a standard or decision of another body, such as an ISO product standard. The right to review is also part of global administrative law norms and principles imposed on national administrative authorities. The Aarhus Convention contains in its Article 9 a very robust "access to justice" provision; the TRIPs agreement requires domestic authorities dealing with intellectual property infringement claims to provide such a right; and bilateral investment treaties contain arbitration clauses, through which the decisions of national agencies can be subjected to third-party review at a supranational level.

These procedural elements are the most important elements of the developing global administrative law, although there are preliminary signs that certain common *substantive principles*, such as proportionality, fair and equitable treatment, and legitimate expectations, are emerging in the decisions of reviewing bodies.

Leading intergovernmental and transnational bodies have adopted global administrative law mechanisms in order to further a variety of institutional objectives. They may take such steps in order to respond to external criticisms and pressures, including from NGOs, business firms, the media, and domestic legislatures and governments. Criticisms may also be made internally. External and internal critics challenge these bodies' decisional processes as closed and

unresponsive, and their substantive policies as disregarding environmental, social, and other affected interests. By adopting the procedural mechanisms of administrative law, these bodies respond directly to process-based criticisms. By affording affected interests greater opportunities for engagement and influence, they may also deflect or meliorate criticisms of substantive policies. In some cases, most notably in the case of the WADA, adverse decisions by domestic courts or threat thereof may impel reform. Global bodies such as ISO, Basel II, the Convention on International Trade in Endangered Species, or the International Civil Aviation Organization may also embrace greater transparency, participation, and reasoned decision making in an effort to improve the quality of the norms and decisions adopted and enhance their acceptance by relevant constituencies. Another objective may be to improve internal accountability. Transparency, participation and reasoned decision making are likely to enhance the ability of a global institution's management or its principals (states, domestic officials, businesses or NGOs) to monitor the decisions of the regime's staff, expert committees, and other administrative components. Review mechanisms may also serve this goal. Thus, the World Bank's Inspection Panel is a means of monitoring staff compliance with environmental and social guidelines (themselves adopted in response to pressures from NGOs and the US Congress), as well as being a mechanism of accountability enabling residents of developing countries and NGOs to challenge Bank-funded projects as violative of the Bank's own guidelines.

Domestic administrative bodies may be obliged to adopt global administrative law requirements of transparency, participation, reasoned decision and review by virtue of treaties such as the Aarhus Convention, the WTO Agreements, and bilateral investment treaties. Often these requirements are developed or elaborated by global tribunals such as the WTO Appellate Body or investment treaty arbitral panels, often influenced by other international norm-enunciating bodies such as international human rights courts and international administrative tribunals, which have evolved increasingly elaborate and demanding standards of regulatory due process. In other cases, the incentives for domestic authorities to follow such norms stem from conditions on financial assistance, based for example on US AID or World Bank "good governance" standards, or through reputational or sociological influences which lead governments to strive for more favorable ratings on the World Bank's "doing business" indicators and other widely recognized measures of economic or social performance.

It cannot 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. 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 of global decision making will be a serious challenge to the extension of administrative law disciplines. Because administrative law as traditionally understood, at least in the developed countries, depends on a relatively high degree of institutional differentiation and legalization, a critical question is the extent to which international regulatory institutions will develop in the direction of greater complexity and legalization. There is also a question of which of the various approaches reflected in domestic administrative law may be best adapted for global bodies, including for example the US interest representation model of administrative law or emerging European practices of consensus-based deliberation. Approaches to administrative law drawn from other countries and regions deserve much more attention than they have thus far received.

*Conceptual and Normative Issues in Global Administrative Law with Particular Significance for International Administrative Tribunals*

Questions of legitimacy and of accountability are among the most pressing in the present and future conditions of global regulatory governance. Global administrative law concepts, mechanisms, principles and rules can be of considerable significance in framing, vindicating and cabining concepts of legitimacy and accountability. Many of the central issues in the practice of global administrative law, and in the academic and conceptual analysis currently being undertaken in the Global Administrative Law Project, bear directly or indirectly on legitimacy and accountability in global governance. Future work could very productively consider the design and operation of international administrative tribunals by reference to these issues. Some of the key conceptual and normative issues in this respect are the following.

*Conceptual Issues*

*Accountability* has become a rhetorical slogan in the globalization debates. Too often, demands are made for greater accountability without serious analysis of precisely what it consists in, how it can be achieved, and what its goals are[15]. Global Administrative Law Project scholars are conducting a more precise analysis of accountability and its relation to the global administrative law mechanisms of transparency, participation, reasoned decision, and review, all of which also require careful analysis. This work shows that "accountability" does not exist in the abstract and should not be viewed as an end in itself. Yet agreement is seldom attained on what underlying goods and policy objectives accountability structures should effectively advance. Nor has enough work been done on how to assess and contain the distortions and costs that the establishment and operation of accountability mechanisms can easily entail - what might be termed the pathologies of accountability[16]. The starting question for practical analysis is who is accountable to whom, and through what types of mechanisms, including those of administrative law. The conclusion is that real accountability mechanisms are far more limited than the rhetoric would suggest. They consist of legal, electoral, fiscal, supervisory, and hierarchical accountability mechanisms. Accountability mechanisms are one among three basic types of global governance tools that can be used to redress the disregard by global regulatory bodies of affected but marginalized social and economic interests. The others are decision rules (the rules and practices that govern decision making by global authorities), and a residual category of other measures to promote

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15 Jonathan Koppel, for example, observes that disagreement about the meaning of accountability is "masked by consensus on its importance and desirability." Nevertheless, analysis of the concept of accountability within public administration is important because "conflicting expectations borne of disparate conceptions of accountability undermine organizational effectiveness." JONATHAN KOPPEL, Pathologies of Accountability: ICANN and the Challenge of 'Multiple Accountability Disorder', 65 *Public Administration Review* (2005). On the complexity of the concept generally, see also RICHARD MULGAN, 'Accountability': An Ever-Expanding Concept?, 78 *Public Administration* (2000) 555; JERRY MASHAW, Structuring a 'Dense Complexity': Accountability and the Project of Administrative Law, *Issues in Legal Scholarship*, The Reformation of American Administrative Law (2005): Article 4; and RUTH W. GRANT / ROBERT O. KEOHANE, Accountability and Abuses of Power in World Politics, *IILJ Working Paper* 2004/7 (Global Administrative Law Series).

16 For a detailed conceptual analysis of accountability, see RICHARD B. STEWART, Accountability, Participation, and the Problem of Disregard in Contemporary Global Governance (forthcoming, 2009).

responsiveness to disregarded interests (these measures include transparency, reason giving, and non-decisional participation). The analysis provides a more precise institutional grammar for examining the role and potential contributions of administrative law in achieving more accountable and just global regulatory decision making.

"*Administration*" is another critical concept for global administrative law that requires clarification and analysis of its implications for governance arrangements. International law has long recognized a category known as "international administration," but this term covers only a limited range of activities carried out by that formal intergovernmental organizations. The premise of global administrative law is that a much wider range of activities, carried out by many diverse types of global bodies, should be regarded as administrative in character and therefore appropriate for administrative law disciplines. In the domestic context, the question of what constitutes "administrative" action is for the most part not controversial, even if administration is only defined negatively, as public power that is neither legislative nor judicial in character. Conceptually, a similar - if much less developed - functional differentiation can be observed at the global level: administration here differs from legislation in the form of international agreements, and from adjudication in the form of episodic dispute settlement between states or other consenting parties. But the precise contours of what constitutes administration in the global context remains unclear. Does it include any, or all, decisions of the Conference of the Parties to a treaty? Of expert committees? Of courts or tribunals that have regulatory functions, a category that arguably includes certain WTO Panels and NAFTA treaty tribunals reviewing domestic regulatory decisions? The answers to these questions have important implications for the scope and content of global administrative law.

"*Publicness.*" Even if the boundaries of "administration" in the global context are clarified, there is also a need to determine the limits of what constitutes "public" power so as to warrant the application of administrative law mechanisms, including the requirement that decisions be justified by public reason. This is particularly important in the context of hybrid public-private and purely private governance structures: at what point do these become essentially public in nature, rendering the application of administrative law both desirable and appropriate? In some cases, the answer appears clear enough: the rules generated by the International Olympic Committee (private) or WADA (hybrid) have such important regulatory effects, and are presented in such standard legal form, as to render their inclusion within the broadly public realm largely uncontroversial. What, however, of NGO-led certification programs or eco-labeling initiatives, such as the forest management certification and wood product labeling system of the Forest Stewardship Council? These can represent a profoundly important barrier to trade in certain contexts - should they thus be brought under the general oversight of WTO bodies, and should they be subject to requirements of participation, transparency, reasoned decision and review?

*Legal Theory*. A further fundamental issue is the legal theory underpinning global administrative law, and in particular how to separate out, from among the myriad of rules, norms, standards and practices that constitute global regulatory governance, those that can be viewed as being legal (and binding) as opposed to prudential in character. International law has long challenged classical positivist understandings of law, in particular through its use of the notion of "soft law," under which norms or guidelines, initially non-binding, can "harden" over time into genuine legal obligations, either through incorporation into national regulations, through application by external judicial bodies, or simply through their development into custom

having generated legitimate expectations through long and unchallenged practice. The Global Administrative Law Project posits that the field of study of global administrative law encompasses "the mechanisms, principles, practices, and supporting social understandings" that promote accountability, transparency, participation and review. Whether all of these norms and understandings can be properly characterized as "law," and the implications of a conclusion one way or another, remain to be addressed. And, to the extent that they are "law," what are their sources?

*Positive Political Theory*. What are the factors that lead to (or hinder) the development of particular administrative law mechanisms in specific areas of global regulation, and under what conditions are such mechanisms likely or unlikely to be successful? For example, are forms of review most likely to emerge and to be successful in situations where power is delegated by a principal to an agent? Will global administrative law be more likely to emerge as a response to the accretion of rules and adjudicative systems at the global level that effectively bind those who have not consented to particular norms or decisions (just as national administrative law has emerged in response to the expansion of the regulatory state), and less likely to emerge where global institutions adhere to traditional international law techniques of treaty-making and of adjudication only between states with state consent? Who anticipates benefiting from such mechanisms and so has incentives to promote them? Who are the losers? Will implementation of a predominantly formal set of measures ostensibly guaranteeing things like accountability, transparency, participation and access to information succeed in empowering marginalized and often disregarded interests to bring about a more responsive and just system of global regulation? Can the successful elements of experience with Public Interest Law in the US and elsewhere be replicated on the global scale? Or will global administrative law mechanisms instead favor corporate or other well-organized groups that have the resources to participate effectively in specialized and complicated administrative proceedings all over the globe? Applied to the creation and structuring of international administrative tribunals, positive political theory calls for analysis of the interests served by different degrees and forms of independence of the tribunals from the political bodies of the institution, from the major member states, and from the secretariat. Thus the members may be chosen quite independently, but be constrained by tight rules set by the political bodies, or vice versa. Members eligible for reelection or for future employment with the institution might (or might not) perform differently than if these possibilities were precluded. Tribunals might have considerable independence, but little power to compel the secretariat or member states to provide remedies or make reforms[17]. Tribunals might have wide jurisdiction, but be inundated by complaints on relatively small issues because in the pre-tribunal phases staff and managers do not have enough incentives or capacity to settle cases earlier.

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[17] The UN Administrative Tribunal hesitated to assert an implied power to make an order for enforcement of its own earlier award (for payment of compensatory salary to a wronged employee) when the UN for a considerable period failed to comply with the award, whereas the ILO Administrative Tribunal has asserted such a power. See UNAT Decision 1283, *Mbarushimana*, 28 July 2006. (The UN's non-payment was related to the Rwandan government's continuing effort to prosecute the applicant, a Rwandan national and erstwhile UNMIK employee in Kosovo, for genocide and crimes against humanity allegedly committed in Rwanda.) The UN Appeals Tribunal, which is the successor to the UN Administrative Tribunal under the 2008 UN Redesign reforms, appears likely to have jurisdiction to issue enforcement orders for its own awards.

*Normative Foundations*

As a first approximation, three basic normative conceptions of the role of global administrative law can be discerned[18]: internal administrative accountability, protection of private rights or the rights of states, and promotion of democracy[19]. The first normative conception, internal administrative accountability, focuses on securing the accountability of the subordinate or peripheral components of an administrative regime to the legitimating center (whether legislative or executive), especially through ensuring the legality of administrative action. This conception emphasizes organizational and political functions and regime integrity rather than any specific substantive normativity, making it a potential model for an international order, particularly a pluralist one that lacks a strong consensus on substantive norms. The second normative conception is liberal and rights-oriented: administrative law protects the rights of individuals and other civil society actors, mainly through their participation in administrative procedures and through the availability of review to ensure the legality of a decision. This may also be extended to the protection of the rights of states; this idea may be especially valuable for many developing countries and other weak states that lack political and economic bargaining power and influence. This conception may also overlap with the notion that global administrative law can promote the rule of law by ensuring the public character of regulatory norms, their reasoned elaboration, and their impartial and predictable application. These two normative conceptions inform quests for legitimacy and accountability in the work of international institutions, and have a direct bearing on the design and functioning of international administrative tribunals and other international tribunals designed to enhance accountability of international organizations.

A third conception views the role of global administrative law as promoting democracy. National administrative law in many countries has a democratic component: it ensures the accountability of administrators to parliament by ensuring their compliance with statutes and to broader economic and social constituencies through public participation in administrative decision making procedures. But at the global level, a system of electorally based representative democracy is far beyond reach. Nor does a consociational conception of democracy at the global level based on civil society entities seem viable. Nonetheless, the development of a global administrative law could work to strengthen representative democracy at the national level by making global regulatory decisions and institutions more visible and subject to effective scrutiny

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18 A full treatment of normative issues would require a much more extensive discussion of more complex and nuanced positions, many of which do not fit very closely into these three simple archetypes. It also calls for debate on the relations between Global Administrative Law and regulatory efficacy, social welfare, democracy, and justice. Should Global Administrative Law embody commitments to promote overall social welfare, encouraging rejection or rethinking or justification on other grounds of policies that reduce social welfare, and promoting policies that increase social welfare? Should it be driven by equity concerns and seek to assure just treatment of marginalized and disregarded economic and social interests? Or should its ambitions be more modest - to promote orderly administration and accountability to those who establish and support or are directly regulated by global regimes? Is Global Administrative Law ultimately dependent on a democratic framework, or can it operate (with perhaps more limited functions) outside democratic contexts? Will the spread of global administrative law, particularly its aspirations to accountability and participation, itself help promote democracy around the world? Considering the great diversity of global regulatory regimes and their goals, universal answers to these questions are improbable, but they point to an important agenda of specific research questions.

19 On similar normative conceptions behind domestic administrative law, see EBERHARD SCHMIDT-ASSMANN, *Das Allgemeine Verwaltungsrecht als Ordnungsidee* (2d ed. 2004).

and review within domestic political systems, and thereby promote the accountability of global regulatory decision makers through those systems. Systems of global administrative law might also support the development of deliberative democracy at the level of global regulatory regimes, although the elements of such a conception as well as the conditions of its effective realization have yet to be resolved[20]. These objectives are usually too remote from the work of international administrative tribunals to play any direct role in their design or functioning, although in special cases particular democratic goals may become relevant.

With these conceptions in mind, the next two sections turn briefly to discuss legitimacy and accountability, with specific reference to the roles and work of international administrative tribunals.

## III. Legitimacy Considerations in the Design and Operation of International Administrative Tribunals

Several of the most prominent of the international administrative tribunals are of venerable age. Following from the work of the League of Nations Administrative Tribunal and associated structures which began in the 1920s, the ILO Administrative Tribunal (established in 1946) and the UN Administrative Tribunal (1949, transformed into the UN Appeals Tribunal from 2009), each of which also exercises jurisdiction in respect of various other consenting international organizations[21], have defined a model which has been emulated and borrowed by many institutions. This model was at the leading edge of, and in some respects pre-dates, both the global transformations in national judicial or tribunal review of official action, and the increasing consciousness of individual rights as a constraint on administration[22]. Changes in the practice and politics of global governance mean that issues going to legitimacy now arise that were barely considered in earlier periods, and this pattern will continue in the future. As the Executive Secretary of the World Bank Administrative Tribunal noted in 2007:

> "times are changing quickly. Practices that were considered unobjectionable twenty years ago would be highly problematic today and could give national courts grounds to pierce a tribunal's veil of independence. Public scrutiny has greatly increased, and the demands for transparency have become ever more stringent… International administrative tribunals were created in the first half of the last century, and proliferated in its second half. International administrative law was developed through the genius of leading members of the international legal community. The field can no longer, however, rest solely on the reputation of its founders and

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20 See Robert Howse, Transatlantic Regulatory Cooperation and the Problem of Democracy, *in: Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects*, 469 (George A. Bermann / Matthias Herdegen / Peter L. Lindseth eds., 2000).

21 For a list see http://www.unjiu.org/data/reports/2004/en2004_3a.pdf. Well over 40 organizations use the ILOAT.

22 The well-established form of these tribunals has been replicated, with variations, in many other institutions, including the World Bank (1980) and the IMF (1994).

successors"[23].

Some current legitimacy issues relating to the design and the operation of international administrative tribunals may be briefly noted.

*Legitimacy in the Design of International Administrative Tribunals*

Concerns about the adequacy, and indeed the legitimacy, of staff grievance processes have driven the creation of administrative tribunal structures in very many international organizations, and increasingly these considerations are prompting re-design of the role and composition of existing tribunals. Some of these issues of legitimacy are similar to those facing many tribunals exercising power in global governance. The issues of legitimacy facing international administrative tribunals may be compared, for example, with those confronting investor-state arbitration tribunals under bilateral and multilateral investment treaties. These two sets of tribunals are also comparable in that both are developing a jurisprudence on substantive and procedural issues of global administrative law[24].

The background threat of review in national courts drives pressure in international organizations for fair, effective and independent mechanisms for addressing employment grievances, lest the immunity from suit of the organization in question be lifted by national courts[25]. In cases brought by staff members against international organizations on matters connected to employment, the Brussels Court of Appeal denied immunity to the General Secretariat of the African, Caribbean and Pacific Group of States (4 March 2003), and the Labor Court of Brussels denied immunity to the West European Union (17 Sept 2003), in both cases because the international organization lacked adequate internal mechanisms to address the complaint. The Labor Court evaluated the West European Union's Appeals Board process under such criteria as: its impartiality and independence from the parties (the members were appointed by an inter-governmental process for two year renewable terms, and hence were not sufficiently independent); judicial and adversarial character of its proceedings; its ability to render binding and reasoned judgments; right of parties to appear; and the public character of the proceedings and hearings, including the publication of the eventual decision (the WEU Appeals Board did not meet these requirements as its hearings were closed and the decisions were not published)[26].

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[23] NASSIB ZIADÉ, The Independence of International Administrative Tribunals, unpublished paper presented at the World Bank Administrative Tribunal Conference March 27, 2007, p. 17.

[24] IMF Administrative Tribunal President Stephen Schwebel, World Bank Administrative Tribunal President Jan Paulsson, WBAT member Francisco Orrego Vicuna, and UNAT member Brigitte Stern are among several leading figures in investor-state arbitration who also play important roles in international administrative tribunals.

[25] In relation to investor-state arbitral awards, national courts have not (so far) threatened to lift the immunity of foreign states, let alone lift the immunity of administering international organizations such as ICSID, on grounds of inadequate arbitral process. However, varying standards of national judicial review of arbitral awards in the place or arbitration or enforcement, and the threat of more aggressive review where the legitimacy of the arbitral tribunal or its process is in question, are increasingly part of the strategic thinking of key actors.

[26] The Brussels Labor Court in a later case evaluated NATO's Appeal Board by reference to similar criteria and concluded its immunity was justified; holding hearings in private was excusable given the nature of NATO's work. On these cases see NASSIB ZIADÉ, The Independence of International Administrative Tribunals, unpublished paper presented at the World Bank Administrative Tribunal Conference March 27, 2007; and AUGUST REINISCH'S

Strong pressures now exist to incorporate a layer of appeal or at least robust review against first-instance determinations of employee rights. This is reflected in the evolution of the UN Administrative Tribunal into the UN Appeals Tribunal, to hear appeals from a UN Dispute Tribunal (which replaces the cumbersome structures of the Joint Appeals Board and the Joint Disciplinary Committees). These pressures reflect the need to provide a workable realization of (or surrogate for) a general human right to a judicial-type process, including appellate review, for certain kinds of claims[27].

Pressures also exist to reform appointments processes to these tribunals, so that robust qualifications are required, outside experts are involved at least in preparing a list of possible candidates, members are not recent or current employees, and members are not constrained by considerations concerning their possible reappointment or future employment. The tribunal registrars and their staffs may also benefit from some comparable protection and guarantees of independence. Tribunal autonomy in financing and in management of cases and processes is also increasingly required. The recent reforms to the UN internal justice system exemplify at least some of these tendencies.

*Legitimacy in the Operation of Tribunals: Precedent, Cross-Citation, and Reason-Giving*

In a phrase that is much quoted, perhaps because it now carries both sincere and gently ironic undertones, C.F. Amerasinghe remarked in 1988 that it has been in large measure "left to the initiative and innovative genius of the tribunals themselves to determine from what formal sources they will derive the rules they intend to apply"[28]. These tribunals frequently refer to their own precedents, and also to precedents from other administrative tribunals. The tribunals in varying ways place emphasis both on consistency and development of a *corpus juris*, and on freedom of tribunals to depart from prior decisions. Departure from their own earlier decisions is attributed to evolutionary interpretation, and the justification most usually given for departure from decisions of other tribunals is that scope must be allowed for each to exercise its own judgment in context. The history and composition of the various tribunals, and the approaches taken by individual members drawing on their own past experiences and their perceptions of the particular organization and its needs, can potentially have a significant impact upon the jurisprudence each produces[29]. Investor-state tribunals deliberate about many of the same issues

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contribution to the present volume. In *Brzak v. United Nations* (SDNY, 29 Apr. 2008 - appeal pending), the US District Court upheld the immunity of the United Nations and former very senior officials in a workplace sexual harassment claim by a staff member, without inquiring into the availability to her of adequate UN internal remedies. Generally on this issue, see EMMANUEL GAILLARD / ISABELLE PINGEL-LENUZZA, International Organizations and Immunity from Jurisdiction: To Restrict or to Bypass, 51 *International and Comparative Law Quarterly* (2002) 1.

27 See *e.g.* KAREL WELLENS, Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap, 25 *Michigan Journal of International Law* (2004) 1, at pp. 6-7. The investor-state tribunal system is subject now to some pressure also to build in an international juridical appeals mechanism from Tribunal awards.

28 C.F. AMERASINGHE, *The Law of the International Civil Service*, vol. 1 (Oxford: Oxford University Press, 1st edition 1988) p. 109.

29 See, for example, PETER C. HANSEN, The World Bank Administrative Tribunal's External Sources of Law: A Retrospective of the Tribunal's First Quarter-Century (1981-2005), 6 *The Law and Practice of International Courts and Tribunals* (2007) 1, at pp. 2-3, suggesting that the external sources of law used by the World Bank

concerning precedent and cross-citation, and parallels may also be drawn with other specialized international bodies seeking to develop a body of substantive and procedural law in contexts where there is appreciable decisional freedom and a lot of scope for individual initiative of tribunal members.

Special significance attaches to reason-giving as a factor in the legitimacy of international tribunals. Courts and tribunals in democratic States are expected to give convincing legal reasons partly because courts are not themselves democratically accountable. Reason-giving by an international tribunal helps justify its decisions by reference to pre-specified law, and perhaps also to wider equitable considerations.

Reason-giving is also important for the international institution as a potential repeat defendant, and for non-litigants more generally, as it is the part of the decision which may guide future conduct and shapes the normative expectations of a wider audience as tribunals increasingly follow precedent, even though there is no *de iure* concept of *stare decisis* in international law in general or in international administrative law. It is this prospective effect or shaping impact that requires that such tribunals see themselves as regulators of future conduct and normative expectations, not simply as adjusters of past situations.

## IV. The Demand for Accountability in Global Governance: International Administrative Tribunals as Accountability Mechanisms

Traditional approaches to international legal accountability based on first demonstrating a breach of treaty or of customary international law, then establishing international legal responsibility of states or of inter-state organizations for the breach, are not adequate frames through which to address current demands for accountability of global regulatory bodies. This demand for more complex or innovative forms of accountability for the actions of global regulatory bodies comes from many sources (sometimes these sources are in tension with one another). One source of demand is from those whose interests are disregarded or undervalued in a substantive global administrative governance action, or in the global decision processes (the "problem of disregard"). A second source of demand is from agencies or components of national governments, dissatisfied with an international institution's performance or processes. A particular dimension of this is pressure from national or European Union courts, which may increasingly consider applying their own public law review criteria to rules or decisions of global institutions directly, or to national measures intended to implement these[30]. Third, a "top-down" demand for accountability comes from the leadership (member states or the secretariat) of global regulatory bodies who, for reasons of effectiveness or "good governance" or rights protection, choose to discipline the internal workings of the organization by the use of internal (though perhaps independent) accountability mechanisms[31]. The international administrative tribunals

Administrative Tribunal mirror the sources doctrine of public international law more generally, in part driven by former ICJ judges serving on the Tribunal.

[30] On this "bottom-up" approach to global administrative law, see generally Richard B. Stewart, U.S. Administrative Law: A Model for Global Administrative Law?, 68 *Law and Contemporary Problems* (2005) 63, at pp. 76-88; see also Kingsbury / Krisch / Stewart, *loc. cit.* n. 1, at pp. 54-57.

[31] On this, see generally Stewart, *ibid.*, at pp. 88-107; see also Kingsbury / Krisch / Stewart, *loc. cit.* n. 1, at pp. 34-36.

are an important instance of the top-down creation of a rights-protecting accountability mechanism. Their capacity to review administrative action reflects to some extent a transposition of national administrative law accountability mechanisms to extra-state institutions. It is of course a limited jurisdiction, generally covering only employment-related disputes between the international organization in question and its staff members. Increasingly, however, international organizations must consider ways of securing (and cabining) their own accountability for actions they or their agents take that impact upon the rights and interests of third parties[32]. The criteria for assessing the legitimacy of tribunals established by international organizations for their own accountability require careful consideration, even while existing international administrative tribunals for the most part do not face major legitimacy crises at present.

International organizations more and more find themselves confronting the question of their accountability to non-employee and non-state third parties whom they may allegedly have harmed. Accountability deficits are a critical problem in some such situations. In certain cases these relate to general regulatory standards set by inter-governmental institutions (for example, on safety and effectiveness of medicines and vaccines, or on calculation of credit risks and adequacy of bank reserves) that have major consequences for economic actors and for ordinary individuals. More often the issues relate to specific regulatory actions directly affecting individual third parties: refugee status determinations, day-to-day administration of camps and, indeed, of entire territories (as in both Kosovo and East Timor in the first decade of the 21st century), as well as military and peacekeeping operations[33]. While the consequences of maladministration in these regulatory functions may be very grave, such international mechanisms as exist to provide accountability in these settings typically are less robust in their protection of the affected third parties than are staff-focused administrative tribunals such as UNAT.

The question of using standing international tribunals to establish accountability of international organizations to third parties, and to staff, is inextricably linked to questions about how to attain legitimacy for any such mechanisms, given that such mechanisms are likely to have been created by, and perhaps will seem to be influenced by, the very institutions they call to account. Max Weber analyzed the legitimacy (and hence the claim to authority outside the power to coerce obedience) of laws and institutions as coming from one or more of three sources: tradition (a long-accepted way of conducting matters), charismatic leadership, or bureaucratic

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32 This is an important implication of the 2007 decisions of the European Court of Human Rights in the *Behrami* case, suggesting that the UN is responsible for any negligent action or inaction by troops in a UN-mandated force, if for example they failed to clear or to effectively warn civilians of dangerous cluster bombs when they had the knowledge and reasonable opportunity to do so. The Court implied, controversially, that civilians who were predictably injured in such circumstances should have a mechanism of direct claim against the UN. *Behrami v. France; Saramati v. France, Germany and Norway,* (2007) 45 EHRR SE10.

33 See MARTIN ZWANENBURG, *Accountability of Peace Support Operations* (Leiden: Martinus Nijhoff, 2005) at pp. 288-292. For a number of detailed studies of human rights and accountability issues in terms of the field operations of international organizations, see MICHAEL O'FLAHERTY (ed.), *The Human Rights Field Operation: Law, Theory and Practice* (Aldershot: Ashgate, 2007). A proposal for the UN to compensate local victims of certain specified peacekeeper abuses on the basis of a limited evidential showing (akin to some existing mass claims processes), rather than demanding a tort-law standard of proof of the UN's liability which it would be impossible for most victims to meet in situations such as those prevailing in the Democratic Republic of Congo, is made by CATHERINE SWEETSER, Providing Effective Remedies to Victims of Abuse by Peacekeeping Personnel, *New York University Law Review* (forthcoming, 2008).

rationality. Newly-created staff tribunals have sought to draw on the longstanding traditions of UNAT and the ILOAT by emulating their structures and referring at times to their jurisprudence, but such a route will not easily be open to any new international organization accountability tribunals dealing with accountability to non-employee third parties. International administrative tribunals have in some cases relied on the distinguished reputations of certain members (for example, as leading national judges or international lawyers) and some of these persons may over time have built up a degree of charismatic authority within secretariats. But this will also be difficult to emulate where tribunals are required to deal with highly diverse third parties. So in Weberian terms, tribunals dealing with third parties will be required, even more than current staff tribunals, to win legitimacy through the legality and rationality of their design, their processes, and the technical quality and persuasiveness of the reasons the tribunals give in explaining and justifying their decisions. Such third-party tribunals will face much greater demands for general public legitimacy and justification than do essentially in-house tribunals, although even existing international administrative tribunals may come under wider scrutiny in high-profile cases or cases that reach national courts.

Electoral democracy provides a different and more elaborate means of legitimation. A particular feature of democratic elections by secret ballot is that they allow for the special democratic freedom of the voters to engage in political expression through acting arbitrarily. Leaders elected in this way bring this legitimacy to the international institutions they establish or control or support (as founders and funders), and to institutions over which they themselves can exercise what might be arbitrary political authority, for example to remove a cabinet minister or the head of a government agency. Extending this democratic legitimation to international institutions in general is not easy. Extending it to international tribunals aimed at making these institutions accountable to third parties, is very difficult. These tribunals must be somewhat independent of states, if they are to hold to account organizations established by states and whose funds for meeting liabilities typically come from states. What then are the non-electoral mechanisms of legitimation of transnational institutions exercising public power? Here global administrative law concepts can play a central role. They can help to define, and to specify the criteria for securing institutional practices that can serve to promote legitimacy, such as participation, transparency, due process, reason-giving, review mechanisms, accountability, and respect for basic public law values including rule of law. This question of non-electoral legitimation is fundamental in all kinds of transnational institutions, especially where they have real powers of governance affecting the rights and responsibilities of individuals, corporations, States, and other groups. Concerns about legitimacy, effectiveness and acting justly, combined of course with political pressure and protests, have led many transnational agencies to change their practices and their views as to what the applicable norms are and indeed what their roles are as regulative institutions and public actors in relation to public issues. Such concerns are also likely to be one influence in a slow, patchy, but significant growth in the use of juridical means to establish accountability of international organizations to third parties in limited and defined situations.

In summary, the design, work, and future evolution of international administrative tribunals is both subject to, and a creative influence on the development of, global administrative law. In addition to the practical work of helping address and resolve particular staff situations, these tribunals have constructed an ever-growing body of specific jurisprudence on staff issues in international institutions, and they enrich the growing general jurisprudence of global

administrative law on matters ranging from due process to same-sex unions. They strike balances between demands for generality in the enunciation and application of core principles, and the need for contextualization in specific institutional or socio-cultural settings. Reforms in their design and operations are being guided, in part, by global administrative law concepts and norms that bear on legitimacy and accountability in global governance. Building on this platform, the international administrative tribunals are one source of experience and in certain respects a model for future attempts to build and to legitimate mechanisms for accountability of international institutions to third parties they may directly and detrimentally affect.