

THE ADMINISTRATIVE LAW FRONTIER IN GLOBAL GOVERNANCE

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This paper argues in part I that a body of global administrative law is under construction, and that this growing body of law is better analyzed as part of the new *jus gentium* rather than being analyzed simply under the traditional international law model of *jus inter gentes*. In part II it is suggested that the roles global administrative law may play in building and delimiting global governance in specialist areas vary, depending whether the dominant dynamic in a particular area of governance is interstate pluralism, interstate solidarism, or transnational cosmopolitanism. The conclusion briefly notes some normative objections to the idea of global administrative law, but suggests that, on balance, global administrative law could offer a valuable way forward in structuring global governance and ameliorating some of its problems.

I. THE SOURCES, PRACTICE AND NATURE OF GLOBAL ADMINISTRATIVE LAW

Global administrative law refers broadly to the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring that these bodies meet adequate standards of transparency, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make.¹ The category of global administrative bodies includes intergovernmental institutions, informal intergovernmental networks, national governmental institutions when acting in distributed transnational administration, hybrid public-private bodies engaged in transnational administration, and (most contentiously) purely private bodies performing public roles in transnational administration.

This concept of global administrative law builds upon at least three ideas advanced in a flourishing literature in this field over the period from approximately 1860 until 1940. The first is the key insight that transnational governance might usefully be analyzed as administration and that distinctive legal principles of administration might be applied to it, an idea developed particularly in the work of Lorenz von Stein.² The second, following from this insight, is the bifurcated approach to the definition of international administrative law as the law applicable to such administration.³ Third is the idea that “administration” includes the making of specific decisions and of general but subsidiary rules.

Drawing on these ideas, the present paper seeks to integrate normative practices of an administrative law character from many diverse sites and to assess the functional implications

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¹ Benedict Kingsbury, Nico Krisch, & Richard Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (Summer/Autumn 2005).

² Lorenz von Stein, *Einige Bemerkungen über das internationale Verwaltungsrecht*, 6 JAHRBUCH FÜR GESETZGEBUNG, VERWALTUNG UND VOLKSWIRTSCHAFT IM DEUTSCHEN REICH 395 (1882).

for global governance entities of this emerging set of principles. This field of law is described as “global” rather than “international” to reflect the inclusion within it of normative practices, and normative sources, that are not encompassed within standard conceptions of international law.

Transnational Governance and Limits to the Reach of National Administrative Law

Three examples illustrate the increasingly wide range of administrative practices which national administrative law does not adequately reach, but for which some administrative law is required:

- 1) *Internationally created property and markets.* The effort to mobilize markets to make international environmental protection more cost-effective is resulting in the direct intergovernmental creation of regulated property rights held by private persons. An example is the Clean Development Mechanism (CDM), set up under the Kyoto Protocol to the UN Framework Convention on Climate Change. Under the CDM Modalities and Procedures, the ten-member Executive Board has the task of deciding on registration of particular projects by private parties and the issuance of Certified Emission Reductions (CERs).⁴ For example, a Dutch corporation undertaking a greenhouse gas emissions reduction project in Indonesia may find that the Executive Board refuses to accept the project, and thus does not issue internationally tradable CERs. Such a decision has major financial consequences for the corporation and perhaps for Indonesia and the Netherlands, but review proceedings in national courts are most unlikely to be effective because they cannot compel the Executive Board to issue CERs.⁵
- 2) *International certification and warnings.* These actions by intergovernmental bodies can have tremendous economic consequences. For example, travel advisory warnings by the World Health Organization (WHO) concerning SARS, in say Toronto, are highly relevant to insurance and liability issues for employers and conference organizers.⁶ But these people have no formal input into the WHO's decision, nor any compensatory remedy if the WHO makes a negligent mistake.⁷
- 3) *International standards.* The International Standards Organization (ISO), which consists of one national standard-setting body from each participating country, has set over thirteen thousand standards. This work is done mainly through 180 technical committees, 550 subcommittees, and two thousand working groups, which altogether involve over forty thousand people. While each country is in theory free to apply or not apply a particular ISO standard, the effect of World Trade Organization (WTO) law is to insulate from challenge those national standards that are based on ISO standards and to place considerable burdens of justification on countries that choose

³ Paul Négulesco, *Principes du Droit International Administratif*, 51 RECUEIL DES COURS 579 (1935). See 1 WÖRTERBUCH DES VÖLKERRECHTS UND DER DIPLOMATIE (Karl Strupp, ed., 1924); Karl Strupp, *Internationale Verwaltungsgemeinschaften*, in WÖRTERBUCH DES VÖLKERRECHTS UND DER DIPLOMATIE, *supra*, at 573–77; Karl Neumeyer, *Internationales Verwaltungsrecht: Völkerrechtliche Grundlagen*, in WÖRTERBUCH DES VÖLKERRECHTS UND DER DIPLOMATIE, *supra*, at 577–81.

⁴ United Nations Framework Convention on Climate Change, Executive Board of the Clean Development Mechanism, *Clarifications to Facilitate the Implementation of the Procedures for Review as Referred to in Paragraph 41 of the CDM Modalities and Procedures*, EB16, Annex 5 (2004), available at <<http://cdm.unfccc.int/EB/Meetings/>> (last visited May 20, 2005).

⁵ This is a hypothetical example, but compare the objections by several NGOs to the Dutch government's proposal to seek CDM registration of the Wayang Windu geothermal plant project in Java, Indonesia. The objectors argued that the plant was being built anyway, and was a “business-as-usual” project that did not meet the requirement of “additionality.” Letter from the Climate Action Network Europe, et al. to the CDM Executive Board, CDM Projects Selected by Dutch Government (Mar. 18, 2003), available at: <<http://www.climnet.org/EUenergy/CDM.htm>> (last visited February 20, 2005).

⁶ See generally DAVID FIDLER, SARS: GOVERNANCE AND THE GLOBALIZATION OF DISEASE (2004).

⁷ KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANISATIONS (2002); AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS (2000).

to set their own standards instead.⁸ In addition, corporations exporting to other markets or needing complementarity with other products often find it cheaper to pay the cost of changing their production to the ISO standard rather than to hold out, even if their national government is willing to resist the ISO standard. Recent research shows that European standard-setting organizations are better adapted to influence the ISO process than are U.S. ones, so more U.S. than European corporations have to pay the costs of changing when a new ISO standard is produced.⁹

These three examples of transnational governance illustrate the growing range of situations in which extranational administrative law is clearly necessary. Even more prevalent are situations in which national administrative law may be applied, but is insufficient or may have disruptive effects because of its engagement with only part of the governance process. The difficulties confronting national courts engaged in administrative law review of decisions of their own governments relating to transnational or international governance are evident in cases relating to national implementation of UN Security Council Resolutions 1267 and 1373. These resolutions establish lists of persons suspected of financing terrorist activities, whose assets states are required to freeze. Individuals whose assets had been frozen litigated in Canadian courts¹⁰ and in the Court of First Instance of the European Union,¹¹ confronting these courts with the dilemma of either acquiescing in possible unfairness to individuals or of ordering governments to act inconsistently with a binding Security Council resolution. These cases were eventually resolved when the governments concerned obtained Security Council delisting of the individuals. The cases also prompted modification of Security Council procedures to enable governments to trigger consideration of delisting more easily. But enduring concerns about such cases became an impediment to an effective system of Security Council listing and highlighted the need for transnational listing arrangements to incorporate national review mechanisms open to affected individuals.

In other areas of global governance, it is to be expected that national courts will increasingly be urged to undertake judicial review of the forum state's actions in participating in, or in implementing, a transnational rule or decision.¹² In some circumstances, national courts may seek to undertake direct judicial review of proceedings in a transnational governance body

⁸ ISO standards do not have the express recognition in GATT, GATS, or the Technical Barriers to Trade (TBT) Agreement that the standards of the Codex Alimentarius Commission and other bodies receive in the Sanitary and Phytosanitary Standards (SPS) Agreement. ISO standards are nevertheless important in TBT Agreement practice. Legal tests used in assessing national standards for consistency with international standards under Article 3(1) of the SPS Agreement are evolving—see, e.g., WTO Appellate Body on European Communities: Trade Description of Sardines, AB-2002-3, WT/DS231/AB/R (Sep. 26, 2002).

⁹ Walter Mattli & Tim Büthe, *Setting International Standards: Technological Rationality or Primacy of Power?*, 56 WORLD POL. 1 (2003).

¹⁰ The Liban Hussein case, concerning a Somali immigrant to Canada whose Barakaat North America money transfer business was initially suspected by U.S. authorities of involvement in terrorist financing. After various proceedings in Canadian courts and the discontinuance of government proceedings against him, the applicant was eventually removed from the Security Council list. For a discussion of this case, see David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 LAW & CONT. PROBS. 129 (Summer/Autumn 2005).

¹¹ Case T-306/01 R, Aden v. Council, 2002 ECR II-02387 (concerning Swedish nationals of Somali origin connected with Al Barakaat). After inconclusive preliminary rulings in the European Court of First Instance, the Swedish government eventually obtained agreement in the Security Council 1267 committee to deletion of Abdirisak Aden from the Security Council list. See Press Release, United Nations, 1267 Committee Approves Deletion of Three Individuals and Three Entities from Its List, SC/7490 (Aug. 27, 2002), available at <<http://www.un.org/News/Press/docs/2002/sc7490.doc.htm>> See also Case T-318/01, Othman v. Council, 2002 O.J. (C 68) 13 (challenging the EU Regulations relating to dealings with the Taliban and Afghanistan).

¹² For example, a U.S. Court of Appeals held in *United States v. Decker*, 600 F.2d 733 (9th Cir. 1979), that U.S. fishing regulations issued pursuant to the International Pacific Salmon Fisheries Convention were subject to judicial review, in the special context of a criminal prosecution under the regulations.

over which they have jurisdiction (especially a non-immune private body such as an international sports federation), or indirect evaluation of the proceedings of a transnational governance body in cases between other parties in which one party relies on the rules or decisions of the transnational body. Actual or threatened scrutiny by national courts, or by other national review institutions, often has a beneficial effect in spurring the reform of the administrative procedures of transnational governance bodies, but such scrutiny may also have chilling or disruptive effects.¹³

Sources and Principles of Global Administrative Law

It is uncontroversial that the sources of global administrative law include applicable treaties, some rules of customary international law, and authoritative decisions of intergovernmental organizations. It is argued here that the sources also include practices in many different forums that exert a normative pull in the operation of intergovernmental and transnational governance. But whose practices count for this purpose? And what general principles of practice are emerging in this agglomeration? Some functional sources and associated principles may be listed by way of preliminary indication.¹⁴

- 1) *Principles drawn from national administrative law*, such as:
 - When administrative agencies make *general rules*, they must:
 - Notify potentially interested persons and invite their comments;
 - Consider any comments received; and
 - Provide reasoned responses.
 - When agencies take *decisions* affecting particular persons, they must:
 - Provide an opportunity to comment and in some cases a hearing;
 - Issue decisions without undue delay;
 - State the reasons on which decisions are based; and
 - Provide a structure for review or appeal.
- 2) *Principles of the WTO agreements*, such as requirements that a member state setting standards for product safety or plant health that might affect international trade must:
 - Ensure the standards are transparent;
 - Establish national enquiry points to provide information to other states and to private parties;
 - Base national standards on “international standards,” which may themselves be set by private or mixed bodies such as the Codex Alimentarius or the International Standards Organization;
 - Recognize other states’ standards as equivalent where so proven, and accept products conforming to these equivalent standards;
 - Follow a notice and comment procedure in setting standards; and
 - Conform to requirements of reasonableness, proportionality, confidentiality, and fair process in certification and control proceedings for foreign products.
- 3) *Principles in international environmental treaties* and in the practice of agencies such as the World Bank, for matters such as:
 - Environmental impact assessment;

¹³ On the impact of pressure from Italian courts, and from a select committee of the U.K. House of Lords, on procedural reforms in the European Commission’s conduct of competition law proceedings, see Francesca Bignami, *Creating Rights in the Age of Global Governance: Mental Maps and Strategic Interests in Europe*, 11 COLUM. J. EUR. L. (2005).

¹⁴ Useful sources include Giacinto Della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law*, 9 EUR. PUB. L. 563 (2003); Sabino Cassese, *European Administrative Proceedings*, 68 LAW & CONTEMP. PROBS. (forthcoming 2005); Sabino Cassese, *Global Standards for National Administrative Procedure*, *id.*; Eduardo Chiti, *Administrative Proceedings Involving European Agencies*, *id.*; Richard Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, *id.*

- Prior informed consent in hazardous waste shipment;
- Notification of dangers; and
- Access to environmental information.

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

- 4) *Intergovernmental agencies whose actions affect private parties directly.* Principles of review and accountability have developed somewhat, although often with much more remaining to be done, for example in:
 - The work of the World Bank Inspection Panel;¹⁵
 - UN High Commissioner for Refugees (UNHCR) investigation of abuses of refugees by UNHCR staff in refugee camps in West Africa, where local courts were not in a position to ensure accountability (although the results of the UNHCR/UN process were limited);
 - Investigation of wrongful actions of UN peacekeeping forces in the Democratic Republic of the Congo and elsewhere, and efforts in the United Nations to develop best practice guidelines and stronger disciplinary and enforcement structures; and
 - Increasing commitment to prior consultation with potentially affected communities before some projects are financed by international development banks.
- 5) *Nongovernmental agencies whose actions affect private parties directly.* Some nongovernmental agencies have impressive administrative codes and review mechanisms. An example is the International Olympic Committee's drugs code under the supervision of the World Anti-Doping Agency, which includes procedural protections and a review structure to adjudicate complaints by athletes that they have been unfairly banned from competition, culminating in appeals to the International Court of Arbitration for Sport. But most nongovernmental organizations (NGOs) providing certification services, for example certifying or refusing to certify "fair trade" coffee or "sustainably managed" timber, do not have robust participation procedures or accountability mechanisms. NGOs conducting field operations (for example, administering refugee camps under contract to states or to the UNHCR) are also very uneven in the adequacy of their participation, control, and accountability structures. Private military firms, which by 2004 had thirty thousand contract personnel in Iraq alone, often operate in poorly regulated environments and without adequate accountability to those they affect. Large corporations increasingly adopt voluntary codes, in some cases with more-or-less independent monitoring institutions and internal compliance procedures, but frequently remain effectively unaccountable on many issues. Assessment and development of codes of practice, fair procedures, and review mechanisms in these and many other areas of nongovernmental administration is an important area of practice and research.

Return of the Jus Gentium?

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

¹⁵ For NGO perspectives on several cases considered by the Inspection Panel, see DEMANDING ACCOUNTABILITY: CIVIL SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL (Dana Clark et. al. eds., 2003).

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

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

If this is not strictly *jus inter gentes*, is it international law at all? It is proposed that this body of normative practice can be understood as international law, under a model not of *jus inter gentes*, but of *jus gentium*.¹⁶ The *jus gentium* model proposed here does not embrace a commitment to natural law. Instead, it focuses on normative elements inherent in law itself, supplemented and extended by practice and dialogue between sites.

What are the costs of ceasing to confine international law to a *jus inter gentes* model? Normative arguments for seeking to analyze global administrative law within the terms of an orthodox sources-based account of international law—a *jus inter gentes* model—are strong. Adherence to a positivist-sources-based conception of international law may be the best way to maintain legal predictability and to sustain rule of law values in international relations.¹⁷ It may be preferable to retain a unified view of an international legal system than to countenance the deformalization and the mosaic pattern that a *jus gentium* approach may imply.

In accordance with such a view, an attempt might be made to enlarge the rubric of “general principles of law” in the ICJ Statute so as to accommodate the principles of global administrative law. Such a project faces two practical obstacles that, while not insuperable, will not easily be overcome. First, the sources of global administrative law are more diverse, its content much fuller, and its scope more comprehensive than the propositions the ICJ has hitherto endorsed in its very limited jurisprudence of “general principles of law.” Second, the status of “general principles” would imply that the principles of global administrative law all enjoy the hierarchical status of international law vis-à-vis other normative systems, such as national law. Practice is a long way from this at present. Principles are applied, but often without a strong sense of hierarchical obligation or even of formal sources. Although the arguments to confine the concept of international law to the *jus inter gentes* have many attractions, and the *jus inter gentes* model may be renovated in the future to catch up with

¹⁶ *Jus gentium* can mean many different things. The reference here is to the conception found in HUGO GROTIUS, *DE JURE BELLI AC PACIS* (1625). See generally Benedict Kingsbury, *A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull*, 17 *QUINNIPIAC L. REV.* 3, 11–18 (1997).

¹⁷ See Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law*, in *EAST ASIAN AND EUROPEAN PERSPECTIVES ON INTERNATIONAL LAW* 139–77 (Michael Stolleis & Masaharu Yanagihara eds., 2003).

the rapidly changing practice of governance, on balance it seems desirable to extend the concept of international law, if possible, so as to encompass a presently operable model that can accommodate many of the most important patterns of governance that actually exist.

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

The WTO Appellate Body's decisions in the *Shrimp-Turtle* case illustrate this *jus gentium* in operation. In the first decision (October 1998), the Appellate Body held that shrimp from India and several other states had been improperly excluded from U.S. markets. The administrative procedures followed by the United States in applying its turtle-protecting legislation constituted "arbitrary and unjustifiable discrimination between Members," and hence the United States was precluded from defending its turtle-protecting measures under the GATT Article XX exceptions. The Appellate Body pointed out that the U.S. procedure for certifying the shrimp industries of particular states as meeting turtle-protecting standards provided "no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it ... no formal written, reasoned decision, whether of acceptance or rejection, [no notification of such decision, and] [n]o procedure for review of, or appeal from, a denial."¹⁸

In conjunction with proceedings leading to this adverse decision, the United States amended its administrative procedures,¹⁹ and the measures were held WTO-compliant in the second Appellate Body ruling.²⁰ Three points about this case are of importance for present purposes:

- 1) The administrative principles articulated by the Appellate Body are only to a limited extent written in WTO treaties. The Appellate Body borrowed these administrative principles from a combination of national administrative law (especially U.S. law), European Union law, and many different treaties.
- 2) The effect of this decision is to press WTO member states to amend their national administrative law to conform to international law requirements, providing procedural rights both to foreign states and to affected private actors in the market.
- 3) The Appellate Body tried in its first decision to avoid deciding the trade-environment values conflict on substantive grounds, and instead shifted the focus to procedural fairness. This technique was partly an acknowledgement of value pluralism, and partly an effort to bolster the WTO's own legitimacy among various influential constituencies whose substantive interests conflict.

II. ROLES OF GLOBAL ADMINISTRATIVE LAW UNDER CONDITIONS OF PLURALISM, SOLIDARISM, OR COSMOPOLITANISM

The rising global demands for effective and legitimate governance of transborder issues come at a time when it is unimaginable to have a global government in the sense of a

¹⁸ WTO Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R at ¶ 180 (Oct. 12, 1998).

¹⁹ Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36,946 (July 8, 1999). Whether and to what extent these amendments were directly connected with proceedings in the WTO is contested.

²⁰ WTO Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia, AB-2001-4, WT/DS58/AB/RW (Oct. 22, 2001).

collectivity capable of acting across the gamut of major policy issues, with its decisions accepted as legitimate and authoritative expressions by the dissenters and the losers. Instead, there is a growing proliferation of special-purpose governance entities. These fragmented governance entities play a valuable role in governance, but they face dangers and problems, including the risks of:

- *Overreaching*, by trying to do more than the members have accepted, or trying to act in ways that affect the interests of non-members who may not have been consulted and may have no ability to call the entity to account; and
- *Underachieving*, because important governance needs cannot be met by entities whose membership or competence is too narrow or who lack wider legitimacy.

Global administrative law is potentially a resource to overcome some such problems associated with these entities and to help further to build the strands of governance and knit them together. Determining how valuable a resource it may be requires further conceptual analysis, empirical research, and normative debate among scholars and practitioners in different parts of the world. Normative debates must address questions of who wins and who loses from the development of global administrative law. This development has thus far been dominated by practice and scholarship in the Organization for Economic Cooperation and Development (OECD) states, particularly North Atlantic states, but other practices and ideas are beginning to find greater voice.²¹

Whereas studies by administrative lawyers tend to begin with the well-theorized understanding of the functions of national administrative law and then consider how these functions might be achieved in transnational governance, it is necessary to complement those studies by beginning with the standpoint of international law and politics and considering what functions may be played by the emerging global administrative law under different conditions of international politics. Employing categories of the English School of International Relations theory as a heuristic,²² it is suggested that governance entities act in very different ways depending whether the legal and political dynamics of international governance on a particular issue are predominantly interstate pluralism, interstate solidarism, or transnational cosmopolitanism. (These are not simply objective descriptions of the state of affairs; they are characterizations that reflect the basic orientations of the participants and of those who happen to be writing about the issues.) The roles that may be played by global administrative law vary with these categories.

Interstate Pluralism

Traditional international law, with its characteristic concept of opposability, is pluralistic. Interstate pluralism faces challenges, but it continues to be the preponderant mode in many areas of international law. The contribution of global administrative law to pluralistic areas of law is primarily at the level of institutions. Where joint management is required, or where gains could be captured by interstate cooperation, global administrative law can play useful

²¹ THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS, AND GLOBALIZATION (Antony Anghie et al. eds., 2003); B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004); Anne Orford, *The Gift of Formalism*, 15 EUR. J. INT'L L. 179 (2004).

²² For an explanation of these English School categories as used here, see, e.g., HEDLEY BULL ON INTERNATIONAL SOCIETY (Kai Alderson & Andrew Hurrell eds., 2000); Andrew Hurrell, *International Law and the Making and Unmaking of Boundaries*, in STATES, NATIONS, AND BORDERS 275 (Allen Buchanan & Margaret Moore eds., 2003); Benedict Kingsbury, *People and Boundaries: An 'Internationalized Public Law' Approach*, in STATES, NATIONS, AND BORDERS, *supra*, at 298.

roles. It can help ensure that full information is available, that all interests are heard, that scientific committees and advisory bodies give reasons for decisions, and that states adversely affected by a particular decision have opportunities to seek review.

One important administrative device for balancing pluralism with market interdependence is mutual recognition of different national regulatory standards meeting agreed criteria. An effective transborder institution can be very useful where the international collective action problem is not simply one of coordination (where an agreement is virtually self-enforcing), but is one of collaboration (in which individual actors have incentives to defect from an established set of norms, but can be dissuaded from doing so by sanctions or the operation of social norms and expectations).

Interstate Solidarism

In a deeper solidarist conception of international legal order, the “international community” is an interstate community committed to a far-reaching set of globally accepted values. Almost all agree that international law does now encompass rules in subject areas in which truly universal approaches are possible because of consensus on core values, as in norms against genocide. But consensus is seldom attainable on strong institutions which may in practice be essential to the speedy operationalization of these norms. Thus Judge Guillaume’s critique of universal jurisdiction in national courts for crimes against humanity, that this would “encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined ‘international community.’”²³

In the absence of strong institutions with agreed decision powers, international governance is increasingly accomplished by informal networks. The idea of some Habermasians²⁴ that a “public” can be constituted by any group participating in a common discourse seems actually to operate in subject areas of international law in which expertise is so specialized, and the shared identity of these specialists is so strong transnationally, that the specialists come to think of themselves as “the international community” pursuing their technocratic purposes for the good of all. These technocratic “publics” function successfully so long as the technocrats can avoid wider politics or being called to account by outside critics. The OECD Mutual Acceptance of Data system for cross-recognition of laboratory test results for chemicals works in this way: they face the politically volatile issue of animal rights and animal welfare in product testing, but several animal welfare NGOs support the OECD process because it cuts down needless repetition of tests in different countries.²⁵ However, these networks are always at risk of overreaching or of challenges to their legitimacy.

²³ Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 ICJ REP.3 (Feb. 14) (separate opinion of President Guillaume at ¶ 15).

²⁴ Compare Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE 109 (Craig Calhoun ed., 1992) for debates on the argument for a multiplicity of publics.

²⁵ See *Decision of the Council Concerning the Mutual Acceptance of Data (MAD) in the Assessment of Chemicals*, OECD Doc. C(81)30/Final (May 12, 1981), at <<http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/99D86B3906ADFD4FC12570080059A0B9?OpenDocument>> (last visited May 21, 2005); *OECD Test Guidelines and Principles of Good Laboratory Practice (GLP)*, id. at Annexes I-II; *Decision-Recommendation of the Council on Compliance with Principles of Good Laboratory Practice*, OECD Doc. C(89)87/Final (Oct. 2, 1989), at <<http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/93458AE1B15342D9C1257008005A3133?OpenDocument>> (last visited May 21, 2005); *Council Decision Concerning the Adherence of Non-Member Countries to the Council Acts Related to the Mutual Acceptance of Data in the Assessment of Chemicals*, OECD Doc. C(97)114/Final (Nov. 26, 1997), at <[http://www.olis.oecd.org/olis/1997doc.nsf/43bb6130e5e86e5fc12569fa005d004c/5b3386d803b995be80256598003a749e/\\$FILE/O1E88527.DOC](http://www.olis.oecd.org/olis/1997doc.nsf/43bb6130e5e86e5fc12569fa005d004c/5b3386d803b995be80256598003a749e/$FILE/O1E88527.DOC)> (last visited May 21, 2005).

In practice, the solidarist approach is often extended beyond true universal agreement to subject areas in which noncompliance by a minority with norms favored by a majority imposes costs (externalities) on the majority that are too great to permit the minority position to continue. “Majority” here sometimes means a numerical majority. Other times it means the holders of the majority of power. In either case, the “majority” may try to act through international institutions and frame its demand in universal terms, provided the distribution of power makes this possible. Such purported universalism may reduce the external and internal cost of “coercing” or “buying off” the minority. The “multilateralism” of the European Union and like-minded states is sometimes framed as the voice of “the international community” for this reason, e.g. in relation to the Kyoto Protocol or the Landmines Convention. Some arguments for the existence of a particular rule of customary international law have a similar quality when the proponents, echoing Grotius, base themselves on a survey of the practice and views not of “all” states but of the “better” states.²⁶ Arguments for special privileges for a community of democratic states (for example, a privilege to have weapons of mass destruction prohibited to other states) may also have this character.

Global administrative law can contribute to controlling the uncertain borders, where an effective governance entity is tempted to extend its competence or is struggling with defining its approach to issues that are partly within its competence and partly outside. For example, on some narrow trade issues the WTO probably is a solidarist entity—in certain areas the Appellate Body does seem to carry all states, including even the losers in these decisions. But problems arise where it purports to *extend* its reach to nonstate interests who are not adequately represented or to a minority of small but specially affected states who cannot block an adverse ruling imposing an interpretation they never consented to. In the *Shrimp-Turtle* cases, the Appellate Body tried to use administrative law to help with these problems. The Appellate Body recognized that structures protecting the participation of affected interests, including third-party participation, could increase support for and the reach of the process. The implication of this holding is that a better developed body of global administrative law might offer a way forward in the vexed trade-environment debate, and in “trade-and ...” debates more generally. Whether taking this route would lead to significant differences in substantive outcomes is an open question requiring further investigation.

Transnational Cosmopolitanism

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

Global markets are one form of cosmopolitanism. They create a demand for forms of community other than state and local community in order to enhance participation and accountability and hence increase the legitimacy of the legal structures of market governance that already exist or are rapidly emerging. Globalization has generated considerable wealth but has corresponded with increased inequality in many societies, reduced or static social welfare provision and labor protection as states compete with each other to reduce costs,

²⁶ HUGO GROTIUS, *DE JURE BELLI AC PACIS* I.1.xii (1646 ed.) (arguing for a focus on the practice not necessarily of all nations, but of those nations “more advanced in civilization” or “in a sound condition.”).

and higher exposure of people to job loss and destabilizing volatility. Without a base in social bargains, no set of universally-accepted substantive norms on globalization can be forthcoming.²⁷

But this lack of support is troubling to global corporations, and to some leading corporations in developing countries, whose future profits are threatened by sick or undereducated workforces, consumer boycotts, and risks of state re-regulation following social protests. An example is the rapidly growing privatization of formerly state-run urban water supplies. The main foreign investors in this sector around the world (a handful of British and French companies) have increasingly tried to establish community service offices, consumer disputes tribunals, and local stakeholder partnerships to reduce social protest and thus increase willingness of consumers to pay charges.²⁸ That is, domestically, they have been using administrative law techniques to widen participation and accountability in order to make their own positions more legitimate and durable. But transnationally, the interests of consumers and local communities are not yet well represented; for example, the ICSID arbitral tribunal in the ongoing *Aguas del Tunari v. Bolivia* case under the Netherlands-Bolivia Bilateral Investment Treaty refused to accept amicus briefs or any other involvement of NGOs and people from the city of Cochibamba where the water services privatization, riots, and subsequent renationalization had occurred.²⁹ It might be argued that the main global water companies, as repeat players, would be better off with an operational global administrative law that generates and involves a global governance entity—public, hybrid, or private—in order to buttress rather than undermine the legitimacy of international arbitral settlements in this sector. This analysis is speculative, but it indicates the need for further research on the potential implications of different configurations of global administrative law for corporate strategies and even for the definition of corporate objectives.

CONCLUSION

International governance lacks a democratic community capable of resolving core distributional and values conflicts.³⁰ It often lacks a highly institutionalized structure. Global administrative law thus lacks crucial foundations on which national administrative law is built in strong states. Global administrative law must perform first-order functions—helping to make community, not simply helping an existing community to operate its administration. This may well be asking too much. The effort may result merely in adding legitimacy and longevity to unjust distributions and ill-functioning institutions. But these limitations are unavoidable in the world of the possible rather than the ideal. It is suggested that, on balance, global administrative law may potentially provide a valuable way forward.

²⁷ John Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, in TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE 93 (David Held & Mathias Koenig-Archibugi eds., 2003).

²⁸ Bronwen Morgan, *Social Protest against Privatization of Water*, in SUSTAINABLE DEVELOPMENT LAW: PRINCIPLES, PRACTICES AND PROSPECTS (Marie-Claire Cordonier Segger & Ashfaq Khalfan eds., 1st ed., 2004).

²⁹ *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3. See Letter from David Caron, President of the Tribunal, to Martin Wagner, Earthjustice International Program (Jan. 29, 2003), available at <http://www.law.berkeley.edu/faculty/ddcaron/Documents/ICSID%20Arbitrations/ARB-02-3_NGO_Petition_ICSID_Response_2003.pdf> (last visited May 20, 2005).

³⁰ See Ruth Grant & Robert Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005).

