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**State Regulatory Capacity and Administrative Law and
Governance under Globalization**

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STATE REGULATORY CAPACITY AND ADMINISTRATIVE LAW AND GOVERNANCE UNCER GLOBALIZATION

Richard B. Stewart*

I. Introduction

This essay addresses global regulatory cooperation, its governance, its power dynamics, and the role of administrative law in the context of two important new initiatives, the Trans Pacific Partnership (TPP) between the US, Japan, and eight other developed and developing Pacific Rim countries,¹ and the proposed US-EU Transatlantic Trade and Investment Partnership (TTIP). While Congress has granted Trade Promotion Authority (TPA) to President Obama for both agreements, their ultimate political viability is far from assured. These two “megaregional” regimes seek to achieve trade, investment, and commercial regulatory and related objectives through a single regional institution covering a major proportion of global economic activity. The TPP agreement has been signed by representatives of the parties but requires domestic approvals.² Negotiations on TTIP are ongoing. While their ultimate political viability is far from assured, they represent major innovations in an era of important changes in the global economic and geopolitical landscape and weakening multilateralism. These megaregional initiatives represent the latest chapter in the globalization of regulation, a topic neglected in American administrative law courses, casebooks, and texts.

Jerry Mashaw has written a book on another hidden world of American administration and law—that of the 19th Century.³ This essay seeks to help correct a similar neglect. Much of his work has addressed state capacity to deliver regulatory protections and economic security to citizens, and the contributions that managerial and decision analytic approaches that constitute part of the internal law of administrative governance can make as contrasted with formal procedures such as adjudicatory hearings in notice and comment rulemaking and judicial review. Internally generated norms and methods of governance are especially important in the global administrative space, where regulatory bodies operate outside the system of domestic legislatures and courts and global equivalents to those institutions are lacking.⁴ As Mashaw observes: “[g]lobal administrative law almost necessarily imagines that there is a normative core of responsible and responsive administrative practice that can be identified and implemented without necessarily making administrative institutions accountable either to elected

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¹ The other countries currently participating in TPP are Canada, Mexico, Australia, New Zealand, Malaysia, Singapore, Vietnam, Chile, Peru and Brunei.

² For the text of the TPP Agreement (signed on 4 February 2016), see <https://www.tpp.mfat.govt.nz/text>.

³ JERRY MASHAW, *CREATING THE AMERICAN ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012).

⁴ Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *THE EMERGENCE OF GLOBAL ADMINISTRATIVE LAW*, 68 *LAW & CONTEMP. PROBS.* 15 (2005) [hereinafter *EMERGENCE OF GLOBAL ADMINISTRATIVE LAW*].

representatives or to courts having broad jurisdiction to review their decisions,” since, at “the global level, these political and legal constraints hardly exist.”⁵ This essay discusses how the developing body of global administrative law responds to the challenges of regulatory globalization in the specific context of TTIP and TPP, including the contributions of US innovations in internal administrative governance such as RIA and quantitative risk assessment.

States seek continually to renew and strengthen their regulatory capacities in order to secure economic prosperity and protect their citizens against harm and insecurity. Under conditions of global integration, they cannot achieve these goals unilaterally. They must engage with other jurisdictions to promote global trade and investment and address transnational market failures. In order to enhance their ability to secure prosperity and protection for their citizens, states must surrender greater or lesser control over regulatory programs to other states through international trade and regulatory organizations, intergovernmental regulatory networks, or various bilateral arrangements. These global regulatory arrangements manifest in new form the iron law of regulatory agency: political principals can enhance their power and performance only by devolving more and more authority, regulatory technology, and discretion to agents. The history of administrative law represents a series of innovations to manage the progressively more serious agency costs that result. Global regulatory programs escalate agency costs and multiply the challenges for administrative law in keeping pace with ensuring accountable and responsive regulatory decisions. This challenge is complicated by the circumstance that regulatory authority is a species of power not only vis-a-vis the regulated but also against competing regulatory jurisdictions. The globalization of regulation accordingly generates geopolitical rivalry. States that dominate regulatory governance of the global economy can use it to advance their economic, ideological, and strategic interests. International regulatory cooperation inherently involves rivalry and potential conflict. The current arrangements for global regulatory governance also pose serious equity issues. By and large, less powerful states must dance to the tunes of the more powerful. The kaleidoscopic array of global regulatory programs exhibits a systemic imbalance between prosperity and protection, serving the interests of well-organized economic actors and disregarding environmental, health, and social harms and adverse distributional consequences generated by economic globalization.⁶

TTIP and TPP must be analyzed and evaluated through these positive and normative frameworks. Their primary aim is liberalize trade and promote investment through a broad suite of measures; reducing tariffs (to zero in the case of TPP); reducing very significant non-tariff barriers created

⁵ Mashaw, *supra* note 3, at 279.

⁶ For discussion of the concept and phenomenon of disregard, see Richard B Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation and Responsiveness*, 108 AM. J. INT’L L. 211 (2014) [hereinafter *Remedying Disregard*]. There is no global equivalent of the domestic political and institutional mechanisms in advanced democracies that operate to maintain balance among regulatory objectives and achieve equitable redistribution. Richard Revesz, *Federalism and Environmental Regulation: Lessons for the European Union and the International Community*, 83 VA. L. REV 1331 (1997).

by domestic regulatory differences and impediments on trade in goods and services; liberalizing domestic regulation and administration including by promoting transparency and anti-corruption; addressing structural barriers including those created by government procurement policies, state-owned enterprises, and, potentially, state industrial policies; promoting development of global supply chains and e-commerce; coordinating competition law programs; and enhancing protection for investment and intellectual property.⁷ TTIP and TPP also contain measures to prevent erosion of environmental and labor standards as a result of enhanced economic integration. Equally important, TTIP and TPP provide innovative institutional arrangements for ongoing regulatory cooperation among the parties with a hub and spoke design comprising a central supervisory and coordinating body and task forces composed of domestic regulators in specific sectors.⁸

In their scope, ambition and design, TTIP and TPP go significantly beyond previous regional trade-regulatory cooperation models such as NAFTA, Mercosur, and recent bilateral Free Trade Agreements (FTAs) initiated by the US or EU; they accordingly justify the label “megaregional.” TTIP represents an effort by the EU and US to compensate for their loss of preeminence in the WTO and other multilateral trade and regulatory bodies by leveraging their combined market power to promote neo-liberal economic regulatory policies against the challenge of China and other emerging economies. The aim is not only to stimulate transatlantic economic growth but also to generate regulatory standards and methods that achieve global currency, potentially marginalizing existing multilateral regulatory bodies in the process. The US, in partnership with Japan and a group of OECD countries and fast-growing developing countries, through TPP seeks to stimulate the participants’ economic growth, promote its international economic policy agenda in the Asia Pacific, and counter the growing regional power of China, with the potential for using TPP as the foundation for an encompassing Pacific Free Trade Agreement that could include China. Both TTP and TTIP have attracted significant criticism and opposition in the EU, US, and some other TPP countries as industry-dominated ventures that will afford unjustified protections to intellectual property rights in foreign investment, harm labor, consumers, health and the environment, and undermine the authority of domestic political and legal institutions.

This essay first addresses the economic, geopolitical, and regulatory protective drivers of regulatory globalization. It then examines the various institutional forms that international regulatory cooperation has taken including the new generation of megaregional regimes, represented by TTIP and TPP. Next, it considers some of the structural consequences of regulatory globalization, including the imbalance between the promotional and protective functions of regulation, increases in agency costs, and the resulting challenges for administrative governance and law. It then considers these challenges in the

⁷ Peter Chase & Jacques Pelkmans, *This Time It's Different: Turbo-charging Regulatory Cooperation in TTIP*, CEPS-CTR project “TTIP in the Balance”, Paper No. 7 (2015).

⁸ Similar if less ambitious initiatives are in process in the Asia-Pacific region involving different configurations of countries.

specific context of TTIP and TPP, including their internal governance, their relation with domestic administrations and administrative law, and their consequences for nonparty countries. It discusses how megaregional regimes pose novel challenges for domestic systems of administrative law by further shifting regulatory decision-making to global institutions and creating potentially significant agency costs. It examines how familiar as well as new administrative law techniques can be deployed to promote greater accountability and responsiveness by global regulatory decision makers in TTIP, TPP and other global regulatory regimes. The discussion considers the importance of the internal law of administration, including US innovations, such as regulatory impact analysis and quantitative risk assessment, and how they can play an important and constructive role in the megaregionals. A conclusion follows.

II. Drivers of Regulatory Globalization

The different institutional forms of international regulatory cooperation (IRC), including megaregional initiatives such as TTIP and TPP, are discussed in the next section of this essay. All of these regimes respond in varying ways to three fundamental drivers: economic benefit, geopolitical considerations, and strengthened regulatory protections.

Economic benefits (herein of prosperity)

One driver of IRC, prominent in TTIP and TPP, is the economic benefits from initiatives to liberalize trade and investment, strengthen the regulatory infrastructure of global commerce, and address market barriers created by domestic regulatory programs and administration. Taken together, these measures can deliver significant economic benefits for participating countries.⁹ While estimates vary, an independent study found that an ambitious TTIP deal would increase the size of the EU economy around €120 billion (or 0.5% of GDP) and the US economy by €95 billion (or 0.4% of GDP) on a continuing basis.¹⁰ A Brookings analysis of TPP estimated that it would generate economic benefits of \$110 billion annually for the participating countries, with global benefits of \$295 billion.¹¹

Liberalization of domestic regulatory programs and their governance can also generate broader political and societal benefits by dislodging factional entrenchment. The Abe administration plans ambitious implementation of TPP in Japan in order to open up competition in agriculture, insurance, medical services and other sectors, and a similar agenda is under consideration by leaderships in Europe.

⁹ Statement by the President on Senate Passage of Trade Promotion Authority and Trade Adjustment Assistance, THE WHITE HOUSE (May 22, 2015), <https://www.whitehouse.gov/the-press-office/2015/05/22/statement-president-senate-passage-trade-promotion-authority-and-trade-ax>.

¹⁰ European Commission, *Transatlantic Trade and Investment Partnership: The Economic Analysis Explained* (2013). The study provides some assessments of the sectors that are likely to benefit most from TTIP, which include metal products (exports up 12%), processed foods (+9%), chemicals (+9%), other manufactured goods (+6%), other transport equipment (+6%), and especially motor vehicles (40%). See also Jacques Pelkmans et al., *The Impact of TTIP: The Underlying Economic Model and Comparisons*, CEPS Special Report 93 (October 2014).

¹¹ Joshua P Meltzer, *From Trans-Pacific Partnership to a free trade agreement of the Asia Pacific?*, Brookings Institution, May 2015.

Enhanced legal protections for investment and intellectual property, however, have stirred widespread controversy and criticism. All parties generally benefit from removal of regulatory impediments to trade; the distribution of benefits from investment and intellectual property protection measures is typically far more one-sided.

Geopolitical objectives (herein of strategic power)

A second driver for IRC initiatives is strategic.¹² Powerful jurisdictions use global regulatory initiatives to secure their interests and those of their most politically influential constituencies, and to extend and embed their dominant paradigms of state and economy. Leveraging their economic and strategic clout, they seek to promote broader adoption of their preferred regulatory agendas and approaches, to gain a greater share of the joint benefits from regulatory cooperation (see the TTIP and TPP investment and intellectual property provisions), and to enhance their firms' global competitive positions. Other countries may adopt the standards of dominant jurisdictions to access their markets. Multinational firms have incentives based on logics of standardization and network effects to adhere to standards adopted by a jurisdiction with a major share of the market for products and services sold in other jurisdictions (the California or Brussels effect).¹³ Such standards tend to: be adopted by other international regulatory bodies, become a condition of development assistance, be promoted through global financial bodies and bilateral development assistance programs, and be adopted "off the shelf" by other states, especially those with limited administrative capacities.

The US, in alliance with Western European countries, has long dominated international economic policy through multilateral regimes promoting a liberal regulatory agenda. The rise of China, India, Brazil, and other emerging economies, the dramatic rise of South-South investment flows, and initiatives such as the BRICS New Development Bank and China's Asia Infrastructure Investment Bank, have eroded the power of the US and its allies and significantly changed the geopolitical landscape.¹⁴ In response the US and EU have shifted from established multilateral approaches to plurilateral and bilateral initiatives, now including TPP and TTIP, in which they exercise greater leverage. Eyal Benvenisti and George Downs have characterized this approach as a "divide and rule" strategy.¹⁵

¹² See Daniel Hamilton & Stephen Blockmans, *The Geostrategic implications of TTIP*, CEPS-CTR project "TTIP in the Balance", Paper No. 5, available at <http://www.ceps.eu/publications/geostrategic-implications-ttip> [hereinafter *Geostrategic Implications of TTIP*].

¹³ Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2013); David Vogel, *Trading Up and Governing Across: Transnational Governance and Environmental Protection*, 4 J. EUR. PUB. POLICY 556 (1997) (for an explanation of the "California effect").

¹⁴ See THOMAS HALE, DAVID HELD & KEVIN YOUNG, *GRIDLOCK: WHY GLOBAL COOPERATION IS VALUABLE WHEN WE NEED IT MOST* (2013).

¹⁵ Eyal Benvenisti & George Downs, *The Emperor New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007) [hereinafter *The Emperor's New Clothes*]; Eyal Benvenisti, *Democracy Captured: To the Mega-Regional Agreements and the Future of Global Public Law*, IILJ Working Paper 2016/2 (MegaReg Series) [hereinafter Benvenisti, *Democracy Captured*].

Strengthening regulatory capacity (herein of protection)

A third driver of IRC is strengthening the capacity of states to deliver effective regulatory protection to their citizens. The ever-growing global economic activity generated by the regulatory standards and infrastructures in support of global investment, trade, commerce, generates growing harms caused by uncorrected market failures operating on a broader scale. At the same time, global economic integration, technological changes, and the rise of global supply chains as well as the mobility of investment have undermined the ability of states acting unilaterally to protect their citizens. Regulatory failures in one jurisdictions spill over into others in the form of financial contagion, unsafe products, pollution and climate change, and illicit trans-border activities. Intergovernmental cooperation is needed to muster the regulatory capacities to fill the regulatory gaps. Securing global public goods such as climate protection and financial stability will require cooperation among all major jurisdictions. In order to carry out their missions, domestic regulators who would otherwise prefer not to cede or share authority may be persuaded or forced to do so.

The market failures generated by global economic integration and growth and the regulatory challenges in addressing them can be grouped in four categories:

1. Protecting consumers against health, safety, environmental and other risks associated with cross-border movements of goods and services through global supply chains and services networks.
2. Addressing pollution, pandemics, climate change, and other ills generated by inadequately regulated production and process methods (PPMs) in other countries.
3. Dealing with risks of financial instability generated by weaknesses in domestic regulatory systems and lack of transnational consistency and effective enforcement.
4. Illicit cross-border transactions such as money laundering, terrorism, corruption, human trafficking, and the drug trade.

By their very character, such ills cannot be addressed effectively by uncoordinated measures adopted by individual states.

The first of the four types of problems outlined above is most relevant to those global regulatory bodies, including TTIP and TPP, which focus on regulatory standards governing international trade in goods and services. Although the primary drivers for TPP and TTIP have been economic and geopolitical, they can also promote more protective regulation of internationally traded goods and services, and recently have been defended on this ground. Collaboration among regulators can achieve scale economies in gathering information, collaborative learning regarding best regulatory practices and

decisional tools, and build the knowledge base for effective regulation.¹⁶ Coordination in enforcement is often necessary to make regulation of cross-border flows of goods, services, and financing effective.

Developed countries have also sometimes sought to leverage the market access elements in IRC regimes in order to promote stronger environmental and labor regulation by developing country parties. The objectives are to prevent leakage of investment to jurisdictions with laxer regulatory standards and to address concerns of developed countries' firms and workers over international competitiveness. The environmental and labor provisions in NAFTA and TPP reflect these objectives and also respond to concerns of NGOs and organized labor with environmental and working conditions abroad.

III. Megaregional and other regimes for intergovernmental regulatory cooperation

Regulatory globalization has resulted from the accumulation of discrete, largely uncoordinated initiatives by powerful countries, non-state actors, and international organizations to address specific promotional or protective objectives in different sectors of global economic activity. These regulatory cooperation initiatives have taken a variety of institutional forms:

- Free trade agreements (FTAs) that impose substantive disciplines (such as national treatment and evidence-based environmental health and safety regulation of foods and crops) and procedural requirements (such as transparency) on domestic regulatory measures and administrations to prevent protectionism and remove other trade impediments.
- Intergovernmental bodies include that set and promote implementation of regulatory standards in specific sectors, ranging from banking, to money laundering, to food safety.
- Various forms of bilateral cooperation among domestic regulatory agencies, often informal, through which regulators in specific sectors may generate common regulatory standards or mutual recognition arrangements, share information and best practices, and engage in ongoing consultation. In some cases this cooperation results in adoption or incorporation by reference of private and hybrid public-private codes.
- A fast-growing array of private and hybrid public-private global regulatory bodies that regulate trade, financial, and other commercial activities in specific sectors. Other organizations founded by NGOs and business actors establish environmental, health and safety standards that operate through global supply chains, for example in sustainable forestry products.

¹⁶ For discussion of democratic experimentalism as a strategy for collaborative regulatory policy learning, see Gráinne De Búrca, Robert O. Keohane & Charles Sabel, *Global Experimentalist Governance*, 44 BRIT. J. POL. SCI. 477 (2014) [hereinafter *Global Experimentalist Governance*].

Cumulatively, these various initiatives have generated massive globalization of regulation. The evolutionary dynamics of IRC activity and its distribution among these different institutional forms is a subject of the emerging field of global organizational ecology.¹⁷ Megaregionals represent major evolutionary steps, of which NAFTA and Mercosur are early examples. TTIP and TPP are the next steps, responding to profound global economic and geopolitical changes and the erosion of multilateralism. TTIP and TPP have, however, quite different structures and reflect somewhat different trade and regulatory strategies.

Although TTIP involves only two jurisdictions, the EU and US together account for around 30 percent of global trade and nearly 70 percent of foreign direct investment. If the EU and US can succeed in reaching agreement on trade and regulatory liberalization and convergence, they will stimulate transatlantic trade and investment and strengthen their economies and geopolitical influence. Their standards could well become the effective standards for the globe. For analogous reasons other countries and international standard-setting organizations will also adopt the standards. The power of the Transatlantic Empire is waning, but together the EU and US might muster enough clout to leave a mark on global trade and economic regulatory policy and perpetuate their influence for some time to come.

In TPP, the US seeks to help strengthen Japan as a partner by stimulating liberalization of its economy and enlisting a variety of the smaller developing and developed countries in the region as a regional counter to China, and by establishing a template for an inclusive Asia-Pacific Free Trade Agreement. TPP enables the US to use access to US and Japanese markets as an incentive for the other TPP parties to adopt its favored regulatory and other measures as part of a single package this is the same “single undertaking” strategy that the US and EU used in the multilateral context in the Uruguay Round Agreements. TTIP and TPP together account for two thirds of world trade, putting the US in a position to exercise very considerable leverage if it can successfully orchestrate and coordinate the activities of the two regional pivots.

IV. Regulatory Globalization: Asymmetries Between Prosperity and Protection

The overall pattern of global regulatory cooperation displays a striking asymmetry. Regulatory regimes to promote trade, investment, and commerce predominate and are generally effective. Measures to afford regulatory protections in order to address the harms generated by the economic activities stimulated by the promotional regimes are, overall, much weaker and incomplete. The most powerful global regulatory bodies promote the objectives of dominant states and economic actors, whereas regimes to protect weaker groups and individuals are often less effective or virtually nonexistent and are

¹⁷ See TERRENCE HALLIDAY & GREGORY C. SHAFFER, *TRANSNATIONAL LEGAL ORDERS* (2015); see Robert O. Keohane & Julia C. Morse, *Counter-Multilateralism*, in *THE POLITICS OF TRANSATLANTIC TRADE NEGOTIATIONS* (Jean-Frederic Moran et al. eds., 2015), 17.

thus unable to protect their interests and concerns.¹⁸ The causes of this disparity include not only differences in the power of the relevant public and private actors but also basic differences in the character of global regulatory coordination games as opposed to cooperation games and the two level structure of global regulatory decision making.

Structural differences in global regulatory cooperation games

The regulatory games involved in promoting markets and in addressing their failures are quite different. Firms have strong interest in common regulatory standards and measures to constitute and facilitate the markets in goods, services, and financial products by aligning the activities of the various market actors involved. The structure is that of a coordination game. Many global regulatory programs—private, public, and hybrid—are focused on generating standards and other regulatory infrastructures to solve such coordination games. Developed country jurisdictions such as the EU, US, and Japan that place a high priority on protecting their citizens secure this goal by requiring imported products and services to meet their domestic standards but also by ensuring that standards adopted by global regulatory programs to solve coordination games serve protective as well as commerce-facilitating goals. Because TTIP and TPP are focused on regulatory coordination of trade in goods and services, they provide the potential for strengthened global regulatory protections in those sectors.

Such measures are not, however, an apt tool to deal with the other three categories of international market/regulatory failures, which originate in manufacturing, agricultural, resource, development, and other activities in other countries or in the global commons; financial practices by firms located elsewhere; and illicit cross-border activities. Here the relevant economic actors have no inherent incentives to follow common regulatory standards, but rather the reverse. These activities must generally be regulated by the jurisdictions where they take place. Many such jurisdictions, including less developed countries, may place a low priority on doing so and/or lack the requisite capacities. Securing international agreement on common regulatory measures have the character of a cooperation game in which there are competitiveness incentives for countries to free ride, either by not joining an agreement or shirking implementation. There is often no clear focal point for agreement on common measures, which is impeded by conflicts over the distribution of benefits and burdens of different arrangements. Effective monitoring and enforcement mechanisms or other compliance incentives must be deployed—a difficult enterprise.¹⁹

¹⁸ *Remedying Disregard*, *supra* note 6, 211.

¹⁹ Countries that adopt regulatory measures over PPM and other activities taking place outside their borders could seek to induce other countries or firms operating elsewhere to adhere to those measures as a condition of market access for their products and services. Unilateral measures to implement such an arrangement would be difficult to devise and implement for many types of problems, costly for the country imposing them, and vulnerable to WTO challenge

TTIP and TPP are driven primarily by economic and geopolitical objectives. Proponents are also beginning to invoke regulatory protections for consumers as a justification for these regimes. They do not include initiatives to address the other forms of global market/regulatory failures, with the exception of provisions in TPP that require adoption of labor and environmental regulatory programs. It uses access to the developed parties' markets as an incentive for the developing country parties to adopt such measures, but ensuring effective implementation will be challenging.

Governance in two-level regulatory systems

A second explanation for asymmetry in global regulatory programs, which in many respects complements the first, is based on the two level structure governance of global regulation, where governmental and other political actors operate both at the domestic and at the international level. Eyal Benvenisti and George Downs have emphasized that domestic executives inherently have far greater power in the construction and operation of global regulatory programs than do domestic legislatures and courts,²⁰ and that well-organized business interests are also better equipped than loosely-organized consumer, environmental, and social interests to influence global regulatory decision-making. Business interests also enjoy this advantage in the domestic context, but courts and legislatures are avenues for influence by less-organized interests and provide a counterweight; these institutional checks are far less powerful and effective at the global level. The economic and geopolitical objectives of domestic executives and the interests of business actors in promoting trade and investment are often aligned. Acting together, they may be able to "launder" through the IRC process regulatory measures that they are unable to secure domestically, and have them adopted at the global level.²¹

V. Regulatory Globalization, The Iron Law of Regulatory Agency Costs and Administrative Law

The globalization of regulation manifests the iron law of regulatory agency, which holds that steps by principals to strengthen their regulatory capacities generate correlative increases in agency costs. The United States, like other developed countries, has equipped agencies with a succession of new and more powerful regulatory technologies under what are in many cases very broad delegations of regulatory authority and lawmaking discretion. These steps have created ever more serious agency costs for their principals (whether understood as Congress, the President, or the citizenry). US administrative law has adopted innovations to manage the associated agency costs and secure accountability and responsiveness to principals by requiring greater transparency, participation, and reason giving for agency decision-

²⁰ *The Emperor's New Clothes*, *supra* note 15; Klaus Dieter Wolf, *The New Raison d'Etat as a Problem for Democracy In a Global Society*, 5 EUR. J. INT'L RELATIONS 33 (1999); Alvin Y.H. Cheung, *Intra-Executive Policy Laundering* (paper presented at ICON-S Global Public Law Conference, New York University School of Law, July 2, 2015) (on file with the author).

²¹ *The Emperor's New Clothes*, *supra* note 15.

making and expanding the availability and scope of judicial review. The agencies themselves often seek to control their own internal agency costs through a variety of internal administrative law mechanisms.²²

Mechanisms to limit agency “slack” (deviations from the principal’s interests and agenda) have costs of their own. For example, formal decision-making procedures and judicial review may impede timely and effective regulatory decision-making. In some instances, accountability mechanisms may make agencies less responsive to their principals.²³ In serving its dual functions of enhancing regulatory capacity and managing the agency costs thereby created, administrative law ideally should aim to balance the marginal costs of new measures to control agency costs against their marginal benefits; this optimum can hardly be achieved.

Global regulatory programs and institutions represent a further step in the development of states’ regulatory capacities. Like previous innovations, they have created new and significant agency costs and consequent opportunities and challenges for administrative law. Global regulatory bodies often enjoy substantial autonomy and may pursue objectives at variance with the interests of their principals. The task of managing agency costs is greatly complicated by multiple principals, the variety of organizational forms for IRC, and the fact that they operate in a fluid and variegated global administrative space radically different from established domestic government structures.²⁴ Where one or a few powerful states are able to dominate global agencies’ decision-making by virtue of establishing, funding them, and otherwise supporting them, they may successfully manage their agents. The smaller countries parties to these regimes, on the other hand, face acute agency problems. The recent shift by the EU and US from multilateral to bilateral and megaregional regimes intensifies such problems. The circumstance of countries that are not party to megaregional regimes such as TTIP and TPP is even less favorable. They are not even nominal principals, yet the megaregional institutions’ decisions can have powerful consequences, good and bad, on their fates.

Beyond the governments that are parties (or not) to global IRC regimes are the interests and concerns of their citizens and non-state actors including business representatives at domestic and transnational NGOs speaking on behalf environmental, consumer and social interests. How far can mechanisms of administrative law, analogous to those developed at the domestic level in advanced countries, be developed to promote a degree of responsiveness and accountability by global regulatory decision makers to these constituencies? This is a task for global administrative law (GAL).

VI. Addressing the Challenges of Megaregional Governance

²² See, e.g., JERRY MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1985).

²³ Jacob E. Gerson and Matthew C. Stephenson, *Over-Accountability*, 6 *J. L. ANALYSIS* 185 (2014).

²⁴ The US system of congressional-executive government also presents a problem of multiple principals, but one quite different from those presented in global regulatory bodies.

The governance issues associated with TTIP, TPP, and other institutionally complex IRC bodies, fall along three dimensions: horizontal structures and procedures for IRC decision-making; vertical relations between IRC decisional processes and their regulatory outputs and domestic regulatory structures, decisional processes, and measures; and external impacts of IRC regimes on and their relations with jurisdictions that are not members of the cooperation regime. The interplay among these elements shapes the performance of the IRC regime and its consequences for the welfare and concerns of diverse individuals and actors across many jurisdictions.

The horizontal dimension: decision-making structures and procedures

The decision-making processes of the global regulatory body must secure its primary mission of reaching agreement on regulatory measures. The primary objective of TTIP and TPP is to promote two analytically distinct but functionally related types of objectives. One is to reduce the barriers and cost burdens on international trade and investment created by different regulatory measures and methods in different countries. The second is regulatory liberalization: to eliminate or reduce the impediments and risks of protectionism closed by regulatory decisions and measures that are not substantially justified by legitimate regulatory objectives, and by opaque domestic systems of administrative regulatory governance that are difficult to navigate and foster arbitrary decision-making. Both of which have high potential for protectionism.

Efforts to advance these two objectives through IRC confront a variety of obstacles, including affected differences among participating jurisdictions in their economic, social, and political circumstances; in their established standards and modes of regulation (including conformity determinations and implementation and enforcement arrangements); in their regulatory preferences; in their decision-making institutions and procedures; and in their underlying regulatory cultures.²⁵ The sheer and often inevitable complexity of many regulatory programs adds to these challenges. Changes in existing arrangements involve adjustment costs for regulators and the regulated, and draw opposition from adversely affected interest groups. Moreover, the costs and benefits of new measures may vary appreciably across countries. Large differences in levels of development among the parties, as in TPP, make regulatory convergence more difficult. Even if the parties have similar levels of development and have already achieved a high degree of integration, as in the EU-US case, differences in risk preferences and long-entrenched regulatory approaches and cultures can create substantial obstacles. Regulators resist loss of decisional autonomy and changes in established regulatory ways, and are unlikely to be motivated by general benefits to the economy from regulatory cooperation.

²⁵ See Fernanda G. Nicola, *The Politicization of Legal Expertise in the TTIP Negotiation*, 78 LAW & CONTEMP. PROBS. 175 (2015).

The familiar tools for IRC to address differences in substantive regulatory measures include harmonization or approximation of standards and conformity assessment criteria and methods, and mutual recognition agreements, usually involving two parties, under which each agrees to accept products or services that complies with the other's substantive or conformity assessment requirements; depending on the agreed arrangement, compliance may be determined by an authority of the originating or of the receiving country or by a private entity. In addition, IRC often involves processes such as intensive consultation and information sharing between the respective regulatory authorities. These measures may secure agreement on convergent regulatory measures and methods or in other ways reduce impediments to trade created by different regulatory systems; they may also promote liberalization in regulatory measures and administrative systems.

TTIP and TPP reflect a new level of ambition, proposing cooperation through joint use by regulators of RIA and risk assessment and other evidence-based decisional methodologies. If successfully deployed on a joint and cooperative basis, these disciplines can promote both convergence and liberalization by revealing that particular features of existing measures are not necessary for achievement of the regulatory objectives in question, or involve disproportionate burdens. RIA can also promote consideration of alternative measures and arrangements that are superior. In addition, TTIP and especially TPP propose strong transparency and regulatory due process requirements for domestic administrations, going beyond those provided in the WTO agreements, in order to promote liberalization. Experience with the RIA/review processes administered by the U.S. Office of Information and Regulatory Affairs (OIRA) discloses that structured and transparent evidence-based analysis of costs and benefits of regulations and alternative measures can promote a better match between regulatory means and ends, and reduce undue regulatory burdens and rent seeking.²⁶ On the model of US Executive Order 13,563, TTIP and TPP may also include joint exercises and retrospective review of the performance, including costs and benefits, of existing regulatory measures in order to determine candidates for revision. They can also stimulate cooperative programs to learn from the experience with different regulatory approaches in order to determine best practices for the future.²⁷

To the extent that RIA, risk assessment, and other analytic evidence-based methods for regulatory decision-making are adopted and successful in the context of global regulatory cooperation,

²⁶ See Textual proposal on regulatory cooperation tabled for discussion with the US in the negotiating round of April 2015 and made public on 4 May 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf [hereinafter EU Commission, Textual Proposal; TPP, *supra* note 2, Chapter 26; RICHARD MORGENSTERN, ECONOMIC ANALYSIS AT EPA: ASSESSING REGULATORY IMPACT (1997).

²⁷ Jonathan B. Wiener & Alberto Alemanno, *The Future of International Regulatory Cooperation: TTIP as a Step Toward a Global Regulatory Laboratory*, 78 LAW & CONTEMP. PROBS. 103 (2015).

they would represent another striking global diffusion of US administrative law innovations, FOIA, notice and comment rulemaking, and environmental impact assessment.²⁸

Decision-making structures and procedures

While the global-level decision-making procedures for TTIP and TPP have yet to be resolved in detail, they will include an institutional platform for ongoing regulatory cooperation in the form of a regulatory cooperation body (RCB) that will establish and oversee the implementation of an agenda for specific initiatives by sectoral working groups of domestic agency officials. The objective would be to steer efforts towards sectors and issues promising the greatest progress in agreements with high payoffs in reducing regulatory barriers and burdens. The megaregionals' central RCB would promote use of harmonized regulatory decision-making processes such as RIA across regulatory sectors. It is increasingly recognized that regulatory cooperation must extend to the mechanisms and procedures for developing, implementing, and enforcing regulatory measures question work to bring about convergence between regulatory programs,²⁹ High-level officials would oversee the work of the RCB and the enterprise as a whole and could supply political muscle to push through agreements that the regulators in specific sectors might resist or be unable to achieve. An obvious model for RCBs is the transnational version of OIRA, which under Pres. Obama's Executive Order acts as a convening and agenda setting apparatus for IRC initiatives by US federal agencies responsible for regulating specific sectors of activity.³⁰

An important and innovative institutional feature of TTIP and TPP is the hub and spoke design that packages regulatory measures in many different sectors in a single IRC that promote agreement by expanding opportunities for horse trading and logrolling across issues. The central regulatory cooperation bodies that TTIP and TPP will establish can help realize these opportunities and mobilize ongoing higher-level political participation from the jurisdictions involved that will be needed in order to push the domestic regulators out of their grooves and break through bargaining impasses.³¹

Opportunities for effective participation by affected constituencies

In TTIP and TPP, as in other IRC bodies, the primary modes for deciding on common or coordinated regulatory measures and methods will be a combination of expert deliberation and

²⁸ Rodrigo Polanco, *CETA and TTIP*, at 26 (paper presented at ICON-S Global Public Law Conference, New York University School of Law, July 2, 2015) (on file with the author).

²⁹ Fernanda Nicola concludes that the relative lack of success in past efforts at transatlantic regulatory cooperation is due in significant part to neglect of this approach. Nicola, *supra* note 25.

³⁰ In 2012, President Obama had issued an executive order to prompt federal agencies to engage in international regulatory cooperation under OMB oversight. EEO 13, 609, *Promoting International Regulatory Cooperation*, 77 FED. REG. 26, 413 (May 4, 2012). For discussion, see Reeve T. Bull, *Developing a Domestic Framework for International Regulatory Cooperation*, 78 LAW & CONTEMP. PROBS. 49 (2015).

³¹ David Ignatius, *A free-trade agreement with Europe?*, THE WASHINGTON POST, Dec. 5, 2012, https://www.washingtonpost.com/opinions/david-ignatius-a-free-trade-agreement-with-europe/2012/12/05/7880b6b2-3f02-11e2-bca3-aadc9b7e29c5_story.html (quoting Hilary Clinton), cited in Benvenisti, *Democracy Captured*, *supra* note 15; C. Boyden Gray, *Upgrading Existing Regulatory Mechanisms for Transatlantic Regulatory Cooperation*, 78 LAW & CONTEMP. PROBS. 31 (2015).

negotiation, neither of which is likely to be successful if conducted in the open. Businesses have far more technical knowledge and experience regarding regulatory standards than NGOs and even many government officials. Business experts must often be at the table in order to produce workable and effective regulatory standards; they will thereby have a substantial influence on the policy elements of IRC, which typically cannot be divorced from the technical elements. Successful negotiation of agreements on global regulatory standards and measures requires a combination of expert deliberation and bargaining, neither of which can successfully be conducted in the open. But closed decision-making processes invite critiques from civil society actors, who have attacked TTIP and TPP for lack of transparency and effective opportunities for civil society participation. They argue that such processes give business undue influence, resulting in weakening of regulatory protections reinforced by “race-to-the-bottom” pressures in IRC.³² Thus, TTIP has been attacked as a “corporate lobbying paradise.”³³ In response, officials have asserted that TTIP and TPP will not allow backsliding in existing regulatory protections.³⁴ The environmental and labor provisions in TPP for enhancing regulatory protections in developing country parties are another response. Enabling civil society and third parties effective voice in megaregional decision-making is also essential, given that TTIP and TPP decisions can have very significant distributional and external impacts.

Many sector-based IRC bodies have internally developed GAL procedures for transparency and public participation in the development of regulatory standards and other normative products; some have also provided for decision makers to give reasons for decisions, and/or for some form of review of their decisions.³⁵ They have generally done so not because of external legal obligations but in order to improve the quality of their regulatory products, promote their uptake by domestic officials and other users, and win acceptance by broader publics, especially when their regulatory decisions generate significant externalities and distributional consequences, as is the case with megaregionals.³⁶ Measures for transparency and participation that unduly advantage business interests with greater resources will not

³² See, e.g. Marija Bartl & Elaine Fahey, *A Post National Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)*, in TRANSATLANTIC COMMUNITY OF LAW: LEGAL PERSPECTIVES ON THE RELATIONSHIP BETWEEN THE EU AND US LEGAL ORDERS (Elaine Fahey & Deirdre Curtin eds., 2015), 210; Marika Armanovia & Roberto Bendini, *Civil society's concerns about Transatlantic Trade and Investment Partnership* (European Parliament, Dir. - General for External Policies Policy Department (2014), available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/536404/EXPO_IDA\(2014\)536404_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/536404/EXPO_IDA(2014)536404_EN.pdf); Trans-Pacific Partnership (TPP): Job Loss, Lower Wages and Higher Drug Prices, <http://www.citizen.org/TPP>.

³³ See Corporate Europe Observatory, *TTIP: Corporate Lobbying a Paradise*, available at <http://corporateeurope.org/international-trade/2015/07/ttip-corporate-lobbying-paradise>.

³⁴ See Pascal Lamy, *Transatlantic Trade Negotiators Should Own Up to their Ambition*, Financial Times, 27 Oct 2014. (Arguing that US and EU officials should adopt measures that preclude backsliding).

³⁵ See *Emergence of Global Administrative Law*, *supra* note 4.

³⁶ See *Remedying Disregard*, *supra* note 6. Demands for public governance procedures are generally absent or muted in the case of international bodies that adopt technical standards to solve regulatory coordination games and informal bilateral IRC arrangements.

satisfy these demands. The challenge is to develop decisional methods that will achieve inclusive engagement while still enabling technically informed deliberation and negotiation to succeed.³⁷

IRC regimes including TPP and TTIP are public authorities and subject to the norms of publicness that call for decision-making mechanisms that consider and generate decisions that serve the interests and concerns of the entire public.³⁸ States cannot escape these obligations by establishing and transferring decision-making responsibilities to global regimes which they govern. It is conceivable that a European court or the WTO Appellate Body might give legal form to these obligations. There are also strong prudential reasons for the new megaregional bodies to take steps to adopt GAL mechanisms to meet criticisms in Europe, the US, and a number of other TPP countries of secrecy and exclusion of nonbusiness voices.

The US notice and comment procedure, which has been adopted in a number of global regulatory regimes such as the Basel Committee, is one possibility.³⁹ This process, however, is normally triggered only when closure has been reached on a proposed measure, and therefore may come too late in the process to be effective in influencing basic choices, especially in the context of multiparty IRC bodies. Also, civil society constituencies may not be able to exercise effective influence over the decisions simply by submitting written comments, especially when the decisions reached are not subject, as they are in the US to hard look judicial review to ensure that the comments were adequately considered. The emerging European version of RIA includes opportunity for targeted public expression of views as part of the RIA process, rather than after a RIA has been prepared for a proposed regulation.⁴⁰ Structured consultations and other forms of engagement with “stakeholder” constituencies, like those followed in European governance⁴¹ are another option. Another approach is to provide, representatives of relevant constituencies a role in deliberations on proposed measures; the Codex Alimentarius provides one model.⁴² In some global regulatory bodies, representative of “stakeholders” serve on standing consultative committees but do not enjoy direct decision-making power. A practice of giving reasons for decisions, and provision for some form of review of decisions at the behest of affected constituencies can provide additional assurances that submissions on proposed decisions and relevant affected interests have been considered. Former US ambassador to the EU Boyden Gray has proposed that TTIP use regulatory

³⁷ For discussion of some of the issues and options in the context of TTIP, see Reeve T. Bull, *Public Participation and the Transatlantic Trade and Investment Partnership*, 83 GEO. W. L. REV. 1262 (2015); Nicola, *supra* note 25; Anne Meuwese, *Constitutional Regulation of Regulatory Coherence in the Transatlantic Trade & Investment Partnership (TTIP): An EU Perspective*, 78 LAW & CONTEMP. PROBS. 153(2015); Francesca Bignami & Giorgio Resta, *Conflict and Cooperation in EU–U.S. Regulatory Relations: The Case of Data Privacy*, 78 LAW & CONTEMP. PROBS. 231 (2015).

³⁸ See Benedict Kingsbury, *The Concept of “Law” in Global Administrative Law*, 20 EUR. J. INT’LL. 23 (2009).

³⁹ For discussion of global applications of the tools and approaches of US administrative law, see Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63 (2005).

⁴⁰ Meuwese, *supra* note 37.

⁴¹ See Bull, *supra* note 37 (comparing European and US approaches).

⁴² See Michael A. Livermore, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 NYU L. REV. 766 (2006).

negotiation (“reg neg”) to promote agreement on regulatory measures, pointing to its successful years on US reformulated gasoline standards that implicated the interests of other jurisdictions.⁴³ The hub and spoke institutional design of TTIP and TPP would provide opportunities for experimentalist governance by using different approaches for engaging the views and concerns of diverse constituencies in regulatory decision-making in different sectoral spokes.⁴⁴

Another form of internal administrative law, the RIA process for examining the costs and benefits of proposed measures and alternatives, can also promote consideration of interests and considerations beyond those of regulated industry, including the environmental and social benefits that regulatory measures will provide.⁴⁵ The Obama administration has estimated a social cost of carbon (SCC) that federal agencies must use in making regulatory decisions. The SCC is based on the effects of climate change not only in the United States but worldwide.⁴⁶ Adopting such approaches to RIA in TTIP and TPP could secure consideration of social and environmental economic impacts, including in third countries, of regulatory decisions.

The vertical dimension: relations between IRC regimes and domestic regulatory governance

The vertical axis of IRC governance concerns the relation between the IRC institution and domestic legal and political regulatory structures, processes and measures. As in all transnational regulatory arrangements, there is recursive multilevel interweaving of initiative, influence, and response. Principal-agent relations run in both directions, between global regimes domestic administrations and societies, depending on the perspective taken.

The top-down perspective.

From the perspective of the global regulatory cooperation body, domestic agencies represent their distributed administrations, on which they depend to ensure effective and reasonably consistent of the agreed cooperative measures.⁴⁷ In the context of TTIP and TPP, there are at least two important requisites for achieving these goals and managing the agency costs associated with distributed administrations. First, those domestic administrations have structures and procedures that enable them to implement such measures; second, mechanisms to ensure that the administrations in fact implement them with reasonable consistency. Achieving the first objective requires institutional complementarity, a functional fit between the globally agreed measures and the institutional structures and decision-making procedures in domestic administrations, as well horizontal complementarity across the different

⁴³ Gray, *supra* note 31. While regulatory negotiation has not flourished widely in the US; it might find might find greater success in an environment without intensive review.

⁴⁴ See *Global Experimentalist Governance*, *supra* note 16.

⁴⁵ See RICHARD REVESZ AND MICHAEL LIVERMORE, *RETAKING RATIONALITY* (2008).

⁴⁶ EPA, *The Social Cost of Carbon*, <http://www.epa.gov/climatechange/EPAactivities/economics/scc.html>

⁴⁷ For discussion of the concept of distributed administration in the context of global regulatory regimes, with specific attention to private and hybrid bodies, see *GLOBAL PRIVATE AND HYBRID REGULATORY GOVERNANCE* (Benedict Kingsbury & Richard B. Stewart eds., forthcoming).

administrations.⁴⁸ In the case of TTIP, a number of significant transatlantic differences in constitutional and political structures in decision-making processes pose obstacles to deeper EU-US regulatory cooperation.⁴⁹ The issues of institutional complementarity in TPP, with a much larger number of parties, are still more complex. The critical role will be effective coordination between parties at the RCB level, which will probably lead parties to develop domestic agencies like OIRA to develop the capacities and information in order to participate effectively in the RCB and implement agreed measures, including RIA procedures. Securing reasonably consistent implementation of the globally agreed measures and methods by the parties' domestic agencies, which constitute the distributed administration of the global regime, also requires transparency and other institutional assurances of fair and evenhanded decision-making in the parties' administrations; monitoring and review of their performance carried out under the auspices of the global body; and mechanisms to address implementation failures including peer review and dispute settlement.. The WTO has a fully developed system that serves these functions.⁵⁰ All effective global regulatory bodies have a wide variety of strategies and institutional arrangements for achieving the three requisites, although generally less elaborate and legalized than those of the WTO. TPP provides strong transparency and regulatory due process requirements for domestic administrations, going beyond those provided in the WTO agreements as well as dispute settlement arrangements that could address implementation failures.⁵¹ The analogues elements in TTIP are still in negotiating solution.

The bottom-up perspective

From the viewpoint of domestic legislatures, courts, and civil society constituencies, at the same time that regulatory globalization enhances regulatory capacity it shifts decision-making to global bodies and thereby compromises domestic political and legal mechanisms for ensuring that officials consider and base regulatory decisions on the interests and concerns of the entire public and are publicly accountable for their decisions.

Officials have made clear that TTIP and TPP measures agreed by the parties will not have binding domestic legal effect; formal regulatory sovereignty will be preserved. Where new legislation is required to implement such measures, opportunity for parliamentary scrutiny is assured. Yet under TTIP

⁴⁸ For discussion of complementarity in the global regulatory context, see TIM BÜTHE & WALTER MATTLI, *THE NEW GLOBAL RULERS* (2011).

⁴⁹ For example, EU regulatory legislation is adopted by the Council and Parliament on the proposal of the Commission, which prefers informal modes of consultation in preparing its proposals. Regulatory impact analyses ensuring public participation occurs only a later stage, and generally do not apply to the subsequent issuance of regulations. In the US, notice and comment procedures and regulatory impact analyses do not apply at all to congressional legislation, but do generally apply to administrative regulations. See Meuwese, *supra* note 37; see also Richard Parker & Alberto Alemanno, *Towards Effective Regulatory Cooperation under TTIP: A Comparative Overview of the EU and US Legislative and Regulatory Systems*, available at http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152466.pdf.

⁵⁰ See Richard B. Stewart & Michelle Sanchez Badin, *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, 9 INT'L J. CON. L. 556 (2011).

⁵¹ TPP, *supra* note 2, see Chapters 25, 26 & 28.

and TPP as with most global regulatory regimes, domestic officials, at least in the US, will typically have adequate authority under existing statutes to carry out the globally agreed measures. The exercise of such authority is in most instances subject to the normal requirements of domestic administrative law; in the U.S. these would generally include public notice and opportunity for comment on proposed rules, RIA procedures, and opportunity for judicial review, although a statutory “foreign affairs” exemption from notice and comment requirements has been recognized in some contexts.⁵² The effectiveness of these disciplines, however, is undermined by the powerful gravitational influence of measures already agreed at the global level, especially where, as in TTIP and TPP, the responsible domestic agency officials have already participated in the global level decisions now to be implemented.⁵³

Administrative law affords two basic responses to the challenges posed by the multi-level structure of global regulation. One, discussed in the previous subsection, is to follow a top-down approach that uses GAL mechanisms to structure and discipline decision-making at the level of the global regulatory body. The other strategy is bottom-up, to address the agency costs of regulatory globalization by unilaterally extending domestic administrative law mechanisms to participation by domestic officials in decision-making within the global IRC regime, or to develop novel techniques for scrutinizing, procedurally and judicially, domestic administrative decisions implementing the already agreed global norms.

Congress and the President have from time to time imposed conditions, including reporting, consultation, inclusion of civil society representatives in delegations to IRC bodies, and other procedural requirements on US officials’ participation in IRC decision-making. Federal courts have sometimes applied more stringent review to federal agency decisions implementing IRC measures.⁵⁴ The D.C. Circuit expressed concern over delegating decisional authority to global bodies in denying legal effect to a decision of the Conference of the Parties (COP) to the Montreal Protocol in a case challenging an EPA regulation as contrary to the COP decision.⁵⁵ These several techniques, however, have only limited purchase and, if pursued through the domestic administrative law systems of different parties to the IRC regime could undermine its ability to function effectively.

Democratic benefits for domestic regulatory governance

⁵² The exemption from notice and comment rulemaking and formal adjudicatory hearing procedures for “foreign affairs functions” provided in the US Administrative Procedure Act, 5 U.S.C. §§ 553(a)(1), 554(a) (4) (2005), has been applied by courts in some cases to exempt from notice and comment requirements domestic administrative rulemakings implementing requirements generated by international treaties to which the US is a party, and any in one case even held that judicial review is not available. This exception, however, has not been recognized in other contexts, such as regulatory norms generated by intergovernmental regulatory networks. For discussion, see Stewart, *The Global Regulatory Challenge to US Administrative Law*, 37 N.Y.U. J. INT’L. L. & POL. 695, 722-732 (2004-2005) [hereinafter Stewart, *Global Regulatory Challenge*].

⁵³ See generally, *id.*

⁵⁴ For discussion of these mechanisms, see *id.*

⁵⁵ 464 F.3d 1 (D.C. Cir 2006). The court’s decision found that the Clean Air Act had not conferred binding legal effect on COP decisions with sufficient explicitness.

A thorough assessment of the governance consequences of IRC, including megaregionals, must also take into account the democracy-enhancing potential of transnationally agreed norms for domestic administrative decision-making.⁵⁶ Thus, WTO provisions requiring transparency, participation, reason giving, and review for domestic administrations have served in some measure to enhance the quality and promote the accountability of their regulatory decision-making.⁵⁷ As discussed previously, TTIP provides and TTIP contemplates procedural disciplines that go beyond those of the WTO agreements in order to open up administrative decision-making, expand participation opportunities, and otherwise liberalize domestic administrations. These arrangements can promote a democratic element in regulatory decision-making and secure rule of law values.

It is expected that TTIP will include RIA procedures that will provide opportunities for public participation in regulatory decision-making in Europe that currently are available only on a limited basis.⁵⁸ RIA also promotes transparency and accountability in regulatory decision-making.

The external dimension: impacts on and relations with third countries and their citizens

If the megaregional strategy succeeds, the regulatory measures that TTIP and TPP generate will have substantial effects, both positive and negative, on countries that are not members. From the perspective of nonmember countries, especially small ones, these can represent an end run around multilateralism, enabling the US and EU to set global regulatory standards without the participation of most of the countries that in which they will be adopted or applied.⁵⁹ As a result, these countries may well function as agents of foreign principals.

TTIP and TPP's geopolitical logics and their ambitious agendas for regulatory convergence, market liberalization, and investment and intellectual property protections have generated substantial attention to their consequences for non-party countries and their citizens, as well as their impact on international trade and economic regulatory multilateralism generally.⁶⁰ To the extent that TTIP and TPP promote trade and investment generally, all countries will benefit, albeit to differing extents. Yet, regulatory standards and measures could threaten other countries with competitive disadvantage or other adverse effects. The TTIP and TPP provisions for investment and intellectual property protections have been a flashpoint of contestation and resistance based both on their distributional consequences and

⁵⁶ See Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INT. ORG. 1 (2009)

⁵⁷ See Stewart & Ratton Sanchez Badin, *supra* note 51.

⁵⁸ Meuwese, *supra* note 37.

⁵⁹ See Keohane & Morse, *supra* note 17.

⁶⁰ See Raj Bhala, *Trans-Pacific Partnership or Trampling Poor Partners? A Tentative Critical Review*, 11 MANCHESTER J. INT'L ECON. L. 2 (2014); Dan Ciuriak, *India's Response to the Challenge of the Mega Regionals* (Curiuak Consulting, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2606720; Michelle Egan, *Is TTI P Really that Different?*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2393755; Peter Yu, *TPP and Trans-Pacific Perplexities*, 37 FORDHAM INT'L L. J. 1129 (2014); Geostrategic Implications of TTI P, *supra* note 12.

their intrusions on democratic government.⁶¹ Nonmember countries and their citizens accordingly have strong claims to some form of say in the megaregionals' decision-making, which Eyal Benvenisti has framed in terms of fiduciary obligations to the "global others."⁶² Robert Howse has addressed the WTO legal aspects, challenging the prevailing assumption that⁶³ GATT Article XXIV, which authorizes regional free trade regimes that establish preferential tariffs among the parties, allows them similar wide latitude in adopting group regulatory measures without compliance with WTO MFN Building on Appellate Body decisions, and provisions in other WTO Agreements relating to development of international standards for domestic regulation. Howse argues that parties to FTA regimes must either open membership to other WTO members or afford them opportunities for participation in regulatory decision-making that will ensure fair consideration of their interests, and may not adopt measures that place nonparties at unjustified competitive disadvantage. These conclusions would have very significant implications for TTIP and TPP.

Participation rights for nonparty countries might include, among other mechanisms, participation in RIA procedures or regulatory negotiations; these could also be available to NGOs, business firms and other non-state actors, potentially through two different participation tracks, one for nonparty states and the others for non-state actors. Harmonization of preferential treatment for poorer developing countries has been suggested as a TTIP priority.⁶⁴ Other commenters have spoken of an "open architecture" for megaregionals that would permit other countries to join at least certain parts of its regulatory cooperation and other programs; TPP is explicitly open to other APEC countries, no doubt reflecting a goal of using it as a base for developing an Asia-Pacific FTA. Another option is to negotiate parallel agreements with nonparty countries, following the precedent of the US FTA with Chile following on NAFTA. It appears, however, that neither TPP nor TTIP has yet considered or taken any position on these important questions.

National regulators must increasingly confront the consequences of their regulatory decisions for other jurisdictions, and of others' regulatory decisions for their own. The RIA procedures proposed for TTIP and TPP include an analysis of the trade impacts of proposed domestic regulatory measures on the other parties. Analysis of consequences beyond trade impacts, and extending the analysis to include impacts on nonparty jurisdictions, would foster a more cosmopolitan perspective in domestic as well as global regulatory decision-making, with the promise of eventually developing more equitable, other-regarding domestic regulatory programs.⁶⁵ The US social cost of carbon precedent indicates how use of

⁶¹ See Benvenisti, *Democracy Captured*, *supra* note 15.

⁶² *Id.*, at 13. See also, Eyal Benvenisti, *Sovereigns as Trustees of Humana: On the Accountability of States Foreign Stakeholders*, 107 AM J. INT'L L. 295 (2013).

⁶³ Robert Howse, *Regulatory Cooperation, Regional Trade Agreements, and World Trade Law-Conflict or Complementarity?*, 78 LAW & CONTEMP. PROBS. 137 (2015).

⁶⁴ See *Geostrategic Implications of TTIP*, *supra* note 12, at 8-9.

⁶⁵ See Benvenisti, *Sovereigns as Trustees*, *supra* note 63.

RIA in IRC could promote greater regard by national decision-makers for the welfare of those in other countries.

VII. Conclusion

This essay has provided a survey and framework for analysis of the challenges that the growth of international regulatory cooperation in various institutional forms pose for governance and administrative law, with specific attention to the new megaregionals, TTIP and TPP. It has also analyzed the roles of GAL mechanisms for transparency, participation, reason giving and review and other techniques including RIA, risk assessment, and mutual recognition in promoting effectiveness, efficiency, and equity in global regulatory programs. Most of these measures represent an internal law of administration developed by global regulatory bodies in order to carry out their business plans and gain acceptance for their standards and decisions by other global and domestic actors. This essay also provides an agenda of both positive and normative issues for future examination. TTIP and TPP represent the latest chapter in the progressive development by states of stronger regulatory capacities, and of administrative law measures to manage the increased agency costs that inevitably result.

TTIP and TPP represent a demanding and fruitful testing ground for new strategies of global administrative law and regulatory governance. While the power that these regimes see to exercise justifies serious legitimate concerns in both the domestic and global perspectives, they could also generate substantial benefits, and not just for the parties. They are led by powerful Western jurisdictions committed to liberal values; their institutional designs are well equipped to incorporate consideration of environmental, consumer, and other non-business concerns as well as the interests of nonparties. Because TTIP and TPP are new and highly ambitious regimes, they have attracted exceptionally keen attention and sharp criticism; by the same token, they have potential to exert a moderately progressive influence on global trade regulatory policy and governance, even as they face resistance from China and other emerging economies.

Even if these regimes as presently proposed do not eventuate, or do so only in truncated form, the issues examined herein are presented in many other global regulatory regimes that have emerged during the past several decades and that will be generated in the future. Regulatory globalization will continue to intensify and deepen in order to address the opportunities associated with global integration as well as embedded problems of market and regulatory failure that have generated an untenable imbalance between the promotional and protective elements of global regulatory programs. Administrative law must adapt and evolve to meet the challenge.