Legitimacy and Accountability in Global Regulatory Governance: Global Administrative Law and Developing Countries

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I. INTRODUCTION

This essay summarizes the growth of global administrative law in response to the need for greater assurances of accountability in global regulatory governance through increased transparency, participation, reason-giving, and review. This development is of special concern to developing countries. Developing countries, their business firms, and their citizens are powerfully affected by the current systems of decision-making by a wide variety of global regulatory authorities, including international and transnational organizations, private regulators, and hybrid public-private bodies. These various bodies generate and apply a flood of regulatory norms and decisions in such diverse fields as banking, financial services, monetary policy, telecommunications, intellectual property, competition law, international trade, international investment, environment, labor, intellectual property, development assistance, international security, and human rights. Examples include the IMF, World Bank, WTO, Basel Committee of Bank Regulators, World Intellectual Property Organization, World Health Organization, UN Security Council, Financial Action Task Force, Inter-American Human Rights Commission, Kyoto Protocol Clean Development Mechanism Executive Board, International Standards Organization, Forestry Stewardship Council, International Labor Organization, and hundreds of others. Their standards and decisions are often implemented through domestic administrative authorities or, in some cases, directly govern the decisions of business firms and other actors. The decisions of governments, especially in developing countries, on many domestic

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issues is powerfully constrained or shaped by global regulatory systems and norms. Many of the cases now brought before international and domestic courts and tribunals concern these bodies and their decisions.

This expansion of global regulation responds to functional necessities created by economic integration and other forms of interdependency associated with globalization. States can no longer deal adequately with these interdependences and secure the welfare of their citizens through uncoordinated domestic regulatory measures. They have accordingly created international organizations and networks of domestic officials to develop and implement coordinated solutions to global challenges in fields such as economic regulation, environmental and public health protection, international security, and protection of human rights. Private and hybrid public-private bodies have also arisen to deal with the consequences of globalization. But these new centers of power and decisional authority are remote from and barely subject to traditional domestic and international mechanisms of legal and political control and accountability. The resulting accountability deficits in global decision-making are of a particular concern to developing countries and their citizens, because these global bodies may often be dominated by powerful developed countries and well-organized economic interests.

Much global regulatory governance — in fields as diverse as trade and investment, financial and economic regulation, as well as the internal management of international organizations — can now be understood as administration. Effective decision-making authority is exercised by large bureaucracies in many international organizations and by committees, expert groups, and networks of domestic officials and private business or NGO actors in these and other global bodies. The pattern of authority is fragmented, with different bodies specializing in different regulatory fields, subject to no higher system of control or coordination. The shift of regulatory authority and activity from domestic governments to these global administrative bodies has outstripped traditional domestic and international law mechanisms to ensure that regulatory decision makers are accountable and responsive to those who are affected by their decisions. In response to these deficits, regulatory decision-making by global bodies is increasingly being held to norms of an administrative law character, including requirements of transparency, participation, reasoned decision, and decisional review, with a view to ensuring greater accountability and responsiveness to the diverse constituencies with a stake in their decisions. We are accordingly witnessing the rise of a Global Administrative Law.
Global Administrative Law

The rise of administrative law-type principles and mechanisms to channel and discipline global regulatory decision-making is the focus of the Global Administrative Law Project at NYU School of Law.1 The project, which engages academics and practitioners in North America, Europe, Latin America, Africa, Asia, and the Pacific region,2 seeks to study this burgeoning field of practice and theory systematically, with a view to analyzing its elements and shaping its inevitable future development so as to help realize such potential as it offers for justice and effectiveness in global regulatory governance. More than 100 papers mapping and analyzing these phenomena have now been written under the auspices of the project. These include papers by Indian scholars on topics such as climate change, the impact of international human rights regimes on domestic policies, electricity regulation,3 and the potentially malign effects of global administrative law on developing countries’ interests.4 Although the landscape is highly variegated, the overall picture these papers present is of the formation of a thickly populated global administrative space, and the development of principles and practices that may be termed Global Administrative Law.

These mechanisms are of particular interest to developing countries and civil society organizations, because they may have the potential to redress power imbalances within global regulatory bodies by ensuring greater participation and voice to disregarded interests and disciplining the exercise of power through requirements of transparency, reasoned decision-making, and review. At the same time, there is the potential that legal procedures — for example, the proce-

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2 The Global Administrative Law Project, jointly with leading law schools and research institutes in Asia, Africa, and Latin America; it has convened conferences in Buenos Aires, New Delhi, Cape Town, Geneva, Beijing, and Abu Dhabi. Publications and reports from these initiatives are available at http://www.iilj.org/GAL.


dures in bilateral investment treaties for protecting foreign investors, or the procedures in WTO TRIPS regime for protecting intellectual property rights — will be exploited by well-organized economic interests to entrench their influence. Also, Southern non-governmental civil societies organizations (NGOs) have sometimes expressed concern that these mechanisms are dominated by Northern NGOs espousing positions that are not always congruent with Southern social interests. Moreover, as Brazil, China, India, and other major developing countries enjoy increasing economic and political power in global affairs, it is not clear how the rise of Global Administrative Law will affect their interests.

II. GLOBAL REGULATORY BODIES

The consequences of worldwide economic integration, transboundary environmental spillovers, cross-border movements of populations, and other phenomena of globalization can no longer be effectively managed by separate national regulatory and administrative measures. In response, many different systems of international and transnational regulation or regulatory cooperation have been established by states, international organizations, domestic administrative officials, and multinational businesses and NGOs, producing a wide variety of global regulatory regimes. The growing density of international and transnational regulation enables us to identify a multifaceted “global administrative space” populated by several distinct types of regulatory administrative institutions and various types of entities that are the subject of regulation, including not only states but firms, NGOs, and individuals. Unlike traditional international law, the ultimate aim of many global regimes is to regulate the conduct of private actors rather than states; private actors also play a major role in influencing the decisions of these regimes.

The regulatory bodies subject to the new global administrative law fall into two basic categories: international or transnational public, private, and hybrid bodies on the one hand, and domestic administrative bodies whose decisions have significant external regulatory impacts on the other.5

A. Intergovernmental and Transnational Regulatory Authorities

Intergovernmental and transnational public, private, and hybrid regulatory authorities can be classified into four basic types.

The first group consists of formal intergovernmental organizations, often established by treaties, that adopt and implement regula-

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5 See Kingsberry, Krisch & Stewart, supra note 1, at 19.
tory standards in a variety of areas. They typically include a secretariat and a variety of other internal organs of an administrative character including specialized committees and working groups and, in some cases, dispute settlement authorities. Examples include UN bodies such as the Security Council and High Commissioner for Refugees, trade regimes like NAFTA and the WTO, the IMF and World Bank, environmental regimes like the Kyoto and Montreal Protocols, the OECD, which promotes regulatory harmonization and cooperation in a wide variety of sectors, and miscellaneous bodies such as the World Health Organization, International Atomic Energy Agency, and World Intellectual Property Organization. These regulatory standards are often implemented domestically by participating nations, although in some cases, such as refugee status determinations by the UN, international organizations may act directly against individuals.

A second form of global regulatory regime consists of intergovernmental networks of national regulatory officials responsible for specific areas of domestic regulation, including antitrust, banking, securities, money laundering, telecommunications, chemicals, food safety, taxation, and transportation safety. These officials may agree to common regulatory standards and practices that they then implement domestically. Many such networks are developing fairly complex institutional structures with significant administrative components.

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

The fourth type of global regulators consists of private bodies exercising public governance functions. The International Organization for Standardization (ISO), for example, has adopted over 13,000 standards that harmonize product specifications and process rules around the world. ISO has adopted elaborate administrative structures and procedures for the development of standards. Many NGOs have developed product certification programs, for example in the fields of sustainable timber and fair-trade coffee. Such “voluntary” standards

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often become commercially obligatory under the pressures of the market through the demands of consumers and contract partners.\textsuperscript{7}

\textbf{B. Domestic Administrative Authorities}

Domestic administrative authorities whose regulatory decisions significantly affect other countries or their citizens are increasingly subject to both substantive and procedural regulatory norms adopted by global bodies such as the WTO, the Security Council 1267 Committee, the Financial Action Task Force, and by international arbitral tribunals operating pursuant to bilateral investment treaties and NAFTA. Increasingly, these norms are institutional and procedural as well as substantive, with far reaching effects on domestic administrative arrangements and procedures. Thus, global administrative law norms are emerging to ensure the accountability of these domestic agencies to global interests in fields such as trade regulation, antiterrorism, environmental protection, finance, and product safety. Examples include administrative law requirements imposed on the US by the WTO Appellate Body in its \textit{Shrimp-Turtle} decision,\textsuperscript{8} requirements of regulatory due process adopted by bilateral investment treaty arbitration panels under the “fair and equitable” standard for treatment of foreign investors, and standards set by the World Bank's good governance indicators, which often condition through various routes the design and operation of national administrative agencies.

While the classification of regulatory bodies as intergovernmental or transnational, or domestic, is analytically convenient, global regulation typically does not operate on two distinct, vertically separated levels. Rather, regulation in global administrative space is highly fragmented.\textsuperscript{9} Different regimes are organized along sectoral lines in specific fields of regulation, often with more than one organization in a given sector. Global regulation functions through a web of interactions and influences, horizontal, vertical, and diagonal, among a diverse multiplicity of different regimes, subjects, and actors. These

\textsuperscript{7} On private regulatory governance generally, see Harm Schefel, \textit{The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets} (2005).


\textsuperscript{9} For a political economy analysis of the factors that explain the fragmented character of global regulation, see Eyal Benvenisti & George W. Downs, \textit{The Empire’s New Clothes: Political Economy and the Fragmentation of International Law}, 60 \textit{Stan. L. Rev.} 595 (2007).
include international organizations, transnational networks of government officials, various private and hybrid transnational bodies, domestic agencies, international and domestic business firms, trade associations, and NGOs. The various global regulatory regimes are linked by ongoing informal communications and negotiations and more established ties through inter-organization representation and participation and consultation procedures that may promote cooperation, equivalence, and harmonization. The overall result is a spontaneously evolving, untidy regulatory mass without center or hierarchy. There is no clear separation of function, activity, or, in many cases, personnel between global bodies and domestic agencies. National systems of administration and law become porous; global norms flow into them, often circumventing the national legislature. Reciprocally, global regimes absorb norms of dominant states and influential societies.\textsuperscript{10}

III. CRITIQUES OF GLOBALIZED REGULATORY ADMINISTRATION AND THE RISE OF GLOBAL ADMINISTRATIVE LAW

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

The globalization of regulation has dissolved what were once firm distinctions between decision-making at the international and at the domestic levels. Global regulatory norms are often adopted and implemented through diffuse, low visibility processes. The resulting accountability gaps have stimulated sharp criticisms by non-governmental organizations (NGOs), politicians, and the media that global regulation has been captured by the wealthy and powerful to the det-

riment of developing countries and environmental, consumer, labor, and other social interests. The “capture” of global regulatory decision-making, it is claimed, has in turn led to a weakening of domestic regulatory protections.\(^{11}\)

The problems of legitimacy raised by this shift of power and authority to extra-state processes and norms are graphic and unresolved. So too are the problems of configuring suitable democracy-respecting but functionally effective relationships between national institutions (including national and sub-national administrative agencies and courts) and extra-national or private institutions of global governance. Accordingly, there are growing demands for more complex or innovative forms of accountability for the actions of global regulatory bodies. These demands come from many sources. One source of demand is from those whose interests are disregarded or undervalued in a substantive global administrative governance action, or in the global decision processes (the “problem of disregard”). A second source of demand is from agencies or components of national governments, dissatisfied with an international institution’s performance or processes. A particular dimension of this is pressure from national or European Union courts, which may increasingly consider applying their own public law review criteria to rules or decisions of global institutions directly, or to national measures intended to implement these.\(^{12}\) Third, a “top-down” demand for accountability comes from the leadership (member states or the secretariat) of global regulatory bodies who, for reasons of effectiveness, or “good governance,” or rights protection, choose to discipline the internal workings of the organization by the use of internal (though perhaps independent) accountability mechanisms. As discussed below, these different types of demands may imply different normative conceptions of law’s role, which may often conflict.

National experience shows that administrative law can both check and steer the exercise of government power. This is accomplished by protecting individuals against unauthorized or arbitrary exercises of official power and by promoting administrative responsiveness to broader public interests. These elements form an integral

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part of democratic systems and, more generally, ensure a basic form of accountability of public power. Because of very significant differences in institutional and political conditions, domestic systems of administrative law cannot simply be transposed to the exercise of public power by global regulatory bodies. Nonetheless, accumulating experience shows that administrative law mechanisms for transparency, participation, reasoned decision, and review, in appropriately modified form, can serve to promote greater accountability and responsiveness by global regulatory bodies to the various interests impacted by their decisions.

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

Administrative law mechanisms are indeed emerging in many different areas of global regulatory governance in response to the deficits in accountability and responsiveness discussed above. They are reflected in the decisions of domestic courts in reviewing Security Council sanctions against individuals; in the Inspection Panel set up by the World Bank to ensure its own compliance with its internal policies; in notice-and-comment procedures adopted by international standard-setters such as the Basel Committee or the OECD; in the inclusion of NGOs in regulatory bodies like the Codex Alimentarius Commission; in rules about foreign participation in domestic administrative procedures as set out in the Aarhus Convention; in the review of domestic administrative procedures and decisions by international panels in the WTO context; and in the work of international administrative tribunals and other mechanisms of accountability in international organizations. The pattern that emerges from these and other, often embryonic mechanisms is not yet coherent: such mechanisms and principles operate in some areas and not in others, and diverge widely in their forms. Yet the overall picture is of widespread, and growing, commitment both to principles of trans-
parency, participation, reasoned decision, and review in global governance.\textsuperscript{13}

IV. THE ELEMENTS OF GLOBAL ADMINISTRATIVE LAW

Procedural participation constitutes, in the domestic setting at least, one of the classical elements of administrative law; there is a significant element that it is being steadily transposed to the realm of global governance. For example, the WTO Appellate Body held in the Shrimp-Turtle case that the United States had failed to provide any of the states whose exports of shrimp products to the United States had been adversely affected by its domestic administrative regulations with any “formal opportunity to be heard, or to respond to any arguments that may be made against [them].”\textsuperscript{14} and required the United States to amend its administrative procedures in order to allow for such procedural participation. Instruments as diverse as the Aarhus Convention and the WADA Code require that national administrative authorities provide such participation rights. Many intergovernmental and transnational administrative bodies have sought to enable some forms of participation in their own regulatory activity for civil society actors and affected economic and social interests: the Basel Committee, for example, established during the development of its Basel II regulations a notice and comment procedure through which banks and other interested parties could participate in the formation of the standards; the International Civil Aviation Organization allows for significant participation in its own standard-setting function, for industry interests at least, through the International Air Transport Association; and the Codex Alimentarius Commission likewise provides for NGO participation in its norm generation procedures. This spread of procedural participation is far from being either uniform (in that a vast range of different participatory roles and powers are involved in different contexts) or complete.\textsuperscript{15} For example, claims that due process requires that the Security Council’s program for listing and freezing the assets of suspected terrorist financiers afford those subject to listing an opportunity directly or indirectly to be heard are unresolved. In its very recent Kadi decision, the European Court of Justice ruled that this regulatory program was subject to European legal norms requiring a

\textsuperscript{13} Daniel C. Esty, Good Governance at the Supranational Scale: Globalizing Administrative Law, 115 Yale L.J. 1490 (2006).

\textsuperscript{14} Shrimp-Turtle Report, supra note 8, ¶ 180.

basic form of hearing for those whose assets are seized, but other jurisdictions may well rule otherwise.

Transparency and access to information are absolutely crucial to the promotion of accountability, and to the exercise of meaningful participation and review. A wide range of international organizations, from the WTO to the OECD to the World Bank have taken significant steps to make documents and records of proceedings available to the public in response to widespread criticisms of secretive decision-making practices. Many regulatory networks, including the Basel Committee, the IOSCO, and the hybrid networks dealing with certification of sustainable forestry practices, have created websites that furnish considerable detail on internal procedures and on the information on which decisions have been based. Domestic administrative authorities are increasingly subject to global regulatory requirements of transparency, such as those imposed by Aarhus Convention concerning environmental regulation or the WTO requirements for trade regulation. Transparency is also a key element in the World Bank's work on the indicators of good governance, in terms of which it takes decisions on the granting of development aid.

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

The right to review of administrative decisions is a bedrock of domestic administrative law but is only beginning to emerge in global regulatory governance. This is perhaps unsurprising, given the general lack of tribunals with compulsory jurisdiction within the international legal order. Specialized regime-specific reviewing bodies are, however, beginning to emerge at the global level. Examples include the World Bank Inspection Panel and the Court of Arbitration for Sport. Global regulatory norms and decisions may also be subject to various forms of review by standing international courts and tribunals and by domestic courts. They may also be subject to a form of review when one global body, such as the WTO Appellate Body, decides whether and how much legal significance to accord to a standard or decision of another body, such as an ISO product standard. The right to review is also part of global administrative law norms and principles imposed on national administrative authorities. The Aarhus Convention contains in its Article 9 a very robust “access to justice” provision; the TRIPs agreement requires domestic authorities dealing with intellectual property infringement claims to provide such a right; and bilateral investment treaties contain arbitration clauses, through which the decisions of national agencies can be subjected to third-party review at a supranational level.

Moreover, review of global regulatory decision-making regulatory authorities is not limited to courts and tribunals. The norms and decisions adopted by one global administrative authority are effectively reviewed by other global administrative bodies deciding whether or not to incorporate or follow the norms in decisions in questions. Domestic administrative authorities similarly review the norms and decisions of global administrative bodies. Also, global businesses or NGOs review the standards adopted by global standard-setting bodies in deciding whether or not to endorse or follow them. In the aggregate, review by administrative bodies is probably much more frequently exercised than review by judicial bodies, if often not so fully articulated. Review by both administrative and judicial bodies extends to the decision-making procedures followed by the global regulatory body in question as well as the substance of norms and decisions that it adopts. In such cases, review becomes a means for promoting wider adoption of global administrative law practices and procedures.

These several procedural elements are the most important elements of the developing global administrative law, although there are preliminary signs that certain common substantive principles, such as proportionality, fair and equitable treatment, and legitimate expectations, are emerging in the decisions of reviewing bodies.
V. THE SPREAD OF GLOBAL ADMINISTRATIVE LAW MECHANISMS

Against the background of the various demands for new legal arrangements to promote accountability to various different interests, many leading intergovernmental and transnational bodies have adopted global administrative law mechanisms in order to further a variety of institutional objectives. They may take such steps in order to respond to external criticisms and pressures from NGOs, business firms, the media, and domestic legislatures and governments and bolster their legitimacy. These criticisms, which may be internal as well as external, attack these bodies’ decisional processes as closed and unresponsive, and their substantive policies as disregarding environmental, social, and other affected interests. By adopting the procedural mechanisms of administrative law, these bodies respond directly to process-based criticisms. By affording affected interests greater opportunities for engagement and influence, they may also deflect or mitigate criticisms of substantive policies. In some cases, notably in the case of the WADA, adverse decisions by domestic courts or threat thereof may impel reform. Global bodies such as ISO, Basel II, the Convention on International Trade in Endangered Species, or the International Civil Aviation Organization may also adopt arrangements for transparency, participation, and reasoned decision-making in an effort to improve the quality of the norms and decisions adopted and enhance their acceptance by relevant constituencies. Another objective may be to improve internal accountability. Transparency, participation, and reasoned decision-making are likely to enhance the ability of a global institution's management or its principals (states, domestic officials, businesses, or NGOs) to monitor the decisions of the regime's staff, expert committees, and other administrative components. Review mechanisms may also serve this goal. Thus, the World Bank's Inspection Panel is a means of monitoring staff compliance with environmental and social guidelines (themselves adopted in response to pressures from NGOs and the U.S. Congress), as well as being a mechanism of accountability enabling residents of developing countries and NGOs to challenge Bank-funded projects as violative of the Bank's own guidelines.

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

It cannot be supposed that the development of global administrative law, which will inevitably reflect the tug and pull of different conflicting interests and values, will be a smooth or harmonious process. Developing countries and global NGOs, for example, may oppose the development of administrative law disciplines to safeguard economic interests but support their adoption in other contexts, such as development assistance conditionality. The need for confidentiality, informality, and flexibility in many aspects of global decision-making will be a serious challenge to the extension of administrative law disciplines. Because administrative law as traditionally understood, at least in developed countries, depends on a relatively high degree of institutional differentiation and legalization, a critical question is the extent to which international regulatory institutions will develop in the direction of greater complexity and legalization. There is also a question of which of the various approaches reflected in domestic administrative law may be best adapted for global bodies, including for example the U.S. interest representation model of administrative law or emerging European practices of consensus-based deliberation. Approaches to administrative law drawn from other countries and regions deserve much more attention than they have thus far received.

VI. CONCEPTUAL ISSUES IN GLOBAL ADMINISTRATIVE LAW

Questions of legitimacy and accountability are among the most pressing in the present and future conditions of global regulatory governance. Global administrative law concepts, mechanisms, principles, and rules can be of considerable significance in framing, vindicating, and elucidating the concepts and norms of legitimacy and accountability. Some of the key issues in this respect are the following.

Accountability has become a rhetorical slogan in the globalization debates. Too often, demands are made for greater accountability without serious analysis of precisely what it consists of, how it can be achieved, and what its goals are. Global Administrative Law Pro-

\[17\] For detailed conceptual analyses of accountability, see Ruth W. Grant & Robert O. Keohane, Accountability and Abuses of Power in World Politics, 99 Am. Pol. Sci. Rev. 29 (2005); Richard B. Stewart, Accountability, Participation, and the Problem of Disregard in
ject scholars are conducting a more precise analysis of accountability and its relation to the global administrative law mechanisms of transparency, participation, reasoned decision, and review, all of which also require careful analysis. This work shows that "accountability" does not exist in the abstract and should not be viewed as an end in itself. Yet agreement is seldom attained on what underlying goods and policy objectives accountability structures should effectively advance. Nor has enough work been done on how to assess and contain the distortions and costs that the establishment and operation of accountability mechanisms can easily entail — what might be termed the pathologies of accountability. The starting question for practical analysis is who is accountable to whom, and through what types of mechanisms, including those of administrative law. The conclusion is that real accountability mechanisms are far more limited than the rhetoric would suggest. They consist of legal, electoral, fiscal, supervisory, and hierarchical accountability mechanisms. Accountability mechanisms are among three basic types of global governance tools that can be used to redress the disregard by global regulatory bodies of affected but marginalized social and economic interests. The others are decision rules (the rules and practices that govern decision-making by global authorities) and a residual category of other responsiveness-promoting measures (including transparency, reason-giving, and non-decisional participation) to promote greater regard for disregarded interests. The analysis provides a more precise institutional grammar for examining the role and potential contributions of administrative law in achieving more accountable and just global regulatory decision-making.

Administration is another critical concept for global administrative law that requires clarification and analysis of its implications for governance arrangements. International law has long recognized a category known as "international administration," but this term encompasses only a limited range of activities carried out by formal intergovernmental organizations. The premise of global administrative law is that a much wider range of activities, carried by many diverse types of global bodies, should be regarded as administrative in character and therefore appropriate for administrative law disciplines. In the domestic context, the definition of what constitutes "administrative" action is for the most part largely uncontroversial, even if it is often negatively defined as public power that is neither legislative nor judicial in character. Conceptually, a similar — if much less developed — functional differentiation can be observed at the global level: administration here differs from legislation in the form of inter-

national agreements among states and from adjudication in the form of episodic dispute settlement between states or other parties. But the precise contour of what constitutes administration in the global context remains unclear. Does it include decisions of the Conference of the Parties? Of expert committees? Of courts or tribunals that have regulatory functions, a category that arguably includes the WTO Appellate Body and bilateral investment treaty tribunals reviewing domestic regulatory decisions? The answers to these questions have important implications for the scope and content of global administrative law.

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

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

18 See Benedict Kingsbury, *International Law as Inter-Public Law, in Moral Universalism and Pluralism* 167, 175 (Henry S. Richardson & Melissa S. Williams eds., 2009).
nal judicial bodies, or simply through their development into custom having generated legitimate expectations through long and unchallenged practice. The Global Administrative Law Project posits that the field of study of global administrative law encompasses "the mechanisms, principles, practices, and supporting social understandings" that promote accountability, transparency, participation, and review. Whether all of these norms and understandings can be properly characterized as "law," and the implications of a conclusion one way or another, remain to be addressed. And, to the extent that they are "law," what are their sources?²⁰

Positive Political Theory. What are the factors that lead to (or hinder) the development of particular administrative law mechanisms in specific areas of global regulation, and under what conditions are such mechanisms likely or unlikely to be successful?²¹ For example, are forms of review most likely to emerge and to be successful in situations where power is delegated by a principal to an agent? Will global administrative law be more likely to emerge as a response to the accretion of rules and adjudicative systems at the global level that bind those who have not consented to particular norms or decisions (just as national administrative law has emerged in response to the expansion of the regulatory state) and less likely to emerge where global institutions adhere to traditional international rules of treaty-making and adjudication only by consent? Who anticipates benefiting from such mechanisms and so has incentives to promote them? Who are the losers? Will implementation of a predominantly formal set of measures ostensibly guaranteeing things like accountability, transparency, participation, and access to information succeed in empowering marginalized and often disregarded interests to bring about a more responsive and just system of global regulation? Can the largely successful experience with public interest law in the United States and elsewhere be replicated on the global scale? Or will global administrative law mechanisms instead favor corporate or other well-organized groups that have the resources to participate effectively in specialized and complicated administrative proceedings all over the globe? Applied to the creation and structuring of international administrative tribunals, positive political theory calls for analysis of the interests served by different degrees and forms of independence of the tribunals from the political bodies of the institution, from the


major member states, and from the secretariat. Thus the members may be chosen quite independently, but be constrained by tight rules set by the political bodies, or vice versa. Members eligible for reelection or for future employment with the institution might (or might not) perform differently than if these were precluded. Tribunals might have considerable independence, but little power to compel the secretariat or member states to provide remedies or make reforms. Tribunals might have wide jurisdiction, but be inundated by complaints on relatively small issues because in the pre-tribunal phases staff and managers do not have enough incentive or capacity to settle cases earlier.

VII. NORMATIVE FOUNDATIONS OF GLOBAL ADMINISTRATIVE LAW

As a first approximation, three basic normative conceptions of the role of global administrative law can be discerned: internal administrative accountability, protection of private rights or the rights of states, and promotion of democracy. The implications of these different normative visions for the design and application of global administrative law may overlap in some respects and diverge rather strongly in other respects. Moreover, a full treatment of normative issues would require a much more extensive discussion of more complex and nuanced positions, including considerations of distributitional justice within and among states and societies, many of which do not fit very closely into these three simple archetypes.

The first normative conception, internal administrative accountability, focuses on securing the accountability of the subordinate or peripheral components of an administrative regime to the legitimating center (whether legislative or executive), especially through ensuring the legality of administrative action. This conception emphasizes organizational and political functions and regime integrity rather than any specific substantive normativity, making it a potential model for an international order, particularly a pluralist one that lacks a strong consensus on substantive norms. The second normative conception is liberal and rights-oriented: administrative law protects the rights of individuals and other civil society actors, mainly through their participation in administrative procedures and through the availability of review to ensure the legality of a decision.

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23 Kingsbury, Krich & Stewart, supra note 1.
24 On similar normative conceptions behind domestic administrative law, see Eberhard Schmidt-Assmann, Das allgemeine Verwaltungsrecht als Ordnungsideal: Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung (3d ed. 2004).
This may also be extended to the protection of the rights of states; this idea may be especially valuable for many developing countries and other weak states that lack political and economic bargaining power and influence. This conception may also overlap with the notion that global administrative law can promote the rule of law by ensuring the public character of regulatory norms, their reasoned elaboration, and their impartial and predictable application. These two normative conceptions inform quests for legitimacy and accountability in the work of international institutions, and have a direct bearing on the design and functioning of international administrative tribunals and other international tribunals designed to enhance accountability of international organizations.

A third conception views the role of global administrative law as promoting democracy. Electoral democracy provides the basic foundation of legitimation for most contemporary states. Extending this form of democratic legitimation to international institutions in general is profoundly challenging. National administrative law in many countries has a democratic component: it ensures the accountability of administrators to parliament by ensuring their compliance with statutes and to broader economic and social constituencies through public participation in administrative decision-making procedures. But at the global level, a system of electorally based representative democracy is far beyond reach. Nor does a consociational conception of democracy at the global level based on civil society entities seem viable. Nonetheless, the development of a global administrative law could work to strengthen representative democracy at the national level by making global regulatory decisions and institutions more visible and subject to effective scrutiny and review within domestic political systems, and thereby promote the accountability of global regulatory decision-makers through those systems. Systems of global administrative law might also support the development of deliberative democracy at the level of global regulatory regimes, although the elements of such a conception as well as the conditions of its effective realization have yet to be resolved. A more modest but viable role for global administrative law would be to develop the tools of transparency, participation, reason-giving, and review to promote greater consideration by decision makers to disregarded interests and promote the rule of law over the regimes of power and bargain. However, from the perspective of developing countries, some argue that global


administrative law might have a limited role in injecting the elements of democracy, equity, and justice into international law and international institutions, whilst it might be co-opted by powerful states to their advantage. According to this view, then, global administrative law can, under certain conditions, "act as a very limited tool of resistance and change."27

VIII. THE FUTURE DEVELOPMENT AND ROLE OF GLOBAL ADMINISTRATIVE LAW

The procedures and practices of global administrative law will continue to spread to an increasing number of global and domestic regulatory bodies and deepen in their application. The demands for greater participation and accountability with respect to these authorities continue to grow, and traditional international and domestic law mechanisms remain inadequate to meet that demand. Global administrative law is the most suitable set of tools for meeting these demands. While the existing pattern of global administrative practices among these different regulatory bodies has a patchwork character, a thicker and somewhat more regularized structure of practice is gradually emerging.

It would be quite premature, however, to regard global administrative law as a single system of well-defined norms and practices.28 Apart for the circumstance that global administrative law practices and procedures are still rapidly evolving, and are informed by somewhat divergent normative conceptions, the functions and structures of different types of global regulatory bodies are too diverse to make a "one size fits all" code practicable or desirable. For example, some global bodies, such as the UN Security Council, the Financial Action Task Force, or Interpol are primarily concerned with security. Other global bodies, such as ICANN, the Montreal Protocol, or the International Labor Organization are ultimately concerned with regulating the conduct of private economic actors to facilitate market transactions or protect the environment and public health, workers, and consumers. Still other regimes, including the Inter-American Human Rights Commission or the Aarhus Convention, are primarily aimed at protecting human rights. The development of global administrative law in these various types of global regulatory bodies will inevitably take somewhat different forms. Accordingly, global administrative law is best regarded as a family of norms and prac-

27 Chimni, supra note 4, at 826.

tices with similar overall goals, but with different specifications, depending on the context.

Juxtaposed to global administrative law is the concept of global constitutionalism favored by many European scholars who seek to extrapolate the successful experiences of Western states and of Europe with democratic constitutional forms of government, including liberal democratic norms and constitutional courts, to the global stage. They envisage an inclusive worldwide legal order in which major decisions and policies of global concern are governed by a constitutional structure or structures ruled by law, with a prominent role for global and domestic courts in its definition and realization, similar to practice in the European Union and the role of the European Court of Justice and the European Court of Human Rights. This attempt to project the concept and practice of constitutionalism, with its deep and rich normative roots, from democratic nation states or the European Union to global governance, however, faces many profound difficulties. The radical fragmentation of global governance, with a heterarchical multiplicity of sites through which power is exercised, the absence of any system of global government or its prospect, the diverse and often sharply antagonistic interests of different states and peoples, the lack of a common history and cultural heritage, and fundamental disagreement over many values and moral norms, makes the constitutionalist project, at least in its more ambitious forms, infeasible for the foreseeable future. As support for their vision, global constitutionalists often point to wide agreement on core human rights, while often overlooking startling discrepancies in practice and the vague character of many norms, especially those concerning economic social and cultural rights. But there is no similar broad agreement on many issues of international security or regulation. Nor are powerful states willing, now or in the foreseeable future, to accede any significant decision-making authority over security, foreign affairs, fiscal and taxing policies, and other major political issues to a general-purpose global decisional authority. In this respect, the views of China, India, and Brazil are no different than those of the United States, the United Kingdom, Germany, or France.

The fragmented and restricted character of global governance, however, is far more amenable to the application of administrative law techniques derived from domestic or supranational practices and

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suitably adopted to the global context. Global administrative law, and its procedural techniques of participation, reason-giving, and review, can suitably be applied to various specific global regulatory bodies without envisaging or requiring a unified overarching global legal constitutional order. Global administrative law proceeds at “retail” rather than “wholesale.” The normative ambitions of global administrative law are more limited than those of global constitutionalism, yet they are by no means modest or insignificant. Subjecting traditional global decision-making mechanisms of power and bargain to the rule of law and securing transparency and participation to a greater range of affected interests is an important goal and achievement.

The potential conflicts among the norms underlying global administrative law must not, however, be ignored. It cannot simply be assumed that its mechanisms will operate in practice to protect the less powerful and ensure more adequate decisional weight to under-valued social, economic, and environmental interests. Procedural mechanisms and rule-of-law norms can be exploited by well-organized economic interests with abundant legal and organizational resources to entrench their interests. In order to prevent this outcome and ensure a more democratic development of global administrative law, developing countries in South Asia and elsewhere must play an informed and active role. This will require law schools in developing countries to give greater attention to global regulation and governance, the interaction between global regulatory regimes and domestic government, and the role of administrative law mechanisms in protecting the interests of developing countries and their citizens in the various fields of global regulation. It will require greater engagement by not only developing country legal academics but also lawyers in

30 Another attempt to frame global governance in terms of public law is illustrated by Armin von Bogdandy, Philipp Dann & Matthias Goldmann, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, 9 German L.J. 1375 (2008), available at http://www.germanlawjournal.com/article.php?id=1025, who propose a “public law approach” based on a combination of the three main existing internal approaches to global governance phenomena: constitutionalization, administrative law perspectives, and international institutional law. All of them formulate important insights for a public law approach: that constitutional sensibility as well as comparative openness to administrative law concepts should inform the analysis of the material at hand, and that international institutional law should be the disciplinary basis for further inquiries.

31 Chimni, supra note 4.
government, NGOs, and private practice in shaping the future development of global administrative law. The Jindal Global Law School is exceptionally well positioned to take up this challenge.