

**LEGITIMIZING SUPRANATIONAL GOVERNANCE: THE ROLE OF
GLOBAL ADMINISTRATIVE LAW**

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Draft
11 April 2005

From the 9/11 tragedy to the global panic engendered by the 2003 outbreak of SARS, the reality of interdependence in our globalized world has become evident in recent years. National governments alone cannot address a range of critical issues including terrorism,¹ economic integration,² infectious disease,³ and worldwide environmental issues such as climate change.⁴ Scholars have highlighted the need for a degree of international policymaking for years.⁵ The theoretical logic of organizing collective action at the scale of the harms to be addressed is well understood.⁶

¹ STROBE TALBOT, *THE AGE OF TERROR* (2002) (explaining new realm of national security interdependence); Brian M. Jenkins, *International Terrorism*, in *THE USE OF FORCE* 70, 70 (Robert J. Art & Kenneth N. Waltz eds. 1999).

² Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003) (some problems of global economic integration exceed domestic regulatory capacity); MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 20 (1995 & 1999) (reviewing role of international trading system); Daniel Tarullo, *Law and Governance in a Global Economy*, 93 AM. SOC'Y INT'L L. PROC. 105, 107 (1999).

³ DAVID P. FIDLER, *INTERNATIONAL LAW AND INFECTIOUS DISEASES* 5-6 (1999) ("strategies emphasize that infectious diseases must be handled through a global, coordinated approach"); Alan R. Lifson, *Preventing HIV: Have We Lost Our Way?* 343 *THE LANCET* 1306-07 ("[T]here is a need for comprehensive and forceful global leadership during the second decade of this [HIV] epidemic"), cited in DOUGLAS A. FELDMAN & JULIA WANG MILLER, *THE AIDS CRISIS* 240 (1998).

⁴ GUS SPETH, *RED SKY AT MORNING* (2004) (calling for a World Environment Organization).

⁵ ERNST HAAS, *BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION* (1964); ERNST HAAS, *THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES 1950-1957* (1958); Ernst Haas, *International Integration: The European and the Universal Process*, 15 INT'L. ORG. 366; PAUL TAYLOR, *THE LIMITS OF EUROPEAN INTEGRATION* (1983); Joseph H.H. Weiler, *The Community System: the Dual Character of Supranationalism*, 1 *YEARBOOK OF EUROPEAN LAW* 268 (1981). Joseph H.H. Weiler, *The Transformation of Europe*, 200 *YALE L.J.* 2403 (1991). Karl Deutsch & J. David Singer, *Multipolar Power Systems and International Stability*, 16 *WORLD POLITICS* 390 (1962); KARL DEUTSCH, *POLITICAL COMMUNITY AT THE INTERNATIONAL LEVEL* (1954); Alec Stone Sweet & Wayne Sandholtz, *Integration, Supranational Governance, and the Institutionalization of the European Policy*, in *EUROPEAN INTEGRATION AND SUPRANATIONAL GOVERNANCE* (Wayne Sandholtz & Alec Stone Sweet, eds. 1998).

⁶ MANCUR OLSON, *LOGIC OF COLLECTIVE ACTION* (1965); ORAN R. YOUNG, *THE INSTITUTIONAL DIMENSIONS OF ENVIRONMENTAL CHANGE: FIT, INTERPLAY, AND SCALE* (2002). Wallace Oates & J. Litvack, *Group Size and the Output of Public Goods: Theory and an Application to State-Local Finance in the United States*, 25 *PUBLIC FINANCE* 42 (1970); Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, *YALE L. & POL'Y. REV.* & *YALE J. REG.* 23 (Symposium Issue 1996).

Draft
11 April 2005

Skepticism about “global governance” remains deep, however, especially in the United States.⁷ In the 2004 Presidential election campaign, President Bush not only cast doubt on the value of international decisionmaking, he mocked his opponent’s suggestion that working through the United Nations might sometimes be a useful strategy for advancing U.S. interests. More broadly, the Bush Administration exudes hostility toward supranational governance.⁸ Somewhat curiously, a parallel degree of skepticism about global-scale policymaking can be found on the political left.⁹ Ralph Nader, some environmentalists, and many anti-globalization activists condemn international organizations and decisionmaking. They decry the “faceless bureaucrats” at the World Trade Organization (WTO) in Geneva who they see as undermining American democracy, sovereignty, and regulatory autonomy.¹⁰

⁷ In March 2005, the United States withdrew from the Protocol to the Vienna Convention on Consular Relations after receiving a decision the Bush Administration did not like. Adam Liptak, *US Says it has withdrawn from World Judicial Treaty*, N.Y. TIMES, March 10, 2005. The Kyoto Protocol, providing an international strategy for addressing climate change, came into effect in February 2005 without the United States. Mark Landler, *Mixed Feelings as Treaty on Greenhouse Gases Takes Effect*, N.Y. TIMES, February 16, 2005. In recent years, the United States has also refused to ratify treaties implementing the global Landmine Ban and the International Criminal Court and obstructed the World Health Organization’s public health campaign aimed at smoking. J. Antonio Ohe, *Are Landmines Still Needed to Defend South Korea?* 225, 226, in *LANDMINES AND HUMAN SECURITY* (Richard A. Matthew, Bryan McDonald, & Kenneth R. Rutherford eds. 2004).

⁸ For example, Undersecretary of State John Bolton declared: “It is a mistake for us to grant any legitimacy to international law even when it may seem in our short term interest to do so.” Robert W. Tucker & David C. Hendrickson, *The Sources of American Legitimacy*, FOR. AFF. (2004), available at <http://www.foreignaffairs.org/20041101faessay83603-p10/robert-w-tucker-david-c-hendrickson/the-sources-of-american-legitimacy.html>. And Bolton also suggested: “If the U.N. Secretariat Building in New York lost 10 stories, it wouldn’t make a bit of difference.” FINANCIAL TIMES (9 March 2005) at 1.

⁹ Giulio Gallarotti, *The Limits of International Organization*, in *THE POLITICS OF GLOBAL GOVERNANCE* 379 (Paul F. Diehl ed. 1997) (international organization has been “attacked both from the right and left in theoretical and nontheoretical treatises”).

¹⁰ LORI WALLACH & PATRICK WOODALL, *WHOSE TRADE ORGANIZATION?* (2004) (condemning the WTO); Friends of the Earth, *WTO Scorecard*, available at <http://www.foe.org/camps/intl/greentrade/scorecard.pdf> (last visited February 28, 2005) (WTO panels have power to go over the heads of democratically elected governments); DANIEL C. ESTY, *GREENING THE GATT* (1994) at 35 (reviewing environmentalists’ hostility to the WTO).

Draft
11 April 2005

Why in a world of demonstrable interdependence is there such hostility to global governance? In this paper, I look at this puzzle through the lens of administrative law. I trace the doubts of American political leaders and the broader public about the value of international policymaking to the perceived lack of democratic legitimacy of international bodies, concerns about lost national sovereignty, unhappiness about the delegation of important policy choices to distant and unaccountable officials, and dissatisfaction with the decisionmaking processes in international bodies. The problems of democracy, sovereignty, and delegation in international decisionmaking can never be fully addressed, but I argue that a more rigorous set of administrative rules and procedures could directly enhance the legitimacy of global governance and help to maximize the gains and minimize the downsides of supranational policymaking.

While I stress the inescapable and growing reality of global-scale interdependence¹¹ and the resulting need for functioning mechanisms of international cooperation, my central goal in this paper is not to make the normative case for more supranational governance.¹² More modestly, I seek to demonstrate that, whether the decisionmaking role assigned to international bodies is narrow or broad — supporting mere *intergovernmental* exchange or full-scale

¹¹ This trend was spotted long ago. ERNST HAAS, *WEB OF INTERDEPENDENCE: THE UNITED STATES AND INTERNATIONAL ORGANIZATIONS* (1970); ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* (1977). Others continue to note this fact. Inge Kaul, et al, *Why Do Global Public Goods Matter Today?* in *PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION* (Inge Kaul, et al, eds. 2003) (discussing interdependence and globalization); ANNE MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

¹² My focus is on policymaking above the level of the nation-state. Thus, I use the term *supranational* to encompass both *global* governance (involving all countries) and *international* governance (involving two or more nations working together). My focus is on *governance*, which I sometimes refer to as *policymaking* or *decisionmaking* in pursuit of collective aims by those to whom some authority for making collective choices has been delegated.

Draft
11 April 2005

supranational decisionmaking¹³ — establishing public confidence in the choices made and policies advanced depends on these institutions acting in ways that meet emerging standards of “good governance.”

I unfold my argument for globalizing administrative law in several stages. I examine in Part I the logic of global governance and the controversies that surround international policymaking. I note that, purely as a descriptive matter, supranational policymaking appears to be expanding.¹⁴ Governments are working together to address the thinning of the ozone layer and other environmental issues, confront public health threats, reduce trade barriers, and promote economic growth. Thus, the existence of global governance cannot really be disputed. What is contested is how much reliance should be placed on international officials and entities as autonomous decisionmakers who exercise political judgment. In seeking to address this question, I spell out the potential benefits of global governance but also catalogue the risks and costs of delegating decisionmaking to international officials. I then put forward two models to explain when legitimacy issues will arise in the supranational governance context – one based on the institutional setting and the other centered on the nature of the issue in question. I conclude

¹³ Stone Sweet & Sandholtz, *Integration*, *supra* note 5 at 8 (establishing a spectrum of international governance activities from mere support for coordination among officials from nation-states to autonomous action by international officials); JOHN RUGGIE, *CONSTRUCTING THE WORLD POLITY* (1998).

¹⁴ David Held, *The Transformation of Political Community: Rethinking Democracy in the Context of Globalization*, in *DEMOCRACY'S EDGES* 84, 84 (Ian Shapiro & Casiano Hacker-Cordón eds. 1999) (citing “growing interconnectedness, and intensification of relations, among states and societies”). Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, *AMERICAN POLITICAL SCIENCE CONVENTION* (August 31-September 3, 2000)(noting “strengthening of international regimes, combined with globalization, creates a double effect: the impact of stronger rules is magnified by higher levels of interdependence . . . By many measures, current levels of globalism—the thickness of networks along several dimensions—are unprecedentedly high”).

Draft
11 April 2005

that administrative law represents a critical tool for legitimizing supranational governance and for working through what John Jackson calls the “devilish detail of balancing the values of nation-state sovereignty with the contemporary world need for cooperation and multilateral activity.”¹⁵

In Part II, I discuss competing visions of governance legitimacy including: (1) elections and “majority will” building on the democratic theory of Rousseau, (2) expertise and the ability to generate “right answers,” drawing on the logic of Weber’s writings on bureaucratic decisionmaking, and (3) systemic legitimacy of the sort Madison advocated where a particular decisionmaker’s authority derives from being part of an overarching governance structure with checks and balances. I then argue that a fourth foundation for policymaking legitimacy should be given more focus: the rules and procedures of the policymaking process. As Habermas makes clear, the *process* itself and the dialogue it generates fundamentally shape how readily people accept the decisions and policies that emerge.¹⁶ The legitimacy of supranational governance therefore depends, in part, on the presence of procedural requirements and safeguards that promote a careful and deliberative policy process which, in turn, limits and disperses power, and advances accountability, participation, rationality, neutrality, fairness, efficacy, understanding, and efficiency in decisionmaking.

¹⁵ John Jackson, *Changing Fundamentals of International Law and Ten Years of the WTO*, 8 J. INT. ECON. L. 3, 4 (2005).

¹⁶JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* Vol. [1] 287 (emphasizing the value of deliberation) (Thomas McCarthy, translator, 1981).

Draft
11 April 2005

In Part III, I discuss the concept of good governance as it applies in the international realm, linking the core elements to the various theories of legitimacy identified in Part II. I also put forward a set of global administrative law tools that might help to promote good governance and legitimate international-scale decisionmaking.

In Part IV, I analyze the existing decisionmaking procedures in the international trading system, the global public health structure, and the international environment regime against the global administrative law template developed in Part III. In the international organizations in each of these realms some of the procedures and mechanisms that might be thought of as essential to good governance have been adopted. I find, as my theoretical framework would suggest, that the regime of administrative law has advanced most in those settings where the governance is supranational, formal, and addressing political issues. But all three systems fall short of an appropriate structure of procedural safeguards and fully developed global administrative law.

In Part V, I offer some tentative conclusions about the challenge of globalizing administrative law. I explain why further attention should be paid to this agenda even if significant obstacles must be overcome to develop a procedural foundation for the legitimacy for global governance.

I. The Supranational Governance Problem

Before delving into why global-scale governance might be necessary and what the problems are with shifting some degree of policymaking to the international level, it is important to establish what supranational governance is.

A. Defining Governance

Governance means different things in different contexts but the concept relates at its core to decisionmaking in response to shared problems.¹⁷ Global or supranational governance might therefore refer to any number of policymaking or rulemaking processes and institutions that help nation-states to address shared or common problems including:

- negotiation by nation-states leading to a treaty;
- dispute settlement within an international organization such as the WTO;
- rulemaking by international bodies in support of treaty implementation;
- development of codes of conduct, guidelines, and norms (e.g., the work of the Organization for Economic Cooperation and Development (OECD) to develop the “Polluter Pays Principle” or the OECD Guidelines for Multinational Corporations);
- pre-negotiation agenda setting and issue analysis in support of treaty-making (such as the work undertaken by the Organization of American States (OAS) in support of the Free Trade Area of the Americas);
- technical standard setting (such as that undertaken by the International Organization for Standardization (ISO) to facilitate trade);

¹⁷ See, e.g., Oran R. Young, *Rights, Rules, and Resources in World Affairs*, in *GLOBAL GOVERNANCE* 1, 3 (Oran R. Young ed. 1997).

Draft
11 April 2005

- regulator networking (such as the OECD meetings which bring together energy ministers, trade ministers, or environment ministers);¹⁸
- structured public-private efforts at norm creation (such as the work of the World Commission on Dams);¹⁹
- informal workshops at which policymakers, NGOs, business leaders, and academics exchange ideas (such as the World Conservation Congress organized by the IUCN, the World Conservation Union); and
- purely private sector activities that help shape future public policy processes (such as the work of the Mexico-US Business Council to lay the foundation for the North American Free Trade Agreement (NAFTA)²⁰ or meetings of scientists and other epistemic communities).²¹

Dan Bodansky argues that governance is more than coordinated problem solving. It is defined by the presence of authority and the ability to exercise power.²² Bodansky is right that the lack of authority in some international institutions means that their role in *governance* is rather thin. Other international institutions do, however, exert influence over the behavior of

¹⁸ WOLFGANG H. REINICKE, *GLOBAL PUBLIC POLICY NETWORKS: GOVERNING WITHOUT GOVERNMENT* (1998) (introducing the concept of “trisectional” networks); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT’L L. 1041, 1042-1043 (2003) (discussing transgovernmental regulatory networks).

¹⁹ Klaus Dingwerth, *The Democratic Legitimacy of Public-Private Rulemaking: What Can We Learn from the World Commission on Dams?*, 11 GLOB. GOV. 65 (explaining how the Commission’s “trisectional network that included members of governments, civil society, and business” developed a set of norms and guidelines for dam building); JOHN RUGGIE & JOHN GERARD, *THE THEORY AND PRACTICE OF LEARNING NETWORKS*, in *LEARNING TO TALK: CORPORATE CITIZENSHIP AND THE DEVELOPMENT OF THE UN GLOBAL COMPACT* (Malcolm McIntosh, Sandra Waddock, & George Kell, eds. 2004) (discussing the UN global compact).

²⁰ *Mexico-U.S. Business Committee*, at <http://207.21.242.176/coa/committees/index.html>.

²¹ Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1 (1992) (explaining the governance role of knowledge-based networks).

²² Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM.J.INT’L L. 596, 597 (1999). By this logic, purely private sector activities are not really global governance — a definitional point I accept. But see Paul Wapner, *Governance in Global Civil Society* in *GLOBAL GOVERNANCE* (Oran R. Young, ed.) (1997) (arguing that policy solutions from outside governments and particularly from civil society are increasingly needed—and emerging).

Draft
11 April 2005

nation-states, economic actors, and individuals.²³ Richard Stewart and others observe that the rise of a global market economy and the emergence of a series of international regulatory regimes make it clear that some degree of global governance now exists.²⁴ The list of international governance activities with real impact would include the trade liberalization work of the WTO, the global health policymaking of the WHO, the standard setting undertaken by the ISO²⁵, and testing protocols and risk assessment methodologies developed by the OECD Chemicals Group among others.²⁶

It is striking that some of these global governance activities go virtually unnoticed, while others generate great controversy. In trying to determine when legitimacy issues will be raised, two institutional issues related to the depth or “thickness” of the supranational policy process emerge as important: (1) who holds the decisionmaking authority and (2) how formal and binding the decision process is. These issues can be arrayed on intersecting spectrums to form Matrix 1 below.

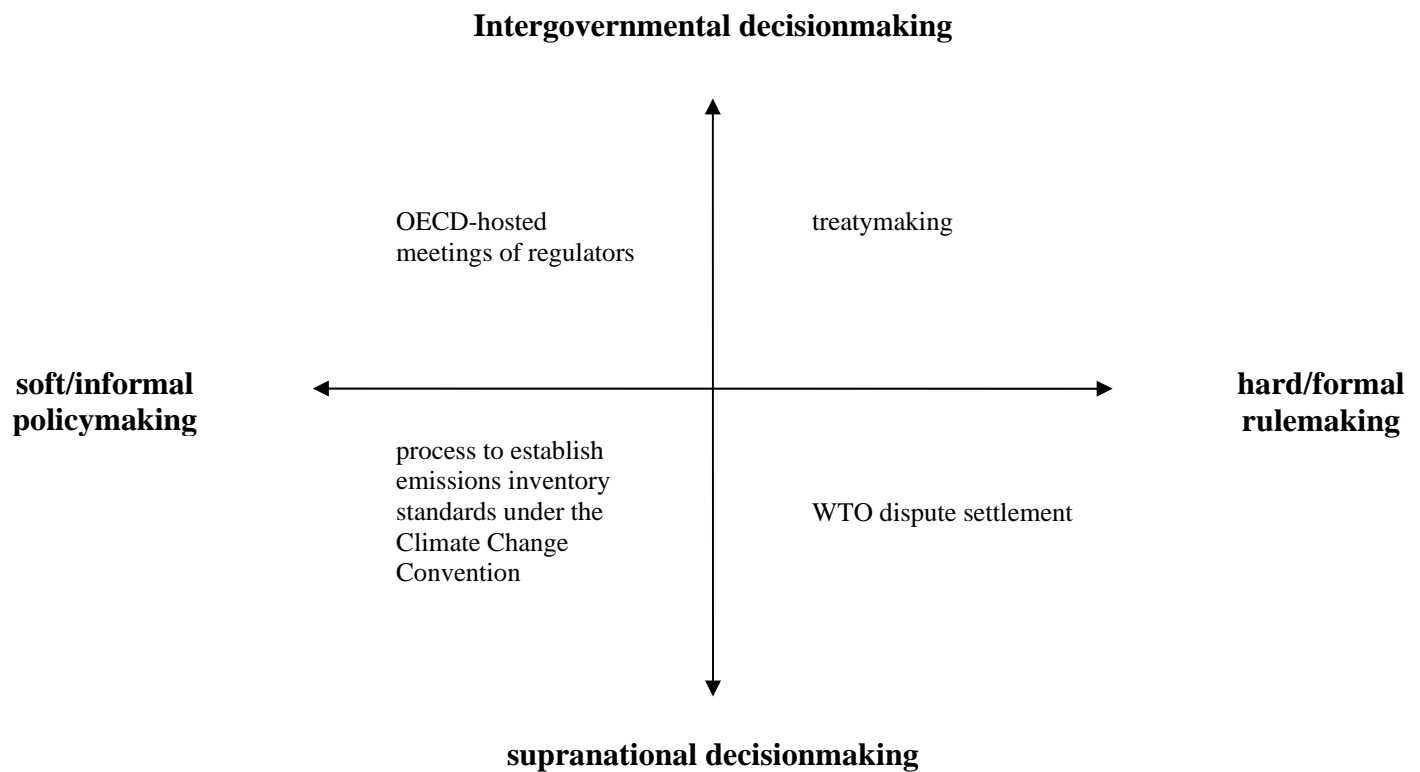
²³ Bodansky *id.*; Benedict Kingsbury, Nikko Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, L. & CONTEMP. PROB. (2005) AT 5-6. Bob Reinalda & Bertjan Verbeek, *The Issue of Decisionmaking, in DECISIONMAKING WITHIN INTERNATIONAL ORGANIZATIONS* 9, 10 (Bob Reinalda & Bertjan Verbeek eds. 2004) (arguing that it is difficult for states to “escape” the force of organizations such as the WTO).

²⁴ Kingsbury et al, *Emergence*, *supra* note 24 at 5; Richard B. Stewart, *US Administrative Law: A Model for Global Administrative Law?* (forthcoming L. & CONTEMP. PROB.); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

²⁵ Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 ECOL. L.Q. 479 (1995) (explaining the ISO’s standard setting role).

²⁶ OECD Guidelines for Testing of Chemicals, available at <http://www.oecd.org/dataoecd/9/11/33663321.pdf>; ESTY, GREENING THE GATT, *supra* note 10, at 178 (discussing the impact of the work of the OECD Chemicals Group).

Matrix 1: Depth of Supranational Governance



At the purely intergovernmental end of the vertical axis, global governance could amount to little more than an international organization providing a forum for negotiations among officials from nation-states. At the supranational end of the spectrum, as Stone Sweet and Sandholtz note, international institutions may exercise substantial policymaking autonomy²⁷ — deepening questions about legitimacy. Supranational governance does not, of course, emerge spontaneously. National governments must “contract” for decisionmaking authority to be lodged

²⁷ Stone Sweet & Sandholtz, *Integration*, *supra* note 5 at 1, 10.

Draft
11 April 2005

at the supranational scale. They will tend to engage in such delegation when they believe it is in their national interest to do so. As I discuss in more detail below, among other factors shaping this calculus, the robustness of the decisionmaking process emerges.

Rulemaking in the international realm also varies by its degree of formality. On this horizontal axis, the binding obligations produced through treaties stands at the formal or *hard law* end of the spectrum.²⁸ As one moves towards the more informal or *soft law* end of the spectrum, one finds a range of international dialogues that generate rules, norms, and lower-order guidelines. Further down the spectrum are discussions that lead to agreements on procedures or which simply result in the exchange of information or performance evaluations. At this informal end of this spectrum, policy influence exists only to the extent that national officials take on board the learning offered about “best practices.” At the formal end of the spectrum, the rules adopted have more bite, and the legitimacy of the governance process becomes more of an issue.

In the upper left quadrant of this matrix, activities are largely carried out by national officials and the results are rather informal in nature. This translates into thin *global* governance and little in the way of legitimacy concerns. As one moves toward the lower right quadrant, both the degree of formality and the autonomy of international officials rises. As the element of

²⁸Joseph S. Nye, Jr., *Soft Power*, FOREIGN POL’Y 153, 167 (Fall 1990) (soft power as “co-optive”); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INTERNATIONAL ORGANIZATION 421, 421-422 (2000) (contrasting hard law--“legally binding obligations”— with soft law — “weakened” “legal arrangements”); R.R. Baxter, *International Law in Her ‘Infinite Variety,’* 29 INT’L. & COMP. L. Q. 549, 554 (1980) (*soft law* as obligations that are not legal or susceptible to enforcement); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INTL L. 413, fn 7 (1983) (soft law as imprecise and “not really compelling” rules).

Draft
11 April 2005

supranational governance thickens, legitimacy questions emerge with more force.²⁹ In this zone, as I discuss in detail below, the need for an administrative law regime intensifies. It is important to note that, in the upper right quadrant, where treaty-making is being undertaken, legitimacy will not be a major issue because decisionmaking authority lies largely with national officials. In the lower left quadrant, attention will need to be paid to legitimacy given the more significant role of and potential exercise of judgment by international officials. But the informality of the output blunts this pressure to some degree.

In sum, more formality and greater delegation to supranational authorities brings the legitimacy of the governance process into question. This dynamic creates pressure for a system of global administrative law as a means of legitimating the policymaking being undertaken. As Martin Shapiro and Alec Stone Sweet among others have suggested, the process of defining and organizing rules is central to institutionalizing any supranational governance process.³⁰ Thus, the growth of activities which fall into the lower right quadrant represents a particular driver for globalized administrative law. Expanded activity in the lower left quadrant adds to this thrust. Refined decisionmaking rules and procedures are nonetheless useful across the full matrix as they help to ensure that, however thick the international policymaking role, what emerges meets

²⁹ Note, for instance, that as the EU's governance role has strengthened, the concerns about a "democratic deficit" have intensified. See, e.g., Heinz Hauser & Alexia Müller, *Legitimacy: The Missing Link for Explaining EU Institution Building*, AUSSENWIRTSCHAFT 17, 29 (cited in Grainne de Burca, *The Quest for Legitimacy in the European Union*, 59 THE MODERN L. REV. 349, 352); see also Joel P. Trachtman, *L'Etat C'est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 Harv. Int'l L. J. 459 (1992)(examining EU legitimacy issues).

³⁰ Martin Shapiro, *The Disinstitutionalization of European Administrative Space*, CENTER FOR CULTURE AND POLITICS (2001) available at <http://repositories.cdlib.org/iic/coop/wp5-2000-09>; Stone Sweet & Sandholtz, *supra* note 5, at 16-17.

Draft
11 April 2005

standards of good governance. In brief, Matrix I helps to predict, in a positive sense, where we might expect to find global administrative law emerging. And, in combination with the “issue” matrix introduced in Subpart E below, it provides guidance on where, in a normative sense, global administrative law should be advanced.

B. The Logic of Supranational Governance

If every country were an island, or perhaps its own planet, there would be no need for supranational governance. Each jurisdiction would manage its own affairs and there would be no externalities or interconnections that require attention.

The logic of supranational governance emerges from the presence of issues that spill across national borders and the recognition that the interdependence generated by this intertwining of fates must be managed.³¹ Efforts to address externalities may unleash a dynamic that leads to further integration as the presence of rules and institutions to manage interdependence creates a new space for supranational politics and the potential for a transnational society to emerge.³² As the sense of community grows, it becomes easier to

³¹ Held, *Transformation*, *supra* note 14; Joseph S. Nye, Jr., *Soft Power*, FOREIGN POL’Y 153, 163 (Fall 1990) (Noting that “...issues of interdependence will require collective action and international cooperation”); but see Andrew Moravcsik, *Integrating International and Domestic Politics: A Theoretical Introduction* in DOUBLE-EDGED DIPLOMACY: INTERACTIVE GAMES IN INTERNATIONAL AFFAIRS (Peter Evans, Harold Jacobson & Robert Putnam, eds. 1993) (arguing that intergovernmental cooperation not supranational decisionmaking is what works best). See also Carol Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 9-17 (explaining when governance is needed and when a “do-nothing” strategy makes sense).

³² Stone Sweet & Sandholtz at 9.

Draft
11 April 2005

establish the next round of supranational rules and institutions—and the burden of managing interdependence falls.³³

National sovereignty is, however, partially surrendered by national governments when they see it as in their best interest to do so. Trade liberalization — and the economic and political gains it promises³⁴ — requires nation-states to cooperate in establishing the terms of engagement for international commerce and in settling disputes that arise. To reap the benefits of economic integration, countries must invest in supranational governance and submit to a degree of lost national sovereignty.

Other points of interconnection are the unintended consequences of policy choices. For example, the open borders implied by free trade and the freedom to travel create an exposure to the spread of disease. Unless one is willing to forgo the benefits of trade and travel, a commitment to policy cooperation in response to infectious diseases is necessary to minimize this unintended consequence of open borders. As the costs of inaction or inattention can be high, the payoff to global governance in public health may therefore be substantial.

Some externalities are best understood as a function of the workings of the natural world rather than policy choices. A subset of environmental problems, such as climate change, are inescapably global because certain harms, such as emissions of greenhouse gases, do not stop at the border but rather blanket the earth. Absent policy cooperation at the international scale, these

³³ ANDRÉ DUA & DANIEL C. ESTY, *SUSTAINING THE ASIA PACIFIC MIRACLE: ENVIRONMENTAL PROTECTION AND ECONOMIC INTEGRATION* (1997) at 92 (explaining the interconnection between economic and political integration).

³⁴ JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* (2nd ed., 1997); ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* (1987) (reviewing the gains from trade).

Draft
11 April 2005

“super-externalities” will result in market failures, economic inefficiencies, and lost social welfare, not to mention environmental degradation.³⁵ Similarly, shared resources such as the oceans and their fisheries will be over-exploited and global public goods (such as global public health and environmental protection programs) will be under-produced without international policy cooperation.³⁶ The theoretical logic of a “matching principle” that establishes governing authority at the same scale of the issue or harm to be addressed, including the global scale, is well established.³⁷

Ultimately, the argument for global governance is an extension of the logic of international law. Without a commitment to structured cooperation, international relations remain in a Hobbesian State of Nature. While this power-dominated world may seem attractive to a hegemon, like the United States in the early 21st century, a lawless international realm is unstable and costly for those who seek to impose order on an ad hoc and issue-by-issue basis. Even those most committed to a world order based on “realism” therefore find some value in having structures in place to facilitate international policymaking.³⁸

C. Other Gains from Supranational Governance

³⁵ DUA & ESTY, *SUSTAINING*, *supra* note 35, at 59-60 (discussing the special challenge of transboundary “super-externalities”).

³⁶ Inge Kaul et al, *Public Goods* *supra* note 11, at 28; OLSON, *LOGIC OF COLLECTIVE ACTION*, *supra* note 6; Oates & J. Litvack, *supra* note 6; Albert Breton, *A Theory of Government Grants*, 31 *CAN. J. ECON. & POL. SCI.* 175 (1965).

³⁷ Butler & Macey, *Health Care Reform* *supra* note 6. See also *supra* note 6.

³⁸ Jack Snyder, *One World, Rival Theories*, *FOR. POL’Y.* (Nov./Dec 2004); HENRY A. KISSINGER, *AMERICAN FOREIGN POLICY* 77-78 (3 ed. 1977). 77-78 (All modern states face problems of bureaucratization, pollution, environmental control, urban growth which “know no national considerations” — and international approaches are required for a successful response).

Draft
11 April 2005

While the central benefit of supranational governance derives from the capacity to respond to the interdependence generated by transboundary externalities, a level of policymaking above the nation-state might be advisable for other reasons as well. Many policy problems have multiple dimensions making response strategies that draw on both decentralized and centralized information optimal.³⁹ Some aspects of policymaking (e.g., testing and technical analysis) have economies of scale which makes global governance potentially efficient. A multi-tier governance structure, with cooperation among global, national, and local authorities, therefore promises a more refined and cost-effective division of labor in policymaking.⁴⁰

Multi-tier governance may also promote welfare-enhancing regulatory competition along a vertical axis.⁴¹ The presence of global-scale authorities, as well as state/provincial and local officials, puts pressure on national governments to address harms effectively and efficiently.⁴² By generating additional policy perspectives, competing assumptions and analyses, options and assessments, global governance institutions provide a supplemental set of policymaking “laboratories.”⁴³

³⁹ Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495 (1999)(explaining the potential for efficiency gains from multi-tier governance).

⁴⁰ Ronald McKinnon and Thomas Nechyba, *Competition in Federal Systems*, in *THE NEW FEDERALISM, CAN THE STATES BE TRUSTED?* 3 (John A. Ferejohn & Barry R. Weingast, eds. 1997); Daniel A. Farber, *Environmental Federalism in a Global Economy*, 83 Va. L. Rev. 1283 (1997).

⁴¹ Daniel Esty & Damien Geradin, *Regulatory Co-opetition*, 3 J. INT’L. ECON. L. 235 (2000) (discussing the value of regulatory competition not just along a Tieboutian horizontal plane but also along a vertical dimension)

⁴² Albert Breton, *A Theory of Government Grants*, 31 CAN. J. ECON. & POL. SCI. 175, 178 (1965); Esty & Geradin, *supra* note 43 (discussing “co-opetition”)

⁴³ See, e.g., D. OSBORNE, *LABORATORIES OF DEMOCRACY* (1988); Sarah M. Morehouse & Malcolm E. Jewell, *States as Laboratories: A Reprise*, 7 ANN. REV. POL. SCI. 177 [year].

Draft
11 April 2005

They also provide a “safety net” guarding against the possibility of policy failure at the national level. International efforts to address the AIDS crisis, for example, have largely supplanted national efforts in the number of African countries where the governments have proven to be incapable of stemming the spread of the disease.⁴⁴

Finally, where normative disputes are deep and policy choices highly contested, the presence of a degree of global-scale policymaking helps to reduce the “all or nothing” nature of national politics. For example, the impact of the Bush Administration’s decision not to ratify the Kyoto Protocol — a policy choice with which a majority of Americans disagree⁴⁵ — has been softened by the existence of an international-scale climate change program that engages U.S. companies, NGOs, and state-level officials in the global response to climate change.⁴⁶ By promoting careful consideration of policy choices, providing a mechanism for benchmarking national policy results,⁴⁷ and forcing decisionmakers to justify their actions,⁴⁸ a functional global

⁴⁴ UNAIDS/WHO Policy Statement on HIV Testing, at http://www.unaids.org/NetTools/Misc/DocInfo.aspx?LANG=en&href=http%3a%2f%2fgva-doc-owl%2fWEBcontent%2fDocuments%2fpub%2fUNA-docs%2fHIVTestingPolicy_en%26%2346%3bpdf (discussing poor HIV testing services).
http://www.unaids.org/en/about+unaids/what+is+unaids/unaids_a+unique+response.asp (discussing formation of the Joint United Nations Programme on HIV/AIDS).

⁴⁵ See Yale Environmental Poll (May 2004).

⁴⁶ Bas Arts & Jos Cozijnsen, *Between ‘Curbing the Trends’ and ‘Business-as-Usual’: NGOs in International Climate Change Policies*, in ISSUES IN INTERNATIONAL CLIMATE CHANGE POLICY 243, 255 (Ekko C. van Ierland, Joyeeta Gupta, & Marcel T.J Kok eds. 2003) (discussing corporate efforts to address climate change).

⁴⁷ The power of performance benchmarking at the global-scale has been demonstrated by the Environmental Sustainability Index. DANIEL C. ESTY, MARC LEVY, TANJA SREBOTNJAK, & ALEXANDER DE SHERBININ, 2005 ENVIRONMENTAL SUSTAINABILITY INDEX: BENCHMARKING NATIONAL ENVIRONMENTAL STEWARDSHIP (2005).

⁴⁸ Sol Piccioto, *North Atlantic Cooperation and Democratizing Globalism* 495, 507, in TRANSATLANTIC REGULATORY COOPERATION LEGAL PROBLEMS AND POLITICAL PROSPECTS (George A. Bermann, Matthia Herdegen, & Peter Lindseth eds. 2001) (discussing supranational checks and balances).

Draft
11 April 2005

governance structure strengthens the system of checks and balances that limits governmental power and improves social welfare.⁴⁹

D. Why Supranational Governance is Problematic

Despite the logic of international collective action in our interdependent world, shifting policymaking responsibilities to supranational authorities presents real risks and costs. These costs reflect, in particular, legitimacy issues that arise from the increased distance from the public to supranational decisionmakers and the lack of democratic legitimacy of international bodies. Other costs can be traced to lost policy control at the national scale as well as worries that international bodies will be unaccountable and prone to mistakes, subject to manipulation by special interests, guided by voting provisions that do not reflect the realities of power, or be burdensome, adding a layer of bureaucracy and contributing to policy stasis. Some of the problems parallel those that arise in the context of delegated decisionmaking at the national level. But others are exacerbated by the absence in the international realm of the same density of rules, institutions, and processes that guide and constrain domestic administrative decisionmaking.⁵⁰

1. Fundamental legitimacy

⁴⁹ Jackson, *Changing Fundamentals*, *supra* note 15 (the international trade regime helps to discipline national governments that might otherwise be prone to welfare-reducing protectionism); Robert Hudec noted that trade rules serve to tie the hands of national governments to the mast, enabling them to ignore the siren call of protectionist special interests and domestic politics. Robert Hudec, *GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade*, 80 YALE L.J. 1299, at 1320-21.

⁵⁰ See, for example, Mashaw's discussion of the "complex and continuous" administrative state that has emerged and how it responds to various potential sources of public choice failure. JERRY L. MASHAW, *GREED, CHAOS & GOVERNANCE* 130 (1999); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, AM. POL. SCI. REV. (forthcoming 2005) at 14 (observing that internationally there is "no system that constrains power").

Draft
11 April 2005

The core criticism of global governance can be traced to the lack of electoral underpinnings for decisionmaking at the international level.⁵¹ Democracy is seen in the modern day as fundamental to legitimacy.⁵² Elections not only justify the exercise of power, they also provide a critical mechanism for accountability — electoral defeat. Additionally, they create incentives for officials to be “representative” and to stay connected to the interests of their constituents. When power is wielded without accountability all sorts of mischief is possible. Officials may pursue policy outcomes that advance their own interests rather than those of the public. This might entail an expanded bureaucracy, outright corruption, or the accepting of inducements to steer decisions in certain directions. The absence of public-mindedness or neutrality might also lead to public choice failures and special interests “capture” of the policy process.⁵³

As a general matter, the legitimacy of decisionmaking becomes more strained as the distance grows between those exercising authority and electoral legitimacy. This problem is especially acute in the international setting as the distance is not only physical but reflects deep potential differences in perspectives, assumption, and values. As Grant and Keohane argue,

⁵¹ Robert C. Dahl, *Can International Organizations Be Democratic? A Skeptic's View*, in *DEMOCRACY'S EDGES* 19 (Ian Shapiro & Casiano Hacker-Cordón eds. 1999); Pippa Norris, *Representation and the Democratic Deficit*, 32 *EUR. J. POL. RES.* 273 (1997) (focusing on representational problems in the European Union); Johan Galtung, *Global Governance for and by Global Democracy*, in *ISSUES IN GLOBAL GOVERNANCE* 195, 197 (emphasizing that the “world is *not* a global democracy”).

⁵² ROBERT A. DAHL, *ON DEMOCRACY* 37 (1998); Bodansky, *supra* note 23 at 599 (democracy has become the touchstone of legitimacy).

⁵³ David A. Dana, *Overcoming the Political Tragedy of the Commons: Lessons Learned from the Reauthorization of the Maginon Act*, 24 *C. Q.* 833 (1997) (special interests may capture government apparatus); Carol Rose, *Givenness and Gift: Property and the Quest of Environmental Ethics*, 24 *ENV'T L.* 1, 9 (1994) (intensely interested groups may come to dominate regulation).

Draft
11 April 2005

there is no “representative global public” to hold power-wielders in the international domain accountable.⁵⁴ Other scholars suggest that there are emerging global-scale communities of various kinds,⁵⁵ and some observe that accountability might be owed to an “imagined community.”⁵⁶ Frank Garcia notes that globalization and the emergence of worldwide norms in some realms, such as human rights, may be creating a limited global community.⁵⁷ But without what Keohane and Nye call an “acknowledged public” there remains an important question about who international officials have in mind when they pursue the public’s interest.⁵⁸ The policymaking complexity this introduces cannot be ignored.

2. *Lost national sovereignty*

If legitimacy stands as the most prominent complaint about supranational governance, the related issue of lost national sovereignty comes a close second. Yet, the concept of sovereignty itself has come under intense scholarly scrutiny in recent years.⁵⁹ Indeed, Stephen Krasner

⁵⁴ Grant & Keohane, *supra* note 52, at 16.

⁵⁵ Peter M. Haas, *Epistemic Communities and International Policy Coordination*, 46 INT’L. ORG. 1,1; RODGER A. PAYNE & NAYEF H. SAMHAT, *DEMOCRATIZING GLOBAL POLITICS* (1994) 1, 27 (finding global-scale knowledge communities).

⁵⁶ BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1991).

⁵⁷ Frank Garcia, *Globalization, Global Community, and the Possibility of Global Justice*, (SSRN working paper at http://papers.ssrn/paper.taf?abstract_id=661564); see also Oona Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J 935 (2002) (arguing that human rights treaties have an “expressive function” that support worldwide norms).

⁵⁸ Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in *EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* (Roger B. Porter et al., eds. 2001)

⁵⁹ Kenneth N. Waltz, *Political Structures*, in *NEOREALISM AND ITS CRITICS* 70, 90 (Robert O. Keohane, ed. 1986) (discussing the difficulty of defining sovereignty); ABRAM CHAYES & ANTONIA CHAYES, *THE NEW SOVEREIGNTY* (1995); John Jackson, *Sovereignty Modern*, 97 AM. J. INT’L. L., 782-802 (2003); Peter M. Haas, Robert O. Keohane, & Marc A. Levy, *Improving the Effectiveness of International Environmental Institutions*, 415-417 in *INSTITUTIONS FOR THE EARTH* (Peter M. Haas et al., eds. 1993).

Draft
11 April 2005

describes the term as “organized hypocrisy.”⁶⁰ John Jackson, suggests that the idea of “impenetrable competences reserved for the nation-states seems not to reflect the reality of needs for international cooperation in a globalized world.”⁶¹ Moreover, as I noted in Subpart B above, in some circumstances, such as where one faces transboundary environmental spillovers, assertions of national sovereignty fly in the face of reality. For example, greenhouse gases do not stop at national borders. Thus, ecological interdependence is a fact, and notions of national sovereignty must be adjusted in response. Nevertheless, there exists a strong desire on the part of many political communities, particularly nation-states, to retain control over policymaking, at least with regard to certain aspects of their destiny, without interference or review by supranational authorities.

Those holding power are most likely to be concerned by the diffusion of authority implied by global governance. Thus, an enduring commitment to the principle of national sovereignty is most strongly visible among national political leaders whose power would be constrained by the presence of a layer of governance above them. Similarly, those in strong states are most likely to object to any international governance that relies upon a one-nation, one-vote decision mechanism that could result in a majority of weak nation-states imposing its will on the strong.⁶² One might anticipate that hegemonic nations, such as the United States in the

⁶⁰ STEPHEN KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999).

⁶¹ John Jackson, *Changing Fundamentals supra* note 15 at 3, 4 (2005).

⁶² Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR. J. OF INT’L. L. 599 (explaining the logic of inequality); Jesse Helms, Chairman, U.S. Senate Committee on Foreign Relations, Address before the United Nations Security Council, January 20, 2000, available at www.usinfo.state.gov/regional/af/unmonth/t0012005.htm (arguing that the United Nations cannot seek “to impose its presumed authority on the American people...without their consent”);

present day, would strongly prefer an international regime with little structure where the realities of power dictate outcomes. As Kingsbury et al suggest, powerful states “will generally be suspicious of strongly legalized regimes because they reduce their discretionary influence.”⁶³ Of course, a far-sighted hegemon might try to use its position of strength to structure the rules of international relations with an eye toward the day when its dominance has passed.

3. *Downsides of Delegated Decisionmaking*

Delegated decisionmaking promises certain efficiencies in governance. Specifically, it enables elected officials to shift the “detail” work of implementing laws and other aspects of policymaking to others who have more time and expertise to devote to the issues at hand. Delegation, however, creates well-documented risks and costs.⁶⁴

As noted above, appointed decisionmakers do not have the same structure of accountability that constrains elected officials. They may not face sanctions for self-dealing or poor choices.⁶⁵ They may lack incentives to stay in touch with the concerns and interests of the public on whose behalf they are making decisions. At least in the domestic context, appointed officials generally serve at the pleasure of elected officials who can remove them for any number of reasons including sub-par results, corruption, inefficiency, or inattentiveness to the needs of the public. This threat of dismissal is less pronounced internationally.

Michael Lind, *One Nation, One Vote? That's Not Fair*, NY TIMES (23 Nov. 1994) (explaining why majoritarian voting makes no sense internationally) (cited in Bodansky, *Legitimacy supra* note 23 at 596).

⁶³ Kingsbury et al, *Emergence, supra* note 24, at 39.

⁶⁴ Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. (1986); Daniel A. Farber, *Democracy and Disgust*, 65 CHI.-KENT L. REV. 161(1989); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES PEOPLE THROUGH DELEGATION* (1993).

⁶⁵ Grant & Keohane, *Accountability, supra* note 52 at 20-21.

While delegation in the domestic context is both guided and constrained by a broad-based system of checks and balances, no similar structure exists in the international realm.⁶⁶ Some constraints exist, but notably, there is no judiciary that provides an established mechanism for cross-checking the legality and rationality of decisions made by appointed officials.⁶⁷ Questions might also be raised about whether the public will be fairly represented, given a voice in the decision process, and feel that due process has been provided.⁶⁸ It may also be more difficult to discipline bureaucratic pathologies including inertia, inefficiency, a tendency to make mistakes that go unrecognized, and manipulation by special interests.

These challenges need not, however, preclude the possibility (and perhaps desirability) of some degree of governance above the nation-state. As Francesca Bignami argues, the real issue is whether social trust and a sufficient degree of civic engagement can be established to make cooperative problem-solving possible.⁶⁹ In this regard, tradition, culture, and geography are important factors in creating the requisite sense of connectedness and community.⁷⁰

⁶⁶ SLAUGHTER, *NEW WORLD ORDER*, *supra* note 11 at 30.

⁶⁷ More accurately, there is a very limited judiciary in the context of a limited-jurisdiction World Court, see, e.g., ROSENNE SHABTAI, *THE WORLD COURT* (1995). At both the ILO and the World Bank there are administrative tribunals to review personnel decisions. The World Bank has also launched an Inspection Panel to field complaints from NGOs and citizens and to determine whether the Bank's policies and procedures have been followed in a particular project.

⁶⁸ Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985).

⁶⁹ Francesca Bignami, *The Challenge of Cooperative Regulatory Relations After Enlargement* in *LAW AND GOVERNANCE IN AN ENLARGED EUROPEAN UNION* (George Bermann & Katharina Pistor, eds. 2004); Jens Steffek, *The Legitimation of International Governance: A Discourse Approach*, 9 EUR. J. INT'L REL. 249, 256 (emphasizing the legitimacy of governance depends on shared values).

⁷⁰ MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996) (emphasizing a sense of "belonging" to a community); ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK* (1993). See also the German Constitutional Court's emphasis on a "sense of social cohesion, shared destiny, and collective self-identity" (*cited* in Joseph Weiler, *European Democracy and Its Critique*, 18 J. EUR. POL. 4 (1995); Bodansky,

Draft
11 April 2005

Cohesiveness, common destiny and trust, can, however, emerge in other ways. Who “we” are can be shaped by economic ties, ecological inks, or efforts to work together on shared problems.⁷¹

A movement towards global governance runs hard also against a presumption in favor of decentralized decisionmaking that exists both in the United States in the form of federalism and in Europe in the commitment to subsidiarity.⁷² The logic of decentralized decisionmaking is powerful insofar as the world is diverse and officials at a national scale are more likely to be aware of local circumstances, preferences and views about the fair distribution of the costs and benefits of governmental actions.⁷³ The preference for lodging decisionmaking authority at the most decentralized level possible also preserves legitimacy and serves to limit delegation to higher-level officials, where their exercise of power might be seen as problematic.

Whether international cooperation can actually be achieved and effective global governance established represents another point of skepticism about supranational

Legitimacy supra note 23, at 615-616; Stephen M. Weatherford, *Measuring Political Legitimacy*, 86 *Am. Pol. Sci. Rev.* 149, 151 (1992).

⁷¹ Stone Sweet and Sandholtz, *supra* note 5 at 6-7 (discussing shift in identity within the EU); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 *MICH. L. REV.* 570, 639 (1996) (emphasizing ecological connectedness).

⁷² Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 *U. TOL. L.R.* 619 (1978); ANTONIO ESTELLA DE NORIEGA, *THE EU PRINCIPLE OF SUBSIDIARITY AND ITS CRITIQUE* (2003); Robert Howse & Kalypso Nicolaidis, *Introduction: The Federal Vision and Legitimacy in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE US AND EU*, (Kalypso Nicolaidis & Robert Howse, eds. 2002); Andrew Moravcsik, *Federalism in the EU: Rhetoric and Reality in NICOLAIDIS & HOWSE, FEDERAL VISION*; Cary Coglianese, *Securing Subsidiarity: The Institutional Design of Federalism in the US and Europe in NICOLAIDIS & HOWSE, FEDERAL VISION*.

⁷³ As I discuss in Part III below, it is the absence of common values and the lack of convergence around normative judgments that makes delegation to supranational officials unworkable in some situations. So substantive use of subsidiarity as a non-delegation doctrine makes sense. Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranational: The Example of the European Community* 99 *COL. L. REV.* 628, 723 (1999) (arguing that the EU faces an insurmountable challenge in democratic governance)

Draft
11 April 2005

decisionmaking. Many national officials and citizens worry about turning over responsibility for important domains of policy to an ineffectual United Nations and about the efficacy of international policy initiatives generally.⁷⁴

Finally, questions about the international policymaking *process* cast a shadow of doubt over global governance, especially in the United States.⁷⁵ America's strong legal culture and its highly evolved modern administrative state establish a set of procedural expectations for "good governance" that international policy processes may often fail to meet. As I discuss in more detail below, those living under parliamentary systems, where legislative and executive functions are more deeply interwoven, may have less fixed assumptions about the necessity of a robust structure of administrative law to both constrain and improve delegated decisionmaking. However, even when tested against modest expectations, the rules and procedures of many international organizations come up short.

E. Balancing the Costs and Benefits of Supranational Governance

How controversial the exercise of delegated power will be depends on the sort of issue that is under consideration. Where a matter is largely scientific or technical, having designated experts address the problem may not create concerns. But as an issue becomes more political or

⁷⁴ John Jackson, *Changing Fundamentals*, *supra* note 15, at 8 (noting the difficulties in the Balkans, Rwanda, Darfur and other UN failures).

⁷⁵ John R. Bolton, *Should We Take Global Governance Seriously?* 1 CHI. J. INT'L. L. 205 (2000) (raising doubts about international decision processes).

Draft
11 April 2005

normatively charged, delegation to those without electoral legitimacy becomes more problematic. The more sharply values diverge, the more intense will be the discomfort.

Where political judgment is required, it therefore becomes more important that decisionmakers have democratic legitimacy and act on behalf of a community or *demos*. The public must identify with and accept the legitimacy of the decisionmaker — if not agree with his or her policy judgment. As noted above, there exists an extensive literature on how political identity is established, much of it centered on a sense of community and “connectedness.”⁷⁶ As the scale of governance rises, therefore, legitimacy issues get thrown into higher relief – and the prospect of global choices that do not match national preferences looms larger. It is the risk of and burden from such mismatches that represents the central cost of global governance.

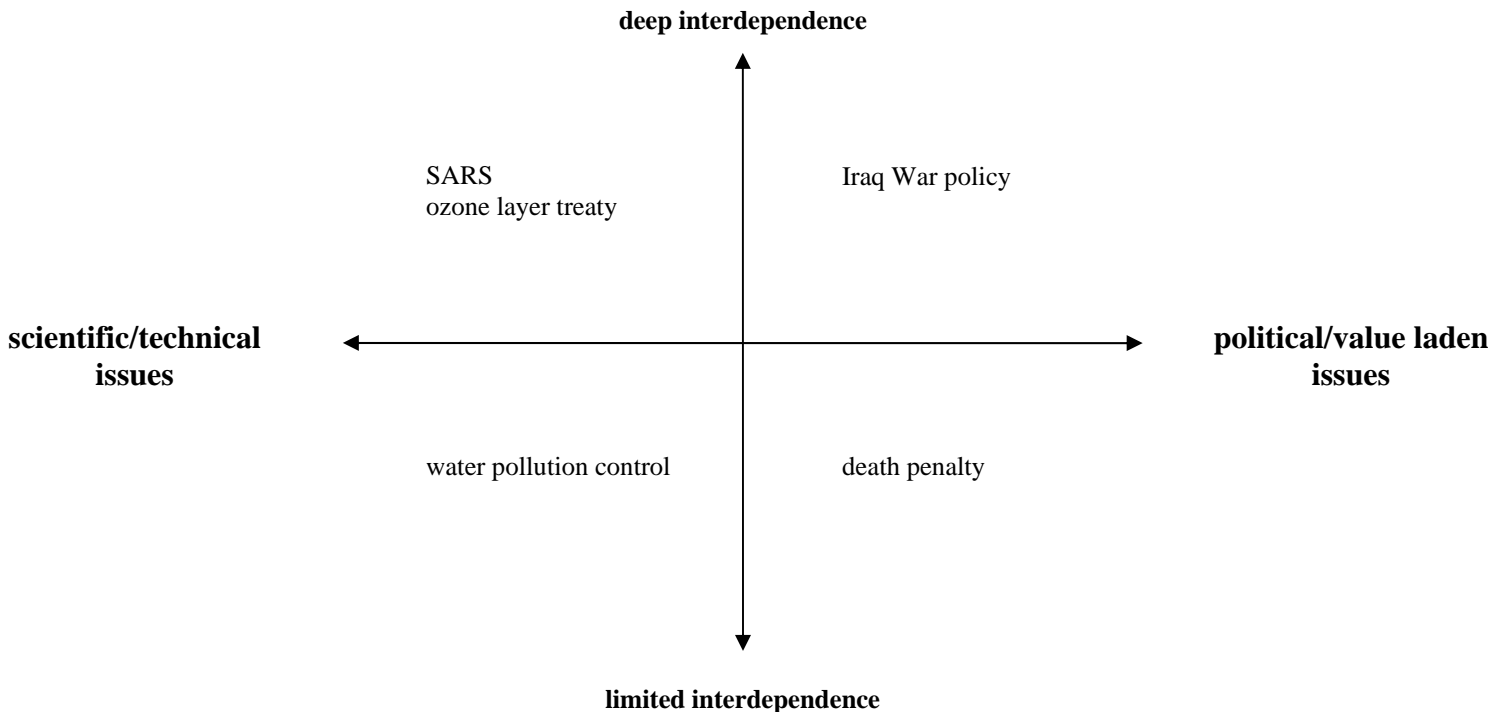
The benefits and costs of supranational governance identified above allow construction of a second “legitimacy” matrix. In this issue-oriented matrix, the benefits of supranational collaboration, emphasized by neofunctionalists (such as Haas and Deutsch), are played off against the costs of shifting the locus on governance to the supranational level, as stressed by intergovernmentalists (such as Keohane and Moravcsik)⁷⁷, highlighting the challenge of global governance. The vertical axis represents a scale from deep interdependence (where the benefits of supranational policy coordination are highest) to limited interdependence (where the payoff to international coordination will be smaller). The horizontal axis offers a spectrum from purely

⁷⁶ See *supra* note 64.

⁷⁷ Keohane, *supra* note 52; Andrew Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmental Approach*, 31 J. COMMON MARKET STUDIES 473 (1993); Andrew Moravcsik, *Liberal Intergovernmentalism and Integration: A Rejoinder*, 33 J. COMMON MARKET STUDIES 611 (1995).

scientific or technical policy choices to deeply political ones with the potential for significant normative divergence across countries. This axis reflects the rising cost of supranational governance toward the “political” end of the spectrum as measured by strained legitimacy due to a lack of shared values, common political identity, and sense of community.

Matrix 2: Costs and Benefits of Supranational Governance



In the upper left quadrant, where interdependence is substantial but the issues are relatively narrow and technical, delegation to international bodies is likely to be least problematic.⁷⁸ Given the technical expertise of the international bodies, the relatively non-political nature of these problems, and the limited scope for normative dispute, a measure of

⁷⁸ Peter L. Lindseth, *The Contradictions of Supranationalism: Administrative Governance and Constitutionalization: Integration Since the 1950s*, 37 LOY. L.A. L. REV. 363, 365 (2003).

Draft
11 April 2005

supranational policymaking is likely to be accepted. The SARS crisis, where the WHO played a leading role, and the effort to phase out chlorofluorocarbons (CFCs) that damage the Earth's protective ozone layer, where the United Nations Environment Program (UNEP) organized the global response, offer examples of activities in this quadrant. Note that the trade liberalizing work of the GATT in its early years fell largely into this zone. Recently, however, trade policy has become much more political, so the work of the WTO is edging toward (and in some cases is in) the upper right quadrant.

For issues in the highly political upper right quadrant, questions about the degree of delegation to supranational officials and entities are likely to emerge with force no matter that a high degree of interdependence promises significant returns to cooperation.⁷⁹ International bodies operating in this zone of greater political sensitivity need more fully developed procedures to establish the legitimacy of their policymaking role. Clear mechanisms for dodging issues that are “too political” may also be useful.

Supranational authorities operating in the lower left quadrant would be expected to have limited authority to act given limited interdependence. Activities with a scientific or technical focus, such as data exchange or policy benchmarking, may offer some benefits at low cost—meaning an international body working in this zone would likely not face too much hostility.

In the lower right quadrant, delegation to global bodies will be most resisted and the legitimacy of international governance hardest to establish given the combination of high

⁷⁹ Devesh Kapur, *The Changing Anatomy of Governance of the World Bank*, in *REINVENTING THE WORLD BANK* 54, 68 (Jonathan R. Pincus & Jeffrey A. Withers eds. 2002) (discussing increased politicization of the World Bank).

Draft
11 April 2005

political sensitivity and low interdependence. International bodies exercising authority in this zone need to tread very lightly and have firmly established procedures for derogation by national governments.

Whatever activities are to be undertaken in the name of global governance must promise benefits that exceed the costs from the perspective of the nation-states setting up the global-scale regime.⁸⁰ And this is where global administrative law comes into play. Delegating decisionmaking always invites legitimacy questions and crises.⁸¹ But a regime of carefully established rulemaking procedures promises to contribute directly to the perceived legitimacy of supranational policymaking and to provide a critical tool for indirectly maximizing the benefits of global governance and minimizing the risks and costs of lodging a degree of decisionmaking authority with international officials. This potential will be spelled out in greater detail in Parts II and III below.

Taken together, Matrices 1 and 2 demonstrate the interplay between institutions and issues in establishing supranational governance legitimacy. Where interdependence is significant, we can expect some movement toward supranationalism, but only where a foundation of legitimacy has been developed commensurate with the “politicalness” of the issues to be addressed. Given the centrality of procedural legitimacy in the supranational governance

⁸⁰ Daniel C. Esty and Robert Mendelsohn, *Moving From National to International Environmental Policy*, 31 POL. SCI. 225 (1998) (laying out a cost-benefit theory of international-scale policymaking); Oona Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1825 (2003) (noting that compliance with treaties depends on how countries view these costs and benefits).

⁸¹ JAMES O. FREEDMAN, *CRISIS & LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* (1978) (discussing the history of U.S. administrative law as an extended crisis over legitimacy); Ernest Gellhorn, *Opening Remarks: Administrative Law in Transition*, 38 ADMIN. L.R. 107 (1986).

context, investments in global administrative law should be made where the logic of supranational decisionmaking is strong but the capacity for good governance at the international scale is lacking.

II. Foundations for Supranational Good Governance

The discomfort with supranational governance identified in Part I largely centers on questions of legitimacy. What legitimate global governance would look like is not, however, easy to define. Franck suggests that legitimacy is the “compliance pull” of a set of rules or requirements.⁸² Steffek argues that legitimacy relates to the normative conditions for exercising power.⁸³ Bodansky similarly sees legitimacy as the justification of authority.⁸⁴ In the modern democratic tradition going back to Rousseau, the right to exercise power has been connected to the expressions of majority will, making legitimacy a function of electoral success.⁸⁵ Many scholars thus see democratic foundations for the exercise of power as the *sine qua non* of legitimacy.⁸⁶ To the extent this is true, global governance is doomed to illegitimacy. There are,

⁸² Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 51 (1992).

⁸³ Jen Steffek, *Legitimation supra* note 71 at 251-2.

⁸⁴ Bodansky, *supra* note 23 at 600-601.

⁸⁵ JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Maurice Cranston trans., 1968); Heinz Hauser & Alexia Müller, *Legitimacy: The Missing Link for Explaining EU Institution Building*, AUSSENWIRTSCHAFT 17, 29 (cited in Grainne de Burca, *The Quest for Legitimacy in the European Union*, 59 THE MODERN L. REV. 349, 352) (discussing lack of EU electoral legitimacy); R. Ladenson, *In Defense of a Hobbesian Conception of Law*, 9 PHIL. & PUB. AFF. 139 (1980); Bernard Manin, Adam Przeworski & Susan C. Stokes, *Elections and Representation*, in DEMOCRACY, ACCOUNTABILITY & REPRESENTATION 29, 29 (Bernard Manin, Adam Przeworski & Susan C. Stokes eds. 1999).

⁸⁶ DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (1995); Bodansky, *Legitimacy supra* note 23, at 599 (democracy is the “touchstone of legitimacy in the modern world”).

Draft
11 April 2005

however, other foundations for legitimacy that interact with and may substitute for democratic underpinnings.

Much of the academic debate over legitimacy has arisen in the context of determining when the authority of a nation-state should be respected.⁸⁷ The question of legitimacy has a slightly different flavor in the context of trying to understand when some delegation of authority to an international body is justified or whether the policies and actions advanced by international decisionmakers in limited zones of competence are entitled to support and adherence. The legitimacy of *governance* must therefore be distinguished from that of *governments*.⁸⁸

A. *Democratic Legitimacy*

Dahl and others steeped in the Rousseauian electoral tradition cast doubt on whether global governance can ever have democratic legitimacy.⁸⁹ Bodansky argues that the very concepts of representative democracy and majority rule depend on having a clear understanding of who the “people” are that are being represented.⁹⁰ Undoubtedly the absence of electoral lines of political accountability makes legitimacy harder to establish. The EU’s “democratic deficit”

⁸⁷ Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, INT’L. & COMP. L. Q. 545, 545; Franck, *The Emerging Right supra* note 90 (other states are starting to recognize as legitimate only those that have democratic governments).

⁸⁸ Franck, *Emergent Right, supra* note 90, at 50-51; Alfred C. Aman, Jr., *The Limits of Globalization and the Future of Administrative Law*, 8 IND. J. OF GL. L. STUDIES 379 (2001); Oran R. Young, *Rights, Rules, and Resources*, 3-5 in WORLD AFFAIRS IN GLOBAL GOVERNANCE (Oran R. Young, ed.) (1997).

⁸⁹ Robert A. Dahl, *Can International Organizations Be Democratic?: A Skeptic’s View*, in DEMOCRACY’S EDGES 19 (Ian Shapiro & Casiano Hacker-Cordón 1999); Robert O. Keohane, *International Institutions: Can Interdependence Work?*, 110 FOR. POL’Y. 82 (1998); James Tobin, *A Comment on Dahl’s Skepticism* 37, 38, in Shapiro & Hacker-Cordón 1999 (agreeing with Dahl from an economist’s perspective). Johan Galtung, *Global Governance for and by Global Democracy* 195, 197, in ISSUES IN GLOBAL GOVERNANCE (1995).

⁹⁰ Bodansky *supra* note 23 at 599.

Draft
11 April 2005

has become a major topic of scholarly discussion and similar concerns have been focused on other supranational governance efforts.⁹¹

In the face of the democratic imperative for legitimacy, David Held has called for global-scale elections and an “assembly of democratic peoples.”⁹² Richard Falk and Andrew Strauss have similarly called for creation of a global parliament.⁹³ But direct election of international officials seems unlikely any time soon. This fact does not end the discussion about the legitimacy of global-scale policymaking.⁹⁴ Keohane, Nye, Franck, Stewart, and other scholars have argued that international policies can have “rightful authority” even without direct elections.⁹⁵ They see the potential for “surrogate politics” and a degree of quasi-democratic legitimacy being established through mechanisms other than elections.⁹⁶ Similarly, Weiler argues that identity and “citizenship” at multiple levels of political affiliation rather than

⁹¹ Giandomenico Majone, *Europe's “Democratic Deficit”: The Question of Standards*, 4 EUR. L. J. 5, 18-20 (1998); Joseph H.H. Weiler & Joel Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT'L. L. & BUS. 354 (1996-97); Lindseth, *Democratic Legitimacy*, *supra* note 75 (neither EU nor other supranational bodies can become constitutional organizations as they lack a *demos*); Eric Stein, *International Integration and Democracy: No Love at First Sight*, AM. J. INT'L. L. 489, 490 (2001) (discussing the “democracy-legitimacy” deficit).

⁹² DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER* (1995) at 273.

⁹³ Richard Falk & Andrew Strauss, *Toward Global Parliament*, FOR. AFF. (January/February 2001).

⁹⁴ Keohane & Nye, *Club Model*, *supra* note 14.

⁹⁵ Robert O. Keohane, *International Institutions: Can Interdependence Work?*, 110 For. Pol'y 82 (1998); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L. L. 705, 752 (1988) (asserting that international institutions can play governance role similar to those of national governments); Joseph S. Nye, Jr., *Globalization's Democratic Deficit*, 80 FOR. AFF. 1, 4 (2001).

⁹⁶ Franck, *Emerging Right*, *supra* note 90 at 51 (stressing that legitimacy is always a matter of degree); Richard Stewart, *Model for Global*, *supra* note 25 (highlighting various mechanism including “domestic checks” on global decisionmaking); Stewart, *Reformation* (1975), *supra* note 70 (on participation mechanism creating “surrogate politics”).

Draft
11 April 2005

democracy are what is essential for legitimacy.⁹⁷ Moreover, as I discuss below, legitimacy, at least in some governance contexts, can be established in other ways.

B. Expertise-based legitimacy

Legitimacy may emerge from expertise and the ability to generate social welfare gains. In this Weberian tradition, a rational/legal governance process yielding good results is what matters.⁹⁸ Recognizing that democracy sometimes produces sub-optimal outcomes, certain decisions might even be delegated to “non-political” actors whose knowledge, expertise, and neutrality and insulation from politics is prized.⁹⁹ The modern American administrative state arising out of the New Deal largely reflects this approach to policymaking.¹⁰⁰ Other examples of efficacy-based legitimacy abound. Lee Kuan Yew’s government in Singapore never had deep democratic footings, but its exercise of power was accepted based on its ability to improve social welfare.

Steffek takes the Weberian logic one step further and argues that an international organization may be the “perfect bureaucracy” with a high potential for rational-legal legitimacy because the detachment of international civil servants from their local backgrounds and

⁹⁷ Joseph H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos, and the German Maastricht Decision*, 1 EUR. L. J. 219 (1995) (developing the concept of “critical citizenship”).

⁹⁸ MAX WEBER, *ECONOMY AND SOCIETY* 223 (Guenther Roth and Claus Wittich eds. 1968) (asserting that the “primary source” of bureaucratic administration’s “superiority” lies in technical knowledge, and that “the legitimacy of an order may...be guaranteed also (*or merely*) by the expectation of specific external effects, that is, by interest situations.”); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT. ORG. 379, 388, (discussing the Weberian efficacy standard as one of the key components of legitimacy), citing MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 953 (Guenther Roth and Claus Wittich eds. 1978).

⁹⁹ Peter Lindseth, *Democratic Legitimacy*, *supra* note 75 (discussing the political and institutional triumph of the “depoliticized” technocrat).

¹⁰⁰ MASHAW, GREED, CHAOS *supra* note 52, at 7-8 (discussing New Deal emphasis on “good government” and suspicion of popular democracy).

Draft
11 April 2005

prejudices heightens their ability to bring expertise to bear free from the biases of national identity and cultural orientation that might otherwise cloud their judgment.¹⁰¹ This potential for expertise-based legitimacy is especially important in the international realm as demonstrated capacity to deliver good results is likely to be the main attraction to nation-states of delegation of elements of policymaking to supranational bodies.

C. *Systemic legitimacy*

The over-arching governance structure also shapes the legitimacy of the policy choices that emerge. Madisonian or systemic legitimacy relies on the dispersion of policymaking responsibilities among contending institutions as a way to protect individual liberty, limit the potential abuses of power, and promote effective decisionmaking.¹⁰² In the U.S. context, the separation of powers provides legislative, executive, and judicial authorities with certain primary responsibilities and oversight roles in other cases. This structure generates a mix of institutional capacities and strengths, blending democratic legitimacy and expert-based authority.¹⁰³ The system as a whole offers a web of checks and balances designed to produce pragmatic governance that advances accountability and efficacy by means of institutionalized cross-

¹⁰¹ Steffek, *supra* note 71, at 261. Of course, other scholars, such as Kahan and Braman would deny that such neutral expertise is possible. Donald Braman & Dan M. Kahan, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 9 YALE LAW SCHOOL, PUBLIC LAW RESEARCH PAPER No. 05. (2001)

¹⁰² MASHAW, GREED, CHAOS *supra* note 52, at 4-6; James Madison, *Federalist #10* in THE FEDERALIST PAPERS, available at http://thomas.loc.gov/home/fedpapers/fed_10.html.

¹⁰³ See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. (2000) (spelling out how the power sharing processes work).

Draft
11 April 2005

checks.¹⁰⁴ Systemic legitimacy promises to be important supranationally as a substitute for democratic legitimacy.

D. Procedural legitimacy

In addition to the electoral underpinnings of the decisionmaker, the substance of the decisions made, and the architecture of the decisionmaking process, the legitimacy of governance also turns on the rulemaking procedures in place. As Habermas argues, the structure of debate and dialogue matters.¹⁰⁵ Administrative procedures therefore legitimate policymaking directly by providing a “right process” for decisionmaking.¹⁰⁶ Because good governance procedures can (a) partially substitute for missing political accountability, and (b) enhance the rational/legal foundations for the policy choices that emerge and thereby increase the odds that these outcomes will be welfare enhancing, and (c) help to create appropriate checks and balances on the exercise of powers, the establishment of a basic system of administrative law can indirectly contribute to legitimizing governance as well.

Habermas’s view of discursive legitimation builds upon Weber’s logic of rational/legal outcomes but stresses the give-and-take of political deliberation as the critical element that leads to legitimacy derived from the authority of reason.¹⁰⁷ The expectation is that a structured

¹⁰⁴ William N. Eskridge, Jr., and John Ferejohn, *The Article I, Section 7 Game*, 80 GEORGETOWN L.J. (1992) 523 (explaining the interplay of legislative, executive, and judicial authority); DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* 293 (1987) (arguing that the authority of the international legal order comes from its “overall systemic image”).

¹⁰⁵ JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (1984) *supra* note 16 (explaining the critical role of deliberation); PAYNE & SAMHAT, *supra* note 57 (discussing Habermas’s deliberative approach to legitimacy).

¹⁰⁶ THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) (emphasizing “right process”).

¹⁰⁷ Steffek, *supra* note 71, at 263 (explaining the discursive foundation for legitimacy that Habermas develops).

Draft
11 April 2005

dialogue, involving competing claims that are constructively debated, leads to outcomes based on rational participation and reason.¹⁰⁸ Others have come to stress a similar dialogic foundation for governmental legitimacy.¹⁰⁹ Manin, for instance, argues that the legitimacy of a governance process depends on the “result of general deliberation, and not the expression of a general will.”¹¹⁰ Fearon emphasizes the importance of discussion to “help render the ultimate choice legitimate in the eyes of the group.”¹¹¹ Civic republicans also stress the importance of deliberation as a foundation for good governance and legitimacy.¹¹² In the absence of democratic legitimacy, a set of rules and procedures – undergirded by administrative law – emerges as a key to broader acceptance of global governance.¹¹³

While international bodies cannot easily correct their democratic deficits nor readily overcome complaints about lost national sovereignty, they can move toward procedures that reflect good governance. As Richard Stewart observes, administrative law offers both “affirmative” (power-directing) and “negative,” (power-checking) functions.¹¹⁴ In the domestic

¹⁰⁸ HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION*, *supra* note 16; PAYNE & SAMHAT, *DEMOCRATIZING GLOBAL POLITICS*, 20 (discussing Habermas’s focus on deliberation as “inclusive and public discussion of common concerns”). Scholars have continued to elaborate and expand upon Habermas’s deliberative framework. *See, e.g.*, Joshua Cohen, *Democracy and Legitimacy* 185, in *DELIBERATIVE DEMOCRACY* (Jon Elster ed. 1999).

¹⁰⁹ *See, e.g.*, BRUCE ACKERMAN & JAMES FISHKIN, *DELIBERATION DAY* (2004)

¹¹⁰ Bernard Manin, *On Legitimacy and Political Deliberation*, 15 *POL. THEORY* 339 (1987) at 352 (quoted in Steffek at 263).

¹¹¹ James D. Fearon, *Deliberation as Discussion* 44, 45, in *DELIBERATIVE DEMOCRACY* (Jon Elster ed. 1998).

¹¹² BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 353 (1980) (discussing the necessity of vindicating all intuitions through dialogue); JAMES FISHKIN, *DEMOCRACY AND DELIBERATION* (1991); Joshua Cohen, *Democracy and Liberty*, *supra* note 120; IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* (2000). Koh’s emphasis on transnational legal process as a mechanism for justifying international law draws on the same vein of thinking. Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181 (1996).

¹¹³ Franck 1992 at 51; Lindseth, *Democratic Legitimacy*, *supra* note 75 (as a substitute for hierarchical authority).

¹¹⁴ Stewart, *Twenty-First Century*, *supra* note 2, at 457 (some problems of global economic integration exceed domestic regulatory capacity).

Draft
11 April 2005

context, where governments are strong, the power-checking function will be most critical. In the international domain, however, where international institutions are relatively weak, the power-directing and efficacy-enhancing role of administrative law takes on greater significance. In a variety of ways, an administrative law regime can both compensate for and enhance other elements of legitimacy.

First, good governance procedures can substitute, in part, for the lack of democratic footings and political accountability that exists in the international domains by structuring the policymaking process in ways that require decisionmakers to engage in a transparent and vigorous political dialogue. This forces them to check their analytic frameworks, assumptions, and policy answers against competing viewpoints, demonstrate that their choices are legal and rational, and subject their results to review and oversight by those with electoral legitimacy. Moreover, a process that promotes broad-based participation of individuals and interest groups can provide some of the “connectedness” that links the general public and decisionmakers in a manner that ensures that political choices represent the will of the people and that decisionmakers are held accountable for their actions.¹¹⁵

Second, a transparent policy process that requires a set of procedural “gates” to be cleared – notice and comment requirements, public hearings, an obligation to explore policy

¹¹⁵ Daniel C. Esty, *NGOs at the World Trade Organization: Cooperation, Competition or Exclusion*, 1 J. INT’L. ECON. L. 123 (arguing dialogue with NGOs and the business community would enhance WTO decisionmaking); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 676 (1998) (discussing empowering actors to participate in transnational legal process and the need to expand participation of various actors); Kal Raustiala, *The “Participatory Revolution” in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537 (1997).

Draft
11 April 2005

alternatives, a mechanism to test whether decisions are well reasoned, etc.¹¹⁶ – promises to generate robust debate that tests the legal/rational foundations for selected policy outcomes and thus enhances Weberian legitimacy.

Third, an effective system of administrative law provides checks and balances that protect against abuses of power, special interest distortions of the policy process, self-dealing by decisionmakers, and corruption.¹¹⁷ A regime of basic global administrative law can thus help to create systemic legitimacy that provides a degree of political accountability even where the link to elections is somewhat remote.¹¹⁸

III. Building Global Administrative Law

There is much talk in both policy and academic circles about *good governance* but little work has been done to define this term in a rigorous way.¹¹⁹ In this Part, I identify a core set of

¹¹⁶ The full set of possible procedural gates is discussed in Part V below.

¹¹⁷ DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES 293-4 (1987)(discussing systemic legitimacy in the international realm).

¹¹⁸ David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769, 798 (1994) (emphasizing “procedural integrity” as a basis for legitimacy); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law* in INTERNATIONAL INSTITUTIONS, LAW AND CONTEMPORARY PROBLEMS (forthcoming 2005) at 7 (discussing how administrative law can provide legitimacy).

¹¹⁹ Most sources have focused on defining global legitimacy, not good governance. See, e.g., Bodansky 1999; Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L. L. (1988); and Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT’L. ORG. (1999). Some, however, have attempted to begin defining good governance. SLAUGHTER, A NEW WORLD ORDER *supra* note 11 (Slaughter does not use the term “good governance” but suggests “five basic principles for an inclusive, tolerant, respectful, and decentralized world order.”). *Governance for Sustainable Human Development A UNDP Policy Document*, available at <http://magnet.undp.org/policy/chapter1.htm> (stating, “Good governance is, among other things, participatory, transparent, and accountable. It is also effective and equitable. And it promotes the rule of law”).

Draft
11 April 2005

good governance goals. I then specify a series of administrative law tools and strategies that could be deployed to advance these goals in the international policymaking domain.

A. Attributes of Good Governance

A number of attributes have been associated with good governance including transparency¹²⁰, fairness¹²¹, participation¹²², “checks and balances,”¹²³ control over special interests,¹²⁴ promotion of robust political debate,¹²⁵ and generation of effective policy outcomes.¹²⁶ I believe that good governance can simply be defined as policymaking with legitimacy. But neither what constitutes *good* governance nor legitimacy is fixed. What is optimal will vary with the context.

I see twelve core elements of an emerging consensus over what constitutes *good governance*. Each of these elements can be connected to one or more of the four foundations of legitimacy identified in Part II. Just as legitimacy depends, in some circumstances, more on one

¹²⁰ See Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 INT’L STUDIES Q. 109, 110-111 (overview of the importance of transparency in regimes).

¹²¹ Gibson 469: *But see* Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) (demonstrating that administrative law may deceive us into thinking decisionmaking is objective).

¹²² Stewart, *Reformation supra* note 70 (emphasizing the role of participation as a way to generate surrogate politics). See also DAVID G. VICTOR, KAUL RAUSTIALA & B. SKOLNIKOFF, *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS* 665 (arguing that participation “matters” in producing effective commitments).

¹²³ MASHAW, *GREED CHAOS, supra* note 52 (discussing various ways administrative law limits government and guides decisionmaking); SUSAN ROSE ACKERMAN, *CONTROLLING ENVIRONMENTAL POLICY* 59 (1995) (contrasting the extensive structure of administrative constraints in U.S. law with the weaker German system of checks and balances).

¹²⁴ Sunstein, *Factions, supra* note 66 (showing how administrative law helps to control special interests). But see Mathew D. McCubbins, Roger D. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987) (arguing that administrative law may simply serve to consolidate interest group victories).

¹²⁵ Sunstein, *Factions, supra* note 66 (showing how the APA promotes deliberation).

¹²⁶ STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982); *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993).

foundation than another, the most critical elements of good governance will vary depending on the context. And just as the sources of legitimacy interact in complex ways — reinforcing and substituting for each other and sometimes working at cross purposes — the elements of good governance will at times reinforce each other and at other times be in tension.

Chart 2 provides a summary of the core elements of good governance I have identified.¹²⁷ The text that follows briefly explains each one and discusses how the concept translates into the supranational context.

Chart 2: Elements of Good Governance

- A. Rousseauian (democratic) legitimacy
 - 1. representativeness
 - 2. accountability
- B. Weberian (expertise-based) legitimacy
 - 3. rationality
 - 4. efficacy
 - 5. efficiency
 - 6. neutrality
- C. Madisonian (systemic) legitimacy
 - 7. power sharing
 - 8. legality

¹²⁷ Others have developed similar lists. See, e.g., Benedict Kingsbury, Richard Stewart, & Nico Krisch, *Administrative Law and Global Governance: Research Project Outline* at 6.

9. fairness
- D. Habermasian (procedural) legitimacy
 10. deliberation
 11. transparency
 12. participation and due process

1. *Representativeness*

The essence of the shift from direct democracy to representative democracy is the transfer of decisionmaking responsibilities from the whole to a subset of the community. When a further delegation to unelected officials occurs, critical questions of the representativeness of the decisionmakers and the vitality of the “majority will” arise. These questions multiply as the scale of delegation becomes international.¹²⁸

As the links to elected officials stretch, alternative mechanisms to ensure that decisionmakers are aware of the concerns, views, and circumstances of the public become critical. As Richard Stewart highlighted in discussing the “reformation” of American administrative law in the 1960s and 1970s, public participation in the regulatory process may help to ensure that delegation does not translate into unrepresentative results.

2. *Accountability*

¹²⁸ Robert Howse, *Transatlantic Regulatory Cooperation and the Problem of Democracy*, in TRANSATLANTIC REGULATORY COOPERATION, George A. Berman, Matthias Herdegen, and Peter A. Lindseth, eds. (2001).

Draft
11 April 2005

Good governance requires that policymakers act in the interests of the citizenry on whose behalf they have been given authority to make decisions. In this context, Anne-Marie Slaughter stresses “responsiveness to the people.”¹²⁹ Ruth Grant and Bob Keohane argue that the essence of accountability lies, in *ex post* opportunities for the public to hold decisionmakers “to a set of standards, and to impose sanctions if they determine that those responsibilities have not been met.”¹³⁰ In the domestic context, elections are the central accountability mechanism. Those who do not meet the public’s standards and expectations can be defeated at the ballot box and stripped of power. In administrative agencies, the link to the public is somewhat more tenuous. In most systems, however, the top officials are appointed and approved by elected officials. Those who fail to follow the Prime Minister or President’s policies can be fired or reassigned.¹³¹

It is important to note that elections are not the only mechanism for ensuring the accountability of those exercising delegated authority. Markets, aggressive officials in other governmental bodies (think of Elliot Spitzer), NGOs, and the media can also force power-wielders to explain their actions and justify their policy choices. In fact, Grant and Keohane identify seven alternative accountability mechanisms that might serve to discipline supranational policymaking.¹³² The more tenuous the link between a delegated decisionmaker and electoral legitimacy, the greater the emphasis that needs to be placed on alternative ways to expose

¹²⁹ Anne-Marie Slaughter, *Agencies on the Loose? Holding Government Networks Accountable*, in TRANSATLANTIC REGULATORY COOPERATION 521, 523 (George A. Bermann, Mattias Herdegen, & Peter L. Lindseth eds. 2001) (defining accountability as “responsiveness to the people.”); Grant & Keohane, *supra* note 52, at 3.

¹³⁰ Grant & Keohane, *supra* note 52, at 3.

¹³¹ Note, however, that civil servants, with protected tenures, are somewhat immune to this sort of accountability. Thus, mechanisms used to ensure the accountability of civil servants may be useful in the international context.

¹³² Grant & Keohane, *supra* note 52, at 23-26.

Draft
11 April 2005

decisionmakers to review and potential sanction.¹³³ Global administrative law could provide *connectedness* and a range of mechanisms — institutionalized review processes, oversight hearings, limited terms, and reappointment provisions — to ensure that international decisionmakers are made to answer for their policy choices.

3. *Rationality*

At the heart of Weber’s legal-rational emphasis lies the intuition that policies founded on careful consideration of the facts and good analysis are more likely to be successful. The Weberian technocratic model depends fundamentally on bringing knowledge, information, and expertise to bear and promoting efficiency and efficacy by requiring that decisionmakers explain their choices and give “reasons” for the policy options they choose to follow.¹³⁴ Thus, in pursuit of Weberian legitimacy, global administrative law should seek to require decisionmakers to examine all relevant information, to think hard about policy options, to consider alternative lines of analysis, to screen out special interest pleading, and to justify their decisions as consistent with the facts and analytically sound – or, at least, not arbitrary and capricious.¹³⁵ Rationality would also be enhanced by systems of checks and balances, particularly “second opinion”

¹³³ Susan Rose Ackerman identifies five sorts of monitoring and participation tools to enhance accountability. SUSAN ROSE ACKERMAN, *DEMOCRATIC CONSOLIDATION AND POLICY-ENHANCING ACCOUNTABILITY, FROM ELECTIONS TO DEMOCRACY* (2005) (looking at Poland and Hungary).

¹³⁴ Weber, 1978 at 979 (cited in Steffek at 261); Kingsbury et al, *Emergence of Global Administrative Law*, *supra* note 24, at 24 (discussing the need for reasoned decisions); Steffek, *supra* note 71, at 263 (“reasoning” or “giving reasons” lies at the heart of the communicative process that legitimates governance); Colin S. Diver, *Policymaking Paradigms in Administration Law*, 95 Harv. L.R. 393-434 (1981).

¹³⁵ Steffek, *supra* note 71, at 250 (discussing the need for justification to legitimize international governance). Avoiding “arbitrary and capricious” policy choices stands at the heart of American Administrative Law. JERRY L. MASHAW, ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* (5th ed. 2003) at 509-10. See also, JÜRGEN SCHWARZE, *EUROPEAN ADMINISTRATIVE LAW* (1992).

mechanisms that permit review or appeal of decisions. Such cross-checks create a capacity to test assumptions, triangulate on “the truth,” and catch mistakes.

Rationality also promotes understanding by the regulated community. This emphasis helps to promote successful implementation of policy decisions, increases clarity, and cuts costs by improving predictability. A focus on understanding also helps to build consensus around the prevailing norms and to inculcate common values over time.¹³⁶ However, as Kahan and Brauman demonstrated, expert-based decisionmaking may prove to be problematic as people disagree about what constitutes an expert.¹³⁷ These tensions may be exacerbated in the international domain as normative starting points diverge and agreed-upon experts become more scarce.

4. *Efficacy*

Over time, expert-based legitimacy rests largely on whether a governance process does, in fact, deliver effective outcomes. The policymaking process should therefore be structured to maximize the chances that the policies advanced promote social welfare. Administrative procedures can help to do this, particularly where the policy process must deal with incomplete information or uncertainty, by encouraging analysis from multiple perspectives, careful assessment of assumptions, and mechanisms to ensure full deliberation as well as continuous reassessment and review. Administrative law mechanisms that generate competing perspectives,

¹³⁶ Steffek, *supra* note 71, at 251 (arguing that “legal-rational governance” involves “*an institutionalization of rational communication about means, ends and values.*”).

¹³⁷ Braman and Kahan, *supra* note 112 at 9; Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 198 (1997-98). (noting that the “major shortcoming” of expert decisionmaking in that agency decisions are “inherently infused with value judgments.”).

Draft
11 April 2005

require the development of policy options, promote dialogue and debate, and encourage refinement of programs and policies over time all support this sort of policymaking care.

Efficacy is no less prized internationally than domestically. One must anticipate, however, more disagreement over what constitutes policy success.

5. *Efficiency*

Analysis, debate, and decisionmaking always entail transaction costs. Yet keeping administrative burdens to a minimum is itself an important element of good governance.¹³⁸ It is essential that policymaking not only be relatively low cost but also timely.¹³⁹ In brief, the transaction costs involved in coming to common positions must be low enough to justify efforts to achieve collective action in response to shared problems.¹⁴⁰

¹³⁸ Oran R. Young, *Global Governance: Toward a Theory of Decentralized World Order*, in GLOBAL GOVERNANCE 273, 285 (Oran R. Young, ed.) (1997).

¹³⁹ Indeed, Mashaw worries that proceduralization may lead to policymaking breakdown by giving rather than taking power from special interests. MASHAW, GREED, CHAOS *supra* note 52, at 72.

¹⁴⁰ It is interesting to note that the push for efficiency in a pluralistic context is what underlies the positive political theory of the 1970s and 1980s — seeking a better performing regulatory system in an administrative context where the participatory emphasis of 1960s “reformation” administrative law ran amok. MASHAW, GREED, CHAOS *supra* note 52, at 23; Peter Schuck, *The Politics of Regulation* 90 YALE L.J. 702 (1981). More recent efforts at regulatory reform push this agenda even harder.¹⁴⁰ Jerry L. Mashaw, *Reinventing Government and Regulatory Reform*, 57 U. PITT. L. REV. 405 (1996) (highlighting reason for a new regulatory process); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Daniel A. Farber, *Revitalizing Regulation*, 91 MICH. L. REV. 1278 (1993); Neil Gunningham & Darren Sinclair, *Regulatory Pluralism: Designing Policy Mixes for Environmental Protection*, 21 LAW & POL’Y 49 (1999). This “counter-reformation” or “Renew Deal” centers on creating a policymaking process that is lighter, faster, and more innovative — centered on eliminating public choice failures and establishing economic efficiency as a central focus in governance. Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 KANS. L. REV. 689 (2000) (describing the “counter-reformation” as an effort to rationalize regulation). Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 262, 274-76, 285-86, 293-301 (contrasting a new “governance model” with the traditional regulatory model); *see also* Brad Karkkainen, *Reply: “New Governance” in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping* 89 MINN. L.R. 471 (in response to Lobel).

Constructing decisionmaking procedures that bring together diverse communities spread over great geographic and ideological space represents an immense challenge, never mind trying to make the process work efficiently adds a further challenge, often in tension with the goals of representativeness and accountability. The divergence of economic circumstances, policymaking competence, interest, and focus on a particular problem are great in the national context — and even greater in the international realm. While the diversity of perspectives, traditions, assumptions, and languages is inescapably greater where a decision process spans nations, the EU demonstrates that these challenges can be successfully addressed.¹⁴¹

6. *Neutrality (objective, unbiased, and uncorrupted decisionmaking)*

To be seen as legitimate and appropriate, the officials engaged in decisionmaking must be understood to be pursuing the public good and not that of powerful special interests or their own private interests. The need for objective policymaking has been the subject of a great deal of scholarly focus.¹⁴² The requisite objectivity or neutrality might be achieved in several ways. First, insulating decisionmakers from “politics” and potential sources of bias might allow them to exercise their judgment with clarity and impartiality. In this regard administrative law can address a range of potential public choice failures. Conflict of interest rules, financial disclosure requirements, lobbying controls, and post-employment work restrictions all help to ensure that

¹⁴¹ Peter L. Lindseth, *The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration Since the 1950s*, 37 LOY. L.REV. 363 (2003) (arguing that the EU emerged as a successful administrative entity); Bignami, *Challenge supra* note 71, at 97, 98.

¹⁴² JOHN RAWLS, *POLITICAL LIBERATION* (1993) at 119; BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980). Amartya Sen, *What Do We Want From a Theory of Justice* (unpublished paper, presented at the Yale Law School, 24 March 2005); Stewart, *Twenty First Century, supra* note 2 (emphasizing impartiality as central to good policymaking).

Draft
11 April 2005

delegated policymaking is not corrupted by officials who are induced to make decisions based on private gain whether in the form of bribes, vacation travel, jobs for relatives, fancy meals, or promises of future employment.

Alternatively, administrative law might seek to promote neutrality through balance — exposing decisionmakers to the logic and arguments on all sides of an issue. Such an approach argues (in the opposite direction) for open access to decisionmakers and broad public participation in the decision process. The countervailing interest group model of decisionmaking always raises important questions about equality of access to the policymaking process.¹⁴³ These questions multiply in the international context. Political participation has historically been difficult for those at a distance from the locus of decisionmaking, with limited means, or difficulty getting organized.¹⁴⁴ These factors undermine the potential for full information and neutral policymaking. Information Age technologies are, however, lowering this burden.¹⁴⁵ But even if access is available, diffuse interests and disadvantaged communities may not engage in the political process as fully or regularly as others.

There is a deeper question here about what the “public interest” is—to which a neutral or objective decisionmaker should be devoted. Similar issues arise in the domestic context. Whose

¹⁴³ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998 (Aarhus, Denmark).

¹⁴⁴ Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723-26 (1985) (noting the advantage of concentrated interests); see also Roger G. Noll, *Economic Perspectives on the Politics of Regulation*, in HANDBOOK OF INDUSTRIAL ORGANIZATION (Richard Schmalensee & Robert D. Willig, eds. 1989) at 1265.

¹⁴⁵ See JOSEPH S. NYE, JR. (ED.), GOVERNANCE.COM: DEMOCRACY IN THE INFORMATION AGE (2002); Daniel C. Esty, *Environmental Protection in the Information Age*, 79 NYU L. Rev. at 167-74; Anne-Marie Slaughter, *Agencies on the Loose?*, in TRANSATLANTIC REGULATORY COOPERATION LEGAL PROBLEMS AND POLITICAL PROSPECTS 521, 529 (George A. Bermann, Matthias Herdegen & Peter L. Lindseth, eds. 2001) (discussing online discussion procedures).

Draft
11 April 2005

interest should an EPA official have in mind when she makes a regulatory policy judgment? The number of people at the global-scale is greater, the range of perspectives of some issues may be wider, and the decisionmaker's connection to the interests and values of the "the public" may be more quickly established in a national context, but the problem of ordering preferences and making social choices is similar whether policymaking is delegated nationally or supranationally.¹⁴⁶ Given the potential confusion over the aims that international officials are pursuing, it makes sense for global administrative law to require international decisionmakers to issue a "statement of the public interest" so that their assumptions about policy ends and other critical value assumptions will be made explicit.

7. *Power Sharing*

Dispersion of authority both vertically (across levels of government) and horizontally (over multiple institutions, agencies, or decisionmakers) is a core element of Madisonian legitimacy.¹⁴⁷ Such separation of powers limits government control, disciplines abuses of authority, and institutionalizes a system of cross-checks. It may also serve to soften the edge of "all or nothing" politics — by creating multiple decisionmaking "spaces" in which issues are considered. Multiple nodes of policymaking authority also produce regulatory competition along several dimensions.¹⁴⁸ It can also facilitate a division of policymaking labor — and the

¹⁴⁶ KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1963); AMARTYA SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* (1970).

¹⁴⁷ ROBERT A. DAHL, *PREFACE TO DEMOCRATIC THEORY* (1956) (describing Madisonian democracy).

¹⁴⁸ Esty & Geradin, *Regulatory Co-opetition*, *supra* note 43 (discussing multiple strands of horizontal and vertical regulatory cooperation).

allocation of sub-tasks to entities more likely to have expertise in the particular facet of policymaking.

Of course, domestic power sharing arrangements in the United States and other nation-states represent carefully constructed and balanced systems that have evolved over many years. No such regime of checks and balances presently exists in most international bodies. The lack of a functioning judiciary is most notable in this regard. The EU has emerged as something of an exception to this rule—with both 50 years of experience with the European Court of Justice and an emergent structure of administrative rules.¹⁴⁹ In this regard, a central focus of global administrative law needs to be on creating a functioning system of oversight.

8. *Legality*

Delegated decisionmaking is always circumscribed.¹⁵⁰ Decision processes must be structured to promote outcomes that are consistent with legal mandates and within the limits of authority that have been granted to those exercising power. One of the most important aspects of administrative law is the provision of mechanisms to test whether decisionmakers are acting within the scope of their authority and not over-reaching in ways that infringe the liberty of individuals or the rights of economic entities.¹⁵¹ The principle of legality helps check abuses of power and ensure that decisionmakers exercise some restraint in their policymaking activities.

¹⁴⁹ JOSEPH H.H. WEILER, *THE CONSTITUTION OF EUROPE* (1999); Bignami, *Challenge*, *supra* note 71; RENÉ SEERDEN & FRITS STROINK (eds.), *ADMINISTRATIVE LAW OF THE EUROPEAN UNION, ITS MEMBER STATES AND THE UNITED STATES* (2002).

¹⁵⁰ MASHAW ET AL, *ADMINISTRATIVE LAW*, *supra* note 152 at 12-13, 17.

¹⁵¹ Kingsbury et al, *Global Governance*, *supra* note 141 (discussing legal limits of delegation).

Such restraint is especially important in the international realm — as over-reaching by supranational authorities quickly raises serious legitimacy issues.

9. *Substantive Fairness*

An essential element of governance legitimacy is an over-arching sense of balance and fairness.¹⁵² Fairness entails both a procedural element that relates to questions of due process and a chance to be heard, as well as a substantive element that asks whether the burdens and benefits of governance are being distributed in ways that meet agreed upon equity norms.¹⁵³ Embedded in the question of substantive fairness is a great deal of scope for normative dispute. As governance moves into the supranational realm, and values diverge, the potential for perceived unfairness grows.¹⁵⁴ Again, a “statement of the public interest” may help to clarify the goals and fairness assumptions of global-scale policymakers.

10. *Deliberation*

The essence of procedural legitimacy is serious deliberation — the making of arguments, responses and rebuttals, leading to a rational conclusion.¹⁵⁵ A central element of good governance is therefore robust dialogue and debate. The importance of give-and-take as a path to “truth” or, at least, systematically superior results over time, can be traced not only to political theory but also to the scientific method. Procedures that promote the advancing of data, testing

¹⁵² JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (2001) (highlighting requirements for fairness); SLAUGHTER, *NEW WORLD ORDER*, *supra* note 11 at 216; RANDY BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (1998).

¹⁵³ See e.g., Weatherford, *Measuring*, *supra* note 72, at 150.

¹⁵⁴ Steffek, *supra* note 71, at 271; Bignami, *Challenge*, *supra* note 71 (discussing this challenge in an expanded EU).

¹⁵⁵ Stone Sweet and Sandholtz at 10.

of theories, scrutiny of assumptions, review of policy results, and the refinement of thinking based on experience are all to be prized.¹⁵⁶

11. *Transparency*

Transparency is a key element of fair process.¹⁵⁷ Seeing the decisionmaker in action and observing who has influenced the decision process is essential to a sense of governance fairness, rationality, and neutrality, as well as public understanding of the policy results. As Abe and Antonia Chayes point out, transparency is especially important in the international context where relationships of trust are not deeply established.¹⁵⁸

12. *Participation and Due Process*

Opportunities for “voice” or participation in some fashion or another are essential for legitimacy.¹⁵⁹ To be meaningful, a policymaking dialogue must be carefully structured and respect the interests of all those who might be affected by the outcome.¹⁶⁰ Procedural fairness,

¹⁵⁶ Stone Sweet & Sandholtz, *supra* note 5, at 10 (discussing EC rules, formulated by “many years of constant interaction between state and supranational officials” (emphasis added)).

¹⁵⁷ FRANCIS FUKUYAMA, *STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY* (2004) (highlighting transparency as an element of good governance); Anne-Marie Slaughter, *Agencies on the Loose?*, in *TRANSATLANTIC REGULATORY COOPERATION LEGAL PROBLEMS AND POLITICAL PROSPECTS* 521, 524 (George A. Bermann, Matthias Herdegen & Peter L. Lindseth, eds. 2001) (invisibility as a key critique of government networks); Francesca Bignami, *Three Generations of Participation Rights Before the European Commission*, 68 *LAW AND CONTEMPORARY PROBLEMS* 101, 102 (2004). (discussing the “drive for transparency” in the EU led by the Netherlands, Sweden, and Finland); Steffek, *supra* note 71, at 256.

¹⁵⁸ CHAYES & CHAYES, *THE NEW SOVEREIGNTY* at 61; see also Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 *INT’L. STUD. Q.* 109, 111 (1998).

¹⁵⁹ Kal Raustiala and David G. Victor, *Conclusions*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS THEORY AND PRACTICE* 659, 663 (David G. Victor, Kaul Raustiala, and Eugene B. Skolnikoff, eds. 1998); Harold Hongju Koh, 35 *HOUS. L. REV.* 623, 676 (1998) (discussing how empowering participation can lead countries to obey international law through the transnational legal process); Steffek, *supra* note 71 at 256 (legitimacy as defined by “democratic participation and control.”)

¹⁶⁰ MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* (2001) at 94-95 (explaining the need for deliberative equality).

Draft
11 April 2005

including opportunities to be heard, is critical to the exchange on which Habermassian legitimacy is based.¹⁶¹ Those affected by policymaking processes are much more likely to accept outcomes if they feel the procedures were fair.¹⁶²

But participation has a potential downside that must be addressed squarely: the risk that special interests will take advantage of open decisionmaking processes to distort policy outcomes.¹⁶³ In this regard, “comitology,” the European style of consultative rulemaking with structured roles for business and NGO interests, has been criticized as “corporativism” that may give undue sway to those with strong views, perhaps ignoring the public interest.¹⁶⁴ The U.S. “interest group” governance model could be faulted for the same reason. Thus, carefully structured international decision processes will be needed that mandate disclosure of those who are seeking to shape policy outcomes but ensure access for those who are interested – balancing participation and mechanisms to control special interest distortions of policymaking.

B. Toward a Global Administrative Law Toolbox

¹⁶¹ Kal Raustiala, *The “Participatory Revolution” in International Environmental Law*, 21 HARV. ENV’T L. REV. 537, 539 (1997); Francesca Bignami & Steve Charnovitz, *Transatlantic Civil Society Dialogues*, in TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY 255, 281 (Mark A. Pollack & Gregory C. Shaffer eds. 2001) (communication must be encouraged but dialogue may heighten “mutual distrust”). See, also, Lewis Rosman, *Public Participation in International Pesticide Regulation: When the CODEX Commission Decides, Who Will Listen?* 12 VA. ENV’T L. L. J. 329, 329 (1992-93).

¹⁶² Gibson, *Understandings* at 483-86 (discussing the importance of fair decisionmaking procedures to legitimate outcomes – even outcomes that are disliked).

¹⁶³ Martin Shapiro, *Administrative Law Unbounded: Reflection on Government and Governance*, 8 IND. J. OF GL. L. STUD. 369 (2001); Rossi, *Participation Runs Amok*, *supra* note 154, at 196-208.

¹⁶⁴ SUSAN ROSE-ACKERMAN, *FROM ELECTIONS TO DEMOCRACY: BUILDING ACCOUNTABLE GOVERNMENT IN HUNGARY AND POLAND* (2005); Peter L. Lindseth, *“Weak” Constitutionalism? Reflections on Comitology and Transnational Governance in the European Union* 21 OXFORD J. L. STUD. 145; Bolton, *supra* note 77 (rejecting “corporatism” run rampant in participatory global governance).

In advancing the good governance goals identified above in the international realm, a number of administrative law strategies, approaches, and tools may prove to be useful.¹⁶⁵ Some of these tools can be drawn directly from the domestic administrative law context. Others will need to be modified for supranational application. I provide below a basic set of global administrative law tools drawing on governance practice in the United States and the EU, and to a lesser degree Japan and South Korea.¹⁶⁶ Not every element proposed will be relevant in every decision process or organization. But this taxonomy provides a starting point for procedural thinking in the international domain.¹⁶⁷

1. *Published drafts with “notice and comment”*

Clarifying the issues under consideration is a simple but critical starting point for good governance. Policy choices should be framed through published proposals and disseminated broadly for review and comment with adequate time for consideration (at least 30 days) by those that might want to participate in the decision process.¹⁶⁸ Such “notice and comment” helps to ensure that critical issues are fully identified and explored, a wide range of options are

¹⁶⁵Kingsbury, et al., *Emergence*, *supra* note 24, at 11 (discussing a need for global administrative law to provide principles and mechanisms of accountability in the “global administrative space”).

¹⁶⁶ MASHAW ET AL, ADMINISTRATIVE LAW, *supra* note 152; Joon Hyung Hong, *Administrative Law in the Institutionalized Administrative State*, and Jun-Gen Oh, *The Characteristics and Results of Korea’s Administrative Regulations Reform*, in RECENT TRANSFORMATIONS IN KOREAN LAW & SOCIETY 47 (Dae-Kyu Yoon ed. 2000); RENÉ SEERDEN & FRITS STROINK (eds.) ADMINISTRATIVE LAW OF THE EUROPEAN UNION, ITS MEMBER STATES, AND THE UNITED STATES (2002); Tom Ginsburg, *Dismantling the “Developmental State”? Administrative Procedure Reform in Japan and Korea*, 49 AM. J. COMP. L. 585 (2001). Others have generated similar lists. See, e.g., Kingsbury et al, Research Outline, *supra* note 141, at 7.

¹⁶⁷ Others have also developed list of “tools.” See, e.g., Kingsbury et al, *Research Project*, *supra* note 141, at 7.

¹⁶⁸ APA § 553; see also Ginsburg, *supra* note 191, at 585; Administrative Procedure Act, Act No. 5241 (1996), amended by Act No. 5809, art. 1 (1999) (Republic of Korea) (requiring administrative agencies to publish proposed legislation that “affects the rights and duties of citizens or affecting the daily lives of citizens” in advance); Act of Disclosure on Information held by Public Agencies, Act No. 5242, (Republic of Korea) (1996), Art 2.

Draft
11 April 2005

considered, all potential participants are notified of possibilities for agenda-setting,¹⁶⁹ and a reasoned decision emerges. Decision processes that invite interested parties to produce useful data and analysis, test divergent hypotheses and assumptions, and engage a broad set of interested parties are likely to produce systematically better results over time.

Notice of a pending policymaking exercise and an opportunity to comment is a now widely accepted aspect of good governance.¹⁷⁰ Supranational policy proposals should therefore be subject to public comment procedures that provide all who might be affected by or interested in an issue an opportunity (within perhaps a 30 day time period) to raise questions and concerns as well as to offer comments, suggestions, data, analysis, and alternative policy formulations.¹⁷¹ Openness to comment and critique is especially important in the international policy context insofar as it provides decisionmakers with a mechanism for connecting to the public. This transparency and structured dialogue provides for participation which compensates, in part, for

¹⁶⁹ Marc A. Levy, Robert O. Keohane & Peter M. Haas, *Improving the Effectiveness of International Environmental Institutions*, in INSTITUTIONS FOR THE EARTH 397, 400 (Marc A. Levy, Robert O. Keohane & Peter M. Haas eds. 1993).

¹⁷⁰ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998 (Aarhus, Denmark). (The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner); APA § 553; Administrative Procedure Act (Korea) (describing the procedures and limitations on public comment) *see also* Ginsburg *supra* note 191 (discussing how notice under Korean administrative law allows for more open notice-and-comment requirements by extending the notice requirement to proposed legislation); Anne-Marie Slaughter, *Agencies on the Loose?*, in TRANSATLANTIC REGULATORY COOPERATION LEGAL PROBLEMS AND POLITICAL PROSPECTS (George A. Bermann, Matthias Herdegen, & Peter L. Lindseth, eds. 2001) 521, 529 (discussing notice and comment procedures similar to those required in U.S. administrative law as important when participants in government networks are engaged in actual policymaking).

¹⁷¹ Kingsbury, et al., *Emergence*, *supra* note 24, at 23 (noting the importance of response mechanisms in global administrative governance).

the lack of direct electoral ties to the public, and can help to ensure that decisions are made on a rational basis.

2. *Clearly identified decisionmaker*

It is equally important that the identity of the decisionmaker(s) in any governance process be known. In some circumstances, this requirement is quite straightforward and easily met.¹⁷² In official WTO dispute resolution, for example, a panel of three experts is selected to hear the case. These experts, generally drawn from well-known officials in the trade community, are publicly identified.¹⁷³ In other circumstances, for example, where a Climate Change Convention working group is trying to develop technical standards for greenhouse gas emissions inventories, the decisionmakers may not be as clear. Indeed, participation in the group will likely evolve over time. International civil servants operating “behind the scenes” may, in fact, drive the process. To ensure accountability and neutrality, those playing a role in decisionmaking should be identified.

3. *Documented decisions*

The rationality of a policy choice can best be evaluated when it is written down and explained.¹⁷⁴ Published decisions also promote understanding and compliance — and by

¹⁷² Administrative Procedure Act, (Korea) at Art. 1 and the Public Information Disclosure Act, *supra* note 194 (mandating the identification of administrative officials whereby all decisionmakers and their contact information are made publicly available).

¹⁷³ WTO, *Understanding the WTO: the Panel Process*, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm

¹⁷⁴ René Seerden & Frits Stroink, *Administrative Law in the Netherlands*, in Seerden & Stroink [2002] 145, 169 (Article 3:46 Awb of the Netherlands’ Administrative Law Code requires decisions to be based on valid reasons, and Article 3:47 para. 1 Awb requires reasons to be stated when a decision is disclosed).

Draft
11 April 2005

building understanding, they reduce future governance costs. To protect against power-wielders exceeding the bounds of their authority, policymaking should generally occur in public, allowing those who are interested, including the media, to observe and report on what is being done in the name of governance. Beyond transparency, discipline against the inappropriate and unaccountable exercise of authority can be provided by requiring written decisions that (a) clearly delineate the legal basis for the policymaking activity and the scope of authority delegated to the decisionmaking body, (b) provide a “statement of the public interest” that highlights the designated policy ends and critical normative assumptions, (c) outline the logic for the outcome settled upon, (d) build on an established administrative record or “docket,” and (e) respond to criticisms advanced through the notice and comment process, and (f) address relevant policy alternatives.¹⁷⁵

4. *Principles of derogation and declination*

When supranational decisionmakers go into the contested political zone of international policymaking without a carefully constructed logic and a well-established foundation of

¹⁷⁵APA§553(c) (following notice, comment, and consideration, agency shall “incorporate in the rules adopted a concise general statement of their basis and purpose”), and Section 556(e) (describing the exclusive record for decision); Seerden and Stroink at 194, *Netherlands General Administrative Law Code (Awb) Article 3:46* (“a decision shall be based on proper reasons); *Awb Article 3:47* (“the reasons shall be stated when the decision is notified”); Lust, *Administrative Law in Belgium*, *supra* note 208, at 30 (The Belgian Act of 29 July 1991 on the “formal motivation of individual decisions” requires administrative authorities to, in the decision, include the “applied legal norms” and facts pertinent to the case. The general principle of substantive motivation also requires all decisions to be justified by law and fact); Rob Widdershoven, *European Administrative Law*, in ADMINISTRATIVE LAW OF THE EUROPEAN UNION, ITS MEMBER STATES AND THE UNITED STATES 259, 287 (René Seerden & Frits Stroink eds. 2002) (Article 253 EC requires that “regulations, directives and decisions shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to the treaty”); Ginsburg, *supra* note 191, at 610 (explaining the differences in the reforms of Korean and Japanese administrative laws requiring documentation of administrative public matters).

Draft
11 April 2005

legitimacy, political crises and challenges to their authority can be predicted. It may therefore make sense for global administrative law to include a degree of legitimacy-guarding flexibility to accommodate intense national political pressures. A provision that permits national governments to derogate from supranational policy prescriptions under certain confined circumstances and at some cost would be one approach. Such “safety valves” already exist in some international institutions.¹⁷⁶ In the WTO, for instance, national governments can decline to follow dispute settlement decisions and pay compensation (in the form of other trade concessions) instead.¹⁷⁷

Another useful mechanism would be a “principle of declination,” which makes it the practice for international bodies to refuse to engage in policymaking on issues where national politics and divergent values are highly salient, leaving the matter to negotiation among nation-states. Such an international rule, akin to the U.S. “political question doctrine,” would help keep international bodies, particularly those that have not established the requisite legitimacy and capacity to address highly contested issues, out of the legitimacy-threatening zones identified in Matrix 2.

¹⁷⁶ Lindseth suggests that the EU’s “variable geometry” in regulation represents such an “opt-out” provision. Lindseth, *Democratic Legitimacy*, *supra* note 75, at 671; John Ruggie, “American Exemptionalism and Global Governance,” KSG Faculty Research Working Papers Series RWP04-006 (February 2004) (explaining how US power might be accommodated in global governance).

¹⁷⁷ WTO, *Understanding the WTO: A Unique Contribution*, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

5. *Hearings or other opportunities for public participation*

Open decision processes are fundamental to a sense of fairness.¹⁷⁸ Individuals and interest groups should be provided with opportunities to both observe and participate in policymaking. Public participation encourages a sense of “ownership” of the process by those who are affected by it. Giving all who have relevant information and positions a chance to contribute to the policymaking process also helps to bring expertise to bear, test the prevailing wisdom, and ensure neutrality within the decisionmaking framework.¹⁷⁹ Public hearings in advance of final policy choices being made promote wide-ranging thinking, consideration of views from a range of perspectives, and careful consideration of options and alternatives. A public hearing requirement for proposed supranational policies should therefore be considered as a way to promote representativeness, efficacy, and fairness. Oversight hearings on existing policies and programs, perhaps conducted by elected national officials, offers another useful tool, particularly as a way to maintain accountability.

¹⁷⁸ APA§552b; Meinhard Schröder, *Administrative Law in Germany*, in Seerden & Stroink (2002) 91, 120 (Germany’s Law of Administrative Procedure includes the right to be heard); Kingsbury, et al., *Emergence of*, *supra* note 24 (discussing having views considered prior to decisionmaking as a “classical element” of administrative governance); Kyu Ho Youm, *Freedom of Expression and the Law: Right and Responsibilities in South Korea*, 38 STAN. J. INT’L. L. 129 (2002); Hong, *supra* note 191, at 51-52 (outlining detailed hearing procedures to ensure requirements for openness and appropriateness of hearings).

¹⁷⁹ The EU is criticized for not having sufficient public participation. Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT’L. L. J. 451 (1999); Peter L. Lindseth, *Democratic Legitimacy*) *supra* note 75 at 628. The corporatist model of regulation they employ may, however, mitigate against a need for such participation. Susan Rose Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279 (1994); Kal Raustiala, *The “Participatory Revolution” in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537, 538 (1997) (discussing NGO participation as leading to “political, technical, and informational benefits for states”).

6. *Public docket and structured fact-finding*

As I have stressed, one of the most important elements of administrative law is its role in promoting a policymaking dialogue and well-reasoned policy outcomes. In this regard, having a formal place where comments are recorded helps both to structure public participation and to ensure that a foundation is provided for the policy decisions that follow.¹⁸⁰ Publicly “docketing” comments also helps to clarify critical issues and encourage deliberation and debate. The existence of a written record that can later be reviewed to see whether it supports the decision taken also protects against illegality, over-reaching, and self-dealing by decisionmakers.

Structured fact-finding that clarifies issues, highlights assumptions, spells out uncertainties, promotes debate, and explores alternatives also helps to promote rationality and effective policy results. The presence of a public docket further provides the foundation for an institutionalized cross-check mechanism for reviewing policies and ensuring that mistakes are identified.

7. *Conflict of interest rules*

The commitment to a neutral foundation for policymaking and unbiased decisionmakers must be supported by rules that seek to expose potential deviations from the commitment of the

¹⁸⁰ APA§556(e) (describing the exclusive record for decision, which include testimony, exhibits, and all papers and requests from hearings); APA§557; EC Treaty Article 253; Sabien Lust, *Administrative Law in Belgium*, in Seerden and Stoink (2002) 39; Meinhard Schröder, *Administrative Law in Germany*, in Seerden & Stroink (2002) at 31 (under the principle of legal security in Belgium, all administrative decisions in Belgium must be published officially).

Draft
11 April 2005

decisionmakers to the public interest.¹⁸¹ In this regard, preventing those who are participating in international decisionmaking processes from benefiting personally from the choices they make is an important starting point.¹⁸² Conflict of interest rules, anti-nepotism principles for hiring and contracting, limitations on gifts, and financial disclosure requirements help to provide transparency, promote objectivity, and limit special interest manipulation of others.¹⁸³

8. *Lobbying disclosure*

One of the most important aspects of good governance is the ability to understand who has tried to shape the outcome of the policymaking process. Having a requirement that lobbyists be registered and required to disclose their contacts with decisionmakers is fundamental to the capacity to control special interest manipulation of the decisionmaking process.¹⁸⁴ How the details of lobbying disclosure would work in the international setting requires some careful thinking. But a principle that mandates reporting on who has contacted decisionmakers and disclosure in a public docket of any information they imparted would not be hard to establish.¹⁸⁵

¹⁸¹ Stewart, *Twenty-First Century*, *supra* note 2, at 437, 439 (2003). (The traditional core of administrative law has focused on “impartial decision procedures.”)

¹⁸² Meinhard Schröder, *Administrative Law in Germany*, in Seerden & Stroink [2002] 91, 121 (Section 22 of Germany’s Law of Administrative Procedure excludes some individuals from administrative procedure to ensure impartiality and provides for voiding of decisions made by individuals with conflicts of interest).

¹⁸³ Some international bodies have such rules. CEC, Joint Public Advisory Committee Rules of Procedure, Annex A, available at http://www.cec.org/files/PDF/JPAC/JPA-dec-2002_en.pdf (The Commission for Environmental Cooperation’s (CEC) Joint Public Advisory Committee (JPAC) Rules of Procedures prevent (JPAC) members from accepting soliciting or accepting gifts from “any source that would compromise their independence. Staff Regulations of the World Health Organization, I, Rules 1.7, available at http://policy.who.int/cgi-bin/om_isapi.dll?hitsperheading=on&infobase=basicdoc&record={110C}&softpage=Document42. (preventing staff from accepting gifts, favors, honors, and other benefits “if such acceptance is incompatible with [their] status as an international civil servant.”).

¹⁸⁴ Public Law 104-65 [2 U.S.C. 1602], Lobbying Disclosure Act.

¹⁸⁵ See, e.g., PAYNE & SAMHAT, *supra* note 57 at 87 (discussing the strength of the World Bank’s Information Disclosure Policy).

Draft
11 April 2005

To preserve neutrality, *ex parte* contacts or other special access by some participants in the decision process should be forbidden or, at least, disclosed.

9. *Transparency and access to information*

Decisionmaking that goes on behind closed doors may have a place in intergovernmental negotiations, but non-transparent policymaking is hard to justify in the context of supranational governance.¹⁸⁶ “Secret tribunals” smack of unfairness and invite questions about due process. Transparency is also essential to creating a sense of fairness and an understanding of the outcomes that emerge.¹⁸⁷ Transparency has thus emerged as a nearly universal principle of good governance.¹⁸⁸ Global administrative law should encourage transparency and a commitment to access to information so as to ensure that all those who are interested in a particular policy process will have enough information to assess the decisions that are being advanced.¹⁸⁹

To make participation in the policy process meaningful, basic information on what is being decided and how it is being decided needs to be made available to all.¹⁹⁰ Thus, a core

¹⁸⁶ Kingsbury, et al., *Emergence*, *supra* note 24, at 23-24 (discussing importance of transparency to administrative governance, although noting that the principle is applied more generally to regulatory adjudications and specific decisions than to general rulemaking).

¹⁸⁷ CHAYES & CHAYES, *THE NEW SOVEREIGNTY*, *supra* note 61 at 135 (1995) (discussing how transparency enhances compliance).

¹⁸⁸ CHAYES & CHAYES, *THE NEW SOVEREIGNTY*, *supra* note 61, at 22 (1995); EVA POLUHA & MONA ROSENDAHL (eds.), *CONTESTING ‘GOOD’ GOVERNANCE: CROSSCULTURAL PERSPECTIVES ON REPRESENTATION, ACCOUNTABILITY AND PUBLIC SPACE* (2002) (arguing that transparency is central to good governance across countries).

¹⁸⁹ Meinhard Schröder, *Administrative Law in Germany*, in Seerden & Stroink [2002] 91, 124 (Section 29 of Germany’s Law of Administrative Procedure grants participants in hearings the right to inspect records to the extent that information is needed for the participant to defend his or her legal interests); APA § 552 and 556.

¹⁹⁰ Lewis Rosman, *Public Participation in International Pesticide Regulation: When the Codex Commission Decides, Who Will Listen?*, 12 VA. ENV’T L. J. 329, 331-32 (1992-1993). “[O]nly by accommodating public participation can an institution legitimately impose regulations in a democratic society.”

Draft
11 April 2005

element of global administrative law needs to be access to information.¹⁹¹ The Internet provides a mechanism for providing access at very low cost so some of the administrative burden issues that might have once been raised with regard to transparency now hold little sway.

10. *Review mechanism*

A fundamental tool of good governance is the “second opinion.” In support of an institutionalized cross-check on any decision that is being made, global administrative law should provide a review mechanism or appeal process for every element of the policymaking system.¹⁹² Absent a functioning judicial system in the international realm, other approaches need to be provided. Whether the ultimate process involves sharing decisionmaking across more than one institution, a structured right to reconsideration (perhaps invocable by NGOs as well as government officials), or some other procedural way of getting an appropriate review, commitment to “checks and balances” is essential at the global scale.¹⁹³

C. Special Challenges for Supranational Administrative Law

Kingsbury et al identify a number of distinct challenges that arise in the international context that makes a body of global administrative law hard to develop.¹⁹⁴ In particular, they note that the decision processes are often multi-level; authority is often shared across different

¹⁹¹ Models abound. APA§552; EU Regulation 1049/2001. How exactly a Freedom of Information Act (FOIA) might work in the international realm would require some further thinking, but the principle of open access to the materials on which policies are based can certainly be established. For a global survey of FOIAs (over 50 countries), see <http://www.freedominfo.org/survey.htm>.

¹⁹² APA § 702; Brian Jones & Katharine Thompson, *Administrative Law in the United Kingdom*, in Seerden & Stroink (2002) 199, 226; Lust, *Administrative Law in Belgium*, *supra* note 208, at 126.

¹⁹³ Kingsbury et al, *Emergence*, *supra* note 24, at 42 (need for checks and balances in global governance).

¹⁹⁴ *id.* at 40-42.

Draft
11 April 2005

institutions; the informality of the decision processes may detract from the application of administrative law; private actors play a larger role in some of the decisionmaking mechanisms; and the mix of government and governance can complicate the application of administrative law.¹⁹⁵ Grant and Keohane suggest that the global challenge is greater because the abuse of power is more serious internationally, global governance lacks even minimal institutional constraints on power-wielders, and there is no “constitutional system” of checks and balances.¹⁹⁶ Slaughter sees similar problems of accountability and institutional weakness.¹⁹⁷

These issues deserve attention. They make the establishment of an administrative law structure more difficult in the international context than it is in the domestic setting. But they are not insuperable. The fact that decisionmaking authority is divided across several levels does not distinguish global-scale policymaking from that undertaken at the national scale. Finding appropriate divisions of responsibility and arranging the linkages across levels is an important part of the administrative law structure within countries. Developing appropriate power sharing arrangements will have to be worked out over time at the international level.

Similarly, authority is often shared in national governments among several different institutions with regard to a particular set of issues. In the United States, both the EPA and the Energy Department have primary responsibility for climate change policy, and a half dozen other departments and agencies have secondary roles. Far from being a problem, overlapping

¹⁹⁵ JAMES M. ROSENAU & ERNST-OTTO CZEMPIEL (eds.) *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* (1992).

¹⁹⁶ Grant and Keohane *supra* note 52, at 14.

¹⁹⁷ SLAUGHTER, *NEW WORLD ORDER*, *supra* note 11 at 3-10.

Draft
11 April 2005

decisionmaking authority can be seen as an important way to ensure careful deliberation, cross-check policy outcomes, and control over-reaching by government officials. Once again, where disagreements arise over which body has competency, principles of priority will have to be established and procedures for setting jurisdictional disputes will have to be developed.

The informality of global-scale decisionmaking may be an issue in some circumstances. It is harder to formalize procedures where interactions are casual. But, as Matrix 1 demonstrates, informality can be a virtue insofar as it lowers the legitimacy threshold for supranational action. Clearly, administrative law and procedures will be harder to build into some international decision processes than others. Where supranational governance is useful or necessary to respond to interdependence, it makes sense to use administrative law to formalize the process to the extent necessary to produce public confidence in the exercise of authority.

The presence of private sector actors in decisionmaking mechanisms at the global scale does not, again, distinguish this level of policymaking from that of the nation-state. In many elements of executive branch delegated decisionmaking, there is a degree of private sector lobbying or participation. The presence of interested parties in the global decision process should not be a surprise. The solution, as suggested above, is to discipline special interest participation in the policymaking process so as to avoid *distorted* outcomes. Disclosure of all those who are seeking to shape policy outcomes represents a good starting point. If lobbyists are required to report on (1) who they represent, (2) who funds their activities, (3) the individuals

Draft
11 April 2005

they have contacted, and (4) what they have said, their attempts to influence the outcome of a process can be put into context.

Kingsbury et al are right that the mix of *government* and *governance* complicates the application of administrative law in the international domain. But this challenge can be overcome as well. To the extent that lawmaking occurs through formal treaty negotiations, one must recognize that this is largely a country-to-country process and not a place where the administrative law that is meant to be applied to delegated decisionmaking would come into play. Rules will need to be tailored to particular institutions and circumstances—reflecting where on the intersecting spectrums of my two matrices an international organization and the issues it faces are located.

Perhaps the greatest problem in translating the national experience with administrative law to the global scale arises from the lack of an institutional structure to constrain the exercise of power and ensure the accountability of decisionmakers. The important role that judicial officials play domestically in mediating between executive and legislative officials must be undertaken in some other fashion in international policymaking. Similarly, the judicial function of protecting individual rights and those of economic entities against overreaching governmental authorities must be designed into the global administrative law structure in a different manner. In some institutions, dispute resolution mechanisms may provide the needed “check.” In other cases, alternatives, such as oversight powers lodged with national authorities, will need to be found. Even in the WTO, which has the most advanced “judicial” system, only governments can

Draft
11 April 2005

bring cases. As highlighted earlier, transparency and the threat of exposure of abuses of power, along with the institutionalization of cross-checks, represent important disciplines on over-reaching authorities—strengthening these safeguards should be a priority in the emerging system of global administrative law.

All of the “representativeness” problems that plague administrative decisionmaking at the national scale, including special interest influence, the connectedness of those exercising authority with the public on whose behalf they act, the focus of policymakers on the public’s needs and preferences, and the principal-agent problems that emerge in the context of delegation, are present and perhaps magnified at the global scale. Many of the tools that have been developed in the national context to address public choice problems will not translate perfectly to the global domain. Moreover, as Mashaw notes (in the domestic context), greater “proceduralization” could embolden special interests and therefore exacerbate rather than alleviate these potential sources of governance failure.¹⁹⁸ Nevertheless, there is value in moving, albeit incrementally and carefully, toward a more sophisticated structure of global administrative law to promote an appropriate degree of global politics and improved supranational governance.

IV. Administrative Law in Global Governance: Current Practice

As Matrix 1 demonstrates, international policymaking ranges widely from largely intergovernmental to quite supranational and from very informal to highly formalized. We should

¹⁹⁸ MASHAW, *GREED CHAOS supra* note 52 at 72.

expect to see, as I suggested earlier, more carefully structured decisionmaking processes toward the supranational and formal ends of these intersecting spectrums. Similarly, where a matter of potential global governance involves highly political or normatively disputed issues, the legitimacy of supranational action will be harder to establish, and the need for procedural rigor and administrative law will be greater as a result.

In this Part, I examine the policymaking practices in three supranational policy realms – international trade, global public health, and environmental protection – and assess their administrative rules and procedures against the template of good governance elements and tools identified in Part III. While none of the international organizations that I review has anything like a fully developed structure of administrative law, I find evidence that as supranational organizations take on more of an autonomous decisionmaking role and face more controversial issues, they tend to develop better governance structures. And where their actions overstep the foundations of legitimacy they have established, they are likely to fail.

A. International Trade

Managing economic interdependence has emerged as a core global governance challenge. Open markets and trade liberalization promise higher social welfare for all nations. But the deepening of economic integration creates externalities and sharpens concerns about the costs of globalization in the economic sphere. Trade, then, is towards the deep interdependence end of the interconnectedness spectrum and holds high potential gains from structured cooperation.

Draft
11 April 2005

Successive rounds of multilateral trade negotiations have dropped tariff rates to quite low levels,¹⁹⁹ which has shifted the focus of trade policymakers to non-tariff barriers.²⁰⁰ This evolution has three important implications. First, it puts market access and “disciplines” on national regulatory programs, including environmental and consumer protection policies, at center stage in trade policymaking.²⁰¹ This emphasis translates into much more global-scale oversight of domestic policies that were once considered to be the exclusive preserve of national governments, which heightens sensitivity about lost national sovereignty.²⁰² Second, the focus on non-tariff barriers means that negotiations no longer turn on tit-for-tat tariff reductions. At least as much emphasis now goes into the creation of “rules” that establish the terms of competition in the international marketplace. Third, the growing emphasis on non-tariff barriers and on creating a “rule-based” trade regime has redirected the locus of rulemaking in the trading system, in part, from trade agreements established through intergovernmental negotiations to the supranational adjudication of trade disputes.²⁰³

¹⁹⁹ TREBILCOCK & HOWSE, REGULATION, *supra* note 2, at 114, 117-18 (1995 & 1999) (discussing Article XXVIII’s provision for negotiations to reduce tariffs, and the “linear cuts” and sector-by-sector methods of tariff cuts during the Kennedy and Tokyo Rounds).

²⁰⁰ TREBILCOCK & HOWSE, REGULATION, *supra* note 2, at 116 (1995 & 1999) (discussing non-tariff codes negotiated during the Tokyo Round).

²⁰¹ See, e.g., WTO. 1998. *India etc versus US: ‘shrimp-turtle’* http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm. (Appellate Body, although sympathetic to the United States’ attempts to protect species under the Endangered Species Act, held for the shrimp exporters, finding that the U.S. had implemented discriminatory trade measures against WTO members)..

²⁰² DANIEL C. ESTY, GREENING THE GATT *supra* note 10 at 35-46 (reviewing the emergence of this tension).

²⁰³ ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993); Alec Stone Sweet, *The New GATT: Dispute Resolution and the Judicialization of the Trade Regime* in LAW ABOVE NATIONS: SUPRANATIONAL COURTS AND THE LEGALIZATION OF POLITICS, (M. Volcansek, ed.) (1997).

Draft
11 April 2005

As a result of these three factors, international trade policymaking has evolved from being highly technical to quite political.²⁰⁴ Long considered to be “low politics” in contrast with the “high politics” of political and military matters, trade policy has now become much more high profile and contentious.²⁰⁵ As the theory behind the two matrices would suggest, the evolution of the trade regime from supporting intergovernmental negotiations to supranational rulemaking on controversial topics through (increasingly) formalized adjudication demands a more fully developed system of administrative law. As I discuss below, the WTO is moving in this direction. Movement toward greater procedural rigor is clearly the trend in the EU and, more modestly, in the structure beneath the NAFTA.

The EU’s expanding structure of administrative institutions, rules, and procedures now stands at the forefront of supranational governance.²⁰⁶ From the European Court of Justice to a stronger role for the European parliament as well as a range of policymaking requirements that promote transparency and participation, the EU has developed or strengthened a number of mechanisms to respond to its “democratic deficit” And legitimize its decisionmaking.²⁰⁷

²⁰⁴ Daniel C. Esty, *The World Trade Organization’s Legitimacy Crisis*, 1 *WORLD TRADE REV.* 7 (2002) (discussing the WTO’s evolution).

²⁰⁵ RORDEN WILKINSON, *MULTILATERALISM AND THE WORLD TRADE ORGANIZATION* 56 (2000) (discussing a move toward a more “political” WTO agenda).

²⁰⁶ The new EU Constitution offers another step forward for European Administrative Law.

²⁰⁷ *See, e.g.*, D. HELD (ED.), *PROSPECTS FOR DEMOCRACY: NORTH, SOUTH, EAST, WEST* 26 (1993) (discussing the “deeply problematic” nature of the lack of a self-governing community in areas such as the European Community. For EC responses to the deficit, *see* Oskar Niedermayer & Richard Sinnott, *Democratic Legitimacy and the European Parliament*, in *PUBLIC OPINION AND INTERNATIONALIZED GOVERNANCE* 277 (Oskar Niedermayer & Richard Sinnott, eds. 1995).

Draft
11 April 2005

Because much has already been written about the EU,²⁰⁸ I review below the governance role of two other international bodies that play an important role in the world of trade, the World Trade Organization (WTO) and the Organization for Economic Cooperation and Development (OECD).

1. WTO

The WTO engages in a variety of activities that range from supporting intergovernmental negotiations to carrying out supranational decisionmaking and from quite informal to highly structured.²⁰⁹ In analyzing the WTO's role in global governance, it is useful to separate three strands of activity.

First, the WTO plays a major role in supporting multilateral trade negotiations and the “legislating” of trade policy by nation-states. For example, the officials at the WTO in Geneva recently helped to bring the world community together to launch the current “Doha Round” of negotiations. The WTO Director General and his team of international civil servants have worked to guide these negotiations and to revive the talks when they have broken down. This type of activity could be seen as purely instrumental, designed simply to assist the national government-to-government negotiations. In fact, however, WTO officials are deeply involved in agenda setting and consensus building.

²⁰⁸ JOSEPH H.H. WEILER, *THE CONSTITUTION OF EUROPE* (1999); Bignami, *Challenge*, *supra* note 71; Klaus Armingeon, *The Democratic Deficit of the European Union*, 50 *AUSSENWIRTSCHAFT* 67 (1995);

²⁰⁹ RICHARD SENTI & PATRICIA COHEN, *WTO – REGULATION OF WORLD TRADE AFTER THE URUGUAY ROUND* 18-19 (1998); BHAGIRATH LAL DAS, *WTO: THE DOHA AGENDA* 58 (2003). Trade and the environment was incorporated into WTO's negotiation responsibilities under the Work Programme following the 2001 Doha Ministerial Conference.

Draft
11 April 2005

The highly respected professional staff and leadership of the WTO have a degree of expertise that gives them a substantial base of Weberian legitimacy for the work they do in the domain of negotiations. Because their efforts are largely behind-the-scenes and informal, the question of the legitimacy of this governance role has not historically been questioned. The efficacy of the trade system in delivering good results is widely appreciated. But as the WTO's profile has grown and economic integration has become a bigger and more contentious issue, the lack of democratic legitimacy has emerged as an issue.²¹⁰ The WTO staff's work to facilitate negotiations has drawn criticism for its secrecy and "closed-door" style as well as its "clubiness" and the privileged access given to some entities (especially the business community) as opposed to others (notably developing countries and NGOs).²¹¹

This mode of operation does, indeed, fall short of the requirements of good governance highlighted earlier including mechanisms for participation to ensure representativeness and accountability and for deliberation in support of surrogate politics to overcome the lack of democratic underpinnings. While WTO conflict of interest rules exist, controls on lobbying and on *ex parte* contacts are not well established, so concerns about the WTO's fairness and neutrality also have some force. Questions about the lack of transparency might be answered with a suggestion that the WTO is simply doing the bidding of its member-states who wish their negotiations to remain secret. As the WTO's independent and substantive role in negotiations expands, however, this argument becomes harder to sustain.

²¹⁰ Esty, *WTO's Legitimacy*, *supra* note 234 (explaining why the WTO faces legitimacy questions).

²¹¹ Keohane & Nye, *Club Model*, *supra* note 14 (looking at why a "club" system no longer works).

Draft
11 April 2005

Second, the WTO staff play an “executive” role in implementing the results of negotiations. They help the member-states to identify issues that need to be addressed and work to resolve trade frictions through meetings of the WTO General Council, a monthly assembly of all member-states. As globalization concerns have made trade liberalization more controversial, the organization’s Weberian legitimacy, derived from its recognized expertise and the technical nature of the work undertaken, has come under attack.²¹² In response, the WTO has moved to broaden its base of legitimacy through a series of good governance initiatives. It has made a major commitment to transparency and launched a website that provides access to most WTO documents. The WTO leadership has also launched a trade journal through which it encourages debate over trade policy. In addition, the WTO has begun to host a series of workshops at which NGOs and business leaders as well as officials from national governments exchange views.²¹³

This new element of openness and the opportunity for participation in the trade policy dialogue has helped to blunt criticism of the organization. These initiatives can be seen as helping to provide a degree of political give-and-take, which enhances the organization’s democratic legitimacy. Nevertheless, the WTO remains at a great distance from the democratic ideal. A more fully developed system of administrative law—including publication of policy proposals, formal “notice and comment” provisions, a public docket where NGOs and private sector entities as well as governments can submit position papers, hearings, and lobbying

²¹² Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT’L. L. J. 303 (2004) (explaining why WTO needs to broaden its governance role); Esty, *WTO’s Legitimacy*, *supra* note 234 (spelling out what the WTO might do to overcome the loss of expertise-based legitimacy).

²¹³ See also WTO, available at http://www.wto.org/english/forums_e/ngo_e/intro_e.htm

disclosure – would strengthen the institution’s legitimacy and capacity to help manage economic interdependence.

Third, the WTO provides a dispute settlement system.²¹⁴ When operating in this “judicial” role, the WTO is at its most supranational and formal. Interestingly, its work in this realm enjoys substantial acceptance and legitimacy.²¹⁵ In part, this is a function of a five-decade-long record of successfully resolving disputes.²¹⁶ Increasingly, however, the legitimacy can be traced to carefully crafted rules and procedures. In fact, while the General Agreement on Tariffs and Trade (and the work of the GATT secretariat which served as an informal international trade organization until the creation of the WTO in 1994) had a good record of dispute resolution, the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes ramped up the sophistication of the trade regime’s administrative law structure in a very substantial fashion.²¹⁷ Alec Stone Sweet traces this “judicialization” to a number of factors: the politicization of trade, an embrace of legalism, and the shift toward seeing the GATT as a system of rules.²¹⁸

²¹⁴ David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT’L. L. 398 (1998) (providing an overview of WTO’s “judicial” role).

²¹⁵ Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional Constraints*, 98 AM. J. OF INT’L. L. 247 (reviewing WTO dispute resolution and its sources of legitimacy); Benvenisti, *Interplay*, *supra* note 131, at 23 (discussing the WTO’s adjudicating structure).

²¹⁶ Jackson, *Changing Fundamentals*, *supra* note 15; ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS, AND DISPUTE SETTLEMENT* (1997); Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L. L.J. 333 (1999).

²¹⁷ Robert Howse, *The Legitimacy of the World Trade Organization* at 357-360 in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* (Jean-Marc Coicaud & Veijo Heiskanen, eds. 2001); WTO, *The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes*, (April 15, 1994) at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf.

²¹⁸ Stone Sweet, *New GATT*, *supra* note 233, at 121-31.

Draft
11 April 2005

The new rules establish more formal procedures for the dispute settlement process, codify mechanisms for eliciting expert advice to panels, mandate new rigor in the selection of panelists, set strict time limits for bringing disputes to closure, prevent the decisions of dispute panels from being held up by national objections (unless the General Council votes to do so), require publication of the panel decisions, and create a mechanism for appeal.²¹⁹ These provisions not only fortify the legal foundations of WTO decisionmaking but advance the accountability and rationality of the decisions that emerge. This puts the WTO in a leadership position in terms of global-scale good governance.

In essence, the dispute settlement process has been converted from being a mechanism of extended negotiations to one that is quasi-judicial in nature.²²⁰ Under the GATT, dispute settlement decisions were considered not to have value as precedent, but the practice under the WTO is to look carefully at the jurisprudential guidance of both panel and the Appellate Body decisions. The Appellate Body, in particular, has moved to strengthen the adjudicatory process and thus broaden the base of WTO administrative law. The WTO's Appellate Body has adopted detailed procedural rules for notices of appeal, specific methods of submitting timely evidence, measures to avoid conflicts of interest for those hearing cases – and even welcomed *amici* briefs,

²¹⁹ Carrie Wofford, *A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT*, 24 HARV. ENV'T'L. L. REV. 563 (2000) (arguing that WTO adjudication has become professionalized).

²²⁰ Stone Sweet, *New GATT*, *supra* note 233 at 131-9; Robert Howse, *The Legitimacy of the World Trade Organization*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS (Jean-Marc Coicaud & Veijo Heiskanen, eds. 2001) 357-360.

Draft
11 April 2005

giving a new avenue for participation in this critical dimension of WTO rulemaking.²²¹ The proceedings of the Appellate Body remain confidential, however, thus lacking a full measure of openness.²²² The Appellate Body has taken the need for explanation of its decisions to heart, carefully laying out the logic for each decision, highlighting precedents, and building a base of WTO jurisprudence. The Appellate Body's formalization of its procedures has helped to build understanding about the rules of international trade, provide a "check" on WTO policymaking, and promote real policy dialogue. These changes, which are part of the broader shift toward a more formal and rules-based institution, have given the WTO a new foundation of Madisonian and Habermasian legitimacy.²²³ In addition to adding to the systemic legitimacy and deliberative capacity of the WTO, the dispute settlement rules and procedures have given the WTO a reputation for neutrality, fairness, and rigor in upholding due process – and thus greater procedural legitimacy.

²²¹Wofford, *supra* note 249 (demonstrating how the Appellate Body has helped to professionalize WTO jurisprudence); Benvenisti, *supra* note 131.

²²² WTO, The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 of the WTO Agreement), April 15, 1994, article 17, at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf; WTO Working Procedures for Appellate Review, January 4, 2005, at http://www.wto.org/english/tratop_e/dispu_e/ab_e.htm#para6.4; WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 of the WTO Agreement), April 15, 1994, article 17, at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf. Article 10 of the Understanding allows the participation of any Members with "substantial interest" in panel matters. But this push for openness has met resistance from some member states; Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions*, Law and Contemporary Problems 23 (forthcoming, 2005); Dan Sarooshi, *Reform of the WTO Dispute Settlement Understanding: A Critical Juncture for Developing Countries*, in FROM DOHA TO CANCUN: DELIVERING A DEVELOPMENT ROUND 105, 116 (Ivan Mbirimi, Bridget Chilala and Roman Grynberg, eds. 2003) (the EC and US have suggested development of a framework governing amicus submissions).

²²³ Howse, Transatlantic, *supra* note 142; Guzman, *supra* note 242, at 330-348.

2. OECD

The Paris-based OECD, an intergovernmental organization with membership representing 30 of the world's most developed economies, operates largely at the informal end of the spectrum identified in Matrix 1. However, in addition to supporting government-to-government dialogues, it plays a supranational role in some important areas, particularly related to managing international economic interdependence. The OECD's great strength has been its technical capacity—and therefore Weberian legitimacy. As Trebilcock and Howse note, the OECD has provides a bridge between the politicized decisionmaking of the WTO and the need for rigorous technical work to underpin trade liberalization efforts.²²⁴

Much of the OECD's work program focuses on bringing together officials from national governments to review policy results, exchange data and information, and benchmark performance.²²⁵ These activities provide an informal policy cross-check, a mechanism to identify international best practices, and a way for governments to evaluate their own results. By enhancing national governance practices, the WTO makes vivid its “value added” and builds its legitimacy.

The organization also hosts regular meetings of Ministers of Environment, Energy, Transportation, Development, and Trade. Lower-level officials meet in the run-up to these meetings, and technical groups are often established to deal with particular issues. In a small

²²⁴ TREBILCOCK & HOWSE, *REGULATION*, *supra* note 2, at 165 (1995 & 1999) (discussing the role of the OECD)

²²⁵ Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, *supra* note 18 (discussing governance issues related to transgovernmental networks); Daniel C. Esty, *Why Measurement Matters* in *ENVIRONMENTAL PERFORMANCE MEASUREMENT: THE GLOBAL REPORT 2001-2002* (Daniel C. Esty & Peter Cornelius, eds. 2002) (discussing the power of policy benchmarking in the environmental context).

Draft
11 April 2005

number of cases, these convocations have yielded formal agreements. OECD initiatives, for example, have resulted in international agreements related to multinational corporations²²⁶, bribery²²⁷, limits on the use of export credits²²⁸, and capital movements.²²⁹ In other cases, OECD officials work with national regulators to adopt guidelines, develop model policies, and distill overarching norms. As a forum for national officials, the OECD has substantial, if informal, influence over how regulators perceive the ends and means of governance. As Anne-Marie Slaughter suggests, the OECD is the “quintessential host of transgovernmental regulatory networks.”²³⁰

OECD dialogues, noted for their substance and analytic rigor, have generated critical policy principles and technical standards that have come to shape regulatory practices and therefore international cooperation. For example, the OECD led the effort to establish the “polluter pays principle” of cost internalization as a central regulatory norm in the environmental realm.²³¹ And the OECD Chemicals Group has developed testing protocols and safety standards that have helped to facilitate trade and promote environmental protection.²³²

²²⁶ Trebilcock & Howse 355 (1995 & 1999)

²²⁷ OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, available at http://www.oecd.org/document/21/0,2340,en_2649_201185_2017813_1_1_1_1,00.html.

²²⁸ OECD, Arrangement on Officially Supported Export Credits, available at [http://webdomino1.oecd.org/olis/2004doc.nsf/43bb6130e5e86e5fc12569fa005d004c/71434220f065dcbbc1256f960060ce5a/\\$FILE/JT00177671.PDF](http://webdomino1.oecd.org/olis/2004doc.nsf/43bb6130e5e86e5fc12569fa005d004c/71434220f065dcbbc1256f960060ce5a/$FILE/JT00177671.PDF); OECD, Recommendation on Common Approaches on Environment and Officially Supported Export Credits, available at <http://www.oecd.org/dataoecd/26/33/21684464.pdf>.

²²⁹ Trebilcock & Howse 292 (1995 & 1999)

²³⁰ SLAUGHTER, A NEW WORLD ORDER *supra* note 11, at 46.

²³¹ OECD, THE POLLUTER PAYS PRINCIPLE: DEFINITION, ANALYSIS, IMPLEMENTATION (1975).

²³² OECD, The OECD Chemicals Programme (1993); David G. Victor, “*Learning by Doing*” in *the Chemicals and Pesticides Trading Regime*, in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL

Draft
11 April 2005

Despite its generally informal and intergovernmental style of decisionmaking, which produces little pressure for formalized administrative law, the organization has adopted a number of operating principles and practices that represent a major commitment to good governance. The organization has placed increased emphasis on transparency and participation. Although their participation is limited in government-to-government meetings, NGOs attend many informal workshops.²³³ Draft policy statements are increasingly published in advance.²³⁴ Great focus is put on promoting dialogue over policy analysis, options, results, and potential future refinements.²³⁵ More effective and efficient policymaking is the organization's *raison d'être*.²³⁶ As a result of these efforts and a top-notch and technically capable staff, the OECD has a reputation for deliberative substance that provides a strong pillar of Weberian legitimacy.

Interestingly, the OECD's most serious policy stumble in the past decade came when it ventured into the highly contested realm of foreign investment. OECD officials led an effort to conclude a Multilateral Agreement on Investment (MAI), but failed to appreciate fully the political sensitivity of this arena.²³⁷ This initiative, which would be seen as an upper right

COMMITMENTS THEORY AND PRACTICE 221, 2258 (David G. Victor, Kaul Raustiala, and Eugene B. Skolnikoff eds. 1998).

²³³ OECD Co-operative Activities With Civil Society, *at*

http://www.oecd.org/document/1/0,2340,fr_2649_201185_3230081_1_1_1_1,00.html.

²³⁴ See, e.g., OECD, Instructions for Commenting on Draft Test Guidelines, *available at* http://www.oecd.org/document/12/0,2340,en_2649_34377_1898188_1_1_1_1,00.html.

²³⁵ For example, the OECD conducts "peer reviews" of each member countries environmental performance and publishes the results with recommendations for improved policies. See Peter M. Haas, *Global Environmental Governance*, in ISSUES IN GLOBAL GOVERNANCE (1995) at 345.

²³⁶ The OECD describes itself as "playing a prominent role in fostering good governance." About OECD, http://www.oecd.org/about/0,2337,en_2649_201185.

²³⁷ James Salzman, *Labor Rights, Globalization and Institutions: The Role and Influence of The Organization for Economic Cooperation and Development* 21 MICH. J. INT'L L. 769 (2000).

Draft
11 April 2005

quadrant issue in Matrix 2 (high degree of interdependence but also high political salience with normative divergence) got caught up in an anti-globalization backdraft and eventually collapsed.²³⁸ The OECD's lack of broader legitimacy, particularly democratic underpinnings, made this project untenable.

The fact that the MAI negotiations were carried out by the OECD Finance Directorate in secret and with limited input from those representing other perspectives (such as OECD staff from the Environment or Development Directorates), not to mention the absence of officials from developing countries, led to deep doubts about the representativeness of those drafting the agreement. Their exercise of political judgment in this contested policy space was simply rejected. The lack of shared drafts, opportunities for interested parties to comment, hearings, open debate, and clarity about the influence being played by multinational corporations and other business lobbies, meant that the organization had no back-up system in place to compensate for its lack of democratic legitimacy and to give credence to its governance role.

B. Global Public Health

International spillovers in the health realm can be substantial as evidenced by the spread of AIDS across the world as well as other diseases such as mad cow, SARS, and bird flu. The very nature of contagion makes international interaction a source of risk – and creates a need for cooperation among countries and a degree of global governance.²³⁹ While the benefits of

²³⁸ OECD, *Getting to Grips with Globalisation* (2004) at 20.

²³⁹ It took many decades, however, for the logic of cooperation across countries to be understood. Richard Cooper, *International Cooperation in Public Health as a Prologue to Macroeconomic Cooperation*, in *CAN NATIONS AGREE?* (R.N. Cooper et al., eds. 1989).

Draft
11 April 2005

coordinated supranational action are clear, the costs of global-scale policymaking may be high insofar as health issues connect to societal interests and behavioral practices in complex, intimate, and potentially politically charged ways. Thus, while some public health issues have a high degree of scientific or technical content, others will be seen as highly value-laden.

Given the technical training of many officials operating in the global health arena and the urgency with which some issues must be addressed, administrative niceties have not been a central focus in global health governance. In my matrix analysis, health policy issues involve deep interdependence but range widely along the scientific-political spectrum. As I discuss below, the shift toward supranational action and formal rulemaking has created pressure to strengthen the administrative law structure that undergirds decisionmaking in the global public health domain.

1. World Health Organization

Like the WTO, the WHO plays a range of roles from supervising nation-to-nation negotiations to a much more substantive role in addressing health crises where transboundary issues are evident. In the “legislative” context, the WHO staff supports negotiators from national governments, who meet annually as the World Health Assembly (WHA), to adopt “sanitary conventions” and other agreements shaping international public health. Recognized for their expertise and global perspective, the WHO staff also play a significant role in agenda setting and

Draft
11 April 2005

consensus building in this formally intergovernmental process. In fact, WHO staff shaped in substantial ways the recently adopted Tobacco Treaty.²⁴⁰

The WHO also operates as a supranational regulatory agency, with rulemaking powers delegated to it by national governments.²⁴¹ Indeed, the WHO Constitution grants WHO the power to enact, through regulations, “sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease.”²⁴² But the organization rarely uses its full authority, generally preferring to advance the global public health agenda through non-binding resolutions.²⁴³ This choice of a more “soft law” approach reflects concerns among WHO staff about the difficulty of mandating specific actions and, more broadly, the legitimacy of an aggressive global governance role for the WHO.²⁴⁴

In some cases, the WHO has used its expertise-based authority to act. Governments ceded a leadership role to the WHO in the SARS crisis based on the organization’s scientific and technical capacity. The WHO issued safety guidelines and recommendations, alerts, research advisories; risk assessments; preparedness frameworks; guidance for laboratory testing; immigration and mass gatherings; and epidemiological guidelines.²⁴⁵ When efficacy mattered and a crisis was at hand, governments relied upon the WHO to guide the response even though

²⁴⁰ Derek Yach, Corinna Hawkes, Joanne E. Epping-Jordan, Sarah Galbraith, *The World Health Organization’s Framework Convention on Tobacco Control: Implications for The Global Epidemics Of Food-Related Deaths And Disease*, 24 JOURNAL OF PUBLIC HEALTH POLICY 274-290 (2004).

²⁴¹ HENRIK KARL NIELSEN, THE WORLD HEALTH ORGANIZATION 12-13 (1999)

²⁴² WHO Constitution art. 21, para. a.

²⁴³ Nielsen at 48-9.

²⁴⁴ Interview with Derek Yach, former WHO official (October 25, 2004).

²⁴⁵ WHO, Severe Acute Respiratory Syndrome (SARS), at <http://www.who.int/csr/sars/guidelines/en/>.

Draft
11 April 2005

its administrative law structure is not highly developed. Perhaps, with the SARS threat unfolding, the costs of inaction loomed large. But broader legitimacy may be needed for an expanded governance role for the WHO in other circumstances.

The WHO team that led the recent effort to conclude a treaty on marketing and trade in tobacco recognized the need to expand the legitimacy of their governance activities as they moved to legislate limits on tobacco globally.²⁴⁶ They developed draft provisions, posted these on the WHO website, held public hearings, convened open dialogues with NGOs and private sector representatives, accepted policy papers and other inputs from external sources, and posted these on the internet.²⁴⁷ The WHO also drew on experts both inside the organization and from outside, including people from sister bodies such as the World Bank and the WTO. The treaty-making effort was chaired by a clearly designated official with outreach across the world directed by “regional bureau chiefs” selected by the countries in the region. A WHA resolution highlighted potential conflict of interest issues and asked governments to take note of these issues.²⁴⁸

As an exercise in global governance and good governance, the WHO’s work on the Tobacco Treaty stands out. In general, however, the WHO has been hampered by a lack of effective decisionmaking rules and structure. Special interest influence has been an issue of particular concern. WHO’s governance structure provides for extensive involvement of advisory groups under Articles 18(e) and 38 of the WHO Constitution, including expert advisory panels

²⁴⁶ Interview with Derek Yach, (October 25, 2004).

²⁴⁷ Derek Yach email, (March 24, 2005); WHO, available at <http://www.who.int/en>

²⁴⁸ WHO Framework Convention on Tobacco Control, WHA56.1

Draft
11 April 2005

that gather technical information and other expert groups that review this technical information to make recommendations to WHO.²⁴⁹ While these provisions might be seen as building a base of expertise, they have, in some cases, undermined the global public health policymaking process. For instance, WHO's work to regulate tobacco was long seen as lacking in neutrality and fairness because industry groups placed individuals in temporary advisory positions within the WHO, shaped the conversations in expert advisory committees, and even harassed journalists at international conferences.²⁵⁰ Reports suggesting problems with special interest influence were covered up.²⁵¹ The efforts of the tobacco industry were so pervasive that in 2000 the WHO staff produced a 250-page report documenting the interference and policy manipulations by this lobby.²⁵²

The WHO now has provisions in place to limit the influence of special interests, in particular requiring committee members to disclose any potential conflicts of interest.²⁵³ WHO regulations prevent staff from accepting gifts, favors, honors, and other benefits "if such acceptance is incompatible with [their] status as an international civil servant."²⁵⁴ The

²⁴⁹ WHO, Reports of advisory bodies and related issues, WHO policy concerning expert committees, May 6, 1998, para. 11, available at http://ftp.who.int/gb/pdf_files/EB102/ee10.pdf.

²⁵⁰ Evidence of the corporate influence on the WHO's processes came to light through documents unearthed in the course of U.S. cases against the tobacco companies. Yach email (March 24, 2005).

²⁵¹ Interview with Derek Yach, (October 25, 2004).

²⁵² WHO, Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization. Report of the Committee of Experts on Tobacco Industry Documents, July 2000. Available at <http://repositories.edlib.org/tc/whotcp/WHO7/>.

²⁵³ WHO, Regulations for Expert Advisory Panels and Committees para 4.6, May 12, 1982, available at http://policy.who.int/cgi-bin/om_isapi.dll?infobase=Basicdoc&softpage=Browse_Frame_Pg42.

²⁵⁴ Staff Regulations of the World Health Organization, I, Rules 1.7, available at http://policy.who.int/cgi-bin/om_isapi.dll?hitsperheading=on&infobase=basicdoc&record={110C}&softpage=Document42.

Draft
11 April 2005

“incompatible with” language represents a major loophole. And some special interests evade these rules simply by promising staff funding for their projects rather than giving them gifts.²⁵⁵

The WHO does not, moreover, consistently create or provide meeting records (neither its own nor those of its committees) so there remains a lack of transparency about who is saying what to decisionmakers. When a public record is provided, the document is often incomplete or opaque. A provision in WHO’s “Rules of Procedure for Expert Committees” even goes so far as to state that “meetings of expert committees shall normally be of a private character. They cannot become public except by the express decision of the committee with the full agreement with the Director-General.”²⁵⁶

Partially buffering this lack of transparency is a requirement that copies of all World Health Assembly reports be sent to Members and participating intergovernmental and nongovernmental organizations.²⁵⁷ This provision fails, however, to cover reporting from expert committee meetings. Thus, while the WHO has taken steps to upgrade its administrative law and procedures, particularly in the context of the organization’s supranational rulemaking efforts in the politically charged Tobacco Treaty, it still has some distance to go in developing a full-scale good governance structure.

²⁵⁵ Interview with Derek Yach, (October 25, 2004).

²⁵⁶ WHO Regulations for Expert Advisory Panels and Committees, rule 4, *available at* http://policy.who.int/cgi-bin/om_isapi.dll?hitsperheading=on&infobase=basicdoc&record={110C}&softpage=Document42.

²⁵⁷ WHO Rules of Procedure of the World Health Assembly, rule 14, *available at* http://policy.who.int/cgi-bin/om_isapi.dll?hitsperheading=on&infobase=basicdoc&record={110C}&softpage=Document42. “Copies of all reports and other documents relating to the agenda of any session shall be sent by the Director-General to Members and Associate Members, to representatives of the Board and to participating intergovernmental organizations at the same time as the agenda or as soon thereafter as possible; appropriate reports and documents shall also be sent to non-governmental organizations admitted into relationship with the Organization in the same manner.”

2. OECD

In its capacity as a public health body, the OECD has developed over 100 chemical testing guidelines²⁵⁸ that facilitate national regulation by providing certified information on risks, test results, and exposure standards. The OECD establishes procedures and testing protocols used by industry, government, and independent laboratories—and formalizes these rules where international agreement can be reached.²⁵⁹ The OECD's chemical guidelines are an example of accepted supranational activity in a relatively narrow and scientific field where the payoff to coordinated policymaking is high and the non-political nature of the initiative makes the costs low. The guidelines have benefited further from a transparent process that always includes notice of proposed actions and a well-defined comment period with opportunities provided to OECD members, non-member countries, industry, citizens, and NGOs to participate.²⁶⁰

C. Global Environmental Governance

Environmental issues were long thought to be largely local. But in the last several decades a series of international problems have emerged including climate change, thinning of the Earth's protective ozone layer, loss of biodiversity, and depletion of fisheries in the world's oceans. In addition, scientists have established the potential for long-range atmospheric transport of heavy metals such as mercury and chemicals such as DDT, making transboundary spillovers of harm a much bigger issue than previously understood.

²⁵⁸ OECD Guidelines for Testing of Chemicals, available at <http://www.oecd.org/dataoecd/9/11/33663321.pdf>.

²⁵⁹ OECD, Chemicals Testing – Guidelines, available at http://www.oecd.org/topic/0,2686,en_2649_34377_1_1_1_1_37465,00.html.

²⁶⁰ OECD, Instructions for Commenting on Draft Test Guidelines, *supra* note 272.

Draft
11 April 2005

While there now exists an increased recognition of ecological interdependence, supranational decisionmaking in the environmental realm remains fraught with difficulties. The response strategies that might be adopted often have substantial economic costs, and these burdens are often not distributed equally across countries. In some circumstances, harms flow back and forth giving all countries a stake in controls. In other cases, however, there is no strong reciprocity. Environmental problems are almost always marked, moreover, by a degree of uncertainty that can lead to disagreements among people and countries over the seriousness of an issue. Such divergences are exacerbated in the international realm where policymakers will approach problems with widely divergent perspectives based on their countries' level of development, policy priorities, economic conditions, climatic and geographic circumstances, attitudes toward Nature, and tolerances for risk.

High degrees of both interdependence and political divergence make supranational governance a particular challenge. At the center of the international environmental regime lies the UN Environment Program (UNEP). While UNEP has adopted a number of good governance practices, it has not been able to move very far along the spectrum from intergovernmental to supranational. The greater success of the North American Commission for Environmental Cooperation (CEC) in this regard may reflect the fact that it has less "political space" to cover as it encompasses only three countries, but also its more advanced structure of administrative law.

Draft
11 April 2005

1. UNEP

At some points in the past several decades, UNEP has played an important role in bringing countries together to respond to shared problems. Most notably, in the 1980s and early 1990s UNEP's Executive Director, Mostafa Tolba, led the charge to protect the ozone layer.²⁶¹ His efforts translated into a framework Convention followed by a series of Protocols phasing out chlorofluorocarbons and related chemicals. Similarly, UNEP's work in information and scientific assessments, particularly with Earthwatch and the Global Environmental Outlook (GEO) processes, and its programs to protect "regional seas," are highly regarded.²⁶²

But in recent years, UNEP's governance activities have diminished and it has not established itself as an independent or autonomous force in global-scale policymaking.²⁶³ Despite its mandate to coordinate multilateral environmental policymaking, UNEP has not been effective in setting the international environmental agenda or addressing a number of critical

²⁶¹ RICHARD BENEDICK, *OZONE DIPLOMACY* (1991).

²⁶² Konrad Von Moltke, *Why UNEP Matters*, in *GREEN GLOBE YEARBOOK* (1996); Jan-Stefan Fritz, *Earthwatch 25 Years On: Between Science and International Environmental Governance* (Report for the International Institute for Applied Systems Analysis) (1997); Mark Imber, *Too Many Cooks? The Post-Rio Reform of the United Nations*, 69 *INTL. AFFAIRS* 1 (1993); Jodie Hierlmeier, *UNEP: Retrospect and Prospect: Options for Reforming the Global Environmental Governance Regime*, 14 *GEORGET. INTL. ENVTL. L.R.* 767 (2002) at 787, 790; Mark A. Gray, *The United Nations Environment Programme: an Assessment*, 20 *ENVTL. L.* 291

²⁶³ Daniel C. Esty and Maria H. Ivanova, *Revitalizing Global Environmental Governance: a Function-Driven Approach* in *GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS AND OPPORTUNITIES* (Daniel C. Esty & Maria H. Ivanova, eds. 2002); Peter M. Haas, *Addressing the Global Environmental Governance Deficit*, 4 *GL. ENVTL. POL.* 4 (2004); BHARAT DESAI, *INSTITUTIONALIZING INTERNATIONAL ENVIRONMENTAL LAW* (2004) at 167-188; Hierlmeier, *supra* note 302.

Draft
11 April 2005

challenges such as climate change. Not only has UNEP failed to move toward supranational policymaking, even its intergovernmental coordination role has shrunk.²⁶⁴

UNEP's weak position could be a function of the highly political atmosphere surrounding global environmental issues.²⁶⁵ But I think other factors have contributed to the lack of confidence in UNEP's capacity for governance. Unlike the WTO and the WHO, UNEP's staff is not highly regarded. The organization has been hampered in its ability to recruit top-notch technical experts both by its location in Nairobi and its weak analytical reputation.²⁶⁶ Lacking the fundamental basis of legitimacy for delegated decisionmaking, Weberian expertise and knowledge, UNEP has been further stymied by its lack of procedural rigor.

On the other hand, UNEP is a relatively transparent organization with a strong tradition of participation by NGOs and business officials in addition to governments.²⁶⁷ When policy proposals are advanced prior to UNEP Governing Council meetings, the UNEP Secretariat, the Governing Council, and the Committee of Permanent Representatives engage in extensive

²⁶⁴NORICHIKA KANIE & PETER M. HAAS, *EMERGING FORCES IN ENVIRONMENTAL GOVERNANCE* (2004); Desai, *supra* note 304, Esty & Ivanova, *supra* note 304; Hierlmeier, *supra* note 302 at 781-82; Frank Biermann & Steffen Bauer, *Managers of Global Governance: Assessing and Explaining the Effectiveness of Intergovernmental Organisations* (paper presented at the 44th Annual Convention of the International Studies) (2003).

²⁶⁵ KANIE & HAAS, *EMERGING FORCES*, *supra* note 305; Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 *NYU L.REV.* 6; Desai, *supra* note 304; Peter M. Haas, *Institutions: United Nations Environment Programme*, 36 *ENVIRONMENT* 7; Esty & Ivanova, *supra* note at 304.

²⁶⁶ Office of Internal Oversight Services (OIOS), *Investigation into the misdirection of contributions made by Member States to the United Nations Environment Programme Trust Fund account (2000) and Review of the United Nations Environment Programme (UNEP) and the administrative practices of its secretariat, including the United Nations Office in Nairobi (UNON) (1997)*, U.N. OIOS REPORT (2000) (A/51/810).

²⁶⁷ Civil Society Consultations on International Environmental Governance, Nairobi, May 22 and 23, 2001; Peter M. Haas, *Global Environmental Governance*, in *ISSUES IN GLOBAL GOVERNANCE* 345 (1995); Von Moltke, *supra* note 302; Adil Najam, *The Case Against a New International Environmental Organization*, 9 *GLOBAL GOVERNANCE* 367 at 370.

Draft
11 April 2005

communication over the issues involved.²⁶⁸ Decisions are published in a timely and comprehensive manner. Rules 10 and 11 of the UNEP Rules of Procedure of the Governing Council also require opportunities for comment on proposed Governing Council agendas and the procedures designed to structure debates.²⁶⁹ UNEP has also been a leader in bringing outside scientific and technical expertise into its policy dialogues.²⁷⁰

But UNEP has never emerged as the primary forum for international policymaking with regard to pollution control or natural resource management. Indeed, more work has been done in this regard at the OECD and the World Bank. Beyond its weak record for promoting deliberation and debate, UNEP has a terrible reputation in terms of efficacy. UNEP has also suffered from deficient internal administrative controls – lack of oversight of staff, limited enforcement of conflict of interest rules, etc. -- leading to a perceived high degree of inefficiency and financial mismanagement.²⁷¹ UNEP's lack of legitimacy can thus be traced to many causes. While the absence of a functioning system of administrative law within the organization is perhaps not among the most significant of these causes, the lack of procedural legitimacy has undermined UNEP's governance capacity.

In the analytical framework of this paper, UNEP offers high potential gains from global governance given the deep interdependence imposed by issues such as climate change. But the

²⁶⁸ Interview with Brennan Van Dyke, Regional Director and Representative, UNEP Regional Office for North America. (November 17, 2004).

²⁶⁹ UNEP Rules of Procedure of the Governing Council, rules 10 and 11, *available at* http://www.oecd.org/document/12/0,2340,en_2649_34377_1898188_1_1_1_1,00.html.

²⁷⁰ Haas *supra* note 308 at 356.

²⁷¹ OIOS, *supra* note 307.

Draft
11 April 2005

political nature of these issues creates a demand for advanced administrative rules and procedures, to draw in expertise, encourage careful policy analysis, promote deliberation, and advance workable policy solutions. UNEP has, however, failed across this spectrum. As a result, it has very limited zones of competence, and it remains mired in a narrow intergovernmental mode of operation.

2. CEC

The North American Commission for Environmental Cooperation (CEC) has emerged as an important international environmental organization. It has a degree of autonomy beyond that found in UNEP, and it boasts a stronger foundation of administrative law based on principles of good global governance.²⁷² Although regional, not global in scale, the CEC demonstrates the success that can be realized from increasing the strength and depth of network-based decisionmaking.²⁷³

The CEC grew out of a “side agreement” to the NAFTA in which the United States, Canada, and Mexico sought to “address regional environmental concerns, help prevent potential trade and environmental conflicts and to promote the effective enforcement of environmental law.”²⁷⁴ The CEC engages in activities across a spectrum from completely non-legal, non-binding activities to formal legal instruments. Some projects simply “explore” NAFTA

²⁷² David L. Markel, *The North American Commission for Environmental Cooperation After Ten Years: Lessons About Institutional Structure and Public Participation in Governance*, FLORIDA STATE UNIV. LAW SCHOOL WORKING PAPER SERIES, vol. 7, no. 2 (February 23, 2005).

²⁷³ SLAUGHTER, *NEW WORLD ORDER*, *supra* note 11, at 168-90.

²⁷⁴ CEC. “Who We Are/Joint Public Advisory Committee (JPAC). Available at http://www.cec.org/who_we_are/jpac/index.cfm?varlan=english; CEC, “Who We Are/Council,” available at http://www.cec.org/who_we_are/council/index.cfm?varlan=english.

Draft
11 April 2005

countries' views and positions on particular topics.²⁷⁵ The CEC also works to “identify common positions in the hopes of proposing joint or coordinated action.”²⁷⁶ For example, the CEC has sponsored training and capacity-building programs for the enforcement branches of the NAFTA countries to reduce illegal trade in wildlife, improve the tracking of transboundary shipments of hazardous waste, and set up an information-sharing network to stem the illegal trafficking in chlorofluorocarbons.” The CEC’s work to establish a binding agreement on transboundary environmental impact assessment represents the more formal side of its activity spectrum.²⁷⁷

CEC rules and procedures contain several measures to support participation, neutrality, transparency, and robust policy dialogues. The CEC Joint Public Advisory Committee (JPAC) Rules of Procedures prevent JPAC members from soliciting or accepting gifts from “any source that would compromise their independence.”²⁷⁸ The CEC Council Rules of Procedure further prohibit the Executive Director and staff from receiving instructions from their individual governments, thus requiring them to act in a truly *supranational* manner.²⁷⁹ CEC procedures also require that summaries of all public CEC Council meetings must be provided to members and the public. Public speakers as well as government officials have the right to submit

²⁷⁵ CEC, NORTH AMERICAN ENVIRONMENTAL LAW AND POLICY XI (1998).

²⁷⁶ *Id.*.

²⁷⁷ *Id.*

²⁷⁸ CEC, JOINT PUBLIC ADVISORY COMMITTEE RULES OF PROCEDURE, ANNEX A, *available at* http://www.cec.org/files/PDF/JPAC/JPA-dec-2002_en.pdf.

²⁷⁹ CEC Council Rules of Procedure, rule 5.5, *available at* http://www.cec.org/files/PDF/COUNCIL/CCL-dec-2002_en.pdf.

Draft
11 April 2005

corrections to the summary record before it is finalized. Records of public meetings must be made available to the public “promptly.”²⁸⁰

These procedures and a highly-regarded staff have positioned the CEC to act both to support intergovernmental cooperation and to engage in limited supranational governance. The CEC’s independent role in determining whether NAFTA member-states are adequately enforcing their environmental laws, based on complaints that can be brought by the public, represents an important “cross-check” on national environmental performance.²⁸¹ And although the CEC has been hamstrung on some occasions in trying to carry out this role, the mere existence of this power is significant.²⁸² Operating as it does in controversial political space, the CEC’s relatively significant authority is, in part, a testament to carefully constructed structure of administrative rules and procedures.

V. Conclusion

The patterns and practices of administrative law that have emerged in the United States, Europe, Japan, South Korea, and elsewhere in recent decades cannot be transferred easily to the international scale. The differences in the context of governance at the national and supranational levels are significant. Policymaking at the international-scale can, however, be

²⁸⁰ *Id.* (CEC Council Rules of Procedure, rule 11)

²⁸¹ SLAUGHTER, *NEW WORLD ORDER*, *supra* note 11, at 190-91.

²⁸² Blanca Torres, *The North American Commission on Environmental Cooperation: Rowing Upstream* in *GREENING THE AMERICAS: NAFTA’S LESSONS FOR HEMISPHERIC TRADE* (Carolyn L. Deere & Daniel C. Esty, eds. 2002) (highlighting strengths and limitations of the CEC); see also NAAEC Article 15.2 (limiting the role of the CEC).

Draft
11 April 2005

improved and endowed with greater legitimacy through adoption of a set of rules and procedures that are associated with good governance. This paper seeks not to spell out a definitive vision of which tools will work in which circumstances but rather to offer the theoretical logic for and some first steps toward a functioning structure of global administrative law.

Even if supranational governance is limited and initially hampered by divergent traditions, cultures, and political preferences, developing a baseline system of global administrative law would strengthen whatever policymaking is undertaken at the global scale. The undeniable presence of a layer of global governance and the normative logic of some degree of international decisionmaking in support of collaborative responses to a growing set of transboundary policy spillovers makes this development more urgent.

Procedural legitimacy becomes ever more important as supranational institutions expand their governance role, move toward more formal rulemaking, and take up more politically charged issues. In this regard, global administrative law, as the structure which facilitates collective action, could emerge as an essential pillar of legitimacy for the efforts being undertaken across the world to manage interdependence. Much work remains to be done, however, in fleshing out appropriate rules and procedures on an institution-by-institution (and even issue-by-issue) basis. Given the array of procedural questions to be addressed and tradeoffs to be resolved, as well as the dynamic state of supranational governance, global administrative law is likely to be in flux for some years to come.