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**THE GLOBAL REGULATORY CHALLENGE TO U.S.
ADMINISTRATIVE LAW**

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**III. U.S. ADMINISTRATIVE LAW, GLOBAL REGULATION, AND GLOBAL
ADMINISTRATIVE LAW**

Global regulation is already having a discernible influence on U.S. domestic regulatory decisions. Although its effect on the United States and other OECD countries has been more limited than its impacts on developing countries, the effects are significant and growing. For example, the WTO Dispute Settlement Body (DSB) has found that a number of U.S. administrative measures contravene WTO agreements, forcing reconsideration and leading to changes in those measures.¹ U.S. federal regulators have supported international harmonization of regulatory standards, and adopted international standards domestically, for example in food safety. In cases where they have not followed international standards, they have, as a result

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1. Kristina Daugirdas, *Mediating Domestic Policy Goals and Compliance with WTO Norms*, at n.29 (April 24, 2005) (unpublished manuscript, on file with author).

of WTO obligations, provided affirmative justifications for doing so. Federal agencies are also beginning to develop mutual recognition agreements with other nations,² to grant equivalence status to their regulatory practices and determinations.³ For example, the FDA regularly decides whether to authorize or take enforcement action against the import of a medical device product that complies with domestic regulatory requirements in the exporting state, based on a determination on whether those requirements are equivalent to those in the United States⁴

Consumer and environmental interests warn that these arrangements for regulatory harmonization and cooperation will lead to a weakening of standards and undermine U.S. environmental health, safety, and consumer regulation. Although it is difficult to find hard evidence that this has actually occurred, the threat must be acknowledged.

The WTO is a frequent target.⁵ Critics claim that the spectre of DSB rulings holding U.S. environmental, health, safety and consumer protection regulations to violate WTO free trade agreements provide strong incentives for regulatory officials to revise, repeal or not adopt important regulatory protections. The DSB process is attacked as lacking transparency, involving unaccountable “trade experts” with

2. Mutual Recognition of Pharmaceutical Good Manufacturing Practice Inspection Reports, Medical Device Quality System Audit Reports, and Certain Medical Device Product Evaluation Reports Between the United States and the European Community, 63 Fed. Reg. 60122 (Nov. 6, 1998) (to be codified at 21 C.F.R. pt. 26) (providing for mutual recognition of good manufacturing practice (GMP) inspection reports for pharmaceuticals provided by signatory countries). These are, however, a number of structural factors inhibiting broader use of such agreements. See David Livshiz, *SPS, International Standards, Domestic Implementation, and Public Participation: Can the Stars Align?*, 7-8, (January 2, 2005) (unpublished manuscript, on file with author).

3. Livshiz, *supra* note 2, at 7-8. See, e.g., Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities, 70 Fed. Reg. 460, 505-06 (Jan. 5, 2005) (justifying the risk assessment for the proposed regulation as complying with the requirements demanded by the Codex and OIE); Bromoxynil, Diclofop-methyl, Dicofof, Diquat, Etridiazole, et al.; Proposed Tolerance Actions, 69 Fed. Reg. 47,051, 47055 (Aug. 4, 2004) (to be codified at 40 C.F.R. pt. 180) (justifying a change in regulations to make them compliant with standards developed by Codex).

4. Livshiz, *supra* note 2 at 12-14. For examples see, Australia’s Meat Safety Enhancement Program (MSEP), 64 Fed. Reg. 30, 299 (June 7, 1999) (finding Australia’s system of meat inspection equivalent to that of the United States).

5. See, e.g., LORI WALLACH AND PATRICK WOODALL, PUBLIC CITIZEN, WHOSE TRADE ORGANIZATION? A COMPREHENSIVE GUIDE TO THE WTO (2004).

little knowledge in the relevant regulatory fields.⁶ As an example of the global threat to the domestic regulatory process, Public Citizen points to a 1996 WTO decision finding U.S. EPA regulation of gasoline to reduce automobile air pollution contrary to WTO trade disciplines.⁷ The regulation treated foreign refiners in Venezuela and Brazil differently than U.S. refiners because of EPA's concern that the lack of reliable information about the regulatory baseline for foreign producers. Finding little success in challenging the regulations in the traditional domestic venues, Venezuela and Brazil challenged the regulations before the WTO and won. According to Public Citizen, this ruling led the EPA to adopt regulations the EPA had previously rejected as unenforceable against foreign producers.⁸ U.S. critics have also attacked WTO rulings holding as contrary to WTO agreements, U.S. regulatory laws prohibiting the import of tuna and shrimp because of the adverse impact of foreign harvesting methods on dolphin and sea turtles, respectively. Critics argue that the logic of these rulings could also be used to challenge a domestic law which restricted the sale of products made in sweatshops or through child labor.⁹

Critics also contend that international harmonization of regulatory standards threatens a weakening of domestic regulation.¹⁰ For example, the WTO Sanitary and Phytosanitary (SPS) Agreement, gives strong incentives to member states to base food-safety measures on international standards.¹¹ Critics fear that international regulatory harmonization will be driven by least common-denominator or other "leveling down" pressures, resulting in a weakening of U.S. environmental, health, safety and consumer protections.¹² This substantive concern is related to a process critique: procedures for harmonization of regulatory standards are far less open to public scrutiny and participation than domestic regulatory decisional

6. *Id.* at 245-47.

7. *Id.* at 25-28 (referring to the DSB ruling in *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2//R (Jan. 29, 1996)).

8. WALLACH & WOODALL, *supra* note 5, at 25.

9. *Id.* at 28-36.

10. *Id.* at 55-56.

11. If states adopt international standards they enjoy a "safe harbor" against challenge under the SPS agreement but must provide affirmative justification for departures from international standards. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Art. 3(1-3) (1995), http://www.wto.org/english/docs_e/legal_e/15-sps.pdf.

12. WALLACH & WOODALL, *supra* note 5, at 63.

processes. Critics similarly fear that mutual recognition and regulatory equivalency arrangements will undermine domestic regulatory protections by opening U.S. borders to goods and services that have not been adequately regulated by the country of origin.¹³ According to Public Citizen, the SPS Agreement led the USDA to weaken its standards for approving the sale of foreign inspected meat. Although the evidence for this claim is less than decisive, a risk remains.¹⁴

The vehement criticism by U.S. environmental and other NGOs of decisions by WTO and NAFTA tribunals, the IMF, the World Bank, and other international bodies is a virtual reply of Ralph Nader's attacks on U.S. federal regulatory agencies in the 1960s. Indeed Nader is still around, making criticisms of the WTO that are virtually the same as those he levied against the Federal Trade Commission 35 years ago.¹⁵ Some analysts have gone so far as to argue that the rise of global regulation amounts to a fundamental alteration of the constitutional and governmental system in the United States by creating a largely unaccountable "international branch" of the federal government that presents challenges comparable to those posed by the New Deal regulatory state.¹⁶ Thus, the rise of global regulation can be regarded as posing a fundamental challenge to U.S. administrative governance similar to that posed in the 1960s by the disillusionment with the administrative process.¹⁷

The impacts of global regulation on the United States and other developed countries as well as on developing countries will undoubtedly grow in the years ahead. Notwithstanding its global power, the U.S. will not be able to escape these impacts, in part because it is a strong proponent of the global regimes, such as the

13. *Id.* at 58, 61-63.

14. *Id.* at 58 (pointing out that in response to the SPS Agreement and the URAA, the USDA changed regulations on imported meat. Formerly, the USDA accepted meat inspected under foreign systems that were "equal to" domestic inspection systems. Now, they approve meat inspected by systems that are "equivalent" to ours. It's not clear that this change of language has made any practical difference).

15. See LORI WALLACH & MICHELLE SFORZA, *WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY* ix (1999) (preface by Ralph Nader attacking "an autocratic system of international governance that favors corporate interests").

16. Chantal Thomas, *Constitutional Change and International Government*, 52 HASTINGS L.J. 1, 3-7 (2000).

17. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 29 (1990).

WTO, that impose such requirements on participating states. For example, the General Agreements on Trade in Services (GATS), an important trade liberalization measure pushed by the United States, will likely have far reaching effects on professional licensing and regulation in the United States by requiring that the professions be opened to foreign citizens.¹⁸ The prospect of growing substantive impacts is joined with process-based concerns with accountability gaps.

The U.S. Congress shares these concerns, as reflected in the 1994 Uruguay Round Agreements Act (URAA), which approved the WTO Uruguay Round Agreements and made implementing changes to federal law. The URAA reflects a strong desire to protect U.S. regulatory autonomy. Thus, the Act directs that any provisions of the Agreements which are inconsistent with U.S. law “shall have no effect,” and that approval of the Agreements gives no person a basis to challenge any U.S. law or action taken by a federal or sub-federal authority.¹⁹ Further, the URAA provides reports by the United States Trade Representative (USTR) to Congress on WTO activities and their effects on the United States and establishes a procedure for Congress to withdrawal of Congressional approval of the Agreements.²⁰ Further, the URAA provides special procedures for the modification of any regulation or practice of a U.S. agency found by the DSB to be inconsistent with WTO obligations.²¹ These various

18. See generally GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION (Pierre Sauvé & Robert M. Stern eds., 2000).

19. 19 U.S.C. § 3512(a)(1) (2000). The Act also directs that, unless the Agreements explicitly provide otherwise, the URAA is not to be construed to modify any U.S. law including environmental, health and safety laws, or the authority of the U.S. to take unilateral action in response to unfair or unreasonable trade practices. *Id.* § 3512(a)(2).

20. 19 U.S.C. § 3535 (2000). It directs the USTR to consult with appropriate congressional committees prior to any major vote taken by the WTO Ministerial Conference or General Council and to report and further consult with those committees on the outcome of the vote, its effects on U.S. interests, and the President’s potential response. Similarly, the USTR is to report to and consult with the appropriate congressional committees whenever a dispute involving the United States is to be brought before the DSB. 19 U.S.C. § 3538 (2000). In addition, Section 123(a) and (b) of the URAA direct the President and the USTR to review the list of persons serving on the DSB and to seek to ensure that well-qualified experts are appointed to this roster. 19 U.S.C. § 3533(a)-(b) (2000). Furthermore, Congress has directed the USTR to lobby the WTO to adopt rules that protect against conflicts of interest among the persons serving on dispute settlement panels and in the Appellate Body. *Id.* § 3533(d).

21. These procedures, including agency notice and comment and consultation

provisions ensure that the operations of the WTO and their effects on the U. S. are carefully monitored by Congress.

This Part considers how U.S. administrative law has already begun to respond to these accountability gaps, and what direction future initiatives may take. These include responses by the courts, the Congress (as reflected for example in the URAA), and the Executive. Many of the critiques of global regulation and the steps taken to meet them reflect and respond to the concerns of domestic constituencies. As noted above, global regulation also creates responsibilities on the part of US administrative decision makers to properly consider the interests of constituencies outside the United States. Changes in U.S. administrative law to address the global elements of regulation must accordingly address the interests of both domestic and global constituencies.

This Part first addresses administrative law measures to respond to domestic concerns with the impacts of global regulation within the United States. It then discusses administrative law measures to address concerns of constituencies outside the United States with the external impacts of U.S. regulation. Next, it discusses the challenges for administrative law created by the relatively informal character of much global regulatory decisionmaking. Finally, it considers alternative strategies for building new systems of administrative law to meet these needs.

*A. Application of U.S. Domestic Administrative Law to Global
Regulatory Decisions and Norms*

How might U.S. administrative law respond to the concerns of domestic constituencies with accountability gaps in regulatory decisionmaking by the first three types of global regulatory regimes discussed above—international treaty regimes and organizations, transnational regulatory networks, and bilateral arrangements for mutual recognition and other forms of regulatory cooperation – and in domestic U.S. implementation? A brief restatement of the basic elements of U. S. administrative law will provide a foundation for addressing these questions.

As framed in the Administrative Procedure Act and elaborated and enforced by the federal courts, the basic elements of U.S. administrative law are six:²²

with Congress, are described below.

22. A further element in U.S. administrative law is the system, established by

1. Transparency: publication of agency rules, decision, procedures and policies, and public access to agency records.
2. Decisionmaking procedures: notice of proposed agency decisions and opportunity of affected or interested persons to submit evidence and argument to the decision maker.
3. Decision requirements: agency statements of factual findings and reasons for decisions, based on an administrative record that includes relevant agency records and submissions by affected or interested persons.
4. Availability of judicial review of final agency decisions.
5. Legality; assurance of that agency decisions conform to binding legal norms, including those established by the Constitution, statute, Executive Order (if reviewable), and agency regulations and adjudicatory decisions.
6. Reasoned and responsive exercise of discretion: assurance that the agency has considered relevant alternatives and their implications and provided a reasoned justification for its choice among the alternatives, giving due account to and responding to the material evidence and arguments in the submissions of affected or interested persons.

In substantive terms, these requirements can be understand as promoting two basic accountability goals, a power-checking goal of ensuring that administrative officials follow the law (element 5), and associated values of impartiality, predictability, and consistency; and a power-directing goal of responsive regulation (element 6). The procedural elements (1-3), promote these goals by facilitating public scrutiny of and input to agency decisionmaking, promoting agency consideration of those inputs, and providing a foundation for the exercise of judicial review (element 4). The procedural elements also serve to promote these two aspects of administrative accountability through other means, for example, by facilitating legislative oversight and review of agency decisions,²³ and also promote participatory and other non-instrumental values.

What are the most important challenges posed in applying this system to the domestic impacts of global regulatory decisions norms

Executive Orders 12,291 and 12,866, requiring federal agencies to follow certain substantive decisionmaking principles and conduct a cost-benefit analysis, subject to review by OMB. This approach has not yet emerged as a significant element in global administrative law, although Jonathan Wiener has proposed its use.

23. See Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

and practices? Assuring legality (element 5) is generally a not a major concern. Apart from some instances, discussed below, in which judicial review of the implementing domestic agency action is not available, courts can effectively review and police U.S. agency decisions for conformity to domestic law, including the U.S. constitution, statutes, and the agencies' own regulations (international norms are generally not directly applicable and binding on federal agencies). The more serious problems relate to the application of the procedural elements 1-3, and securing promoting the reasoned and responsive exercise of agency discretion (element 6). These problems arise because domestic agency decision often incorporate or are significantly based upon norms generated elsewhere by global regulatory regimes. Further, the domestic agency decision makers may be institutionally or personally pre-committed to these norms and face strong incentives, arising from the logic of international regulatory coordination, to adopt them. Thus the effective center of decisionmaking gravity lies outside of the U.S. administrative agency and outside of the United States This arrangement depreciates the value of the U.S. administrative law procedural requirements, which do not extend to the global elements. If global regulatory regimes do not themselves adopt administrative law practices that include these procedural elements –and, to varying degrees they do not – then the norms eventually implement in the United States escape these disciplines. This arrangement also creates a dilemma for courts reviewing the U.S. agencies' exercise of decisionmaking discretion (element 6). That exercise of discretion has been powerfully shaped by global decisions that are not themselves subject to review by the court and, to the extent that they are made without being subject to elements 1-3, are not even knowable. The scope and efficacy of judicial review is accordingly truncated, perhaps severely. This blunting of the domestic judicial review function, together with the lack of procedural disciplines on global regulatory decisionmaking, undermines the ability of administrative law to promote reasoned and responsive regulation.²⁴

24. In the purely domestic context, procedural requirements and judicial review likewise do not extend to informal communications with and influences on agency decisionmaking exerted by the executive, Congress, and the public prior to or outside the context of formal processes of rulemaking or adjudication. But these influences are the product of domestic political mechanisms and serve to promote domestic political interests. Such mechanisms operate only in an attenuated fashion or not at all with respect to global regulatory decisionmaking. For further discussion of this point, see TAN, *infra*.

How might U.S. administrative law respond to these problems? As discussed in the remainder of this section, one possibility is to apply U.S. administrative law directly to the decisions and other actions of these global regulatory regimes. A second is to develop administrative law disciplines to address more effectively the global elements involved in U.S. administrative implementation of global regulatory norms. A third is to apply such disciplines to the participation by U.S. administrative officials in the decisionmaking of global regulatory regimes.

1. *Direct Application of U.S. Administrative Law to Decisions of International Regulatory Regimes*

The strongest case for direct application of U.S. administrative law requirements—including requirements of procedural due process, reasoned administrative decisionmaking, and judicial review for legality and abuse of discretion – is where decisions of global regulatory regimes impose liabilities on or otherwise directly impact specific persons. Currently, most global regimes do not have such authority, but instances are likely to grow as international regulation intensifies. One current example is the Executive Board of the Clean Development Mechanism under the Kyoto Protocol, which determines whether privately financed projects undertaken in developing countries to reduce greenhouse gases (GHG) are eligible to receive commercially valuable GHG emissions reduction credits. Private project developers and investors are, however, afforded no procedural rights before the Board and no opportunity for review of Board decisions.²⁵ Another example is provided by the UN Security Council 1267 Committee, which lists persons that it determines are engaged in financing international terrorism; UN member states are obligated to freeze the assets of listed persons, who are afforded no procedural rights before the Committee to challenge the correctness of its listing decisions. In the absence of any effective remedy at the level of the global regime, courts in the United States and other countries may begin to review the legality, procedural and/or substantive, of such decisions as they directly impact specific persons. Thus, persons listed by the 1267 Committee have challenged implementing domestic asset freezes in domestic courts in a number of countries, leading in some

25. See Ernestine E. Meijer, *The Clean Development mechanism Loss in a “win-win” Instrument* (unpublished article on file with author).

cases to the lifting of the freeze.²⁶

If a claimant brought such a suit in a U.S. federal court, the boldest possibility would be for courts to hold that the global regulatory regime is a de facto federal agency to which effective decisionmaking power has been delegated by treaty or executive action, so that the procedural and other requirements of the APA apply directly to that regime.²⁷ Such a step would be so deeply inconsistent with the courts' reluctance conduct by the executive of foreign affairs that it would have has no practical chance of adoption. Nonetheless, federal courts might, without relying on the APA, apply constitutional requirements of procedural due process and other generally applicable principles of administrative law to review decisions of global authorities that directly and adversely impact individual persons and provide relief through injunctions and declaratory judgments.²⁸

But what about the much more common situation where the decisions of global regulatory regimes are not directly applicable to or enforced against private persons but instead adopted and implemented through domestic administrative decisions that are subject to domestic administrative law requirements and judicial review. It is unlikely that

26. See Dyzenhaus, *supra* note **Error! Bookmark not defined.** at ____.

27. A court would have to conclude that the global authority was an "agency" for purposes of the APA, which defines "agency" as "each authority of the government of the United States." 5 U.S.C. §551(1) (2005). While UN and other international organizations and their officials regularly plead official immunity when sued in domestic courts, domestic courts may start to chip away at immunity if such organizations fail to provide effective accountability for serious errors or abuses by their officials and employees. See Frederick Rawski, *To Waive or Not to Waive: Immunity and Accountability in UN Peacekeeping Operations*, 18 CONN. J. INT'L L. 103 (2002) (discussing recent moves by the United Nations to limit the use of immunity when serious breach of law is alleged); Jennifer Murray, Note, *Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina*, 34 COLUM. HUM. RTS. L. REV. 475, 506-10 (2003) (discussing the abuse of the immunity doctrine by UN personnel involved in peace keeping missions).

28. By way of analogy, the Bosnian Constitutional Court held that it could review certain decisions by the Office of the High Representative in Bosnia (established by the Dayton accords and endorsed by the Security Council) on the ground that the High Representative was a de facto domestic official and therefore his acts could be reviewed for consistency with Bosnian law. Tort remedies are another possible mechanism of review and redress. Tort claims have, for example, been asserted in India against asserted negligence by UNICEF employees in the distribution and administration of vaccines, which assertedly caused medical injuries to those receiving the vaccines [citation to be supplied]

domestic courts would directly review the procedures and decisions of global regimes in such cases. Instead, the courts are most likely to consider how domestic administrative law disciplines can most effectively be brought to bear on the global elements of the norms being implemented by domestic agencies. This approach is addressed in the following subsection.

2. *Application of U.S. Administrative Law to Domestic Implementation of Global Regulatory Norms*

Federal regulatory officials, as previously noted, play multiple roles in global regulatory decisionmaking. They serve on U.S. delegations to treaty regimes, serve on international boards and expert committees, participate in transnational regulatory networks, and negotiate mutual recognition arrangements. Subsequently, they implement at the domestic level the regulatory norms and practices adopted through these arrangements. U.S. administrative officials thus have both an “external” and an “internal” role. The focus in this subsection is on their internal, domestic role. Their external role is the focus of the following subsection.

When global regulatory norms are domestically implemented, a critical issue is the extent to which procedural requirements and judicial review of domestic implementation reach back to consider the development and basis of the global regulatory norms being implemented. Because of pre-commitment by agency officials, rulemaking or other procedures may have little impact on the eventual decisions and the justification given by an agency for its action may be a rationalization of a *fait accompli*. Accordingly, domestic administrative law may provide little in the way of meaningful accountability unless the record considered by the court and the reasons given by the agency encompass the global elements and the court is able to evaluate them in the context of global the entire decisionmaking process.

In addressing these issues, a fundamental question is whether U.S. agency decisions that implement norms are subject to the same procedural requirements and principles regarding the availability and scope of judicial review as similar decisions that are purely domestic in character. There are three possible answers to this question. Decisions implementing international agreements may be subject to the same requirements as purely domestic decisions (“parity”). They may be subject to lesser requirements (“parity minus”). Or, they may be subject to greater requirements (“parity plus”).

Parity

Subject to a limited statutory exception in the case of notice-and-comment rulemaking procedures, discussed below, nothing in the APA indicates that domestic agency decisions in implementing global norms are exempt from APA requirements or subject to a lesser standard of judicial review than comparable purely domestic decisions. While the APA provides wholesale exemptions from all of its provisions for certain military functions,²⁹ no such exemption applies to agency actions relating to foreign affairs.

Accordingly, the parity principle holds that, subject to any specific statutory provisions to the contrary, agency decisions implementing global regulatory norms should be subject to the same administrative law procedures, requirements, and scope of review as purely domestic agency actions. There are a number of court decisions that reflect this approach. See, e.g., *United States v. Decker*,³⁰ upholding, in the context of a criminal prosecution, the judicial reviewability of fishing regulations issued pursuant to the International Pacific Salmon Fisheries Convention; *Bethlehem Steel Corp. v. United States*,³¹ holding that U.S. agency suspension of countervailing subsidies investigation pursuant to United States-Brazil agreement is subject to notice and comment rulemaking; and *Public Citizen v. DOT*,³² where the Ninth Circuit Court of Appeals held that the Department of Transportation was required to prepare an Environmental Impact Statement and conduct a Clean Air Act conformity determination in issuing regulations that would permit Mexican motor carriers to operate in the United States; as discussed below, this decision was overturned by the Supreme Court.

Even under parity, however, some forms of U.S. agency implementation of global regulatory norms will not be subject to procedural requirements or judicial review because equivalent purely domestic decisions are not. For example, under the APA, an administrative decision whether to or not to initiate enforcement proceedings in a given case is not judicially reviewable where relevant statutes (as in generally the case) do not specify any requirements or criteria for such decisions; in such cases, enforcement decisions are deemed to have been “committed to agency discretion by law.”³³

29. 5 U.S.C. § 551(1)(f)-(g) (2005).

30. 600 F.2d 733, 737-38 (9th Cir. 1979).

31. 159 F. Supp. 2d 730, 739 (Ct. Int’l Trade 2001).

32. 316 F.3d 1002, 1032 (9th Cir. 2003), *rev’d*, 541 U.S. 752 (2004).

33. 5 U.S.C. § 701(a)(2) (1994); *Heckler v. Chaney*, 105 S.Ct. 1649, 1655

Thus, decisions by the FDA or USDA not to take enforcement action against imported products in connection with international mutual recognition and other regulatory equivalence arrangements will generally not be subject to judicial review unless the arrangement has been formalized in a regulation or other measure that is legally binding on the agency and the agency's action is claimed to violate it.³⁴ Similarly, agency guidance and similar policy documents that do not purport to have the force of law are generally not subject to notice and comment rulemaking requirements or, in many cases, to judicial review.³⁵ Thus, agency use of such documents or other informal means to implement global regulatory norms or cooperative arrangements will likewise not be subject to those disciplines. As explained below, however, in a number of recent decisions, the WTO DSB has held that policy guidance issued by U.S. administrative agencies is subject to DSB review for consistency with WTO Agreements; these holdings may change U.S. practice in this respect.³⁶

Further, even under a parity paradigm, the facts and circumstances involved in the development of the global regulatory norms which the agency is implementing and the agency's role in their development may not be included in the administrative record or subject to judicial review. In reviewing agency rules, for example, courts generally limit themselves to the record generated after rulemaking has been formally notice and initiated by the agency. Prior informal prior discussions between the agency and interested persons, which may play a decisive role in shaping the proposed and final rule, are generally not part of the relevant record before the court and not considered by it.³⁷ Similarly, the informal background of licensing or enforcement decisions by agencies is generally not included in the administrative record or considered on judicial review. Given this precedent, courts following a parity approach would refuse to delve

(1985).

34. When the decision is to enforce, the importer, of course, will generally have a right of review of the merits but not of the decision to take the enforcement action as such.

35. 5 U.S.C. § 553(b)(3)(A), (d)(2) (1966) (exempting policy statements from the procedural requirements of notice and comment); 5 U.S.C. § 704 (1966) (providing for judicial review of preliminary and intermediate agency actions only given a statutory provision or the issuance of a final agency action).

36. See TAN, *infra*.

37. Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977) (stating that contacts received prior to the issuance of formal notice of proposed rulemaking need not necessarily be disclosed).

into the global decisionmaking processes that occurred before the initiation by the agency of formal domestic decisionmaking steps, leaving out what may often be the most crucial part.

The APA provides a statutory exception to parity by exempting “foreign affairs functions” from the notice and comment procedures otherwise applicable to rulemaking and the trial-type hearing requirements otherwise applicable to formal adjudication.³⁸ The legislative background indicates that this exemption should be limited to those matters which “so affect relations with other governments that ... public [agency decisionmaking processes] would clearly provoke ... undesirable international consequences.”³⁹ Courts have nonetheless tended to interpret it fairly broadly to cover the implementation of international economic and regulatory agreements.⁴⁰ But in the URAA, Congress restored parity in the specific, politically salient context of agency responses to WTO DSB decisions holding U.S. regulations to be contrary to Uruguay Round Agreements. Before modifying such a regulation, the relevant agency must provide public notice and opportunity for comment and justify any change in relation to the comments received. In addition the agency may not change the rule until after both the agency head and the USTR consult with specified congressional committees and obtain the views of relevant private sector advisory committees.⁴¹

Parity minus

The principle of parity minus holds that domestic administrative decisions should not be subject to the same procedural requirements or availability and scope of judicial review as purely domestic decisions. Its rationale is that excessive legalization and procedural formality will cause compromise confidentiality in international negotiations and otherwise impair the ability of the executive to conclude and promptly and efficiently implement international agreements. The executive must be able to deliver prompt, reliable implementation in order to maintain negotiating credibility. Opportunities for delay through procedural formalities or judicial review will enable disaffected interests to block or delay implementation of beneficial

38. 5 U.S.C. §§ 553(a)(1), 554(a)(4) (2005).

39. Att’y Gen. Manual on the Administrative Procedure Act 26 (Dep’t of Justice 1947).

40. See C. Jeffrey Tibbels, *Delineating the Foreign Affairs Function in the Age of Globalization*, 23 SUFFOLK TRANSNAT’L L. REV. 389, 395-97 (1999).

41. 19 U.S.C. §3533(g)(1) (2005).

international agreements. Since the executive can, as a general matter, conduct and conclude international agreements without being subject to the constraints of domestic administrative law, arguably it should also enjoy significant flexibility when taking the domestic steps necessary to implement these agreements.

This approach finds support in a number of court decisions. For example, in *Jensen v. National Marine Fisheries Service (NOAA)*,⁴² the court held that a challenge by U.S. fishing interests to regulations issued by the International Pacific Halibut Commission and approved by the Secretary of State (who was delegated such authority by the President) were not subject to judicial review, on the ground that presidential action in the field of foreign affairs is committed to agency discretion by law.⁴³ *International Brotherhood of Teamsters v. Pena*⁴⁴ invoked the “foreign affairs function” exemption in the APA rulemaking provisions to reject a claim by U.S. truck drivers that the Department of Transportation was required to follow notice and comment procedures in issuing regulations authorizing Mexican truck drivers to drive in the United States based on determinations driver licensing equivalency.⁴⁵ The court’s ruling may well have been influenced by a perception that liberalization in trade and services is generally beneficial and a reluctance to provide opponents with procedural weapons to fight it.

Deference to executive flexibility is also reflected in *Public Citizen v. United States Trade Representative*,⁴⁶ holding that USTR was not required to prepare an Environmental Impact Statement for the negotiation of NAFTA, on the ground that there would be no final agency action unless and until the negotiations were successfully concluded. At that point, the agreement would be submitted by the President to Congress for approval, an action that is also not subject to

42. 512 F.2d 1189 (9th Cir. 1975)

43. The court invoked *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948), which held that determinations by the CAB (Civil Aeronautics Board) and the President’s determination of international airline route service authorizations and recommendations by the CAB regarding such awards were not subject to judicial review. See also *Z. & F. Assets Realization Corp. v. Hull*, 311 U.S. 470 (1941) (decisions by the Secretaries of Treasury and State to certify awards pursuant to determinations of U.S.-German Mixed Claims Commission not subject to judicial review).

44. 17 F. 3d 1478, 1486 (D.C. Cir. 1994).

45. See generally Judith L. Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT’L ORG. 603 (2000); Benvenisti, *supra* note **Error! Bookmark not defined.**

46. 970 F.2d 916, 918-19 (D.C. Cir. 1992).

judicial review, with the result that judicial review is not available at any stage.⁴⁷ And, in *Public Citizen v. DOT*⁴⁸ the Supreme Court held that DOT was not required to conduct an EIS and make a Clean Air Act conformity determination in issuing regulations, in implementing NAFTA and relevant federal statutes, to authorize operation of Mexican trucks in the United States. The Court reasoned that the combination of NAFTA obligations and relevant federal statutes left DOT with no choice but to grant the authorization; hence an EIS and a conformity determination were unnecessary. This decision makes clear how global regulatory norms that are legally binding on the United States can short circuit otherwise applicable domestic administrative law processes.

Parity plus

A third approach would subject domestic administrative decisions implementing international regulatory norms to more demanding administrative law disciplines than equivalent purely domestic actions. The basic justification for this approach is that the norms being implemented were chosen through global decisionmaking processes that are more remote, opaque, and closed than equivalent purely domestic processes and therefore less subject to political and other mechanisms of accountability, justifying more demanding accountability through administrative law as a compensating corrective.⁴⁹ Global regulatory decisionmaking often occurs in distant locations such as Basel or Geneva. Informal “club” arrangements for global regulatory decisionmaking make it very difficult for concerned interests in the United States, and especially less well-organized consumer, environmental, and other “public” interests, to acquire the information and organize effectively to influence such decisions. U.S. administrative officials may use informal negotiations with regulators in other countries to enhance their independence from otherwise applicable domestic political checks.⁵⁰ The chains of delegation running from Congress to regulatory decisionmaking by

47. 864 F.Supp. 208, 212 (D.D.C. 1994). See also *Public Citizen v. Kantor* (holding that the USTR’s negotiation of the GATT Uruguay Round was not subject to judicial review under the APA.)

48. 541 U.S. 752 (2004).

49. See David A. Wirth, *Public Participation in International Processes: Environmental Case Studies at the National and International Levels*, 7 *COLO. J. INT’L ENVTL L. & POL’Y* 1 (1996).

50. See Zaring, *supra* note **Error! Bookmark not defined.**

administrative officials are far longer and weaker in the global than in the domestic context, justifying stronger administrative law disciplines for global regulatory decisions in order to compensate.

The basic impetus for a parity plus approach is similar to that animating the development by the federal courts of an interest representation model of administrative law beginning in the 1960s: a perception that political and other extra juridical mechanisms of accountability have failed to ensure effective agency protection of diffuse “public” interests relative to those of well-organized economic actors, and a correlative extension of administrative law mechanisms to protect such interests.⁵¹

How might courts implement a parity plus approach to applying U.S. administrative law in the context of global regulation? A key objective would be to enhance the transparency of the facts, analyses, and considerations that underlie global regulatory decisions in order to expose them to public scrutiny and contestation and enable courts to apply requirements of reasoned justification, based on an adequate record, for the regulatory choices made.⁵² The operating premise is that open deliberations and transparency tend to “level the playing field,” alleviate information asymmetries, and check the influence of narrow interest groups in favor of broader but less well-organized constituencies.⁵³

In order to implement parity plus, procedural requirements and judicial review would be directed not only at a federal agency’s implementation of a global norm, but would extend to the underlying norm itself and the process of its adoption, even in cases where analogous earlier stage agency decisionmaking in the purely domestic context would not be subject to such disciplines. Thus, in cases where domestic implementation involves formal adjudication or notice and comment rulemaking, courts might require the agency to submit for the record evidentiary materials on the global decisionmaking process and the reasons why the global norms in question were adopted. The agency might be required to explain why the relevant agency officials

51. See Richard B. Stewart, *The Reformation of American Administrative Law*, 86 HARV. L. REV. 1666 (1976).

52. The extent of need for such measures will presumably vary depending on the extent of transparency and accessibility of the international regulatory regime, including whether it is a network or more formal treaty-based regime; these variations may influence the degree of intrusiveness in courts’ application of hard look review.

53. Benvenisti, *Factors Shaping the Evolution of Administrative Law*, supra note **Error! Bookmark not defined.**

agreed, in their “external” capacity as participants in the global decisional process, to the norms adopted and what commitments they made regarding domestic U.S. implementation. FOIA might also be used to obtain discovery of agency records relevant to the international negotiations.⁵⁴ The justification for these steps would be that they are necessary in order for a court adequately to review the agency’s domestic decision by enabling it to take into account . the underlying global norms, circumstances and considerations. Also, the enhanced transparency resulting from such steps could energize legislative and other political oversight. The executive, of course, would strongly resist any such initiative as an unwarranted interference with its conduct of foreign relations and with needed informality and confidentiality in international negotiations.

A parity plus approach would reject the limitations on the availability of judicial review and agency procedures adopted by the courts following a parity minus approach, and the scope of review would extend significantly beyond that applied by courts following a parity principle. In many cases doctrines of reviewability and ripeness would have to be relaxed in order for a court to undertake review of the global components of agency decisions. No court has yet taken this path. But the ever increasing importance of global regulation, growing criticism of both the procedural and substantive elements of global decisionmaking, and the concomitant erosion of domestic political and legal mechanisms of accountability may well lead the courts to take the initiative, much as they did in the 1960s in response to similar criticisms of agency regulatory decisionmaking.

Congress as well as the courts can take steps to implement a parity plus approach. Thus, in the URAA, Congress not only required agencies to provide notice and comment before and reasoned justifications before modify a regulation found by the DSB to contravene WTO agreements. It also provided that an agency may make such modifications only after the USTR and the agency head consult with the appropriate congressional committees on the proposed modifications. Any final rule or other modifications does not take effect for 60 days, during which time specified congressional

54. The Freedom of Information Act provides a “deliberate privilege” exemption which might be involved by the government to withhold from disclosure records pertaining to global regulatory matters. It also provides an exemption for matters that are “specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy” and properly classified under that order. *See* 5 U.S.C. §§ 552(b)(1), (5) (2004).

committees may take a non-binding vote to indicate agreement or disagreement with the modification. These provisions reflect that U.S. government responses to an adverse DSB ruling involve two processes: agency reconsideration of the measure, and USTR negotiation with the successful complaining states. The URAA provides legal and political mechanisms to promote accountability by the government officials engaged in both.

In summary, the limited number of court decisions and other initiatives on these questions have taken different approaches, providing limited support for each of the models—parity, parity minus, parity plus —, but no clear trend can be discerned. Under parity or parity minus, it is doubtful that courts would do much to close the accountability gap. It is highly uncertain whether courts will adopt a parity plus approach and how far they might push it. There are, however, suggestive parallels between the present situation and the late 1960s in the United States, when courts lost faith in the performance and accountability of U.S. federal administrative agencies and adopting far-reaching innovations in administrative law, including expanded standing and participation rights and “hard look” judicial review of agency discretion. On the other hand, many of the measures needed to deal with regulatory globalization will have to come from Congress or the Executive.

3. *Extending U.S. Administrative Law to U.S. Participation in International Regulatory Regime Decisionmaking.*

A third approach to dealing with accountability gaps would be to extend federal administrative law disciplines directly to agency officials’ participation in global regulatory decisionmaking, whether through treaty-based regimes, regulatory networks, or transnational cooperation regarding regulatory equivalency. The initiatives discussed in this subsection are primarily the province of Congress and the executive. Even an ambitious approach to judicial review of domestic implementation of global regulatory norms would not allow the public to have notice of, comment on, or have an opportunity to participate or influence the decisional process at the global level where the controlling decisions are often made.⁵⁵

55. Federal agencies entering into international regulatory agreements with counterparts must clear these agreements with the State Department and notify Congress pursuant to the Case-Zablocki Act, but this notification occurs only after the agreement has been concluded. See Horton, *supra* note **Error! Bookmark not defined.**, at 713.

One unlikely possibility would be to treat federal agency officials' participation in global regulatory decisionmaking as those of their agency for APA purposes and accordingly subject to APA procedural requirements and judicial review. The APA and general principles of federal administrative law, however, afford little or no purchase for such an initiative. Judicial deference to the executive's conduct of foreign affairs is a major additional obstacle. [DEVELOP]. Where U.S. agency officials participate in a formal global regime decision by casting a vote as a representative of the U.S. government deference to the executive and reluctance to interfere with the decisionmaking of international organizations in which other countries are represented would make courts unwilling to review the U.S. official's action. Where global regulatory norms arise out of less structured processes of deliberation and discussion, the informal character of the interaction, prior to any formal decision process, poses obstacles. Furthermore, the APA and general administrative law principles of standing and ripeness law would normally fail to countenance immediate judicial review of an agency's international-level informal discussion of or even agreement to a regulatory norm prior to adoption of a domestic implementing measure that adversely affects the plaintiffs.

Accordingly, new statutes or executive initiatives would most likely be needed in order to extend domestic administrative law disciplines to agency participation in international regulatory decisionmaking. Although there is little prospect of extending judicial review directly to global regulatory decisions, procedural requirements for agency participation in international regulatory negotiations have already been adopted by the executive in certain instances. They include the following:

Public notice and opportunity for comment in advance of agency participation in international regulatory negotiations. Prior to entering into active negotiations on the Montreal Protocol, the Departments of State and EPA published a rather detailed program in the Federal Register and invited public comments. They also issued an environmental impact statement.⁵⁶ The executive branch also provided Federal Register notice of its intent to negotiate NAFTA and held public hearings.⁵⁷ The FDA and USDA are subject to a statutory requirement to notify the public about international "sanitary or phytosanitary standards under consideration or planned for

56. Wirth, *supra* note 49, at 25.

57. *Id.* at 26.

consideration.”⁵⁸ Other agencies, including USTR, and the Department of Commerce have from time to time, as a matter of agency practice, provided public notice of regulatory harmonization activities.⁵⁹ These opportunities for public input to the US position in international regulatory negotiations often include public meetings at which participants will be informed of the U.S. negotiating position and provide comments to agency officials.⁶⁰

In the aftermath of unsuccessful efforts by NGOs to judicially challenge the failure of the federal government to prepare carry out environmental impact statements on the negotiation of the NAFTA and Uruguay Round agreements,⁶¹ President Clinton issued Executive Order 13,141 which directs USTR to prepare an environmental review for the negotiation of comprehensive multilateral trade rounds, bilateral or plurilateral free trade agreements, and trade agreements in natural resource sectors. The scope of such reviews was expanded in the Bipartisan Trade Promotion Authority Act of 2002, which require similar reviews of the impact of trade agreements on U.S. employment and labor markets.⁶²

Participation of NGO and business representatives in international negotiations.

Non-governmental representatives, including representatives of business and NGOs, are often included as members of the U.S. delegation to international regulatory regime negotiations, including those at the OECD and the Codex.⁶³ They may also participate by

58. 19 U.S.C. § 2578(c)(1) (2004).

59. See *International Trade Agreements*, *supra* note **Error! Bookmark not defined.**, at 443-3.

60. See Livshiz, *supra* note 2, at 15

61. See, e.g., *Public Citizen v. USTR*, 970 F.2d 916 (1992).

62. 19 U.S.C. § 3802(c). Nevertheless, it is not immediately clear what impact such new measures will have particularly as neither the congressional legislation nor the executive order provides for judicial review, and the executive order explicitly disallows it. Exec. Order No. 13,141, 64 Fed. Reg. 63,169, 63,170 (Nov. 18, 1999). The American Bar Association has recognized the need for additional steps to provide greater transparency in connection with international negotiations on regulatory harmonization, and has recommended that the President encourage federal agencies to provide notice and opportunity for comment with respect to negotiation activities, establish advisory committees in connection with such negotiations, and make of documents available under FOIA with respect to each significant international regulatory harmonization activity in which it is engaged.

63. See, e.g., International Standard-Setting Activities, Codex Alimentarius Commission; Duties of United States Delegates and Delegation Members Including Non-Government Members, 63 Fed. Reg. 7,118 (Feb. 12, 1998).

virtue of membership on USTR advisory committees.⁶⁴ Additionally, the Transatlantic Business and Consumer dialogues, established as part of the 1995 New Transatlantic Agenda, have provided businesses and NGOs with opportunities to consult with government negotiators on issues of transatlantic policymaking.

Measures to promote negotiation transparency. EPA has freely made OECD documentation available to non-governmental representatives participating in U.S. delegations to the regulatory harmonization negotiations held by the OECD Chemicals Group, notwithstanding the “restricted” status of the documents; this practice has, however, not been applied to other aspects of OECD’s work in regulatory harmonization.⁶⁵

In addition, as noted above, Congress in the URAA required agency notice and comment prior to revising a regulation held by the DSB to be contrary to WTO agreements, at the same time required the USTR as well as the agency to consult with Congress. These procedures respond to the dual track process involved in the U.S. government’s response to an adverse ruling. While the DSB agency reconsiders the regulation, the USTR (with agency involvement is simultaneously engaged in international negotiations with the complaining WTO member states.

The application of these various measures is uneven, and there is no consistent overall federal government policy or practice. Moreover, these measures are generally limited to global negotiations in the context of treaty-based regimes, and have little or no application to more informal regulatory networks and bilateral cooperative arrangements. Moreover, nongovernmental actors, and especially NGOs, often find that the opportunities for participation have limited value. Often the issues presented are highly technical. The costs of traveling to and participating in distant fora is also a barrier for many NGOs. As a result, many NGOs lack the capacity to participate effectively, which helps to explain the low level of NGO attendance at meetings and submission of comments on U.S. negotiating positions.⁶⁶ Also, business and union groups enjoy preferential access to some global regulatory negotiations by virtue of their membership on agency advisory committees.⁶⁷ Often there may be one representative for each industry while consumer groups are left with a

64. See Wirth, *supra* note 49, at 28.

65. *Id.* at 15-19.

66. See Livshiz, *supra* note 2, at 20.

67. *Id.*

single representative. Even when nongovernmental actors are members of delegations or have other participation opportunities, they may be effectively shut out of high level negotiations between principals or otherwise marginalized.⁶⁸ NGOs in particular tend to view the meetings and other procedural opportunities as cosmetic in character. This view may be reinforced by the fact that, under the initiatives summarized above, agency officials have no obligation to publicly justify the negotiating positions that they ultimately take or to respond to the comments submitted.

Notwithstanding their limitations, wide adoption of such measures could have a significant effect in promoting transparency and opportunity for input with respect to U.S. federal agencies' participation in global regulatory decisionmaking. They could also be expected to have an influence on subsequent judicial review of domestic implementing measures by providing potential litigants with additional information regarding the global regulatory background and facilitating expansion of the administrative record and the range of factors considered by reviewing courts. It is of course quite possible that non-state actors based in other countries could seek to take advantage of these measures, including opportunity for comment and subsequent judicial review.⁶⁹ That could be an important step in the development of a genuinely cosmopolitan administrative law.

As discussed in subsection C, the limitations of such efforts in dealing with the more informal modes of global regulatory decisionmaking must, however, be emphasized. Also, as discussed further in subsection D, extension of U.S. administrative law to U.S. officials' participation in global regulatory decisionmaking strongly might be resisted by other nations. On the other hand, such initiatives, especially if matched by similar initiatives from the EU and other major jurisdictions, could prod the adoption by global regulatory regimes of administrative law mechanisms of in order to preempt,

68. *See, e.g.*, Press Release, Trans Atlantic Consumer Dialogue, U.S. – EU Summit Puts Bus. CEOs Ahead of Consumer Groups (June 23, 2004) (announcing a boycott of a summit of the Transatlantic Economic Partnership by TACD when business groups were offered a meeting with presidents of the United States and the European Union, but consumer groups were denied a similar meeting), available at <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/press.cfg&id=39>.

69. *Cf. Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999), where the court entertained but rejected on the merits a claim by foreign telecommunications carrier that FCC regulations implementing WTO agreement had legally impermissible extraterritorial effects on foreign carriers.

fend off, or manage the impact of different, uncoordinated domestic administrative law requirements, as suggested by the experience with international sports federations discussed previously.