

INTRODUCTION: PERSPECTIVES ON THE DEVELOPMENT OF GLOBAL ADMINISTRATIVE LAW IN LATIN AMERICA

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This volume¹ examines development-related investment and financing in Latin America, and associated global and national regulatory issues, from the new perspective of “Global Administrative Law.” The idea of Global Administrative Law begins with the twin observations that much economic governance by transnational and national institutions is a form of administration, and that this administration involves the exercise of power which can be channeled and controlled through the use of administrative law-type techniques nationally and internationally. This has important implications for both global and national regulatory governance. In the global or extra-national administrative space, Global Administrative Law encapsulates the use of administrative law techniques (such as transparency, participation, reasoned decision, review, and accountability) to promote both mutual accommodation and greater responsiveness by the growing variety of global regulatory bodies, including accountability and responsiveness to developing countries and civil society interests. The concept of Global Administrative Law thus encompasses the legal mechanisms, principles, and practices, along with supporting social understandings that promote or otherwise affect the accountability of global and regional administrative bodies—for example, the World Bank, International Monetary Fund, World Trade Organization, International Standards Organization, the Basel Committee

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of bank regulators, international investment tribunals, international criminal tribunals, internet governance bodies, and even international sports federations and their tribunals. In the national administrative space, global administrative law distils legal implications of the impact of global regulatory authorities and procedural and institutional practices and norms on domestic systems of decision making, including domestic administrative law and the role of courts and other tribunals; and conversely, the impact of these national practices on extra-national governance. The broad tendency of Global Administrative Law (with many exceptions and much contestation) is to ensure that global, regional and domestic governance bodies exercising powers of public importance meet adequate standards of transparency, consultation, participation, rationality, and legality, and that there is effective independent review of the rules and decisions that these bodies make. This field of law is described as “global” rather than “international” to reflect the complexity of national and intergovernmental regulation, the increasing role of private regulators and public-private hybrid bodies, the wide array of informal institutional arrangements that operate alongside formal institutions, and the foundations of the field in a wide variety of transnational as well as international normative sources and practices.

Globalization has a more and more pervasive impact on government decisions and policies in Latin American countries. They are strongly affected by the decisions of global regulatory bodies in areas such as trade (*e.g.* WTO), investment (*e.g.* international investment arbitral tribunals), monetary policy (*e.g.* IMF), development aid (*e.g.* the World Bank and the Inter-American Development Bank), environment (*e.g.* OECD), health and safety (*e.g.* Codex Alimentarius), human rights (*e.g.* the Inter-American Commission and Court of Human Rights), and others. They are also subject to regulatory requirements imposed through conditions on financial assistance (for example, by the World Bank and other multilateral and bilateral development assistance agencies) and through treaty provisions such as the provisions in investment treaties prohibiting expropriation of foreign investors’ investments (treaty provisions on fair and equitable treatment or expropriation can change the possibilities of re-negotiation of contracts and imposition of environmental and other regulatory requirements by host countries.) In many cases these requirements and conditions relate to decision making procedures and other governance elements that countries must follow in given areas, for example in adopting and enforcing regulatory measures that affect internationally traded products or services and international investment. Other bodies, including transnational networks of national regulators, private standard setting bodies, and hybrid public/private bodies, often have a more indirect but nonetheless powerful influence on domestic policies and decision making procedures. These impacts and more subtle effects are often especially powerful in the case of developing

countries, which are particular dependent on foreign investment and assistance, and may often lack the institutional resources and expertise to influence, deflect, or otherwise deal with them.

From the perspective of Global Administrative Law, these various regulatory and procedural and institutional impacts in Latin America raise at least five sets of questions for investigation. First, what has been the impact of these requirements and conditions, as well as of broader global governance dynamics, on government decision making and policies in Latin American countries, with particular emphasis on regulatory policies, procedures and the functioning of administrative law including the role of domestic courts? To what extent have these impacts been beneficial or adverse from the perspective of particular Latin American countries and their citizens? Second, are global regulatory bodies that impose these requirement and conditions, adequately accountable and responsive to the distinctive needs and interests of Latin American countries? Third, in so far as the legitimate interests and needs of Latin American countries are being adversely affected or disregarded by global authorities, to what extent can the development and adoption of new administrative law mechanisms and techniques in the global or national administrative space help address these problems? Fourth, who are the winners and losers from the adoption of global administrative law techniques and values? Does Global Administrative Law primarily serve the interests of rich countries and multinational firms and investors, or can it be harnessed to protect the interests of developing countries and social interests? Fifth, in what ways are Latin American countries and their civil society organizations knowledgeable and effective players in global regulatory governance, and how might this expertise be enhanced and integrated with better management of the domestic implications and influences of global regulatory standards and practices?

These are large questions. To maintain a coherent focus, this volume seeks to illuminate some elements of these issues through substantial study of one particularly important and broad area of practice. This volume first presents the overall theoretical ideas of Global Administrative Law and global governance from several different perspectives, then uses these perspectives to consider the field of foreign investment, national regulation, and development finance. In doing so, we hope it also provides some indicative directions for the future development of global administrative law from the perspective of Latin American countries.

This book represents one aspect of a collaboration on Global Administrative Law jointly sponsored and organized by the University of San Andrés in Buenos Aires, and the New York University Institute for International Law

and Justice and its Global Administrative Law Project, with the energetic support of the journal *Res Publica Argentina*. Eight of the authors are based in Argentina, three are professors in Brazil, two are Chilean, and three of the papers are written by NYU Law School faculty (with co-authors trained in part at NYU.) An initial workshop and subsequent activities have provided a forum for engagement among Latin American scholars, government officials, private lawyers and civil society representatives from many countries, along with some scholars from the United States and Europe, in discussing issues of global regulatory governance and administrative law from a Latin American perspective. The organizing institutions, together with partners in other developing countries around the world, have initiated this work in response to the risk that the emerging practice of Global Administrative Law will be overly influenced by developed countries - states with strong institutions, global power and largely consolidated systems of administrative law. It is essential that the perspectives, experiences, ideas and contributions of developing countries, including the diverse countries of Latin America, shape the development of global administrative law. Further workshops of the NYU Global Administrative Law project have been held at the Centre for Policy Research in New Delhi, the University of Cape Town Law Faculty, Tsinghua Law School in Beijing, and the NYU Abu Dhabi Institute in Abu Dhabi. Joint research projects on specific issues concerning Global Administrative Law and global and national regulatory governance are now under way among these and several Latin American institutions, working also with the NYU IILJ and the University of Toronto, on topics such as corruption and money-laundering, control of access to essential medicines, procedures and institutions in competition law, uses of indicators in global and national governance, and specific features of the “regulatory state of the South.” Papers from this and other work, in English, Spanish, Portuguese, Chinese and other languages, are regularly added to the Global Administrative Law project website, www.iilj.org/GAL.

The first section of this volume begins with a presentation by KINGSBURY, KRISCH, and STEWART of the core idea of Global Administrative Law. They argue that much governance can be viewed as administration, that the control and channeling of public power through administrative-law type mechanisms is increasingly evident in global governance, and that there are some normative reasons to support this development even while recognizing that its normative justification can be strongly contested, and that there is a real risk of it contributing to injustices. The connections of these dimensions of global governance with developments in the theory and practice of Latin American public law and governance, particularly in Brazil, are addressed in the chapter by MICHELLE RATTON SÁNCHEZ BADIN, one of several professors at FGV-Direito in São Paulo working centrally on Global Administrative Law and the national

effects of global regulatory governance. In the next chapters, leading Argentine professor in administrative law, AGUSTIN GORDILLO, and PABLO FERNÁNDEZ LAMELA, consider the implications of legal globalization and of different types of global regulatory governance (including inter-governmental networks, which are the principal subject of FERNÁNDEZ LAMELA'S chapter), for the practice and the conceptualization of public law and legal globalization in Latin America and elsewhere. These chapters together delineate the broad foundation on which national administrative lawyers increasingly are engaging with Global Administrative Law.

The second section of the volume consists of six papers analyzing in depth foreign investment issues, particularly investor-state arbitration, using the optic of Global Administrative Law and governance. This is of fundamental practical importance, particularly to Argentina which has by far the most claims against it, but it also raises distinctive conceptual issues. What is the impact of internationalization of conflicts about investment on the rule of law in Latin American countries? What is, or should be, the impact on national administrative law, on the institutional roles of national courts, and on central and provincial governments and public agencies? In more basic policy terms, what is the best forum to settle disputes between government and private investors? Is there justification for the perceptions in relation to some Latin American situations that international arbitral tribunals tend to favor investors, and national courts tend to be pro-state; and if so, might the use of a Global Administrative Law approach in these tribunals and courts, where proper, make any difference to those perceptions?

HÉCTOR MAIRAL, a prominent legal practitioner who has advised many investors, points to reasons foreign investors affected by the 2001-02 economic crisis have tended not to win cases against governmental authorities in Argentine courts, and indeed have tended not to bring their claims to the courts, having instead flocked to external arbitration if they could not negotiate settlements. He argues that the rush to arbitration as an extranational governance alternative ought to trigger reform of the Argentine judicial process, certainly to reduce court fees and resolve cases faster. JORGE BARRAGUIRRE (H), who has significant experience representing the Argentine government as defendant in arbitral proceedings brought by foreign investors, expresses misgivings about arbitral tribunals not applying what should be applicable national administrative law, and more generally about the erosion of national public authority through this arbitral jurisprudence. He contests claims that the arbitral tribunals should as a normative matter be regarded as truly representing Global Administrative Law authority. In that respect, he points to key features of national administrative courts that are not, in his view, fully replicated by international investor-state

tribunals. National courts typically have one or more appellate levels, and they adhere to established administrative law principles such as transparency, participation, reasoned decision and legality. They have, in some countries, more specific expert knowledge of administration and of regulated industries than do investment arbitral tribunals, and thus command a particular expertise-based Weberian legitimacy. Most fundamentally, the national administrative space is an emanation of a national demos, with shared traditions and values including legal principles, whereas the global administrative space is not.

BENEDICT KINGSBURY and STEPHAN SCHILL argue that investor-State arbitral tribunals must be regarded, as a factual matter, as exercising power in the global administrative space. In setting standards for State conduct *vis-à-vis* foreign investors, for example in defining what is improper administration or a violation of due process under fair and equitable treatment, tribunals set standards which may influence future conduct by the respondent State and other States, as well as conduct by other tribunals. They are thus governance actors, not merely decision-makers on single disputes. Moreover, tribunals in many circumstances act in fact as review agencies of a State's specific actions, even while tribunals often purport to disavow such a role, as JORGE BARRAGUIRRE (H) notes. The tribunals are thus shaping the emerging body of Global Administrative Law. At the same time, this regulatory activity of arbitral tribunals attracts significant criticism, not only of specific decisions but with regard to the legitimacy of the decision-making powers of these tribunals as such. The chapter argues that applying Global Administrative Law criteria to, and in, the work of these tribunals could somewhat ameliorate parts of this legitimacy problem. This issue is addressed from one perspective by Chilean legal scholar SANTIAGO MONTT, who cautions about the dangers of the old gunboat diplomacy becoming gunboat arbitration, but argues that investment arbitration instantiating BELLO-CALVO principles can play a useful role in spurring Latin American legal systems to apply to citizens and foreigners alike the same kinds of liberal property, economic and process rights protections as the countries of the North Atlantic. EZEQUIEL NINO, drawing on experience of major Argentine NGOs in pressing for acceptance of their *amicus* briefs by investor-state tribunals in cases concerning privatization of urban water supplies (making arguments on matters such as the human right to water), notes that some tribunals have begun to accept such briefs but that there continue to be major difficulties for civil society views and interests (such as human rights interests of affected consumers) to be given serious weight in these processes. He associates this with wider patterns of secrecy or disregard for civil society interests in processes of global economic regulation, taking as a case study the use by the IMF of non-public side letters to public agreements, such as accompanied the stand-by facility agreement the IMF negotiated with Argentina in January 2003. One

strategy for overcoming excessive secrecy, at least in national governments, is that described by JUAN PABLO OLMEDO BUSTOS , who helped bring the *Claude Reyes* case against Chile in the Inter-American Court of Human Rights. The case challenged refusal of the relevant Chilean investment agency to release information on environmental effects of a proposed foreign investment in the forestry sector. The Court issued a strong finding in favor of freedom of public access to information, eventually precipitating an amendment to the Chilean constitution along similar lines.

The chapters by NINO and OLMEDO point to the important need for sustained scholarly and policy work, from many angles, on the relations between Global Administrative Law and human rights, particularly with reference to global and national regulatory governance of economic issues. Part of the backdrop is major constitutional, legislative and institutional reforms regarding the role of human rights within domestic law, which many Latin American countries made after emerging from military dictatorships. In some cases, like Argentina, international human rights treaties can be enforced by national courts, and the interpretative decisions of international human rights tribunals may be regarded as a basis for decision for some domestic courts. Thus the roles of both national courts and of the Inter-American Court and Commission of Human Rights have changed. The Inter-American human rights bodies operate in some situations as part of a regulatory process, engaging in dialogues involving the executive branches of countries like Argentina, the domestic courts, and the networks of human rights NGOs that interact intensively with legislatures, national courts, and government ministries. These human rights dialogues can extend to commercial actors, to inter-government institutions such as the World Bank and the IADB, and in some respects to investor-state tribunals. But at the same time, the diverse demands placed on the state in relation to human rights are impacting both the states' own regulatory structures and processes, and the national administrative law. Demands are made to increase the power and effectiveness of the state, to protect people against death squads, violent crime, and disruptions arising from transnational pressures on social policy and economic flows. Demands are rising also to use state or inter-state power to subject some non-state actors to regulation and to obligations aimed at promoting human rights; but also to protect these actors under human rights rubrics (due process of law, free speech, property rights, etc.) This complex *problématique* invites future attention to several important research and policy questions on Global Administrative Law and human rights in the region. How well do the Inter-American bodies understand and perform their regulatory roles? Are they helped or hindered by other actors (including human rights NGOs) in doing this? How are understandings of the roles and place of the State changing within national and international human rights processes? Are

these processes adequately addressing privatized entities, private actors, and changing methods of regulation? Is national administrative law aligned with human rights objectives? How do transnational NGO networks understand their roles in relation to regulatory and administrative questions having human rights dimensions? Are they effective? What is the impact of internationalization in the enforcement of human rights on democratic and administrative dynamics of Latin American countries, and how does this compare with prevailing views in Europe and the U.S.? Should the accountability of international agencies in their interpretations and applications of international conventions (including “friendly settlements”) be improved? To what extent are international tribunals and monitoring mechanisms of human rights in fact shaping, and should they be shaping, administrative law practices, obligations, mandates and public policies in Latin American countries?

The third section of the book widens the discussion from investment to others areas of national economic regulation. PAULO TODESCAN LESSA MATTOS of the University of São Paulo uses a case study of public participation within the phalanx of independent regulatory agencies created in the Brazilian privatizations of the 1990s, to establish an account of the possibilities of vertical (intra-agency) accountability as a complement and alternative to extra-agency accountability to other bodies. He locates this case study within what he sees as a broader societal normative demand for manifestations of Habermasian deliberative democracy in relation to these privatized economic sectors.

The innovative research presented in the chapter by MAÍRA ROCHA MACHADO (FGV-Direito in São Paulo) and GUILLERMO JORGE (San Andrés), shows the significant differences in the concrete regulatory application and consequences in Brazil and Argentina of the international anti-money laundering regime. With the goal of reducing illegal markets, usually conducted by organized crime groups, the anti-money laundering paradigm is a sophisticated crime control policy that involves substantial regulatory controls on financial markets, liberal professions, and financial transactions all around the world. Although the norms and supervisory structures are primarily defined by the Financial Action Task Force, which is a non-treaty limited-membership inter-governmental network body with strong peer-review arrangements, treaty-based intergovernmental bodies, networks of private banks, multilateral financial institutions, a network of Financial Intelligence Units (the Egmont Group) and various regional bodies all contribute actively to this governance process. The regime is premised on mandatory reporting of information by private sector actors, and includes strong sanctions powers exercised by the local state and by distant states and international bodies. This chapter documents the substantial variations in the effects in Brazil and Argentina that have resulted from superficially the same

global regime, with very different effects on detection of official and elected-politician corruption, personal financial reporting, and other issues.

The fourth section of the book broadens from investment to examine the wider topic of Global Administrative Law in the field of development finance. NYU Professor KEVIN DAVIS, a pioneer of Financing Development as a field of legal research and study, sets forth its conceptual foundations. His work covers a range of development-finance techniques, extending from World Bank and IMF lending, sovereign borrowing on commercial bond markets, transnational project finance, through for-profit or non-profit microcredit, to official development assistance and private charitable aid. He integrates the private and commercial law elements of these techniques, with wider issues concerning the formulation and implementation of public policy and public interest, using Global Administrative Law approaches to help structure this analysis. JORGE DANIEL TAILLANT of CEDHA provides an Argentinian NGO perspective on methods of mobilization against proposals for two specific development projects, to construct pulp mills on the Uruguayan side of the Uruguay-Argentina border river. The opposition campaign included popular protests to mobilize the Argentine state, which then filed an inter-state case in the International Court of Justice. But much of the effort was by civil society groups operating in a wide array of global, regional, and domestic institutions, including their work with the International Finance Corporation of the World Bank, the procedures of the OECD Guidelines on Multinational Enterprises, public interest actions in Argentina's domestic courts, and litigation pressures against the Finnish Botnia Company. This mobilization of environmental opposition to a foreign investment in a neighbouring country where that investment received support, was conducted primarily on the traditional international law basis that detrimental and legally-cognizable effects would be felt in Argentina. But the dimension of concern for the extra-state environment, and the extra-state effects of civil society mobilization, adds a further complexity to the dynamics of Global Administrative Law analysis. Administrative law issues of process and standing, including the rights of different publics to have access to environmental information and to participate in environmental decisions, and rights of access to justice to redress denials of these rights, are becoming more and more significant in the legal governance of such dynamics.

MARTIN BÖHMER, who as a public interest lawyer and founding Dean of the San Andrés Law School has been a prominent Argentine proponent of efforts to rethink Latin American legal practice and legal education under the current conditions of globalization, provides a fitting conclusion to a volume he played a substantial part in initiating. His short sketch of Argentine public law in different epochs, provides the context for his analysis of the challenges

since the 1983 restoration of democracy in achieving a working combination of respect for and enforcement of fundamental human rights, consolidation of democracy, and the establishment of stable and effective sets of public rules. The transition after 1983 from authoritarian to constitutional government, from abuses of basic rights to commitments to national and international rights protections, from monopolies to privatization of utilities and other public services, and from a subdued to a highly active civil society pursuing distinct agendas, have been accompanied by increasingly active judges playing at times counter-majoritarian roles, and by a growth in public interest lawyering as well as new legal thinking in administrative law as in other fields. Overlain on all of this, however, have been the rapid changes in the terrain of engagement and in the position of the state, wrought by globalization. The democracy the country seeks to consolidate can no longer be understood simply under a conception of representative democracy that is mainly confined to parliamentary discussion and electoral decision. The multiplication of deliberative processes and sites of influence or control in national public law (regulatory agencies, the judicial power, administrative bodies) and in international governance, force the different actors to develop new approaches to decision-making and accountability, to give reasons for actions, and to repeatedly nudge or modify policies as they interact with this dynamic governance environment. These changes are again reconfiguring the available public spaces, and call for new skills which include the skills of global administrative lawyering. BÖHMER notes the deliberate paradox that will endure for as long as the idea of 'global' administrative law takes its framing and content predominantly from North American or North Atlantic ideas and interests. The deepening and reshaping of Global Administrative Law is one part of the new enterprise he calls for in arguing for the deepening and reshaping of Argentine and Latin American public law, legal education, and lawyering skills under these new conditions. It is hoped that the increasing engagement of Latin American lawyers with these contemporary challenges, whether adopting, refashioning or rejecting the Global Administrative Law perspective on these issues, will have a substantial impact not only in Latin America, but in each context where these issues must rapidly and carefully be addressed.