Public Choice and Global Administrative Law: Who's Afraid of Executive Discretion?

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I. Introduction

Delegating authority to administrative agencies is necessary to make up for the generality of the law. The legislature cannot address every contingency. But delegation of authority entails discretion to the administrative agents, and discretion breeds corruption. Administrative law attempts to curb such discretion by structuring the decision-making process, providing for transparency and voice, and by setting up review mechanisms, including judicial review. Such attempts, however, produce new discretionary powers, and so on. The "cat and mouse" game continues indefinitely. As Martin Shapiro says, administrative law is "an endless game of catch-up in which previously granted discretions are brought under rules, even as new discretions are granted, and no discretion granted is ever completely and finally reduced to rules."[1]

Administrative discretion – exercised by politicians, political appointees and professional bureaucrats – results not only from the inherent limits of primary legislations. It is often a product of a disinterested or captured legislature that surrenders policy-making to the executive. Lawmakers that seek to influence outcomes of executive action use administrative law as one of the tools to increase the likelihood that their wishes are heeded. When lawmakers are actively challenging the executive, we should expect to find quite an elaborate administrative code. In

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contrast, indifferent lawmakers fail to constrain the executive. This, however, would not necessarily imply that the administrative law would be weak. The executive itself may have an interest in constraining through law at least some agencies within the administration. The court also has a will and means of its own. When lawmakers defer to the executive with no strings attached, it is often the case that courts fill the gap with judicially invented rules. Such judicial activism depends in turn on the level of court involvement that the legislature and executive tolerate. Thus, administrative law, perhaps more than other areas of law, reflects accurately the existing balance of power between the various branches of government.

International institutions constitute another arena for the evolution of administrative law. International institutions do not follow the usual legislative, executive and judicial division of powers that characterize democracies. Hence, certain principles of domestic law will not apply to international bodies. For example, the requirement found in many domestic constitutions that courts will be established by law, a requirement that reflects important democratic guarantees that the legislative process provides, may be irrelevant in the context of an international body, whose constitution and procedures are different.[2] But to the extent that treaties allocate responsibilities to treaty bodies, and delegate decision-making powers to them, similar issues of administrative law concerning the decision-making process may arise. As in domestic administrative law, the administrative law of an international institution will result from enactments of the state parties (in the treaty establishing the institution), from various kids of inputs from their executive organs, and from decisions of their

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[1] Martin Shapiro, The Institutionalization of European Administrative Space, http://ist-socrates.berkeley.edu/~iir/culture/papers/Shapiro.pdf

[2] *See* the decision on the legality of the Secutity Council's establishment of the ICTY: *Dusko Tadic*, Case No. IT-94-1-AR72, Oct. 2, 1995 (Appellate Chamber)), (http://www.un.org/icty/tadic/appeal/decision-e/51002.htm). para. 43: "the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions."

judicial organs. The principal-agent tensions that exist between the lawmaker and the executive in the domestic scene can be found also in the international scene, between the state parties and the different treaty-bodies. Hence, like domestic administrative law which reflects the domestic political balance of power, the law constraining the discretion of the various actors within the international institution will reflect the specific balance of powers between the state parties and within the institution.

This paper attempts to outline the different motivations for the development of administrative law in domestic law (Part II), and on this basis identifies the factors shaping the evolution of administrative law in international institutions (Part III). Part IV examines whether the practice concerning the evolution of international administrative law in the European Communities (EC), the World Trade Organization (WTO) and the United Nations (UN) confirms the theoretical insights. Part V addresses the role of the International Court of Justice (ICJ) in developing international administrative law. Part VI concludes.

II. The Theory on the Evolution of Administrative Law

In their seminal paper,[3] McNollgast argue that the US Federal Administrative Procedure Act of 1946 reflects the interest of Congress to reign in the administration. The idea is simple: members of the Congress wished to have an impact on the policies adopted by the administration. To compensate for their relative institutional deficiencies that precluded active monitoring of the executive, they invented procedural rules that made it easier for individual citizens to enforce these rules through litigation. In other words, the lawmakers used the citizens as their agents in

[3] McNollgast, Administrative Procedures as Instruments of Political Control, 3 J. Law Econ. & Org.

their competition with the executive. The McNollgast theory of the evolution of administrative law describes a joint venture of constraining the powerful administration through the combined action of the legislature (that produces the rules), the public (that invokes them) and the courts (that interpret and enforce them).

The McNollgast theory assumes both an independent legislature and an independent judiciary. But despite the fact that every democracy formally provides for independence for both the legislature and the court, it is often not the case. When lawmakers depend on the executive for reelection, and judges depend on them for promotion, the executive reigns supreme.[4] While the US Congress is indeed independent of the President, legislatures in many other countries are not. In parliamentary democracies, the kinds we encounter in Europe and elsewhere, the legislature may be quite deferential to the executive.[5] The reason often is that the political parties straddle the divide between the executive and the legislative branches. Whoever controls the party controls both its members in the executive and in the legislature. The members of the executive body – usually the seniors of the political party – have the power to influence the reelection chances of their less powerful party members, those who serve as legislators. Internal party politics is the glue that binds individual legislators to their bigger brothers in the executive, and undermines much of the formal law on checks and balances.

The McNollgast theory does not offer any prediction as to the evolution of administrative law in political environments of parliamentary systems where the legislature is often dependent on the executive. Yet, we do encounter in many

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243 (1987). *See also* McNollgast, The Political Origins of the Administrative Procedure Act, 15 J.L. Econ. & Org. 180 (1999).

[4] *See* Mark Ramseyer, The Puzzling (In)dependence of Courts: A Comparative Approach, 23 J. Leg. Stud. 721 (1994).

[5] Murray J. Horn, The Political Economy of Public Administration 9, (1995) (on the dependency of the legislator on the executive in a Westminster parliamentary system).

parliamentary democracies surprisingly vigorous systems of administrative law. What can partly explain these norms is the wish of the ruling executive to have them. Politicians have several good reasons to prescribe administrative law and provide for judicial review of their own actions. Administrative law and adjudication provides legitimacy to the institutions.[6] Law and litigation may provide politicians with control over bureaucracies which they cannot obtain through party discipline (for example when the bureaucrats are professionals and are not party members), or over political subcomponents such as provinces, regional authorities and municipalities.[7] When political power tends to fluctuate, administrative rules that constrain future decision-makers can offer a longer life span to enacted policies.[8] Ultimately, perhaps, the politicians know full well that administrative law is "an endless game of catch-up," a game in which they can have the edge when it really matters. Therefore, often the benefits they get from complying with the rules are worth their costs. And if the courts bite to hard the politicians can always influence the legislature to undo the caselaw.

But this not the entire story. Administrative law often develops through caselaw which legislatures find difficult to undo. This phenomenon suggests that a fuller account of the evolution of administrative law requires an explanation of the motivations of the courts in developing the law. Such an explanation is called for also in light of the fact, unnoticed by McNollgast, that although the APA is the creation of

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[6] Roger Cotterrell, The Sociology of Law 169-171 (2nd Ed., 1992), Gerald Frug, The Ideology of Bureaucracy 97 Harv. L. Rev. 1276, 1334 (1984). Tom Ginsburg suggests that the motivation for the enactment of the Korean Administrative Appeals Act of 1984 was President Chun Doo Hwan's attempt to gain legitimacy to his government: Tom Ginsburg, Administrative Procedure Reform in Japan and Korea, 49 Am.J. Comp.L. 585, 597 (2001).

[7] J. Mark Ramseyer & Minoru Nakazato, Japanese Law – An Economic Approach (1999) at 217-18 (politicians of the ruling LDP party sought control over local bureaucracy through judicial review of local government).

[8] McNollgast (1999), supra note #; Ginsburg, *supra* note #, at 613-614 ("Parties that govern for an extended period have less need to rely on independent courts as monitors because they will be able to manipulate bureaucrat's careers and develop other alternative means of control.")

Congress, the US courts have actually transformed the meaning of crucial parts of the APA through its interpretation.[9]

Courts that are dependent on the executive will not produce administrative law unless and to the extent that the executive wishes them to do so.[10] But independent courts, where they exist, are likely to fill the gaps left by the legislature and constrain politicians even against their will. They will do so for a variety of reasons: either because judges perceive their role as correcting the deficiencies of the political process, because they seek outcomes which they perceive as beneficial to the specific litigants or to society at large, or because judges seek to strengthen their personal and institutional reputation. But this suggests a paradox: why would an active executive and a legislature that cannot author administrative rules tolerate judicial lawmaking in administrative law?

As we saw above, politicians may have good reasons to cultivate an independent judiciary that will be active in enforcing administrative law. Therefore, the politicians may enact administrative rules. But the question is why would they allow courts to go beyond the enacted law, develop interventionist judicial doctrines and adopt more intrusive interpretations? One explanation focuses on the possibility of internally divided legislature that leads to "legislative impasse" that precludes the adoption of more intrusive administrative law. When lawmakers cannot agree on the adoption of specific rules such as transparency or voice to NGOs in administrative procedures the default would mean that such rules are not enacted. But when the lawmakers do not prescribe rules because they are unable to agree on such, they often may be similarly constrained from voting *against* the same rules. Judges are often sensitive to this

[9] Shapiro, supra note 1, at #.
[10] *See* J. Mark Ramseyer & Minoru Nakazato, Japanese Law – An Economic Approach 214-15 (1999). (Chapter 8) (analyzing the evolution of Japanese administrative law in a system where judges are controlled by politicians).

inertia and exploit it. They realize that the same legislative impasse that precluded the enactment of rules would constrain those legislators who would want to undo the caselaw. Hence, judges may actually be emboldened to change the legal status quo, knowing that they would not be overruled. The more power is diffused between lawmakers, the more room for a strong judiciary,[11] and the more administrative lawmaking is done by the courts. This logic, as I argue below, is a central explanation for the contemporary evolution of *international* administrative law.

III. The Evolution of Administrative Law in International Institutions: Theoretical Expectations

The same rationale that explains the evolution of administrative law within democracies can explain the evolution of most of international administrative law. The observation that administrative law is a method for restraining actors and hence a reflection of the balance of power among actors within political institutions, we should expect to find the law on decision-making within the international institution to reflect an interplay between the actors that participate or wish to participate in the decision-making process within the institution. The main actors are three: First are the governments that represent the states parties to the treaties establishing the institutions; Second, domestic interest groups, competing domestic institutions (like active legislatures or courts) or opposition parties to those governments, that wish to voice their views independently of their governments in the international arena; Third, officials of the institution (including judges) who have certain decision-making powers. Consequently, the internal administrative law will reflect the complex

[11] John Ferejohn, The Law of Politics: Judicializing Politics, Politicizing Law 65 Law & Contemp. Prob. 41, 55-60 (2002)("fragmentation of power" within the political branches encourages judicial activism) Nicos C. Alivizatos, "Judges as Veto Players," in *Parliaments and Majority Rule in Western Europe* 566 (Herbert Doering ed., 1995) (statistical findings suggesting same).

balance of power between the state parties, within each of the state parties,[12] and within the different treaty bodies. Because these actors not only vie for power, for power sake, but also wish to promote certain values, competition over values becomes yet a fourth factor shaping the design of administrative norms within these institutions.

Inter-State Competition

The power relations between the states composing the institution is a key factor shaping their inclinations to adopt administrative norms constraining decision-making. Generally, it can be said that constraints on the decision-making process tend to reduce power disparity between actors. This is so, because accountability and transparency call for reasoning of decisions, and sheer power can never be a valid justification for decisions. Power does not translate itself easily into law.

Powerful states face several options. One would be to resist any budding of administrative law. This may be the case when their most basic interests are at stake, and they want to control the outcome. For example, the Permanent Five veto holders at the Security Council strongly oppose a more transparent decision-making process at the UN Security Council.[13] Another option would be to construct the process in ways that privilege their interests. When domestic constituencies so demand, or when the treaty bodies to whom authority is delegated can be expected to conform with their goals, it would make sense to delegate and constrain authority. Through legalization of the decision process, not only will the powerful achieve their goals; their claims will also be vindicated as legitimate. Yet another option is to agree on

[12] All states play a "two-level game:" Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 436 (1988).
[13] David M. Malone, The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the U.N. Charter, 35 N.Y.U. J. Int'l L. & Pol. 487, 503-504 (2003). See also infra Part

formal decision-making process but at the same time to try to manipulate the outcome by threatening to disregard the outcomes or even to exit the institution.

At the same time, the relatively weaker states will, of course, have just the opposite interests. Trying to minimize disparities in power, they may demand strong administrative provisions to curtail power disparities, or extract side payments for their support of the stronger.

In many institutions we can expect to find variegated approach which reflects the interest of the state parties to delegate much authority in some matters, but retain discretion in other matters, and as a result we may expect to find stronger interest in administrative law in the areas of delegated authority but not in the other areas. The UN comes to mind as an institution whose bureaucracy would enjoy extensive delegated authority in the context of, say, employees' discipline, but would have little authority in the context of the discretionary powers of the Security Council acting under Chapter 7 to determine whether a threat to international peace and security exists and how to accommodate it. In the former case, we should expect quite elaborate rules on the employees' rights and obligation, and effective judicial review body.[14] In the latter case we can expect that the Permanent Five will object to the evolution of procedural rules constraining their discretion and to judicial review functions.[15]

IV (on the UN).

[14] It is noteworthy that the United Nations Administrative Tribunal (UNAT) was established by the General Assembly (Resolution 351 A(IV) of 24 November 1949). In fact, several international institutions (including the World Bank, the IMF and the League of Arab States) have created tribunals to deal with internal labor disputes, and the ILO's Administrative Tribunal is also authorized to hear disputes arising from other institutions: Jan Klabbers, An Introduction to International Institutional Law 269-273 (2002). On the law of employment relations in international institutions see Chittharanjan F. Amerasinghe, Principles of the Institutional Law of International Organizations, 323-367 (1996).

[15] *See* the discussion below about the role of the ICJ as the judicial organ of the UN..

Domestic Competition

Competition between domestic interest groups and between organs of government yields, as we saw, rather robust systems of domestic administrative law. This law is designed primarily to control the executive. The law is tailored primarily for controlling the executive when acting in the domestic sphere. When acting in the international sphere, mainly through negotiations with other governments, the executive enjoys more opportunities to overcome its domestic restraints. Inter-state policy making is largely the product of bargaining behind closed doors. When the product – a treaty, an informal agreement – is brought before the domestic organs for ratification, it is presented as a "take it or leave it" option, with little information about the feasibility of alternatives. Such opaque inter-state bargaining privileges the participating governments and harms their competing domestic actors.[16] These competing domestic actors will therefore be wary of the opportunities granted to the government to influence, even preempt outcomes that have domestic effect through decisions taken at the level of an international institution. Hence those competing domestic actors will insist on a more elaborate administrative law within the institution to provide sufficient control of the outcomes at the institution, unless they can rely on improving the existing domestic system of administrative control. Hence, other thing being equal, democratic states with effective domestic checks and balances will have a stronger interest than non-democratic states, or states with weaker domestic political competition, in elaborate administrative norms constraining the decision-making processes within the international institution.

An alternative would be for the competing domestic actors to opt for more effective *domestic* means to control the activities of the international institution. One

[16] Eyal Benvenisti, Exit and Voice in the Age of Globalization 98 Mich. L. Rev. (1999).

possibility is direct participation in the international bargaining process. The involvement of the US Congress in treaty negotiations in the so-called "fast track" procedure is an example in that direction.[17] Another possibility would be for domestic courts to review decisions of the international organization. Indeed, as Richard Stewart suggests, "In the absence of any effective remedy at the level of the international regime, domestic courts may seek to directly review the legality of the international regulatory decisions that directly impact specific persons in the United States and elsewhere."[18] These expectations, however, have to take into account several impediments. First, surveys so far indicate that domestic courts tend to exercise their authority very cautiously when examining the performance of their governments in the international political arena.[19] Second, such interference will have limited effect if the institution and other states refuse to recognize the outcome of the litigation in the domestic court, and insist on compliance from the government. Third, such interference is likely to carry adverse effects for the economy of the state whose court will start intervening in the decisions of international institutions. Such interventions will have spillover effects to the operation of many other international institutions acting within the jurisdiction of the court. These institutions will view this judicial assertiveness as a significant drawback on doing business within the jurisdiction, and may consider moving to or investing in more amenable environments. Thus seems to be the reason why domestic courts hesitate long before

[17] Under this procedure, the President agrees to involve Congress in the negotiation phase of trade agreements in return for a bicameral congressional commitment to vote the agreement up or down without amendment. Congress's involvement at the negotiation phase limits the discretion of government negotiators at the international bargaining process and provides more voice to groups that are less influential with the Executive, although the President continues to control the agenda. *See* Benvenisti, Exit and Voice, *supra* note # at #; Harold H. Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143 (1992).

[18] Stewart, at p. 24

[19] Mattias Kumm, International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model *44 Va. J. Int'l L. 19 (*2003); Benvenisti, Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts, 4 Eur. J. Int'l. L. 159

venturing to interfere with the activities of international institutions. From the decision of the London courts not to entertain the suit against the bankrupt International Tin Council[20] to the decision of the Dutch court in The Hague not to review the legality of the Security Council's Resolution setting up the International Criminal Tribunal on Yugoslavia (ICTY),[21] domestic courts signal – also to each other – that they will not cooperate in providing this public good. The contrast between this domestic court hesitancy on the one hand, and the assertiveness of international tribunals (discussed infra) on the other hand, suggests that the better strategy for the domestic opposition is to devote considerable resources to influencing international tribunals rather than domestic ones.

Internal Competition

The first two factors are responsible for shaping the design of the institution. But once the institution is created, it can shape a life of its own. The allocation of authority within the institution is a significant factor shaping the development of the institution. The more decision-making is relegated to the treaty bodies, the more there are checks and balances between competing bodies within the institution, the more elaborate will administrative law develop. On the one far end of the range of possible institutions we find institutions with strong bureaucracy to whom much discretion has been assigned. The EU immediately comes to mind as an example of such institution, often criticized for that very reason. On the opposite end we find institutions whose

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(1993)

[20] In the wake of the collapse of the London-based International Tin Council, claims of individual debtors were rejected owing to the immunity enjoyed by the organization. *See* J.H. Rayner Ltd. v. Dep't of Trade & Indus., [1989] 3 W.L.R. 969, 81 I.L.R. 670 (H.L.)

[21] Milosevic v. The State Of The Netherlands, The Hague District Court Civil Law Division, Judgment In Interlocutory Injunction Proceedings Of 31 August 2001, Case Number KG 01/975 (rep. in Council of Europe Doc. Consult/ICC (2001) 44).

bureaucracy has mainly fact-finding functions and very few discretionary powers, due to the desire of some or all parties to retain tight control over decisions.

While there is a wide array of international institutions, with varying degrees of delegated authority to internal bureaucracies, there is a common denominator to many of them. This is the relatively high bargaining costs of enacting administrative rules. States that negotiate a treaty establishing an international institution would often have different interests, different domestic constraints, and as a result, different expectations from the institution and from the functioning of its bureaucracy. This often leads to legislative impasse, where the lawmakers cannot overcome the default rules of international law that so far offer very limited administrative law.[22] While such differences may be glossed over in the establishing treaty, they resurface in the institution's routine work. As a result, one can expect the evolution of administrative law through the judicial organs of such institutions where such organs exist. If we also factor in the likelihood that the members of the judicial organs are not career judges whose record counts for their future assignments, we can expect the evolution of quite intrusive administrative rules binding decision-makers way beyond what had been anticipated by their creators. Although powerful states may try to influence such outcomes by threats of cutting funds or exit, the costs of doing so may at times be prohibitive.[23]

Competing Values

This fourth factor does not necessarily reflect a balance of power. The competing actors often share similar goals they wish to promote, but at times they have rival values in mind. A conflict of values arises when, for example, some actors appreciate

[22] On the development of such rules see infra Part V.

more security while others are concerned with what they see is disproportionate limitations on human rights; some appreciate more the ability of government to react swiftly to contingencies, while others attach importance to democratic participation and are concerned with the distributional and long term effects of lax administrative rules. Thus, if we draw from the debate on the appropriate transparency of the WTO processes, some have argued that the more structured process "enhances the mobilization of anti-trade forces relative to the already well-organized pro-trade groups."[24] Hence, "legalization could undermine liberalization."[25] Another sphere of international cooperation where values clash is the recent "war on international terrorism," where security interest conflict with individual liberties. In this context, the internal processes of the Counter Terrorism Committee (CTC) established pursuant Resolution 1373 of the UN Security Council has come under serious criticisms for not providing for basic procedural guarantees.[26]

The Interaction Between the Different Factors

The four factors identified above shape the evolution of administrative law within the institution in different ways. Of course, for most states some factors work in favor of stricter rules and some against. For some states, the preference for or against administrative rules will depend on the issue at hand. Developing countries will be interested, for example, in more transparency in the internal proceedings of the UN Security Council, and at the same time resist efforts to open up the WTO processes to third parties and to NGOs.

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[23] The ICJ litigation in the claim of Nicaragua against the US is one rare example for the limits of power.
[24] Judith Goldstein and Lisa L. Martin, "Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note" (2000) 54 *International Organization* 603, at 607.
[25] *Id., id.*
[26] For criticism on these opaque procedures see Jose E. Alvarez, Hegemonic International Law

This analysis suggests that because international institutions vary, the administrative law that develops in each of them will be tailored to reflect the specific character of each one of them. “Like minded” states establishing exclusive institutions will enjoy little legislative impasse, and will be able to prescribe procedural rules to accommodate their interests. The more diverse is the composition of institution, the more discord about the procedure, the more legislative impasse which will preclude agreement on administrative law within the institution. In the latter cases, internal treaty bodies of the international institution are expected to exploit the legislative impasse to develop administrative law endogenously. This is true in particular to the judicial organs of such institutions that are expected to draw on the silence of the lawmakers and the divergence of opinions of state parties to develop strong administrative judge-made law. This insight suggests that state parties to an international institution who have a strong interest in administrative norms can certainly expect the cooperation of the judicial organs of the institution in their promotion and enforcement.

Hence, the comparative study of administrative law in international institutions must be taken with great sensitivity to the factors influencing the balance of powers within the institution and also within the parties to the institution. An attempt to develop a unified administrative international law must remain very much attuned to the specific constraints within each institution.

Revisited, 97 AJIL 873, 874-878 (2003).

IV. Theory and Actual Practice: The examples of the EC, the WTO, and the UN

This Part briefly examines the evolution of administrative law in three international institutions: the EC, the WTO and the UN.

The EC

The story of the evolution of administrative law within the EC is well documented.[27] The lack of administrative law in the establishing treaties is complemented by caselaw of the ECJ and especially the Court of First Instance. The motivation for this evolution can be traced to the potentially divergent attitudes national governments have over the exercise of discretion by a powerful EC bureaucracy. Governments that have limited interest in domestic administrative law, because they feel they control the outcome of domestic processes, have a much stronger interest in EC administrative law, because they feel they do not control the outcome of the processes within the EC. But not all governments have similar interests, and so no rules are enacted in the treaties. Instead, it is the court who enters into the legal void provided by the silent treaties and divergent governmental interests, continuing its traditional role in strengthening the rule of law within the organization.[28]

In the EC context, administrative rules also reflect strong interest in constraining the decision-making process coming from within the member states. This interest is derived from the realization that the domestic processes do not adequately

[27] Giacinto della Cananea "Beyond the State: The Europeanization and globalization of procedural administrative law" *European Public Law* (9), 2003; Martin Shapiro, *supra* note #; Francesca Bignami The Administrative State in a Separation of Powers Constitution: Lessons for European Community Rulemaking from the United States, Jean Monnet Working Papers 5/99 http://www.jeanmonnetprogram.org/papers/99/990501.html

[28] Shapiro notes that "judicial activism in administrative review comes fairly easily to courts that are active in constitutional review." (*supra* note 1 at p. 18). The ECJ has been quite active solidifying the constitutional law of the EC.

offer voice and do not provide sufficient control against government discretion at the level of the EC. Constituencies seek to open up channels of communications as one of the ways to substitute for elections. [29] This was the basis for the German Constitutional Court's approval of Germany's ratification of the Maastricht Treaty.[30] In an integrated European Union, reasoned the Court, the demand for democracy will be satisfied if the union will provide an "ongoing free interaction of social forces, interests, and ideas, in the course of which political objectives are also clarified and modified, and as a result of which public opinion moulds political policy."[31] To preserve democracy, in the Court's view, "it is essential that both the decision-making process amongst those institutions which implement sovereign power and the political objectives in each case should be clear and comprehensible to all, and also that the enfranchised citizen should be able to use its own language in communicating with the sovereign power to which it is subject."[32] Government seeking domestic approval of an ever-closer union, through treaties that in some countries are subject to referenda, must pay attention to such concerns.

The WTO

The debate within the WTO about administrative law reflects a strong North-South division. As a result, there is legislative impasse which enables the Appellate Body (AB) to develop administrative law through its decisions. This section provides an account of the debate and the development of the law by the AB.

Since the creation of the WTO, there has been growing NGO demand for more transparency in decision-making. The norm-setting process within the WTO involves

[29] Bignamy, *supra* note #, Benvenisti (Exit and Voice). *supra* note #
[30] Federal Constitutional Court Decision concerning the Maastricht Treaty, of October 12, 1993 (trans. in 33 I.L.M. 388 (1994)), at p. 420.
[31] *Id., id.*

all member states. This is mainly an informal, behind-the-scenes process of negotiations and consultations. The official website of the WTO suggests that such "informal consultations within the WTO – and even outside – play a vital role in bringing a vastly diverse membership round to an agreement."[33] This informal prescriptive process remains opaque to civil society. Indeed, NGOs representing diverse interests can sometimes use this opacity to present their views and gather information,[34] but this influence remains a matter of discretion for states who find it opportune to support some NGOs on a certain matter under discussion.

The plenary sessions of the Ministerial Conferences were open to observers since the first Conference held in Singapore in 1996.[35] In July 1996 the General Council adopted Guidelines for Arrangements on Relations with Non-Governmental Organizations.[36] The guidelines recall Article V: 2 of the Marrakesh Agreement establishing the WTO, which provided that "the General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO." The Council members "recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities." (Article 2) They further acknowledge that NGOs are "a valuable resource [that] can contribute to the accuracy and richness of the public debate." (Article 4) The Members therefore agree to improve transparency and develop communication with NGOs." (Article 2) For this purpose, the guidelines call upon members to "ensure more information about WTO activities in particular by

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[32] *Id. id.*
[33] From the WTO official website < http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm>
[34] See Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO* (1998) J. OF INT'L ECON. LAW 433. For a recent appraisal of the debate see Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AJIL 489, 504-09 (2001).
[35] The number of NGOs attending the plenary sessions has grown from 108 at the Singapore Ministerial Conference in 1996 to 686 at the Seattle Ministerial Conference in 1999 (see *WTO: External Transparency*, Communication from Hong Kong, China, 31 October 2000, WT/GC/W/418).
[36] WORLD TRADE Doc No. WT/L/162.

making available documents which would be derestricted more promptly than in the past." The WTO Secretariat is requested to provide on-line computer access to such documents. (Article 3). The Secretariat is instructed further to "play a more active rôle in its direct contacts with NGOs ... through various means such as inter alia the organization on an ad hoc basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO." (Article 4).

At the same time, however, the guidelines reflect the concern many governments have with more formalized decision-making procedures that may increase transparency and voice to other governments and to NGOs. Article 6 emphasizes "the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations," and points out the "broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings." The intergovernmental character of the WTO implies, according to the guidelines, that the appropriate level for NGOs' direct participation is the national level: "Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making."

In other words, these guidelines recognize the need to ensure transparency in the decision-making process, or what is called in the WTO jargon "external transparency" (as distinct from "internal transparency" which relates to openness among state

parties). In the years since 1996 impressive efforts have been made, particularly by the Secretariat, to provide accessible information including documents to the general public by posting it on the WTO website. A few "Northern" members have come up with suggestions for improved transparency. Canada, Norway and the United States suggested inter alia that General Council and other committee meetings be open to observers, including Trade Policy Review meetings, where members' policies are reviewed for conformity with WTO rules.[37] Other suggestions included the establishment of fora to enable open dialogue between WTO bodies and NGOs, the inclusion of advice of legislators from member states and of experts in specialized areas, and the creation of ad-hoc advisory boards to provide non-binding NGO advice on a variety of issues.[38]

Such "Northern" suggestions are not very well-received by the developing "Southern" countries. The latter are less constrained domestically by democratic considerations. They apparently also realize that they stand to lose from a more active role for NGOs that represent the interests of the relatively well-off societies seeking to maintain high levels of welfare and environment protection. The effort of the developing members is to restrict public participation to the passive role of receiving information from WTO bodies rather than communicating it to the WTO.[39]

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[37] See *General Council Informal Consultations on External Transparency, October 2000,* Submission from the United States, 10 October 2000, WT/GC/W/413; *WTO External Transparency*, Informal Paper by Canada, 17 October 2000, WT/GC/W/415; *External Transparency*, Communication from Norway, 2 November 2000, WT/GC/W/419.

[38] See in particular the Canadian paper, *supra* note #.

[39] Note the position of Hong-Kong, China on this matter, elaborating on the distinction between external transparency and direct participation:

"8. In our view, enhancing "external transparency" of the WTO means keeping the public informed and educated of the WTO's work, enriching their understanding and awareness of the Organization and the multilateral trading system, and thereby improving the ability of the public to reflect views to their governments. On the other hand, "participation" in the WTO by non-Members implies a right to take part in the decision-making process of WTO, a right to make representations of interest in the formal WTO setting and in the process prejudice the outcome of discussions.

As predicted by the insights elaborated above, the impasse at the political institutions of the WTO creates a power vacuum which the judicial organ exploits in its efforts to formalize the decision-making process. The main area of attention in this respect has so far been the procedures within the judicial organs themselves. In contrast to most other international adjudication procedures, the WTO procedures maintain secrecy. Litigation before the Panels and the Appellate Body are closed to WTO members that are not parties to the litigation and to the general public. Calls for transparency focus therefore on making all parties' submissions available to the public and on enabling the general public to observe the proceedings using various tools, including webcasting.[40] Moreover, suggestions for enabling the flow of communication from the public to the adjudicators concentrate on the possibility of submitting amicus briefs to the panel and the appellate bodies.

Here again one can trace a north-south tension, northern members strongly supporting open and accessible proceedings to the dismay of southern states. The United States is the most ardent supporter of transparency and communication in the dispute settlement process.[41] It, apparently, has most to gain from such openness. In fact, it was the first and so far the only state that presented NGO briefs as integral part of its brief while defending its environment-friendly unilateral restrictions on trade against the complaint of India, Malaysia, Pakistan and Thailand.[42]

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9. While we are prepared to consider those proposals aiming at improving transparency, we are not convinced of the desirability of adopting proposals which seek to make provisions for direct participation of the civil society in the Organization in this exercise. Such proposals go against the inter-governmental nature of the WTO, risk politicising the operations of the Organization due to sectoral and electoral interests, and undermine the rights and obligations of individual WTO Members." See Communication from Hong Kong, China, *supra* note #.

[40] See the US submission, *supra* note #.

[41] See its proposals in the submission, *id*.

[42] The complaint criticized the US prohibition on the importation of certain shrimp and shrimp products caught in methods considered by the US to adversely affect the population of sea turtles: *United States – Import Prohibition of Certain Shrimp and Shrimp Products*: Report of the WTO Appellate Body, WT/DS58/AB/R (1998).

The Appellate Body has shown a clear inclination to consider amicus briefs.[43] In 1998 it decided it had authority to accept NGO briefs in the Shrimp/Turtles dispute which one litigant – the United States – incorporated into its briefs.[44] In a subsequent case, it explained its authority to do so, unabashedly reveling in the silence of the lawmakers:

> "In considering this matter [of amicus briefs], we first note that nothing in the DSU or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal. **On the other hand, neither the DSU nor the Working Procedures explicitly prohibit[s] acceptance or consideration of such briefs.** … [Article 17.9 of the DSU] makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements. Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal."[45]

In a subsequent case, the Appellate Body went even further. In the midst of hearings, it invited "any person" to file applications for leave to file briefs concerning the dispute at hand.[46] The invitation, setting highly rigorous conditions for eligibility to file briefs, was posted on the WTO website on 8 November 2000. The Appellate Body received 11 applications for leave to file a written brief within the time limits specified. It " carefully reviewed and considered each of these applications in

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[43] For analyses of the Panels' and Appellate Body's authority to consult amicus briefs see Robert Howse, Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence, in The EU, the WTO, and the NAFTA, 35, 48-51 (Joseph H.H. Weiler, Ed., 2000), Petros C. Mavroidis, Amicus Curiae *Briefs Before The WTO: Much Ado About Nothing*, Jean Monnet Paper No. 2/01 (available at http://www.jeanmonnetprogram.org/papers/papers01.html).

[44] See *supra* note #.

[45] United States – Imposition of Countervailing Duties on Certain Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R, adopted 7 June 2000, para. 39 (my emphasis).

[46] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Communication from the Appellate Body 8 November 2000, WT/DS135/9.

accordance with the Additional Procedure and, in each case, decided to deny leave to file a written brief."[47]

What the Appellate Body does not recount in its report that its invitation sparked angry protests by a number of member states that questioned its authority to do so. A few members – reportedly Pakistan and Egypt, supported by India and Malaysia[48] -- immediately reacted by requesting the Chair of the General Council to convene a special meeting to discuss this issue. In the meeting, which took place on 22 November 2000, several members expressed criticism, arguing that the Appellate Body exceeded its authority, yet no final decision could be reached.[49] The Appellate Body's ultimately unexplained decision to deny the requests to file briefs may very well reflect the furious reactions to its invitation. Note, however, that despite the strong political reaction to its invitation, the Appellate Body did not retract its principled approach, left open the door for future requests for third party intervention, and actually enabled them in a subsequent case.[50]

Another significant contribution of the Appellate Body in the context of administrative procedure is the recognition of a right of hearing during national legislation proceedings for potentially affected foreign interest groups. In the report in the case of *United States -- Import Prohibition of Certain Shrimp and Shrimp Products,* the WTO Appellate Body elaborated, inter alia on the meaning of the reference in Article XX to "arbitrary discrimination." It insisted that the United States, in prescribing laws that have effects on foreign traders must provide administrative procedures pursuant to which foreign governments and traders would be able to

[47] European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, AB-2000-11, WT/DS135/AB/R, 12 March 2001.
[48] BRIDGES Weekly Trade News Digest – Vol. 4 No. 44, 21 November 2000.
[49] See e.g. Statement by Uruguay at the General Council on 22 November 2000, WT/GC/38.
[50] European Communities – Trade Description of Sardines (2002) WTO Doc. WT/DS231/AB/R, paras.153-160 (brief by a private individual), paras. 161-170.

comment on and challenge such laws before U.S. institutions, either administrative bodies or courts. The Appellate Body held that a lawmaking process that is not "transparent" or "predictable" is "arbitrary" because it does not provide any "formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it," the U.S. implementing agency issues "no formal written, reasoned decision, whether of acceptance or rejection," and there is no "procedure for review of, or appeal from, a denial of an application." The Appellate Body also cited Article X of GATT 1994 as requiring the United States to grant foreign traders and countries their "due process" rights.[51] Following the report, the US announced it will revise its procedures and offer foreign governments greater "due process" rights, including the right to challenge "preliminary" findings before they become definitive.[52]

What remains to be seen is whether the Appellate Body would constrain the political organs of the WTO itself by imposing on them procedural requirements. After developing procedural norms concerning its own decision making procedures and concerning individual states, the next step cannot be ruled out as impossible.

The UN

Article 92 of the UN Charter provides that “the International Court of Justice shall be the principal judicial organ of the United Nations.” As such it has theoretically the opportunity to develop administrative law for the operation of the various internal organs, and in particular, to provide for judicial review of decisions taken by the Security Council. In theory, the ICJ could have settled several questions

[51] See the decision, *supra* note #, at paras 175-182.
[52] Gregory Shaffer United States -- Import Prohibition of Certain Shrimp and Shrimp Products. WTO Doc. WT/DS58/AB/R. World Trade Organization, Appellate Body, October 12, 1998 *93 A.J.I.L. 507, 513* (1999)

related to the functioning of the various organs of the UN. It could have stated whether the abstention of a Permanent Member at the Security Council amounted to a "no" vote, whether the General Assembly may issue "Uniting for Peace" Resolutions, it could have required more transparency at the Security Council and even subject Resolutions of the Security Council to scrutiny under general international law. The ICJ approached this role with much nuance to the concerns of the member states, in particular to those of the Permanent Five who have little interest in such an active role, which almost certainly would have destroyed the delicate balance between power and legality within this institution.

Initially the ICJ agreed to examine in much detail the decision of the General Assembly to set up the UN Administrative Tribunal.[53] The ICJ extolled the merits of that tribunal, and approved its creation, finding implicit authority in the UN Charter.[54] But later it signaled its disinclination to serve as the judicial review organ of the UN.[55] When Security Council Resolutions aimed at restoring "international peace and security" under Chapter 7 came to the fore, the ICJ backed down. Despite much scholarly criticism,[56] the ICJ did not accept the invitation to second-guess the legality

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[53] Supra note #.
[54] Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (1953-1954) 1954 I.C.J. Reports 47.
[55] "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned." (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Reports 16, at para. 89 (Advisory Opinion of 21 June).
[56] A sample of this rich debate includes: Jose E. Alvarez, "Judging The Security Council" 90 A.J.I.L. 1 (1996); Thomas M. Franck, The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?, 86 AJIL 519 (1992); W. Michael Reisman, The Constitutional Crisis in the United Nations, 87 AJIL 83 (1993); Ken Roberts, Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review, 7 PACE INT'L L. REV. 281 (1995); Edward McWhinney, The International Court as Emerging Constitutional Court and the Co-ordinate UN Institutions (Especially the Security Council): Implications of the Aerial Incident at Lockerbie, 1992 CAN. Y.B. INT'L L. 261; Geoffrey R. Watson, Constitutionalism, Judicial Review, and the World Court, 34 HARV. INT'L L.J. 1 (1993); Vera Gowland-Debbas, The Relationship between the International Court of Justice and the Security Council in Light of the Lockerbie Case, 88 AJIL 643 (1994).

of the Security Council's Resolution to impose sanctions on Libya.[57] A similar challenge is now presented to the court by the General Assembly with the request of the GA for advisory opinion on the "legal Consequences of the Construction of a Wall **i**n the Occupied Palestinian Territory."[58] Given the fact that the Security Council has made an earlier resolution on "the situation in the Middle East, including the Palestinian question" and decided to "remain seized of this matter,"[59] this request raises similar concerns about the possible room for judicial activism of the ICJ in the delicate power relationship among the various state parties and among the organs of the UN.

Note that the same judicial hesitation to review the legality of Security Council Resolution is shared by other courts. These courts have the opportunity to address such questions indirectly, for example, when examining the obligation of their government to comply with a Resolution or their own competence to adjudicate a matter. The International Criminal Tribunal for the former Yugoslavia (ICTY), a creation of the Security Council acting under Chapter 7 had to decide on its own competence.[60] It accepted its own authority to decide upon this matter, but given the wide discretion of the Security Council under the Charter Nations, and the incidental type of its jurisdiction, it asserted a rather lenient basis for review – "particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter,"[61] – and rejected the challenges against its legality using language concerning the wide discretion of the SC, the Permanent Five were certainly pleased

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[57] Case Concerning Questions of Interpretation And Application of The 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya V. United States of America) Request For The Indication Of Provisional Measures, 14 April 1992.

[58] Resolution ES-10/16 (3 December 2003).

[59] Resolution 15151, of 19 November 2003.

[60] *Dusko Tadic*, Case No. IT-94-1-AR72, Oct. 2, 1995 (Appellate Chamber) (http://www.un.org/icty/tadic/appeal/decision-e/51002.htm). For criticism of the decision see Jose E. Alvarez, *Nuremberg Revisited: The Tadic Case* 7 EJIL 245 (1996).

to read. The Dutch court, faced with a similar challenge, refused to give an independent ruling on these matters and deferred to the ICTY's decision.[62]

V. The ICJ and the Evolution of International Administrative Law

The other role of the ICJ is settlement of inter-state disputes. As such, the ICJ is in a unique position to enhance the procedural legal aspects of bilateral institutions, when disputes concerning the operation of such institutions are brought before it. In its role as a body for inter-state dispute settlement, the ICJ has the opportunity to inject procedural obligations upon states, whether through the restatement of customary international law or the interpretation of treaties. As such, the ICJ is in a unique position to change the default rules for state parties who negotiate treaties that establish institutions. It can enhance the procedural legal aspects of such institutions while interpreting the treaties that set them up.

In this context I would like to draw attention to the ICJ's decision in the dispute between Hungary and Slovakia concerning the implementation of a treaty between the two countries on the utilization of the Danube River. I refer to the 1997 decision in the *Gabcikovo-Nagimaros* case.[63] That decision transformed international law on transboundary resources through the emphasis on the bilateral duties of parties to cooperate in the management of transboundary resources.

The decision reflects the ICJ's awareness of the literature analyzing the question as one calling for collective action. It opinion clearly strives to force the two litigant states into cooperation:

> "It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty,

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[61] Tadic case, at para. 21.
[62] Milosevic case, *supra* note #.
[63] Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 7.

> which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses…"[64]

Such cooperation through a join regime, the court reasons, "will also reflect in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the [bilateral Treaty], in concordance with Article 5, paragraph 2, of the [1997 Watercourses Convention]."[65]

Debates in recent years concerning institutional design do not revolve as much around the recognition of these participatory rights. There is wide scholarly agreement that participatory rights are necessary, especially in the context of environmental institutions. A more structured and transparent treaty negotiation and decision making process can significantly limit the opportunities of domestic interest groups, bureaucrats, and politicians to pursue short-term sectarian goals to the detriment of the larger society and future generations. At the same time, it is quite difficult to achieve global consensus on the need to develop international law to provide for such procedural rules. Similarly situated developed democracies readily adopt strong procedural rules. The member states of the Economic Commission for Europe (ECE) demonstrated their interest in such rules in the context of regional cooperation in environment protection.[66] But the framers of the 1997 Watercourses Convention failed to offer such rules despite the urges of the various ILC rapporteurs and strong academic criticism. It can be assumed that the ICJ was aware of this debate and of the

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[64] *Id.* para. 141.
[65] *Id*. para. 147.
[66] The preamble to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted in Aarhus, Denmark on June 25, 1998 by member states of the Economic Commission for Europe and other European states, emphasizes these points: "*Recognizing* that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns, *aiming* thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment, …" (The text appears in http://www.un.org/Depts/Treaty/collection/notpubl/27-

legislative impasse. It is likely that the same motivation of the court, to enhance regional cooperation and provide for sustainable use of shared resources, will in due course lead it to elaborate further on procedural norms, which are so important for the effective management of such institutions.

Just like the ECJ and the WTO Appellate Body, the ICJ has the opportunity to "exploit" the power vacuum that results from disagreement among the state parties, and hence their difficulties – when such exist –to annul its decisions. Therefore it constitutes an effective mechanism for legislating – through treaty interpretation, through the evolution of the elusive concept of customary international law – new international obligations that states would have had great difficulties to agree upon through multilateral bargaining.[67]

VI. Conclusion

The three judicial organs surveyed (actually four, the ICJ having two distinct roles) demonstrate an ability to develop norms that constrain decision makers and provide for more transparency and voice to parties and interests that are not privy to the inter-government give and take. Moreover, it is possible to notice an effort by these judicial bodies to utilize this ability and to play a constructive role by developing procedural norms, when not constrained by the political organs. Disagreements among the state parties to international organizations open the door for the judicial organs to exercise judicial activism.

These findings fit well the theoretical expectations gleaned from the literature on the evolution of domestic administrative law. Administrative norms reflect the

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13eng.htm).

[67] See Benvenisti, Customary International Law as a Judicial Tool for Promoting Efficiency, forthcoming in Benvenisti & Hirsch (eds.) The Impact of International Law on International Cooperation (2004).

balance of power within institutions. Hence the laws would not be the same in all institutions. Indeed, we should expect that there would be different norms (or general norms coupled with exceptions to those norms) even within one single institution. The ICJ offers a good example for this observation, as it shies away from assuming an active role in reviewing Security Council resolutions, and at the same time actively imposes obligations on states in the context of the management of transboundary resources.

Three general conclusions may be suggested. First, the lack of administrative norms prescribed in the legal instruments establishing an international institution need not signify that the institution will have none. Almost to the contrary: it is quite likely that the institution's judicial organs would interpret such silence as an invitation for judicial creativity. If such silence reflects disagreement, the court is likely to regard this political impasse as an asset to ensure the effectiveness of its enactments. Governments that abhor constraints on their discretion should consider, when setting up such institutions, elimination or at least considerable weakening of the judicial functions.

Second, the comparative study of the evolution of administrative law in international institutions must not assume facile comparisons and the finding of "general principles" shared by all institutions. Much sensitivity for the specific political constraints and the factors influencing the balance of powers within the institution and also within the parties to the institution. An attempt to develop a unified administrative international law must remain very much attuned to the specific constraints within each institution.

Finally, and related to the second point, visions as to the progressive development of global administrative law (and also the prospects that such developments would in turn reverberate in the domestic legal systems and progressively develop them) should keep in mind the strong interests of many actors to oppose such progression. What can be said with certainty is that this area of law and politics is becoming a new sphere of contest among governments and other international actors. Having said that, one may anticipate eventually a convergence of wills: States that prefer more structured decisions in one institution and more opaqueness in another may eventually find common grounds with other states with conflicting interests. Then we will be able to talk about global administrative law.