

U.S. Administrative Law: A Resource for Global Administrative Law?

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I Introduction

This paper examines the potential for drawing on American administrative law in the development of a global administrative law² to secure greater accountability for the growing exercise of regulatory authority by international or transnational governmental decision makers in a wide variety of fields. A global administrative law must of course draw on legal principles and practices from many domestic and regional legal systems and traditions, as well as sources in international law. Accordingly, the U.S.-based perspective offered in this paper is only one of many which must be considered.

The past several decades have witnessed an explosive development of a great variety of international economic and social regulatory regimes.³ These regimes have been created in response to the rise of a global market economy (itself constructed through private and public international law regimes), the consequences of economic, social, environmental, informational, and other forms of interdependence, and the perceived inadequacies of purely national solutions in the problems generated by those consequences. These regulatory regimes encompass a wide variety of subject areas, including trade; finance and banking; environment, health and safety; pharmaceuticals; transportation and communications; conditions on financial assistance; human rights; and unlawful

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² The term international administrative law has traditionally been limited to administrative rules, procedures, and tribunals relating to the staff of international organizations. See C.F. Amerasinghe, *The Law of the International Civil Service As Applied by International Administrative Tribunals* (1988).

³ Some of these regulatory regimes are bilateral. Others are multilateral, some of regional and some of global scope. Further, as developed below, some of these regimes are established by treaties to which states are parties, while others consist of networks among domestic officials responsible for a given area of regulation. This paper refers generically to all of these different types of regimes as international regulatory regimes.

or undesirable activities. As in the domestic context, different arrangements of administration and administrative law may be appropriate for these different types of regulatory regimes. These issues, however, can not be addressed within the scope of this paper, which address issues of global administrative law at a generic level. The reasons why these new international regulatory regimes have been created and their normative underpinnings also have important implications for administrative and other legal and institutional questions, which I can not develop within the scope of this paper.⁴ For now, I merely note three familiar perspectives. The first is welfare economic. To what extent can international regulatory regimes be explained (as a positive matter) or justified (as a normative matter) by concurrent failures of global markets and of decentralized domestic regulatory systems adequately to secure economic welfare? The second is the perspective of justice. To what extent can such regimes be explained or justified by a need for international measures to correct injustices due to power disparities in the context of global interdependence.⁵ The third, which is closely related to the first two and receives greater attention in this paper, is the perspective of governance, focusing on accountability, control, and responsiveness. To what extent can international regulatory regimes be explained or justified by the need to render accountable and control the exercise of economic and social power by global market actors (governmental as well as non- governmental) and render it more responsive to the interests and values of those affected? In this last respect, an important and much debated question is whether and to what extent governance at the global level can be conceived and realized on a democratic basis. Global administrative law has a second-order role, ensuring that global regulatory regimes in fact serve their justificatory ends. It seeks to apply mechanisms of accountability, control and responsiveness to those regimes themselves. This raises the potential relation between administrative law, in both the domestic and global contexts, and democracy. In considering these issues, it will be helpful to distinguish three different conceptions of democracy formulated by Robert Howse:⁶

- Representative democracy. is conception animating the familiar form of electorally-based representative government prominent in the United States, Europe, and many other nations.

⁴ Thus, this paper does address the extent to which international regulatory regimes are or might be justified by the welfare economic benefits of harmonizing product regulatory standards, managing environmental spillovers, preventing a “regulatory “race to the c bottom” or other market/domestic regulatory failures.

⁵ In the view of many critics some international regulatory regimes, such as the WTO and the IMF, are instruments of the powerful that perpetuate and deepen rather than correct injustice.

⁶ Robert Howse, *Transatlantic Regulatory Cooperation and the Problem of Democracy*. Howse identifies two additional conceptions of democracy in addition to the three discussed in the text: democracy as republicanism or collective self-determination, and democracy as decentralization and competitive federalism. Both of these conceptions require a radical decentralization of regulatory authority, and in that respect do not have much practical relevance to a nation, such as the United States, with a relatively high degree of regulatory centralization in many fields (and it is those fields that are most likely to be the subject of international regulation) or to the governance of international regulation at the global level.

- Consociational or corporatist democracy operates on a different principle of representation; makes “agreement or consensus among organizations or associations representing different groups (for example, business, labour, organized religion, etc.) the, or at least a, central criterion for democratic legitimacy.”⁷
- Deliberative democracy which reflects a conception of democracy “not simply in terms of popular will and decision, but as a legitimation of power that depends on a conception of public justification and deliberative reason.”⁸

Two basic types of international regulatory regimes

For purposes of our analysis, two basic types of international regulatory regimes may be distinguished.

Formal international regulatory regimes are established by treaties to which nations are parties. These regimes typically include a secretariat and other institutional features of an international intergovernmental organization. Examples include trade regimes like NAFTA and the WTO, and environmental regimes as the Montreal Protocol (regulating stratospheric ozone depleting chemicals) and the Convention on International Trade in Endangered Species (CITES).

International regulatory networks are created by national regulatory officials responsible for specific areas of domestic regulation. These officials communicate and meet informally and coordinate policies and enforcement practices in areas such as antitrust, telecommunications, chemicals regulation, and transportation safety in order to reduce barriers to trade and commerce created by differing national regulations and address transnational regulatory problems that exceed purely domestic capabilities.⁹ For example, national regulators may agree to accept each others’ product regulatory standards as mutually equivalent, or pool information and coordinate antitrust measures to address the practices of multinational firms.

In practice, the distinction between formal and network regulatory regimes, is not always clear cut. Formal international regimes often provide a forum for informal networking among domestic regulatory officials. Some regulatory networks function through their own international organizations (which, however, are generally not treaty-based). Others operate pursuant to executive agreements

⁷ Howse at 477.

⁸ Howse at 478.

⁹ For an introduction to such horizontal networks, see Ann-Marie Slaughter, *The Accountability of Government Networks*, 8 Ind. J. Global Legal Stud. 347 (1992). See also Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 Int’l Org. 1 (1992); David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 Tex. Int’l L.J. 281 (1998).

between national government heads. Still others are loose-knit and highly informal. Also, many international regulatory networks involve significant participation by business and NGO representatives. These non-state actors also play an increasingly significant role in many treaty based regulatory regimes and organizations.¹⁰

Vertical linkages

Both formal treaty-based regimes and networks operate through two-way vertical linkages between the domestic and international levels.

First, domestic officials represent their governments at the international level. In formal regimes, a national delegation may involve representation of several ministries or departments, often headed by a foreign ministry official, structured through established protocols of supervision and review by the represented government. In networks, the representation process is typically far less structured and officials may represent only their own agency, affording them much greater freedom of action. In addition to acting as representatives of their respective governments, officials also function as members of the international regime, and may develop a personal stake in its success. Business and NGO representatives may also participate in the representation process in both treaty-based and network regimes.¹¹

Second, measures agreed at the international level are often implemented through domestic regulatory regimes. Almost without exception, treaty-based regimes lack authority directly to regulate the conduct of non-state actors.¹² But, such regimes often generate norms that are, as matter of international law, binding on party states. These international norms are typically adopted or established through formal legal acts, including treaties and also, in some cases, through subsidiary legislation adopted through the regime international organization or through judgments of regime dispute settlement tribunals. They follow what Dan Tarullo has called a “statutory/adjudicatory” model of command and control governance.¹³ In order to comply with these norms, domestic governments often enact new regulatory legislation, or adopt new administrative regulations pursuant to existing regulatory statutes. Also, treaty-based norms may provide strong incentives for governments to change domestic regulations, even where they do

¹⁰ Still other types of mixed arrangements are currently emerging. The World Summit for Sustainable Development at Johannesburg spawned an array of partnership arrangements between national governments, multinational businesses, and environmental, consumer, labor, developing country, and other non-governmental organizations in order to achieve international regulatory and development goals; in some cases, these partnerships will involve international organizations as well.

¹¹ See Wirth, *Public Participation in International Processes: Environmental Case Studies at the National and International Levels*, 7 *Colo. J. Int'l Envtl L. & Policy* 1 (1996)

¹² Some exceptions to this generalization are discussed in Section III, *infra*.

¹³ Daniel K. Tarullo, *Law and Governance in a Global Economy*, *Am. Soc. Intl L. Proceedings* 105

not mandate such changes. For example, the WTO SPS agreements have lead the U.S. to adopt, at the domestic level, international standards for food safety regulation in order to avoid potential WTO legal challenges to its domestic regulations under the SPS.¹⁴

Informal regulatory networks lack direct coercive regulatory authority over non-state actors and the measures agreed on are not legally binding on states. Implementation at the domestic level of policies and measures agreed to by networks depends on and can generally be accomplished by the initiative of the relevant participating national officials, who are often able to carry out such implementation through the exercise of their existing administrative authority without the need for legislation or action by other government authorities. Dan Tarullo has termed this a “regulatory convergence” model of governance, which typically operates without any formal transmission of legal provisions or decisions from the international to the domestic level.¹⁵ Thus, the network of central bank governors forming the Basle Committee on Banking Supervision agreed on new capital requirements for banks; the participating government officials then followed these harmonized measures in exercising their domestic administrative regulatory authority.¹⁶

Transparency and opportunities for access and participation

Both treaty-based regimes and international regulatory networks typically function against the background of traditional diplomatic norms of confidentiality in negotiation. Confidentiality has generally been thought necessary to secure agreement on new measures, given the general international rule that states or their representatives must voluntarily assent to such measures order to be bound by them. The transaction costs and other impediments to successful negotiations are already high, especially for multilateral agreements, even if negotiations are confidential. Transparency could aggravate these impediments. For example, confidentiality has been thought justified on the need to prevent threats to successful negotiations by domestic interest groups who might mobilize to block, for example, trade liberalization. In the case of regulatory agreements, these agreements for confidentiality are reinforced by the premise that the issues involved are often technical and appropriately resolved by experts.

Treaty-based regulatory regimes nonetheless involve some elements of transparency. In addition to operating in significant part through formal, public legal acts, treaty-based regimes typically make decisions through established rules and processes. Networks, by contrast, as a rule operate much more informally and

¹⁴ See Linda Horton, Mutual Recognition Agreements and Harmonization, 29 Seton Hall L. Rev. 692 (1998); Lori M. Wallach, Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards, 50 U. Kan. L. Rev. 823 (2002); Memorandum by David Livschitz on U.S. Adoption of International Regulatory Standards.

¹⁵ Tarullo, *supra*, at 109.

¹⁶ See Zaring, *supra*.

their decisions and decision making processes are generally significantly less transparent than those of treaty-based regimes. These distinctions, as discussed more fully below, are important for the potential application of administrative law, which can be much more readily applied to regimes that operate through more formalized and visible decisional processes. In considering the potential application of administrative law mechanisms to international regulatory regimes, it is thus important to understand what factors favor the use of either formal treaty-based regimes or more informal networks to address particular types of regulatory problems.

Networks have the advantage of lower transactions costs and lower domestic political visibility; these considerations become especially important in the multilateral context as the number of participants that must reach agreement increases. They also have the advantage, from the perspective of network participants of making it more difficult to apply mechanisms of legal accountability to their actions. On the other hand, the ability of formal regimes to generate legally binding norms may be an advantage in some situations. Also, publicity and transparency may create reputational and other incentives for compliance by participating states. But formal, legally binding international norms are not necessarily more important or effective than more informal measures. Thus, the recommendations regarding economic policy made to domestic governments by the World Bank or the IMF are informal, confidential, and in no sense legally binding, yet they generally have a major impact on domestic policies. The bank capital requirements agreed to by government officials in the Basle Committee were swiftly and efficiently implemented at the domestic level. In some cases, business firms (especially if they have been involved in the network) may voluntarily adhere to internationally agreed norms without formal domestic implementation or enforcement.¹⁷ These non-formal arrangements have often proven far more effective than many treaty-based regimes operating through legally binding international norms. Further, network arrangements create incentives for participating officials to carry out agreed measures in order to continue to participate in the network and secure the cooperation of and reciprocal concessions from the other participants. Systematic study by social scientists of the incentives for the use in international regulation of treaty-based arrangements and a statutory-adjudicatory model of regulatory governance versus networks for is just beginning.

Issues of control and accountability: domestic and global perspectives

The dramatic growth of international regulatory regimes urgently raises governance issues of accountability, control, and responsiveness with respect to the power that they exercise. These questions can be viewed from either a domestic or a global perspective.

¹⁷ I am indebted to Nico Krisch for this point.

In the domestic perspective, international regulatory regimes have been attacked in many countries, including the United States, on the ground that they result in changes in domestic law without being fully or adequately subject to the domestic systems of political and legal accountability and control that would apply to purely domestic regulatory measures. While treaties require either Senate consent or congressional legislation, special arrangements like the fast track process for congressional approval of trade agreements short-circuits the normal processes of legislative control. Neither executive agreements nor regulatory networks require any legislative approval. Further, new regulatory norms adopted by international regulatory regimes, whether treaty-based or network, can often be implemented by executive branch agencies under their existing statutory authorities without the need for new legislation. Implementing administrative measures, such as the issuance by an agency or regulations or orders, may in some cases be subject to domestic administrative law procedures and judicial review but the underlying policy was adopted through supranational processes that are not.¹⁸ Some binding international norms adopted by treaty-based regimes may allow no or only limited discretion in domestic implementation, short-circuiting the role of domestic administrative law. In other cases administrative implementation may be accomplished through an informal adjudicatory determination or an administrative exercise of enforcement discretion that is not subject to procedural requirements and (in the case of enforcement discretion) also not ordinarily subject to judicial review. Examples include decisions by U.S. regulators not to enforce U.S. requirements against imported products based on determinations of functional equivalence or mutual recognition of regulatory standards pursuant to informal agreements with regulators in other countries.¹⁹ Moreover, even where domestic administrative law disciplines are applicable, they generally apply only to domestic implementation and not to the international component of the decision-making process, which is often by far the most important..

Critics accordingly contend that the norms, policies, and practices adopted by international regulatory regimes are not subject to adequate political and legal accountability. The criticisms have both procedural and substantive components, and may focus on either the domestic or international level implications. The displacement of domestic processes is most obvious in the case of international treaty regimes that follow a statutory-adjudicatory model of regulatory governance and operate through the adoption of binding norms that must be incorporated in domestic law and, in some cases, through binding dispute settlement authority, under which domestic regulatory measures may be held contrary to international law. Treaty-based regimes like the WTO and the IMF have been widely attacked for imposing measures that are generated by secret processes without opportunity for participation and review by the domestic

¹⁸ See Eleanor Kinney, *The Emerging Field of International Administrative Law: Its Content and Potential*, 54 ADMIN. L. REV. 415, 425-32 (2002).

¹⁹ Linda Horton, *Mutual Recognition Agreements and Harmonization*, 29 Seton Hall L. Rev. 693 (1998); Sidney Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, 54 Adm. L. Rev. 435 (2002).

interests affected by their decisions. A widely publicized example is the WTO DSB decision holding that U.S. laws banning the import of tuna caught without compliance with U.S. regulatory requirements to protect dolphins was contrary to WTO free trade disciplines.

Process-based criticisms of the domestic impact of international regulation are characteristically joined with a substantive attack: that the absence of adequate mechanisms of transparency, accountability, and control enables well-organized industrial and financial interests to “capture” the process and dominate the setting of international regulatory standards and measures, to the detriment of the environment, consumers, workers, and the poor. As a result of the circumvention of domestic mechanisms of legal and political accountability, “[i]nternational negotiations sometimes enable government leaders to do what they privately wish to do, but are powerless to do domestically.”²⁰ Especially in the case of networks, international agreements can be used on a low-visibility means of favoring some domestic constituencies over others. The vehement criticism by environmental and other NGOs in the U.S. and abroad of decisions by WTO and NAFTA tribunals, the IMF, the World Bank, and other international bodies is a virtual replay of Ralph Nader’s attacks on U.S. federal regulatory agencies in the 1960s. Indeed, Nader is still around, making criticisms of the WTO that are virtually the same as those he levied against the Federal Trade Commission 35 years ago.²¹ These critics have protested the delegation of extensive powers to supposedly objective, expert international bodies without adequate mechanisms of legal or democratic accountability, and asserted that decisions are made through an opaque “insider” process that systematically serve corporate profit to the detriment of other social interests.²²

Some analysts have gone so far as to argue that the rise of international economic regulation amounts to a fundamental alteration of the constitutional and governmental system in the United States through the creation of a largely unaccountable “international branch” of the federal government that presents challenges comparable to those posed by the New Deal and the development of a centralized administrative state.²³ The remedy that these critics generally advocate is to strengthen and extend domestic mechanisms of political and legal accountability and control over domestically implemented international regulatory standards and measures.

²⁰ Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 *Intl Org.* 427, 457 (1988), quoted in Zaring, *supra*, at 321

²¹ See Lori Wallach & Michelle Sforza, *WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY* ix (1999) (referring in the preface by Ralph Nader to “an autocratic system of international governance that favors corporate interests”). See generally, Gregory Shaffer, *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO’s Future*, 24 *FORDHAM INT’L L.J.* 608, 609 fn. 5 (2000).

²² See Wallach and Sforza, *supra*.

²³ Thomas, *Constitutional Change and International Government*, 52 *Hastings L.J.* 1 (2000)

When taking a global perspective, NGOs and other critics focus on the deficiencies of governance at the level of the international regulatory regime, rather than on the weakening or circumvention of domestic mechanisms of political and legal control and accountability. They make both process and substantive criticisms similar to those levied by their domestically oriented counterparts. Process-based criticism tends to focus on the secrecy of international regulatory processes and the lack of adequate opportunity for effective access to information participation and input by developing countries and by affected environmental, worker, consumer, indigenous peoples interests. Associated substantive criticisms are that the process enables the international regulatory process to be dominated by well organized economic interests and powerful countries like the United States, often resulting in inadequate regulatory protection and economic injustice.²⁴ International regulatory regimes are in theory representative of and accountable to the national governments that create and participate in them, and ultimately, through those governments and their respective domestic political processes, to the citizens of those nations. In reality, these mechanisms of control and accountability are often attenuated, and international regulatory regimes enjoy greater or lesser degrees of autonomy, especially on many regulatory matters that are not the stuff of high politics but which, cumulatively, are of great economic and social significance.

While they generally do not endorse such sweeping indictments of the international regulatory process, many students of that process acknowledge the circumvention or weakening of domestic political mechanisms of political and legal accountability and dangers of abuse of power and potential for undue weakening of regulatory protections.²⁵ They recognize that these arrangements, by making regulation a two-level game, generate serious information asymmetries, create significant agency costs, and increase the severity of the collective action problems faced by unorganized “public” interests, thereby serving to “filter” interests and systematically disadvantage “larger and politically weak groups” such as workers, the poor, the uneducated, or the vulnerable.²⁶ They also note that distributional issues may be especially important in the context of global regulatory regimes because of the lack at the international level of robust fiscal mechanisms of redistribution and security that can, in the domestic context, cushion the adverse impacts of regulatory policies that are focused on wealth maximization.²⁷

Potential Administrative Law Responses.

²⁴ [citations]

²⁵ See, e.g., Putnam, *supra*; Sidney A Shapiro, International Trade Agreements, Regulatory Protection, and Public Accountability, 54 Admin L. Rev. 435 (2002); Slaughter, The Accountability of Government Networks, 8 Ind JI Global L Studies 347 (2001). Network agreements on policies can be used to reward some domestic interest groups over others.

²⁶ See Benvenisti, Welfare and Democracy on a Global Level: The WTO as a Case Study.

²⁷ Revesz cite

One means of addressing these problems is the development of more effective and appropriate systems of administrative law to discipline and hold to account international regulatory decision making and its domestic implementation. We could either follow a bottom-up strategy, extending domestic administrative law to assert more effective control and review with respect to the supranational elements of domestic regulation, or a top-down strategy, developing a new international administrative law directly applicable to international regulatory regimes. Or, we might pursue both approaches at the same time, in the hope that they might support and reinforce the other.

As an example of the bottom up approach, U.S. courts dealing with domestic agency decisions implementing policies adopted by transnational regulatory networks might seek to extend the administrative law procedures and techniques of review applicable to purely domestic measures to include the international regulatory elements of such measures. Thus, they might require U.S. regulators to afford public notice and comment before entering into discussions and negotiations in the context of an international regulatory network. Where an international agreement is reached and implemented domestically, for example through a new regulation adopted through rulemaking, U.S. agencies might be required to include a summary of the international considerations and discussions in the notice of a proposed rule and discuss them in the final decision. In addition to reviewing domestic implementing measures for conformance with the agency's statutory authority, courts could extend "hard look" review of the exercise of administrative discretion to the international elements of U.S. regulatory measures. Much more boldly, domestic courts might refuse to recognize decisions of international organizations that did not satisfy basic standards of transparency, opportunity for input by affected interests, and reasoned decision. Other participating nations might come to impose similar requirements, which might coalesce and ripen into de facto transnational administrative law.

Alternatively, under a "top down" approach, a treaty regime or even a network might adopt procedures to promote greater transparency and opportunities for participation and input from affected interests and establish reviewing bodies or other mechanisms to promote accountability with respect to international regulatory decisions. In this context, we will probably need, to an even greater extent than in a purely domestic context, to liberate ourselves from a court-centered conception of administrative law. NGOs often advocate wholesale importation of interest representation models of administrative law on the U.S. domestic model. International practice has already begun to generate a variety of different approaches, including the World Bank inspection panel;²⁸ the procedures of the NAFTA Commission for Environmental Cooperation;²⁹ and the inclusion

²⁸ See generally Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553 (1994).

²⁹ See generally Sarah Richardson, *Sovereignty, Trade, and the Environment – The North American Agreement on Environmental Cooperation*, 24 CAN.-U.S. L.J. 183 (1998); Gillian Dale, *III. NAFTA: Commission for Environmental Cooperation*, 1996 COLO. J. INT'L ENVTL. L. & POL'Y

of NGOs in decision making by the Codex Alimentarius Commission on international food safety standards and under the Convention on International Trade in Endangered Species.³⁰

In assessing the potential for these and other strategies,³¹ we must frankly recognize that the challenge posed to administrative law by regulatory governance is significantly greater at the international than at the domestic context. How feasible and desirable is it to develop an administrative law for these new arrangements that will fulfill both the negative (power checking) and affirmative (power directing) functions that administrative law serves in a wholly domestic setting? Domestically, regulatory agencies generally operate at one remove from elected legislatures. A central issue for administrative law is how to ground the administrative exercise of regulatory authority in electorally-based representative government or provide surrogate mechanisms of democratic accountability and responsiveness. International regulatory networks and organizations operate at an even further remove, often involve many nations and, in many cases, international non-state actors as well. There are good reasons for traditional diplomatic norms of secrecy and confidentiality in international negotiation and for the use of informal models of governance based on regulatory convergence. It is by no means clear that the procedures and institutional mechanisms of transparency and participation developed in the domestic context can simply be transferred to the international level without creating serious difficulties, procedural and substantive. Moreover, administrative law in the United States and most other jurisdictions depends heavily on the exercise of review of administrative acts by independent courts or tribunals, which barely exist at the international level. Finally, we must remember that even at the domestic level many important administrative functions – such as central banking – are for good reasons barely subject to the administrative law mechanisms applicable in other regulatory contexts.

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26 (1996); Stefan R. Miller, Comment, *NAFTA: A Model for Reconciling the Conflict Between Free Trade and International Environmental Protection*, 56 U. PITT. L. REV. 483, 509-522 (1994).

³⁰ For discussions regarding NGO participation at Codex Alimentarius meetings, see Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards*, 50 U. KAN. L. REV. 823, 836-38 (2002); Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 CORNELL INT'L L.J. 699, 718-20 (1994). For discussions regarding NGO participation in the context of other international treaties and organizations, see Daniel Vice, Note, *Implementation of Biodiversity Treaties: Monitoring, Fact-Finding, and Dispute Resolution*, 29 N.Y.U. J. INT'L L. & POL'Y 577, 616-19 (1997); Kal Raustiala, Note, *The "Participatory Revolution" in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537, 547-48 (1997).

³¹ The EU comitology process provides another institutional model which might be adopted to the global context. For discussion of the comitology process, see generally Christian Joerges & Ellen Vos, *EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS* (Hart, 1999); Michelle Egan & Dieter Wolf, *Regulation and Comitology: The EC Committee System in Regulatory Perspective*, 4 COLUM. J. EUR. L. 499 (1998).

In the United States and other liberal democratic societies, administrative regulation is itself regulated by administrative law. It defines the structural position of administrative agencies within the governmental system, specifies the decisional procedures that they must follow, and determines the availability and scope of review of their actions by the independent judiciary. It furnishes a common set of principles and procedures that cut horizontally across the many different substantive fields of administration and regulation.

This section summarizes the basic elements of federal administrative law in the United States. This system has evolved over time from a core function of protecting individuals against coercive impositions by government that lack constitutional and statutory authority to broader functions of securing persons' entitlements to government assistance and other benefits including regulatory protection, assuring the legality of general administrative rules and regulations, and controlling the exercise of administrative discretion. These protections are secured by procedural requirements for administrative decision making and review of administrative actions by independent federal courts.³²

Basic Elements of U.S. Federal Administrative Law

The system of federal administrative law in the United States has certain key characteristics that are fundamental in considering its potential application to international regulatory decision-making. Most obviously, the system involves institutional differentiation and specialization that includes, at a minimum, the following elements:

- A legislative body that enacts statutes and delegates their implementation to an administrative body;
- The administrative body, a discrete, responsible decision-making entity that is subordinate to and derives authority from the legislature, that implements the relevant law through adjudication, rulemaking, or and/or other forms of administrative implementation and that regulates and serves non-governmental individuals and entities;³³
- A tribunal, independent of the agency and the legislature, that reviews the agency decisions for conformance with the terms of the statutory delegation and other applicable legal requirements.

³² It should be remembered that current judicial models of administrative law are the product of long historical evolution in Anglo-American law from the Curia Regis to the present, which includes experimentation with alternative models such as the Star Chamber and Court of High Commission.

³³ Martian Shapiro Administrative Law Unbounded: Reflections on Government and Governance, 8 Indiana J Global legal Stud 369 (2001).

U.S. federal administrative law, currently codified in the federal Administrative Procedure Act,³⁴ comprises four basic elements: procedural requirements for agency decision making; threshold requirements for the availability of judicial review; principles defining the scope of judicial review; and provisions regarding public access to agency information.³⁵

The APA provides two basic types of procedures for agency decision making. In adopting regulations and other rules having the force of law, agencies are required to provide the public with notice of the rules that it proposes to adopt, afford opportunity for written submissions of comments by the public on the proposal, and provide a written justification for the rule finally adopted. These comments, together with all of the documents in the agency's possession that are relevant to the rulemaking, are contained in a rulemaking docket open to the public for inspection and copying, and form the administrative record on the basis of which the agency must justify the rule adopted. This record also forms the basis for judicial review. In formal adjudicatory proceedings to impose sanctions, licenses, and similar actions, agencies must generally provide to the affected private party a trial-type hearing before an independent hearing officer; the hearing creates the record on which the agency must base its decision and the court reviews that decision. In cases of more informal actions, reviewing courts insist that the agency provide a documentary record of the factual basis and justificatory purpose of its action. Often agencies afford opportunity for public notice and comment prior to taking such informal actions.

These various agency procedures provide transparency by generating extensive publicly available records of the factual, analytic and policy position of the agency and of outside parties. In addition, the federal Freedom of Information Act (which is a part of the APA) provides a right for "any person" to promptly obtain copies of any identifiable records in the agency's possession (including information in electronic form), subject to quite limited exceptions.

The APA imposes certain threshold requirements and limitations on the availability of judicial review-- including requirements of jurisdiction, reviewability, standing, ripeness, and exhaustion of administrative remedies-- in order to ensure that the agency process has reached a final and determinate decision that has concrete adverse effects on the person seeking review and thus present a specific case or controversy presenting focused legal and factual issues suited for judicial adjudication.³⁶ These threshold requirements are rooted in

³⁴ § U.S.C §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521.

³⁵ See generally, S.Breyer, R.Stewart, C.Sunstein and M.Spitzer, *Administrative Law and Regulatory Policy* (5th Ed. 2001). [Hereafter Breyer & Stewart]

³⁶ These requirements consist of a constitutional or legislative grant of jurisdiction to the tribunal to review the administrative decision in issue; review of the particular decision by the agency has not been precluded by legislation; standing by the party seeking review by showing an infringement of his legal rights or other concrete adverse effect resulting from the agency decision that will be redressed by a judgment in his favor; an agency action that represents a focused and final decision that is ripe for judicial review; an agency decision governed by legal standards which the

separation of powers concerns and are designed to present judicial intrusion into the decision making of the politically accountable executive and legislative branches except where necessary to resolve a specific wrong suffered by one or more identifiable persons.

The APA authorizes courts to review four basic types of issues: the agency's compliance with applicable procedural requirements; the sufficiency of the record evidence to support agency factual determinations; whether the agency's action is in conformity with applicable constitutional and statutory requirements, limitations, and other provisions; and whether the agency's decision is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law."³⁷

The Traditional Model of Administrative Law and Subsequent Evolutionary Developments

The core of administrative law in the United States has focused on securing the rule of law and protecting the liberty and property of citizens by ensuring, through procedural requirements and judicial review that agencies act within constitutional limitations and the bounds of the statutory authority delegated by the legislature, and respect private rights.³⁸ The traditional subject of administrative law is government issuance or enforcement of an order imposing regulatory requirements or liabilities on a specific person. Here the function of administrative law is primarily negative: to prevent unlawful or arbitrary administrative exercise of coercive power against private persons. This is to ensure accountability for the legality of administrative decisions. This function is rooted in principles of democratic self government: that the liberty or property of citizens should be subject to restriction by government only when the citizenry has authorized such restrictions through the processes of electoral representation and subject to the constitutional limitation and procedures adopted by the citizenry.³⁹ This approach to administrative law is rooted in a conception of democracy based on electoral representation – the first of the three conceptions outlined above.

In recent decades, U.S. administrative law has assumed a broader scope and function. It has developed new and more inclusive procedural requirements and promoted transparency in administrative decision-making, including rulemaking, and expanded the availability and scope of judicial review. The typical subject of administrative law has been agency adoption of a regulatory or other rule - - a form of subsidiary legislation -- although procedural requirements and judicial review have also been extended to a wide range of other actions with broad social

court can appropriately apply to determine the validity of the decision; and prior exhaustion by the party seeking review of any available administrative remedies.

³⁷ 5 U.S.C. § 702

³⁸ See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1671-76 (1975)([hereinafter Stewart, Reformation];Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1203 (1982).

³⁹ See Stewart, Reformation at-----.

effects, including government or government-financed development projects, management of the public lands and other public resources, and other administrative programs. Here administrative law has assumed the affirmative task of ensuring that regulatory agencies exercise their policy-making discretion in a manner that is informed and responsive to the wide range of social and economic interests and values affected by their decisions, including the beneficiaries of regulatory programs as well as those subject to regulatory controls and sanctions.⁴⁰ Here the functions of administrative law go beyond the core of ensuring legality accountability to the broader goal of securing accountability to social interests and values.

Early administrative law in the United States relied heavily on common law actions by citizens against regulatory officials as an *ex post* means for judicial review of administrative legality. Beginning in the late 19th century, however, legislatures created railroad commissions and other regulatory agencies to deal with the consequences of industrialization. Tort actions would be an awkward method of reviewing their decisions. In response, courts and legislatures developed what I have called the traditional model of administrative law⁴¹; agencies were required to conduct trial type adjudicatory hearings before adopting rate orders or other regulatory requirements. Courts scrutinized the agency's fact findings based on the hearing record and determined whether the requirements imposed conformed to statutory authority. In most cases, review is *ex ante*, occurring before the agency finally makes or enforces a decision. The creation of these new bodies created a democratic anxiety. How could their exercise of power be reconciled with democratic government? The traditional model's answer was to treat the agencies essentially as subordinate adjudicatory bodies subject to close statutory and judicial control. Administrative law functioned as a transmission belt to legitimate the exercise of regulatory authority by ensuring, via judicial review, that particular impositions on private persons had been statutorily authorized by the democratically elected legislature.⁴²

The adequacy of this model was sharply challenged in the New Deal, where Congress created a raft of new federal regulatory agencies and endowed them with very broad powers through open-ended statutes. These broad delegations of law making authority to administrators intensified democratic anxieties to the point of crisis.⁴³ The agencies were attacked as an unconstitutional "fourth branch" of government.⁴⁴ While application of the traditional model might ensure that agencies acted within the bounds of their statutory powers, those bounds were so wide as to give agencies vast discretionary powers, creating a palpable

⁴⁰ See Stewart Reformation at __; Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) at 1202-04.

⁴¹ Stewart & Sunstein, *supra*

⁴² Stewart, *Reformation* at 1675.

⁴³ See Mathew McCubbins, Roger Noll, & Barry Weingast ("McNollgast"), *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 192 (1999)

⁴⁴ See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

democracy deficit and the threat of arbitrary power. Defenders of the New Deal, such as James Landis, appealed to the notion of regulatory management by experts to resolve these criticisms.⁴⁵ Landis equated regulatory officials to business managers. Market capitalism had broken down. The task of regulation was to manage business or other sectors of the economy to restore their economic health and protect the public. Guided by experience and professional discipline, expert administrators would adopt measures to secure these public interest goals and thereby serve democratic needs. There would accordingly be only a limited need and role for formal legal hearings or judicial review.

In 1946 Congress enacted the Administrative Procedure Act. It, and administrative law in the U.S for the next 20 years, reflected an uneasy accommodation of the traditional model of administrative law and the Landis vision of regulatory managerialism.

Basic changes in administrative law were made in the late 1960s in response to three interrelated developments:⁴⁶

- Widespread acceptance of Ralph Nader's critique that regulatory agencies had failed to protect the public and were "captured" or otherwise dominated by regulated industry.
- The rise of public interest law through the proliferation of new legal advocacy groups in environmental, consumer, civil rights, labor, and other fields.
- A new wave of environmental, health, safety, civil rights, and other social regulatory programs adopted by Congress as part of a "rights revolution."

In response, agencies shifted, often in accordance with congressional mandates, from case-by-case adjudication and enforcement of regulatory controls to rulemaking and the adoption of broadly applicable regulations as a more efficient, explicitly legislative procedure for implementing the new, far reaching regulatory programs. As rulemaking displaced adjudication as the dominant paradigm for administrative lawmaking, the focus of administrative law has shifted from adjudicatory due process and checking governmental power in order to protect individual rights to due process of rulemaking and the need to structure and mobilize the exercise of governmental authority in order to serve and protect collective interests. At the same time, courts fundamentally changed many basic elements of administrative law by new interpretations of the APA. Judges concluded that the right to participate in agency decision-making and obtain judicial review should no longer be limited, as it had been under the traditional model, to individuals and firms subject to regulatory controls and liabilities, and extended these rights to the beneficiaries of regulatory programs, including consumers and environmentalists, and others whose interests were affected by

⁴⁵ James Landis, *The Administrative Process* (1938).

⁴⁶ Cass R. Sunstein, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 2* (1990)

regulatory agency decisions. New NGO public interest advocacy groups arose to represent these interests. Through a new form of “hard look” review of agency discretion, courts required agencies to address and respond to the factual, analytical and policy submissions made by parties participating in rulemaking and adjudication and justify their policy decisions with detailed reasons supported by the rulemaking record, including responses to all significant comments made.⁴⁷ Transparency was reinforced by the documents and other information generated by these procedures and by vigorous judicial enforcement of the FOIA.

The Interest Representation Model of Administrative Law

These developments produced what I have termed an “interest representation” model that makes the right to participate in agency proceedings (including in particular rulemaking as well as adjudication) and to secure judicial review widely available and meaningful. These arrangements promote transparency help, ensure not only that agencies comply with constitutional and statutory requirements and limitations but also that they exercise their discretion in a reasoned manner that is responsive to the evidence, contentions, and issues presented by a wide variety of affected and concerned individuals and organizations. Public participation through rulemaking and other processes and “hard look” review of agency discretion by courts have become central foundations of administrative law and practice.

This new approach implicitly recognizes the inherent limitations of an administrative law limited to a conception of democracy based solely on electoral representation. The extent of power exercised by administrative agencies and the breadth of the discretion that they enjoy under many statutory delegations means that the system of electoral representation can afford only a limited degree of accountability for their decisions. Because it is focused on securing accountability for legality by ensuring agency conformance with statutory directives, the traditional model of administrative law is subject to this same limitation. The “transmission belt” traditional model aspires to legitimate agency exercises of power by synchronizing them with the directions issued by the electorally accountable legislature. Broad statutory delegations, however, enable agencies to escape any such tight agent-principal linkage and leave them with a large residual discretion that is not legally accountable at all. The interest representation model seeks to fill this gap by creating a surrogate process of representation through legal procedures rather than electoral mechanisms and expand the scope of judicial review to include close scrutiny of agency exercises of discretion. In doing so, it seeks to promote accountability to social interests and values in the exercise of agency power.

At first glance, the interest representation model of administrative law might appear to be a form of consociational or corporatist democracy operating through structures created by the judiciary. This, however, would be a mistake. Unlike

⁴⁷ See Breyer and Stewart at 415-487.

corporatist approaches, access to agency procedures and judicial review in the United States is not limited to organizations officially recognized or selected as representatives of various social and economic interests. In the case of rulemaking, for example, any individual or organization can submit comments. Standing to secure judicial review is available to any person or organization who can show some adverse effect and whose interest is “arguably protected or regulated” under the relevant statute.⁴⁸ The Supreme Court has rejected the notion that standing should be based on whether or not a litigant is a capable and legitimate representative of a given interest, such as an environmental interest.⁴⁹ American suspicion of corporatism is also reflected in judicial refusal to embrace regulatory negotiation among interests as a legitimate basis for making regulatory decisions.⁵⁰ Thus, judges have rejected the notion that they should defer to agency rules adopted after a process of regulatory negotiation on the ground that such rules represent a consensus among relevant interests.⁵¹ It is not sufficient that an agency decision reflects the vector of organized interests. Rather, the agency must justify its decision by reference to public norms -- the norms established by the statute or endorsed by the agency in the exercise of its statutory discretion – and the evidence of record. The contentions and evidence advanced by participants in the agency process are relevant only insofar as they relate to those public norms. In short, the conception of democracy adopted in the interest representation model is a deliberative one. The judiciary is the vital cockpit. In applying the “arbitrary and capricious” standard for review of agency discretion, the courts do not substitute their own judgment for those of agency regarding sound policy. That would be undemocratic. Instead, they seek to promote a form of dialogic rationality in the administrative process by requiring the agency to articulate and justify its exercises of power by reference to the public norms invoked by outside parties and the agency itself, and by examining the sufficiency of the agencies’ responses and justifications.

The interest representation model has not displaced the traditional model of administrative law. It supplements rather than supplanting it. Courts still ensure legality accountability, consistent with electoral representation conception of democracy, by reviewing agencies’ conformance to statutory directives and other applicable law. Beyond this, they also review agencies’ exercise of discretion to promote accountability to social interests and values, consistent with a deliberative conception of democracy. By promoting transparency and requiring the agency to articulate reasoned justifications for its choices, the interest representation model may also serve to mobilize electorally-based representative institutions.

⁴⁸ See *Association of Data Processing Industries v. Camp* 392 U.S. 150 (1970)

⁴⁹ *Sierra Club v. Morton*, 405 U.S. 727 (1972)

⁵⁰ See *U.S. Group Loan Services v. U.S. Department of Education*, 83 F. 3d 708 (7th Cir. 1996); Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?* 10 *Colum. J. Envtl. L.* 1(1985)

⁵¹ For a good discussion of interest group pathologies, see Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 *WM. & MARY L. REV.* 411, 427-45 (2000).

Regulatory Fatigue and Institutional Innovation: Networks and Economic Incentive Systems

At the same time, the United States is facing a growing problem of regulatory fatigue. Regulatory administrative government seems less and less capable of providing appropriate levels of regulatory protection in an efficient and effective manner.⁵² Regulatory results often fall short of expectations at the same time that regulatory requirements grow ever more burdensome. Many have blamed this problem on the contemporary system of administrative law, claiming it produces significant delay and “ossification” in the regulatory process.⁵³ In my view, however, these problems are merely symptoms. The basic cause is excessive reliance on command and control methods of regulation -- the dominant approach that we have used for achieving regulatory goals over the past 100 years -- and the inherent problems involved in attempting to dictate on a central, uniform basis the conduct of millions of actors in a fast changing and very complex economy and society.⁵⁴ These problems have become more acute as regulation has intensified.

In response to these problems, two new approaches to regulation are emerging in U.S practice, government-stakeholder network structures and economic incentive systems.

Various forms of flexible agency-stakeholder networks for innovative regulatory problem solving have developed in order to avoid the limitations of top down command regulation and formal administrative law procedures.⁵⁵ Examples include cooperative arrangements involving governmental and non-governmental entities in delivering family services or administering Medicare, and negotiation, in the draconian shadow of the Endangered Species Act, of regional habitat conservation plans by federal natural resource management agencies, private landowners, developers, and state and local governments.⁵⁶ These and similar arrangements in other fields of regulation generate a quasi-contractual working relation between government regulators and other governmental and non-governmental participants to solve regulatory problems on a coordinated basis. Rather than centralized mass-production, this method embraces a post-industrial strategy for producing regulation, with emphasis on flexibility, innovation,

⁵³ Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 19 & fn. 50 (1997). Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 483-84 (1997).

⁵⁴ Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 21 & fn. 1 (2001). [Hereinafter Stewart, *New Generation*]

⁵⁵ See generally Seidenfeld, *supra*; Stewart, *New Generation* at ----; Georgette C. Poindexter, *Addressing Morality in Urban Brownfield Redevelopment: Using Stakeholder Theory to Craft Legal Process*, 15 VA. ENVTL. L.J. 37 (1995).

⁵⁶ See, e.g., Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189, 190 (2002).

benchmarking, transparency of performance measures, and mutual learning by doing. In the EU, this approach is being widely used for implementing social service regulatory programs in the member states under the title of the Open Method of Coordination.⁵⁷

A second, entirely different emerging response to regulatory fatigue is the use of economic incentive systems. Examples including tradable pollution permits and environmental taxes; infrastructure and environmental impact charges on developers; and experiments with economic incentives for health care providers.⁵⁸ Rather than dictating conduct, these methods use prices –for example, a tax on each unit of pollution emitted – to steer conduct in the desired direction while leaving regulated actors the flexibility to select the least costly method of doing so. Properly designed and enforced tradable pollution permit systems, for example, have simultaneously achieved huge reductions in air pollution and dramatic cost savings – up to 50% or more – relative to traditional command techniques.⁵⁹

In order to win broad acceptance, the new regulatory methods must provide superior regulatory results. They must also confront questions of legal accountability and political legitimacy. The network strategy deliberately blurs the received distinction between public and private in favor of a cooperative fusion. The premise is that competency must match the scope of regulatory problems, which increasingly cross jurisdictional lines. The network participants form a community of specialized knowledge and experience with respect to a particular regulatory problem, yet represent different governmental, social and economic interests and perspectives. These features may go some distance to validate the regulatory policies that emerge. Network methods of regulation, however, deliberately shrink the role of formal government lawmaking or enforcement actions, which are the focus of administrative law as we know it. They accordingly present an enormous challenge for the prevailing system of administrative law in the United States, which is premised on a high degree of institutional differentiation and legalization.

⁵⁷ Joshua Cohen & Charles F. Sabel, *Sovereignty and Solidarity: EU and US*. Some network regulatory methods depart even further from the command model, removing agencies from direct substantive engagement. Instead, the agencies create structures or incentives for private sector problem-solving. Examples include information-based approaches, such as EPA's toxic release inventory, which requires facilities to monitor and report and then publicizes information about toxic air pollutant emissions and government encouragement of corporate environmental management and audit systems to track and improve environmental performance. In these methods, which have been termed "reflexive law", government develops frameworks and communications channels to promote self-regulating measures by non-governmental entities. Stewart, *New Generation* at 127-34. See generally Eric W. Orts, *Reflexive Environmental Law*, 89 Nw. U. L. Rev. 1227 (1995); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 Law & Soc'y Rev. 239 (1983)

⁵⁸ See Stewart, *New Generation* at ----.

⁵⁹ See Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 715

The network is not a legally accountable entity. In some cases, the network process will eventually result in formal legal arrangements involving governmental authorities, such as memoranda of understanding, licenses for regulated entities, or even formal regulations. These can be reviewed by courts for excess of power – manifest violation of statutory or constitutional limits. Effective review may, however, be frustrated by difficulties in pinpointing responsibility. Policies may emerge from interactions among many different governmental entities from different levels of government. These different entities may be subject to review in different courts. Even if the negative, power-checking functions of administrative law can be successfully maintained, it is hard to see how the interest representation model, which relies on formal legal procedures for decision making, can be successfully applied to network arrangements. Network method proponents argue that transparent systems of information and exchange will provide safeguards and allow for program review. This strategy has yet to be spelled out. Because the authority or authorities that establish a regulatory network select the other actors that participate in it, the network approach to regulation is most congruent with a consociational or corporatist approach to democracy. The United States has had much less experience with this approach to governance than Europe, and relevant U.S. administrative law is fairly rudimentary.⁶⁰

Economic incentive systems also reduce the reach of administrative law; they do so by delegating to market actors, via price signals, implementation decisions currently made by government agencies through more or less formal processes subject to judicial review. As a result, those adversely affected by the decisions of private actors in response to the economic signals generated by the regulatory program – for example, neighbors exposed to higher pollution levels as a result of decisions by firms to pay higher pollution taxes or purchase more pollution permits in order to pollute at higher levels-- may have only limited legal redress for harms suffered as a result of those actors' exercise of the flexibility afforded by the system. Unlike network strategies, however, economic incentive systems maintain a firm distinction between government and governed, and thereby fix clear political and legal responsibility on the government for the design and implementation of the regulatory program structures. They also impose market as well as regulatory disciplines on regulated actors. . If flexibility results in excessive harm, the government can be charged with responsibility for changing the regulatory program design to restrict flexibility. Accountability can also be promoted by measures to assure transparency. For example, in the highly successful U.S. SO₂ emissions trading systems, sources must continuously monitor and report their emissions; emissions data as well as emissions allowance holdings and transactions for all sources are available on EPA's web site. Such transparency is far more difficult to achieve in new work arrangements.

Alternative Forms of Administrative Law

⁶⁰ One example is the Federal Advisory Committee Act, which seeks to promote balanced representation and transparency in agency advisory groups.

The basic model of administrative law in the United States, based on highly developed rulemaking and adjudicatory procedures at the agency level and a fairly broad scope of judicial review, is supplemented by a number of other mechanisms to promote agency accountability and responsiveness.

Regulatory Analysis and OMB Review. An important recent innovation in federal administrative law is the system of economically-oriented regulatory analysis and OMB review for new agency regulations. At the very same time that the interest representation model was reaching full bloom, President Reagan in 1981 issued EO 12291, requiring agencies to perform a cost benefit analyses of proposed new major regulations and alternatives.⁶¹ These analyses as well as agency compliance with the executive order are subject to review by OMB, but not by the courts. Although the OMB regulatory analysis review process was initially strongly anti-regulatory and politically controversial, as the system has matured, it has become widely accepted by Democratic as well as Republican administrations and has become an integral part of U.S. administrative law.⁶² This system operates in parallel with and in many respects complements the judicially-based model of administrative law.

This initiative reflected a very different view of agency failure than Nader's, namely that a largely uncontrolled, hydra-headed array of federal regulatory agencies, afflicted with tunnel vision and spurred by "public interest" advocates, were using vague statutes to adopt ever more intrusive, rigid and costly regulatory requirements, oblivious to their burden on the economy and U.S. international competitiveness. Short of outright deregulation, the cure is to discipline regulatory decision-making and eliminate unjustified regulation through cost-benefit analysis and centralized review and oversight in Executive Office of the President. This system, which is designed to regulate the regulators, does not operate through formal legal procedures and does not involve judicial review. It constitutes an administrative system of administrative law. The Landis vision of regulatory administration has been reinvented through the new tools of formal policy analysis, including cost-benefit analysis and quantitative risk assessment, in the new system of analytic management of regulation.

Tort Law. While largely superseded by ex ante mechanisms of administrative law, ex post tort liability remains an important remedy for harms caused by the negligent acts of government employees in carrying out government operations; it does not, however, apply to "discretionary functions" including decisions on

⁵¹Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1982). The provisions of this order were modified but not fundamentally changed by E. O. 12,866 (1993), issued by President Clinton, which currently governs the OMB regulatory analyses review success.

⁶²Economic and other forms of regulatory impact analysis are increasingly used by public interest groups as well as industry, and are now being invoked by OMB itself to argue for more as well as less regulation.

regulatory policy. Also, tort liability is an important remedy for constitutional torts committed by state officials.⁶³

Peer review bodies. Another important mechanisms for promoting agency accountability is review of particular agency regulatory decisions or more general regulatory policies by official bodies of scientists, economists, or other experts. Examples include EPA's Scientific Advisory Committee, its Clean Air Act Science Advisory Committee, and special panels of the National Academy of Sciences that have been convened to review specific regulatory decisions by EPA, FRDA, and other government agencies.

Advisory Bodies Federal agencies rely on a wide variety of advisory committees and other bodies for informal input of information and views. Some of these advisory bodies are established by statute, others by agencies themselves. Although their functions is regulated by the Federal Advisory Act, there is no systematic structure for the advisory function comparable to the EU comitology process.

III. Bottom-Up Approaches to Developing a Global Administrative Law

This section consider the possibilities for creating a global administrative law “bottom up” through application of domestic administrative law to decisions of international regulatory regimes and their domestic implementation, taking the U.S. model of administrative law summarized in the previous section as an example. One possibility is to apply U.S. administrative law directly to decisions or other actions by international regulatory regimes. Another is to apply administrative law disciplines to domestic implementation of international regulatory law. A third is to apply such disciplines to the participation by U.S. administrative officials in the decision making of international regulatory regimes.

Application of U.S Administrative Law Directly to Actions of International Regulatory Regimes

As previously noted , international regulatory regimes generally do not have authority to determine or enforce requirements or liabilities directly against individual non-state actors. Instances of such authority are likely to grow as international regulation intensifies. One example is listing by the Security Council of persons determined to be engaged in financing terrorism. One consequence of listing is that the person's assets are frozen. While the asset freeze must be effectuated through member state law, implementation has been automatic without opportunity for hearing or review at either the international or domestic

⁶³ See Breyer and Stewart at 120-143. See Breyer and Stewart at 963-977.

level. Another example, discussed in greater detail below, is the Executive Board of the Clean Development Mechanism under the Kyoto Protocol, which determines whether projects to reduce greenhouse gases (GHG) are eligible to receive commercial valuable GHG emissions reduction credits, and the amount of such credits. Instances of such authority are likely to grow as international regulation intensifies. Although such determinations have important consequences for project developers and investors, there are no formal hearings or independent review procedures provided.

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. Review could include procedural issues; for example, a failure to afford any form of hearing to the person adversely affected by the international decision could be challenged as a violation of procedural due process. It could also include substantive issue; for example, the international decision could be challenged as in excess of jurisdiction or otherwise contrary to applicable international law, or as arbitrary and an abuse of discretion. While international organizations regularly plead official immunity when sued in domestic courts, in a sufficiently egregious courts might refuse to recognize such immunity. In the specific context of the United States, the boldest possibility would be for courts to hold that the international regulatory regime is a de facto federal agency to which effective decision-making power has been delegated, so that the procedural and other requirements of the APA apply directly to that regime. Such a step would be so deeply inconsistent with the deference courts show to the conduct by the Executive of foreign affairs that it would have no practical chance of adoption. Nonetheless, federal courts could, without relying on the APA apply requirements of constitutional due process and other generally applicable principles of law to review decisions of international authorities that directly and adversely impact individual persons.

Another possibility is to use tort law to promote accountability for decisions by international regimes. Such a remedy would be best suited for shortcomings in the operational activities of international organizations. Tort claims have, for example, been asserted in India against asserted negligence by UNICEF employees in the distribution and administration of vaccines, which assertedly caused medical injuries to those receiving the vaccines. Tort liability is generally an awkward remedy for defective regulatory decisions, but might be invoked in appropriate cases if other remedies are unavailable.

Application of U.S Administrative Law to Domestic Implementation of International Regulatory Norms

In most cases, international regulatory norms must be implemented through domestic legal systems. In the United States, international regulatory laws generally do not have direct legal effect in domestic law. Implementing domestic

lawmaking is generally required.⁶⁴ In some instances, congressional legislation will be necessary. In such cases, additional administrative measures to implement such legislation will typically be needed. In other cases, the existing statutory framework may be sufficient, and only administrative lawmaking is necessary

Where administrative implementation is necessary, the relevant federal government officials will typically participate in decision making by international regulatory regimes (whether networks or treaty-based regimes) and then later implement the regime level decision domestically through administrative agency decisions for which they are responsible. These implementing decisions sometimes take the form of rulemaking; for example, agencies may adopt new regulations or modify existing regulations to incorporate the substance of international regulatory standards. Alternatively, they may take the form of adjudicatory or enforcement decisions in individual cases. For example, under international regulatory regimes of mutual recognition or equivalency, the FDA will often have to decide whether to authorize or take enforcement action against the import of a medical device product that complies with domestic regulatory requirements in the exporting state, based on a determination on whether those requirements are equivalent to those in the U.S.⁶⁵

U.S. administrative officials have both an “external” and an “internal” role; they are part of both national and international governance systems⁶⁶ The focus in this subsection is on their internal role. It considers whether and to what extent either the domestic measures to implement international regulatory norms are subject to procedural requirements and judicial review under U.S. administrative law. The subsection which follows addresses the external or international component of the officials’ activities.

Should administrative decisions that implement international agreements be subject to the same procedural requirements and principles regarding the availability and scope of review as similar decisions that are purely domestic in character? There are three possible answers to this question. Decisions implementing international agreements may be subject to the same requirements as purely domestic decisions. (“parity”). They may be subject to less requirements (“less than parity”). Or, they may be subject to greater requirements (“more than parity plus”)

The Paradigm of Parity

Subject to a limited statutory exception in the case of notice-and-comment rulemaking procedures, discussed below, nothing in APA supports notion that

⁶⁴ Because the focus of this paper is on administrative law, it does not consider the issues presented domestic implementation of international law through legislation.

⁶⁵ For discussion of these and other domestic U.S. means for implementing international regimes for harmonizing regulatory standards, see Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, 54 *Admin L. Rev.* 435 (2002); Horton, *Mutual Recognition Agreements and Harmonization*, 29 *Seton Hall L. Rev.* 692 (1998).

⁶⁶ See Slaughter at, *supra.*

domestic agency actions in implementing international decisions are to be exempted from APA requirements or subject to a lesser standard of judicial review. While the APA provides wholesale exemptions from all of its provisions for certain military functions,⁶⁷ no similar exemptions apply to the agency actions relating to foreign affairs.

Under a parity paradigm, some forms of agency implementation of international decisions will not be subject to procedural requirements or judicial review because equivalent purely domestic decisions are not. For example, under the APA, an administrative decision whether to or not to initiate enforcement proceedings in a given case is not judicially reviewable where relevant statutes (as in generally the case) do not specify any requirements or criteria for such decisions; in such cases, enforcement decisions are deemed to have been committed to agency discretion by law” and judicial review is precluded.⁶⁸ Thus, decisions by the FDA or USDA not to take enforcement action against imported products in connection with international regulatory equivalence and mutual recognition regimes will generally not be subject to judicial review.⁶⁹ Similarly, agency guidance and similar policy documents that do not purport to have the force of law are generally not subject to notice and comment rulemaking requirements or to judicial review. Thus, agency use of such documents or other informal means to implement international regulatory agreements or measures will likewise not be subject to those elements of U.S. administrative law.

Even under a paradigm of parity, federal administrative decisions that implement international regulatory norms may present special types of issues that are not presented by purely domestic decisions. For example, one important set of issues, not considered further here, is the authority of the President or of lower-level executive branch officials to participate in international lawmaking or policy-setting through executive agreements, networks, or other means. Another set of issues includes the appropriate principles for interpreting U.S. statutes implementing international norms and the application in that context of the Chevron doctrine of judicial deference to agency interpretations of the statutes that they are responsible for administering, including the possibility of deference to the relevant international law-making body.⁷⁰ Another issue is whether a litigant may challenge the domestic implementation of an international regulatory norm on the ground that the norm was not validly adopted by the international regime.⁷¹

Putting aside these distinctive issues, the paradigm of parity holds that domestic implementation of international regulatory norms should be subject to the same

⁶⁷ See U.S.C § 1 (F), (G).

⁶⁸ See 5 U.S.C. § 701(a)(2); Heckler v. Chaney, 470 U.S. 821 (1985)

⁶⁹ When the decision is to enforce, the importer, of course, will generally have a right of review of the merits but not of the decision to take the enforcement action as such.

⁷⁰ See Stephen, Accountability and International lawmaking: Rules, Rents and Legitimacy, 17 N.W. J. Intl L. & Bus. 681 (1996/1997).

⁷¹ See Hobson v. Kreps, 622 F.2d 1375 (9th Cir.1980)

procedural requirements and principles regarding the availability and scope of judicial review as equivalent decisions that are purely domestic, including the availability of hard look judicial review of the agency's exercise of discretion in relation to the relevant affected social interests and values. There are a number of court decisions that reflect this approach. See, e.g., *United States v. Decker*,⁷² upholding, in the context of a criminal prosecution, the judicial reviewability of fishing regulations issued pursuant to the International Pacific Salmon Fisheries Convention; *Bethlehem Steel Corp. v. United States*,⁷³ holding that U.S. agency suspension of countervailing subsidies investigation pursuant to U.S.-Brazil agreement is subject to notice and comment rulemaking; and *Public Citizen v. DOT*,⁷⁴ requiring DOT to prepare an Environmental Impact Statement and conduct a Clean Air Act conformity determination in issuing regulations that would permit Mexican motor carriers to operate in the United States.

The paradigm of less than parity

This approach holds that domestic administrative decisions should not be held to the same procedural requirements and principles of judicial review as purely domestic decisions. The rationale for such an approach is as follows: Excessive legalization and procedural formality will cause delay and compromise confidentiality in international negotiations and otherwise impair the ability of the executive to successfully conclude and promptly implement international agreements. Prompt and efficient implementation is necessary to secure the credibility of the executive in international negotiations. Also, opportunities for delay through procedural formalities or judicial review proceedings will give undue scope for domestic economic interests to block or delay implementation of international agreements that benefit the United States as a whole, as well as foreign nations whose cooperation is needed. Since the executive can, as a general matter, conduct and conclude international agreements without being subject to the procedural and judicial review requirements of domestic administrative law, it should also enjoy significant freedom when taking the steps necessary to implement these agreements.

This paradigm finds support in a number of court decisions. For example, in *Jensen v. National Marine Fisheries Service (NOAA)*,⁷⁵ the court held that a challenge by U.S. fishing boats to regulations issued by the International Pacific Halibut Commission and approved by the Secretary of State (who was delegated such authority by the President) were not subject to judicial review, on the ground that presidential action in the field of foreign affairs is committed to agency discretion by law.⁷⁶ *International Brotherhood of Teamsters v. Pena*,⁷⁷ 17

⁷² 600 F.2d 733 (9th Cir 1979)

⁷³ 2001 C.I.T. 93 (2001)

⁷⁴ 316 F.3d 1002 (9th Cir. 2003)

⁷⁵ 512 F.2d 1189 (9th Cir. 1975)

⁷⁶ The court invoked *Chicago & Southern Air Lines v. CAB*, 333 U.S. 103 (1948), which held that determinations by the CAB and the President's determination of international airline route service authorizations and recommendations by the CAB regarding such awards were not subject to judicial review. See also *Z. & F. Assets Realization Co. v. Hull*, 311 U.S. 470 (1941) (decisions

F.3d 1478, held that the Department of Transportation was not required to follow notice and comment rulemaking procedures in issuing of regulations authorizing Mexican truck drivers to drive in the United States based on determinations that Mexican driver licensing was equivalent to that in the United States. The court invoked a provision in the APA excepting from notice and comment requirements for a “foreign affairs function of the United States.”⁷⁸ It emphasized that the regulations implemented a U.S.-Mexico executive agreement, rejecting a challenge by U.S. truck driver unions seeking to resist increased competition from Mexican truckers. The court’s decision is consistent with the view that greater legalization of trade relations means more openness, which enhances knowledge of distributional consequences of trade liberalization, and hence more opposition to economically beneficial liberalization initiatives.⁷⁹ See. also *Public Citizen v. United States Trade Representative*,⁸⁰ holding that USTR was not required to prepare an Environmental Impact Statement for the negotiation of NAFTA; *Public Citizen v. DOT*,⁸¹ holding that DOT was not required to conduct an Environmental Impact Statement and make a Clean Air Act conformity determination in issuing regulations to implement a NAFTA arbitral award.

The paradigm of parity plus

A third approach would subject domestic administrative decisions implementing international regulatory norms to more demanding administrative law requirements than equivalent purely domestic actions. The basic justification for such a position would be that the norms being implemented were chosen through international decision-making processes (whether through informal networks or treaty-based regimes) that are more remote, opaque, and closed than equivalent purely domestic processes and therefore less subject to informal mechanisms of participation, influence, and accountability.⁸² Often the locus of decision making is shifted out of the United States to distant locations such as Basel or Geneva. The use of international “club” mechanisms to make decisions makes it very difficult for interests in the United States, and especially consumer, environmental, and other “public” interests, to acquire the information and organize effectively to influence such decisions, in contrast to well-organized multinational business and financial interests. The ability of “public” interests to exert influence over international negotiations through domestic political action in the United States is undermined not only by the use of foreign venues but also by the ability of

by Secretaries of Treasury and State to certify awards pursuant to determinations of U.S.-German Mixed Claims Commission not subject to judicial review).

⁷⁷ 17 F. 3d 1478 (D.C. Cir. 1994)

⁷⁸ 5 U.S.C. § 553(a)(1). See also *Helms v. Secretary of Treasury*, 721 F. Supp. 1354 (D.D.C., 1989) (regulations implementing Comprehensive Anti-Apartheid Act of 1986, in accordance with Security Council resolution, not subject to notice and comment rulemaking requirements).

⁷⁹ See Goldstein and Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 *Int’l Organization* 603 (2000); Benvenisti, *Welfare and Democracy on a Global Level: The WTO as a Case Study*.

⁸⁰ 297 U.S.App.D.C. 287 (1992).

⁸¹ 316 F. 3d 1002 (C.A.9th Cir., Jan 16, 2003)

⁸² See Wirth, *supra*.

administrative officials to use international networks to enhance their independence from and leverage over otherwise applicable domestic political checks.⁸³ Thus, international regulatory decision making may act to “filter” the influence of environmental, consumer and other weakly organized collective interests relative to business interests and as a result produce policy outcomes that favor the latter to a greater extent than purely domestic regulatory processes. Even if domestic implementing measures are subject to the same administrative law requirements as purely domestic decisions, procedural requirements and opportunity for judicial review may have little impact because the responsible regulatory officials have already committed themselves, as a result of an international agreement, to a given outcome.⁸⁴ As a result of a prior international “deal” the outcome of a subsequent domestic decision process may, as a practical matter, be a *fait accompli*.⁸⁵ Further, the ability of the court to engage in hard look review of discretion will be seriously compromised because the essential considerations that have led an agency to adopt given measures lie in international regulatory negotiations that do not form part of the record and are not accessible to the court. Thus, parity even if it would generally enable a court to determine whether an agency acted within its statutory authority, may not be adequate to ensure adequate accountability to local interests and values.

How might “parity plus” be implemented within the scope of the procedural and judicial review requirements of the APA in order to offset these systemic factors? An essential requirement is to enhance the transparency of the circumstances and considerations that underlie the international regulatory negotiations in order to expose them to public scrutiny and contestation and enable courts to apply requirements of reasoned justification, based on the entire record to the regulatory choices made.⁸⁶ The operating premise is that open deliberations and transparency tend to “level the playing field,” enhance the contestatory function, alleviate information asymmetries, and check the influence of narrow interest groups in favor of larger, less well-organized constituencies.⁸⁷

Thus, in cases where domestic implementation involves formal adjudication or notice and comment rulemaking, courts might require the agency to submit documents and other evidentiary materials relevant to the international negotiations, disclose and review the facts and considerations that were discussed in the negotiations, and provide a summary of the reasons why the international norms in question were adopted. The agency might be required to explain why

⁸³ See Zaring, *supra*.

⁸⁴ Precommitment may also occur from time to time at the purely domestic level, but is likely to be far more persistent and generally more powerful in the case of international regulatory agreements.

⁸⁵ See Zaring, *supra*; Wirth *supra*.

⁸⁶ The extent of need for such measures will presumably vary depending on the extent of transparency and accessibility of the international regulatory regime, including whether it is a network or more formal treaty-based regime; these variations may influence the degree of intrusiveness in courts’ application of hard look review.

⁸⁷ Benvenisti, *supra*, at 7

the relevant agency officials agreed, in their “external” capacity as participants in the international negotiations, to the norms adopted and what commitments they made regarding domestic U.S. implementation. FOIA might also be used to obtain discovery of agency records relevant to the international negotiations.⁸⁸ The justification for these steps would be that they are necessary in order to adequately review the underlying basis and purpose of domestic administrative decisions. They would enable to the court to assess the justification offered by the agency for its decision in the context of the relevant international as well as domestic circumstances and considerations. The enhanced transparency resulting from such steps could energize legislative and other political oversight. The government, of course, would strongly resist any such initiative as an unwarranted interference with the executive’s conduct of foreign relations and essential informality and confidentiality in international negotiations.

Extending U.S. Administrative Law to U.S. Participation in International Regulatory Regime Decision Making

A potential supplement or alternative to intensifying the reach of APA requirements as applied to domestic implementation of international regulatory norms is to extend U.S. administrative law disciplines to a federal agency’s participation in regulatory decision making at the international level. The paradigm of parity plus does so only indirectly, by expanding the scope of the evidentiary record and the factors that the agency must discuss and apply in justifying its domestic implementing decision to the public and, potentially, a reviewing court. These requirements, because they apply at the later domestic implementation stage, do not allow the public to have notice of, comment on, or have an opportunity to participate or influence the decisional process at the international level where the controlling decisions are often made.⁸⁹

One possibility is to hold that federal agency officials participating in international regulatory decision making are functioning as an agency for APA purposes are therefore subject to APA procedural requirements and judicial review. Even putting aside judicial deference to the executive’s conduct of foreign affairs, there would be significant limitations to this approach. Private parties might argue that the international negotiations were an initial and decisive step in the domestic rulemaking process for implementing an international agreement, and that accordingly an agency must provide prior public notice of its intention to participate in international negotiations and provide the public opportunity to comment on the position that it should take in the negotiations. Further, it might be argued that the agency should maintain a summary of the negotiations for

⁸⁸ FOIA provides a “deliberate privilege” exemption which might be involved by the government to withhold from disclosure records pertaining to international regulations.

⁸⁹ Federal agencies entering into international regulatory agreements with counterparts must clear these agreements with the State Department and notify Congress pursuant to the Case-Zablocki Act, but this notification occurs only after the agreement has been concluded. See Horton, *supra*, at 713.

enclosure in the rulemaking record. There is, however, no support in purely domestic APA law for such a claim. Administrative agencies have great latitude to consult informally with other governmental or private parties and develop rulemaking proposals before noticing a specific proposal or subject for public comment. Under established interpretations of the APA, procedural requirements would thus not be triggered until the federal agency formally proposes a rule that implements the international decision. Furthermore, APA law would fail to provide a basis for obtaining immediate judicial review of an agency's international-level decision to agree to an international standard or policy. The government could persuasively argue that there has been no final decision made prior to domestic implementation, and even if informal agency official agreement to an international norm were regarded as agency decision, litigants could generally not satisfy requirements of standing and ripeness prior to adoption of a domestic implementing measure that adversely affects them.

Accordingly, new law would be needed in order to extend administrative law disciplines to agency participation in international regulatory decision making. Although there is little prospect of extending judicial review directly to agency decisionmaking at the international level, procedural requirements for agency participation in international regulatory negotiations have already been adopted in certain instances. They include the following:

Notice and opportunity for comment in advance of agency participation in international regulatory negotiations. Prior to entering into active negotiations on the Montreal Protocol, the Departments of State and EPA published a rather detailed program in the Federal Register and invited public comments. They also issued an environmental impact statement.⁹⁰ The executive branch also provided Federal Register notice of its intent to negotiate NAFTA and held public hearings.⁹¹ The FDA and USDA are subject to a statutory requirement to notify the public about international "sanitary or phytosanitary standards under consideration or planned for consideration."⁹² Other agencies, including USTR, and the Department of Commerce have from time to time, as a matter of agency practice, provided public notice of regulatory harmonization activities.⁹³

Participation of NGO and business representatives in international negotiations. Non-governmental representatives are often included as members of the U.S. delegation to international regulatory regime negotiations, including those at the OECD. They may also participate by virtue of membership on USTR advisory committees.⁹⁴

Measures to provide negotiation transparency.

⁹⁰ Wirth, *supra*, at 25.

⁹¹ *Id.*

⁹² 19 U.S.C. § 2578(c)1.

⁹³ See Shapiro, *supra*, at 443-444.

⁹⁴ See Wirth, *supra*, at 25.

EPA has freely made OECD documentation available to non-governmental representatives participating in U.S. delegations to the regulatory harmonization negotiations held by the OECD Chemicals Group, notwithstanding the “restricted” status of the documents; this practice has, however, not been applied to other aspects of OECD’s work in regulatory harmonization.⁹⁵

The application of such measures is uneven, and there is no consistent overall federal government policy regarding them. Also, opportunities for access are sometimes unevenly distributed among different categories of nongovernmental actors; for example, business and union groups enjoy preferential access to some international negotiations by virtue of their membership on agency advisory committees.⁹⁶ The American Bar Association has recognized the need for additional steps to provide greater transparency in connection with international negotiations on regulatory harmonization, and has recommended that the President encourage federal agencies to provide notice and opportunity for comment with respect to negotiation activities, establish advisory committees in connection with such negotiations, and make of documents available under FOIA with respect to each significant international harmonization activity in which it is engaged.⁹⁷

These and similar measures, if required or widely adopted, could have a significant effect in promoting transparency with respect to U.S. federal agencies’ participation in international regulatory negotiations. They could also be expected to have an influence on subsequent judicial review of domestic implementing measures by providing potential litigants with additional information and insight regarding the international regulatory foundations of such measures and expanding the scope of the administrative record and the range of factors considered by reviewing courts. It is of course quite possible that non-state actors based in other countries could seek to take advantage of these measures, including opportunity for comment and subsequent judicial review.⁹⁸

The limitations of such efforts must be emphasized. It will be most difficult to apply domestic U.S. techniques of judicial review, transparency, and widely-available procedures for participation and input to the decisions of informal regulatory networks, yet it is such networks are most in need of institutional disciplines to secure accountability for their decisions. Formal measures to implementation network norms at the domestic level can provide some basis for the application of domestic administrative law to network decision making. But many network norms will be implemented through informal administrative

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ American Bar Ass’n, House of Delegates Recommendation No. 107C, Harmonization Recommendation (Aug. 2001).

⁹⁸ Cf. *Cable & Wireless P.L.C. v. FCC*, 334 U.S. App. D.C. 261 (1999), where the court entertained but rejected on the merits a claim by foreign telecommunications carrier that FCC regulations implementing WTO agreement had legally impermissible extraterritorial effects on foreign carriers.

means, such as determinations of substantial equivalence or mutual recognition arrangements. As this example indicated, the bottom up technique is likely to be better adapted for addressing some regulatory subjects and types of regulatory instruments than others. And, in many cases, the private sector will comply with network norms without the need for domestic implementing measures. In the case of treaty-based regimes, on the other hand, the reach-back of domestic administrative law disciplines may be avoided by the development by such regimes of formal records of decision and process that will enable them to resist further inquiry.

Further, even if the U.S. government were to adopt such measures, their application might be resisted by other nations. They might fear, for example, that such U.S. initiatives would undermine the informality, confidentiality, and efficiency of international negotiations, making agreements more difficult as well as causing headaches for international diplomats. Developing countries might fear that such measures would provide additional and unwelcome influence for northern NGOs, and therefore oppose such measures for the same reasons as they have opposed the practice of amicus briefs in the WTO dispute settlement process. U.S. administrative law initiatives with respect to international regulatory regimes could also be resented as another instance of hegemonic unilateralism and an attempt to export the adversary and formalized U.S. legal culture.

On the other hand, such initiatives, especially if matched by similar initiatives from the EU and other major jurisdictions, could gradually encourage the development of distinctive systems of administrative law at the level of international regimes. The cumulative effect of steps by a number of major jurisdictions to discipline their governments' participation in international regulatory regime through the application of administrative law techniques could gradually transform the operation of those regimes in the direction of greater transparency and participation. Thus, such steps could not only promote greater domestic accountability with respect to the participation by domestic governments in international regulatory regimes, but could also promote greater accountability with respect to those regimes themselves. Further, international regulatory regimes might well themselves develop harmonized regime-level systems of administrative law in order to preempt, fend off, or manage the impact of different, uncoordinated domestic administrative law requirements on the regime.

IV Top-Down Approaches to Development of Global Administrative Law

An alternative approach to the development of a global administrative law is to develop new administrative law mechanisms directly at the level of international regulatory regimes. This section first considers the prospects for development of a U.S.-style administrative law at the global level through a top down approach by examining a number of international regulatory regimes that are institutionally

differentiated and relatively highly legalized. It considers alternative ways of conceptualizing the administrative and reviewing components and functions in such regimes. The section then considers the possibilities for more modest conceptions of administrative governance at the global level. Finally, it briefly considers the potential implications for global administrative law of international regulatory regime influences on domestic administrative law.

Elements of Administrative Law Within Treaty-Based International Regulatory Regimes

Implementing a U.S.-style system of administrative law at the level of international regulatory regimes will require, at a minimum, an institutional structure with distinct legislative, administrative, and independent reviewing bodies. Such a structure involves higher degree of institutional differentiation and legalization than currently found in most treaty-based regimes. It will also require a considerable degree of precision in legal norms that are binding within the regime.⁹⁹ Some treaty-based regimes exhibit these characteristics, while others do not. Regulatory networks generally do not involve significant institutional differentiation or determinate, legally binding norms. Accordingly, the development of a global administrative law resembling U.S. models will ultimately depend on whether or not there is considerable further development of institutional differentiation and legalization in international regulatory regimes. The conditions under which such legalization is likely to occur, and the steps that might be taken to further its development (if desired) are important issues for future research. Because network regimes do not satisfy the minimum conditions of institutional differentiation and legalization necessary to support a US-style administrative law system, most of the discussion in the remainder of this section is limited to treaty-based regimes. Moreover, only some treaty-based regimes have developed to the point that might begin to support such a system.

International Treaty-Based Regimes that Directly Regulate Non-State Actors

As previously noted, only a few international regimes currently exercise direct authority regulatory authority over non-state actors. The imposition by the Security Council, through listing decisions, of a freeze on the assets of persons determined to be engaged in financing international terrorism, is one example. Another is the Executive Board of the Kyoto protocol Clean Development Mechanism, which determine the eligibility of projects under the CDM and the GHG emission reduction credits to which they are entitled. At present, neither of these regimes provides affected persons with procedural rights similar to those afforded under U.D. domestic administrative law, and neither provides for review by an independent tribunal of the administrative decisions in question. The intensification of international regulation is likely to result in more regimes exercising direct administrative regulatory authority over non-state actors, which

⁹⁹ For discussion of delegation, precision, and binding quality as the defining characteristics of legalization of international regimes, see Abbott, et al.

will increase pressures for the development of procedural and reviewing mechanism. If the absence of these protections at the regime level leads domestic courts to nullify or review for legality the decisions of regime administrative bodies, the regimes will have strong organizational incentives to adopt procedural and reviewing mechanisms which they can design and operate, rather than being exposed to review by different domestic courts.

International Regimes That Regulate through Member State Compliance or Implementation¹⁰⁰

In most cases, the regulatory norms adopted by international regimes are implemented through member state laws that are in turn applied to non-state actors. There are several different ways of conceptualizing the applicability of a U.S.-style model of administrative law to such an arrangement. On one conceptualization, it is the individual member states that are the regulated entities. On the other conceptualization, the regulated entities are non-state actors and the individual member states are the administrative bodies responsible for implementing the regime regulatory program through regulatory controls on the non-state actors. Some international regulatory regimes, including a number of international human rights regimes and the IMF and World Bank, are aimed exclusively or primarily at the conduct of states. But many other international regulatory regimes are aimed both at the conduct of states and, ultimately, the conduct of non-state actors. They can be analyzed under either conception. The discussion which follows provides examples of the application of each conception, including a number of regimes discussed under both.

1. States as the Regulated Entities

Under this conception, the legislative body is the group of states that ratify the regime treaty, which is the legislation for the regime. This same group of states may subsequently, acting as the conference of the parties (COP) or members of an international organization, adopt additional legislative-type norms. The regulated entities are the individual state parties responsible for implementing the legislative norms adopted. In order to develop a U.S.-style administrative law under this conceptualization, the regime would have to include not only the legislative body, but a distinct administrative body with the power to adopt or apply regime norms that are binding on member states, and also a distinct reviewing body that determines the conformance of the decisions of the administrative body with the regimes' legislative norms, including both substantive and procedural requirements.¹⁰¹ There are a substantial number of regimes that have two out of

¹⁰⁰ I am grateful to Ernestine Meijer for identifying and summarizing many of the regimes discussed in this subsection.

¹⁰¹ These administrative bodies are the bodies acting on the basis of powers conferred to them by secondary institutional and procedural rules adopted by legislative bodies authorizing them to create, extinguish, modify and apply primary rules that establish the substantive norms of conduct required of the regulated entities. The distinction between primary and secondary rules is developed in Hart, L.A., *The Concept of Law* (Oxford University Press/Clarendon Press, 1994).

these three bodies, but only a few that have all three. This subsection first discusses regimes that have an independent norm-generating administrative body. It then discusses regimes that have a reviewing body but lack an administrative authority. It finally discusses a few regimes that have reviewing bodies that review the decisions of a regime administrative authority. For reasons noted above, some of the regimes discussed in this subsection can also be fruitfully analyzed under the alternative conception, which regards states as administrative agencies and non-state actors as the regulated entities.

a. Regimes with administrative bodies

Subsidiary legislation by a majority of state parties to a regime.

Muddying the distinction between legislative and administrative is the circumstance that in many regimes the COP, besides being the official legislative body responsible for the treaty and amendments to it, fulfills functions that can, in the context of international law, be regarded as ‘administrative’ because involving the creation of subsidiary norms without following the procedures, such as ratification, required for treaty law. In some cases, states that are members of treaty-based international organizations fulfill this role as well. For example, under the London Convention¹⁰², the Bonn Convention¹⁰³, the Basel Convention,¹⁰⁴ and CITES¹⁰⁵, the COP has the power to amend, by majority decision, annexes to the treaties that specify in greater detail the regulatory obligations of parties. Unlike amendment to the treaties, these amendments do not need ratification of the parties in order to enter into force.¹⁰⁶

Another example is the Codex Alimentarius Commission which consists of representatives of Member Nations and Associate Members of FAO and/or WHO.¹⁰⁷ Acting by majority vote, the Commission issues food standards to protect consumer health and ensure fair business practices. The procedure for

See also Abbot, Kenneth W. et al, *The Concept of Legalization* (54 International Organization 3, p. 401)

¹⁰² Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, article XV, para 2 (Dec. 29, 1972, 26 UST 2403, 1046 UNTS 120).

¹⁰³ Convention on the Conservation of Migratory Species of Wild Animals, article XI (June 23, 1979, 1990 UKTS No. 87). *See in general on Conventions protecting migratory species* De Klemm, Cyril, *Migratory species in international Law* (29 NRJ 935).

¹⁰⁴ Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, article 18 (June 23, 1979, 1990 UKTS No. 87). *See on the Basel Convention* Kummer, Katharina, *International management of hazardous wastes: the Basel Convention and related legal rules* (91 Am. J. Int'l L. 572).

¹⁰⁵ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Article XV (Mar. 3, 1973, 27 UST 1087, 993 UNTS 243). *See on this convention* Dansky, Shawn M. *The CITES “objective” listing criteria: are they “objective” enough to protect the African elephant?* (73 TLNLR 961).

¹⁰⁶ State Parties having objections to the amendments, can generally make reservations to them. Not making objections is considered as consent.

¹⁰⁷ Established by a resolution of the Food and Agriculture Organization (Eleventh Session of the Conference of FAO in 1961) and a resolution of the World Health Organization (Sixteenth World Health Assembly in 1963).

adopting standards includes an extensive role for expert (sub)committees. Codex standards are formally binding only in those member states who adopt them. However, states face strong incentives to adopt Codex standards, because the WTO SPS agreement provides a “safe harbor” against SPS challenge for domestic product regulatory standards that conform to relevant international standards, including Codex standards.

The Montreal Protocol provides a compelling example of the power of a majority of member states to adopt new regulatory requirements; in this case, the requirements are binding on all members. The Meeting of the Parties (MOP), operating by majority vote, has the authority to modify the Protocol's regulatory requirements.¹⁰⁸ For example, the Protocol originally stipulated that the production and consumption of the five main ozone-depleting gases was to be reduced by 50% of 1986 levels by 1999. ‘Adjustments’¹⁰⁹ made to the Protocol by the MOP in 1990 and 1992 determined that production and consumption of these CFCs should be phased out completely by 1996. Similar far-reaching changes have subsequently been adopted for regulation of other ozone-depleting substances listed in the various annexes to the Protocol.¹¹⁰ Similarly, a majority of the states members of the International Civil Aviation Organization (ICAO) can modify regulatory requirements under the Chicago Convention on International Civil Aviation that are binding on all members.¹¹¹ Amendment procedures like those found in the Montreal Protocol and ICAO generally deal with subjects considered technical in nature and/or that require frequent adjustment of regulatory norms due to changes in information and circumstance. Some measures, however, often have major practical consequences.

The World Bank and the IMF generate subsidiary norms through decisions by representatives of member states - -the Bank’s Board of Directors and the IMF's Managing Directors – who decide through a system of weighted voting based on the member states’ financial contributions.

Subsidiary legislation and adjudication by purely administrative bodies

The Executive Board of the Clean Development Mechanism (CDM) under the Kyoto Protocol more closely approximates the domestic law conception of an

¹⁰⁸ Montreal Protocol on Substances That Deplete the Ozone Layer (Sept. 19, 1987, 1522 UNTS 293). See DeSombre, Elizabeth R., *The experience of the Montreal Protocol: particularly remarkable, and remarkably particular* (19 UCLA J. Envtl. L. & Pol'y 49).

¹⁰⁹ Montreal Protocol, article 2 para 9.

¹¹⁰ Unlike the London, Bonn, Basel and CITES Conventions, these ‘adjustments’ are binding to the State parties to the Protocol, *without* a possibility to object to them. See Churchill Robin R. and Ulfstein G., *Autonomous institutional arrangements in multilateral environmental agreements: a little noticed phenomenon in international law*, (94 AMJIL 623). See also Swanson, Timothy, Johnston, Sam *Global environmental problems and international environmental agreements* p. 228 (United Nations 1999).

¹¹¹ Convention on International Civil Aviation, article 90 *juncto* article 54(l) (December 7, 1944. 1947. 61 Stat. 1180; TIAS 1591; 15 UNTS 295).

administrative body.¹¹² The Executive Board, which consists of 10 members, ‘supervises’ the CDM,¹¹³ applying the CDM Modalities and Procedures adopted by the COP/MOP. The Board engages in subsidiary lawmaking both through rulemaking and adjudication. Its decisions establish subsidiary norms that member states must follow in implementing the Protocol, consistent with the conception of member states as regulated entities. Thus, the Board has taken it upon itself to provide guidance and clarifications in respect of the CDM Modalities and Procedures; some of its “clarifications” constitute a deviation from the text of the CDM Modalities and Procedures.¹¹⁴ The Board also approves the methodologies used in specific CDM projects, takes decisions on accreditation, re-accreditation, suspension and withdrawal of accreditation of operational entities under the CDM. As previously noted, it also decides on the registration of a project under CDM and the issuance of Certified Emission Reductions (CERs) for emissions reductions achieved by the project.¹¹⁵ These not only have binding consequences for participating states, but also for private parties, as discussed above. Accordingly, as discussed below, the Protocol regime is conceptually complex.

Another example of a purely administrative body exercising legally binding authority is provided by the ‘Office International des Epizooties’ (OIE), an international regulatory organization concerned with animal diseases and their spread and responsible for issuing and administering the Animal Health Code. The OIE is governed by an International Committee, composed of technical representatives appointed by each of the participating States.¹¹⁶ The Office has specialist Commissions on a number of animal diseases, among which is the ‘OIE Foot and Mouth Disease and Other Epizootics Commission’, composed of six experts.¹¹⁷ This Commission makes the initial decision to grant a country a ‘foot and mouth disease (FMD) free’ status,¹¹⁸ although its decision has to be ratified by the International Committee. In the case of FMD free countries that experience outbreaks of disease, the FMD commission, operating under a ‘fast track’

¹¹² Kyoto Protocol to the United Nations Framework Convention on Climate Change (Dec. 10, 1997), U.N. Doc. FCCC/CP/197/L.7/Add. 1, reprinted in 37 I.L.M. 22 (1998), not yet entered into force).

¹¹³ Article 12, para 4 Kyoto Protocol.

¹¹⁴ For example, the Executive Board has decided as a ‘clarification’ that entities which have applied to become accredited and designated as operational entities can already perform certain tasks before their actual accreditation. In the CDM Modalities and Procedures these tasks were exclusively meant for accredited operational entities See <http://cdm.unfccc.int/DOE/AEnewMeth> (last visited on 8 January 2004).

¹¹⁵ CDM Modalities and Procedures, articles 5, 36 and 65.

¹¹⁶ Organic Statutes of the OIE, article 6 (appendix to the International Agreement establishing the OIE, January 25, 1924), Organic Rules of the OIE, article 4 (May 24 1973).

¹¹⁷ Established on the basis of the General Rules of the OIE, article 18 (May 24, 1973). According to article 4 of the terms of Reference and Internal Rules of Specialist Commissions, adopted by the OIE International Committee (Resolution No. XIV of 27 May 1983): “The President and Secretary General shall be specialists of renowned authority on foot and mouth disease. The other Members shall be competent authorities on specific problems caused by foot and mouth disease.”

¹¹⁸ The different categories of ‘disease free’ are laid down in the Animal Health Code, chapter 2.1.1. (http://www.oie.int/eng/normes/mcode/A_00030.htm, last visited on 6 January 2004).

procedure,¹¹⁹ can restore the country's FMD Free status without a vote of the International Committee.¹²⁰ The decision whether or not to grant a country an FMD free status has enormous consequences for its trade animals and animal products (as has been clearly shown by the large outbreak of FMD in several European countries in 2001). Further, regulatory norms adopted by the OIE have the status of international standards under the SPS Agreement.

The World Bank and the International Monetary Fund both have administrative bodies that adopt and implement regulatory norms. Their management develops and imposes regulatory conditions on loans and other forms of financial assistance to member states. These conditions are included in loan agreements and, in principle, are legally enforceable by the Bank and Fund. These conditions, unlike the general regulatory norms adopted under many other international regimes are specific to individual countries or projects. However, the Bank has also adopted guidelines relating to environmental and social issues that apply to all grants; as discussed below, compliance with these conditions is subject to review by the Bank's Inspection Panel. Failure by a project to comply with the guidelines may result in termination of a grant. Thus, the guidelines represent norms with a potentially important regulatory effect on recipient nations. The Bank management also exercises effective regulatory authority over recipient nations through more informal means, such as the confidential recommendations that accompany the Bank's country economic reports.¹²¹

Other administrative bodies

In addition, a number of treaty-based regimes have subsidiary bodies that develop detailed, procedures, and protocols for implementing international regulatory treaties, which are not legally binding as such, but are either subsequently adopted as binding by the COP or function as non-binding but influential guidance for implementation by member states. These institutions represent an intermediate stage of institutional differentiation that may eventually ripen into authority to adopt binding norms.¹²² Examples of such institutions are the Methodology Panel and the Accreditation Panel established by the CDM Executive Board.¹²³ Both panels consist of experts appointed by the Executive Board, assisting the Board in approving methodologies for determining project emissions and in the accreditation operational entities. The recommendations of the "Meth Panel" have almost always been followed by the Executive Board.¹²⁴

¹¹⁹ 65th General Session of the International Committee (1997), Resolution XVII.

¹²⁰ If the Country provides evidence that the outbreaks were eradicated in accordance with the relevant provisions of Chapter 2.1.1. of the *Animal Health Code*.

¹²¹ See Andrés Rigo Sureda, *Informality ad Effectiveness in the Operation of the International Bank for Reconstruction and Development*, 61 *Intl Econ Law* 565.

¹²² In respect of the role of science, see also *The CITES Fort Lauderdale criteria: the uses and limits of science in international conservation decision making* (114 *HVLR* 1769)

¹²³ Pursuant to article 18 of the CDM Modalities and Procedures (annex to Decision 17/CP.7).

¹²⁴ The Executive Board has not yet made any accreditation decisions.

Similar bodies have been created under the Climate Change Convention, including the Subsidiary Body for Scientific and Technological Advice (SBSTA), which provides the COP and other subsidiary bodies with information and advice on scientific and technological matters and the Subsidiary Body for Implementation, which assists the COP with respect to matters of implementation.¹²⁵ Another example of such a body is the Scientific Council of the Bonn Convention on migratory species, which provides advice on scientific matters to the COP, to the Secretariat, to other subsidiary bodies or to a Party.¹²⁶ Among other functions, the Scientific Council proposes amendments to the annexes I and II of the Bonn Convention. These proposals are generally followed by the COP.¹²⁷

b. Regimes with reviewing bodies but no administrative bodies.

The WTO is a prominent example of a regime that lacks a subsidiary norm-generating administrative body but has a strong independent tribunal to review member state compliance with regime norms, at the behest of other member states adversely affected by the asserted violations. It is also quite fruitful to view the WTO under the alternative conception, where member states are administrative agencies; the WTO is discussed from this perspective in the following subsection.

Other prominent examples in this category can be found in human rights treaties with an individual complaints clause, which give regime reviewing bodies the power to review actions of member states and determine their compliance with regime norms, at the behest of the subjects of those actions. The European Convention on Human Rights, for example, authorizes the European Court on Human Rights to receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the Member States to the Convention Parties of one of the human rights in the Convention or the protocols thereto, provided that they have exhausted local remedies.¹²⁸ The Member States have agreed to abide by the final judgments of the Court¹²⁹ and in order to ensure that this actually happens the final judgment is

¹²⁵ Article 10 of the Climate Change Convention. Both technical bodies play a role in reviewing the reports submitted by Annex I Member Parties under article 12 of the Convention. See Gavounelui, Maria *Compliance with international environmental treaties, the empirical evidence* (91 Am. Soc'y Int'l L. Proc. 234) and Bodansky, Daniel, *The United Nations Framework Convention on Climate Change, a commentary* (18 Yale J. Int'l L. 451)

¹²⁶ Article VIII of the Bonn Convention.

¹²⁷ Secretariats to Conventions also take decisions which may have significant consequences. For example, the secretariat to the Framework Climate Change Convention, has the power to 'to enter, under the overall guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its functions'. Article 9 of the Climate Change Convention.

¹²⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms, article 34 (4 November 1950).

¹²⁹ ECHR, article 46, para 1.

both published¹³⁰ and transmitted to the Committee of Ministers which sees to its execution.¹³¹

The International Covenant on Civil and Political Rights has an optional protocol¹³² under which a State allows the Human Rights Committee to consider complaints of individuals under its jurisdiction who claim to be victims of a violation by that State of one or more of the rights set forth in the Covenant. A total of 104 States has ratified this optional protocol.¹³³ The Committee consists of 18 members from Member States, serving in their personal capacity.¹³⁴ An individual can lodge a complaint with the Committee when he/she has exhausted all local remedies.¹³⁵ The State Party involved submits written explanations or statements clarifying the matter and the remedy, if any, that it may take.¹³⁶ Finally, the views of the Committee are sent to the Party and the individual and a summary of its activities are included in the Committee's annual report.¹³⁷ The recommendations of the Committee are not binding on the State Party, but may have normative force. Similar provisions on individual complaints exist under the Convention on the Elimination of Racial Discrimination¹³⁸ and the Convention against Torture.¹³⁹

A somewhat different approach to reviewing member state compliance with an international human rights regime is found in the Inter-American Court of Human rights. Aggrieved individuals or groups must first apply to an administrative body, the Inter-American Commission of Human Rights, which is the sole body that can bring claims before the Court. The Commission investigates applications and has discretion to decide which claims to prosecute before the Court.

Another important example of independent review of non-compliance by State Parties is provided by the Investor protection provisions of NAFTA's Chapter 11. Under this chapter, investors of a NAFTA Party can bring a claim directly against other NAFTA Party stating that this Party has violated provisions of NAFTA's Chapter 11, Part A (including provisions on national treatment, MFN treatment).¹⁴⁰ The dispute is subject to arbitration rules of the International Center

¹³⁰ ECHR article 44, para 3.

¹³¹ ECHR, article 46, para 2.

¹³² Optional Protocol to the International Covenant on Civil and Political Rights (General Assembly resolution 2200A (XXI) of 16 December 1966). *entry into force* 23 March 1976

¹³³ See UNHCHR report "Status of ratifications of the principal international human rights treaties" (<http://www.unhchr.ch/pdf/report.pdf>, last visited on 9 January 2004).

¹³⁴ International Covenant on Civil and Political Rights, article 28.

¹³⁵ Optional Protocol to the International Covenant on Civil and Political Rights, article 2.

¹³⁶ Optional Protocol to the International Covenant on Civil and Political Rights, article 4.

¹³⁷ Optional Protocol to the International Covenant on Civil and Political Rights, article 6.

⁵³ International Convention on the Elimination of All Forms of Racial Discrimination, article 14 (G.A. Res. 2106 (XX), U.N. GAOR (1965).

⁵⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 22 (Dec. 10, 1984, 1465 U.N.T.S. 113).

¹⁴⁰ North American Free Trade Agreement, Arts. 1102-1106, 1110 (Dec. 17, 1992, 32 I.L.M.642).

for Settlement of Investment Disputes (ICSID), the ICSID Additional Facility or the United Nations Commission on International Trade Law (UNCITRAL).¹⁴¹ The dispute is heard by a panel of three persons, the decision of this panel is binding on the parties and enforceable within the domestic legal context of the State Party against whom the claim was brought.¹⁴² Similar arrangements are provided in many bilateral treaties. Under NAFTA and bilateral treaties, review is conducted by arbitral panels rather than a standing regime body, but the NAFTA system may evolve toward a regime tribunal.

c. Regimes with both administrative and reviewing bodies.

Separate, independent regime bodies with authority to review the decisions of subsidiary norm-generating administrative bodies are rare. Such bodies, however, have emerged only recently, and their number may grow.

The most notable example is the World Bank Inspection Panel, which reviews whether or not Bank-funded projects conform to the Bank's environmental and social guidelines.¹⁴³ Originally adopted as a technique of control by the Board of Executive Directors of the Bank of the Bank's management, and a tool of internal administration, the Panel mechanism has developed into a forum that can be invoked by NGOs and other non-governmental actors. This evolution, which bears a certain resemblance to the evolution of the royal courts in England, has made the panel into a more or less independent reviewing tribunal open to parties outside the Bank. The panel process consists of two phases. First, the panel makes a preliminary review of a request for inspection and recommends to the Board of Executive Directors whether or not the matters complained of should be investigated. Secondly, if the Board decides that a request shall be investigated, the Panel will collect information and provide its findings, independent assessment and conclusions and such to the Board. On the basis of the Panel's findings and recommendations, and recommendations by the Bank's management on the basis of the Panel report, the Executive Directors will consider the actions, if any, to be taken by the Bank.¹⁴⁴ In a formal sense, the Panel's powers are limited. It needs authorization to investigate a case and its findings and

See *Greening NAFTA, the North American Commission for Environmental Cooperation*, eds. Markell, David L. and Knox, John (Stanford University Press 2003).

¹⁴¹ *Idem*, Art 1120.

¹⁴² *Idem* article 1135, para 1.

¹⁴³ The Inspection Panel is an independent forum established by the Executive Directors of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) by IBRD Resolution No. 93-10 and the identical IDA Resolution No. 93-6 both adopted by the Executive Directors of the respective institutions on September 22, 1993. See in general Dana Clark, Jonathan Fox, and Kay Treakle, eds, *Demanding Accountability: Civil-Society Claims and the World Bank Inspection Panel* (2003); Ellen Hey, *The World Bank Inspection Panel: towards the recognition of a new legally relevant relationship* (2 HOFPLS 61); David Hunter, *Using the World Bank Inspection Panel to defend the interests of project-affected people* (4 CHIJIL 201); Daniel D Bradlow, *International organizations and private complaints: the case of the World Bank Inspection Panel* (34 VAJIL 553).

¹⁴⁴ See Operating Procedures, World Bank Inspection Panel.

recommendations are not binding. However, the panel report, the management's recommendations and the Board's decision must be made publicly known. The Panel seeks to enhance public awareness of the results of investigations through all available information sources. These circumstances can generate strong pressures for the Bank's management and Board to follow the Panel's recommendations.¹⁴⁵

A second example of an independent body reviewing decisions of subsidiary administrative decision making entities is the Seabed Disputes Chamber (SDC) of the International Tribunal for the Law of the Sea (ITLOS).¹⁴⁶ The SDC has jurisdiction with respect to different types of seabed-related disputes involving various parties, including states that are Parties to the Law of the Sea Convention, the Seabed Authority, the Seabed Enterprise, state enterprises, and private firms and individuals. In these disputes, the SDC applies UNCLOS, other international law compatible with UNCLOS, rules, regulations and procedures of the Authority adopted in accordance with UNCLOS and the terms of contracts concerning activities in the Area in matters relating to those contracts.¹⁴⁷ The circumstances that States can file applications with the SDC in respect of decisions of the Authority and the Enterprise, that the SDC is allowed to apply a wide range of law and that its decisions are binding¹⁴⁸ and enforceable¹⁴⁹ make the SDC into a relatively effective example of an administrative review body.

2. Individual member states as implementing administrative agencies; non-state actors as regulated entities.

An alternative conceptualization of international treaty-based regulatory regimes with a relatively high degree of institutional differentiation and legalization is that the regime member states collectively compromise the legislative body, the members states individually are the administrative bodies responsible for implementing regime norms, the firms and other non-governmental entities subject to regulation by member states are the regulated entities, and the regime dispute settlement tribunal is the reviewing body that determines compliance with regime norms by the implementing member states, regarded as administrative bodies. This model can be applied to regimes, like the WTO, that lack a regime-level administrative body but have strong regime-level tribunals and whose

¹⁴⁵ See Frederic L. Kirgis, *International Organizations in their Legal Setting* 524 (2d ed. 1993) and O. Yoshida "Soft enforcement of treaties: the Montreal Protocol's noncompliance procedure and the functions of internal international institutions" (10 *Colo. J. Int'l Envtl. L. & Pol'y* 95)

¹⁴⁶ See in general on UNCLOS, ITLOS and jurisdiction Oxman, Bernard H. *Complementary agreements and compulsory jurisdiction* (95 *AMJIL* 277) and Tomlinson, Margaret L. *Recent developments in the international Law of the Sea* (32 *INTLLAW* 599) and Noyes, John E. *The International Tribunal for the Law of the Sea* (32 *CNLILJ* 109).

¹⁴⁷ Article 293 UNCLOS.

¹⁴⁸ Article 33 Statute ITLOS

¹⁴⁹ Article 39 Statute ITLOS: The decisions of the SDC are enforceable in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought.

ultimate aim is to establish a sound system of regulatory system for private market actors. But it can also be applied to regimes, like the Kyoto Protocol's Clean Development Mechanism, that also have regime level administrative bodies; such regimes accordingly have a two-level administrative structure, including both a regime-level body like the Executive Board, and the implementing member-states, who are bound by the norms adopted by the regime-level administrative body. As discussed below, the conception of non-state actors as the regulated entities presents an evolution of international regulation away from a state-centric mode and towards a conception of integrated or harmonized international regime regulation of market actors, with states serving an intermediate position. Examples of such regimes include the WTO, the Montreal Protocol, and the Kyoto Protocol.

Although in form a body for resolving disputes among member states, the WTO Dispute Settlement Body (DSB) has increasingly understood its role as promoting the sound and consistent regulation of international trading, giving due regard to the interests of member states. It understands that the subjects of trade regulation are market economic actors, and that its role is promote open and even-handed competition and predictability in the collective regulatory trade fabric (woven out of individual member state measures and WTO law), consistent with appropriate regard for member state latitude in domestic policies. DSB proceedings initiated by member states are in form the adjudication of disputes between states but functionally in many instances are the occasion for the DSB to exercise this supervisory and reviewing role over the implementation of the WTO trade regulatory regime. Further, there are emerging signs that the DSB regards members states as administrative agencies within this system. In order to promote a reasoned and predictable system of international trade regulation, the DSB has required member states that adopt trade-restrictive measures to provide decisional transparency, opportunity for affected parties to be heard, and reasoned justifications for decisions made.¹⁵⁰ These rulings very much resemble those of U.S. courts reviewing administrative agency decisions. The transformation of member states into regime administrative agencies that must establish institutions and adopt decisional procedures to promote a rational and open system of trade regulation will be further intensified with implementation of the TRIPS and GATS agreements. The DSB will no doubt play a significant role in this implementation process through review of member state compliance.

The Kyoto Protocol is another example of a regime that is substantially oriented towards regulation of market actors, who play an explicit implementing role in the CDM and will play an important role in the other flexibility mechanisms, especially emissions allowance trading.¹⁵¹ In order to secure effective regulatory

¹⁵⁰ See Giacinto della Cananea, *Beyond the State: the Europeanization and Globalization of procedural administrative law*, forthcoming, 9 *European Public Law* ____ (2003)

¹⁵¹ Although the Kyoto Protocol in its present form may not enter into force, if it does not, some successor or equivalent regime that will include international emissions trading involving private

implementation by Annex I Parties, the COP/MOP has established a compliance mechanism by creating a regime-level administrative body with normative authority, creating a two-level administrative structure under the conception applied here.¹⁵² Also, a Compliance Committee, consisting of two branches, the facilitative branch and the enforcement branch, has been established. The enforcement branch is the branch with the most far fetching review possibilities. It determines whether a Party fulfills its commitments in respect of emissions reductions, reporting requirements and eligibility requirements.¹⁵³ Questions of implementation regarding a State Party are presented to a branch of the Committee by expert review teams, a State Party itself, other State Parties, the COP and the other branch. Also, inter- and non-governmental organizations can provide information. When the enforcement branch has determined that a Party is not in compliance, it may issue a declaration of non-compliance and the State in question is to develop a plan stating the causes of the non-compliance and possible remedies. In the case of non-compliance with emissions reductions (when the Annex I State has exceeded its assigned amount), a penalty may be imposed: for the next commitment period, the excess amount of emissions (the amount not allowed) times 1.3 will be deducted from the Party's assigned amount. The development of additional compliance incentives, including "buyer liability" for private entities participating in emissions trading, is under active consideration.

The Montreal Protocol is another regime that aims at effective regulation of private market actors; among other matters, it addresses issues of industrial rationalization in ozone-depleting substances (ODS) production and ODS trade-related issues.¹⁵⁴ The Protocol was one of the first environmental regimes that included an institutionalized compliance mechanism involving a regime-level body of an administrative nature.¹⁵⁵ The Secretariat to the Protocol, other Member States and a Member State itself can notify the Implementation Committee that the State may not be meeting the implementation obligations of its commitments under the Protocol, therewith triggering the non-compliance procedure. The Implementation Committee, consisting of 10 State representatives, may itself collect information on compliance itself or to receive it from non-state actors. Based on the information and with the aim of reaching an 'amicable solution, the Committee makes recommendations to the MOP. The MOP decides on possible compliance measures to take to provide appropriate assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer and financial assistance, and information transfer and training to issue cautions to suspend "in accordance with the applicable rules of international law

market actors inevitably will. See Richard Stewart and Jonathan Wiener, *Reconstructing Climate Policy: Beyond Kyoto* (2003)

¹⁵² COP/MOP Decision 24/CP.7

¹⁵³ *Idem* chapter V article 4.

¹⁵⁴ See *on the Montreal Protocol and non-compliance* Ehrmann, M. *Procedures of compliance control in international environmental treaties* (13 *Colo. J. Int'l Env'tl. L. & Pol'y* 377).

¹⁵⁵ Article 8 of the Protocol provides for the possibility of approval of such procedures by the MOP. The latest version of the compliance mechanism is Annex II of the report of the 10th MOP.

concerning the suspension of the operation of a treaty, specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned by industrial rationalization, production, consumption, trade, transfer of technology, financial mechanisms and institutional arrangements."¹⁵⁶

Under the three above regimes, non-compliance proceedings are initiated by States Parties, although under the Kyoto and Montreal Protocols regime-level authorities can also initiate compliance proceedings. This feature is not inconsistent with a conception of the regimes in which private market actors are the subjects of regulation; compliant Member States and their firms have a strong interest in correcting non-compliance by other Member States in order to protect their own firms against unfair competition from firms in the non-compliant states.

The International Labor Organization provides for initiation of non-compliance proceedings by private market actors against member States that fail to implement ILO norms. An industrial association of employers or of workers may file a complaint with the International Labor Office that a Member State has failed to secure the effective observance within its jurisdiction of an ILO Convention to which it is a party. The ILO Governing Body in its turn may communicate this representation to the government against which the complaint is made, and invite that government to make a statement on the subject.¹⁵⁷ If the government does not produce a statement within a reasonable time or if the statement is not deemed to be satisfactory by the Governing Body, this Body has the right to publish the representation and the statement, if any, made in reply to it.¹⁵⁸

Complex Regimes

A number of the regimes discussed above have a high degree of institutional differentiation and legalization. They can accordingly be characterized as complex regimes; such regimes are most likely to exhibit the characteristics of delegation, specificity, and binding quality in norms that are favorable to the development of a U.S.-style administrative law at the regime level.

One form of complexity results in the case of regimes whose norms govern the conduct of individual member states but are also implemented by member states with the objective of regulating private sector actors, and where the norms that govern member state implementation include legislative norms adopted by the member states collectively and subsidiary norms adopted by a regime-level administrative body.¹⁵⁹ This arrangement combines the two conceptions of

¹⁵⁶ Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances That Deplete the Ozone Layer, U.N. Environment Programme, para. 56, Decision IV/5, at 13, U.N. Doc. UNEP/OzL.Pro.4/15 (1992).

¹⁵⁷ Constitution of the International Labor Organization, article 24.

¹⁵⁸ Constitution of the International Labor Organization, article 25.

¹⁵⁹ Still another potential conception is to view regime tribunals as the administrative bodies generating subsidiary norms that bind member states or regulated firms. It is possible to view powerful regime tribunals such as the DSB in this fashion. But this conception leaves no

international regulatory regimes set forth above. Examples of such arrangements include the Montreal Protocol, Kyoto Protocol, the OIE, the World Bank, the LOS seabed regime, and possibly the ILO.

In addition, some of these regimes provide for a further degree of institutional differentiation and legalization by establishing a regime-level reviewing body that can either review the adoption of subsidiary norms by regime administrative bodies or compliance by individual member states with regime norms (both primary and secondary), or both. Examples of such tribunals include the World Bank Inspection Panel and the compliance institutions established under the Montreal Protocol and Kyoto Protocol.. This is also the legal institutional model generally followed for EC regulation.

Still a different dimension of complexity is provided by regimes that also have the power directly to regulate private market actors, in addition to regulating the conduct of member states and using them as administrative bodies to implement regulation of private market actors. Combining these arrangements with a regime-level reviewing tribunal results in the greatest degree of institutional differentiation and legalization. It is the model followed in the United States under certain regimes of “cooperative federalism.” For example, states may exercise delegated authority to implement federal environmental statutes; in doing so, they must follow regulations adopted by the federal EPA and may also be subject to review by federal courts. Regulated firms are also subject to direct enforcement actions by EPA. The international regulatory regime that most closely approximates this model is the Kyoto Protocol. The Executive Board of the Clean Development Mechanism is already exercising the power to develop and apply subsidiary norms, and the Subsidiary Bodies for Implementation and Technical Assistance are approaching this function. The regime compliance mechanisms are likely to develop into a tribunal that will review not only compliance by member states but also by private market actors, and also review the generation of subsidiary norms by regime administrative bodies. If the Protocol or its equivalent enters into force, the development of an international greenhouse gas emissions trading mechanisms will create very strong pressures for extensive administrative adoption of more detailed subsidiary norms and development of a highly legalized and efficient dispute settlement body to which private firms as well as member states participating in emissions trading mechanism can resort in order to clarify the rules governing the trading market. These market actors will demand a relatively high degree of legal certainty and predictability, and swift resolution of disputes. Because the success of trading markets is essential to the success of the regulatory scheme, the regime and states participating in it will have strong incentives to develop the necessary institutional means of meeting these needs.

conceptual or institutional space for a separate reviewing tribunal, unless there emerged a general international court with jurisdiction to review the decisions of the various tribunals of individual regimes.

A further element of complexity is the extent that civil society actors have the opportunity to participate in the normative decision making of regime administrative bodies and/or invoke regime tribunals. Participation through established procedures in regime administrative decision making is considerably advanced in some international regulatory regimes, such as the Codex, CITES and the Kyoto Protocol. In other regimes, including the World Bank, human rights regimes, and the ILO, non-state actors have the ability to invoke reviewing body procedures. Such procedures and their use by civil society actors provide a further stage of institutional differentiation and complexity.

A final element of complexity is the impact of international regulatory regimes on domestic administrative law. Professor della Cananea has shown how the WTO DSB is developing a body of requirements for Member State decision making in domestic trade-related regulatory administration that amounts to a globalized system of administrative law at the domestic level.¹⁶⁰ These developments will intensify as TRIPS and GATS are fully implemented. These systems of administrative law are designed and required to ensure effective implementation of regime norms in member states with the objective of effective and consistent regulation of public and private market actors. Similar systems of regime administrative law directed at member states to assure proper implementation of regime law are found in the EU and in “cooperative federalism” arrangements in the United States. Such systems are likely to emerge under other intentional regulatory regimes, such as the Kyoto Protocol or its equivalent, that rely on statutory./regulatory strategies to achieve effective and uniform regulation of global market actors.

These various elements of complexity make out an important field for further research. A systematic comparative analysis of the most important international regulatory regimes, using typologies like those advanced in this paper, would be extremely valuable in considering the potential for a global administrative law. Such a study would examine the characteristics and authority of different types of regime administrative authorities, their decisional procedures, and who may invoke them. It would conduct a similar analysis of regime reviewing tribunal. It would also consider the role of member states, both as regulated entities and as implementing agencies including the international regime’s impact on domestic administrative law. It would also examine the role of civil state actors in the various institutions of the regulatory regime at both the international and domestic levels. It would also consider why some regimes have developed greater complexity than others. What are the factors that account for the development of administrative authorities with normative competence and/or reviewing tribunals in some regimes than others. What accounts for the existence of a significant role for non-state actors in some regimes and not others? To what extent are these variables affected by the particular subject-area being regulated or the regulatory instrument used?

¹⁶⁰ See della Cananea, *supra*.

From a U.S. administrative law perspective, the functioning and extent of authority of independent reviewing bodies will be of greatest interest. Who may invoke review? What procedures does the body follow? Does it engage in fact finding or review the factual determinations of the administrative authority? On the basis of what sort of record? What is the scope of authority to determine the administrative body's conformance with applicable norms? Review of discretion? What is the legal or other consequence of their determinations? How does the reviewing body promote transparency, access, and participation with respect to regime decision making? This of course reflects a court-centered view of administrative law. All of the legal-institutional elements of the regime, and their relation to one another, must be considered.

Implications for Development of U.S.-Style Administrative Law at the Level of International Regulatory Regimes

The development of a U.S.-style administrative law at the level of international regulatory regimes requires a relatively high degree of institutional differentiation, legalization, and complexity, which is associated with a statutory/regulatory approach to international regulation. Its development thus depends on how far this approach is followed, as compared to a strategy of regulatory convergence, and the degree of legalization needed to effectively implement regime regulation.

The experience in industrialized countries indicates that the need for institutional specialization, including the use of both administrative and reviewing bodies, as the extent of intensity of regulation increases. Growing regulatory density will require the elaboration of more detailed norms and implementing arrangements. It also requires constant information gathering, analysis, and evaluation of the performance of existing regulatory arrangements and the ability efficiently to make necessary changes to improve performance. Legislative bodies face too many transaction costs and other disincentives to undertake these functions on a widespread basis. Hence, the creation of and delegation of authority to subsidiary bodies to refine and implement regulatory norms. Such delegations in turn invite the creation of specialized reviewing bodies to police conformance by administrative bodies with the terms of the delegation and promote impartial and reasonably predictable administration. Experience in Europe and the United States suggest that the need for a highly legalized regulatory regime is greatest in two-level jurisdictional systems when it is thought necessary to have a system of regulation at the higher level jurisdiction in order to address regulatory problems that can not be effectively solved by decentralized regulation among lower level jurisdictions and it is also thought important to assure a regulatory "level playing field" among private firms competing in a common market. The problem of climate change provides the clearest example at the global level.¹⁶¹

¹⁶¹ See Stewart and Wiener, *supra*.

The considerations at work, however, are political as well as functional. One must therefore examine, in the context of international regulatory regimes, the incentives faced by states in deciding whether to delegate authority for and thereby lose a degree of control over the adoption and content and application of regime norms. What conditions are they likely impose on the exercise of delegated authority? Under what circumstances will they be willing to adopt administrative bodies or reviewing tribunals with normative competence? Although these issues have been studied extensively in the U.S. domestic context, social science research is just beginning to address these questions systematically at the level of international regimes. In this respect a fundamental issue is the extent to which strong institutions for ensuring legality accountability are compatible with the characteristics of international regimes and the interests of participating states. The regulatory convergence approach also promises to provide a regulatory level playing field to ensure that generally applicable regulatory objectives are achieved a smoothly functioning common market. In two-level jurisdictions like the United States and the EU, this approach is not widely followed because it involves high transaction costs and may not produce very ambitious regulation, relative to the statutory-regulatory approach. But in these regimes, the higher-level authorities are sufficiently developed and have sufficient power to carry out relatively ambitious statutory/adjudicatory regulatory programs in an effective manner. These capacities are much less developed at the international level, and may develop, if at all, only slowly in the future.

The Possibilities for Administrative Law in International Regulatory Regimes That Are Not Highly Legalized

The system of U.S.-style administrative law can not be applied to “less legalized regimes.” -- network regimes and the many treaty-based regimes that are not institutionally differentiated and legalized to a high degree. Such regimes are likely to remain an important part of international regulation. Indeed, for reasons just discussed, their relative importance may even increase.

These circumstances raise the question of the extent to which some subset of the mechanisms or functions of U.S.-style administrative law can be applied to less legalized regimes? Generally, these will involve institutional tools that do not require a strong, independent reviewing authority. The potential candidates include freedom of information and other mechanisms to promote decisional transparency on the part of all regimes decisionmaking institutions, including legislative and administrative bodies and such reviewing bodies as are formed; notice and opportunity for public comment and input of decisions by such institutions; and other mechanisms for participation in regime decision making, for example through attendance at meetings where decisions are discussed or taken, and membership on advisory or even decision making bodies. These mechanisms may provide a substantial degree of informal responsiveness to those social interests and values that are able to take advantage of the opportunities

provided by these mechanisms to monitor and influence regime-level decisions. But they will not provide strong assurances of legality accountability, and indeed may even undermine legality, as the U.S. experience with regulatory negotiation suggests.¹⁶²

From a U.S. perspective, such an approach represents, at best, “administrative law lite.” By elevating accountability to interests over legality accountability, it inverts the order of priorities in U.S. administrative law, which gives precedence to assuring agency compliance with the Constitution, statutes, and the agency’s own regulations over review of the exercise of discretion.¹⁶³ Indeed, it may be questioned whether mechanism that do not provide assurances of legality can probably be regarded as administrative *law*; they can at most be regarded as tools of administrative governance. Moreover, the U.S. has in recent decades placed a high value on the authority of judges not only to review not only the legality of agency action but also the exercise of agency discretion, and to ensure the reasoned exercise of that discretion in relation to affected social interests and relevant social values. Other procedural and institutional mechanisms alone have not been thought sufficient to secure not only legality accountability but, in addition, adequate accountability to social interests and values and fully deliberative democracy. Yet, in the international regime context, states have traditionally been quite unwilling to cede to other bodies the power to make authoritative determinations of legality or to create strong tribunals with regime review powers, including review of the exercise of discretion by other regime decisionmaking institutions. Conceptions of administrative law built solely on accountability to social interests and values and not involving strong independent reviewing tribunals may therefore need to be developed in the international regulatory context. Such conceptions of administrative law have yet to be developed.

V. Conclusion

This paper has examined the potential applications of administrative law disciplines, and in particular of U.S.-style administrative law, to international regulation, considering both a bottom-up and a top-down approach. It seems likely that the extent and intensity of regulatory authority by international regimes will continue to grow. This will inevitably result in greater demands for legal institutional mechanisms of accountability for the decisions of such regimes. Unless those regimes move more rapidly than they have in the past to adopt such mechanisms at the regime level, we are likely to witness the extension, by one

¹⁶² See Funk, When Smoke Gets in Your Eyes, Regulation, Negotiation and The Public Interest – EPA’s Woodstove Standards, 18 *Env’tl L* 55 (1987)

¹⁶³ This priority order is reflected in judicial decisions on reviewability. Courts are much more reluctant to find that an agency action is not reviewable when it is challenged as violating the Constitution or a statutory requirement or limitation than when it is challenged on abuse of discretion grounds.

means or another, directly or indirectly, of domestic administrative law mechanisms of judicial review and administrative procedure to regulatory decisions by international regulatory regimes. Such reactions at the domestic level, or their prospect, will likely accelerate the current development of administrative law at the international regime level. At the same time, some international regimes will be developing systems of administrative law to be applied at the domestic level by regime member states. Such steps will likely have a reciprocal influence back on the development of administrative law at the international regime level. It will be difficult for such regimes to resist being subject to administrative law disciplines which they themselves impose on member states.

Because administrative law as traditionally understood, especially in the United States, depends on a relatively high degree of institutional differentiation and legalization, a critical question is the extent to which international regulatory institutions will develop in the direction of greater complexity and legalization. Will there be increasing use of more ambitious and penetrating statutory/adjudicatory systems of regulation, which are likely to bring in its train a system of administrative law that bears some resemblance to those in advanced industrial societies? Or will we see a continuing proliferation of more informal network arrangements based on a regulatory convergence strategy and possibly including civil society actors, that will resist legalization and the development of administrative law institutions based on traditional domestic models? As discussed in Part II of this paper, the emergence of network styles of regulation in the United States is already posing a challenge to the established model of administrative law. However, as also noted in section II, there is a third basic alternative strategy for regulation, namely the use of market-based incentives. The use of such instruments in the international context will tend to encourage a high degree of institutional differentiation and legalization involving international regimes and global private market actors, that is conducive to strong forms of administrative law, as suggested by the Kyoto Protocol regime at the international level. Thus, the development of global administrative law will be powerfully influenced by the choice of regulatory methods.

A final issue is the potential linkage, if any, between global administrative law and democracy. A system of electorally based representative democracy at the global level is at present far beyond reach. Nonetheless, the development of a global administrative law, by expanding transparency and opportunities for participation and input, could work to strengthen the application of representative democracy by making international regulatory decisions and institutions more visible and subject to effective scrutiny and review within domestic political systems based on representative democracy, and thereby promote the accountability of international regulatory decisionmakers through those systems. Systems of global administrative law might also support the development of either consociational democracy or deliberative democracy at the level of international regimes. The conditions under which these several developments

might occur and the implications deserve careful reflection. Alternatively, we might conclude either that global administrative law might foster the institutional conditions of an entirely new globalized conception of democracy.
