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ABSTRACTS

REGULATING THE ECONOMIC REGULATORS: GLOBAL GOVERNANCE DIMENSIONS

Global Bank Regulation: An Analysis of the Basel Process

Michael Barr and Geoffrey Miller

The increasing integration that characterizes the current period of globalization has sparked a heated debate about the role that law should, or could, play in the process. Some attack international 'law-making' by sub-national actors and 'regulatory networks' of bureaucrats on the ground that these processes lack accountability and legitimacy. 'New sovereignists' argue that customary international law improperly displaces national arrangements of authority for law-making at the state and federal level. Others call for enhanced public participation and transparency in treaty-based regimes such as the WTO. Still others criticize the rise of international networks that operate seemingly without any form of legitimacy or accountability.

In response to the perceived 'democracy deficit' in international law-making, Benedict Kingsbury, Richard Stewart and their colleagues are attempting to build a scholarly agenda under the rubric 'Global Administrative Law'. By that term, Kingsbury et al. mean 'the structures, procedures and normative standards for regulatory decisionmaking. . . that are applicable to formal intergovernmental regulatory bodies; to informal intergovernmental regulatory networks, to regulatory decisions of national governments where these are part of or constrained by an international intergovernmental regime; and to hybrid public-private or private transnational bodies'. The basic contention is that there is, or ought to be, a global administrative law that governs the conduct of international entities and national governments in international matters, and that in some way responds to the normative desire, shared in many ways with domestic administrative

law, for accountability, fairness, protection of individual rights, and some sense of democratic decision-making.

This contribution joins the search for global administrative law, focusing specifically on the activities of the Basel Committee on Banking Supervision, an institution that meets under the auspices of the Bank for International Settlements in Basel, Switzerland. The Committee is composed of representatives of the central banks and supervisory authorities of the G-10 countries (Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Spain, Sweden, Switzerland, the United Kingdom, and the United States) and Luxembourg. Launched to coordinate responses to an international banking crisis in 1974 stemming from the failure of Herstatt Bank in Germany, the Committee evolved into a forum for harmonizing national supervision and capital standards for banks. Over the past two decades, the Basel Committee has developed progressively more sophisticated guidelines for capital adequacy in depository institutions.

The Committee's 1988 Accord ('Basel I') was initially intended to govern only internationally active banks in the G-10 and Luxembourg. It is fair to say that Basel I is one of the most successful international regulatory initiatives ever attempted. It was adopted as domestic law by the G-10 nations, applied by them to all of their banks, and then promulgated by over 100 countries around the world although implementation varies widely from country to country. The Committee is currently engaged in a long-running process to revise the 1988 Accord, and has proposed a complex capital standard (Basel II) running at hundreds of pages.

The Basel Committee is perhaps the most important example of a trans-governmental regulatory network that exercises vast powers, seemingly without any form of democratic accountability. Imagine a club of central bankers meeting secretly in one of Switzerland's wealthiest cities, known for its discretion, its iconic graphic design school, and boring bars. The members of the Basel Committee develop regulations governing the very lifeblood of domestic economies in ways that expand the reach of distant, unaccountable bureaucrats. Legislators may find themselves out of the loop and international banks can find no escape from burdensome rules. No wonder sober commentators such as former U.S. House Financial Services Committee ranking member John LaFalce has called the Basel process 'fundamentally flawed' and 'dangerous' and former Federal Deposit Insurance Corporation (FDIC) Chairman William Isaac described it as a 'runaway train'. And the reach of the Basel Committee extends beyond the economies of its member countries. Developing countries face pressures from the market, the IMF and the World Bank to adopt the Basel standards even though they are not members of the club. For those reasons, some have pointed to the Basel Committee as the 'leading suspect' of a trans-governmental agency 'on the loose'.

A closer examination, however, reveals a structure of global administrative law inherent in the Basel process that could be a model for international rule-making with greater accountability and legitimacy. While far from ideal, the Basel process has come a long way from the purely closed 'club' model of its origins, and demonstrates the possibility for enhanced accountability and legitimacy in international regulation. At the international level, the Basel committee has recently engaged in a relatively open process akin to a notice and comment rule-making in developing international capital standards, and has improved its transparency. At the domestic level, central banks and national bank regulators have enmeshed the Basel standards in the domestic notice and comment rule-making process, enhancing the legitimacy of the international process through local

procedural protections. Moreover, international regulatory processes, including Basel, can in some instances help to reinforce, rather than undermine, domestic norms of accountability and legitimacy, particularly in countries where inside elites block reforms and prevent transparent domestic regulatory processes from occurring.

The interaction among these international, transnational and domestic administrative procedures generates norms of behavior and structures of practice that can help to promote accountability and legitimacy in the global administrative space.

Administrative Law through Institutional Transplant: Global Administrative Law and Independent Electricity Regulators in India

Navroz K. Dubash

Independent regulatory agencies are a recent institutional development in India, as in much of the developing world. In this paper I will explore one set of independent regulators, those established to regulate India's electricity sector, within the emergent framework of global administrative law.

I will begin by re-constructing the emergence of electricity regulators as part of a larger effort at "electricity restructuring," a process substantially (but not entirely) led by the World Bank in India. I examine the extent to which this history allows us to read electricity regulators as part of the framework of global administrative law. I will suggest that not only the establishment of regulators, but also their own procedural arrangements organized around transparency, participation, and to a lesser extent, reasoned decisions, are drawn with reference from global practice and a coalescing set of globally accepted practices. Post establishment, I will also highlight three possible global mechanisms that may shape regulatory functioning. First, the application of trade disciplines to investment – whether under multilateral auspices such as the WTO or bilateral agreements -- is a possible source of constraints on regulatory functioning. Second, the global climate regime may create conditions to which regulators will have to adapt. Third, there are growing regional networks of regulators, which may increasingly serve as global administrative bodies.

The second part of the paper will explore how administrative procedures allowing for transparency and participation embedded in the code of regulatory agencies have worked in practice. I suggest that while the implementation of these procedures is uneven and incomplete, they have created an embryonic political space for mobilization and new forms of discussion and debate aimed at resolving political and social tensions around electricity.

The concluding section of the paper will use the empirical discussion to reflect on some of the larger themes of the conference, notably the desirability and viability of a western model of administrative law as transplanted to India, and whether administrative procedures need a substantive basis for promotion of social objectives such as equity or justice.

Independent Regulation and Dispute Resolution in India's Communications Sector -- A Legal and Policy Appraisal

Vikram Raghavan

Reflecting the panel's focus on economic regulators, in my paper, I intend to analyze the scope and impact of sector-specific regulation in India by focussing on communications (telecom, broadcasting, and cable services). I will first examine the original rationale for the creation of the Telecom Regulatory Authority of India (TRAI) and present an overview of its statutory powers and functions. I will discuss TRAI's evolution as an independent regulatory institution focussing on its role in influencing key telecom developments and its additional responsibility since 2004 for regulatory broadcasting and cable services. I will then evaluate the reasons why parliament established the Telecom Disputes Settlement and Appellate Tribunal (TDSAT), its jurisdictional bases, and its record as a specialized dispute resolution forum for communications disputes and an appellate body for reviewing TRAI's decisions. Finally, I will present what I believe are TRAI and TDSAT's institutional strengths and weakness with particular emphasis on their governance structures and their capacity to make and influence administrative law and policy.

ADMINISTERING TRIPS: DETERMINING WHO WINS AND WHO LOSES

IN GLOBAL INTELLECTUAL PROPERTY GOVERNANCE

Regulating Dynamic Innovation in a Complex Political Economy: Administering Intellectual Property on the International Stage

Rochelle Cooper Dreyfuss

International intellectual property law provides an interesting case study on the need for norms of global governance. Multilateral instruments covering copyrights, patents, and trademarks have existed for over a century. At first administered in two separate Unions (Paris and Berne), control shifted to the Bureaux for the Protection of Intellectual Property (BIRPI) in 1893 and to the World Intellectual Property Organization (WIPO) in 1970. At the insistence of the developed countries, intellectual property protection became part of the WTO framework in 1994 as the TRIPS Agreement. While all of the multinational instruments have focused on the protection of right holders, the early conventions also recognized the dynamic nature of information production. Thus, they gave their members ample freedom to continually balance the interests of producers in earning a return from their intellectual investments against the interests of users in accessing new knowledge for both consumptive and productive purposes. In contrast, the WTO's concern was with "trading chips"—with commodifying information streams and turning knowledge products into articles of commerce. Through the combined effect of most favored nation, national treatment, and (for patents) technological neutrality requirements, the negotiators created an engine that drives protection to ever-higher levels throughout the WTO.

Experience is beginning to reveal problems with the Agreement's focus on commodification. Certainly, there are traders in the North who are thriving from the added revenue available from WTO-wide protection. In addition, there are emerging economies—India and Brazil are examples—that are starting to reap rewards from innovating at world levels. At the same time, however, the South continues to perceive TRIPS obligations as little more than a tax on local consumption and the North is starting to find it difficult to craft laws that accommodate follow-on production in the

new knowledge economy. In addition, the emerging “Middle” understands that the road to technological capacity passes through a stage of “fair following” (adapting the work of others); they are concerned that these activities will be found inconsistent with TRIPS requirements.

Admittedly, the TRIPS Agreement appears to permit nations to strike the appropriate local balance between proprietary and access interests. It includes a set of vaunted “flexibilities,” exceptions, transition provisions, and promises of technical assistance and technology transfer. However, these measures have come to very little. Apart from the important accommodation made to facilitate the distribution of essential medicines, “lawmaking” has proceeded through a series of challenges under the Understanding on Dispute Settlement (DSU). While this type of lawmaking—although controversial—has served some of the WTO instruments quite well, it has proved ineffectual for the TRIPS Agreement. Because the drafters of TRIPS incompletely theorized the function of exclusive rights regimes, they did not create judicially manageable standards. As a result, DSU adjudicators have a difficult time evaluating challenges to public-regarding legislation.

TRIPS does, however, include two potential saving graces. It contemplates close cooperation with WIPO, which now administers upward of 20 intellectual property instruments. Furthermore, the Agreement sets up a Council to oversee compliance, conduct negotiations on issues left open at the end of the Uruguay Round, and carry out responsibilities assigned to it by the members. The combined expertise of these two entities (WIPO in intellectual property; the TRIPS Council in trade) could be exploited to rectify the deficits in TRIPS. However, before these organizations can be utilized, several issues of institutional design must be resolved. The first is a method for controlling the forum shopping that has long characterized international intellectual property negotiations. While regulatory competition has many benefits, history shows that it produces ever-stronger—and increasingly dysfunctional—protective regimes. Second, WTO members must abandon consensus-based decision making and conceive of the decision to rely on WIPO and the Council as an expression of—rather than a derogation from—sovereign authority. At a minimum, that will require a mechanism for assuring members that WIPO and Council decisions will be implemented only when they are within the scope of the authority that the members chose to delegate.

A third constellation of issues relates to questions of transparency, competence, and participation. While it is attractive to bring together the intellectual property expertise of WIPO and the trade expertise of the TRIPS Council, it is necessary to take a closer look at the source of these institutions’ knowledge base. In both cases, there has been considerable suspicion that information is acquired selectively and mainly from strong protectionists. Both organizations tend to act in secret and neither has formal procedures for insuring broad stakeholder input. While the merger of interests among the South, low protectionists in the North, and the emerging “Middle” suggests that the dynamics of negotiation within these organizations is changing, it is nonetheless imperative to develop global administrative norms and, as important, a mechanism for insuring their application.

In addition to these governance norms, which are largely derived from domestic administrative law, special attention needs to be paid to the international context, where member states at very different levels of sophistication are pitted against each other. For example, the TRIPS Council is currently responsible for assisting members engaged in

dispute resolution; that obligation should be broadened to help members pursue their interests in Council deliberations—during what is, essentially, agency rulemaking. Indeed, because one effect of TRIPS is to keep countries at a comparative *disadvantage* disadvantaged, there may be a special obligation in the intellectual property portion of the WTO Agreement to reach out to developing countries to make sure that transparency and participation objectives are measured from their perspective.

It may be tempting to see the problems of adapting TRIPS to the WTO as unique. But it is not. TRIPS became a part of the WTO framework partly because intellectual property is traded in an international marketplace, but also because decisions that one country makes about protection spill over to other nations. There are other areas where spillovers also exist and where minimum standards are therefore desirable. Some of these may, like trade, represent situations where there is an optimum result that does not vary greatly temporally or geographically. But there are many situations where the issues are complex and both technologically and culturally contingent, and where continual monitoring and adjustments will be required. In these situations, there will inevitably be a similar move to depend on the expertise of specialized bodies, and thus a congruent need for global governance norms.

Securing Compliance at the WTO: Cross Retaliating Against “TRIPS”?

Shamnad Basheer

The biblical *David vs Goliath* paradigm plays out very frequently in international trade disputes. In 2003, a tiny island state, Antigua and Barbuda took on the United States in a WTO dispute, alleging that the US violated GATS obligations by effectively foreclosing their borders to Internet gambling services. It won at both the panel and the appellate levels. However, to this date, it has been unable to secure compliance by the US.

Its best option now is to “retaliate” against the US—something that the WTO system permits, as a means of securing compliance. Under traditional norms, Antigua is expected to retaliate in the same sector—for instance, by imposing tariffs on US services/goods. However, given the highly disparate value of trade between Antigua and the US and the relatively “lower” value that the US places on its exports to Antigua, such a form of retaliation would not prove a serious enough disincentive to force the US to comply. Besides, given the much “higher” relative value that Antigua places on “US imports”, such retaliation may tantamount to Antigua shooting itself in the foot.

This story is the same one for a number of developing countries. Illustratively, India and Brazil have secured rulings against the US and EU, which haven’t been enforced as yet. In order to achieve a true win, the “David” in our dispute (India, Brazil or Antigua) has to get creative and identify the right “retaliatory” sling that will hurl the stone with enough force to hurt Goliath (US or EU). For developing countries, one such optimal sling would be the suspension of “intellectual property” obligations under TRIPS.

This is not without precedent. In the EU Banana case, the WTO arbitrator permitted Ecuador to retaliate by suspending obligations under TRIPS. However, Ecuador has chosen not to do so as yet. We are therefore devoid of any effective precedent to see what kind of IP retaliatory model would work well. This paper evaluates some potential models that might work optimally in these circumstances. And to this extent, the amount

of “discretion” with an administrative agency such as the WTO to fashion such remedies would be explored.

As one can appreciate, fashioning such remedies is of critical importance for the legitimacy and “fairness” of the world trading system. This will make the WTO agreements more meaningful to a large number of developing countries that continue to see it as representing an inequitable bargain.

Impacts of National and Global Patent Protection on Poverty

Philippe Cullet

The adoption of the TRIPS Agreement completely changed the nature of intellectual property law for most developing countries. The ‘minimum standards’ that form the bedrock of the TRIPS Agreement are on the whole a consensus position adopted among developed countries. For most developing countries these minimum standards constitute a quantum jump. This has significant impacts on the overall process of development for most developing countries, whether economic and technological development or social, environmental and human rights dimensions of development. Least developed countries that have little or no capacity to benefit from the rules in place are for instance likely to only suffer after the implementation of their commitments after 2013/2016.

A country like India is an even more interesting case study in this context. Not only did it have all the characteristics of a developing countries in the early 1990s but it was also very vocal in its (early) opposition to the adoption of the TRIPS Agreement that not only imposed high minimum standards of protection but also imposed on India to amend a number of changes that had been introduced in the Patents Act, 1970 specifically to address socio-economic concerns related to patents. The politically painful process of complying with the TRIPS Agreement and the three amendments to the Patents Act highlight some of these issues.

While the aggregate situation of individual countries is extremely important in the context of the TRIPS Agreement, what is even more important are the impacts that the new standards have on people in general, on socio-economic development, on environmental conservation and more fundamentally on the realisation of human rights. This is especially the case in the context of basic need related products such as medicines and seeds whose protection under TRIPS mandated minimum standards directly impact the realisation of the human rights to health, food and life. In other words, there is a direct relationship between the strengthening of patentability standards and poverty. This may be acknowledged in vague terms at the policy making level but since the dismantling of the Patents Act, 1970, that had a clear poverty alleviation focus, for TRIPS compliance, the poverty element has been relegated at best to ‘trickle down’ debates. This paper seeks to examine these issues in more details.

ADMINISTERING DEMOCRACY IN POLITICAL CRISES: EMERGING GLOBAL NORMS?

Administering the Limits of Democracy

Samuel Isscharoff

Democratic regimes around the world find themselves besieged by antidemocratic groups that seek to use the electoral arena as a forum to propagandize their cause and

rally their supporters. Virtually all democratic countries respond by restricting the participation of groups or political parties deemed to be beyond the range of tolerable conduct or viewpoints. The prohibition of certain views raises serious problems for any liberal theory in which legitimacy turns on the democratic consent of the governed. When stripped down to the essential, all definitions of democracy return ultimately to the primacy of electoral choice and the presumptive claim of the majority to rule. The removal of certain political views from the electoral arena calls into question the legitimacy of the choices that are then permitted to the citizenry and, by extension, the entire democratic enterprise.

This article asks under what circumstances may democratic governments act (perhaps, must they act) to ensure that their state apparatus not be captured wholesale for socially destructive forms of intolerance. The problem of democratic intolerance takes on special meaning in deeply fractured societies, in which the electoral arena may serve as a parallel or even secondary front for extra parliamentary mobilizations. Such democratic societies are not without recourse to the threat of being compromised from within. At the descriptive level, the prime method is the prohibition on extremist participation in the electoral arena, a practice that exists with surprising regularity across the range of democratic societies. Seemingly the world has learned something since the use of the electoral arena as the springboard for fascist mobilizations to power in Germany and Italy.

The primary concern in this article is with the institutional considerations that either do or should govern restrictions on political participation. Particular attention will be given to the use of administrative structures to control impermissible electoral groups in countries such as India and Turkey. The article distinguishes among the types of parties that may be banned or impeded, with the greatest attention being given to mass antidemocratic parties that actually seek to win elections. Further lines are drawn among types of prohibitions, ranging from the use of criminal sanctions in the U.S. to party prohibitions in most European countries to restrictions on electoral speech and conduct in India. Ultimately, the argument is that democratic societies must have weapons of self-preservation available to them, but that strong institutional protections must be in place before they may be deployed.

**DISPLACEMENT AND DISRUPTION OF LIVELIHOODS: TRANSPARENCY,
ACCOUNTABILITY AND CIVIL SOCIETY IN THE GOVERNANCE OF DEVELOPMENT
AND CONSERVATION PROJECTS**

The Case of India's Special Economic Zones

Smita Narula

The relationship between development, sustainability, and human rights at the international level is often the subject of academic inquiry. The interaction of these norms on the developmental policies and jurisprudence of the global South, however, is under-examined. This paper will analyze the impact of the substantive and institutional interaction of these norms in the context of development-led displacement in India.

There are three different levels of inquiry within this project. First, is to look briefly at the sources and nature of positive obligations imposed on developing countries as a result of these norms, which often provide conflicting messages and impose obligations

that may work at cross purposes. Moreover, different norms enjoy varied levels of credibility and institutional backing, which in turn influence their domestic implementation.

Not only do these norms conflict, they often fail to account for vertical distinctions within the South. The North-South divide is not simply an inter-country phenomenon but an intra-country phenomenon as well. The second level of inquiry asks whether prevailing norms surrounding issues of transparency and accountability sufficiently address differential power equations that render particular communities more vulnerable to development-led displacement and diminish their ability to secure appropriate redress. In India in particular, economic development and growth are inextricably linked to issues of inequality and social stratification on the basis of caste, religion, or tribal community status. Yet global policy prescriptions around issues of economic reform often fail to take into account such power differentials.

The third level of inquiry looks at the role of civil society and the Supreme Court as key arbiters in the enforcement and implementation of international norms. This paper reviews the shifting jurisprudence of the Indian Supreme Court where it is called upon to balance the state's multiple goals of development, sustainability, and human rights. While civil society groups have achieved some measure of accountability, development and market-based reforms possess greater institutional backing and tend to prevail over relatively weaker human rights or sustainability concerns.

The paper focuses on the recent proliferation of Special Economic Zones and the resulting displacement and disruption of livelihood in India as a case study through which to consider the three levels of inquiry outlined above.

Conservation-induced displacement and Global Administrative Law: Perspectives from the Field

Asmita Kabra

Attempts at 'preservation via displacement' are an extreme manifestation of the 'fortress' or exclusionary conservation paradigm, support for which has increased lately due to escalating conservation threats. While the policies and processes emanating from this paradigm have produced positive *conservation outcomes* for some Protected Areas, *livelihood outcomes* for the displaced people have seldom been as positive. In fact, it appears that these outcomes are inherently biased against the poor, and thus the more marginalized a displaced community (or household) is, the less likely it is to obtain benign or positive livelihood outcomes after displacement. This has important implications for social justice, especially for Adivasi communities, which have been guaranteed special legal rights in India precisely because of their vulnerability.

This paper looks in detail at the impact of conservation-induced displacement from an Indian Protected Area on the livelihood of the displaced households. The Sahariya Adivasi are a forest-dependent community living in and around the Kuno Wildlife Sanctuary (KWS) in the semi-arid tropical region of Madhya Pradesh. The paper posits that understanding the dynamic livelihood context of displaced communities, especially the ecological base of their livelihoods, is critical to any assessment of their pre-and post-displacement livelihood strategies and livelihood outcomes (like income, poverty, food security and health). A combination of the Sustainable Livelihoods (SL) framework and the Impoverishment Risks and Reconstruction (IRR) model is used in this study to assess

the extent to which key livelihood risks arising out of displacement from Kuno Sanctuary were addressed by the rehabilitation package and process.

The paper argues that the Sahariya, a socially, politically and economically marginalized community, whose lives and livelihood were intricately linked to their ecological base. Inadequate attention was paid to this factor while designing a suitable rehabilitation package for the Sahariya, and as a result, their material condition has deteriorated after displacement, largely due to loss of livelihood diversification opportunities obtained from their natural resource base. Displacement has thus resulted in rapid proletarianization and pauperization of a majority of the Sahariya, and their 'integration' into the national 'mainstream' has occurred at highly disadvantageous terms. The paper also examines in this context the national and international laws and covenants that come into play in situations of conservation-induced displacement, and contextualizes "the difficult interplay between risks and rights" that Lustig and Kingsbury highlight in a recent paper (Conservation and Society, Vol. 4, No.3, September 2006).

CAN CLIMATE CHANGE BE CONTROLLED THROUGH GLOBAL REGULATION? AT WHOSE EXPENSE?

Post-Kyoto Strategies for Addressing Global Climate Change

Richard B. Stewart

As the Intergovernmental Panel on Climate Change (IPPC) has recently confirmed, the scientific evidence is abundantly clear that humans are causing significant warming of the planet and other changes to the climate that are beginning to cause hotter weather, droughts, increased storm intensity, sea level rise, biodiversity loss, and other adverse effects on human welfare and ecosystems. These adverse effects, which will disproportionately impact developing countries, will intensify as greenhouse gas (GHG) emissions continue to rise sharply in both developed and developing countries. If warming occurs at the upper end of the range estimated by the 1007 reports of the Intergovernmental Panel on Climate Change (IPPC), the effects will be catastrophic. The gravity of the problem demands urgent action by the major nations of the world from all regions to limit and before long reverse the growth of emissions and also proactively adapt to the adverse effects that are already occurring, and will only intensify. These impacts and their implications were emphasized by R.K. Pachauri in his Nobel Lecture accepting the Nobel Peace Prize on behalf of the IPCC. He added:

Coming as I do from India, a land which gave birth to civilization in ancient times and where much of the earlier tradition and wisdom guides actions even in modern times, the philosophy of "Vasudhaiva Kutumbakam," which means the whole universe is one family, must dominate global efforts to protect the global commons.

Achieving these goals requires a post-Kyoto structure for global climate regulatory policy in which all major emitting nations participate and that will achieve increasingly stringent reductions in the growth of GHG emissions and eventual reductions in the absolute levels in order to stabilize GHG atmospheric concentrations at levels that will avoid the worst adverse effects. This goal can only be accomplished by moving developed and developing countries to climate-sustainable paths to economic development that

incorporate a low-carbon paradigm of growth. The post-Kyoto structure should use a comprehensive approach, covering all GHG and sinks, in an international GHG cap and trade system that would include the U.S. along with other industrialized nations but also, before long, major developing countries. Such a system is the only way to ensure effective and cost-efficient limitations on emissions on the scale required, spur innovation by business in low-GHG technologies, and transfer sufficient capital and technology from developed to developing countries to assist them in implementing sustainable pathways to development.

The indispensable first step is for the US to impose significant regulatory limitations on its GHG and re-enter serious international climate regulatory negotiations. This is highly likely to occur in 2009-10. The next step is to engage major emitting developing countries in limitations arrangements through means that respect developing countries' equity claims, their opportunities for economic growth, and their sovereignty. The challenge is how to secure the right to development in a climate-constrained world. Some developing countries have already taken significant steps to limit GHG emissions, largely for reasons other than climate concerns. While these steps are welcome, much more ambitious steps are needed to limit the growth in developing country emissions while ensuring continued economic development. This can best be accomplished by the industrialized countries' offering developing countries generous "headroom" GHG allowances to participate in an international cap and trade system that sets a firm limit on the emissions of all participants. By giving developing countries generous and commercially valuable emissions allowance allocations, the industrialized countries would effectively finance limitations in developing countries. Developing countries would benefit from reductions in the adverse effects of climate change; from new inflows of capital and technology; and from assistance in pursuing sustainable paths to development that will provide local as well as global environmental benefits. In addition, a global tax on emissions trading should be imposed in order to finance adaptation measures in developing countries.

For a variety of reasons, China, India, and other major developing countries are most unlikely to agree to join a cap and trade system in the near future. Accordingly, other strategies for engaging developing countries in cooperative arrangements to limit emissions should be explored and adopted as an initial step towards such participation. These include arrangements for technology transfer and cooperation, capacity-building assistance, pledge and review systems, sectoral agreements and credit trading systems, no-loss targets, use of emissions intensity targets in place of limitations on emissions quantities, and use of "safety valve" techniques. Negotiations and agreements on such arrangements - - bilateral, plurilateral, and regional, and including cooperative arrangements between developing countries as well as between industrialized and developing countries -- would most likely occur initially outside but in parallel with the Kyoto process, leading to eventual adoption of a more inclusive global cap and trade system for limiting emissions.

Regulating Climate Change in a Diverse World

Global Regulation & Indian Experience

Lavanya Rajamani

Climate change has been characterized as the central human development challenge of the 21st century, and yet nations have not been able to respond to this challenge with the requisite sense of urgency and community. The Bali Roadmap, the latest step in the international response to climate change, does not prescribe a target range of emissions reductions for the next commitment period, destabilizes the existing burden-sharing architecture of the climate regime, and postpones all the difficult decisions. Admittedly, there are significant hurdles facing nations seeking to craft a common platform for addressing climate change. Among the many factors that contrive to render this problem seemingly irresolvable are the vast differences between countries in terms of contributions to global environmental harm, industrial advancement and wealth, and climate vulnerabilities; increasing disparities between and within nations; a worsening of poverty; a reluctance to modify existing lifestyles or development pathways; and differing levels of faith in technological solutions. In the face of these diversities, nations have crafted a burden sharing arrangement for addressing and regulating climate change, rooted in the principle of common but differentiated responsibilities (CBDR).

This paper consists of two distinct yet inter-related parts. The first part explores the global regulation of climate change under the FCCC and its Kyoto Protocol within the frame of the CBDR principle. It outlines the existing burden sharing arrangement between industrialized and developing countries, and offers initial insights into the framework for re-negotiating the burden sharing architecture of the climate regime set in motion at the Bali Climate conference earlier this month. In doing so it explores issues relating to participation (countries to which regulatory limitations should be extended), effectiveness (why certain countries must participate in regulatory limitations), and equity (how the balance of commitments between countries might be structured).

The second part of the paper examines the Indian experience in operationalizing global climate regulation, in particular through the Clean Development Mechanism (CDM). The CDM is a direct emanation of the CBDR principle, as currently interpreted. The Indian experience with the CDM offers us a useful paradigm of global-national interplay in regulating climate change. The national regulatory framework and the operation of administrative officials within it is also an example of “distributed administration” in that under its frame, “domestic regulatory agencies take decisions of foreign and global concerns.” In studying how global regulatory norms, such as those governing the CDM, are operationalized by domestic administrative officials, this paper explores a central element of accountability, that is, the extent to which domestic administrative officials “are faithful to that regime and the states that have established it”

Market Mechanisms: A Driving Force for Instituting and Enforcing a New and Effective Global Regulation for Climate Change?

Yukari Takamura

However we evaluate the effectiveness of the current climate change regime what unmistakably strikes us is the need for vigorous expansion of the carbon market created by the Kyoto Protocol. About 850 CDM projects are already registered and 2,000 more projects are now in the pipeline. More than 2 billion ton CO₂ equivalent is expected to be reduced by the end of 2012 through the CDM, which corresponds to 2-year's aggregated emissions of Spain and the UK. In 2005, 374 million tCO₂e, mainly of Certified Emissions Reductions (CERs) issued by CDM projects, were transacted at a value of US\$2.7 billion, which corresponds to 4 year's funding (2002-2006) to developing

countries under the Global Environmental Facility. Thus, market mechanisms have now become a window for significant emission reduction in developing countries as well as a window for transferring the technologies and funds to developing countries necessary for decarbonizing their economy and society.

The compliance procedure under the Kyoto Protocol is also influenced by market mechanisms. One of its specificities is that the compliance procedure is oriented towards a stronger response to non-compliance in order to deter countries from free-riding and to keep the market mechanism operating soundly. In addition, the compliance mechanism seems to make use of market forces to deter non-compliance by parties. Consequences of non-compliance under the procedure, even though non-binding, would be implemented in most cases; if not, not only non-compliant parties but also their authorized entities would lose their eligibility for the Kyoto Mechanisms, leading to great economic losses to economic actors and thereby increasing in domestic pressure from such actors for the parties to comply. The more the carbon market expands, the more the incentive to comply heightens, and expanding the carbon market has become a driving force for compliance.

The evolution of the carbon market has also led to a change in the setting of discussions on a regulatory framework beyond 2012. Developing countries, having been distrustful of market mechanisms, are now strongly supportive of the continuation of the CDM beyond 2012. After establishing its own emissions trading scheme, European countries have become one of the supporters of the market mechanisms. While the business sector in general has been reluctant to accept more stringent reduction, some sectors, among them, the finance sector, have clearly expressed their support for deepening the Kyoto-type commitment together with continuation and expansion of the market mechanisms.

From a regulatory perspective, keeping the carbon market operating soundly requires a specific regulatory framework. It requires that somewhere, someone must have binding stringent emissions obligations to generate a demand for emission credits. Deeper cut than the current level of emissions by someone as well as effective enforcement sufficient to deter non-compliance is an essential requirements for the carbon market.

With the remarkable developments of emissions trading schemes across the world, the idea of linking the one with the other has emerged. For linking schemes, some of these important schemes' components will have to be necessarily harmonized in order to maintain a sound carbon market operation as well as to avoid competitive distortions. Among such components are confident monitoring and verification systems and the appropriate level of non-compliance penalty and, if any, the level of the safety valve price (price cap of allowance).

In order to achieve the regulatory goal to address global warming, the market has to play a crucial role. On the other hand, without the regulatory framework, the market does not work. The “regulated” market by nature requires a strong regulatory and enforcement framework and harmonization of domestic regulations to ensure an equal footing among market players and to keep the market operating soundly, while seeking to expand its coverage to a more comprehensive and global one.

INTELLIGENCE AND SECURITY ISSUES: PROBLEMS OF TRANSPARENCY AND ACCOUNTABILITY

Countering the Financing of Terrorism: Challenges for GAL

Menaka Guruswamy

This paper will examine the need for better Global (and local) Administrative Law, in the context of efforts to monitor and combat the direct and indirect financing of terrorism through development aid. The paper will seek to establish such a framework of GAL drawing from UN Security Council Resolutions 1373 and 1566.

It will illustrate the lacunae in practice, by looking to countries whose civil society and charities give aid internationally, egs; *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for US-Based Charities* , released by the American Treasury Department and the British Charity Commission.

Finally, it is now clearly emerging that some local development aid given by governments domestically, is consistently ending up financing domestic terrorism/insurgency. The paper will seek to make a case, for better accountability and governance mechanisms domestically, by briefly examining the situation in India.

Secret Intelligence and Global Administrative Law

Simon Chesterman

International law has traditionally had little to say on the subject of intelligence — in large part because outraged rhetoric has long been contradicted by widespread practice. This article surveys efforts to regulate the collection of intelligence in international law before turning to more recent checks on the manner in which intelligence has been invoked in international organizations. Long a “dirty word” within the United Nations, intelligence is now being used to justify military strikes, target financial sanctions, and indict war criminals. While there is little prospect for limiting collection of intelligence beyond activities that can be physically intercepted or prevented, increasing recourse to intelligence in multilateral forums is beginning to impose procedural constraints on the purposes to which that intelligence may be employed.

[This short paper draws heavily on Simon Chesterman, “The Spy Who Came In from the Cold War: Intelligence and International Law”, *Michigan Journal of International Law*, vol. 27, p. 1071 (2006), in particular Part I.E.]

Governance of Private Military Companies: Lessons from Blackwater

Surabhi Ranganathan

This paper will examine the legal and policy literature on the regulation of private military companies in the context of recent developments involving Blackwater Co. in Iraq. With increasingly prominent presence in civil security and non-combat military contexts, private military companies have moved well beyond identifiers such as ‘mercenaries’ and ‘dogs of war’. Yet acceptance is tempered with distrust, given their frequent proximity to

vulnerable populations. Stringent regulation, by the home state and the host state is often advocated as the best way to ensure that they perform their tasks without causing harm. Sometimes, this may be supported by international regulation. An examination of the Blackwater incident brings to light the difficult legal, political and practical hurdles that may stand in the way of national regulation of these companies; highlighting in particular the problems of transparency, accountability and political will. How will states (and the international community) respond?