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**Frontiers of Global Administrative Law  
in the 2020s**

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## Frontiers of Global Administrative Law in the 2020s

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Global administrative law (GAL) has many pertinent antecedents,<sup>1</sup> but the framing and labelling of what is now regarded as GAL began with academic initiatives in the early 2000s.<sup>2</sup> In 2005 it was proposed that there was emerging a body of GAL, defined as comprising

the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.<sup>3</sup>

The initial approach was explicitly a normative intervention: although mindful of pathologies in GAL, it asserted the broad desirability of seeking to render the rule-making and decision-making of these global regulatory bodies accountable and responsive to the diverse publics significantly affected by their decisions.<sup>4</sup> The aim of this chapter—written for a general readership more than as a specialist contribution to the scholarly debates on GAL—is to consider how GAL now stands in

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<sup>1</sup> Some are crisply canvassed in C Bories, 'Historie des Phénomènes Administratifs au-delà de la Sphere Étatique: Tâtonnements et Hesitations du Droit et/ou de la Doctrine' in C Bories (ed), *Un Droit Administrative Global?* (Pedone, 2012). See also J Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations' (2014) 24 *European Journal of International Law* 645; J Klabbers, 'The Transformation of International Organizations Law' (2015) 26 *European Journal of International Law* 9 (particularly on Paul Reinsch and Frank Sayre).

<sup>2</sup> S Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' (2005) 37 *New York University Journal of International Law and Politics* 663; B Kingsbury, N Krisch and RB Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3–4) *Law and Contemporary Problems* 15. On the power and problems of this labelling, S Marks, 'Naming Global Administrative Law' (2005) 37 *New York University Journal of International Law and Politics* 995.

<sup>3</sup> Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law' 17.

<sup>4</sup> Whether GAL mechanisms prove to be mere window-dressing, helping to give a gloss of legitimacy to what are in essence unjust arrangements, or instead prove to provide useful tools for the voices and interests of the relatively powerless and the disregarded, depends in part on struggles that occur case by case. Progressive advocates have made effective use of GAL mechanisms within some regulatory programmes, but have been thwarted or not engaged at all in many others.

relation to some of the major conceptual and contextual issues that might be thought likely to affect the nature and even the viability of this 2000s project in the 2020s.<sup>5</sup>

It will begin, in section I, by introducing the range of practices with which GAL has been concerned. In section II it first notes the contexts in which ideas about, and the practice of, GAL obtained some valence and rapid uptake in the period c 1990–c 2015, and then turns to some major contextual shifts that, from about 2015 onward, have seemed to alter the landscape for GAL quite dramatically. Building on this, section III examines some conceptual issues bearing on the nature and viability of GAL. Section IV takes a single set of GAL proceedings against a private global sports governance institution relating to eligibility to compete in the female category in elite athletics, to illustrate reasons for the continued and likely expanded role of GAL in the 2020s in some areas of private governance. Section V concludes.

## **I. The Practices Informing GAL's Development as an Analytic Field**

The academic projects that have helped constitute GAL as a field of scholarship and research are by their nature interventions, aimed at encouraging practices to be viewed in a particular way. These interventions generate categories and ideas of a theoretical nature, but in a close interrogation with practice. In this case, practice pre-exists the theory, but the analytic and theoretical work may have some influence on practice over time. What constitutes the practice that is the subject matter of GAL?<sup>6</sup>

GAL scholarship tends to start with fragments of practice, rather than with grander ideas of global constitutional structures or values or fundamental unifying legal instruments. It brings together practices from the level of specific regulatory regimes and sectors, examining the deployment and gradual but uneven spread of GAL practices of transparency, participation, reasoning and review among different regulatory regimes. Given the current highly disaggregated state of global administration and governance, this approach has important analytic strengths. Further, a sufficient number of incremental steps in the development of GAL practices may have tipping points or other systemic effects, with the result that GAL's normative logic and mechanisms may

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<sup>5</sup> A few of the many thoughtful academic responses to the original project—which overall have expressed interest, puzzlement, scholarly debate and scepticism all in good measure—will be considered below.

<sup>6</sup> This section, and a few other paragraphs, draw with thanks from a paper (published in Spanish) jointly authored with Richard Stewart, which appears in the B Kingsbury and RB Stewart, *Hacia el Derecho Administrativo Global: Fundamentos, Principios y Ámbito de Aplicación* (Global Law Press-Editorial Depeche Global, 2016) 57.

come to be widely regarded as exemplary or even obligatory for global regulatory administrations, at least in some important fields.<sup>7</sup>

The development and spread of GAL practices and norms have not been accomplished through any overall plan or system. They are the product of accumulated discrete decisions by the different generative actors in different institutional settings, responding to the need to channel and discipline the exercise of administrative power occurring in certain recurring structural modes. These actors include not only domestic and international courts and tribunals but also other global regulatory bodies, domestic regulatory authorities, institutional entrepreneurs of various stripes, business firms, non-governmental organisations (NGOs), and private and public/private networks of actors.

Private actors enlist GAL to promote their regulatory agendas. Pharmaceutical companies successfully pushed for extensive GAL procedures in the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the 2016/18 Trans-Pacific Partnership (TPP) agreements, in order to heighten intellectual property protections for their products and to constrain governments and certain competitors.<sup>8</sup> Environmental advocates promoted adoption of obligations on states to comply with demanding GAL standards, and some international supervision of these, in the Aarhus Convention to advance environmental goals.<sup>9</sup> Courts and tribunals, and international investment arbitral bodies, review the legality of global administrative decisions and norms (including those of their distributed domestic components) as a condition of their validity and, in some cases, their enforcement. In other cases, a domestic agency or another global regulatory body, in deciding whether or not to recognise or validate a global regulator's decisions or norms, may give weight to whether or not it followed GAL practices in decision-making. In still other cases, private actors are deciding whether to conform to the decision or norm in order to enhance their reputations, become credible partners in business or other transactions or ventures, or otherwise

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<sup>7</sup> E. Fromageau, *La Théorie des Institutions du Droit Administratif Global* (Bruylant, 2016).

<sup>8</sup> RC Dreyfuss, 'Fostering Dynamic Innovation, Development and Trade: Intellectual Property as a Case Study in Global Administrative Law' in H Corder (ed), *Global Administrative Law: Innovation and Development* (Juta, 2009); L Helfer, 'Pharmaceutical Patents and the Human Right to Health' in TC Halliday and G Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press, 2015); P Mertenskötter and RB Stewart, 'Remote Control: TPP's Administrative Law Requirements' in B Kingsbury et al (eds), *Megaregulation Contested: Global Economic Governance After TPP* (Oxford University Press, 2019).

<sup>9</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998), 2161 UNTS 447 (entered into force 30 October 2001).

further their interests. In all of these contexts, the extent to which the global regulator has followed GAL practices of transparency, participation, reason-giving and opportunity for review in making decisions is often a substantial and in some cases a controlling factor in the decision of the validating or recipient authority or actor on whether or not to validate, recognise or conform to the decision or norm in question.

Transparency, participation, reason-giving and review can help global regulatory bodies solve regulatory coordination and cooperation games by enhancing the quality of their rules and their responsiveness to the interests and concerns of the rule users and other constituencies, generating support for the regime. At the implementation stage, these procedures, especially when coupled with review, can promote accurate and consistent execution of the rules by both internal and distributed administrations, as illustrated by regimes as diverse as the World Trade Organization (WTO), the Aarhus Convention and the global sports anti-doping regime.<sup>10</sup> GAL procedures, however, involve costs and delays, may limit negotiation flexibility and have other drawbacks in specific regulatory fields, for example in security, where transparency may defeat regulatory efficacy.

The need and justification for the GAL quartet of mechanisms, or for some of them, depends upon the type of regulatory regime, including its objectives and ‘business plan’, its members and structure, its distributed administration (explained in section III.C) and other contextual variables. The mechanisms may not be needed, and their use may actually be counterproductive. For example, formal structures of participation, reason-giving and review may be unnecessary and indeed counterproductive in regulatory regimes that resolve coordination games through technical standards to align the behaviours of market actors in a given sector, at least where distributional issues and externalities are modest.<sup>11</sup> There may be far greater need for the mechanisms in the case of many regimes to solve cooperation games that involve significant distributional consequences and require measures to prevent free riding, or in programmes that may impose serious deprivations on individuals or groups.

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<sup>10</sup> For materials on these regimes, see S Cassese et al (eds), *Global Administrative Law: The Casebook* (3rd edn, IRPA, 2012).

<sup>11</sup> As a study in progress by Orfeas Chasapis-Tassinis demonstrates, much of the work of the International Swaps and Derivatives Association (ISDA) falls into this category, but some of its work imposes major externalities on non-members.

In some contexts, both functional and normative logics combine to favour use of GAL procedures—they advance the regime’s mission, for example transparency, participation, reason-giving and review may improve regulatory decisions that command broad support, and may also serve goals such as accountability and responsiveness to the disregarded. In other cases, for example in programmes to combat illicit activities, the two logics have conflicting implications for GAL. Pervasive tensions operate between transparency and decision-making according to public reason, epistemic authority and negotiated resolution of differences as modes for regulatory decision-making. Moreover, there are many dimensions to transparency, different forms of participation, variants in reason-giving requirements and numerous different mechanisms to provide review.

The precise types of GAL mechanisms capable of advancing functional and normative goals in particular circumstances require careful examination and specification. Global regimes’ use of GAL mechanisms will depend largely on assessments by an organisation and its most important members of their costs and benefits relative to those of other available governance tools. Constructivist factors may also play a significant role. The wide use of GAL in regulatory bodies founded by NGOs based in the North Atlantic region in the 1990s and 2000s illustrates their enthusiasm for mechanisms and styles of governance that had worked well for them in Europe and North America. But NGOs in Europe and elsewhere have increasingly come to voice doubts about the actual effects of neutral-seeming transparency and public participation provisions, at least in the context of market-oriented regulatory regimes such as the Transatlantic Trade and Investment Partnership (TTIP), critiquing them as licences for business to lobby and as magnifying the returns to wealth. The GAL ethos or ideology has long been criticised by people connected with developing countries on the ground that the promise of participation is illusory; civil society groups, particularly in developing countries, do not have the organisational capacities and resources to make effective use of GAL mechanisms and are badly outmatched by business interests.

In sum, the institutional method for the development of GAL is decentralised, incremental, cumulative, variable as to the details and overall embrace of GAL, continually open to adjustment and revision, and subject to cycles of contestation and rejection along with embrace and reform. This piecemeal approach, while it in part echoes the style of common law legal systems, is here inflected by the sheer multiplicity of jurisgenerative bodies and participants or critics throughout the global administrative space. Insofar as various global regulators adopt GAL practices, and gradually internalise GAL norms, this is for highly diverse reasons. These reasons include, most obviously, the

desire to obtain validation, recognition, and acceptance of their decisions and norms by relevant validating or recipient authorities or actors. The various different global regulatory bodies operating in different sectors and fields of regulation accordingly become subject (albeit very unevenly) to GAL norms developed and applied by international tribunals, by domestic courts, and by other global regulatory bodies and domestic authorities on whose cooperation they depend. Or global regulatory organisations may impose GAL practices on some of their own components to address internal management objectives and promote institutional and programmatic coherence. Or they may adopt such practices to garner demand for adherence to their norms from businesses or individual consumers concerned to follow or support socially and environmentally responsible practices and products, or to meet criticism and enhance their public reputation. Domestic administrations that function as the distributed element of global regulatory regimes are subject to GAL norms applied by the global regulatory bodies of which they are a part, by international tribunals and arbitral bodies, and by their own domestic courts. Widespread practices of voluntary, uneven or idiosyncratic adoption of GAL norms, and unsanctioned deviance from them, naturally raise issues regarding the legal status of these norms.

## **II. GAL and Changes in Global Political, Economic and Social Orders**

The regulatory terrain of standard-setting and decision-making, and the evaluation of GAL, is integrally connected with, but not necessarily synchronous with, changing patterns in global and sub-global orders.

### **A. The Period Prior to 2015**

From a North Atlantic perspective, a familiar narration of the advent of modern global regulatory governance—up until a sharper turn around 2015—runs as follows. Legal-administrative structures began to be created and used actively to address beyond-the-state practical problems of coordination and expertise-building from the 1850s, so that the category of international administrative unions was flourishing along with globalisation by 1910, and a new, more formal juridification and programmatic ambition was added on top of this in the League of Nations era but largely failed. This latter initiative was tried anew in inter-governmental structures from 1945 with greater endurance.

On top of this structure of treaties and formal inter-governmental organisations was layered from about 1990 a growing set of inter-state courts, including some providing direct access for



private parties. Contemporaneously from 1990, in a period of United States (US) dominance buttressed by support from most North Atlantic powers, there occurred an increase in active military interventionism and in imperial-type governance structures based on coalitions of the more-or-less willing,<sup>12</sup> accompanied by some sidestepping, or undisguised assertions, of hierarchy within formally inter-state structures. This US–NATO–OECD dominance was countered quietly by some soft balancing, and non-state violence, and eventually in more overt inter-state initiatives both by rival organisations (such as the Shanghai Communiqué Organisation) and by resistance from emerging powers within existing institutions (as in the WTO). A parallel development was the growth of intergovernmental networks of domestic regulatory officials operating in specific fields (banking regulation, pharmaceutical testing, anti-money laundering, etc) to coordinate regulation without the encumbrances of treaty arrangements. Initiated by the US with leading European nations and, often, Japan, these coalitions sooner or later provided for participation by others. Also characteristic of this period was growth in private standard-setting, transnational NGO and corporate norm production, and systems of regulatory discipline. The label ‘global governance’ became prevalent in this period, applied by some to this whole congeries, and by others to the more liberal or North Atlantic-palatable aspects.

However, further new global inter-state institutional juridification and judicialisation came to a near halt after 2000. In part it was blocked by inter-governmental politics—including by BRICS (Brazil, Russia, India, China and South Africa) contestation and US neo-conservatism—and in part it was undermined by democratic-legitimacy objections and ponderous or even sclerotic multilateral processes. Energy and attention were diverted into other forms of global regulatory governance, including the proliferation of intergovernmental networks and the still largely unblocked possibilities of global hybrid and private governance, in which North Atlantic values and techniques still had space to predominate.<sup>13</sup> These values were articulated and pursued in the languages and techniques of law, but rather than inter-state public international law, hybrid and private governance were characterised by newer combinations of law or law-like forms. Attempts were made to marry these again with inter-state public international law forms, as in the Paris Climate Agreement of 2015, or the 12-state TPP as finalised in 2015–16. Contemporaneously and partly in response, the European

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<sup>12</sup> A Rodiles, *Coalitions of the Willing and International Law* (Cambridge University Press, 2018).

<sup>13</sup> AM Fejerskov, *The Gates Foundation’s Rise to Power: Private Authority in Global Politics* (Routledge, 2018); J Pauwelyn, R Wessel and J Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012); A Berman et al (eds), *Informal International Lawmaking: Case Studies* (Torkel Opsahl, 2012).

Union (EU) pushed for the EU–US TTIP, China initiated the Asian Infrastructure Investment Bank, following broadly the established institutional script for multilateral development banks, and inter-governmental institutionalisation continued in Africa and (albeit with strong political divisions among different groups of states) in Latin America.

## **B. Reasons for the Rise of GAL**

Five elements that in different ways prompted interest in, and uptake of, GAL in the period 1990–2015 may be summarised as follows.

### *i. Burgeoning of International Institutions*

GAL offered one response to the dramatic post-Cold War growth in the number and reach of formal and informal international institutions exercising governance power with uncertain legitimacy.<sup>14</sup> Some sought through deployment of GAL to make these institutions more efficient, more effective or more accurate in accomplishing their burgeoning tasks. Others were primarily concerned that these institutions exercised power without—and at times circumvented or undercut—the rule of law and accountability structures embedded in national democracy and human rights<sup>15</sup>; or that the operations of these institutions were deformed and skewed against developing countries and their interests.<sup>16</sup>

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<sup>14</sup> If there was significant and growing regulatory authority or governance power located in institutions outside the territorial state, or if policies were being set in inter-governmental or even private transnational settings with major implications for governance within the state, then (it was argued) there was a strong case for fashioning a body of law that might fulfil functions roughly equivalent to those performed by administrative law within the state. See L Casini, ‘The Expansion of the Material Scope of Global Law’ in S Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar, 2016); S Battini, ‘The Proliferation of Global Regulatory Regimes’ in S Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar, 2016); G della Cananea, *Due Process of Law Beyond the State* (Oxford University Press, 2016).

<sup>15</sup> F Kratochwil, *The Status of Law in World Society* (Cambridge University Press, 2014) 177–199; G Teubner, ‘*Quod Omnes Tangit*: Transnational Constitutions Without Democracy’ (2018) 45 *Journal of Law and Society* S5.

<sup>16</sup> For Chimni, the amelioration of international institutions has been GAL’s major focus, hence GAL ‘only offers a partial approach to international law, focused as it is primarily on addressing democratic deficit in the functioning of international bodies’: BS Chimni, *International Law and World Order* (Cambridge University Press, 2017) 4. His own forward-looking project, which he calls an ‘Integrated Materialist Approach to International Law’, specifies nine self-imposed requirements, including that it ‘should seek to promote democratic modes of global governance. It would envisage the restructuring of regional and international institutions to address the problem of democratic deficit through inter alia promoting deliberative and participatory democracy and adherence to global administrative law’: *ibid* 549. The long-serving South African Finance Minister, Trevor Manuel, while in office visited a GAL conference in 2008 to proclaim that ‘Global Administrative Law is an idea whose time has come’: TA Manuel, ‘Opening Address’ in H Corder (ed), *Global Administrative Law*:

ii. *Securitisation*

GAL was invoked as an ameliorating response to (and equally as a legitimisation of) the securitisation of transnational structures that followed the 9/11 attacks. This is exemplified in the classic GAL loci of cases related to freezing of assets under United Nations (UN) Security Council regimes against financing of terrorism, symbolised by *Kadi I & II*,<sup>17</sup> and various reforms of process within the UN Security Council, including the creation and remit of an ombudsperson in regard to some of these matters. Another cluster of GAL *causes célèbres* address accountability for actions of UN peacekeepers or for UN-authorized military operations.<sup>18</sup>

iii. *Economic Governance*

GAL concepts and mechanisms have been prominent both as a tool of international economic governance<sup>19</sup> and as a means of refining or curbing some elements of its international institutional operation.<sup>20</sup> The WTO *Shrimp-Turtle* case became a GAL classic not only because of the Appellate Body's extensive review, using GAL criteria, of the sufficiency of the US Government's administrative and review processes in prohibiting imports of shrimp from the complaining countries, but also because the Appellate Body exercised an institutional governance function in crafting (and supervising) some legal space for environmental goals in the trade regime when the

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*Innovation and Development* (Juta, 2009) xix. He explained that his own experience representing South Africa in the Financial Action Task Force, the G20 (which he chaired), the IMF, the World Bank and other bodies led him to conclude 'we have to find solutions to poor decision-making structures and to find resonance for a body of applicable law ... a legal system that is trusted and tested, that aligns the responsibilities at both a global and sovereign level, and a system capable of compelling the commitment of states in the interest of the global good. Such a legal system is, of course, this whole nascent and visionary branch of philosophy you have elected to call Global Administrative Law': xvi–xvii.

<sup>17</sup> Case T-315/01 *Kadi v Council of the European Union* [2005] ECR II-3659 (*Kadi I*); C-402/05 P, C-415/05 P *Kadi v Council of the European Union* [2008] ECR I-6351 (*Kadi II*).

<sup>18</sup> On *Kadi* and on the introduction by UN peacekeepers of cholera to Haiti, see D Hovell, 'Due Process in the United Nations' (2016) 110 *American Journal of International Law* 1.

<sup>19</sup> RB Stewart and MR Sanchez Badin, 'The World Trade Organization: Multiple Dimensions of Global Administrative Law' (2011) 9 *International Journal of Constitutional Law* 556.

<sup>20</sup> For example in pushbacks against investor-state arbitration: G Van Harten and M Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *European Journal of International Law* 121; J Alvarez, 'Is Investor-State Arbitration Public?' (2016) 7 *Journal of International Dispute Settlement* 534; C Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA & TTIP' (2016) 19 *Journal of International Economic Law* 27; A Kawharu and L Nottage, 'The Curious Case of ISDS Arbitration Involving Australia and New Zealand' (2018) 44 *University of Western Australia Law Review* 32.

member states had been unable to reach political agreement on that.<sup>21</sup> Invocation of GAL became more prominent—as instrument and as critique—with the expansion of such economic governance after the 2008–09 financial crisis.<sup>22</sup> GAL was invoked as a ground for critique of institutions ranging from the G7 and the International Monetary Fund (IMF), to credit ratings agencies and ISDA. Arguments to deploy GAL principles and mechanisms to increase transparency and accountability were made, and quite often adopted, in many such institutions.

*iv. Post-Washington Consensus*

GAL was a key feature in the instantiation of the shift from North Atlantic-led neo-liberalism toward a post-Washington Consensus agenda.<sup>23</sup> Insofar as GAL principles and mechanisms became normal accoutrements of post-Washington Consensus institutional forms and prescriptions, they have tended to be replicated in processes of emulation, and used to provide some openings for critique. In some cases, they have come to be cabined or bypassed as more powerful interests reassert themselves, including by shifting between institutions or by resorting to informal arrangements or direct external governance by unilateral national action.

*v. In-Country Reform*

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<sup>21</sup> *Shrimp Turtle I (United States – Import Prohibition of Certain Shrimp and Shrimp Products)*, WTO Appellate Body WT/DS58/AB/R (1998). See BS Chimni, ‘Cooptation and Resistance: Two Faces of Global Administrative Law’ (2005) 37 *New York University Journal of International Law and Politics* 799.

<sup>22</sup> In this context, the critical scholar Kanishka Jayasuriya refers to the institution-constitutive acts and substantive output of rules and decisions of such institutions as being GAL (rather than to the more procedural aspects of GAL): ‘In one sense, the common element of both 9/11 and the current [2008–09 financial] crisis lies in the ushering-in of a global state of emergency; and in a distinct form of international emergency regulation and standards—very much in the form of a global administrative law—that reframes the jurisdictional practices that have shaped national constitutional formations. The economic crisis, like 9/11, was a global state of emergency that may lead to the emergence of new jurisdiction of governance layered onto the domains of national and international law. With the current crisis, we are back to the idea of global administrative law, and here too as in the 9/11 crisis, new forms of state power have been created that allow actors to bypass “national” constitutional and administrative structures.’ J Sprague, ‘Statecraft in the Global Financial Crisis: An Interview with Kanishka Jayasuriya’ (2010) 3 *Journal of Critical Globalisation Studies* 127, 131–132.

<sup>23</sup> Kratochwil summarised this neatly: ‘[In the 1990s] the neo-classical orthodoxy that had informed the Washington consensus moved towards a “post Washington Consensus”. The latter contained some new policies such as poverty abatement, greater accountability of governments and international organizations, the promotion of the “rule of law,” and the adoption of “best practices” developed by experts in informal networks, sometimes even with the participation of members of civil society. Everything seemed to fit like a hand in a glove: accountability could be strengthened, participation enhanced, welfare augmented (as waste and corruption could be cut), and law—even though thoroughly “deformalized” and largely cut off from its traditional sources—could provide the discursive “space” within which we could pursue the necessary global collective goods.’ Kratochwil, *The Status of Law in World Society* 169.

Some groups in developing countries saw GAL as a means to nudge policies and institutions in their own countries onto some other preferred global track, or onto a different and often locally-adapted (perhaps locally-constructed) path.<sup>24</sup>

### C. Post-2015

By about 2015, the ideology—as well as many specific practices—of ‘global governance’ had become the subject of some intense political and technical criticism. Governmental and public mistrust was reflected in the extreme rarity of any national politician anywhere in the world championing ‘global governance’ as a desirable objective. In many places ‘global governance’ had by 2015 become strongly and pejoratively associated with some or other of: the pursuit of US interests and techniques of US regulatory domination and self-exemption; vindication of North Atlantic preferences and styles; the rule of experts and technocracies, and a new post-bureaucrat class of polyglot post-national and comprador highly-educated ‘participants’ including NGO and multi-stakeholder policy entrepreneurs allied to super-rich corporate owners and agenda-driving philanthropists and political insiders; the endurance of severe poverty and the rise and rise of global and societal inequality; circumvention of democratic state structures; deliberate strategies of fragmentation and displacement of issues away from forums where small states have power; facilitation of greenwashing and other techniques of corporate evasion; failure to reach much into China or other major counter-powers; and relative overall ineffectiveness in relation to the most serious global risks and problems.

Popular cynicism or indifference were accompanied by active resistance to particular visible or symbolic markers of ‘global governance’ at work. Donald Trump campaigned successfully in 2016 on opposition to TPP and a whole set of other trade agreements. His administration energetically extracted the US from commitments to the Paris Climate Agreement of 2015, the United Nations Educational, Scientific and Cultural Organization, and the Arms Trade Treaty. It largely opposed investor-state dispute settlement during the North American Free Trade Agreement renegotiations,

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<sup>24</sup> N Dubash and B Morgan (eds), *The Rise of the Regulatory State of the South* (Oxford University Press, 2013) includes substantial theoretical discussion as well as infrastructure case studies. Cases in other fields are presented in depth in E Fox and M Trebilcock (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press, 2013); RC Dreyfuss and CA Rodríguez-Garavito (eds), *Balancing Wealth and Health: The Battle over Intellectual Property and Access to Medicines in Latin America* (Oxford University Press, 2014). See also RF Uruña, ‘Global Administrative Law and the Global South’ in S Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar, 2016).

so that its role in the 2018 Canada–Mexico–US Agreement (USMCA) is much diminished; the US acted assertively against any glimmers of International Criminal Court action directed to the US; and (in continuation of Obama-era approaches) it obstructed the WTO Appellate Body’s replenishment.<sup>25</sup> President Bolsonaro, inaugurated as President of Brazil in early 2019, employed similar rhetoric on some international issues (including the Paris Climate Agreement). Within the EU, nationalist (and in some cases populist) leaders in several countries took sceptical positions on what had previously been received ideas about the European project.

By the 2020s, the 1990s-era vision and subsequent drivers toward GAL had by no means entirely dissolved, and many existing institutions continued to have GAL practices and norms embedded in them, but some of the earlier drivers had certainly abated or been overshadowed. In world terms they had become less generative. The styles and registers of national politics in many countries have changed significantly from those that spilled over into 1990s global governance. In the era of Presidents Putin, Trump and Xi, and of Prime Minister Modi, the pursuit of international politics through multilateral and legally-framed international institutional initiatives is hardly a prevalent governance strategy. More fundamentally, transnational regulatory governance strategies are now shaped in different places, often addressing newer technological forms or players, and the articulate political interest in international legal construction as a means for innovating in these situations is very limited in many major countries (though certainly not all).<sup>26</sup>

#### **D. The Future**

Five sets of such macro-contextual conditions and considerations seem noteworthy in informing the next phases of scholarship with regard to GAL. These five sets by no means exhaust the range, and may not be what is most relevant and important. Moreover, they are likely to interact together, and also to interact with significant vestiges of the earlier impetus, in relation to GAL and to determining its future influence.

##### *i. Managing Globalisation while Opposing Global Governance*

The first set is about the political management of globalisation in different places—globalisation’s economic dislocations and security concerns, its cultural implications, and its effects on political

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<sup>25</sup> J Goldsmith and ST Mercer, ‘International Law and Institutions in the Trump Era’ (2018) 61 *German Yearbook of International Law* 11–39.

<sup>26</sup> A Hurrell, ‘Beyond the BRICS: Power, Pluralism, and the Future of Global Order’ (2018) 32 *Ethics & International Affairs* 89.

autonomy and legal self-government. Every state is striving to manage the opportunities and threats of globalisation and technological disruption, experimenting at times with different development models (eg ‘the new developmental state’) and struggling to maintain particular varieties of capitalism under external pressures. Yet public suspicions of ‘global governance’ as a means of management are great (other than a baseline acceptance of the UN and some of its longstanding agencies). Few national politicians mention ‘global governance’ except to excoriate it (China is a major exception, but there the term is used with a different valence, carrying a confidence that the states (certainly China) will be able to maintain control of policy-making).<sup>27</sup> For many of them, the drive is to cabin globalisation and return to an accent on national autonomy and control of the borders. Whereas the protests of the 1990s (such as those in 1993–95 in India against TRIPS, and those in Seattle in 1999 against the WTO and G7) were couched roughly as *anti*-globalisation,<sup>28</sup> by the late 2010s and 2020s a more affirmative *de*-globalisation movement was in progress, as a significant political agenda if not an economic reality. Insofar as GAL has been an artifact of globalisation, the retreat of the tide could potentially leave it a stranded construction from an earlier era. In practice, however, so long as international institutions endure, GAL may be significant in precisely the venues where populist and nationalist projects (including their legalist and autonomy-promoting dimensions) are both pursued and contested.<sup>29</sup>

*ii. Power Shifts*

The second set of macro-contextual conditions and considerations is more of an agitated mix of changes in societal distributions and demographics, changes in the means and forms of wealth, power, dominance and risk, and shifts in the world-affecting (or geopolitical) distribution and balances of power and vulnerability. The global distribution of state power has tipped toward rising powers in Asia. China is evolving toward a match for the US and embarking on its own ordering projects (such as Belt and Road), and many Asian economies are increasing in their international weight.<sup>30</sup> Global tectonic friction as well as regional positioning have followed as these new realities are felt. Africa’s fast-growing and fast-urbanising young populations hold and seek many new

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<sup>27</sup> L Chan, P Lee, and G Chan, ‘Rethinking Global Governance: A China Model in the Making?’ (2008) 14 *Contemporary Politics* 3; J Zeng, ‘Chinese Views of Global Economic Governance’ (2019) 40 *Third World Quarterly* 578.

<sup>28</sup> R Howse, ‘The Globalization Debate—A Mid-Decade Perspective’, in S Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar, 2016).

<sup>29</sup> C Bob, *Rights as Weapons: Instruments of Conflict, Tools of Power* (Princeton University Press, 2019).

<sup>30</sup> C Cai, *The Rise of China and International Law* (Oxford University Press, 2019).

possibilities.<sup>31</sup> Intra-polity social and economic inequality has risen and risen, as in some places has discontent, with associated alienation and weakening of old democracies, and growing appeal of authoritarian (or populist) government or techniques. The 1990s North Atlantic dominance that facilitated ‘law and global governance’ projects like GAL is most unlikely to be renewed, but its institutional and programmatic edifices (like GAL) still stand, and are to some extent being repurposed or (re)appropriated for the more uncertain new conditions.

*iii. Private Ordering*

While private ordering has long been a major feature of much transnational governance, the obstructed environment of intergovernmental governance innovation has made more room for private structures and intensified demand for them.<sup>32</sup> Whether and how GAL applies in private ordering arrangements—or at their numerous interfaces with public power—involves debated but unresolved conceptual problems, as well as a raft of practical questions about the suitability or frailty of particular mechanisms for enforcement. Some private ordering is organised for the closed production of ‘club goods’ for members, taking little procedural account of non-member interests, while other forms are polyarchic, using multi-stakeholder models with sophisticated GAL mechanisms.<sup>33</sup> The ecosystem of private ordering has shifted with the sharp restriction in many countries on transnational NGOs and foreign funding.<sup>34</sup> International economic law increasingly protects foreign for-profit investment but not foreign non-profit activities. Most private ordering is dependent on state blessing or more active support—or on state promises of non-interference—and state and private are not too sharply separated in many places. The political-institutional consequences of all of this for GAL play out every day in nearly every space.

*iv. Digitisation*

The fourth set of macro-contextual conditions and considerations concerns the digitisation of society, the capacities of Artificial Intelligence, the arrival of more granular and self-enforcing

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<sup>31</sup> JT Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge University Press, 2011); D Bach, *Regionalism in Africa: Genealogies, Institutions and Trans-State Networks* (Routledge, 2017).

<sup>32</sup> MP Vandenberg and JM Gilligan, *Beyond Politics: The Private Governance Response to Climate Change* (Cambridge University Press, 2017).

<sup>33</sup> Philip Schleifer, ‘Varieties of Multi-Stakeholder Governance: Selecting Legitimation Strategies in Transnational Sustainability Politics’ (2019) 16 *Globalization* 50.

<sup>34</sup> D Rutzen, ‘Aid Barriers and the Rise of Philanthropic Protectionism’ (2015) 17 *International Journal of Not-for-Profit Law* 1; E Bornstein, ‘The Report: A Strategy and Nonprofit Public Good’ (2019) 10 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 109.



(algorithmically coded) law,<sup>35</sup> and the implications for transparency, participation, reason-giving, review (including adjudication), forms of contestation and the nature of the administrative output.<sup>36</sup> United States-model and China-model governance forms contend with one another in the digital economy—where Facebook and other companies have created their own surrogate GAL-type terminology—and soon probably in space as US-style private sector ventures increasingly define standards and affect third parties and other states. GAL scholars have obtained only limited purchase in addressing outputs that have regulatory effects but deliberately do not have the form of standard regulatory instruments, including recommended best practices, ranked indicators of performance on one or more criteria, models (such as climate risk and macroeconomic forecasting models), lists (such as no-fly lists) and algorithms.<sup>37</sup> The global regulation of the regulatory output of Silicon Valley corporations is ephemeral,<sup>38</sup> and often jurisdictionally fragmented or misaligned with the technology and its effects. One approach is to refocus this as the regulation of digital infrastructure and its physical and human actants, dependents, constructors and maintainers.<sup>39</sup>

*v. Concepts*

The final set of macro-contextual conditions and considerations is conceptual. Topics that received considerable attention in the first decade or so of GAL scholarship included fundamental conceptual matters: What does it mean to use the concept of ‘law’ in GAL, and are the analytical proponents of GAL justified in referring to this as law? What is the concept of ‘administration’ and can it be defined with sufficient precision? Does the ‘global’ moniker have enough meaning, and does it do any more than put a veneer of legitimacy over massive differences in power, influence and life-chances? These are bound to be perennial questions. Yet the reasons for asking them, and the

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<sup>35</sup> C Busch and A de Franceschi, ‘Granular Legal Norms: Big Data and the Personalization of Private Law’ in V Mak, E Tjong Tjin Tai and A Berlee (eds), *Research Handbook in Data Science and Law* (Edward Elgar, 2018).

<sup>36</sup> R Brownsword, E Scotford and K Yeung (eds), *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press, 2019).

<sup>37</sup> KE Davis, A Fisher, B Kingsbury and SE Merry (eds), *Governance by Indicators* (Oxford University Press, 2012); SE Merry, KE Davis and B Kingsbury (eds), *The Quiet Power of Indicators* (Cambridge University Press, 2015); F Johns, ‘Data, Detection, and the Redistribution of the Sensible in International Law’ (2017) 111 *American Journal of International Law* 57.

<sup>38</sup> K Klionick, ‘The New Governors: The People, Rules, and Processes Governing Online Speech’ (2018) 131 *Harvard Law Review* 1598; ME Walsh, ‘Facebook Plans to Create a Judicial-like Body to Address Controversial Speech’ (1 May 2019) *American Bar Association Journal* (online).

<sup>39</sup> This is the direction of the New York University (NYU) Law School Institute for International Law and Justice’s InfraReg research project, available at [iilj.org/infrareg](http://iilj.org/infrareg). This work is linked also to NYU Law School’s Guarini Global Law and Tech initiative, available at [guariniglobal.org](http://guariniglobal.org).

terms and significance of debates about them, are likely to change as the contextual shifts already mentioned come to have larger impact. This chapter turns now to some of these conceptual questions.

### III. GAL Concepts and Methods

#### A. Administration and Administrative Action

Central to the whole idea of GAL is that ‘administration’ is a relevant, usable and useful category for legal analysis relating to governance beyond a single state. The 2005 framing of the emergence of a body of global administrative law focused on the accountability of global *administrative* bodies (and in particular on transparency, participation, reasoned decision, legality and effective review).<sup>40</sup> By ‘global administrative bodies’ was meant

formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance.<sup>41</sup>

The range of bodies encompassed was thus highly heterogeneous. To focus on the entities provides legal purchase that a simple focus on the action does not. It is essential, however, not to confine legal analysis to each entity in isolation from others. The terms of inter-entity relations must also be part of legal analysis. This creates difficult problems of plural authority, protection of different voices and different rights achieved not by any one entity but by combination and mismatches of jurisdiction.<sup>42</sup> One sub-set of these questions will be addressed in section III.C with reference to distributed administration.

GAL is about the exercise of power on a quotidian basis. Much of the action studied is politically obscure, even unnoticed. Insofar as GAL is about power of these kinds, the forms of regulatory governance it addresses continue to flow as deep currents even while political storms

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<sup>40</sup> Kingsbury, Krisch and Stewart, ‘The Emergence of Global Administrative Law’ 17.

<sup>41</sup> *ibid.*

<sup>42</sup> N Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford University Press, 2013); E Benvenisti, *The Law of Global Governance* (Hague Academy of International Law, 2014).

create choppy seas above. The focus on entities and administration may thus prove in the 2020s to have more vitality than grander political forms.

The understanding of what was potentially within the domain of ‘administrative’ law in the GAL framing literature was and remains a capacious one—recognisable to those familiar with common law jurisdictions, but much broader than what is ordinarily regarded as ‘administrative law’ in many civil law countries.<sup>43</sup>

The potential ‘administrative’ matter within the field of GAL extends across:

- (1) The institutional design, and legal constitution, of the global administrative body (a public entity, or a private entity with public implications, other than a state)
- (2) The norms and decisions produced by that entity, including norms and decisions that have as their addressees, or otherwise materially affect:
  - other such public entities
  - states and agencies of a particular state
  - individuals and other private actors.
- (3) Procedural norms for the conduct of those public entities in relation to their rules and decisions, including arrangements for review, transparency, reason-giving, participation requirements, legal accountability and liability.<sup>44</sup>

These three categories may be separated analytically. In simplified terms, they represent input, output and process dimensions. The (input-side) legal constitution and institutional rules of a global administrative body may be ‘law’ for that body—and for its members and even for others—depending on the powers and intentions of the authors of its constitutive instruments and the views taken in the institution’s own practice and in responses to this. There may be delegation to the institution—by a *pouvoir constituant*—or there may not (some institutions are primordial). The institution may be confined by the terms of a mandate, or not.

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<sup>43</sup> This observation is rightly made by Paul Craig (endorsing the wider approach) in P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 629–632.

<sup>44</sup> B Kingsbury, ‘The Concept of “Law” in Global Administrative Law’ (2009) 20 *European Journal of International Law* 23, 34. This approach draws from D Dyzenhaus, ‘Accountability and the Concept of (Global) Administrative Law’ [2009] *Acta Juridica* 3.

The (output-side) norms and decisions issued by the entity may themselves be law, if it has such powers and status and is treated that way, or they may not. If they are transitive, or could potentially be made so, there are stronger grounds for treating them as law—does a structure exist, or might one be conceivable, in which someone could revisit this administrative action or call to account those engaging in it? Would that review entail the use of GAL standards as normative guides for evaluation? This applies also to output that affects other entities, and helps structure inter-entity relations. Thus much of the output of these global administrative bodies could be characterised as ‘administrative action’ (to which GAL might apply): rule-making, administrative adjudication between competing interests, and other forms of regulatory and administrative decision and management.<sup>45</sup>

Finally, process norms of GAL are focused on how the entity operates and how it produces output. This is the core focus of GAL. Principles and mechanisms applying to govern how an entity operates and produces output, could themselves be law even if the output itself is not law, and even if the entity is not itself legally constituted.

It is proposed that considerations of publicness may be introduced through this process layer.<sup>46</sup>

An important theoretical rejoinder to this whole focus of GAL on administration reprises a long-standing view that ‘administration’ must be distinguished from ‘law’.<sup>47</sup> One way of putting this is reminiscent of Hans Kelsen: no doubt these bodies do many things that might be termed administration, but it is not law-governed except to the extent that there are constitutive rules of the relevant entity which it must follow. If there are process norms that flow across from one issue silo

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<sup>45</sup> This avowedly broad approach to legally-cognisable administrative action was influenced by common law sensibilities; other national systems of administrative law are framed with reference to much narrower understandings of administrative action: cf L Hilton, ‘Rethinking Global Administrative Law: Formulating a Working Definition of “Global Administrative Action”’ (LLM Research Paper, Victoria University of Wellington, 2015) examining New Zealand, South African and US administrative law.

<sup>46</sup> B Kingsbury, ‘The Concept of “Law” in Global Administrative Law’ (2009) 20 *European Journal of International Law* 23; B Kingsbury, ‘International Law an Inter-Public Law’, in HS Richardson and MS Williams (eds), *Nomos XLIX: Moral Universalism and Pluralism* (New York University Press, 2009); B Kingsbury and M Donaldson ‘From Bilateralism to Publicness in International Law’ in U Fastenrath et al (eds), *Essays in Honour of Bruno Simma* (Oxford University Press, 2011).

<sup>47</sup> C Möllers, ‘Constitutional Foundations of Global Administration’ in S Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar, 2016) 107–128.

to another, these procedural norms might be simply meta-management principles.<sup>48</sup> A related suspicion of GAL is that it is simply a lawyerly version of managerialism, and moreover one that deformalises and even denatures law by using the language of law and rights but in an entirely managerial context.<sup>49</sup> A similar argument is now made about Facebook and other digital platform companies.<sup>50</sup>

This is probably not a debate that is soluble in theoretical terms, as the claims are in part contingent and empirical. A feature of the GAL approach is that it introduces law and legal criteria, including values immanent in law or carried by well-trained lawyers; and it links otherwise disparate areas of practice through the unifying idea of a complexly-differentiated global administrative space. One potential contribution of GAL is in helping to overcome problems of disregard. Other potential contributions include the recognition and protection of rights and promoting democratic governance practices. In the churned political conditions of the 2020s it does not seem that any other promising strategy is really displaced by GAL, nor that other strategies are so much more likely to contribute to such goals that they should be prioritised instead.

## **B. Does GAL Really Involve ‘Law’?**

The claim made in 2005 was that GAL was (then) ‘emerging’. Could this claim still be made in the 2020s? In the ordinary rhythm of human secular affairs, this seems rather a lengthy emergence. Neil Walker’s charitable reading of scholars’ championing almost every type of global law is that this indefinite temporality is intrinsic to the specific circumstances and character of the ‘global law’ enterprise. He thus looks not for the arrival of global law, but for intimations of it (intimations here

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<sup>48</sup> Much of the practice ‘is too far removed from the self-conscious application of legal procedures to pass as instance of a legal process ... The problem that arises for the GAL project is that owing to its practical ambition it is inclined to describe processes which do not give rise to legally binding acts as though they were constituted by administrative law, while these very same processes can equally plausibly also be described as mere instances of permissible conduct.’ A Somek, ‘The Concept of “Law” in Global Administrative Law: A Reply to Benedict Kingsbury’ (2009) 20 *European Journal of International Law* 985, 987.

<sup>49</sup> A related concern, as Jason Varuhas has suggested (personal communication), is that attribution of ‘law’ to managerial practices leads to the legal formalisation of *administration*, and to associated problems such as ossification and lack of flexibility.

<sup>50</sup> T Shadmy, ‘The New Social Contract: Facebook’s Community and Our Rights’ (2019) 37 *Boston University International Law Journal* (forthcoming); N Sheffi, ‘The Fast to the Furious’ in D McKee, F Makela and T Scassa (eds), *Law and the ‘Sharing Economy’ Regulating Online Market Platforms* (University of Ottawa Press, 2018) (about Airbnb).

meaning both informative announcements and unspoken indications).<sup>51</sup> No doubt this is sage counsel. The consolidation (or formal arrival) of fully-fledged GAL, if it occurs, is likely to be discernible more in retrospect—the changes in practice and normativity are not millenarian but quotidian, dispersed, uneven, gradual and not unidirectional.

If the claims for GAL are somewhat airy about time and embodiment, is there anything special about the nature of the claim(s) that might be made to ‘law’? Liam Murphy puts neatly the problematique as regards GAL:

To pursue ... the question of what distinguishes the legal from other normative orders, and perhaps to justify raising it in the first place, we can consider the case of emerging law. The most important and interesting discussion in contemporary international legal theory concerns what is usually referred to as ‘global governance’. ... [T]he rough idea is to highlight the impact made by international organizations on the policy options of states and the lives of people globally. It is important that while these institutions may be the creatures of treaties and so too of international law in the classical sense, that is just one possibility. They may also be informal club-like arrangements between states’ executive branches, hybrid public/private institutions or even fully private institutions. The political issue raised by this aspect of globalization is that there is a global institutional sphere of great impact that is not necessarily subject to the control of states and so potentially lacks even so much accountability as customary and treaty law may have ... [The claim of] the global administrative law model ... is that accountability for the effects of the actions of these multifarious international organizations requires compliance with such norms as transparency, consultation, participation, rationality and review. In the absence of more robust democratic accountability, compliance with these norms of process would obviously be a good thing. But the proposal is that a global administrative law

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<sup>51</sup> N Walker, *Intimations of Global Law* (Cambridge University Press, 2014). Whether it is convincing to submerge different sets of ideas and practices into a unifying idea of ‘global law’ (let alone ‘post-national law’) is a different matter.

is emerging, and my question is what exactly this means in a context where conventional jurisprudence currently recognizes no such law.<sup>52</sup>

Legal philosophy canvases numerous criteria that might be relevant. Some of the requirements Lon Fuller identified as qualities of legality are clearly necessary,<sup>53</sup> but their external manifestation alone is not sufficient for the existence of law.<sup>54</sup> Specific institutions (legislatures, courts) are highly germane in that their presence and effective operation are strong indicia of the presence of law, but they are not strictly necessary for law. Clearly a basic social acceptance and efficacy is a *sine qua non* for the epithet ‘law’ in the kinds of circumstances with which legal philosophers have generally been concerned, although violation or disregard of law cannot in itself negate the existence of law (as law must be understood normatively, not simply behaviourally). Liam Murphy articulates one view in arguing that the claim to law is the claim to a

kind of normative order that would appropriately (where feasible) include some rules designed to encourage compliance and that it would be right and proper for the authorities (if there are any) to enforce the norms coercively in the ordinary course of events. We have in mind a normative order whose rules are generally taken to be, and are presented as being, appropriately enforced—if feasible and done in accordance with rules of that very order. That is one main difference law makes, one value that it adds. And that is why, I venture, you would want a global administrative law if you are concerned about the impact of unaccountable global institutions on our lives, rather than just international organization ethics.<sup>55</sup>

This view is Dworkinian in focusing on law as justification for enforcement action (although Murphy’s approach does not limit that to coercion). Other views focus on law as providing reasons

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<sup>52</sup> L Murphy, ‘Law Beyond the State: Some Philosophical Questions’ (2017) 28 *European Journal of International Law* 203, 222 and 224.

<sup>53</sup> L Fuller, *The Morality of Law* (Yale University Press, 1969), refers in particular to generality, promulgation, prohibition of retroactive laws, clarity, non-contradiction within or among laws, prohibition of laws requiring the impossible, constancy of the law through time, and congruence between the official action and declared rule. These principles form a central basis for efforts to distinguish law from non-law in the interactional account of international law developed by J Brunnée and SJ Toope, *Legitimacy and Legality in International Law* (Cambridge University Press, 2010).

<sup>54</sup> A slightly different critique is of non-systematic thinking and conceptual fuzziness in GAL. See, eg, the introductory chapter in C Möllers, A Voßkuhle and C Walter (eds), *Internationales Verwaltungsrecht* (Mohr Siebeck, 2007).

<sup>55</sup> Murphy, ‘Law Beyond the State’ 225–226.

(perhaps exclusionary reasons) for action (or forbearance), with legal reasons have particular qualities and significance. Another view of law, particularly apposite to infrastructure and to digital platforms, focuses on the relationship of law to affordances. Under each of these views, the presence of, or aspiration toward, particular qualities or effects or a particular kind of order helps explicate the ‘law’ element that is built into claims about GAL. This claim about law within the articulation of GAL does not mean that ‘global administrative law’ must be a freestanding form of law, unmoored from other forms of law.<sup>56</sup> An argument has been made that GAL might be built up from lots of fragments of law in different practice sectors—these are sectors in which there exist law-like conduct and claims, an internal sense of obligation toward these norms, and a shared view among relevant officials in the practice sector on what constitutes law and what they will recognise as law in their sector (a rule of recognition).<sup>57</sup> Others have argued against this approach, asserting that it promotes fragmentation, dis-connecting one micro-sector from another, and in doing so is likely to impair the possibilities of law’s being actually efficacious and accepted as truly law anywhere.<sup>58</sup> Scholars have variously urged that the legal elements are better understood as part of an international public law,<sup>59</sup> or as part of traditional public international law,<sup>60</sup> or perhaps (for some portions) as part of a private international law of global governance. Standard resources (whether formal sources of applicable law, or bodies of material used analogically) drawn upon in propositions about the global administrative norms that govern the foundation, governance structures, competence and decision-making procedures of the various global regulatory bodies are found in national public law, private law, private international law and public international law; these also supply some standard techniques of interpretation and legal evaluation.<sup>61</sup>

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<sup>56</sup> This has some echoes of Dicey’s objection to the whole idea of introducing ‘administrative law’ into English law—state officials were for legal purposes just like everybody else, and subject to the general laws (eg liability for torts against private persons). That debate is succinctly reprised by Jason Varuhas: JNE Varuhas, ‘Taxonomy and Public Law’ in M Elliott, JNE Varuhas and SW Stark (eds), *The Unity of Public Law?* (Hart Publishing, 2018).

<sup>57</sup> Kingsbury, ‘The Concept of “Law” in Global Administrative Law’.

<sup>58</sup> This is the view taken in L Murphy, *What Makes Law* (Cambridge University Press, 2014) 170; it is not addressed in Murphy, ‘Law Beyond the State’.

<sup>59</sup> A von Bogdandy, ‘General Principles of International Public Authority: Sketching a Research Field’ (2008) 9 *German Law Journal* 1909, esp 1920.

<sup>60</sup> M Forteau, ‘Le Droit Administratif Global, Signe d’une Evolution des Techniques du Droit International?’ in C Bories (ed), *Un Droit Administratif Global?* (Pedone, 2012).

<sup>61</sup> See the remarks of Alain Pellet (interviewed with Benedict Kingsbury) in C Bories, ‘Views on the Development of a Global Administrative Law’ in C Bories (ed), *Un Droit Administratif Global?* (Pedone, 2012).



The critique that argues that what is called GAL would be better evaluated as international law, says that the broadly-accepted authority-claims and universality of international law, and consequently the terms of its relations to other orders (such as national law in different places), are an important resource of humanity (which GAL is most unlikely to replicate) and should be nurtured and utilised rather than fragmented.<sup>62</sup> As a statement of the ultimate objective, this seems correct.<sup>63</sup> It does not in itself answer the questions whether this is attainable in the world as it is now or could become, and if so, what are the best paths to pursue to get there. The enduring commitment of all governments and many other institutions to the basic principles of public international legal order has survived notwithstanding other significant shifts in context and style. Simultaneously and separately, however, significant legal normativity exists in key transnational organisational and contracting forms of capitalism,<sup>64</sup> in transactional ordering led by governments, and in private sector or private–public forms ranging from global sports bodies and the Internet Corporation for Assigned Names and Numbers (ICANN) to State-Owned Enterprises and Sovereign Wealth Funds, many of which also interact with numerous other entities in complex inter-entity relations and sectoral standard-setting and governance.<sup>65</sup> The engagement of GAL through

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<sup>62</sup> Cf Murphy, *What Makes Law*; Murphy, ‘Law Beyond the State’. A different claim is that international law is in any case no longer confined to the narrow inter-state forms and sources by which some GAL writing has stylised it, and has the practical resources to address many of the issues and entities addressed by GAL: see remarks of Alain Pellet in Bories, ‘Views on the Development of a Global Administrative Law’; JM Thouvenin, ‘Conclusions Generales’ in Bories (ed), *Un Droit Administrative Global?*.

<sup>63</sup> É Fromageau, ‘The Concept of Positive Law in Global Administrative Law: A Glance at the Manhattan and Italian Schools’ (2015) E-Publica [online] 121, 127–129, makes this exegesis: ‘Kingsbury’s conception of positive international law is thus state-centered and sourced in the will and consent of states (or jus inter gentes), and GAL is not a part of it. The reasons underpinning this exclusion relate essentially to the need to retain a “unified view of an international legal system”. One may wonder that if GAL is not part of positive international law, part of international law “as it is”, is it positive law at all? ... [I]n Kingsbury’s concept of GAL, the purpose of GAL was never to be positive law. It is rather meant to be a factor of change, a “valuable way forward”, aiming to reform a positive law that is not performing a listed number of functions. In this context, Kingsbury’s “ideal positive law” seems rather to be what he describes as an “inter-public law”, as the law between public entities. By including states as public entities in this model, Kingsbury reunites the two sides of his dual positivism. Inter-states relations are then integrated in the wider context of public entities relations.’

<sup>64</sup> K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019); G Hadfield, *Rules for a Flat World* (Oxford University Press, 2017); G Mallard and J Sgard (eds), *Contractual Knowledge: One Hundred Years of Legal Experimentation in Global Markets* (Cambridge University Press, 2016); KW Abbott, D Levi-Faur and D Snidal (eds), *Regulatory Intermediaries in the Age of Governance* (Special issue of The Annals of the American Academy of Political and Social Sciences, Vol 670, 2017); J Black, “‘Says Who?’ Liquid Authority and Interpretive Control in Transnational Regulatory Regimes’ (2017) 9 Transnational Legal Theory 286.

<sup>65</sup> M Young (ed), *Regime Interaction in International Law* (Cambridge University Press, 2012); N Roughan and A Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press, 2017).

these multiple entry points into major forms of legal normativity seems indispensable both to the management of these forms of power and to the uptake of GAL.

Whether the embrace of claims to law made for GAL can be regarded as adhering to the requirements conventionally associated with legal ‘positivism’ has been a matter of intense debate. It has been suggested that the kinds of norms and values associated with GAL can be, and are being, operationalised through a requirement of ‘publicness’—a requirement that law be made by taking account of the entire relevant public and that law speak to that entire public.<sup>66</sup> It has been proposed that such a requirement could be part of the rule of recognition applied in relation to claims to be law within the ambit of GAL—a kind of ‘inclusive legal positivism’.<sup>67</sup> Even scholars sympathetic to the substance of this publicness requirement, however, have balked at the argument that an approach to law that introduces a content-dependent requirement to the specification of law can properly be regarded as positivist.<sup>68</sup> However, in situations where there is no state or national juridical society whose law and practices about law are determinative in relation to some transnational legal practice, and where there is no other clearly and strongly constituted legal power, it might be thought that the adoption of a rule of recognition is a matter for participants. And they can include a view of what law means within that, which enables them to include elements they consider to be immanent in law. As a practical matter this is usually not the case within a state, as the coercive power and political legitimacy of the sovereign can in effect exclude a relatively free choice as to what the rule of recognition is—there already is one. But transnational governance contexts are often much more amorphous, with rather little ability to compel, and an authority that may be fragmented and quite tenuous.

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<sup>66</sup> B Kingsbury and M Donaldson, ‘From Bilateralism to Publicness in International Law’ in U Fastenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, 2011) 79, drawing on work of Jeremy Waldron. The term ‘publicness’ is seldom used in common law systems, nor until recently in international law. Its meaning and value are strongly contested. However, space constraints make it impossible to enter into this important debate here.

<sup>67</sup> Kingsbury, ‘The Concept of “Law” in Global Administrative Law’.

<sup>68</sup> Craig, *UK, EU and Global Administrative Law*, arguing that GAL may correctly be characterised as law, but only under a non-positivist account of law.

### C. Distributed Administration

The roles and real operation of GAL procedures can only be understood and evaluated in relation to different regulatory bodies' missions and governance structures,<sup>69</sup> their regulatory logic (eg coordination versus cooperation games), their regulatory environment, their business model and strategies, the relevant inter-institutional relations (regulatory cooperation versus competition), and their niche in global institutional ecology. Frequently, however, they must be studied not in isolation but in intricate networks or clusters. It is quite common for rules and decisions to be adopted by one body but implemented by numerous entirely separate bodies, then challenged in a third body, at the suit of persons who had had little or no involvement in the earlier rule-making and decision-making but were centrally affected. The *Dutee Chand* and *Caster Semenya* cases in the Court of Arbitration for Sport, discussed in section III.D, exemplify this pattern. Reflection on such cases also illustrates the frequent impossibility of effectively analysing and influencing global regulatory governance without taking account of the relations between entities. This section considers just one specific and particularly neglected instantiation of this, the important phenomenon of distributed administration.<sup>70</sup>

One key element in relation to many global governance institutions is the structure of the pertinent distributed administration. 'Distributed administration' is the term used to encompass the other institutions (often very local or specialised institutions) through whose efforts the rules, decisions and other normative acts adopted in a global regulatory institution actually come to take effect (often in adapted or attenuated form) on the ground. These other institutions may also provide monitoring, accreditation, information, proposals for localised adjustments, funding, expertise, personnel or other inputs to the further work of the global regulatory institution in a continuous iterative or reflexive process. It is thus vital to study the distributed administrations of

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<sup>69</sup> Similar points are often made with regard to certain national administrative law systems. De Smith observed with regard to English (and Commonwealth) law, 'Administrative law is not a homogeneous body of jurisprudence, but is rather an agglomeration of diverse and complex branches of law [such as public health, housing, etc] and judicial review in each individual branch of administrative law has tended to develop in a distinctive manner' (SA De Smith, 'Wrongs and Remedies in Administrative Law' (1952) 15 MLR 189, 189). A similar view about French administrative law was articulated by J Rivero, 'Existe-t-il un critère du droit administratif?' (1953) 59 *Revue du droit public et de la science politique en France et à l'étranger* 279.

<sup>70</sup> The analysis of distributed administration here draws freely on B Kingsbury, 'Three Models of "Distributed Administration": Canopy, Baobab, and Symbiote' (2015) 13 *International Journal of Constitutional Law* 478. It will be further developed and systematised in a book to be edited by Benedict Kingsbury and Richard B Stewart on global private and hybrid governance (in preparation).

global regulatory institutions in close detail. Legal scholarship has tended to neglect this need and focus overly on the central global institutions.

Although the term ‘distributed administration’ is one introduced by the GAL literature, it refers to an old and simple notion. The obvious and mundane-seeming idea in relation to inter-state global regulatory institutions is that they frequently depend on national (state) governments, including national regulatory agencies, to take the rule-making, decision-making, and implementation and enforcement steps necessary for an agreed international regulatory scheme to actually have operational effect. This ‘distributed administration’ structure has echoes of what in the 1930s Georges Scelle termed ‘*deboulement fonctionnel*’, where national agencies take on, in addition to the functions they were established for in national administration, a second overlapping set of functions as the administering agents of an international law rule.<sup>71</sup>

That older account has been somewhat reinforced by two features of modern practice in international regulatory bodies established by states. First, in many international regulatory network institutions, key national regulatory agencies are represented directly (rather than through the Foreign Ministry), so the standards set by the international bodies are likely closely to reflect the views and priorities of at least some of the major national agencies, and national agencies generally are more likely to have some degree of ownership of and commitment to these standards. Second, many national regulatory agencies have been created or re-engineered in accordance not with the demands of national politics but with ‘global scripts’. The regulatory practices they follow are inspired by, and receive credence and validation from, currents of ideas and practices that flow through global networks of professionals and through transnational business and civil society connections.

In practice, however, the agent/principal relationship of national regulatory institutions to international institutions in many cases may be rather attenuated or unreliable (and in the case of the most powerful states, the global body may operate as their agent). This attenuation is exactly what is called for by much national normative political theory, particularly democratic or sovereignty-oriented theories, as well as being an inherent consequence of design and structure. National agencies are constituted under national law, accountable to the national executive or legislative branch, in many cases dependent on the national government for resources and senior

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<sup>71</sup> G Scelle, *Précis de Droit des Gens: Principes et systématique* (Sirey, 1934) 10–12.

appointments, and dependent on national constituencies for political support in exercising regulatory powers. Moreover, in a large state, the primary interactions of national regulatory bodies may be with other regulatory bodies in the same state, rather than with foreign counterparts or with international bodies. Even in developing countries where the regulatory agencies have been designed and constituted in accordance with practices abroad (such as the creation of independent regulatory agencies to supervise privatised enterprises in sectors such as telecommunications, electricity, medicines or water supply), the actual operation of the agencies may take on a distinctly local or national style and prioritisation.

A special case of purpose-built distributed administration, however, is where an inter-governmental body and its most powerful members effectively press each state to establish and operate a specific form of national agency, facilitate supply of technical assistance and even financial support to help it operate, and aggressively monitor and report on the performance of the national agency and associated national government activities. A strong version of this is the Financial Action Task Force (FATF), which, in tandem with its multi-country regional affiliates, effectively requires each country (whether a member or non-member) to have a Financial Intelligence Unit (FIU), and it assesses (with site visits and peer review) and reports on each country's performance in relation to a set of detailed standards. The national FIUs in turn tend to share the basic orientations and regulatory priorities of the FATF, and seek to impose these through national regulations on banks, casinos, auction houses and other entities required to report suspicious financial transactions and to take special measures in relation to certain customers.

Distributed administration through national government bodies has considerable potential, as well as some hazards, as a means for improving quality and effectiveness in governance beyond the state. The local administrative site can be a focal point for contestation and resistance to global regulatory norms, as civil society actors ally with domestic authorities to evade or block implementation and enforcement. Entrenched political and economic interests, for example, may resist WTO norms, including GAL norms, for promoting market access by foreign firms. Alternatively, NGOs in a number of Latin American countries, in some cases allied with local pharmaceutical companies and national agencies, have resisted application of global patent protection standards to essential medicines.<sup>72</sup> Reliance by global regulators on domestic

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<sup>72</sup> Dreyfuss and Rodríguez-Garavito (eds), *Balancing Wealth and Health*.

administrations also readily accommodates pluralism, local flexibility, and the use of experimentalist governance forms to enable innovation and (where the appropriate global networking structures are in place) sharing of results and learning among different national agencies, with the possibility then of revision of standards and of processes such as certification and accreditation.

Private and hybrid global regulatory bodies typically rely on various types of distributed administrations other than national government entities; in a few cases, regulatory bodies established by states may do so as well. These distributed administrations may be separated into two categories: territorially-defined functional entities (examples of which are given in the next paragraph) or non-territorial functionally-defined entities (discussed in the paragraph following). Each of these categories may be further divided into member entities, endorsed or accredited non-member entities, and separately existing entities.

Some global private and hybrid institutions have territorially-defined national member bodies that participate in the international institution and also, in their national activities, give effect to its standards and decisions. Thus the International Olympic Committee provides for one (and only one) National Olympic Committee in each country, and the International Organization for Standardization (an immensely important body in setting product, process and interoperability standards in use worldwide) has in each country one (and only one) National Member Body. Endorsed or accredited but non-member territorial bodies include the Global Fund to Fight Malaria, Tuberculosis and HIV AIDS (a major global health-funding body), whose system requires one (and only one) Country Coordinating Mechanism in each country as a precondition for funding activities in that country. The World Anti-Doping Code structure requires a national anti-doping agency in each country, with some oversight from the World Anti-Doping Agency and subject to the jurisdiction of the Court of Arbitration for Sport.

Global regulatory institutions with membership that is functionally defined and not territorially structured are prevalent in issue areas with transnational or global business structures, relatively free flow of goods, services, money and information, and civil society or social entrepreneurial groups with transnational organisation or focus. These bodies (and others) may use functional, non-territorial distributed administration entities, whether non-profit or for profit, providing, for example, accreditation, validation, verification, certification, audit and related services to promote implementation and compliance with the global regulatory norms. International regulatory programmes established by states may also use such entities. One such structure is the

Clean Development Mechanism (CDM), established by the United Nations Framework Convention on Climate Change Conference of the Parties and administered by the CDM Executive Board. The CDM delegates power to private certifying companies, whose funding and profit depend in turn on the fee paid to them by the entities whose projects they certify. These companies are thus engaged in applying, interpreting and verifying compliance with the standards, including proposing new methodologies, which the CDM may then adopt. The ICANN similarly began with a primarily functional rather than territorial structuring, and administration by functional entities such as top-level domain name registries. But the increasing role of governments, territorially-defined governmental Internet regulation and nationally-characterised registries reflect global struggles as to whether the Internet will be regulated on a national basis or primarily on a functional basis.

Stronger global regulatory institutions seek to exercise some degree of discipline and control over less powerful entities forming part of their distributed administration systems. International sports bodies (such as FIFA—the Fédération Internationale de Football Association) require that the national government not interfere with the relevant national sports body, and they also require that the leadership, rules and decisions of each such body be established in accordance with both its own constitution and with standards set by the global institution. This can prevent political interference; but it can also result in sheltering a corruptly-governed national entity from discipline by domestic governments. The global sports regulatory bodies enjoy immense leverage because of their ability to exclude the national team, and players or clubs registered through the national system, from all international competitions and from sharing in revenues from webcasting and broadcasting agreements. This leverage operates, however, as cassation power—the global institution can refuse to approve a national entity, but it cannot easily itself restructure or remake that entity or name leaders to it, so that while coups and flagrant abuses can be reversed, chronic mismanagement, unproven corruption and mediocrity are all difficult to combat.

Supervision of non-member entities in distributed administration is possible where the entity is accredited by the global institution, as the threat of non-renewal provides leverage. The Forest Stewardship Council (a private multi-stakeholder global body that sets standards for sustainable forestry and issues certificates and labels for products from such forests) established its own specialist body, Accreditation Services International, to administer its accreditation system for validators and verifiers, and that body is now also used by other global regulatory institutions. The CDM Executive Board also has an elaborate system of certification of designated operating entities,

but the relatively low market value of carbon credits is likely increasingly to impose cost constraints on the rigour of this supervision. In each case, effective supervision and control by the global institution of the distributed administration entities depends on leverage. That is, leverage based on asymmetric dependence (enhanced where the global institution is effectively a monopoly or dominant and non-substitutable supplier of under-supplied goods sought by the entities), and deployment by the global institution of cost-effective means of monitoring, assessment and approval or sanctioning of performance. Global institutions lacking these attributes of leverage are unlikely to operate a tightly disciplined system of distributed administration.

Further, from the perspective of principal–agent models, entities with multiple principals spurring them in different directions are unlikely to be faithful agents of any one principal. This is a structural feature of many forms of distributed administration in global regulatory programmes. Local territorial entities, for example, are typically expected to answer to local constituencies, indeed to be embedded in the national polity, as well as the global institution. Where certifying entities are financed by the firms whose performance they certify, they may be more responsive to their interests than those of the global regulator.

In the most extreme cases, the principal–agent relation may be reversed; the distributed administration may be bigger and much more powerful financially and politically than the global institution, and may come to dominate it.

#### **IV. Private Governance**

The interaction between private governance and state power is pervasive and fundamental.<sup>73</sup> Partly this stems from: the dominance of states in the capacity for forcible action and coercive taxation; the dependence of most property rights and many organisational forms on state law; the centrality of states in most economies; the interests of states in significant markets and flows; and the interests of major market players in invoking state power in certain circumstances. Few major markets are sustained without regulation, and states (whether acting individually or in coordination) are major suppliers of territorial and some extra-territorial regulation.

This is the background in which the private governance of global elite sport has developed. Just as states have proved indispensable for sports governance in several key areas, at the same time

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<sup>73</sup> EF Lambin and T Thorlakson, ‘Sustainability Standards: Interactions between Private Actors, Civil Society, and Governance’ (2018) 43 *Annual Review of Environment and Resources* 369.



as sports bodies also need to hold states at arm's length on other issues, so too is there in global sports bodies both attraction to and repulsion of GAL principles and some binding GAL rules and mechanisms. On some issues, GAL is recognised to be essential as a means to head off intervention by state governments, or by national or regional courts interested in assuring human rights protections or upholding other public values and interests.

Independent review mechanisms where athletes can challenge decisions of sports governance bodies have increasingly been adopted to provide a managed and somewhat limited system of rights protection. The Court of Arbitration for Sport (CAS) is an intra-regime reviewing body, directed in part at the efficient functioning of the regime of which it is designated as a component—but following decisions of the Swiss Federal Tribunal, it maintains formal independence from the sports administrative bodies it reviews. In the background are other international and domestic courts and tribunals that might well assert the right and capacity episodically to review decisions of global sports bodies, particularly when implemented by their distributed administrations. The structural problem posed by trans-systemic activities involving fundamental rights or public interests is inescapable: how to combine or trade off the great advantages of cross-system coherence with the strongly felt imperatives of the forum's (or the local) legal order. Where this is not neatly solved by acceptable legislation, national or regional courts and tribunals forced to weigh in on the issue often look for procedural pathways. Comity, deference, proportionality and private international law doctrines such as public policy, the revenue rule and mandatory rules are among the many familiar techniques. A special kind of challenge for national public law, however, is how to treat global private orders applying to numerous individuals as a precondition for participation in a vocation, such as that of elite sport.

The case brought by Dutee Chand to CAS proved an important episode in the long struggles of the International Association of Athletics Federations (IAAF) to draft a rule specifying and limiting eligibility of athletes to compete in women's athletics events.<sup>74</sup> A longstanding practice is to separate women's events from men's events, in a simple binary structure. Under the IAAF's 2011 Regulation, only people characterised by pertinent national law as male could compete in men's events, and only people characterised by national law as female could compete in women's events. However, among people meeting this latter criterion, the 2011 Regulation disbarred from eligibility

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<sup>74</sup> *Dutee Chand v IAAF and AFI*, Court of Arbitration for Sport, Interim Award of 24 July 2015.

women with a level of naturally-occurring testosterone higher than a specified concentration. This hyperandrogenism regulation was the basis—in a crudely approximated way—for a 2014 decision by relevant sports authorities in India to exclude Dutee Chand from elite competition, both national and international.

Under contracts Dutee Chand (like all elite athletes) had been required to sign in order to take part in top-level athletics, recourse against any such decisions of the IAAF or the Athletics Federation of India (AFI) was to CAS in Switzerland.<sup>75</sup> The IAAF defended its regulation, but not aggressively, having for several years been well aware that making rules in this space was fraught, and that whatever approach it adopted was unlikely to prove compelling and durable with both social attitudes and scientific research changing rapidly. The Indian authorities by this time were backing Dutee Chand despite their previous conduct in declaring her ineligible (and mishandling the whole process with her). There was thus general relief that the matter could be handed over to CAS—and CAS and the parties seemed to understand its institutional role in that light, appointing an arbitral panel chosen carefully for the task.<sup>76</sup> This panel was equipped to—and did—act more boldly and with more of a public law sensibility than has been common in CAS cases. The panel determined that the Regulation discriminated between two different groups of women, and that as there was

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<sup>75</sup> Dutee Chand did not try to challenge the 2014 AFI decision excluding her from competition in the Indian courts. Had she done so, she would likely also have challenged the Sports Authority of India (SAI), a government entity that was directly involved in her exclusion but not subject to CAS jurisdiction. The administrative law basis, and quite possibly also the constitutional law basis, of her case would have been strong. The Indian courts would then have had to consider whether an overall policy of deferring to international sports bodies about sports rules, or more specifically the damage done to the obvious value of having a globally uniform rule on which athletes were eligible to compete (as at international events they would be competing with one another), should weigh (and if so, how much) on the other side of a human rights-based claim that an Indian national detrimentally affected by actions in India of a state agency (and a private agency under state oversight) ought to be able to vindicate her rights under Indian law. (This is somewhat comparable to the ECJ's approach in *Kadi II*.) The court might also have had to consider the effects of a clause (if there was one) in her athletics contract requiring all challenges to go to the CAS and excluding recourse to national courts. (And a privity issue—since the SAI is unlikely to be party to that contract.) Instead, the AFI allowed itself to be brought into the arbitration—along with the IAAF—even though this meant the laws of Monaco were part of the applicable law, and even though the arbitration clause did not necessarily reach the AFI. The SAI was clearly not bound by the arbitral award—but seems to have decided to align its conduct with the award. In effect, all parties were delegating to CAS the de facto authority (overlapping its de jure authority) to resolve the whole matter.

<sup>76</sup> The ad hoc arbitral panel chosen comprised Justice Annabelle Bennett, a very experienced judge of the Federal Court of Australia (President), Richard McLaren (a Canadian, and a very prominent and experienced figure in sports arbitration and energetically committed to anti-doping and anti-corruption) and Hans Nater (a well-known Swiss lawyer with much experience in commercial and sports law arbitration).

prima face discrimination, the burden of justifying it shifted to the IAAF. This burden was not met, as there was not enough evidence that the Hyperandrogenism Regulations as written

were necessary and proportionate to pursue the legitimate objective of organizing competitive female athletics to ensure fairness in athletic competition. Specifically, the IAAF has not provided sufficient scientific evidence about the quantitative relationship between enhanced testosterone levels and improved athletic performance in hyperandrogenic athletes.<sup>77</sup>

The operation of the rule was therefore suspended for two years, and Dutee Chand, who had already been accorded temporary eligibility by the panel early in the proceedings, became eligible during the suspension.

In 2018, the IAAF adopted a new rule that would exclude only runners at distances longer than Dutee Chand's sprint events, so her eligibility was effectively accepted, although the new rule was then challenged in CAS by Caster Semenya, a well-known South African athlete who was affected by it. Her application was rejected in April 2019—with much hesitation—by a differently constituted CAS Tribunal with overlapping membership to that which decided the *Dutee Chand* case.<sup>78</sup> The *Caster Semenya* tribunal concluded, by majority, that the more important flaws that had led to the earlier IAAF rule's being suspended had been overcome in the 2018 rule. As regards some of the distances covered it had doubts, however, and in effect it left open the possibility of further review as new evidence became available.<sup>79</sup> Caster Semenya challenged the CAS Award in the Swiss Federal Tribunal, which in 2019 ended a temporary stay in implementation of the 2018 IAAF Regulation pending its own consideration of the Award, as it doubted the challenge would succeed.

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<sup>77</sup> Citation *t/c. Dutee Chand v IAAF and AFI*, Court of Arbitration for Sport, Interim Award of 24 July 2015 para 547.

<sup>78</sup> The Chair of both Panels was Judge Annabelle Bennett. Dr Hans Nater was appointed by the IAAF in both cases. Whereas Dutee Chand appointed Richard McLaren, Caster Semenya appointed Judge Hugh Fraser, a nomination supported by Athletics South Africa (ASA). Hugh Fraser, who competed as a track athlete in the 1976 Olympics, had retired after a long career as a judge of the Ontario Court of Justice. ASA had objected to, and challenged, the appointment in the *Semenya* case of any members of the *Dutee Chand* panel, but the Board of the International Council of Arbitration for Sport rejected these challenges.

<sup>79</sup> *Caster Semenya and Athletics South Africa v IAAF*, Court of Arbitration for Sport, Award of 30 April 2019, dismissing (by majority) requests for arbitration. At paras 606–624 the Tribunal expressed doubts about the adequacy of evidence with regard to performance in 1500m and mile races; and also about the possible unfairness for DSD athletes taking medication to reduce endogenous testosterone below the prescribed level, if changes in their training regimes or other situations resulted in fluctuations above that level that they could not reasonably be expected to control.

This was classic administrative law: rule-making by one body, reviewed by another, focused on the evidentiary record, discrimination, justification and proportionality. The process was a kind of dialogue between the regulator and the review body. In both cases the athlete affected was present in person and participated (with language a barrier, however, for Dutee Chand), and many other interested persons (including other elite female athletes) found ways to make their voices heard in the review. The entire review process was almost indispensable for the IAAF as a means to obtain some legitimacy for the rule that eventually entered into force. Puzzlingly, however, while CAS focused in detail on the rule as drafted, and on the evidence in support of it (a rationality requirement), very little attention seems to have been given to the IAAF's rule-making process, either for the rule Dutee Chand challenged, or for the modified rule issued in 2018 and challenged by Caster Semenya. The consultation process used by the IAAF was not trumpeted—and there does not seem to have been any notice and comment structure. The CAS review process was demanding in its application of a proportionality standard in substantive review, but also rather limited with regard to rule-making process, in that it did not indicate (let alone de facto prescribe) for the IAAF what process it would have to follow in its rule-making. This may be contrasted to other review bodies, such as the WTO Appellate Body's statements about standard-setting processes (for Codex Alimentarius<sup>80</sup> and other bodies) in *Sardines*,<sup>81</sup> or the WTO Technical Barriers to Trade (TBT) Committee's prescriptions on the same matter.<sup>82</sup>

## V. Conclusion

At its zenith in the post-Cold War 1990s, global regulatory governance was a new articulation of global order, dependent on and layered over the existing political-realist and liberal-institutionalist models, and grappling in distinctive ways with core considerations of power, value conflicts and inequality. That period of North Atlantic pre-eminence and global regulatory governance, which combined American global predominance with European confidence in its post-national legal and

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<sup>80</sup> The Codex Alimentarius is a collection of standards, guidelines and codes of practice concerning food. These are adopted by the Codex Alimentarius Commission, a body with 188 member states and over 220 observer organisations. The Commission was established jointly by the UN Food and Agriculture Organization and the World Health Organization and has operated since 1963.

<sup>81</sup> *European Communities – Trade Description of Sardines* WTO DS231, Appellate Body Report of 26 September 2002.

<sup>82</sup> WTO, TBT Committee, Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement, G/TBT/9, 13 November 2000.

economic integration project, was fleeting and is long over. It has left an important politico-legal and institutional residuum; and some aspects of North Atlantic leadership and the 1990s–2000s global regulatory governance project retain a continuing vitality. However, many other locales and forces have substantial effects in contesting, and in shaping, the prevailing contours of global political and social order, the terms in which it is enunciated (beyond the vital fundamentals articulated in the UN Charter), and the major influences on and in it. As has been true in the past, global order in its more demanding or aspirational dimensions is once again multivalent, contested and uncertain. This chapter has reflected on the nature, roles and limits of global administrative law in a period in which the UN Charter order and the subsisting North Atlantic global governance legacy co-exist with re-assertive nationalism and even deglobalisation in the North Atlantic region, a power shift away from that region, new ordering forms such as the Chinese infrastructure-based Belt and Road Initiative, and a tilt in US practice toward transactional governance and against institutionalised governance and multilateral treaties.

Headwinds, crosswinds and choppy seas now characterise the inter-state environment in which GAL precariously operates. Yet states and their leaders have strong reasons to undertake intergovernmental governance initiatives, including to reinvigorate economic activity at times of stagnation, manage geopolitical issues and defend their own interests, in matters such as: anti-terrorism preoccupations; migration and infectious diseases crises; partly-coordinated state-centered efforts to use criminal law to combat illicit activities such as illegal drugs, illegal fishing, human trafficking and intellectual property violations; rising inter-state military-security tensions; struggles over climate/energy policy; and growing restiveness associated with human vulnerability, inequality and disrespect. Moreover, the already-existing governance structures have largely been maintained rather than abolished or superseded. While inter-governmental creation of new global legal institutions or major governance agreements was largely frozen from 2016 in the absence of US support, the leaders of most other states are well aware that cooperative international regulatory governance can enhance the effectiveness of their regulatory programmes, increasing the welfare of their members and, often, some broader constituencies as well. States establish and support global regulatory regimes in order to build markets, redress market failures, promote security and otherwise advance the welfare of their citizens under conditions of global interdependence where purely domestic action would fall short. This was the logic (certainly contested) of the Comprehensive and

Progressive Agreement for Trans-Pacific Partnership, and of Japan's Abe-era steps toward a greater leadership role.<sup>83</sup> A similar logic drives the creation of many private and hybrid regulatory bodies.

Global regulatory governance in multiple forms accordingly seems certain to endure, and to deepen in some areas while retracting in others. Whether it features significant elements of GAL depends in part on whether inter-state patterns tip heavily toward the transactional (and non-institutional) or veer toward legal governance through institutions. This is a major question for world political ordering in relation both to the US and to China. For other states, however, the pursuit of institutionalised governance may become part of a strategy to balance against transactional and hub-and-spoke models in which their interests fare poorly as against those of much more powerful counterparts. In any case, private governance in institutionalised forms is likely to grow in importance, at least in the subject areas and with the forms acceptable to major open-but-authoritarian state systems.<sup>84</sup> It thus remains imperative both to understand the roles of legal and organisational as well as political features in governance, and to assess them as targets of bitter critique and as potential sources of normative value.

Insofar as global administrative law is a functional response to 'the emergence of global governance and the corresponding need to regulate it',<sup>85</sup> the practice of GAL may be expected to continue. Explaining GAL in these politico-economic terms suggests a basic capitalist logic: that the key drivers are the maximisation by each actor of achievement of its own (self-defined) interests within the constraints of the prevailing constellation of power. But global order is almost equally concerned with identities and values—including values conflicts and cultural diversity—and with the implications of humiliation and powerlessness and dramatic but shifting gradients of power.

A multiplicity of normative justifications for developing accountability and responsiveness has received some support: achieving the substantive objects of the institution(s); securing rights and rule of law; overcoming improper disregard of the various affected publics and persons; mitigating injustice or promoting substantive justice; nudging the welfare and distributional consequences of

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<sup>83</sup> B Kingsbury et al (eds), *Megaregulation Contested: Global Economic Governance After TPP* (Oxford University Press, 2019).

<sup>84</sup> D Guttman et al., 'Environmental Governance in China: Interactions between the State and "Nonstate Actors"' (2018) 220 *Journal of Environmental Management* 126.

<sup>85</sup> Benvenisti, *The Law of Global Governance* 25.

the global regulatory bodies' decisions.<sup>86</sup> To some degree GAL has been viable because it has been possible to agree on some procedural standards even without agreement on the normative justifications for them. A second source of support for GAL is the wide recognition that it is and needs to be defeasible. In particular settings (not all settings), some or all components of GAL may be counter-productive; embrace of GAL principles and mechanisms is likely to produce losers as well as winners; the winners are likely to be those who are already powerful or wealthy; and the whole GAL enterprise may do more to legitimate the unjust than it does to promote substantive justice. Even from such viewpoints, however, GAL provides valuable lenses from which to critique existing institutional arrangements and demand reform.

The academic proponents of GAL have not generally been suspected of charting a decisive political course at the outset—indeed the absence of a clear political course on such normative matters, or of a weighty moral keel to keep the vessel upright and on track, was one of the charges levelled in some of the early critiques of GAL. (Another was that the proceduralist terminology and globally-inclusive rhetoric of GAL masked its likely course—variously supposed to be liberal diversionism from fundamental injustices,<sup>87</sup> neo-liberal corporate-capitalist domination, the shoring up of American power and legalised influence, or a Western ideology for defence against the rise of the rest.) At a time of plurality of power as well as style, culture and interest, the open-textured and somewhat indistinct political valence of GAL may prove a vital source of buoyancy, as much larger forces that express in shifting responses to globalisation increasingly strain, negate and remake international ordering in the 2020s.

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<sup>86</sup> RB Stewart, 'The Normative Dimensions and Performance of Global Administrative Law' (2015) 13 *International Journal of Constitutional Law* 499; M Savino, 'What if Global Administrative Law is a Normative Project?' (2015) 13 *International Journal of Constitutional Law* 492.

<sup>87</sup> J Linarelli, M Salomon and M Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford University Press, 2018).