THE EMERGENCE OF GLOBAL ADMINISTRATIVE LAW

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II

THE STRUCTURE OF THE GLOBAL ADMINISTRATIVE SPACE

The conceptualization of global administrative law presumes the existence of global or transnational administration. We argue that enough global or transnational administration exists that it is now possible to identify a multifaceted "global administrative space" (a concept to which we will return shortly), populated by several distinct types of regulatory administrative institutions and various types of entities that are the subjects of regulation, including not only states but also individuals, firms, and NGOs. But this view is certainly contested. Many international lawyers still view administration largely as the province of the state or of exceptional interstate entities with a high level of integration, such as the European Union. In this view, which is complemented by what has hitherto been the largely domestic or E.U. focus of administrative lawyers, international action might coordinate and assist domestic administration, but given the lack of international executive power and capacity, does not constitute administrative action itself. This view, however, is contradicted by the rapid growth of international and transnational regulatory regimes with administrative components and functions. Some of the most dense regulatory regimes have arisen in the sphere of economic regulation: the OECD networks and committees, the administration and the committees of the WTO, the committees of the G-7/G-8, structures of antitrust cooperation,[6] and financial regulation performed by, among others, the IMF, the Basle Committee[7] and the Financial

6. On antitrust, see Eleanor Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 925-32 (2003).

7. For analysis of the Basle Committee, see David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281, 287-91

Action Task Force. Environmental regulation is partly the work of non-environmental administrative bodies such as the World Bank, the OECD, and the WTO, but increasingly far-reaching regulatory structures are being established in specialized regimes such as the prospective emissions trading scheme and the Clean Development Mechanism in the Kyoto Protocol. Administrative action is now an important component of many international security regimes, including work of the U.N. Security Council and its committees, and in related fields such as nuclear energy regulation (the IAEA) or the supervision mechanism of the Chemical Weapons Convention. Reflection on these illustrations immediately indicates that the extraordinarily varied landscape of global administration results not simply from the highly varied regulatory subject areas and correlative functional differentiations among institutions, but also from the multi-layered character of the administration of global governance. In this section we seek to provide some conceptual tools for organizing the analysis of these diverse phenomena by identifying the different structures and subjects of global administration and by positing the notion of a global administrative space.

This enterprise in some measure builds on conceptions of international administration and international administrative law that developed from the mid-19th century and became prevalent in the 1920s and 1930s. The idea of analyzing transnational governance as administration subject to distinctive administrative law principles appears, for instance, in the work of late-19th century social reformers and institution builders, as in Lorenz von Stein's conception of international public health work in administrative terms.[8] This administrative approach was spurred by the rise of international regulatory institutions, "international unions," dealing with such matters as postal services, navigation, and telecommunications, sometimes with significant powers of secondary rule-making that did not require national ratification to be legally effective.[9] The cooperation of domestic administrative actors that took place in the framework of these unions, and the centrality of domestic actors for the success of the regimes in question, led some authors to adopt broad notions of "international administration" that included both international institutions and domestic ad-

(1998); *see also* David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547 (2005).

8. Lorenz von Stein, *Einige Bemerkungen über das internationale Verwaltungsrecht*, 6 JAHRBUCH FÜR GESETZGEBUNG, VERWALTUNG UND VOLKSWIRTSCHAFT IM DEUTSCHEN REICH 395 (1882). For discussion of the early history of the field, see José Gascón y Marin, *Les transformations du droit administratif international*, 34 RECUEIL DES COURS 4, 7-15 (1930); and more recently, CHRISTIAN TIETJE, INTERNATIONALISIERTES VERWALTUNGSHANDELN (2001). On Lorenz von Stein, see FRANK SCHULZ-NIESWANDT, DIE LEHRE VOM ÖFFENTLICHEN GESUNDHEITSWESEN BEI LORENZ VON STEIN (1989).

9. *See* Paul S. Reinsch, *International Administrative Law and National Sovereignty*, 3 AJIL 1 (1909); *see also*, Paul Négulesco, *Principes du droit international administratif*, 51 RECUEIL DES COURS 579 (1935). For a central work developing a conflict of laws approach to administrative law on trans-border issues, see KARL NEUMEYER, 4 INTERNATIONALES VERWALTUNGSRECHT (1936).

ministrative actors when taking actions with transboundary significance.[10] These comprehensive approaches, along with the whole idea of administrative elements in international affairs, faded away in most standard international law texts after 1945,[11] although notable exceptions are to be found in the works of Wilfred Jenks, Soji Yamamoto, and a few others.[12] Our conceptualization of global administration seeks to revitalize the broader vision that lay behind those earlier approaches.

A. Five Types of Global Administration

Five main types of globalized administrative regulation are distinguishable: (1) administration by formal international organizations; (2) administration based on collective action by transnational networks of cooperative arrangements between national regulatory officials; (3) distributed administration conducted by national regulators under treaty, network, or other cooperative regimes; (4) administration by hybrid intergovernmental–private arrangements; and (5) administration by private institutions with regulatory functions. In practice, many of these layers overlap or combine, but we propose this array of ideal types to facilitate further inquiry.[13]

10. *See* Pierre Kazansky, *Théorie de l'administration internationale*, 9 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 353, 360 (1902); *see also* Négulesco, *supra* note 9, at 589-593. George Scelle, in the first two volumes of his *Précis de droit des gens* (1932 and 1934), sketched aspects of such an approach, focusing on the double role of national governmental agencies as both national actors and administrators of international action. Scelle had intended to develop this approach in a third volume on international administrative law. *See* SCELLE, 1 PRÉCIS DE DROIT DES GENS 69 (1932).

11. Notions such as "international administrative unions" continue to be recognized, *see, e.g.*, Rüdiger Wolfrum, *International Administrative Unions*, *in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1041 (Rudolf Bernhardt ed., 1995). The "administrative tribunals" of international organizations, and associated review mechanisms, have long been concerned with a narrow but important aspect of international administration relating to the rights of staff members of these organizations and to general issues concerning the international civil service. The significant role these tribunals may play in certain cases is exemplified by the decision of the *Administrative Tribunal of the International Labour Organization in Bustani v. Organisation for the Prohibition of Chemical Weapons*, Judgment No. 2232, July 16, 2003, *available at* http://www.ilo.org/public/english/tribunal/fulltext/2232.htm. The Tribunal upheld elements of José Bustani's complaint about his dismissal from the post of Director-General of the OPCW, a dismissal that followed confrontations with the United States about inspections of chemical facilities under the OPCW regime; *see also* Ana Stani, *Removal of the Head of a Multilateral Organization—Independence of International Organization and Their Secretariat—Political Interference by Member State in the Operation of International Organization*, 98 AJIL 810 (2004).

12. C. WILFRED JENKS, THE PROPER LAW OF INTERNATIONAL ORGANISATIONS (1963); Soji Yamamoto, *Kokusai gyoseiho no sonritsu kiban* ("The Positive Basis of International Administrative Law"), *in* 76:5 KOKUSAIHO GAIKO ZASSHI ("THE JOURNAL OF INTERNATIONAL LAW AND DIPLOMACY") 1 (1967); *see also* INTERNATIONAL ADMINISTRATION: ITS EVOLUTION AND CONTEMPORARY APPLICATIONS (Robert S. Jordan ed., 1971); and Hugo J. Hahn, *Control Under the Euratom Compact* 7 A. J. COMP. L. 23 (1958)

13. On the combination of different layers in E.U. administration see Sabino Cassese, *European Administrative Proceedings*, 68 L. & CONTEMP. PROBS. 21 (Winter 2004); *see also* Giacinto della Cananea, *The European Union's Mixed Administrative Proceedings*, 68 L. & CONTEMP. PROBS. 197 (Winter 2004); Edoardo Chiti, *Administrative Proceedings Involving European Agencies*, 68 L. & CONTEMP. PROBS. 219 (Winter 2004).

In *international administration*, formal inter-governmental organizations established by treaty or executive agreement are the main administrative actors. A central example is the U.N.Security Council and its committees, which adopt subsidiary legislation, take binding decisions related to particular countries (mostly in the form of sanctions), and even act directly on individuals through targeted sanctions and the associated listing of persons deemed to be responsible for threats to international peace. Similarly, the United Nations High Commissioner for Refugees has assumed numerous regulatory and other administrative tasks, such as conducting refugee status determinations and administering refugee camps in many countries. Other examples include the World Health Organization's assessing global health risks and issuing warnings, the Financial Action Task Force's assessing policies against money-laundering and sanctioning violations by specific states of the standards it has adopted, the compliance mechanisms of the Montreal Protocol under which subsidiary bodies of an administrative character deal with non-compliance by Parties to the Protocol, and the World Bank's setting standards for "good governance" for specific developing countries as a condition for financial aid.

Transnational networks and coordination arrangements, by contrast, are characterized by the absence of a binding formal decisionmaking structure and the dominance of informal cooperation among state regulators. This horizontal form of administration can, but need not, take place in a treaty framework. For example, the Basle Committee brings together the heads of various central banks, outside any treaty structure, so they may coordinate on policy matters like capital adequacy requirements for banks. The agreements are non-binding in legal form but can be highly effective. A different example is the pressure WTO law exerts for mutual recognition of regulatory rules and decisions among member states, thus establishing a strong form of horizontal cooperation through which regulatory acts of one state automatically gain validity in another.[14] National regulators also develop, on a bilateral basis, arrangements for mutual recognition of national regulatory standards or conformity procedures and other forms of regulatory coordination, such as regulatory equivalence determinations.[15]

In *distributed administration*, domestic regulatory agencies act as part of the global administrative space: they take decisions on issues of foreign or global concern. An example is in the exercise of extraterritorial regulatory jurisdiction, in which one state seeks to regulate activity primarily occurring elsewhere. In some circumstances, such regulation is subject to substantive limitations and even procedural requirements established internationally, as has become evident from the WTO Appellate Body's 1998 ruling in *United States—Import*

14. *See* Sidney Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, 54 ADMIN. L. REV. 435, 453-57 (2002).

15. *See* Kalypso Nicolaidis and Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, 68 L. & CONTEMP. PROBS. 251 (Summer/Autumn 2005).

Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtle).[16] But even domestic administration without immediate extraterritorial effects may be part of the global administrative space, especially when it is charged with implementing an international regime. National environmental regulators concerned with biodiversity conservation or greenhouse gas emissions are today often part of a global administration, as well as part of a purely national one: they are responsible for implementing international environmental law for the achievement of common objectives, and their decisions are thus of concern to governments (and publics) in other states, as well as to the international environmental regime they are implementing. Arrangements for mutual recognition of standards and certifications between particular national regulators might also have some of the qualities of distributed administration, although opinions vary sharply as to how best to understand the mosaic of mutual recognition agreements and comparable cooperative approaches.

A fourth type of global administration is *hybrid intergovernmental-private administration*. Bodies that combine private and governmental actors take many different forms and are increasingly significant. An example is the Codex Alimentarius Commission, which adopts standards on food safety through a decisional process that now includes significant participation by non-governmental actors as well as by government representatives, and produces standards that gain a quasi-mandatory effect via the SPS Agreement under WTO law. Another example is the Internet address protocol regulatory body, the Internet Corporation for Assigned Names and Numbers (ICANN), which was established as a non-governmental body, but which has come to include government representatives who have gained considerable powers, often via service on ICANN's Governmental Advisory Committee, since the 2002 reforms. Determining how administrative law can be shaped or made operational in relation to such bodies is difficult. The involvement of state actors, subject to national and international public law constraints, alongside private actors who are not, and who may indeed have conflicting duties such as commercial confidentiality, threatens a very uneven and potentially disruptive set of controls. The challenge is nevertheless an important one, and sufficiently distinctive that we treat these hybrid bodies as a separate category.

Fifth and finally, many regulatory functions are carried out by *private* bodies.[17] For example, the private International Standardization Organization (ISO) has adopted over 13,000 standards that harmonize product and process rules around the world. On a smaller scale, NGOs have come to develop standards and certification mechanisms for internationally traded products, for ex-

16. WTO Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R Doc. No. 98-3899 (Oct. 12, 1998) [hereinafter *Shrimp-Turtle*]; *see* discussion *infra* Part III.C.3; *see also* United States—Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248/AB/R (2003).

17. *See generally* THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002).

ample fair-trade coffee and sustainably harvested timber. Business organizations have set up rules and regulatory regimes in numerous industries, ranging from the Society for Worldwide Interstate Financial Telecommunications (SWIFT) system for letters of credit, to Fair Labor Association standards for sports apparel production. In national law, such private bodies are typically treated as clubs rather than as administrators, unless they exercise public power by explicit delegation. But in the global sphere, due to the lack of international public institutions, they often have greater power and importance. Their acts may not be much different in kind from many non-binding intergovernmental public norms, and may often be more effective. We cautiously suggest that the margins of the field of global administration be extended to the activities of some of these non-governmental bodies. The ISO provides a good example: not only do its decisions have major economic impacts, but they are also used in regulatory decisions by treaty-based authorities such as the WTO. An example of a private regulatory body that is less connected with state or inter-state action is the World Anti-Doping Agency, an organization connected with the International Olympic Committee, which applies careful due process standards in dealing with athletes suspected of using banned substances, culminating in the review system of the private International Court of Arbitration for Sport. Significant normative and practical problems arise in proposals to extend administrative law approaches to such bodies, although these problems are context-specific rather than uniform. We believe it is desirable to study such bodies as part of global administration, and to trace similarities as well as differences in mechanisms of accountability developed for public and private bodies.

B. The Subjects of Global Administration: States, Individuals, Corporations, NGOs, and Other Collectivities

Breaking down the domestic–international dichotomy may have further repercussions in the way we think about the *subjects* of global administration. Traditionally understood, the subjects of international law are states. Correlatively, global governance is the governance of states' behavior with regard to other states. Increasingly however, regulatory programs agreed to at the international level by states are effectuated through measures taken by governments at the domestic level to regulate private conduct. Coordinated regulation of private conduct is often the very purpose of the international scheme in fields such as regulation of pollution or financial practices. In classical theory the domestic regulatory measures are the implementation by states of their international obligations. Private actors are formally addressed only in the implementation stage, and that is solely a domestic matter. But the real addressees of such global regulatory regimes are now increasingly the same as in domestic

law: namely, individuals (as both moral agents and economic and social actors),[18] and collective entities like corporations and, in some cases, NGOs.[19]

This characterization is most powerful when international bodies make decisions that have direct legal consequences for individuals or firms without any intervening role for national government action. Examples include certification of CDM projects by the Kyoto Protocol Clean Development Mechanism, UNCHR determinations of individuals' refugee statuses, and certification of NGOs by U.N.agencies as being specifically authorized to participate in their procedures. The notion that private actors are the subjects of global regulation is also evident in much of the regulatory governance accomplished through networks, wherein the national regulatory officials perform both an international-level role, deciding collectively with counterparts on regulatory requirements applicable to private firms (for example, commercial banks), and a domestic-level role in implementing and enforcing those same norms with respect to the regulated firms within their jurisdiction. This is even more evident in the case of private governance arrangements such as ISO, wherein most standards are designed for implementation by private firms, even if they may also be implemented in national law.

In other situations, the aim of the international regime is to achieve desired changes in private conduct by imposing regulatory obligations on states and supervising the manner in which states regulate the private actors subject to their jurisdiction. These arrangements are similar to models of multi-level governance that have been developed to understand the European Union and the "European administrative space."[20] Examples include the Convention on International Trade in Endangered Species (CITES), the Montreal Protocol on ozone layer depletion, the Basel Convention on hazardous wastes, and the Conventions of the International Labour Organization (ILO). The international administrative bodies responsible for promoting and supervising implementation often play a major regulatory role, outside of and contrary to the classical theory. In many instances, the administrative bodies in question have assumed a mixed public-private governance structure in which firms and NGOs participate along with representatives of states; this builds on the longstanding approach exemplified by the tripartite governance structure of the ILO based on national delegations representing governments, employers, and labor.

In yet other areas, states are the primary subjects of global regulation, which is undertaken to protect or benefit distinct groups of individuals, private market

18. *See* Stewart, *supra* note 5. The argument that individuals are the ultimate subjects of legal regulation has long been made by one liberal tradition of international lawyers. *See, e.g.*, J.L. Brierly, *Règles générales du droit de la paix*, 58 RECUEIL DES COURS 5, 47-52 (1936).

19. For an early approach along such lines, see Négulesco, *supra* note 9, at 604-05. For tendencies towards a similar conceptualization in the European Union, including by E.U. courts, see della Cananea, *supra* note 13.

20. *See* Martin Shapiro, *The Institutionalization of European Administrative Space*, *in* THE INSTITUTIONALIZATION OF EUROPE 94 (Alec Stone Sweet et al. eds., 2001); DER EUROPÄISCHE VERWALTUNGSRAUM (Heinrich Siedentopf ed., 2004).

actors, or social interests. Examples include the "good governance" and rule of law standards or the environmental standards imposed by agencies such as the World Bank as conditions for financial assistance to developing countries, including requirements for environmental impact assessments for development projects.

Finally, in some areas of regulatory administration, such as international security, the classical view that global governance is directed at the behavior of governments toward other governments, rather than toward private actors, still has great force. However, even here the growing privatization of international security activities, like the growing use of private contractors to carry out traditional state functions in situations such as the military occupation of Iraq, is beginning to erode the classical view.[21]

These various examples suggest that differences in the subjects of global administrative regimes—in some cases individuals or firms, in others both states and market actors, in others states with distinct groups of individuals, market actors, NGOs, or social interests as the beneficiaries, and in still others states alone—might depend on differences in the subject area, the objectives of regulation, and the functional characteristics of the regulatory problem. This is a significant issue for future research.

C. A Global Administrative Space?

This brief survey of structures and examples indicates that important regulatory functions are no longer exclusively domestic in character and have become significantly transnational, or global. This is especially true in the area of rulemaking, in which genuinely international action combines with action by national regulators in networks of global coordination to supplement, and often determine, domestic action, thus penetrating deeply into domestic regulatory programs and decisions. Further, in more and more cases global decisions directly affect individuals or firms, as for example in U.N. Security Council decisions on sanctions and anti-terrorism measures, in UNHCR activities, in the Clean Development Mechanism under the Kyoto Protocol, or in the quasi-automatic incorporation in domestic law of decisions by the Financial Action Task Force.

Yet this does not conclusively answer the question whether a distinct global administrative space should be recognized, or whether it is still possible and indeed preferable to maintain the classical dichotomy between an administrative space in national polities on the one hand and inter-state coordination in global governance on the other. It is true that the global and the domestic remain po-

21. *See* Anna Leander, *Conditional Legitimacy, Reinterpreted Monopolies: Globalisation and the Evolving State Monopoly on Legitimate Violence*, COPRI Working Paper 2002/10, 18, *at* http://www.ciaonet.org/wps/lea04.pdf; Elke Krahmann, *Private Firms and the New Security Governance*, 5 CONFLICT, SECURITY AND DEVELOPMENT (forthcoming 2005); Peter W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. OF TRANSNAT'L L. 521 (2004).

litically and operationally separate for many purposes. Nonetheless, the two realms are already closely intertwined in many areas of regulation and administration. The rise of regulatory programs at the global level and their infusion into domestic counterparts means that the decisions of domestic administrators are increasingly constrained by substantive and procedural norms established at the global level; the formal need for domestic implementation thus no longer provides for meaningful independence of the domestic from the international realm. At the same time, the global administrative bodies making those decisions in some cases enjoy too much de facto independence and discretion to be regarded as mere agents of states. Weighing the significance and trajectory of this interconnectedness is a matter of appreciation, on which views differ. In our view, international lawyers can no longer credibly argue that there are no real democracy or legitimacy deficits in global administrative governance because global regulatory bodies answer to states, and the governments of those states answer to their voters and courts. National administrative lawyers can no longer insist that adequate accountability for global regulatory governance can always be achieved through the application of domestic administrative law requirements to domestic regulatory decisions. We argue that current circumstances call for recognition of a global administrative space, distinct from the space of inter-state relations governed by international law and the domestic regulatory space governed by domestic administrative law, although encompassing elements of each.[22]

This multifaceted administrative space incorporates the five different types of international or transnational administrative bodies described above. In this space, states, individuals, firms, NGOs, and other groups or representatives of domestic and global social and economic interests who are affected by, or otherwise have a stake in, global regulatory governance, interact in complex ways. The space is characterized by distinct features and dynamics that call for independent positive and normative study and theorizing. These efforts must necessarily build on, but at the same time transcend, both traditional international law, and domestic administrative law—an insight foreshadowed in writings on international administrative law in the early 20th century, but neglected since.[23] The relative autonomy and distinct character of this global administrative space, and its increasingly powerful decisionmaking bodies, lead us to argue for the recognition and further development of new and distinct principles and mechanisms of accountability through a global administrative law. The practical result of such developments is that lawyers representing governments, international organizations, firms, individuals, and NGOs concerned with a growing proportion of regulatory decisions will have to become familiar with the institutions and activities within the global administrative space and participate in the building of a global administrative law to help govern that space.

22. On similar approaches in E.U. jurisprudence, see Cassese, *supra* note 13, at 34-36.

23. For an emphasis on the roots of international administrative law in both public law and international law, see, e.g., Négulesco, *supra* note 9, at 592-99; *see also* Kazansky, *supra* note 10, at 365.

Our espousal of the notion of a global administrative space is the product of observation, but it inevitably has potential political and other normative implications. On the one hand, casting global governance in administrative terms might lead to its stabilization and legitimation in ways that privilege current powerholders and reinforce the dominance of Northern and Western concepts of law and sound governance. On the other hand, it might also create a platform for critique. As the extent of global administrative government becomes obvious (and framing global regulation in traditional terms of administration and regulation exposes its character and extent more clearly than the use of vague terms such as governance),[24] the more resistance and reform may find points of focus. Thus, from the perspective of smaller developing countries, global regulatory institutions including the WTO, IMF, World Bank, and U.N. Security Council might already appear to be "administering" them at the bidding of the industrialized countries, which are generally subject to far less intrusive external regulation. Confronting these issues in administrative terms may highlight the need to devise strategies for remedying unfairness associated with such inequalities.

III

THE EMERGING GLOBAL ADMINISTRATIVE LAW

A. The Scope of Global Administrative Law

Understanding global governance as administration allows us to recast many standard concerns about the legitimacy of international institutions in a more specific and focused way. It provides useful critical distance on general, and often overly broad,[25] claims about democratic deficits in these institutions. It also shifts the attention of scholars of global governance to several accountability mechanisms for administrative decisionmaking, including administrative law, that in domestic systems operate alongside, although not independently from, classical democratic procedures such as elections and parliamentary and presidential control. This inquiry usefully highlights the extent to which mechanisms of procedural participation and review, taken for granted in domestic administrative action, are lacking on the global level. At the same time it invites development of institutional procedures, principles, and remedies with objectives short of building a full-fledged (and at present illusory) global democracy.

In this light, global administrative law draws together different areas of law that pertain to global administration but have long been treated separately, of-

24. *See* Michel Foucault, *Governmentality*, *in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87 (Graham Burchell et al. eds., 1991); *see also* Christian Joerges, *The Turn to Transnational Governance and its Legitimacy Problems: The Examples of Standardization and Food Safety*, *at* http://www.law.nyu.edu/kingsburyb/spring04/globalization/Joerges%20Draft4%20%20g%20Feb%2004.doc.

25. *See* Andrew Moravcsik, *Is there a 'Democratic Deficit' in World Politics? A Framework for Analysis*, 39 GOVERNMENT AND OPPOSITION 336 (2004).