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Whose Administrative Law is it Anyway? How Global Norms Reshape the Administrative State

Daphne Barak-Erez[†] & Oren Perez^{††}

The emergence of global norms of administrative law reshapes the administrative state. In many areas, covering diverse topics such as trade, financial regulation, public health, and the environment, various international agencies have acquired increasing influence over domestic regulatory processes. The integration with the global arena requires the state to forgo some of its regulatory powers. This Article focuses on the normative challenges posed by this new reality. Part I explicates the way in which the argument presented differs from the global administrative law literature. Whereas global administrative law studies the meta-norms that regulate the activities of global administrative bodies, we focus on the way in which international norms reshape decision-making processes within domestic bureaucracies. This Article develops an analytical schema that captures the distinct impacts of global administrative law on the domestic level. This schema distinguishes between three forms of influence: the substitution of domestic administrative discretion by global standards, the emergence of universal standards of administrative due process, and the globally inspired transference of enforcement responsibilities. Part II maps the various mechanisms through which transnational regulatory processes intervene in the local realm, reshaping the contours of domestic administrative law. The Article takes a pluralistic approach by highlighting the diverse sources and paths through which global law influences the domestic realm. Thus we focus both on the influence of the WTO system, as reflected in the three recent rulings against the U.S. (the *Tuna-Labeling*, *Clove-Cigarettes*, and *Country of Origin Labeling* (“COOL”) *Requirements* cases) and on the influence of private transnational institutions such as the International Organization for Standardization, certification bodies such as Social Accountability International (“SAI”), and regulatory scientific institutions such as the International Commission on Non-Ionizing Radia-

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tion Protection (“ICNIRP”). Part III proceeds to examine the normative challenges posed by these transnational regulatory processes. We start by exploring the hidden ideological agendas of this new global normative body, highlighting especially its neo-liberal, capitalist origins. We then move to discuss the problem of fragmented accountability regimes. These reflections question the legitimacy of the new body of globalized administrative law and point to the need to adapt our democratic conceptions and practices to this new reality. In this context, our approach steers a middle course between the extremes of sovereign exceptionalism and global constitutionalism, focusing on the potential of administrative law for democratic innovativeness.

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Introduction

Can a Government require cigarette manufacturers to sell their tobacco products in “plain” packages, not bearing their trademarks? Drawing on overwhelming evidence that the removal of trademarks could reduce smoking rates among the next generation of smokers, who are not yet “brand-loyal,”¹ Australia has recently enacted the *Tobacco Plain Packaging*

1. See Crawford Moodie et al., *Young People’s Perceptions of Cigarette Packaging and Plain Packaging: An Online Survey*, 14(1) NICOTINE & TOBACCO RES. 98 (2012); Harry

Act, which requires cigarettes packages to be sold in drab dark brown packages not bearing any trademarks other than the brand name of the tobacco company.² This regulatory intervention reflects the traditional model of administrative law, which assumes that governments and their administrative agencies have broad discretion to shape and implement policies, using a wide array of regulatory choices. In fact, however, various global processes have significantly curtailed this regulatory freedom. Tobacco manufacturers argue, in this case, that the new initiative of the Australian government consists of possible breaches of Australia's international obligations under the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights, the Technical Barriers to Trade ("TBT") Agreements, as well as under Australia's Bilateral Investment Treaty ("BIT") with Hong Kong. In November 2011, Philip Morris Asia Limited filed a claim against Australia under the Australia-Hong Kong bilateral investment treaty, alleging that the Plain Packaging Law expropriates intellectual property.³ More recently, Ukraine,⁴ Honduras,⁵ and the Dominican Republic⁶ all initiated proceedings against Australia in the WTO, arguing that Australia's measures erode the protection of intellectual property rights and impose severe restrictions on the use of validly registered trademarks.

While the Australian government still struggles to justify this legislation against criticism based on international economic law, a recent tragic accident in a textile factory in Pakistan calls for a reevaluation of the impact of transnational norms on domestic administrative law from a different perspective. On September 12, 2012, a fire swept through Ali Enter-

Clarke & David Prentice, *Will Plain Packaging Reduce Cigarette Consumption?* (Apr. 18, 2012), available at <http://ssrn.com/abstract=2042296>.

2. *Tobacco Plain Packaging Act 2011* (Cth) ss 19, 20 (Austl.) [hereinafter *Plain Packaging Law*]; see Andrew D. Mitchell & David M. Studdert, *Plain Packaging of Tobacco Products in Australia: A Novel Regulation Faces Legal Challenge*, 307(3) *JAMA* 261 (2012); Simon Chapman, *Legal Action by Big Tobacco Against the Australian Government's Plain Packaging Law*, 21(2) *TOBACCO CONTROL* 80 (2012).

3. In a remarkable move, this Hong Kong-based subsidiary of the Philip Morris conglomerate purchased a 100% stake in Philip Morris [Australia] Limited only months before the legislation was introduced, presumably to pave the way for this claim. Mitchell & Studdert, *supra* note 2. In addition, Philip Morris, British American Tobacco, Imperial Tobacco, and Japan Tobacco filed constitutional challenges to the legislation, focusing on section 51(xxxi) of the Australian Constitution, which is generally interpreted as providing just compensation to the owner of property that the government acquires. *Id.*

4. Establishment of a Panel, *Australia - Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434 (Sept. 28, 2012). The legal challenge against the law has been rejected, however, by the Australian High Court. See *British American Tobacco Australasia Ltd. v Commonwealth* [2012] HCA 30 (Austl.).

5. Request for Consultations by Honduras, *Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435 (Apr. 4 2012).

6. Request for Consultations by the Dominican Republic, *Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS441 (July 18, 2012).

prises textile factory in Karachi, trapping hundreds of workers in a building with barred windows and just one open exit, causing the death of nearly three hundred workers. On August 20, 2012, merely a month before the accident, this plant was granted the prestigious Social Accountability 8000 (“SA8000”) certification, issued by Social Accountability International (“SAI”)—a prominent international organization.⁷ The SA8000 is an auditable social certification standard for a decent workplace; among its various requirements are provisions regarding “Health and Safety,” which require certified firms to “take effective steps to prevent potential accidents and injury to workers.”⁸ One of the questions raised by this accident—probably one of the worst industrial disasters in history—is whether the Pakistani administration relied on SAI to regulate the health and safety aspects of the Ali Enterprises operations, and thus transferred (de facto) to SAI its administrative duties. Such reliance, to the extent that it has in fact occurred, represents a departure from the classic paradigm of administrative law that places these regulatory responsibilities solely within the administrative agencies of the state.⁹

7. See Declan Walsh & Steven Greenhouse, *Inspectors Certified Pakistani Factory as Safe Before Disaster*, N.Y. TIMES (Sept. 19, 2012), http://www.nytimes.com/2012/09/20/world/asia/pakistan-factory-passed-inspection-before-fire.html?pagewanted=all&_r=0; see also, Q&A: ALI ENTERPRISES FIRE IN KARACHI, PAKISTAN, SOC. ACCOUNTABILITY INT’L (Dec. 7, 2012), http://www.sa-intl.org/_data/n_0001/resources/live/Q&A_AliEnterprises_8Dec2012.pdf.

8. *Social Accountability 8000 Guidance Document*, SOC. ACCOUNTABILITY INT’L, http://www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf. Article 3.1 states that “[t]he company shall provide a safe and healthy workplace environment and shall take effective steps to prevent potential accidents and injury to workers’ health arising out of, associated with, or occurring in the course of work, by minimizing, so far as is reasonably practicable, the causes of hazards inherent in the workplace environment, and bearing in mind the prevailing knowledge of the industry and of any specific hazards.” Other requirements concern child labor; forced labor; freedom of association, and more. See *id.* at arts. 1, 2, 4.

9. Just nine months after this event, another disaster has hit the garment industry in the east, this time in Bangladesh. A building hosting a garment factory collapsed, leaving more than five hundred dead. This disaster was again linked to poor safety standards and raised general concerns about the working conditions of more than 3.6 million Bangladeshis working in the garment industry and the role that Western retailers should play in improving them. See Amy Kazmin, *Bangladesh Factory Collapse a Catalyst for Workers’ Rights*, WASH. POST, May 4, 2013, http://www.washingtonpost.com/world/asia_pacific/bangladesh-factory-collapse-a-catalyst-for-workers-rights/2013/05/03/67a0c1f0-b416-11e2-baf7-5bc2a9dc6f44_story.html. These recurring disasters have led to the development of several new transnational regulatory schemes. On July 8, 2013, the EU launched a joint initiative for improving conditions for workers in Bangladeshi garment factories entitled “Compact for Continuous Improvements in Labor Rights and Factory Safety in the Ready-Made Garment and Knitwear Industry in Bangladesh.” Press Release, EU Trade Commission, EU Trade Commissioner De Gucht Launches Global Sustainability Compact in Response to Bangladesh Tragedy (July 8, 2013), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=935>. The textile industry has also initiated schemes seeking to improve conditions at Bangladeshi factories. Across the Atlantic a group of seventeen North American retailers and clothing makers has agreed to a five-year safety pact that calls for inspecting all factories that supply their garments within a year. See Anne D’Innocenzio, *U.S. Companies Detail Bangladesh Safety Pact*, SEATTLE TIMES (July 10, 2013, 7:22 AM), http://seattletimes.com/html/business/technology/2021364945_apbcusbangladeshsafetyaccordusretailers.html; *Canadian*,

These cases are just two examples that highlight the extent to which transnational norms intervene in domestic regulatory processes.¹⁰ Taking them as a starting point, this Article seeks, first, to unfold the structure of the increasing transnational intervention into local administrative processes, and second, to evaluate the gap between the articulation of regulatory discretion in traditional administrative law and the current reality of extending transnational intervention.

Classical works in the field of administrative law emphasized the problems that arise from endowing the executive branch with broad administrative discretion.¹¹ Generally speaking, the conventional narrative of administrative law has conceptualized agencies as omnipotent decision-makers with vast bureaucratic power. In his *Ideology of Bureaucracy in American Law*,¹² Gerald Frug stated that “[b]ureaucracy is the primary form of organized power in America today.”¹³ This organized bureaucratic power has been perceived as a threat to human freedom and to constitutional principles.¹⁴ Thus, controlling the discretion of unelected bureaucrats has been seen as the guiding principle of traditional administrative law.¹⁵ According to this approach, administrative law should be understood as an attempt to legitimize modern bureaucratic power, by providing “a series of assurances that the legal system can overcome the perennial concerns about bureaucratic organizations” and that “bureaucratic organizations are under control.”¹⁶ This Article challenges this traditional narrative in two ways. First, it argues that the strong state-centric character of traditional administrative law,¹⁷ which associates bureaucratic power with

U.S. Retailers Sign Bangladesh Factory-Safety Pact, CBC NEWS (July 10, 2013, 1:22 PM), <http://www.cbc.ca/news/world/story/2013/07/10/bangladesh-factories.html>. European retailers, including Swedish retailer H&M and Italian clothing company Benetton, have signed a similar safety pact earlier that month. *70 Retailers Agree to New Bangladesh Factory Safety Pact*, CBC NEWS (July 8, 2013, 5:14 PM), <http://www.cbc.ca/news/business/story/2013/07/08/business-bangladesh-factory.html>.

10. See also DAVID SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE* (2008) (describing the influence of international economic law on domestic regulation using the terminology of constitutionalism, thus emphasizing the extent to which this body of law puts fundamental limitations not only on regulators, but also on legislatures). The focus on administrative law, suggested here, is preferable, because it highlights the way in which transnational regulation changes the everyday functioning of regulators, as exemplified later on. This, we argue, is the more significant aspect of this new legal phenomenon. See also Gus Van Harten, *Investment Rules and the Denial of Change*, 60 U. TORONTO L.J. 893 (2010).

11. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

12. Frug, *supra* note 11.

13. *Id.* at 1295. Recognizing the broad discretion exercised by administrative agencies also meant that—for better or worse—policy has been continuously shaped by these agencies. See Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).

14. Frug, *supra* note 11, at 1295; Lawson, *supra* note 11, at 1232–33.

15. CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 11 (1990).

16. Frug, *supra* note 11, at 1284 (internal quotation marks omitted).

17. See, e.g., *id.*; Lawson, *supra* note 11.

the state apparatus and problematizes this power in the context of domestic constitutional law, disregards the increasingly globalized legal environment in which administrative action is embedded. Many local administrative decisions affect not only citizens but also foreign entities, such as investors, immigrants, and foreign laborers. Moreover, as a result of globalization processes, the state has lost its exclusive power to regulate matters that lie within the traditional realm of administrative law. In many areas, covering diverse topics such as trade, financial regulation, public health, and the environment, various international agencies have acquired increasing influence over domestic regulatory processes. The integration with the global arena, together with the economic promises it contains, requires the state, as will be elaborated below, to forgo some of its regulatory powers.¹⁸ Second, this decoupling between bureaucratic power and the state apparatus also challenges the mechanisms of control developed by administrative law in order to counter potential abuse of administrative power. The main mechanisms of control—the non-delegation doctrine and judicial review of administrative action—by their very nature are not equipped to regulate the actions of transnational administrative bodies. The non-delegation doctrine assumes that the legitimacy of government bureaucracies is derived from legislation. According to this doctrine, “the legislature must retain primary decisionmaking authority for governmental activity because it represents the subjective desires of the democratic electorate. Bureaucrats must carry out the wishes of the people (as expressed by their chosen representatives), not their own personal conceptions of the good.”¹⁹ But this doctrine becomes irrelevant once its basic premise no longer holds in the era of globalization. Judicial review by domestic courts also lacks the power to control transnational regulatory processes, due to jurisdictional limitations.

The normative reality generated by globalization calls for the reexamination of the basic theoretical and doctrinal conceptualizations of administrative law. This Article critically examines these conceptualizations and adapts them to the challenges administrative law faces in today’s globalized society. Part I explicates the way in which our thesis differs from the arguments presented by the global administrative law literature. Whereas this literature typically focuses on the meta-norms that regulate the activities of global administrative bodies in their capacity as global norm-makers and

18. See THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION* 105-06 (1999); H.W. Arthurs, *Administrative Law Today: Culture, Ideas, Institutions, Processes, Values: Essays in Honour of John Willis: V. Public Law in a Neoliberal Globalized World: The Administrative State Goes to Market (and Cries Wee, Wee, Wee All the Way Home)*, 55 U. TORONTO L.J. 797, 818 (2005).

19. Frug, *supra* note 11, at 1300–01. David Dyzenhaus similarly notes that “if Parliament is to be sovereign, the supreme lawmaker, it has to establish its supremacy over the executive, which requires an independent judiciary in order to ensure that the officials who make up the executive and who claim the authority of law for their decisions are in fact acting in accordance with the law.” David Dyzenhaus, *Dignity in Administrative Law: Judicial Deference in a Culture of Justification*, 23rd McDonald Lecture, 2011, 18 (Oct. 1, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029818.

regulators, we focus on the way in which international norms intervene and reshape decision-making processes within domestic bureaucracies. This Article develops an analytical schema that captures the distinct impacts of global administrative law on the domestic administrative arena. This schema distinguishes between three forms of influence (which have not been clearly articulated before): *the substitution of domestic administrative discretion by global standards*, *the emergence of universal standards of administrative due process*, and *the globally inspired transference of enforcement responsibilities*.

Part II maps the various mechanisms through which transnational regulatory processes intervene in the local realm, reshaping the contours of domestic administrative law. In doing so, it responds to a lacuna in the literature on globalization that has tended to disregard the exact analytical and empirical features of this process.²⁰ Our analysis draws on the literature on global legal pluralism by noting the diverse sources and paths through which global law influences the domestic realm. Thus we focus not only on the influence of the WTO framework—as reflected in the three recent rulings against the U.S. in the *Tuna-Labeling*, *Clove-Cigarettes*, and *Country of Origin Labeling* (“COOL”) *Requirements* cases—but also on the influence of private transnational institutions—such as the International Organization for Standardization and the International Commission on Non-Ionizing Radiation Protection (“ICNIRP”)—and global certification bodies—such as Social Accountability International (“SAI”) and the *Global Food Safety Initiative*. As we will demonstrate below, some of these global bodies provide also meta-regulatory rules that govern the actions of other transnational bodies (which in turn influence the domestic realm).

Part III proceeds to examine the normative challenges posed by these processes of transnational rule-making. We argue that this new reality requires administrative law to develop new legitimization devices that would supplement and even replace traditional devices. Our argument thus sheds new light on the classic critique of administrative law.²¹ We start by criticizing the hidden ideological agenda of this transnational legal body, highlighting especially its propensity to neo-liberal, capitalist ideas. This bias undermines any attempt to ground the legitimacy of global administrative law on some universal rationality. We explore how this ideological bias can be countered at the global level. We then move to discuss the problematic posed by the fragmented accountability regimes that characterize today’s global legal system. This fragmentation calls into question the legitimacy of global administrative law by exposing the lack of efficient control mechanisms on both the domestic level and the global level.

20. See, e.g., Michael Goodhart & Stacy Bondanella Taninchev, *The New Sovereignist Challenge for Global Governance: Democracy Without Sovereignty*, 55 INT’L STUD. Q. 1047, 1055 (2011); David Held, *Restructuring Global Governance: Cosmopolitanism, Democracy and the Global Order*, 37 MILLENNIUM: J. INT’L STUD. 535, 537 (2009); GUNTHER TEUBNER, *CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION* 5 (2012); Arthurs, *supra* note 18.

21. See Frug, *supra* note 11.

Finally, we examine the challenge posed by the expanding influence of universal administrative law norms on our democratic conceptions of legitimization. While modern administrative law has developed sophisticated methods of public participation, these mechanisms have remained confined to the domestic level, disregarding the extent to which domestic administrative law is influenced by external norms. We assess the challenge of developing new decision-making processes and forms of participation that will be better attuned to the new global reality and at the same time meet democratic standards. In this context, our approach steers a middle course between the extremes of sovereign exceptionalism and global constitutionalism by focusing on the potential of administrative law for democratic innovativeness at the micro level of administrative praxis.²²

The analysis leads us to the conclusion that global processes have drastically changed the realm of administrative law. Administrative law can no longer be studied only by using traditional assumptions of absolute sovereignty and autonomous administrative discretion. The increasing influence of transnational norms on domestic bureaucratic processes should be taken as critical to the theory of administrative law, and not only as a footnote to it.

I. Global Administrative Law or Globalized Administrative Law

Our argument builds on the paradigm of global administrative law,²³ but seeks to transcend it. Global administrative law literature focuses on transnational regulatory processes and studies the meta-norms that regulate the activities of international bodies as global norm-makers and regulators.²⁴ In contrast, our study focuses on decision-making processes within

22. See Peter J. Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, 79 FOREIGN AFF. 9 (2000); Anne Peters, *The Merits of Global Constitutionalism*, 16 IND. J. GLOBAL LEGAL STUD. 397 (2009).

23. Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 17 (2005); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006); Ming-Sung Kuo, *Taming Governance with Legality? Critical Reflections Upon Global Administrative Law as Small-C Global Constitutionalism*, 44 N.Y.U. J. INT'L L. & POL. 55 (2011). For a preliminary discussion of these challenges, see Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 695 (2005) (discussing these challenges from the perspective of domestic law, but only from the perspective of the United States, i.e., a hegemonic state on the international scene).

24. See, e.g., Kingsbury, Krisch & Stewart, *supra* note 23, at 17 (defining global administrative law 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.”); Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT'L ORG. L. REV. 319, 326–34 (2009). This is also how external observers perceive the field of global administrative law. See, e.g., TEUBNER, *supra* note 20, at 50–51. But see David Livshitz, *Updating American Administrative Law: WTO, International Standards, Domestic Implementation and Public Participation*, 24 WIS. INT'L L.J. 961 (2007) (providing a rare exception to the usual transnational focus).

domestic bureaucracies, and the way in which they are *influenced* by international processes and norms. Our argument thus exposes a certain blind spot of the global administrative law scholarship, which has not given sufficient attention to the dynamic of global-national interactions. To the extent that current research examines the influence of global administrative law on national processes it mainly focuses on the work of domestic courts, drawing on classical doctrinal notions such as “incorporation” or “legal transplants,” or on the formal questions of the status of public international norms at the domestic sphere.²⁵ In contrast, this Article seeks to uncover the impact of international norms on domestic bureaucracies, taken as semi-autonomous systems, and on the potential reciprocal dynamic this impact could unleash between the national and international bureaucratic orders.

This Article develops an analytical schema that provides a framework for analyzing and better understanding the influence of global administrative law on domestic regulatory processes, distinguishing, as noted above, between three forms of intervention. We focus in particular on the emergence of *universal standards of the administrative process*. Here, we address the fact that beyond the particular norms generated by global bodies, transnational norm-production processes also establish basic standards of procedural and institutional integrity, which together form an emerging body of *universal administrative law*. By standards of procedural and institutional integrity we refer to those rules that regulate the procedure and structure through which decisions are being made. These include both *due-process rules*, which focus on the fairness of the administrative process, and *perfecting rules*, which seek to improve the decision outcome in terms of some overarching principle.²⁶

25. See, e.g., Benedict Kingsbury, *Weighing Global Regulatory Rules and Decisions in National Courts*, 2009 ACTA JURIDICA 90, 99; Andrew P. Cortell & James W. Davis, *When Norms Clash: International Norms, Domestic Practices, and Japan's Internalisation of the GATT/WTO*, 31 REV. INT'L STUD. 3, 6 (2005); Andrew P. Cortell & James W. Davis, Jr., *Understanding the Domestic Impact of International Norms: A Research Agenda*, 2 INT'L STUD. REV. 65, 68-84 (2000).

26. We use the concept of “universality” here in a somewhat tentative fashion to designate the emergence of global administrative law norms that apply at the domestic level. These norms diverge from conventional international law norms because they pierce the sovereignty veil, reaching subjects beyond the usual scope of public international law. Our use of the term is tentative because we are describing an evolving process; there is still substantial diversity and discord in this emerging body of law. Our discussion will highlight the pluralistic nature of this field, pointing out the role of both classic treaty-based bodies as well as hybrid and private bodies. Further, some of the processes we describe are soft law phenomena, and thus cannot be analyzed using the conventional doctrine of validity in international law. Therefore, the validity of some of the norms we describe cannot be articulated using the conventional theory of the secondary rules of recognition (the doctrine of sources) of international law (which is used to establish primary rules of international law). See Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 531 (1993). More specifically, our thesis is that it would be a mistake to dismiss these processes because of their non-conventional structure. See generally Oren Perez, *Purity Lost: The Paradoxical Face of the New Transnational Legal Body*, 33 BROOK. J. INT'L L. 1 (2007); PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* (2012); Ralf Michaels, *Global Legal Pluralism*,

II. The Influence of International Norms on National Administrative Law: An Anatomy of Multi-Dimensional Influence

The influence of international norms on national administrative law is multi-dimensional both in terms of its sources or institutional background and in terms of its routes of implementation. In this part we want to offer an in-depth description of this multi-dimensional causality, drawing on the analytical framework that was introduced above. This framework will assist us in developing a better understanding of the inter-linkages between the evolving body of globalized administrative law and domestic administrative law and should pave the way for more detailed comparative studies.²⁷

A. Global Standards Replacing Local Administrative Discretion

The substitution of local administrative discretion by particular global standards happens when particular international standards are adopted by national systems. This process reflects, by its very nature, a contraction of the discretion of domestic regulators, which had traditionally included the freedom to design a regulatory policy, to set the necessary standards, and to enforce their implementation. The influence of international norms on national administrative law has undergone remarkable changes in recent years, in terms of both the extent and scope of that influence. International norms influence domestic administrative law not just through the realm of public international law but also through private and hybrid sources of transnational law. This argument draws on a pluralistic understanding of the transnational legal realm, recognizing the multiple ways through which international norms are developed.²⁸

The first pathway by which international law affects local administrative law is the classic channel of treaties.²⁹ Countries are subscribed to an increasing number of international treaties in many areas (e.g., trade, environment, intellectual property, etc.), which limit the discretion of their bureaucratic agencies in multiple areas. Of these, especially important are treaties in the international economic and trade spheres, particularly the WTO Agreement.³⁰ Membership in the WTO binds member states to a complex system of agreements,³¹ which constrains the discretion of their

5 ANN. REV. LAW & SOC. SCI. 243 (2009); Burkard Eberlein et al., *Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*, REG. & GOVERNANCE (forthcoming 2013), available at <http://ssrn.com/abstract=2152720>.

27. See Peer Zumbansen, *Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance* 16 (Osgoode Hall Law Sch., CLPE Research Paper No. 1/2012, Feb. 7, 2012), available at <http://ssrn.com/abstract=2000803>.

28. Perez, *supra* note 26; Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 529-32 (2009); Michaels, *supra* note 26, at 243.

29. We do not focus on customary international law primarily because customary norms affect only limited areas, primarily in the law of war and human rights.

30. Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

31. See generally *id.*

administrative agencies across multiple dimensions. Other economic agreements that constrain the discretion of national administrative authorities are regional and bilateral trade treaties, as well as bilateral investment treaties. The Organization for Economic Co-operation and Development (“OECD”)³² is another example of a multilateral treaty that has broad-ranging influence over domestic administrative law in diverse areas, from the struggle against corruption to environmental protection. Another important development in this context is the emergence of judicial tribunals with normative authority exceeding the conventional conceptions of the authority of public international law.³³ Prominent examples are the tribunals of the WTO and the International Criminal Court (“ICC”).³⁴

Administrative law is affected not only by standards associated with international treaties but also by norms produced by private international governance organizations (“PIGOs”)—international organizations that are not the product of international treaties.³⁵ This route is the result of the increasing complexity of the global legal map, and the emergence of “regime complexes”—a new form of transnational governance in which treaty-based bodies and private or hybrid bodies combine to co-produce a governance regime in a particular field.³⁶ Prominent examples of such actors include standard-setting organizations such as the ISO, which constitutes an important source for technical and organizational standards;³⁷ the Global Reporting Initiative (“GRI”), which is the global leader in the area of environmental reporting;³⁸ and hybrid regulatory-scientific bodies such as ICNIRP, which promulgate exposure guidelines for non-ionizing

32. The formal name of the organization is Organization for Economic Cooperation and Development.

33. The authority of these tribunals extends beyond the classical sources of international law as envisioned in Article 38 of the Statute of the International Court of Justice. See the discussion in Perez, *supra* note 26.

34. The Rome Statute that founded the ICC represents an exceptional case in which an international organization was created that has judicial authority even over citizens of countries that did not ratify the treaty. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), 2187 U.N.T.S. 90.

35. The institutional structure of these organizations varies. Some are controlled by private entities; others are controlled jointly by governments and private entities. We will use the term IGOs (International Organizations) to designate the institutions established by multilateral treaties (e.g., WTO, ICC, UN).

36. See also Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSP. ON POL. 7, 7 (2011); Kenneth W. Abbott, *The Transnational Regime Complex for Climate Change* 1-24 (Nov. 4, 2011), available at <http://ssrn.com/abstract=1813198>.

37. Oren Perez et al., *The Dynamic of Corporate Self-Regulation: ISO 14001, Environmental Commitment, and Organizational Citizenship Behavior*, 43 LAW & SOC'Y REV. 593 (2009).

38. *Sustainability Reporting Guidelines*, GLOBAL REPORTING INITIATIVE (2011), <https://www.globalreporting.org/resource/library/G3.1-Sustainability-Reporting-Guidelines.pdf>. The International Accounting Standards Board (“IASB”), which creates accounting standards (International Financial Reporting Standards—IFRSs), is a related example. See *About the IFRS Foundation and the IASB*, IFRS FOUND., <http://www.ifrs.org/The-organisation/Pages/IFRS-Foundation-and-the-IASB.aspx> (last visited June 15, 2013).

radiation.³⁹ Other important certifying schemes are the SA8000 social certification standards for a decent workplace⁴⁰ and the Global Food Safety Initiative (“GFSI”), which provides benchmarking for global food-safety standards.⁴¹

Norms of this type penetrate the local legal sphere through two main conduits. First, in some cases administrative authorities adopt standards that were developed by international organizations. Such adoption usually takes place through either secondary legislation or by administrative directives.⁴² A second conduit is a voluntary incorporation by firms. This route has become a significant source of legal incorporation as more and more firms subscribe to transnational codes.⁴³ Such voluntary incorporation tends to have a network effect, especially as market leaders, such as Wal-Mart (in the food market) or Karstadt-Quelle, Argos, and Woolworth (in the toys market), adopt certain standards.⁴⁴

A fascinating recent development in the field of private transnational regulation is the evolution of meta-regulatory processes: legal schemes that seek to regulate the global standard-setting process itself. Thus, for example, ISEAL Alliance, which is a global association of standard-setting organizations and accreditation bodies focusing on sustainability standards, has developed a Standard-Setting Code (ISEAL Code of Good Practice for Setting Social and Environmental Standards) that defines good-practice

39. ICNIRP generates exposure guidelines routinely adopted by the United Nations' World Health Organization (“WHO”) and subsequently used as a basis for local regulation by many nation-states. See Adi Ayal et al., *Science, Politics and Transnational Regulation: Regulatory Scientific Institutions and the Dilemmas of Hybrid Authority*, 2 *TRANSNAT'L ENVTL. L.* 45 (2013); see also Mike Repacholi, *Science and Precautionary Measures in EMF Policy*, 10 *IOP CONF. SERIES: EARTH & ENVTL. SCI.* 1, 1 (2010), available at http://iopscience.iop.org/1755-1315/10/1/012001/pdf/1755-1315_10_1_012001.pdf. Other prominent examples include the Basel Committee on Banking Supervision and sustainable indexes such as FTSE4GOOD and the Dow Jones Sustainability Index, which articulated systems for ranking firms. BASEL COMM. ON BANKING SUPERVISION, *INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS* (Nov. 2005), <http://www.bis.org/publ/bcbs118.pdf>; Oren Perez, *Private Environmental Governance as Ensemble Regulation: A Critical Exploration of Sustainability Indexes and the New Ensemble Politics*, 12 *THEORETICAL INQUIRIES L.* 543, 566 (2011).

40. See *Social Accountability 8000*, *supra* note 8.

41. See *About GFSI*, GFSI.COM, <http://www.mygfsi.com/about-gfsi.html> (last visited June 15, 2013).

42. Such incorporation is particularly prominent in the areas of occupational safety, environment and health, securities regulation (IFRS rules), and banking (Basel rules).

43. See Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 *AM. J. SOC.* 297 (2007); Perez, *supra* note 39.

44. Walmart had adopted the GFSI scheme. See WALMART, 2012 GLOBAL RESPONSIBILITY REPORT 24 (2012), available at http://www.walmartstores.com/sites/responsibility-report/2012/pdf/WMT_2012_GRR.pdf; *Code of Business Practices*, INT'L COUNCIL TOY INDUSTRIES, <http://www.toy-icti.org/info/codeofbusinesspractices.html> (last visited June 15, 2013) (outlining the Code of Business Practices supported by Karstadt-Quelle, Argos, and Woolworth). See also Reinhard Biedermann, *From a Weak Letter of Intent to Prevalence: The Toy Industries' Code of Conduct*, 6 *J. PUB. AFF.* 197, 206-07 (2006); Gregory Jackson & Androniki Apostolou, *Corporate Social Responsibility in Western Europe: An Institutional Mirror or Substitute?*, 94 *J. BUS. ETHICS* 371, 388 (2010).

standard-setting processes with the objective of increasing the credibility of the resulting standard.⁴⁵ The GFSI developed general benchmarking criteria for food safety schemes, which define the process by which food safety schemes may gain recognition by GFSI.⁴⁶ These meta-regulatory schemes have gained recognition by significant global actors.⁴⁷

The incorporation of private transnational norms into domestic law is driven by two concepts of authority: epistemological authority, that is, recognition of the superior knowledge and expertise of the rule-making body, and normative authority, which reflects recognition of the authority of these transnational bodies to produce binding norms.⁴⁸ In some cases, especially in the field of technical standards, the normative authority is created through endorsement by public treaties. The establishment of the WTO was particularly important in this context: the Agreement on Technical Barriers of Trade (“TBT”) and the Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS”) encourage WTO Members to adopt international standards set by organizations such as the ISO and the Codex Commission.⁴⁹ The adoption of private transnational norms is also motivated by economic interests, especially in non-hegemonic states, in which local decision makers (regulators or company managers) may have little choice but to adopt the international standards.

B. Global Standards Affecting the Administrative Process: Due Process and Beyond

The concept of *universal standards of the administrative process* sheds light on a distinct type of influence on national administrative law. It calls attention to the fact that beyond the particular norms generated by global administrative bodies—both public and private—transnational norm-pro-

45. For another example of the links between the different bodies that constitute the global regulatory network, see ISEAL ALLIANCE, *SETTING SOCIAL AND ENVIRONMENTAL STANDARDS v5.0: ISEAL CODE OF GOOD PRACTICE* (2010), available at <http://www.isealliance.org/our-work/defining-credibility/codes-of-good-practice/standard-setting-code> (last visited June 15, 2013). The standard draws, partially, from the ISO/IEC Guide 59 Code of Good Practice for Standardization, and the WTO Technical Barriers to Trade (TBT) Agreement annex 3. See ISO/IEC, *ISO/IEC Guide 59: 1994 Code of Good Practice for Standardization* (1994); Agreement on Technical Barriers to Trade, Apr. 15, 1994, annex 3, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

46. See GLOBAL FOOD SAFETY INITIATIVE, *GFSI GUIDANCE DOCUMENT* (2012), available at http://www.mygfsi.com/gfsifiles/GFSI_Guidance_Document_Sixth_Edition_Version_6.2.pdf. The core criteria of the GFSI framework are included in Part III of the Guidance Document (“Requirements for the Management of Schemes Contents”), which specify the requirements for the recognition of food safety schemes. See *id.* at 99-147.

47. See Fabrizio Cafaggi & Andrea Renda, *Public and Private Regulation: Mapping the Labyrinth* 20 (Ctr. for European Policy Studies, Working Paper No. 370, 2012) (discussing ISEAL Code of Good Practice for Setting Social and Environmental Standards); WALMART, *supra* note 44, at 24.

48. See Ayal et al., *supra* note 39 (discussing the term “authority” in the context of international organizations); Jonathan G.S. Koppell, *Global Governance Organizations: Legitimacy and Authority in Conflict*, 18 J. PUB. ADMIN. RES. & THEORY 177, 179-80 (2008).

49. David A. Wirth, *The International Organization for Standardization: Private Voluntary Standards as Swords and Shields* 36 B.C. ENVTL. AFF. L. REV. 79, 95 (2009).

duction processes also establish general standards of procedural and institutional integrity, which together form an evolving body of *global general administrative law*. By standards of procedural and institutional integrity, we refer to those rules that regulate the procedure and structure through which decisions are made. What we have in mind are both *due process rules* that focus on the fairness of the administrative process (e.g., notice-and-comment rules, transparency rules)⁵⁰ and *perfecting rules*⁵¹ that seek to improve the decision outcome in terms of some overarching principle such as collective welfare (e.g., proportionality, cost-benefit analysis, risk-assessment).⁵²

Among the diverse sources driving this process, the WTO takes a prominent role. The WTO adds to the development of both due process rules and perfecting rules. But the WTO is not alone in this process. It is part of a broader transnational network of law-making bodies, consisting of both public and private institutions that take part in the promulgation of this new universal administrative law rulebook. What distinguishes this network from global administrative law is that it claims to directly shape the discretion of national administrative bodies. Below we provide an overview of this new body of law and elaborate on the way its impact takes place.

1. *The Development of Universal Due Process Norms*

The WTO legal system plays a key role in the development of this network of universal due process rules. Article X of the GATT establishes a general framework for regulatory due process in trade regulation, which consists of rules on transparency of trade-related regulatory measures and the uniform, impartial, and reasonable administration of these rules. Similar requirements about transparency can be found in the SPS and TBT Agreements. The WTO rulebook also includes provisions that seek to protect the fairness of the legal processes that take place within the regulatory systems of WTO Members in areas governed by WTO law. Thus, for example, the Anti-Dumping Agreement contains provisions for issuing notices to interested parties and to the public about the launching of dumping investigations (Article 12), as well as regarding the review of administrative deci-

50. See Robin Creyke, *Administrative Justice: Towards Integrity in Government*, 31 MELB. U. L. REV. 705, 710 (2007).

51. Alice Woolley, *Legitimizing Public Policy*, 58 U. TORONTO L.J. 153, 176 (2008).

52. The distinction between fairness procedures and perfecting procedures is not exact. Some perfecting procedures can also serve fairness goals (e.g., cost-benefit analysis contributes to the ideal of fairness by facilitating comparison, thus making discrimination more difficult). “Due process” rules could be considered perfecting since they contribute to the total fairness of the administrative system as a whole as well—at least by some observers—to its epistemic perfectness by bringing to the process the views of people outside the regulatory circle. Perfecting procedures are commonly driven by particular worldview, and thus can also be a source of ideological conflict. See Amy Sinden, Douglas A. Kysar & David M. Driesen, *Cost-Benefit Analysis: New Foundations on Shifting Sand*, 3 REG. & GOVERNANCE 48 (2009) (reviewing MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006)).

sions concerning anti-dumping duties (Article 13).⁵³ Transparency rules have also been introduced by other international treaties such as the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the Stockholm Convention on Persistent Organic Pollutants, the Aarhus Convention, and more.⁵⁴

The rulings of WTO tribunals have served as another source of due process rules.⁵⁵ A good example of this process is the case of Argentina's poultry anti-dumping duties.⁵⁶ Article 12.1 of the Anti-Dumping Agreement requires the authorities of the importing Member to notify about the initiation of an investigation both the WTO Member or Members the products of which are subject to such investigation, as well as to "other interested parties known to the investigating authorities to have an interest" in the investigation.⁵⁷ The Panel discussed the question of the effort required by the administrative authority to locate an interested party for the purpose of notification and ruled that "the nature of the Article 12.1 notification obligation is such that the investigating authority should make all reasonable efforts to obtain the requisite contact details."⁵⁸ It then reached the conclusion that Argentina did not make such a "reasonable effort," and therefore violated Article 12.1 of the Anti-Dumping Agreement.⁵⁹

Another example of the potential influence of the WTO on the procedural standards of domestic administrative law is the decision in the

53. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, annex 1, arts. 12-13 [hereinafter Anti-Dumping Agreement].

54. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade arts. 12-13, Sept. 10, 1998, 38 I.L.M. 1 (1999) [hereinafter Rotterdam Convention], available at <http://www.pic.int/TheConvention/Overview/TextoftheConvention/tabid/1048/language/en-US/Default.aspx>; Stockholm Convention on Persistent Organic Pollutants art. 8, adopted May 22, 2001, 2256 U.N.T.S. 119 (entered into force May 17, 2004) [hereinafter Stockholm Convention], available at <http://chm.pops.int/Convention/ConventionText/tabid/2232/Default.aspx>; see Ronald B. Mitchell, *Transparency for Governance: The Mechanisms and Effectiveness of Disclosure-Based and Education-Based Transparency Policies*, 70 *ECOLOGICAL ECON.* 1882, 1885 (2011); Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters arts. 3.1-5.2, 7, opened for signature June 25, 1998, 2161 U.N.T.S. 447 (entered into force Oct. 30, 2011) [hereinafter Aarhus Convention], available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>; Cartagena Protocol on Biosafety to the Convention on Biological Diversity, annex III, adopted Jan. 29, 2000, 2226 U.N.T.S. 208 (entered into force Sept. 11, 2003) [hereinafter Cartagena Protocol], available at <http://www.cbd.int/doc/legal/cartagena-protocol-en.pdf>; Aarti Gupta, *Transparency Under Scrutiny: Information Disclosure in Global Environmental Governance*, 8 *GLOBAL ENVTL. POL.* 1, 2 (2008).

55. According to WTO law, the rulings of the WTO tribunals are binding upon WTO members. The influence on local law is usually indirect because in most jurisdictions these WTO rulings do not have direct effect in the local realm. In many jurisdictions, however, local courts will take such ruling as guidance for interrelating local law, in order to prevent prospective breaches of the state's international obligations.

56. Panel Report, *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R (Apr. 22, 2003).

57. See *id.* ¶¶ 7.128, 7.129.

58. *Id.* ¶ 7.132.

59. *Id.* ¶¶ 7.132, 7.135.

Shrimps case.⁶⁰ In that case, the Appellate Body accepted the American position whereby the regulatory regime that it established, which prevented the import of shrimps without certification concerning the use of methods that protect sea turtles, was entitled to the exemption specified in Article XX of the GATT (starting, among others, with limitations required for the protection of the lives and health of people, animals, and plants).⁶¹ Nevertheless, the ruling of the Appellate Body contained substantial criticism of the decision-making processes, and it is likely to affect the shaping of universal standards of due process. The original decision of the Panel noted that, in this matter, the American regulatory arrangement suffered from administrative flaws. Thus, as part of the process of obtaining an import license, the applicants (India, Pakistan, Malaysia, and Thailand) were not given the opportunity to be heard (which could have been the cause of the denial of the import license), they did not receive a reasoned decision, and they had no proper way of appealing the administrative decision.⁶² Subsequently, the Appellate Body also discussed the fairness of the process, but in doing so it did not base its decision on the American administrative law but on the interpretation of the expression “arbitrary . . . discrimination between countries where the same conditions prevail,” found in Article XX of the GATT.⁶³

The recent decision of the WTO Panel in the dispute over the country of origin labeling (“COOL”) requirements for imported livestock in the U.S. provides another illustration of this form of intervention, as the Panel noted the failure of the U.S. to meet the WTO transparency requirements.⁶⁴ In *U.S. - Clove Cigarettes*, the United States was found in breach of both the notification and the “reasonable interval” requirements of the TBT Agreement.⁶⁵

While the norms promulgated by the WTO are similar in their spirit to existing standards of administrative law in developed legal systems, they

60. Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimps* case].

61. See General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, as amended by Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A, 1867 U.N.T.S. 154 [hereinafter GATT, GATT Agreement].

62. See also Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EUR. J. INT’L L. 23, 37 (2009).

63. See the *Shrimps* case, *supra* note 60; see also GATT, *supra* note 61, at art. XX.

64. The Panel found that a letter sent by U.S. Secretary of Agriculture, Thomas Vilsack, to the agriculture industry addressing how companies could implement the COOL measure, had breached Article X:3(a) of the GATT 1994 by failing to meet the requisite standards of transparency and procedural fairness. Panel Report, *United States - Certain Country of Origin Labelling (COOL) Requirements*, ¶ 7.864, WT/DS384/R, WT/DS386/R (Nov. 18, 2011).

65. Panel Report, *United States - Measures Affecting the Production and Sale of Clove Cigarettes*, ¶¶ 7.550, 7.595, WT/DS406/R (Sept. 2, 2011) [hereinafter *U.S. - Clove Cigarettes*]. According to Article 2.12 of the TBT Agreement, members must also allow a “reasonable interval” between publication and entry into force of a measure “in order to allow time for producers . . . particularly in developing country Members, to adapt their products or methods of production.” TBT Agreement, *supra* note 45, at art. 2.12.

may differ in their particular details from the position of domestic law. The normative status of WTO law provides its prescriptions with unique influence over local administrative law.

International investment law is another field of international economic law that establishes global general norms of administrative due process. International investment law serves as the source of both due process and perfecting rules. Particularly noteworthy in this context is the concept of regulatory expropriation, which creates a potential cause of action under most bilateral investment treaties. The NAFTA case of *Metalclad* provides a good example for both types of rules.⁶⁶ The case dealt with a Mexican subsidiary of a U.S. disposal company that operated a hazardous waste facility. The Mexican government granted the company federal construction and operating permits, and the local government granted a state operating permit.⁶⁷ However, the company's application for a municipal construction permit had been rejected for environmental reasons.⁶⁸ The company instituted arbitration proceedings under the ICSID rules. It argued for infringement of Article 1105(1) of NAFTA, which states that "each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."⁶⁹ The tribunal held:

The absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA.⁷⁰

In addition, the municipality failed to give proper and specific reasons for its decision, which would refer to defects in the physical construction of the site.⁷¹ In addition, the investor was not given an opportunity to appear before the body that made the decision.⁷² Following that, the tribunal held that the municipality's refusal to issue the local construction permit due to environmental considerations amounted to an indirect expropriation of *Metalclad's* investment without providing compensation.⁷³ Thus, Mexico was found in violation of Article 1110 of NAFTA, which provides that

[N]o Party to NAFTA may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discrimina-

66. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, (Aug. 30, 2000), 5 ICSID Rep. 212 (2002).

67. *Id.* ¶ 52.

68. *Id.* ¶ 50.

69. *Id.* ¶ 74.

70. *Id.* ¶ 88.

71. *Id.* ¶¶ 92-93.

72. *Id.* ¶ 91. See also Vicki Been and Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine* 78 N.Y.U. L. REV. 30 (2003).

73. *Metalclad*, ICSID Case No. ARB(AF)/97/1, ¶¶ 106-07.

tory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.⁷⁴

The new field of private transnational regulation is another important source of due process norms. Particularly important are rules regarding transparency and participation. Thus, standards such as GRI, ISO 14001, ISO 26000, Equator Principles, OECD Multinational Guidelines and Accountability standards all include provisions on disclosure and stakeholder participation.⁷⁵ While the details vary, they all seem to share a similar principled commitment to procedural fairness. Unlike the WTO rules, which have universal application due to the WTO's broad membership, these private rules apply only to the firms that choose to adopt them.⁷⁶ However, taken together, in fact these private rules contribute to the consolidation of norms regarding transparency and public participation and thus to the creating of a new global body of due process norms.⁷⁷

2. *Reaching Beyond Classical Due Process: The Evolution of Perfecting Procedures Allowing Deep Intervention into Regulatory Discretion*

The contribution of the WTO to the development of global general standards of administrative law extends also to issues that lie beyond the procedural concept of due process, to what we suggest to call *perfecting rules*. This development is manifested in three main areas, most prominently realized in the context of the TBT and SPS Agreements and in the jurisprudence of Article XX of the GATT 1947: (a) general perfecting principles such as necessity, proportionality, and even-handedness used to review regulatory decisions with anti-trade effects;⁷⁸ (b) principles of risk assessment and scientific justification in the context of the SPS Agreement; and (c) detailed perfection procedures (risk assessment) developed by global standardization bodies.⁷⁹

To illustrate our argument, we focus on the TBT and SPS Agreements. These agreements give the WTO extraordinary powers to intervene in regulatory discretion in areas that fall outside the domain of trade, such as public health and environmental quality. Generally, the SPS and TBT agreements endow three distinct types of transnational bodies with the authority to intervene in the discretion of national authorities, covering dif-

74. *Id.* ¶ 1.

75. Basel Banking rules also include rules on transparency.

76. See, e.g., The Equator Principles Association, *The Equator Principles* (2006), available at http://www.equator-principles.com/resources/equator_principles.pdf.

77. On the inter-linkages between private CSR rules, see Perez, *supra* note 39.

78. See Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law: In Comparative Perspective*, 42 *TEX. INT'L L.J.* 371, 372 (2007).

79. We do not claim that these rules have, at this point in time, a clear meaning; they are still at the process of consolidation. They represent, however, a new and unprecedented development in international law. For a discussion of the interpretative dilemmas underlying, for example, the Appellate Body Article XX(b) jurisprudence, see Chad P. Bown & Joel P. Trachtman, *Brazil-Measures Affecting Imports of Retreaded Tyres: A Balancing Act*, 8 *WORLD TRADE REV.* 85, 89 (2009).

ferent phases of the regulatory process: *international standards setting bodies* (standards content), *the WTO judicial tribunals* (through the doctrines of even-handedness, necessity, risk-assessment and scientific justification), and *foreign laboratories and accreditation bodies* (compliance assurance).⁸⁰

Overall, the SPS and TBT Agreements have considerably expanded the grounds on which the WTO can intervene in local regulatory processes, by creating a regulatory system that reaches beyond the traditional concerns of the international trade system, and provides grounds for intervention in the regulation of non-trade issues such as environmental and health risks.⁸¹ The SPS Agreement deals primarily with regulation focusing on food safety and agricultural products;⁸² the TBT Agreement deals with technical standards in general.⁸³ There are similar provisions concerning technical and SPS standards in some of the bilateral free trade agreements as well.⁸⁴ The SPS and TBT Agreements are driven by the understanding that transnational differences in technical standards increase the cost of transnational commerce and thus undermine public welfare. In view of this problem, the agreements seek to encourage a process of global harmonization by means of two parallel mechanisms. First, the SPS and TBT agreements encourage member countries to adopt international standards

80. On the latter point, see *infra* sub-section c. See also Tim Büthe, *The Globalization of Health and Safety Standards: Delegation of Regulatory Authority in the SPS Agreement of the 1994 Agreement Establishing the World Trade Organization*, 71 *LAW & CONTEMP. PROBS.* 219 (2008); Sieglinde Gstöhl, *Blurring Regime Boundaries: Uneven Legalization of Non-Trade Concerns in the WTO*, 9 *J. INT'L TRADE L. & POL'Y* 275 (2010); William Magnuson, *WTO Jurisprudence & Its Critiques: The Appellate Body's Anti-Constitutional Resistance*, 51 *HARV. INT'L L.J. ONLINE* 121 (2010); Jan Wouters et al., *In Search of a Balanced Relationship: Public and Private Food Safety Standards and International Law* (Leuven Ctr. for Global Governance Studies & Berkeley Ctr. on Insts. & Governance, Working Paper No. 29, 2009), available at www.law.kuleuven.be/iir/nl/onderzoek/wp/wp139e.pdf. For the influence of the WTO rulebook on internal regulation in other areas, see *Ruling in US-China Piracy Dispute Raises Controversy*, BRIDGES WEEKLY TRADE NEWS DIGEST (Int'l Ctr. for Trade & Sustainable Dev., Geneva, Switz.) Jan. 28, 2009, at 7, <http://ictsd.org/i/news/bridgesweekly/38830/>.

81. For additional details, see OREN PEREZ, *Science, Standardisation and the SPS/TBT Agreements*, in *ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM: RETHINKING THE TRADE AND ENVIRONMENT CONFLICT* 115 (2004).

82. See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

83. See TBT Agreement, *supra* note 45.

84. See, e.g., U.S.-Australia Free Trade Agreement, ch. 7, May 18, 2004, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text>; U.S.-Chile Free Trade Agreement, ch. 6, June 6, 2003, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>; Israel-United Mexican States Free Trade Agreement, arts. 7-02, 7-03, Apr. 10, 2000, available at <http://www.moital.gov.il/NR/exeres/9A3E771D-2105-44CB-AF58-4F149C37C75C.htm>; Israel-EFTA Free Trade Agreement, art. 10, Sept. 17, 1992, available at <http://wits.worldbank.org/GPTAD/PDF/archive/EFTA-Israel.pdf>; Turkey-Israel Free Trade Agreement, arts. 10, 19, Mar. 14, 1996, available at <http://www.economy.gov.tr/upload//628611D0-E4D1-89C6-3900EABA653B214B/2.%20Turkey-Israel%20Agreement.pdf>; Canada-Israel Free Trade Agreement, arts. 4.2, 4.3, July 31, 1996, available at <http://wits.worldbank.org/GPTAD/PDF/archive/Canada-Israel.pdf>; Israel-Mercosur Free Trade Agreement, ch. 7, Dec. 18, 2007, available at <http://www.moit.gov.il/NR/rdonlyres/5E091B0A-D8C5-4896-BA48-5937F66BF7D7/0/MercosurEN.pdf>.

set by organizations such as the ISO and the Codex Alimentarius Commission (“Codex Commission”).⁸⁵ A key element in the harmonization strategy of the two agreements is the creation of a presumption of conformity with the SPS, TBT, and GATT Agreements in favor of legislation consistent with international guidelines, recommendations, and standards.⁸⁶ The second mechanism of harmonization used by both agreements relies on bilateral agreements of mutual recognition of standards⁸⁷ and mutual recognition of conformity assessment carried out in the laboratories of the other country.⁸⁸

The SPS and TBT Agreements deviate from the traditional focus of the GATT Agreement on non-discrimination⁸⁹ by focusing not only on matters of transparency⁹⁰ and consistency,⁹¹ but also, and most importantly, on the manner in which national administrative authorities exercise discretion in setting and implementing their public health and environmental regulatory regimes—topics that, until the establishment of the WTO, had been considered to lie exclusively within the jurisdiction of the sovereign state. The SPS and TBT Agreements establish two sets of principles that help determine the legitimacy (trade-wise) of a given regulatory measure. The first set is based on the classical GATT principle of non-discrimination encapsulated in the doctrines of “most favored nation” and “national treatment”.⁹² The second set examines the substantive justification of the regulatory measure, from the points of view of both scientific justification and

85. TBT Agreement, *supra* note 45, at art. 2.4; SPS Agreement, *supra* note 82, at art. 3.1. See also Büthe, *supra* note 80. Regarding the SPS Agreement, these organizations include the World Organization for Animal Health and the organizations operating as part of the International Plant Protection Convention (IPPC). Regarding the TBT Agreement, the leading international organizations are ISO and the International Electrotechnical Commission (IEC).

86. See TBT Agreement, *supra* note 45, at art. 2.5; SPS Agreement, *supra* note 82, at art. 3.2.

87. The idea behind these agreements is that in the presence of equivalence between two standards, there is no need to impose additional technical demands that would increase the cost of the transaction without serving the substantive purpose of the regulation. See SPS Agreement, *supra* note 82, at art. 4.1; see also TBT Agreement, *supra* note 45, at art. 2.7.

88. See TBT Agreement, *supra* note 45, at art. 6 (mutual recognition of conformity assessment).

89. Tuerk and Howse refer to this as the anti-protection norm that is at the basis of article III (4) of the GATT. See Robert Howse & Elisabeth Tuerk, *The WTO Impact on Internal Regulations—A Case Study of the Canada-EC Asbestos Dispute*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 283, 309 (Gráinne De Búrca & Joanne Scott eds., 2001).

90. For example, the TBT Agreement, *supra* note 45, created a strict regime of reporting that obligates countries to disclose any technical standard that can affect trade. The various notifications are stored in a searchable database. See *TBT Information Management System*, WTO, <http://tbtims.wto.org/>.

91. The demand for consistency was applied, for example, with respect to regulatory requirements applicable to materials of similar qualities. This issue arose in the *Hormones* case, *infra* note 117, when it became clear that the EC enacted an incoherent regime with regard to the use of synthetic hormones in cattle vis-à-vis pigs. See PEREZ, *supra* note 81, at 132-37.

92. See PEREZ, *supra* note 81, at 148-51.

proportionality (in the sense of being least trade restrictive).⁹³

A recent illustration of WTO's capacity to intervene in domestic regulatory processes can be found in a series of cases dealing with the TBT Agreement. In these cases—involving U.S. internal regulation of the labeling of tuna products, the labeling requirements for imported livestock, and the ban on the sale of “flavored” cigarettes (cigarettes containing a flavor or herb or spice, excluding menthol cigarettes)—the WTO tribunals have demonstrated their willingness to delve deeply into the rationale and architecture of U.S. domestic regulation.⁹⁴

The *Tuna-Labeling* case provides a good illustration of our argument.⁹⁵ In that case, Mexico challenged the U.S. labeling scheme regarding tuna products (U.S. Dolphin Protection Consumer Information Act, “DPCIA”). It argued that the DPCIA, despite its non-prescriptive nature, is a “technical regulation” and subject to the provisions of the TBT Agreement.⁹⁶ Further, Mexico argued that the DPCIA is discriminatory (TBT Article 2.1), more trade-restrictive than necessary (TBT Article 2.2), and unjustifiably fails to use an international standard—the 1999 Agreement on the International Dolphin Conservation Program (“AIDCP”) as the basis for labeling (TBT Article 2.4).⁹⁷

The decision of the Appellate Body on these issues serves as an example of the potential of the WTO to reshape domestic administrative law. First, the Appellate Body adopted an expansive reading of the definition of “technical regulation.”⁹⁸ This expansive reading has far-reaching consequences because it extends the regulatory ambit of the TBT Agreement. The Appellate Body rejected the U.S. argument that “compliance with a labelling requirement is not mandatory in situations where producers retain the option of not using the label but nevertheless are able to sell the product on the market.”⁹⁹ The Appellate Body noted that the restrictive U.S. interpretation is not supported by the text of TBT Annex 1.1. It attached significance to the fact that “while it is possible to sell tuna products without a ‘dolphin-safe’ label in the United States, any ‘producer, importer, exporter, distributor or seller’ of tuna products must comply with the measure at issue in order to make any ‘dolphin-safe’ claim.”¹⁰⁰

93. Howse & Tuerk, *supra* note 89, at 309–10.

94. See Appellate Body Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (May 16, 2012) [hereinafter *Tuna Labeling case*]; Appellate Body Report, *United States - Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (Apr. 4, 2012) [hereinafter *Clove Cigarettes case*]; Appellate Body Report, *United States - Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012) [hereinafter *COOL case*].

95. A detailed discussion of the three cases lies beyond the scope of this article, although we will briefly comment also on the other two cases.

96. The *Tuna Labeling* case, *supra* note 94.

97. *Id.*

98. *Id.*

99. *Id.* ¶ 196.

100. *Id.*

Second, the Appellate Body accepted the Mexican claim that the U.S. “dolphin-safe” labeling provisions modify the conditions of competition in the U.S. market to the detriment of Mexican tuna products and thus are inconsistent with TBT Article 2.1.¹⁰¹ The Appellate Body examined in this context the U.S. claim that the different criteria that were used to substantiate “dolphin-safe” claims have been “calibrated” to the risk that dolphins may be killed or seriously injured when tuna are caught.¹⁰² “In this regard, the [U.S.] emphasized the uniqueness” of the Eastern Tropical Pacific (“ETP”) “in terms of the phenomenon of tuna-dolphin association,” which is widely used “to catch tuna, and causes observed and unobserved mortalities” that, the U.S. argued, “are not comparable to dolphin mortalities outside the ETP.”¹⁰³ This uniqueness justified, the U.S. argued, the unqualified ban on tuna products that contain tuna caught in the ETP from applying for a “dolphin-safe” label. The Panel heard expert evidence from both sides and concluded that while the U.S. demonstrated that the fishing technique of setting on dolphins is indeed particularly harmful to dolphins, the U.S. failed to demonstrate, based on the evidence that Mexico presented, that the risks to dolphins from *other* fishing techniques are insignificant¹⁰⁴ and do not, under some circumstances, rise to the *same level* as the risks from setting on dolphins.¹⁰⁵

The Appellate Body ruled that United States had therefore failed to demonstrate that “the detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction.”¹⁰⁶ The Appellate Body noted, in particular, that whereas “the US measure *fully* addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP” *it does not* “address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP.”¹⁰⁷ In these circumstances, even if the fishing technique used by Mexican fishermen is particularly harmful to dolphins, the Appellate Body noted that it is not “persuaded that the United States has demonstrated that the measure is even-handed in the relevant respects.”¹⁰⁸ The Appellate Body reached similar conclusions in the *Clove-Cigarettes* and *COOL* cases.

The Appellate Body’s rejection of the argument that the U.S. measure in the *Tuna-Labeling* case (as well as in the *Clove-Cigarettes* and *COOL* cases) was not more trade-restrictive than necessary to fulfill its legitimate objectives, and thus not inconsistent with Article 2.2 of the TBT Agree-

101. *Id.* ¶ 298.

102. *Id.* ¶ 282.

103. *Id.*

104. *Id.* ¶ 289; Panel Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 7.529, 7.531, 7.562, WT/DS381/R (Sept. 15, 2011) [hereinafter *Tuna Panel Report*].

105. The *Tuna Labeling* case, *supra* note 94, ¶ 289; *Tuna Panel Report*, *supra* note 104 ¶ 7.562.

106. The *Tuna Labeling* case, *supra* note 94, ¶ 297.

107. *Id.* (emphasis added).

108. *Id.*

ment, could be seen as reflecting a policy of deference to the discretion of domestic regulators—counter to our thesis.¹⁰⁹ It would be wrong, however, to overstate the deference component of this decision. The Appellate Body’s conservative reading of Article 2.2 is in fact overshadowed by its ruling that the U.S. regulatory measures in all the three cases were incompatible with Article 2.1 of the TBT Agreement due to their discriminatory nature. This ruling reflects a *de facto* interventionist approach, inconsistent with the Appellate Body’s ostensibly deferential reading of Article 2.2. First, the application of Article 2.1 by the Appellate Body involved an in-depth scrutiny of the regulatory measure, as demonstrated by the critique of the “calibration” argument presented by the U.S. in the *Tuna Labeling* case (the “even-handedness” requirement). Second, correcting the discriminatory aspect of local regulation may be difficult to achieve, due to internal regulatory complexities. Such difficulties could ultimately undermine the capacity of the state to achieve its legitimate regulatory objectives.

Thus, for example, in the *U.S. Clove-Cigarettes* case the capacity of the U.S. authorities to achieve the objective of reducing smoking rates is mired by the implications of the Supreme Court ruling in *FDA v. Brown & Williamson Tobacco Corp.*,¹¹⁰ which stated that the FDA did not have the power to regulate tobacco, and the political entanglements in Congress following it.¹¹¹ The U.S. could theoretically implement the WTO ruling by banning menthol cigarettes,¹¹² but this proposal is unlikely to pass Congress and would not assist Indonesian exports of clove cigarettes.¹¹³ The U.S. could repeal the current ban on cigarettes with flavoring other than menthol or tobacco, but this move is again likely to meet political resistance in Congress.¹¹⁴ While the discrimination-based argument of the Appellate Body may seem less interventionist than the “least-trade restrictive” argument of article 2.2, the way in which it was applied by the Appellate Body in these three cases was ultimately similarly interventionist, both

109. *Id.* ¶¶ 323-331; *COOL case*, *supra note* 94, ¶¶ 462-469; *Clove Cigarettes case*, *supra note* 94, ¶¶ 7.353-7.432.

110. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 (2000); see generally J. Christopher Baird, *Trapped in the Greenhouse?: Regulating Carbon Dioxide after FDA v. Brown & Williamson Tobacco Corp.*, 54 *DUKE L.J.* 147 (2004).

111. See Memorandum from Todd Tucker to Consumer and Health Groups 16 (Apr. 27, 2012), available at <http://www.citizen.org/documents/memo-appellate-body-clove-ruling-04-12.pdf>.

112. The 2009 Family Smoking Prevention and Control Act (Tobacco Control Act), which expressly grants the FDA the power to regulate the tobacco industry, does not apply to menthol cigarettes. Tobacco Control Act, § 907(1)(A), 123 *STAT.* 1776 (2009); see also Elisa Solomon, *WTO Creates Roadblock to Administration’s Anti-Smoking Initiative*, *REG. BLOG* (Apr. 11, 2012), <https://www.law.upenn.edu/blogs/regblog/2012/04/wto-creates-roadblock-to-administrations-anti-smoking-initiative.html>; Tania Voon, *The WTO Appellate Body Outlaws Discrimination in U.S. Flavored Cigarette Ban*, 16 *AM. SOC’Y INT’L L. INSIGHTS* 1, 1-7 (2012).

113. Tucker, *supra note* 111.

114. See Press Release, Energy and Commerce Comm., Rep. Waxman Statement on the WTO ruling on Clove Cigarettes (Apr. 4, 2012), available at <http://democrats.energycommerce.house.gov/index.php?q=news/rep-waxman-statement-on-the-wto-ruling-on-clove-cigarettes>.

because it involved an in-depth critique of domestic regulatory decisions and because of its potential detrimental impact on the capacity of domestic regulators to accomplish their legitimate goals.

A further illustration of the way in which the SPS and TBT agreements extend the intervention horizon of WTO law beyond its traditional focus on non-discrimination can be found in the risk jurisprudence of the SPS Agreement. According to the SPS Agreement, WTO members cannot impose limitations on the importation, marketing, and sale of any materials or products, even if the limitations are imposed equitably, if the national regulation is not based on sound scientific justification¹¹⁵ and a detailed process of risk assessment.¹¹⁶ The influence of the SPS Agreement on the substantive discretion of state authorities was addressed in several cases by the WTO judicial bodies. The best-known case is the *beef hormones* dispute,¹¹⁷ which began in the 1980s, when the EC prohibited the importation of beef injected with synthetic growth hormones. The prohibition was enshrined in a Directive stating that no beef that has been treated with synthetic or natural hormones is to be sold in EC countries, whether produced locally or imported.¹¹⁸ The U.S. claimed that this position was inconsistent with the SPS Agreement. The Appellate Body accepted the U.S. and Canadian claims that the Directive was inconsistent with the principles of the SPS Agreement, which require that regulation in the area of food safety¹¹⁹ be based on scientific justification and a proper process of scientific assessment.¹²⁰ Another example is the U.S.-EU con-

115. SPS Agreement, *supra* note 82, at art. 2.

116. *Id.* at art 5. Article 2.2 of the SPS Agreement states: "Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5." *Id.* At art. 2.2. Article 5.1 states: "Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations." *Id.* at art. 5.1. See also *id.* at, app. A art. 4 (defining risk assessment). Article 2.2 of the TBT Agreement is based on a similar logic. For commentary on this article, see Tuerk & Howse, *supra* note 89, at 313-20.

117. Appellate Body Report, *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998) [hereinafter *Hormones* case].

118. *Id.*

119. The legal principle is formulated in the decision of the appellate body as follows: "We believe that Article 5.1 . . . with . . . Article 2.2 of the SPS Agreement, requires that the results of the risk assessment must sufficiently warrant - that is to say, reasonably support - the SPS measure at stake. The requirement that an SPS measure be 'based on' a risk assessment is a substantive requirement that there be a rational relationship between the measure and the risk assessment." *Id.* at art. 193. For a discussion of the directives of this agreement, see Perez, *supra* note 81, at ch. 4.

120. The case was debated again by the Appellate Body: Appellate Body Report, *United States - Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS320/AB/R (Oct. 16, 2008) (adopted Nov. 14, 2008); Appellate Body Report, *Canada - Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS321/AB/R (Oct. 16, 2008) (adopted Nov. 14, 2008). For further discussion of these decisions, see B.Hoekman & J. Trachtman, *Continued Suspense: EC-Hormones and WTO Disciplines on*

flict concerning genetically engineered food (GMOs).¹²¹

As noted above, a further important source of perfecting rules is the general guidelines on risk assessment promulgated by global standard setting bodies. Article 5.1 of the SPS Agreement states that member countries, as part of their internal regulatory process, must take into account risk assessment techniques developed by the relevant international organizations.¹²² In other words, when they promulgate domestic regulations, member countries must take into consideration not only the international standards relevant to the specific regulatory problem being addressed, but also the methodology of risk assessment developed by such organizations.¹²³ The organizations listed in Article 5 include the International Office of Epizootics (OIE), Codex Alimentarius Commission (Codex), and the International Plant Protection Convention (IPPC).¹²⁴

Another body of law that influences the scope of regulatory discretion is international investment law. This influence derives from the concept of regulatory expropriation, based on the expropriation provision present in one form or another in all bilateral investment treaties. This provision obligates the host state to compensate foreign investors for loss of their investment in case it is expropriated. The expropriation provision is interpreted as potentially applying not only to cases involving actual expropriation of investments but also to cases in which the value of investment was reduced due to the establishment of stricter regulation.¹²⁵ In making

Discrimination and Domestic Regulation Appellate Body Reports: Canada/United States—Continued Suspension of Obligations in the EC—Hormones Dispute, WT/DS320/AB/R, WT/DS321/AB/R, (adopted 14 November 2008), 9 WORLD TRADE REV. 151 (2010) (noting the weakening of the scientific justification standard).

121. See Oren Perez, *Anomalies at the Precautionary Kingdom: Reflections on the GMO Panel's Decision*, 6 WORLD TRADE REV. 265 (2007).

122. SPS Agreement, *supra* note 82, at art. 5.1.

123. Perez, *supra* note 81, at 115–150; Jacqueline Peel, *A GMO by Any Other Name . . . Might Be an SPS Risk!: Implications of Expanding the Scope of the WTO Sanitary and Phytosanitary Measures Agreement*, 17 EUR. J. INT'L L. 1009 (2006).

124. See, e.g., OIE, *Terrestrial Animal Health Code*, WORLD ORG. ANIMAL HEALTH ch. 2.1 (2011), <http://www.oie.int/doc/ged/D10905.PDF> (regarding import risk analysis); see also *Procedural Manual*, CODEX ALIMENTARIUS COMM'N, 85–91, 180 (2010), <http://www.fao.org/docrep/012/i1400e/i1400e01.pdf> [hereinafter, the Codex Manual]; see also ISO, *International Standards for Phytosanitary Measures: Framework for Pest Risk Analysis*, IPPC (2011), https://www.ippc.int/sites/default/files/documents//1323944382_ISPM_02_2007_En_2011-12-01_Refor.pdf; Int'l Org. for Standardization, *ISO/TR 13121:2011: Nanotechnologies – Nanomaterial Risk Evaluation*, ISO (2011), http://www.iso.org/iso/catalogue_detail.htm?csnumber=52976.

125. See Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15 J. INT'L ECON. L. 223 (2012); Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* (Chester Brown & Kate Miles eds., 2012), available at <http://ssrn.com/abstract=2065706>; Markus Krajewski, *Investment Law and Public Services*, SSRN (Apr. 1, 2012) <http://ssrn.com/abstract=2038514>; see also Justin R. Marlles, *Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law*, 16 J. TRANSNATIONAL L. & POL'Y 275, 278 (2007); Thomas Waelde & Abba Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 INT'L & COMP. L.Q. 811, 819 (2001).

decisions regarding disputes involving regulatory expropriation, several arbitral panels have made reference to proportionality in the evaluation of the relationship between the purpose of the impugned measure and the effect of the measure on the investor.¹²⁶ This trend seems to be consistent with the WTO jurisprudence on that issue. Some authors have argued that the capacity of international investment law to intervene in national regulatory discretion is inconsistent with the public interest and could lead to (socially unjustified) regulatory chill.¹²⁷ At the same time, others have argued that this intervention can improve domestic regulatory failures.¹²⁸ At any rate, what we want to emphasize is that international investment law, just like the WTO, intervenes not just in classic questions of due process but also in issues relating to the logic and rationale of the regulatory decision.

C. Transnational Transfer of Enforcement Responsibilities

The transference of enforcement responsibilities occurs in several arenas involving both public and private forms of international law. Taken together, these different processes reflect a further significant impact of global administrative law on the domestic arena. One area in which this transference takes place is conformity assessment of technical standards. As described above, one of the ways through which the TBT and SPS agreements seek to advance the goal of international harmonization is to encourage WTO members to sign agreements on conformity assessment.¹²⁹ Conformity assessment agreements seek to reduce the cost of international trade by allowing exporters to test the conformity of their

126. See Henckels, *supra* note 125, at 225-26.

127. See David Schneiderman, *Investing in Democracy: Political Process and International Investment Law*, 60 U. Toronto L. J. 909 (2010).

128. Thanh Tra Pham, *The Impact of Treaty-Based Investment Protection upon Host States' Regulatory Autonomy*, KU LEUVEN (May 11, 2011), <https://lirias.kuleuven.be/handle/123456789/307494>.

129. Conformity assessment is "the demonstration that specified requirements relating to a product process, system, person or body are fulfilled." ISO/IEC 17000:2004(E): *Conformity assessment – Vocabulary and General Principles*, ISO, cl. 2.1 (2004), http://www.iso.org/iso/catalogue_detail.htm?csnumber=29316. See also *What is Conformity Assessment?*, ISO, www.iso.org/iso/resources/conformity_assessment.htm (last visited July 26, 2013). Further work in this field is conducted by International Laboratory Accreditation Cooperation (ILAC) and the International Accreditation Federation (IAF). The international agreements signed under the aegis of ILAC and IAF, which are called "Multilateral Recognition Arrangements," require that every signatory to treat the certifications granted to laboratories and testing organizations by the other partner as if they were granted by the signatory themselves. See *Multilateral Recognition Arrangement Documents (ML Series)*, IAF, http://www.iaf.nu/articles/MLA_Documents/39 (last visited July 26, 2013). Participating certification bodies operate in accordance with the requirements of the ISO/IEC 17011 standard, which addresses the general requirements of certification bodies. See *ISO/IEC 17011(2004): Conformity Assessment—General Requirements for Accreditation Bodies Accrediting Conformity Assessment Bodies*, ISO (2004), http://www.iso.org/iso/catalogue_detail?csnumber=29332. Two additional prominent examples are the IECEE organization's CB scheme and the IQNet organization's network. See *About the CB Scheme*, IECEE (Sept. 19, 2008), www.cbscheme.org/cbscheme/pdf/cbfunct.pdf; IQNET, www.iqnet-certification.com.

products with local (or international) standards in laboratories located outside the target country (e.g., in the country of origin). These agreements erode the power of domestic administrative agencies, even when the standard remains local, since they transfer the power to supervise and implement the domestic norm from the national administrative agency to an external body.

The scale of this phenomenon at the global level can be ascertained from the work of the Committee on Conformity Assessment (CASCO) established by the ISO in order to encourage international harmonization of conformity assessment procedures. The committee both works on the principles and the practice of conformity assessment¹³⁰ and develops documents that are published as ISO/IEC International Standards or Guides.¹³¹ CASCO's main objectives are (1) to prepare international guides and International Standards relating to the practice of testing, inspection, and certification of products, processes, and services; and (2) to promote mutual recognition and acceptance of national and regional conformity assessment systems, and the appropriate use of International Standards for testing, inspection, certification, assessment and related purposes.¹³² So far, CASCO has been involved in the publication of 27 standards.¹³³ It has 71 participating countries and 48 observing countries.¹³⁴

Similar processes of transference of enforcement powers also occur in the domain of corporate social responsibility (CSR). Many of the global CSR codes have developed an intricate system of private verifications and accreditation, which is operated and managed outside the boundaries of state control. Prominent examples of this process are the environmental management system—ISO 14001,¹³⁵ the Sustainability Disclosure Guidelines of GRI¹³⁶ and the social accountability standard for ethical working

130. Int'l Org. for Standardization, *ISO and Conformity Assessment*, ISO (2005), http://www.iso.org/iso/casco_2005-en.pdf.

131. Int'l Org. for Standardization, *Standards Catalogue*, ISO, http://www.iso.org/iso/home/store/catalogue_tc/catalogue_tc_browse.htm?commid=54998 (last visited Sept. 21, 2013).

132. Int'l Org. for Standardization, *ISO/CASCO Committee on Conformity Assessment*, ISO, http://www.iso.org/iso/iso_technical_committee.html?commid=54998 (last visited Sept. 21, 2013).

133. *Id.*

134. *Id.*

135. See Matthew Potoski & Aseem Prakash, *Covenants with Weak Swords: ISO 14001 and Facilities' Environmental Performance*, 24 J. POL'Y ANALYSIS & MGMT. 745 (2005).

136. GRI Sustainability Reporting Guidelines G3.1, *supra* note 38. The GRI Guidelines offer two complementary compliance mechanisms. GRI can check the reporter's self-declaration of its reporting application level. Another alternative is to have the report reviewed by a third party. *Id.* at 6. GRI checks for the presence or absence of the criteria in the report that corresponds to the report maker's self-declared Application Level. The GRI Application Level check does not represent GRI's view on the quality of the report and its content; it is simply a statement about the extent to which the GRI Reporting Framework was utilized. In contrast, external assurance is expected to assess whether the report provides a reasonable and balanced presentation of performance, taking into consideration the veracity of data in a report as well as the overall selection of content. See *id.* at 41.

conditions SA8000.¹³⁷ The certification procedures of the SA8000 standard came under scrutiny following the 2012 tragic accident in Ali Enterprises textile factory in Karachi, already mentioned in the introduction. We will further examine the implications of this incident below.¹³⁸

The transference of regulatory powers also occurs at the meta-regulatory level: the transnational system also provides the framework that supervises and monitors the multiple bodies—laboratories, accreditation bodies, external verifiers—that provide those various enforcement services. For example, one of CASCO's main goals is to develop international guides and international standards relating to the operation and acceptance of testing laboratories, inspection bodies, certification bodies, and accreditation bodies.¹³⁹ In a similar manner, the ISEAL Code of Good Practice for Assuring Compliance with Social and Environmental Standards provides general guidance for assurance compliance processes.¹⁴⁰ The global organization AccountAbility developed a general framework for assurance compliance for organizations. The AA1000 Assurance Standard 2008 provides a comprehensive way of holding an organization accountable for its management, performance, and reporting on sustainability issues by evaluating the adherence of an organization to the AccountAbility Principles and the reliability of associated performance information.¹⁴¹ Such meta-regulatory frameworks can also be found in more specific contexts. For example, SAAS has developed meta-rules regarding the accreditation of certification bodies in the context of social standards such as SA8000.¹⁴²

137. The accreditation and monitoring of organizations certifying for SA8000 is carried out by the international accreditation agency Social Accountability Accreditation Services (SAAS) which was founded in 2007 to accredit and monitor organizations as certifiers of compliance with social standards, including the Social Accountability 8000. See SOC. ACCOUNTABILITY. ACCREDITATION SERV., <http://www.saasaccreditation.org/index.htm> (last visited Sept. 27, 2013). See also Ingrid Gustafsson & Kristina Tamm Hallström, *Unpacking the Certification Revolution—The Construction of Legitimacy* (2012), available at http://carbsdrupal.hosting.cf.ac.uk/sites/default/files/ipa2012/Final_Version_IPA_Paper_Reference_163.pdf; Rainer Braun, *Social Accountability International*, in *THE HANDBOOK OF TRANSNATIONAL GOVERNANCE: INSTITUTIONS AND INNOVATIONS* 338 (Thomas Hale & David Held eds., 2011).

138. See *infra* notes 205–207 and accompanying text.

139. The primary references in this context are: Int'l Org. for Standardization, *ISO/IEC 17021:2006: Conformity Assessment—Requirements for Bodies Providing Audit and Certification of Management Systems*, ISO (2006), http://www.iso.org/iso/catalogue_detail?csnumber=29343; Int'l Org. for Standardization, *ISO/IEC Guide 62:1996 General Requirements for Bodies Operating Assessment and Certification/Registration of Quality Systems*, ISO (1996), http://www.iso.org/iso/home/store/catalogue_ics/catalogue_detail_ics.htm?csnumber=2525.

140. See ISEAL ALLIANCE, http://www.isealalliance.org/sites/default/files/Assurance%20Code_v01_Oct312011.pdf.

141. See ACCOUNTABILITY, <http://www.accountability.org/standards/aa1000as/index.html>.

142. See SAAS, *Accreditation of Certification Bodies of Social Accountability Systems* (Jan. 18, 2008), <http://www.saasaccreditation.org/docs/Procedure%20201,%20January.2008.pdf>.

III. Challenges for Administrative Law in the Era of Globalization

The increasing influence of global law on national administrative law raises important normative and policy dilemmas. In particular, we argue that the emerging decoupling of bureaucratic power and the state apparatus challenges the traditional mechanisms of control developed by administrative law in order to counter to potential abuse of administrative power. The new reality of increasing transnational intervention in the domestic sphere requires administrative law to develop new legitimization devices.

We start by examining the possibility to ground the legitimacy of this new body of transnational administrative law in (some) universal rationality, exploring, in particular, and in this context criticizing, its ideological undercurrents. We then move to discuss the problem of fragmented accountability regimes. This fragmentation questions the legitimacy of global administrative law by pointing to the lack of efficient control mechanisms. Finally, we examine the challenge posed by the expanding influence of universal administrative law norms on our democratic conceptions of legitimization.

A. The Ideological Undercurrents of Global General Administrative Law

The norms of this evolving system of global general administrative law are not ideologically neutral. They are driven by certain perceptions regarding the nature of a good and just society, more specifically by a neo-liberal, capitalist vision. This ideological dimension is problematic mainly because it remains concealed behind a discourse of rationality and objectivity. Exposing the way in which the ideological presuppositions underlying this new body of law are manifested in its intricate doctrinal structure is thus an important contribution to the project of “placing political controls on a globally unleashed capitalism.”¹⁴³ This ideological bias undermines any attempt to ground the legitimacy of global administrative law on some universal rationality.¹⁴⁴

The neo-liberal, capitalist vision is particularly dominant in the regimes of WTO law and international investment law. Because of the institutional ties between the WTO and some of the global standardization regimes (through the TBT and SPS Agreements), this ethos also influences the norm-production process in their respective spheres. The way in which the capitalist ethos influences the structure of the new universal regime of administrative law is not always obvious or transparent. It is beyond the scope of this Article to provide a complete exposition of this influence and we will focus on two recent examples—the decisions of the Appellate Body in the *Tuna-Labeling* case and the *Clove-Cigarettes* case—which illustrate this point.¹⁴⁵ In the *Tuna-Labeling* case, the Appellate Body ruling was

143. See Jurgen Habermas, *Toward a Cosmopolitan Europe*, 14 J. DEMOCRACY 86, 87 (2003); TEUBNER, *supra* note 20, at 85, 93.

144. The depiction of this ethos by Max Weber is still relevant. See MAX WEBER, *THE PROTESTANT ETHIC AND THE “SPIRIT” OF CAPITALISM* 18-19 (Routledge, 2005).

145. For a more detailed discussion, see Perez, *supra* note 81; SCHNEIDERMAN, *supra* note 10; Habermas, *supra* note 143, at 91.

driven by the understanding that “the lack of access to the ‘dolphin-safe’ label of tuna products containing tuna caught by setting on dolphins has a detrimental impact on *the competitive opportunities* of Mexican tuna products in the US market.”¹⁴⁶ The Appellate Body did not consider an alternative approach that would focus on the possibility of achieving a better environmental response to this dilemma. Thus, it did not ask itself how to combine the U.S. regulatory regime (the DPCIA) with the AIDCP in order to produce a better regime for protecting dolphins in the ETP and elsewhere. Similarly, in the *Clove-Cigarettes* case the Appellate Body did not consider the political economy factors that could undermine the capacity of the U.S. authorities to achieve the objective of reducing smoking rates, following the discrimination-based ruling of the Appellate Body. Overall, the main problem with the Appellate Body’s discrimination-based strategy is that it has been motivated solely by a concern over the competitive conditions in the tobacco market and not by a holistic approach to the regulatory dilemma.¹⁴⁷

Exposing the capitalist undercurrents of the universal administrative law norms highlights the need to develop new institutional venues in which the ideological presuppositions of this new body of law could be subject to public contestation.¹⁴⁸ What is needed, in other words, are institutionalized mechanisms that could support reflexive deliberation regarding these rule-making processes, in a way that will enable the public to unveil and criticize their underlying presuppositions. One way to promote this goal is to create a new global alliance (or alliances) of transnational institutions that pursue non-economic objectives. Such alliances should include both treaty-based international organizations such as UNEP and WHO and private transnational organizations such as GRI and Social Accountability International.¹⁴⁹ Creating such sustainability-based alliances could counter the economic-driven logic of the WTO with a more holistic thinking that gives due regard to social and environmental/health concerns. Such an alliance also has the potential to promote sustainability thinking in the emerging global general standards of administrative law. Two examples are the subjection of the SPS principle of scientific justification to the precautionary principle and the extension of the transparency principle to environmental and labor issues as promulgated by the GRI G3.1 Sustainability Reporting Guidelines.¹⁵⁰

146. The Tuna Labeling case, *supra* note 94, ¶ 235 (emphasis added).

147. *Id.* ¶¶ 111-113.

148. See Habermas, *supra* note 143, at 94; Peter Wagner, *The Democratic Crisis of Capitalism: Reflections on Political and Economic Modernity in Europe*, SSRN (2011), <http://ssrn.com/abstract=1969031>.

149. Prominent examples of such public-private alliances include the GRI, which has global strategic partnerships with the OECD, UNEP and the United Nations Global Compact as well as the UNEP Finance Initiative, which is a global partnership between UNEP and the financial sector. GRI’s *Alliances and Synergies*, GRI <http://www.globalreporting.org/information/about-gri/alliances-and-synergies/Pages/default.aspx>; *What We Do*, UNEP, <http://www.unepfi.org/>.

150. One possible interpretation of the precautionary principle (PP) is the imposition of greater sensitivity to false negatives. In some environmental-health contexts involving

Sustainability-based alliances have already emerged in various contexts. Various global initiatives follow this vision: the United Nations Environment Programme Finance Initiative (UNEP FI), which is a global partnership between the UNEP and the global financial sector; the GRI global strategic partnerships with the OECD, the UNEP, and the United Nations Global Compact; ISO 26000 Guidance on social responsibility was developed through a wide range consultation, drawing on a network of sustainability organizations.¹⁵¹ The main problem facing this idea is the current asymmetry between the institutions of global capitalism and the institutions that have the potential to be part of such a sustainability alliance. A good example of this asymmetry is the failure of the June 2012 Rio+20 Conference to strengthen UNEP, leaving it almost as weak as it was before the conference.¹⁵² The Rio+20 Conference has also failed in its effort to promulgate a clear concept of “green economic growth,” which could serve as a counter concept to the vision of growth underlying the WTO.¹⁵³ In that respect, the literature celebrating the emergence of new resisting institutions, following the 2008 financial crisis, seems to express wishful thinking.¹⁵⁴

severe hazards the possibility of false negatives (Type II errors)—that is, failing to detect a true hazard—could be considered much worse than the possibility of false positives (Type I errors)—that is, falsely describing something as hazard. Type I errors drive the conventional scientific work and by imposing greater sensitivity to Type II errors the PP could reform the nature of scientific justification in the specific context of health and environmental hazards. See Steve E. Hrudey & William Leiss, *Risk Management and Precaution: Insights on the Cautious use of Evidence*, 111 ENVTL. HEALTH PERSP. 1577, 1580 (2003).

151. See *About UNEP FI*, UNEP, <http://www.unepfi.org/about/index.html>, *GRI's Alliances and Synergies*, *supra* note 149; Int'l Org. for Standardization, *ISO 26000 Project Overview*, ISO (Sept. 2010), http://www.iso.org/iso/iso_26000_project_overview.pdf.

152. Despite the commitment to “Enhance the voice of UNEP and its ability to fulfill its coordination mandate,” the reform suggested in Rio+20 appears to stop short of upgrading UNEP to the same level as more powerful UN bodies, such as the WTO. See UN, *The Future We Want*, agenda item 19, ¶ 88(c) (Sept. 11, 2012), available at <http://www.uncsd2012.org/thefuturewewant.html>; Frances Vorhies, *Life after Rio+20: A Commentary by Mark Halle*, IISD, FORBES June 18, 2012, available at <http://www.forbes.com/sites/francisvorhies/2012/06/25/life-after-rio20-a-commentary-by-mark-halle-iisd/print/>; Jonathan Watts, *Rio+20 Earth Summit Moves to Boost UN Environment Programme*, GUARDIAN June 18, 2012, available at <http://www.guardian.co.uk/environment/2012/jun/18/rio-20-earth-summit-environment>. Similarly, the WHO Framework Convention on Tobacco Control (WHO FCTC) does not offer an effective regulatory framework, capable of countering the forces of the global tobacco industry. See WHO Framework Convention on Tobacco Control, (May 21, 2003), available at <http://www.who.int/fctc/en/>; Ross Hammond & Mary Assunta, *The Framework Convention on Tobacco Control: promising start, uncertain future*, 12 TOBACCO CONTROL 241 (2003) (highlighting the problem of effectiveness).

153. *The Future We Want*, *supra* note 152, at 10 (“Green economy in the context of sustainable development and poverty Eradication.”).

154. See, e.g., TEUBNER, *supra* note 20, at 94–96 (discussing the limited potential of CSR codes); Peter Muchlinski, *The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World*, 18 IND. J. GLOBAL LEGAL STUD. 665 (2011) (discussing framework for human rights and business developed by the U.N. Special Representative of the Secretary General on Business and Human Rights, John Ruggie).

B. The Accountability Challenge: Disharmony Between the Universalization of Administrative Law Norms and the Fragmentation of Accountability Regimes

The accountability challenge focuses on the tension between the processes of regulatory harmonization and transference of enforcement responsibilities, described above, and the primarily domestic regimes of accountability (tort law, criminal law, and administrative forms of accountability), which are still highly fragmented. In other words, while globalization has triggered a process which requires domestic regulators to exercise their discretion according to globally determined decision-frameworks and to rely on the discretion of external bodies (laboratories and accreditation bodies) in the implementation of local (or global) standards, decisions on liability for the same actions are still governed by domestic systems of accountability.¹⁵⁵

This accountability gap could distort both global and local decisions regarding risks in a way that may lead to sub-optimal policies. First, the fragmentation of accountability regimes could prevent attempts to hold international actors accountable for their negligent actions. This problem arises because of the inherent mismatch between states' exposure to foreign actors and their capacity to subject them to ex ante regulatory scrutiny or ex post tortious or criminal liability. Transnational regulatory bodies could generate risks that could influence the external domestic market in various ways: (1) through the negligent promulgation of a standard (which was followed by local players—whether firms or public officials); (2) by negligently conducting conformity assessments of products designated for export (which were relied upon by local players—whether firms or public officials); and (3) by negligently certifying a local firm to some global standard (e.g., the incident in the Ali Enterprises textile factory in Karachi involving SA8000 certification).¹⁵⁶

The risks associated with the work of transnational regulatory bodies should be analyzed in the context of the primary risks created by foreign firms, through the manufacturing of hazardous products or in engaging in risky production processes. Subjecting these foreign bodies to regulatory

155. See, e.g., Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081 (2010); Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA J. INT'L L. 251 (2005); Marta Infantino, *Making European Tort Law: The Game and Its Players*, 18 CARDOZO J. INT'L & COMP. L. 45 (2010).

156. See Robert H. Heidt, *Damned for Their Judgment: The Tort Liability of Standard Development Organizations*, 45 WAKE FOREST L. REV. 1227 (2010); Ronen Avraham, *Private Regulation* 34 HARV. J. L. & PUB. POL'Y. 1, 49 (2011). A similar problem arises in the context of accrediting bodies. See Peter H. Schuck, *Tort Liability to Those Injured By Negligent Accreditation Decisions*, 57 LAW & CONTEMP. PROBS. 185, 185-86 (1994). This problem is mitigated due to jurisdictional issues. See, e.g., Hannah L. Buxbaum & Ralf Michaels, *Jurisdiction and Choice of Law in International Antitrust Law—A U.S. Perspective*, in INTERNATIONAL ANTITRUST LITIGATION: CONFLICT OF LAWS AND COORDINATION (Jürgen Basedow et al, eds, 2012); Sarah C. Kacxmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT'L ORG. 745 (2011); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081 (2010).

scrutiny (both *ex ante* and *ex post*) is problematic due to jurisdictional issues (the problem of long arm jurisdiction), as well as to differing standards of liability.¹⁵⁷

Second, the accountability gap is problematic in that it subjects domestic regulators to contradictory expectations—reflecting the conflict between the forces of trade liberalization and domestic regulatory oversight—which cannot be resolved at the level of a particular regulatory agency. A particularly illuminating manifestation of this conundrum is the case in which a hazardous product has entered the domestic market, drawing on a negligent assessment and certification by foreign laboratory (drawing on a bilateral conformity assessment procedure). In such circumstances, should the domestic regulatory agency and the domestic importer, which have both relied on the evaluation by the external body, receive immunity from local tortious or criminal liability? Forcing domestic regulators and firms to duplicate tests done abroad could lead to a waste of scarce administrative resources and is inconsistent with the harmonization effort of the TBT and SPS Agreements. However, the accountability gap raises valid concerns regarding the deference to transnational regulatory bodies, especially in the context of certain risk-prone products such as pharmaceutical and food products.

Two examples, taken from the U.S. and Israeli contexts, illustrate the scope of this accountability challenge. In the U.S., this challenge is exemplified by the growing discontent with the inability of the FDA to supervise the quality and safety of imported products, mainly food, drugs, and cosmetics. The 2008 Chinese Heparin contamination incident is a case in point.¹⁵⁸ Reports indicated that, in 2008, dozens of cases of death and hundreds of cases of physical injury reports were related to the use of Heparin, a contaminated blood-thinner drug that was manufactured by the American drug company Baxter Healthcare Corp. (Baxter).¹⁵⁹ Researchers at the FDA identified the contaminant as “oversulfated chondroitin sulfate,” which mimics the characteristics of Heparin, but can cause deadly reactions,¹⁶⁰ as the contaminant.¹⁶¹ The FDA’s investigation revealed that the contaminated Heparin originated in Changzhou SPL Company, Ltd. (Changzhou), a subsidiary of Scientific Protein Laboratories (SPL), which operated in Jiangsu Province. Changzhou sold the Heparin to SPL, which, in turn, sold the Heparin to Baxter.¹⁶² Baxter purchased Heparin from

157. For a more detailed analysis of this problem, see, e.g., Buxbaum, *supra* note 156; Kacxmerek, *supra* note 156; Robertson, *supra* note 156.

158. Another food-safety scandal involving Chinese manufacturers is the Sanlu milk contamination affair. See Céline Marie-Elise Gossner, *The Melamine Incident: Implications for International Food and Feed Safety*, 117 ENVTL. HEALTH PERSP. 1803 (2009).

159. *Information on Heparin*, FDA (Dec. 6, 2012), <http://www.fda.gov/Drugs/Drug-Safety/PostmarketDrugSafetyInformationforPatientsandProviders/UCM112597>.

160. Marisa A. Pagnattaro & Ellen R. Peirce, *From China to Your Plate: An Analysis of New Regulatory Efforts and Stakeholder Responsibility to Ensure Food Safety*, 42 GEO. WASH. INT’L L. REV. 1, 7 (2010).

161. *Id.*

162. *Id.*

Changzhou beginning in 2004, yet it did not inspect Changzhou's plant until September 2007. The FDA also mistakenly failed to inspect the Changzhou plant, so it was unable to uncover the problem before it arose.¹⁶³

The incident raised broad public concerns regarding the responsibility (and the capability) of the FDA to fulfill its regulatory functions in an increasingly open economy. Congressional hearings on this matter revealed that the FDA is short of the money, manpower, and legal authority necessary to cope with the current scope of drug imports. In fact, the FDA itself stated that it does not have the funds or the necessary legal powers to inspect, on a regular basis, overseas manufacturers of pharmaceutical ingredients—not every overseas manufacturing site, and not every shipment that crosses U.S. borders. Moreover, this very limited scope of inspection with regard to imported products is not unique to drugs. Currently, the FDA does not attempt to inspect every shipment to the U.S.—it inspected only 1.28% of imported foods in 2007 and projected that it would inspect only 1.26% in 2009.¹⁶⁴ One of the difficult legal issues raised by this case is to what extent Baxter can rely on the preemption doctrine in its defense and argue that the FDA approval should preempt any state tort claim against it. The broad application of the preemption doctrine has been criticized,¹⁶⁵ and was even slightly narrowed in recent case law.¹⁶⁶ The *Heparin* case litigation, which consists of several lawsuits, is still in its early stages, and therefore it is hard to know which direction it will take.¹⁶⁷

The inability of domestic regulators to fully supervise the quality and safety of imported products is not unique to the FDA. Another example of this problem comes from the Israeli *Remedia* affair.¹⁶⁸ The case dealt with the marketing of baby food products imported from Germany, which did

163. Editorial, *The Frightening Heparin Case*, N.Y. TIMES (Apr. 28, 2008), <http://www.nytimes.com/2008/04/28/opinion/28mon2.html>.

164. David Plunkett & Caroline Smith DeWaal, *Who is Responsible for the Safety of Food in a Global Market? Government Certification v. Importer Accountability as Models for Assuring the Safety of Internationally Traded Foods*, 63 FOOD & DRUG L. J. 657 (2008); Stuart O. Schweitzer, *Trying Times at the FDA—The Challenge of Ensuring the Safety of Imported Pharmaceuticals* 358 NEW ENG. J. MED. 1773 (2008) (indicating that the FDA inspects only around 7% of foreign establishments in a given year).

165. See Peter H. Schuck, *FDA Preemption of State Tort Law in Drug Regulation: Finding the Sweet Spot*, 13 ROGER WILLIAMS U. L. REV. 73 (2008); Mary J. Davis, *The Battle Over Implied Preemption: Products Liability and the FDA*, 48 B.C. L. REV. 1089 (2007); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449 (2008).

166. In general, in the matter of medical devices, the Supreme Court ruled that the FDA's Pre-Market Approval (PMA) does preempt state tort law, and therefore "shields" the manufacturer from tort accountability. See *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 317 (2008). However, preemption did not apply under the circumstances of *Wyeth v. Levine*, 555 U.S. 555 (2009), where the case involved additional labeling requirements mandated by state law.

167. See, e.g., In re *Heparin Products Liability Litigation*, No. 1:08-hc-60000, MDL 1953, 2010 U.S. Dist. LEXIS 100543 (2010); see also Pagnattaro, *supra* note 160.

168. See Judy Siegel-Itzkovich, *Remedia Owner, CEO Face Indictment*, JERUSALEM POST (Oct. 9, 2006), <http://www.jpost.com/Israel/Article.aspx?id=34394>.

not contain a vitamin necessary for the development of infants (B1) and thus caused severe health issues, some of them irreversible, and even death, to infants whose only source of nutrition was the Remedía baby formula.¹⁶⁹ After the case was made public at the end of 2003, public shock focused the attention on the issue of the regulation of imported food products.¹⁷⁰ Ultimately, an Israeli court placed most of the responsibility for the absence of B1 in the food on the German manufacturer (Humana) and on the German laboratory that checked the product.¹⁷¹

The Remedía affair resulted in not only tort actions against the Israeli importer, but also in criminal indictments issued against three high-level Remedía officials, as well as against five Israeli Health Ministry officials. The final court ruling was somewhat complex, acquitting some of the defendants from several indictments and convicting them of others. While the court stated that the defendants should have done more to inspect and supervise the importation of the product it also noted the difficult dilemma underlying this case, as will be elaborated below.¹⁷²

Focusing once again on the accountability challenge, the question raised by the case is whether in a world that is increasingly dominated by free trade, should a domestic regulator formulate a policy that requires the conduct of independent tests of the quality and safety of imported goods, or can it rely on the testing and standards of other countries with which it maintains trade relations? This question has two aspects: standards (is it enough to meet a foreign standard?) and testing (is it possible to rely on testing carried out abroad by the manufacturer and/or certified laboratories?). The indictment attributed negligence to the Remedía defendants, among others, because:

[T]hey adopted a policy of complete and blind reliance on Humana in all matters of product safety, and not only were Humana products not tested by Remedía Marketing, but Humana was not even required to send to Remedía Marketing the results of its analysis of the products that Remedía Marketing had ordered.¹⁷³

The indictment of the management of the Health Ministry officials, in particular, addressed the fact that the officials “caused a reduction in the scope of testing carried out by supervisors at the quarantine stations for imported foods,” and “caused the formation of an attitude at the quarantine station that resulted in minimal, if any, testing of imported foods.”¹⁷⁴ The indictment implies that administrators cannot rely on standards and testing performed in other countries and should act independently. This approach is at odds with the attempt of the TBT and SPS Agreements to

169. Yonah Jeremy Bob, *Former Technologist Convicted in Baby Formula Case*, JERUSALEM POST (Feb. 13, 2013), <http://www.jpost.com/National-News/Former-technologist-convicted-in-baby-formula-case>.

170. *Id.*

171. *Id.* But cf. (Petach Tikva Magistrate) 2613/08 State of Israel vs. N. Black & Others (verdict given on 13 February 2013) (in Hebrew).

172. *Id.*

173. *Id.*

174. *Id.*

remove artificial trade barriers and to encourage processes of reciprocal recognition in standards and conformity assessment.¹⁷⁵

The indictments issued in *Remedia*, especially those directed at the public officials involved, seem to reflect unwarranted disregard for the tension between the powers and capabilities of domestic administrative agencies and the international trade framework in which they fulfill their regulatory responsibilities. This disregard became apparent not only because of the criminal trial, but also because the Israeli Ministry of Trade has continued to promote a policy of mutual recognition of standards and conformity assessments within the WTO and in other contexts. In fact, the Agreement on Conformity Assessment and Acceptance of industrial products, between EU and Israel (signed on 6 May 2010 and ratified by the EU on 23 October 2012) includes an important annex in the area of pharmaceutical products.¹⁷⁶ Eventually, facing this seeming paradox was left for another day since the indictments against the defendants from the Ministry of Health resulted in plea bargains.¹⁷⁷ Nonetheless, the Court's final ruling regarding the managers of *Remedia*, given on 13 February 2013, seems to reflect the regulatory complexities underlying this case. The Court acquitted *Remedia*'s CEO from most of the indictments against him, noting that his reliance on the German manufacturer and the German laboratory was reasonable under the circumstances and that *Remedia* was not required to re-check the products' quality in Israel.¹⁷⁸ The Court noted in that context that the German manufacturer adopted strict international standards such as ISO 9000 and HACCP.¹⁷⁹ Finally, the Court noted the lack of specific Israeli standards on baby food and quoted the Director General of the Ministry of Health, who noted that when a product certified by a reputable standard is imported to Israel the practice is that Israeli

175. These dilemmas were openly discussed in Parliamentary proceedings. For example, at the debate held in the Labor, Welfare and Health Committee of the Knesset in 2003, the Director General of the Ministry of Health, Prof. Boaz Lev, said: "We must remember that the accepted basis of checking worldwide is based on documents. In other words, certificates of analysis that arrive from the countries of origin are the basis of the checking. It is not possible and there is no way and there is no country in the world that performs this, that checks personally and rechecks all the ingredients of the food after the food has been checked in a recognized laboratory in another country. . . . Just as we don't check, for that matter, when a Mercedes arrives here, whether the brakes of that Mercedes indeed stop the car. We don't check it. We know that Mercedes, the firm, is a company with a quality mark, and when a car arrives here it has its brakes and its transmission, and Mercedes cars also break down. . . . When we talk about baby food and food additives, which are apparently more sensitive items, the manufacturer must have good manufacturing practices, GMP, in the country of manufacture. GMP is not something we made up. It is some worldwide standard. We don't deviate from some other world standards, we say that they should have GMP, that they should have a quality mark which conforms to very meticulous and strict procedures worldwide." Protocols of the Labor, Welfare and Health Committee of the Knesset, 2003 (our translation).

176. See David Kriss, *European Parliament Approves EU-Israel Agreement to Simplify Trade*, DELEGATION OF THE E.U. TO ISRAEL (Oct. 25, 2012), http://eeas.europa.eu/delegations/israel/press_corner/all_news/news/2012/20121025_en.htm.

177. See Bob, *supra* note 169.

178. *Id.*

179. *Id.*

authorities will not check it again.¹⁸⁰

The solutions available to this regulatory challenge at the domestic level tend to provide only a partial response. Broadening the scope of inspection of foreign producers and imported products is not only economically costly but also seems to be inconsistent with the WTO-inspired effort to reduce the transaction costs associated with divergent standards and compliance assurance processes. This is the route taken by the FDA Food Safety Modernization Act (FSMA), which gives the FDA more authority to ensure that foods consumed in the U.S. are safe. With this new law, the FDA is required to double the number of foreign food facility inspections each year from 2011 to 2016.¹⁸¹ An opposite approach is to refrain from any inspections and impose the responsibility to inspect foreign producers on importers. This approach, which amounts to the de facto privatization of the regulatory process, is problematic in that it assumes that importers can be completely relied upon to fulfill this regulatory task.¹⁸² A middle-way approach is to develop a risk-based inspection system, which focuses inspection efforts on importers and manufacturers that are more likely to pose a threat (based on recent incidents, reputation, geographical location of the manufacturing sites, characteristics of the product, etc.).¹⁸³

Because the regulatory problems associated with the accountability gap cannot be solved completely by unilateral steps, both regulators and firms have developed solutions that involve transnational efforts. One such approach is to create deeper relations between the regulators of different trading partners. A good example of this approach is the agreement signed between the U.S. Department of Health and Human Services and the Chinese government on cooperation and exchange with regard to the

180. See Case 2613/08, *supra* note 171, at 855, 905, 982. For details on the plea bargains, see Ron Friedman, *5 Health Ministry Workers Plead Guilty for Remedix Deaths*, JERUSALEM POST (Feb. 28, 2011), <http://www.jpost.com/Health/Article.aspx?id=210139>. One of the intriguing facts about this affair is that whereas the Israeli authorities have initiated long and protracted criminal proceedings against the managers of Remedix and the Ministry of Health officials, the German authorities satisfied themselves with a very low-key response. On December 10, 2008 the District Court in Bielefeld authorized a bargain between the German police and the four Humana employees involved, ordering them to pay very modest fines (in the range of 6000 to 20000 euros). See Case 2613/08, *supra* note 171, at 25–26.

181. The FDA Food Safety Modernization Act was enacted by the U.S. Congress and signed into law by President Obama on January 4, 2011. Food Safety Modernization Act (FSMA), Pub. L. No. 111-353, 124 Stat. 3885; see also *FDA Food Safety Modernization Act: Top 10 New Requirements Food Industry Professionals Need to Know*, REGISTRAR CORP. (Mar. 8, 2012), <http://fda-news.registrarcorp.com/2012/03/fda-food-safety-modernization-act-top-10-new-requirements-food-industry-professionals-need-to-know/>.

182. Kenneth A. Bamberger & Andrew T. Guzman, *Importers as Regulators: Product Safety in a Globalized World*, IMPORT SAFETY: REGULATORY GOVERNANCE IN THE GLOBAL ECONOMY (Coglianese et al, eds., 2010).

183. See Caitlin E. Fleming, *Overdosed and Contaminated: A Critical Examination of The FDA and Drug Industry's Role in Drug Safety in the Context of the Heparin Catastrophe*, 13 QUINNIPIAC HEALTH L.J. 117, 168 (2002) (stating that during Congress' hearings regarding the Heparin case, Congressional staff suggested that Baxter's request to change the manufacturing site of its Heparin from Wisconsin to China should have been considered a high risk action).

safety of food and feed.¹⁸⁴ The agreement established various mechanisms expected to assist the parties in fulfilling their regulatory objectives, primarily through more open and efficient exchange of information.¹⁸⁵ One of the interesting consequences of the agreement has been the opening of three FDA offices in China in 2008 (the first FDA offices to open outside the United States).¹⁸⁶ Agreements of this type can improve regulatory cooperation but cannot completely resolve the accountability gap that results from the fragmented jurisdictional structure of the international arena.

A different type of response focuses on the transnational arena, seeking to strengthen the regulatory capacities of the relevant international schemes. Two mechanisms are worth noting in this context. The first is the use of meta-regulatory schemes, such as the GFSI benchmarking criteria for food safety schemes, discussed above.¹⁸⁷ The second involves stricter inter-firm contractual monitoring. For example, Walmart's Standards for Suppliers Manual states that suppliers may be subject to audits by Walmart and its third party service providers and must cooperate with such audits.¹⁸⁸ Further, according to Walmart's 2012 CSR Report, since 2007 Walmart requires all private-brand suppliers and select categories of national-brand suppliers to obtain certification from one of the Global Food Safety Initiative's (GFSI) internationally recognized food safety standards.¹⁸⁹ In addition, every international market in which Walmart has retail facilities has required all facilities producing private-brand products to become certified against one of the GFSI standards.¹⁹⁰

C. The Democratic Challenge: Toward Diversity of Participation and Consultation Models

The expanding influence of universal administrative law norms poses a challenge to the democratic conceptions of domestic administrative law. While modern administrative law has developed sophisticated methods of public participation, these mechanisms have remained embedded in a domestic framework, disregarding the extent to which domestic administrative law is influenced by external norms. The ideological undercurrents of the general norms of global administrative law and the accountability gap discussed above emphasize the need to cope with this democratic deficit, which questions the legitimacy of the transnational normative network.

184. See generally Agreement on the Safety of Food and Feed, U.S.-China, Dec. 11, 2007, T.I.A.S. No. 07-1211.1, available at <http://www.state.gov/documents/organization/108850.pdf>.

185. See Pagnattaro, *supra* note 160, at 24-26.

186. See *id.* at 26.

187. See GFSI Guidance Document, *supra* note 46 and accompanying text.

188. WALMART STORES, INC., STANDARDS FOR SUPPLIERS MANUAL 22 (2012).

189. FDA Food Safety Modernization Act: Top 10 New Requirements Food Industry Professionals Need to Know, REGISTRAR CORP. (Mar. 8, 2012), <http://fda-news.registrarcorp.com/2012/03/fda-food-safety-modernization-act-top-10-new-requirements-food-industry-professionals-need-to-know/?lang=pt>.

190. Walmart 2012 Global Responsibility Report, *supra* note 44, at 24.

In thinking about this democratic dilemma, we develop a strategy that steers a middle course between the extremes of sovereign exceptionalism and global constitutionalism.¹⁹¹ The attempt by the advocates of sovereign exceptionalism¹⁹² to reestablish popular democracy by resisting the intrusion of external norms into the constitutional space of the nation-state seems to us to be out of touch with the empirical and normative repercussions of globalization. First, the penetration of global norms into the local realm is so pervasive that it is simply unrealistic, even for powerful countries, to resist this process. Second, the isolationists' approach disregards some positive aspects of the development of global administrative law. For example, The WTO normative framework can correct, in some cases, failures in the internal democratic system that impair the government's ability to act in the public's best interest, due to pressures of interested parties.¹⁹³ In the case of developing countries, where poverty runs deep and the regulatory framework is weak, private standards such as SA8000 may be one of the few mechanisms for improving social and environmental practices.¹⁹⁴ Finally, the new sovereigntists also disregard the fact that in our increasingly interconnected world, coping with global problems such as climate change, poverty, and peace keeping requires collaborative action. There is a strong moral argument for transnational collaboration, which must also be reflected in the structuring of domestic regulation.¹⁹⁵

However, the case for global constitutionalism or cosmopolitan democratization seems to us equally problematic. The attempt to solve the democratic deficit of the new body of globalized administrative law by embedding it in an overarching global constitutional framework (with the associated political institutions) is problematic because it disregards the gap between the proposed global constitutional structure and the social-political reality.¹⁹⁶ A constitutional system can survive only if it is supported by a sense of civic solidarity shared by all citizens. Such solidarity does not exist at the global level. Indeed, as Jürgen Habermas argues, "peoples emerge only with the constitutions of their states. Democracy itself is a legally mediated form of political integration."¹⁹⁷ Such a process of inte-

191. For further critique of these two positions see, Goodhart, *supra* note 20.

192. These are primarily American scholars. See Spiro, *supra* note 22.

193. See Robert O. Keohane et al., *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1, 11 (2009). Thus, for example, the limitations resulting from international trade laws (for example, regarding the granting of subsidies, the imposition of antidumping duties or the use of discriminatory taxes or tariffs), reduce the ability of the government to use its power for the benefit of narrow interests that are not consistent with the public interest. See *id.* at 1-31; see also Miguel Maduro, *Where to Look for Legitimacy?*, in INSTITUTIONAL CHALLENGES IN POST-CONSTITUTIONAL EUROPE: GOVERNING CHANGE 45, 45 (Catherine Moury & Luis de Sousa eds. 2009).

194. See Karin Kreider *ISAEAL Alliance Effective Assurance in Light of Pakistan Fire*, SOC. ACCOUNTABILITY INT'L (Dec. 2012), <http://www.sa-intl.org/index.cfm?fuseaction=page.ViewPage&PageID=1392#.UP0A2G8Uma8>.

195. See Held, *supra* note 20, at 542-543.

196. *Id.*

197. See Habermas, *supra* note 143, at 97 (noting the problems facing the project of political integration within the European Union).

gration, however, is full of hurdles and its prospects to succeed at the global level seem to be very low.

We argue that a preliminary response to the democratic challenge might be based on the potential for democratic innovativeness ingrained in administrative law. This thesis is based on three premises:

- (1) Modern administrative law has developed sophisticated participatory mechanisms that increasingly draw on web-based platforms.¹⁹⁸ Such platforms can be used to support consultation efforts at the transnational level.
- (2) Domestic regulators are already deeply involved in transnational processes of norm-production, through both interactions with their peers at other countries and direct interaction with relevant transnational institutions.¹⁹⁹ This expanding transnational regulatory network can serve as a preliminary platform for incorporating civic voices in global regulatory processes.
- (3) Global institutions, especially private and hybrid bodies, that are involved in the transnational regulatory process, have already developed innovative mechanisms of deliberation and consultation.²⁰⁰ These experiences can serve as a model for a more expansive democratic framework.

Taken together, these three premises constitute a platform for democratic innovation at the global level and, therefore, provide at least a partial response to the problems of ideological bias and accountability gap discussed above. While this vision is still far from being fully implemented, there are already varied examples that demonstrate its potential. Global CSR organizations, such as GRI, SAI, or AccountAbility, have developed an intricate platform of governance, which allows a broad spectrum of stakeholders to take part in their daily operations and in the promulgation of new standards.²⁰¹ More established bodies, such as the WTO and the

198. Probably the most prominent example of such mechanisms is President Obama's "Open Government Directive" ("OG Directive"), developed in response to a presidential order he signed on his first day in office. Memorandum from Peter R. Orszag, Director of the Office of Management and Budget on the OG Directive to the heads of the executive departments and agencies (Dec. 8, 2009), http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf. A key element of this initiative is Regulations.Gov, which is the consultation hub for U.S. federal regulations. Other countries have developed similar initiatives. See, e.g., GOVERNMENT OF CANADA, <http://www.open.gc.ca/index-eng.asp> (last visited Sept. 27, 2013); PETITION THE GOVERNMENT, http://www.direct.gov.uk/en/Di011/DoltOnline/DG_066327; see also Oren Perez, *Open Government, Technological Innovation and the Politics of Democratic Disillusionment: (E-)Democracy from Socrates to Obama* (June 6, 2012), available at <http://ssrn.com/abstract=2078741>.

199. See Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113 (2009); Eleanor M. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 INT'L LAWYER 151 (2009).

200. See Oren Perez, *E-Democracy, Transnational Organizations, and the Challenge of New Techno-Intermediation*, in *CONNECTING DEMOCRACY: ONLINE CONSULTATION AND THE FLOW OF POLITICAL COMMUNICATION* (S. Coleman and P. M. Shane eds., 2011).

201. See *Governance Bodies*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/network/network-structure/governance-bodies/Pages/default.aspx> (last visited Apr. 21, 2013); *About SAI*, SOC. ACCOUNTABILITY INT'L, <http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=490> (last visited Apr. 21, 2013); *AA1000 Standards*

World Bank, have also started to give more attention to the link with civic society, creating special venues through which NGOs can voice their concerns.²⁰² The Open Government Global Partnership, initiated by President Obama in 2011, reflects a vision that links local and global processes of transparency and participation.²⁰³ In that spirit, the opening statement of the Open Government Declaration (September 2011) states “that people all around the world are demanding more openness in government. They are calling for greater civic participation in public affairs, and seeking ways to make their governments more transparent, responsive, accountable, and effective.”²⁰⁴

These new forms of global governance create a reflexive potential that could counter some of the concerns noted above, e.g., the accountability gap. The incident at the Ali Enterprises textile factory in Karachi illustrates this potential. That case raises obvious accountability concerns since the Social Accountability International (SAI), the global organization responsible for the certification of the factory (through SAAS and RINA),²⁰⁵ was not subject to regulatory oversight by either the Pakistani government or any international organization. Despite this regulatory lacuna, SAI has initiated a process of self-reflection, involving all the organizations involved in the certification process. This process of internal review resulted in several concrete actions, including the offering of more advanced fire safety courses for auditors and workplaces and an increase in the number of spot checks and unannounced certification audits by SAAS.²⁰⁶ In Pakistan, these measures included the suspension of new SA8000 certificates until SAAS can conclude its analysis and make the necessary changes to its accreditation and certification procedures, a decision not to allow RINA to

Governance, ACCOUNTABILITY, <http://www.accountability.org/standards/aa1000-governance/index.html> (last visited Apr. 21, 2013).

202. See *For NGOs, WTO*, http://www.wto.org/english/forums_e/ngo_e/ngo_e.htm (last visited Apr. 21, 2013); *The World Bank and Civil Society*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,pagePK:220469-theSitePK:228717,00.html> (last visited June 15, 2013).

203. See *What is the Open Government Partnership?*, OPEN GOV'T P'SHIP, <http://www.opengovpartnership.org/about> (last visited June 15, 2013).

204. *Open Government Declaration*, OPEN GOV'T P'SHIP, (Sept. 2011), <http://www.opengovpartnership.org/open-government-declaration>.

205. Social Accountability Accreditation Services (SAAS) is an independent nonprofit accreditation agency that SAI has empowered to oversee the certification of SA8000. One of SAAS'21 accredited certification bodies is RINA, the global certification body based in Genoa, Italy that issued the Karachi factory's certificate. As part of the certification process, RINA used a subcontractor, RI&CA, to coordinate and deliver its auditing services. *Q&A: Ali Enterprises Fire in Karachi, Pakistan*, SOC. ACCOUNTABILITY INT'L (Dec. 7, 2012), http://www.sa-intl.org/_data/n_0001/resources/live/Q&A_AliEnterprises_8Dec2012.pdf.

206. SAI's multi-stakeholder Advisory Board (which includes trade unions, business, and NGOs) convened for three days from October 9-11, 2012 to focus on the Ali Enterprises fire and its implications for the SA8000 system. *Fire Safety a Key Focus in SA8000 Revision*, SOC. ACCOUNTABILITY INT'L, (Mar. 11, 2013), http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=1435&utm_source=March+2013+Newsletter+short+version+&utm_campaign=March+2013+newsletter&utm_medium=archive#.UXSZHKVhyZM.

issue SA8000 certificates in Pakistan, and a decision to require all certification bodies undertaking SA8000 certifications in Pakistan to conduct unannounced fire safety inspections and report back to SAAS.²⁰⁷ This process of self-reflection, which took place despite the absence of formal regulatory requirements, stemmed from SAI's character as a multi-stakeholder organization, whose legitimacy depends on the continuous support of its varied stakeholders.²⁰⁸

At the same time, it is important to highlight the hurdles expected to face any attempt to develop transnational democratic processes. First, existing transnational regulatory networks tend to be insulated from civic society.²⁰⁹ These networks currently constitute a closed techno-bureaucratic system, consisting of experts and bureaucrats who may resist attempts to incorporate civic voices into their working routines. Second, it is important to note the mixed record of global institutions with participatory mechanisms. Some organizations, especially in the technical domain, limit their decision-making processes to experts with little opportunities for civic input. Once again, this technocratic tendency for closure will have to be resisted.²¹⁰

Finally, it is important to clarify the limitations of this vision of administrative-based transnational democratization, which is not expected to meet the ideal of an all-inclusive global democratic framework of the type advocated by David Held.²¹¹ Our vision is more limited in its ambitions and scope. It is based on an experimental vision of direct deliberation, which recognizes the highly fragmented structure of the globalized administrative law. It is likely to produce fragmented regulatory "publics," centered on particular regulatory subject matters.²¹² Nonetheless, we think that this vision offers a more realistic response to the need to subject global processes of rulemaking to civic scrutiny than the model of global constitutionalism. Our thesis is based on a vision of fragmented democratization that seeks to expand the reflexivity and value-pluralism of this new body of law by subjecting it to diverse processes of critique, taking place simultaneously at multiple venues. This multiplicity, through its defiance of domination and exclusion, is likely to generate creative forms of critique—challenging established categories, recasting them in new light and resisting dogmatic patterns. The appeal of the nexus "creative administrative law" does not depend, therefore, on particular ideological premises, or on the promise of inter-subjective rationality, but on the capacity of creative institutions to challenge habitual social structures. In a world that cherishes diversity of thought and forms of life, this competency could play an

207. Q&A: *Ali Enterprises Fire in Karachi, Pakistan*, *supra* note 7; Q&A *Ali Enterprises Event*, RINA, http://www.rina.org/_files/pdf/Rina_Details/QandA_en.pdf (last visited Sept. 27, 2013).

208. See SOCIAL ACCOUNTABILITY NT'L, <http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=1365>.

209. Pierre-Hugues Verdier, *supra* note 199, at 118.

210. See Perez, *supra* note 200.

211. See Held, *supra* note 20 at 542-43.

212. See Kuo, *supra* note 23, at 61.

important role.²¹³

Conclusion

Global norms are increasingly reshaping the contours and dynamic of domestic administrative law. We have shown that external influence originating in the global sphere manifests itself both in the specific contents of the regulation, in the formulation of global general standards of due process, and in the transference of enforcement powers to global bodies. In this context, we have distinguished between due process rules that focus on the fairness of the administrative process, and perfecting procedures such as rules pertaining to risk assessment. The influence of this emerging body of law is not limited to the economic domain. It also extends to the regulation of environmental and health risks. The norms of universal administrative law are the product of a highly pluralist transnational regime. This pluralistic framework influences the paths through which these administrative norms penetrate the domestic realm—either by administrative decisions or through voluntary decisions of private corporations.

In light of this complex reality, this Article has drawn attention to the challenges that administrative law faces at the present juncture: the meta-theoretical challenge associated with hidden ideological presuppositions of the new universal administrative law; the challenge of the fragmentation of accountability regimes; and the democratic challenge. We cannot offer easy solutions to these challenges. However, identifying and mapping them is crucial for any long-term thinking about the administrative state in the 21st century.

213. See Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 *IND. J. GLOBAL LEGAL STUD.* 25 (2003).

