GLOBAL ADMINISTRATIVE LAW: CAN IT BRING GLOBAL GOVERNANCE TO ACCOUNT?*

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I INTRODUCTION

In recent years, scholars worldwide have begun organising and developing a coherent framework and research agenda focused on the emerging field of 'global administrative law'.[1] This nascent body of law, unlike domestic or national forms of administrative law, does not operate within the bounds of unitary nation states, and unlike traditional accounts of public international law, it does not arise exclusively between nation states. Instead it operates in a transnational or global space occupied by a vast variety of administrative actors responsible for trans-governmental regulation and administration; the field of 'global governance'.[2] To combat growing concerns that there are crucial legitimacy, accountability and democratic deficiencies inherent in this system of global governance, numerous administrative law type mechanisms and principles have been developed by global administrative bodies. Global administrative law embodies the totality of these various mechanisms and principles. While this body of law is still in its infancy, and is yet to be wholly systematised or coherently organised, it is already populated with examples from a

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1 The most conspicuous example of this body of scholarship is the Global Administrative Law Project of the NYU School of Law found online at <http://www.iilj.org/GAL/> at 1 September 2009.

2 See, eg, Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3) *Law and Contemporary Problems* 15; Benedict Kingsbury, 'The Administrative Law Frontier in Global Governance' (2005) 99 *American Society of International Law Proceedings* 143.

spectrum of regulatory areas.[3] This paper examines the rise of global administrative law, its ramifications for domestic administrative law in Australia, and its challenges, limitations and promise.

II GLOBAL GOVERNANCE

Global administrative law is intrinsically intertwined with the expansion of global governance. The former presupposes the existence of the latter.[4] More importantly, global administrative law has emerged as a response to the accountability challenges peculiar to this 'global administrative space'.[5] This space has been created through the coordination of transnational regulation in response to the increasing interconnectedness and interdependence of nation states flowing from the 'globalisation' movement towards economic and social integration, which has gathered pace since World War II.[6] Regulation and administration is no longer chiefly the domain of national governments with a domestic focus; these bodies now coexist alongside a complex global system or field of governance.[7]

Perhaps the key feature of the field of global governance is the fact that it is not populated by a homogenous set of entities. Contrary to the state-centred conceptualisation of global level interaction which underpins the classical understanding of international law as *jus inter gentes*, the unified nation state is not the key actor in the global governance model, and treaties between states are no longer the exclusive expression of substantive global administrative decision-making.[8] Instead, regulatory authority is shared by an interconnected web of mixed and distinct entities including trans-governmental networks and public international organisations in addition to national governments.[9] Further, the shift from a state-centred regulatory approach towards market forms of regulation[10] has seen, inter alia, non-governmental bodies increasingly involved, despite their 'private' identity, in the quintessentially 'public' task of regulation and administration.[11]

Considering the wide variety of entities participating in the system of global governance, attempts to categorise these entities into a closed list risks obscuring their complex diversity. Notwithstanding this, some scholars have attempted such a

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3 Eleanor Kinney, 'The Emerging Field of International Administrative Law: Its Content and Potential' (2002) 54 *Administrative Law Review* 415, 416–17.

4 Kingsbury, Krisch and Stewart, above n 2, 18-19.

5 Ibid.

6 Kinney, above n 3, 417–8.

7 Ibid, 419.

8 Kingsbury, above n 2, 143.

9 Kinney, above n 3, 419.

10 Alfred C Aman Jr, 'The Limits of Globalization and the Future of Administrative Law: From Government to Governance' (2001) 8 *Indiana Journal of Global Legal Studies* 379.

11 See generally Matthew Diller, 'Introduction: Redefining the Public Sector: Accountability and Democracy in the Era of Privatisation' (2001) 28 *Fordham Urban Law Journal* 1307; Anne-Marie Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy' (2003) 24 *Michigan Journal of International Law* 1041; David Zaring, 'Informal Procedure, Hard and Soft, in International Administration' International Law and Justice Working Paper 2004/6 (Global Administrative Law Series). See further Part IV below.

catalogue.[12] To illustrate the variety of bodies involved in global governance and the critical features of this field, it is at least appropriate to focus on two contrasting prototypical categories of bodies. Firstly, formal international organisations formed by treaties between nation states, and secondly, informal trans-governmental regulatory networks arising ad hoc between sub-state administrators and their counterparts in foreign countries.[13] These two are chosen for particular emphasis since they represent, respectively, a category of formal bodies familiar to traditional accounts of public international law, and a category of informal networks which challenge and contrast with the understanding of global interactions underpinning these traditional accounts.

A International organisations

The broad category comprised of formal public international organisations provides the clearest and most conventional example of a transnational administrative body.[14] The scope and extent of the regulatory authority and powers accorded to these international organisations varies greatly. However, these bodies are all formed by virtue of a constitutive instrument which is almost always a treaty between nation states.[15] Their membership is composed of states or international organisations, yet distinct from their members they enjoy an autonomous 'will' along with separate legal personality and an institutional structure which allows for the promulgation of norms amongst their membership.[16] This broad category of 'public international organisations' covers a heterogeneous mix of United Nations organisations, other specialised formal trans-governmental bodies, agencies and organisations, regional intergovernmental organisations, and supranational organisations, and covers regulatory areas as diverse as security, banking and economic regulation, trade, health, environmental protection, intellectual property, communication, and migration and refugee issues.[17]

A prime example of a formal international organisation is the United Nations Security Council which is principally charged with maintaining international peace and security through dispute settlement, and where this fails, the imposition of coercive sanctions.[18] Importantly, the Security Council has the capacity to make binding decisions in relation to particular states, and even certain individuals, through

12 See, eg, Kingsbury, Krisch and Stewart, above n 2, 20–3; Richard Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?' (2005) 68 *Law and Contemporary Problems* 63, 65-7.

13 Other categories of bodies are suggested by various scholars. For example, in Kingsbury, Krisch and Stewart, above n 2, 20, 'cooperative arrangements between national regulatory officials', 'distributed administration conducted by national regulators under treaty, network, or other cooperative regimes', 'administration by hybrid intergovernmental-private arrangements' and 'administration by private institutions with regulatory functions' are also identified as discernible groups of trans-governmental regulatory bodies, yet the point is made that many of these groups 'overlap or combine' in practice.

14 See Kingsbury, Krisch and Stewart, above n 2, 21; Kinney, above n 3, 420.

15 Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (5th ed, 2001) 442.

16 Ibid 16.

17 See, eg, Kingsbury, Krisch and Stewart, above n 2, 21; Kinney, above n 3, 420.

18 Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (5th ed, 2001), 43. The United Nations Security Council maintains a website with a description of its composition and functions at <http://www.un.org/sc/> at 1 September 2009.

targeted sanctions.[19] The World Trade Organization (WTO)[20] is an example of an international organisation outside the United Nations system, but nevertheless associated with it. It operates as the primary institution administering and developing the system of multilateral trading rules originally established by the General Agreement on Tariffs and Trade (GATT), and also performs a crucial role in resolving trade related disputes between nations.[21]

B Trans-governmental networks

Outside of these formal international organisations, a more inconspicuous collection of entities may be identified. These bodies are not formed by virtue of a formal agreement between states, they do not generally have a permanent secretariat or institutional framework, the norms they forge do not bind their constituents with the force of law, and they are generally not comprised of unified nation states. These entities are what have been called 'trans-governmental regulatory networks'[22] or 'epistemic communities',[23] and are created where government agencies, officials and other administrative decision-makers collaborate and interact with their counterparts and peers in foreign states and international organisations.[24] The effect of this networking is that norms are developed at the transnational or global level and are then adopted for the purposes of decision-making at the national or domestic level. Crucially, these interactions between sub-units of government in multiple different states are not controlled or closely guided by the central executive officers in each respective national government.[25] It has also been suggested that these networks tend to be comprised of specialists and experts in their respective fields whose approach to policy or problem

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19 *Charter of the United Nations* arts 39-51 (Chapter VII); Kingsbury, Krisch and Stewart, above n 2, 21.

20 The World Trade Organization maintains a home page at <http://www.wto.org/> at 1 September 2009.

21 Tania Voon, 'The World Trade Organisation' in Andrew Mitchell and Jenny Beards (eds), *International Law: In Principle* (2009) ch 11. Other examples include, eg, the United Nations High Commissioner for Refugees, the World Health Organization, the World Bank, the International Monetary Fund, the OECD and the Food and Agriculture Organization.

22 Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy', above n 11.

23 Peter M Haas, 'Introduction: Epistemic Communities and International Policy Co-ordination' (1992) 46 *International Organization* 1.

24 Kinney, above n 3, 416. There is voluminous literature on the nature and extent of these informal networks. See, eg, Anne-Marie Slaughter, 'Governing the Global Economy through Government Networks' in Michael Byers (ed) *The Role of Law in International Politics: Essays in International Relations and International Law* (2000) 177; David Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations' (1998) 33 *Texas International Law Journal* 281; Zaring, 'Informal Procedure, Hard and Soft, in International Administration', above n 11; Kal Raustiala 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43 *Virginia Journal of International Law* 1.

25 Robert O Keohane and Joseph S Nye Jr, 'Transgovernmental Relations and International Organizations' (1974) 27 *World Politics* 39.

solving may be somewhat myopically focused on objectives and goals prejudicial to the interests of vulnerable parties deprived of representation.[26]

The trans-governmental regulatory network which has attracted the greatest degree of critical attention is the Basel Committee on Banking Supervision (Basel Committee).[27] Originally established in 1974, the Basel Committee focuses on '[improving] the quality of banking supervision worldwide' by exchanging information, developing supervision techniques and by setting 'minimum supervisory standards'.[28] Its membership is made up of the central bank Governors, and other bank regulators, of a number of nations.[29] The Basel Committee functions informally as a forum to facilitate networking between members, and its recommendations are not legally binding, but they do require a consensus amongst members.[30] Effectively, the recommendations and publications of the Basel Committee are produced as 'guidelines' and 'statements of best practice' to encourage 'convergence towards common approaches and common standards', but the specific detail involved in practically implementing these policies at the national level is left to the individual members to determine.[31]

C Other trans-governmental regulatory actors

Outside the scope of these two principal categories, there exists a variety of miscellaneous trans-governmental regulatory actors. Some commentators have suggested additional categories to structure this space.[32] Unfortunately, there is little agreement as to the appropriate naming or grouping of these extra categories. The categories offered include: 'mutual recognition agreements', typically bilateral formalised agreements to co-ordinate and converge regulations or standards; private non-governmental or hybrid public-private bodies which have been delegated certain regulatory powers;[33] transnational judicial bodies, which have been regarded by some as sufficiently distinct from entities in other categories so as to warrant their own;[34] and finally 'distributed administration', whereby domestic regulators conduct global administration through national level decision-making relating to matters of a

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26 Picciotto, 'Networks In International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism' (1996) 17 *Northwestern Journal of International Law and Business* 1014.

27 See, eg, Zaring, 'Informal Procedure, Hard and Soft, in International Administration', above n 11, 7–11. The Basel Committee maintains a homepage at <http://www.bis.org/bcbs/> at 1 September 2009.

28 *History of the Basel Committee and its Membership* (2009) Bank for International Settlements <http://www.bis.org/bcbs/history.pdf> at 29 July 2009.

29 The nations represented are: Australia, Belgium, Brazil, Canada, China, France, Germany, India, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, Russia, Spain, Sweden, Switzerland, the United Kingdom and the United States.

30 Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations', above n 24, 288.

31 *History of the Basel Committee and its Membership* (2007) Bank for International Settlements <http://www.bis.org/bcbs/history.pdf> at 10 July 2008.

32 See, eg, Kingsbury, Krisch and Stewart, above n 2, 20–23; Kinney, above n 3.

33 Aman, above n 10; Kingsbury, Krisch and Stewart, above n 2, 22.

34 Kinney, above n 3.

transnational nature.[35] This demonstrates the difficulties associated with any attempt to categorise the field of trans-governmental regulatory actors into a closed catalogue and emphasises the high degree of differentiation which characterises the field's constituents. In many ways these extra groups conceptually overlap with one another and the primary categories of formal international organisations and trans-governmental networks, perhaps underlining the need for further research.[36]

III THE ACCOUNTABILITY OF GLOBAL GOVERNANCE

At the domestic level, administrative law functions alongside constitutional law to subject the exercise of public government power to the rule of law. Under Australian national law this is augmented by mechanisms and principles of responsible and representative government. These features of Australian constitutionalism ensure, respectively, that the executive arm of government is responsible and accountable to Parliament for its actions, and that Parliament is constituted by directly elected representatives of the people and made politically accountable for its decision-making.[37] These mechanisms of accountability form part of the fundamental legal framework of the state. However, in the global administrative space which lies beyond the state no such corresponding foundation exists, giving rise to concerns as to the accountability of global governance.[38] Further exacerbating these concerns, transnational regulatory decision-making arguably suffers from a 'democracy deficit'[39] to the extent that it lacks transparency and opportunities for public participation.

The accountability of formal international organisations has been defended by reference to the nature of these bodies as creatures of treaties between states. The existence of a formalised treaty means that participating nations must have expressed their consent to be bound through executive ratification, and passed supporting domestic legislation where required. Consequently, the power exercised by a particular international organisation is limited to that which the nation state constituents have formally and legally delegated. In principle, it remains open to the legislature or executive of each individual participant to withdraw their approval of, and participation in, an institution should they no longer approve of its activities. Such

35 Kingsbury, Krisch and Stewart, above n 2, 21-2. This includes, for example, national environmental regulators whose decisions are of concern to governments in other states as well as the international environmental regime.

36 This is one of the key objectives of the Global Administrative Law Project, see above n 1.

37 For equivalent principles in US law, see Richard B Stewart, 'Administrative Law in the Twenty-First Century' (2003) 78 *New York University Law Review* 437 and Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?', above n 12, 73–5.

38 See generally Johnathon R Macey, 'Regulatory Globalization as a Response to Regulatory Competition' (2003) 52 *Emory Law Journal* 1353; Lori M Wallach, 'Accountable Governance in the Era of Globalization: The WTO, NAFTA and International Harmonization of Standards' 50 *University of Kansas Law Review* 823; John Frerejon, 'Accountability in a Global Context' IILJ Working Paper 2007/5 (Global Administrative Law Series); Alois Stutzer and Bruno S Frey, 'Making International Organizations More Democratic' (2005) 1 *Review of Law and Economics* 305; David Dyzenhaus, 'Accountability and the Concept of (Global) Administrative Law' IILJ Working Paper 2008/7 (Global Administrative Law Series); Ruth W Grant and Robert O Keohane 'Accountability and Abuses of Power in World Politics' (2005) 99 *American Political Science Review* 29.

39 See generally Kingsbury, above n 2.

a decision was made by Bolivia when it notified the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) of its intention to withdraw from the organisation in a letter dated 1 May 2007.[40] A trend towards widespread nationalisation in the Bolivian economy brought the state into conflict with affected international investors who initiated arbitration claims with ICSID seeking compensation for the loss of assets compulsorily placed under state control. Dissatisfaction with the outcomes and decision-making processes of these ICSID arbitrations lead to the decision to secede from the organisation which was described by the Bolivian President as biased in favour of multinational corporations.[41] While this might be seen as an extreme reaction, it highlights the presumptive capacity of states to withdraw from an organisation,[42] even though such a course of action will be highly problematic politically and pragmatically in many circumstances.

It may therefore be suggested that, at least in theory, these institutions do not truly raise formal or legalistic accountability concerns.[43] However, particularly with respect to the WTO, recent times have seen a significant level of public criticism and protests rallied against international organisations, on the basis that they favour unjust solutions prioritising the interests of powerful non-government bodies and nation states, to the general detriment of the poor.[44] Much of this criticism relates to a sentiment of mistrust, inspired by a perception of inadequate transparency and insufficient global public or citizen participation in the decision-making of these organisations. Hence, even if the consensual involvement of nation states in these treaty-based organisations mitigates some of their accountability concerns, there is at least a real public perception that problems exist in relation to the democratic accountability of these organisations.

In the case of informal trans-governmental networks these concerns are amplified. The clandestine informality of these interactions contrasts sharply with that of formal state-to-state interactions occurring within a treaty framework. The absence of such a formal framework applicable to trans-governmental regulatory networks means that the policy decision-making undertaken by these networks almost completely avoids exposure to scrutiny in domestic political forums.[45] Furthermore, the memberships of these networks ordinarily encompass collections of likeminded experts, thereby conjuring images of governance by an elitist group potentially more sensitive to the interests of powerful nation states and transnational non-governmental organisations

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40 International Institute for Sustainable Development, *Investment Treaty News (ITN), May 9 2007* (2007) 1-2 <http://www.iisd.org/pdf/2007/itn_may9_2007.pdf> at 22 July 2008.

41 *Latin Leftists mull quitting World Bank Arbitrator* (2007) Thomson Reuters, <http://www.reuters.com/article/worldNews/idUSN2936448520070430?pageNumber=1&virtualBrandChannel=0&sp=true> at 22 July 2008.

42 Chittharanjan Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd ed, 2005) 117–21.

43 Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy', above n 11, 1054.

44 See generally, Stutzer and Frey, above n 38; See Wallach, above n 38; B S Chimni 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 3.

45 Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 8 *European Journal of International Law* 435.

than those of ordinary citizens worldwide.[46] These issues have given rise to suggestions that trans-governmental regulatory networks suffer from a 'chronic lack of legitimacy'.[47] This concern is essentially focused on whether there are suitable mechanisms or measures operating to ensure that these trans-governmental regulatory networks are held sufficiently accountable in their decision-making so as to prevent them from becoming a runaway and shadowy technocracy.[48] This has been a recurring criticism historically levelled against the Basel Committee, which has traditionally been somewhat secretive and exclusionary in its decision-making.[49] Until recently, the policy formulation undertaken by the Basel Committee was fundamentally lacking any opportunities for outside participation or public scrutiny.[50] However, as will be seen later, the Basel Committee has responded to these concerns by adopting some specialised administrative law type mechanisms aimed at improving the extent to which non-members may access and influence its regulatory decision-making and policy formation.

Thus, the need for accountability mechanisms is clear. Like its domestic law counterparts, the legitimacy of global administrative law requires that transnational actors be held accountable for their decisions, and to support this, their decisions ought to be transparent and open to public scrutiny which, in order to be meaningful, must be accompanied by opportunities for outside participation and comment. Without these features, the global governance project of achieving harmonisation and convergence in transnational regulation risks devolution into an unrepresentative and undemocratic hegemony, which prioritises the interests of powerful and influential 'insiders' to the detriment of the global public who are deprived of access to transnational decision-making.

IV THE RISE OF GLOBAL ADMINISTRATIVE LAW

The various regulatory activities undertaken by these transnational administrative bodies are blurring the traditionally bright line distinctions between public/private and national/international in the global administrative space. This is underpinned and supported by a perceptible shift towards a disaggregated system of governance rather than bounded government.[51] Consequently, classical notions of accountability, democratic legitimacy and legality of administrative decision-making must be reconceptualised at both a practical and a conceptual level in order to operate in this global space. This is necessary to the extent that these classical accounts have been developed with a very different model of administration in mind; one that focuses on the regulatory activities of 'bounded' public government agencies operating within a

46 See, generally, Anne-Marie Slaughter, 'The Accountability of Government Networks' (2001) 8 *Indiana Journal of Global Legal Studies* 347.

47 Picciotto, above n 26.

48 Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy', above n 11, 1056.

49 Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations', above n 24, 288.

50 Michael Barr and Geoffrey Miller, 'Global Administrative Law: The View from Basel' (2006) 17 *European Journal of International Law* 15, 17.

51 Anne-Marie Slaughter, *A New World Order* (2004) 12; Aman, above n 10; Martin Shapiro, 'Administrative Law Unbounded: Reflections on Government and Governance' (2001) 8 *Indiana Journal of Global Legal Studies* 369.

single unified nation state. This task is made all the more important since, as has already been foreshadowed, the regulatory actors in the field of global governance are increasingly encountering questions and concerns as to their legitimacy and accountability.[52]

To combat this 'democracy deficit', administrative law type mechanisms, procedures, rules and principles have begun to emerge, or have been purposefully woven into the fabric of a variety of bodies, both formal and informal, in the global administrative space. These developments form the foundation of global administrative law. Despite being presently unsystematised and somewhat fragmented as a body of law, some commentators have suggested that core principles are emerging.[53] These include both classical administrative law conceptions of fair and legal decision-making and review procedures, and also more substantive, albeit nebulous, 'public law' or 'good governance' values.[54] Together these principles are: procedural participation and transparency, reasoned decisions, access to review mechanisms, proportionality and reasonableness, avoidance of unnecessarily restrictive means and legitimate expectations.[55] This is not suggested as an exhaustive list, but rather a set of potential candidates for general principles[56] as reflected in a presently disjointed, but nevertheless growing body of administrative law type mechanisms.

The fact that these principles are linked to a transnational model of global governance, rather than domestic government, conceptually distinguishes them from their equivalents in the administrative and constitutional jurisprudence of national or domestic legal systems.[57] As has already been foreshadowed, the field of global governance is populated by a disparate collection of regulatory entities amongst which the task of global regulation and administrative decision-making is spread. In addition to this, this space has been said to be characterised by a disaggregation of nation states into collections of sub-state regulatory actors which are increasingly networking with their peers across jurisdictions and national boundaries[58] to form a complex web of vertical and horizontal networks functioning alongside more traditional treaty based international organisations. Since this 'disaggregated world order'[59] is a complex system of administrative regulation quite far removed from classic domestic administration, a traditional understanding of administrative law focused on national government agencies operating as domestic 'organs of public administration' subordinated to legislative and judicial oversight within the unified framework of a nation state and domestic legal order[60] is not suited for direct transplantation to the global or transnational context.

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52 See generally, Stutzer and Frey, above n 38.

53 See Kinney, above n 3; Kingsbury, Krisch and Stewart, above n 2.

54 For a detailed analysis of the distinction between prototypical administrative law procedural requirements and general public law values see Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European Journal of International Law* 187.

55 Kingsbury, Krisch and Stewart, above n 2.

56 Kingsbury, Krisch and Stewart, above n 2, 37.

57 See Harlow, above n 54.

58 See Slaughter, *A New World Order*, above n 51, 12.

59 Slaughter, *A New World Order*, above n 51, chap 4.

60 This is the traditional account referred to in Shapiro, above n 51, 369.

Instead what a conceptual framework for global administrative law must encompass are the highly varied ways in which domestic administrative law has begun to increase its reach into global decision-making, in addition to the numerous specialised administrative law type mechanisms developed by the transnational bodies responsible for these decisions. These are the two forms of global administrative law this paper will discuss.

It is perhaps unsurprising that the task of providing a unifying comprehensive framework to underpin global administrative law is still incomplete, since such a framework must span the many sorts of global regulatory actors while seamlessly extending across the national/international divide. Indeed, the conclusion that the body of scholarship focused on global administrative law is still in its infancy is, considering this absence of a unifying framework, inescapable. It is also consistent with the way that administrative law has historically developed. While, in contrast, informal and formal global governance mechanisms have been growing in scope and scale for many decades and are well established,[61] the disparity in the rate of growth between administrative regimes and the body of law which sets legal limits on administrative decision-making mirrors similar unevenness in the historical development of administrative law and administration at the domestic level. Outside of France,[62] administrative law was largely subsumed into general constitutional jurisprudence until the 1920s when it began to emerge as a distinct body of law.[63] However, the unification of domestic administrative law type principles into a coherent system has been an even more recent phenomenon largely associated with legislative activity in the area.[64] Prior to these instances of legislative intervention, administrative law grew incrementally as courts sought solutions to new types of cases for which existing principles, procedures and rules were found lacking.[65] This is

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61 See Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy', above n 11, for a short history of the 'trans-governmentalism' phenomenon in its legal, political science and sociological dimensions.

62 The independence of *droit administratif* (administrative law) as a coherent and distinct body of law has long been recognised in French jurisprudence. See for example, *Blanco*, Tribunal des Conflits, 8 February 1873, about the independence of the Administrative Law: 'Considérant que la responsabilité, qui peut incomber à l'Etat, pour les dommages causés aux particuliers par le fait des personnes qu'il emploie dans le service public, ne peut être régie par les principes qui sont établis dans le Code civil, pour les rapports de particulier à particulier ; Que cette responsabilité n'est ni générale, ni absolue ; qu'elle a ses règles spéciales qui varient suivant les besoins du service et la nécessité de concilier les droits de l'Etat avec les droits privés;' ('Considering that the liability of the State for damages caused to individuals linked to the fact that it employs people in the public service, cannot be governed by principles that are established in the Civil Code, regarding the relations between individuals; That this liability is neither general nor absolute and has its own special rules, which vary depending on the service requirements and the need to reconcile the State's rights with private rights;'). See generally Guy Braibant, Pierre Devolvé, Bruno Genevois, Marceau Long and Prosper Weil, *In Les Grands Arrêts de la Jurisprudence Administrative* (16th ed, 2007) and René Chapus, *Droit Administratif Général* (15th ed, 2001).

63 For a useful study of the comparative development of administrative law across numerous jurisdictions see Durga Das Basu, *Comparative Administrative Law* (1969), in particular the introductory section.

64 See, eg, *Administrative Decisions (Judicial Review) Act 1977* (Cth) in Australia, and *Administrative Procedure Act*, 5 USC §500 (2008) in the United States.

65 *Ridge v Baldwin* [1963] 2 All ER 66, 76 (Lord Reid).

highly analogous to the manner in which global administrative law has, thus far, grown by accretion as isolated and specific instances of principles and mechanisms are gradually added to a loosely associated and eclectic collection. This process arguably began with the inception of the League of Nations and has continued unabated into the present.[66]

In the absence of a comprehensive conceptual framework to unify this collection, a working definition of global administrative law may be posited as a placeholder. This definition would render global administrative law as embodying all the rules, procedures and systematized norms governing global administration with special emphasis placed on the mechanisms which impose accountability, transparency and legal legitimacy on global administrative decision-making.[67] This classification covers the range of specialized mechanisms developed for specific international organisations and other transnational regulators, but also captures the ways in which domestic institutions and domestic administrative law may operate as a check or a forum for review applicable to decision-making undertaken by these organs of global governance.

V THE EXTENSION OF DOMESTIC ADMINISTRATIVE LAW

It has been suggested that domestic administrative law theory and jurisprudence, appropriately adapted for the global context, may prove crucial in constructing a framework to unify this disparate collection of administrative law type mechanisms.[68] Advantageously, the task of dealing with a wide assortment of varied systems, agencies and mechanisms is one that domestic administrative law is familiar with.[69] The themes and practice of domestic administrative law may also play a role in guiding and shaping further practical implementation of global administrative law principles in the form of new administrative law type mechanisms applicable to the decision-making of regulatory actors in the global space.[70]

The involvement of domestic administrative law in global governance becomes especially pronounced and explicit where domestic courts are called upon to review global administrative decision-making.[71] This is where domestic administrative law itself directly functions as a source of law for global administrative law. However, the coexistence of domestic administrative law alongside other bodies of law, especially constitutional law in the context of a national legal system, creates complexities and legal conflicts which may restrict the extent to which domestic administrative law can effectively operate in isolation as a foundational source for global administrative law.[72] Nevertheless, it has been suggested that this 'bottom up'[73] extension of

66 See H B Jacobini, *An Introduction to Comparative Administrative Law* (1991), who suggests that until the League of Nations, there were insufficient international bureaucrats for truly international regulatory administrative action to take place.
67 Kingsbury, Krisch and Stewart, above n 2, 28.
68 Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?', above n 12.
69 Charles Koch Jr, 'Introduction: Globalization of Administrative and Regulatory Practice' (2002) 54 *Administrative Law Review* 409.
70 Kingsbury, Krisch and Stewart, above n 2, 28.
71 Ibid 30.
72 Ibid.

domestic administrative law and judicial review into the field of global governance may help address the accountability deficits in transnational administration, particularly, as will be seen, where such extension stimulates reform of the relevant transnational regulator. There are three ways in which domestic administrative law and judicial review may be extended into the sphere of transnational regulation.[74] First, decisions of transnational regulatory actors may be directly subjected to review by a national court or other body under domestic law. Second, domestic administrative law may be applied to review decisions undertaken by national regulators attempting to implement norms developed at the transnational level. Third, domestic administrative law may be applied to the participation of national officials in global governance regimes. Each of these methods exposes aspects of a general theme in which domestic administrative law encounters difficulties and tensions in its application to a model of governance which combines and connects elements of both domestic and international legal orders.

A Review of a decision taken by a transnational body

When a domestic court contemplates direct review of a decision made by an international administrative entity it must overcome a threshold issue: is it within the competence of the court to assert its jurisdiction over the transnational regulatory actor in the circumstances?[75] This was the question which confronted the Bosnian Constitutional Court when it was requested to evaluate the constitutionality of the *Law on State Border Service* enacted by the High Representative for Bosnia and Herzegovina in January 2000.[76] Critically, the administrative powers granted to the High Representative are derived from international law, primarily the General Framework Agreement,[77] which was a peace treaty signed following the end of the War in Bosnia and Herzegovina. In contrast, the Bosnian Constitutional Court is a domestic judicial body formed under Article VI of the *Constitution* of Bosnia and Herzegovina.[78] This was a case where a national court was asked to directly review the decision-making of a transnational actor. It would have been open for the Court to find that the High Representative's enactment of the Law on State Border Service occurred within the context of a different legal order rendering review beyond the competence of the Court.[79] However, rather than regarding the decision as fundamentally international in character, the Court decided that by intervening in the legal order of Bosnia and Herzegovina in substitution for the national legislature, the High Representative was in fact operating as a de facto domestic authority.[80] This brought the law thus enacted

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73 For a more detailed description of this 'bottom up' approach, see pt III of Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?', above n 12.

74 Ibid 76.

75 August Reinisch, *International Organizations before National Courts* (2000).

76 Constitutional Court of Bosnia and Herzegovina, Case No. U 9/00, online at <http://www.ustavnisud.ba.> at 5 September 2009.

77 Also known as the Dayton Peace Agreement, online at <http://www.ohr.int /dpa/default.asp?content_id=380> at 5 September 2009.

78 The Bosnian Constitution is published online at <http://www.ccbh.ba/eng/ article.php?pid=835&kat=518&pkat=500 > at 5 September 2009.

79 Carsten Stahn, 'International Territorial Administration in the former Yugoslavia: Origins, Developments and Challenges Ahead' (2001) 61 *Zeitschrift für ausländiches öffentliches Recht und Völkerrecht* 107, 166-7.

80 Constitutional Court of Bosnia and Herzegovina, Case No. U 9/00 at [5]–[6].

within the scope of the national *Constitution* and thereby subject to review by the Constitutional Court. Importantly, in doing so, the Court held that it was irrelevant that the law was enacted through the High Representative exercising a power derived from international rather than domestic law.

Alternatively, the fact that the High Representative derived its legislative authority from international law, and was not a domestic national authority, could have compelled the Court to take the view that the *Law on State Border Service* was outside the jurisdiction afforded to an exclusively domestic adjudicative body such as the Constitutional Court. There is precedent for this alternative view. In Germany after 1945, German courts concluded that the powers and authority of the Allied Powers, as territorial administrators, were not subject to domestic judicial review since they did not exercise power stemming from a national authority and were instead empowered by international law.[81] The focus of this approach is therefore quite clearly placed on the source of the power exercised. In contrast, the Bosnian Constitutional Court reached its conclusion by shifting its focus onto the circumstances and subject matter of the decision taken, rather than fixating on the source of the power exercised by the High Representative. Since the High Representative's act, in the circumstances, effectively created what was in substance a national law, it had substituted itself for the domestic legislature and its act was therefore subject to constitutional review.[82]

In pursuit of a general principle from this specific reasoning by induction, it is tentatively suggested that where the circumstances of a decision made by a transnational body are such that the decision-maker has practically and effectively substituted themselves for a domestic public authority, that decision ought to be subject to review under domestic law. While this case might therefore suggest a means through which domestic administrative law may be extended into the field of transnational governance, there are some clear limitations. The Bosnian Constitutional Court was quick to acknowledge that it was incompetent to review the decisions and powers of the High Representative in general circumstances.[83] A mere connection with the territory of Bosnia and Herzegovina would not amount to the level of 'intervention' or 'substitution' required to bring a decision within the jurisdiction of the Court. This demonstrates an important jurisdictional restriction on the range of transnational regulatory decisions which might be reviewable in a domestic court and it suggests that the extension of domestic administrative law and judicial review into the field of global governance can only go so far.

B Review of domestic implementation of transnational regulations

A different set of difficulties and challenges arise when domestic courts are called upon to review decisions made by national government agencies which attempt domestic implementation or incorporation of directions or norms forged at the level of global governance. In this situation the decision-maker derives its powers from within the domestic legal order thereby avoiding the sort of jurisdictional difficulty confronted when the decision-maker is an international organisation or actor. However, this does not mean that the justiciability issue is resolved. A judicial

81 Carsten Stahn, *Accountability and Legitimacy in Practice: Lawmaking by Transitional Administrations* (2005) European Society of International Law, *9* < http://www.esil-sedi.eu/english/pdf/Stahn.PDF> at 29 July 2009.

82 Constitutional Court of Bosnia and Herzegovina, Case No. U 9/00 at [5]–[6].

83 Ibid.

reluctance to review decisions relating to the treaty-making power of the executive, or other foreign affairs decisions, is common across jurisdictions.[84] This was demonstrated in the decision of the Australian Federal Court in *Peko Wallsend*,[85] where the Court held, following English authority,[86] that it was unable to review a decision of the Australian Federal Cabinet regarding implementing treaty obligations because it was, inter alia, a decision primarily involving Australia's international relations.[87] As domestic regulations implementing transnational or international regulations or agreements will generally contemplate such subject matter, this is a substantial impediment.[88]

C National agency participation in transnational decision-making

When the subject matter subject to review is not the domestic implementation of a global initiative or agreement but rather the participation of national officials in the process of forging such an agreement at the transnational level, the hesitation of courts to intervene becomes all the more acute. Rather than merely a decision relating to the executive treaty-making power, such review would contemplate the actual exercise of the power itself. If the former is unlikely to be justiciable, then it is all the more unlikely that the circumstances of national participation in transnational decision-making would be justiciable, and furthermore, any attempted action would encounter significant barriers with respect to standing.[89]

D What role can domestic administrative law play?

There are therefore substantial obstacles faced when domestic courts are asked to undertake judicial review of global regulatory decision-making, including issues relating to jurisdiction, justiciability and standing. However, this does not mean that domestic administrative law can have no wider, indirect effect. Indeed, there are many examples where this has been the case.

First, unsuccessful actions may still provide the stimulus for law reform, either at a domestic or international level. Domestically, legislative or executive action may be taken to impose procedural fairness requirements on the involvement of national officials in transnational regulatory negotiations.[90] A telling example of this occurred following an unsuccessful action, brought by a non-profit public interest organisation,

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84 See, eg, *Blackburn v Attorney-General* [1971] 2 All ER 1380, 1382 (Lord Denning MR).

85 *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 ('*Peko-Wallsend*').

86 *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374.

87 *Peko-Wallsend* (1987) 15 FCR 274, 307 (Wilcox J).

88 On the review of domestic implementation of transnational regulations see Vera Gowland-Debbas and Djacoba Liva Tehindrazanarivelo (eds), *National Implementation of United Nations Sanctions A Comparative Study* (2004); Vera Gowland-Debbas, 'The Domestic Implementation of UN Sanctions' in Erika De Wet, André Nollkaemper and Petra Kijkstra (eds), *Review of the Security Council by Member States* (2003) 63. See also Chris Finn, 'The Concept of "Justiciability" in Australian Administrative Law' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 143.

89 It is difficult to imagine how an applicant, at such a preliminary point in the decision-making process, could satisfy the requirement of a 'special interest in the subject matter' of the decision: *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493.

90 Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?', above n 12, 72.

Public Citizen,[91] who sought from the court a declaration that the United States Trade Representative (USTR) was under an obligation to prepare an environmental impact statement addressing international trade agreements under negotiation.[92] The decision of the court that no such obligation existed was negated by Executive Order 13141 under which the President ordered that such environment review was mandatory and that it must be made available in both draft form, enabling public comment, and in its final form.[93] This represents the imposition of administrative law type procedures on the participation of the USTR in global negotiations.[94] Generalising this approach would create a situation in which citizens in each of the states represented in negotiations would enjoy a degree of de facto participation in the decision-making process to the extent that they may be able to effectively influence the negotiating position of their respective representative through domestic mechanisms for political accountability. However despite the desirability of such an approach, this would, naturally, depend on domestic governments each taking the initiative to pass such legislation.[95]

Unsuccessful domestic judicial review may also stimulate reform at the global level.[96] For example, a series of unsuccessful cases in Canada and Europe challenging the domestic implementation of sanctions attaching to persons listed by the 1267 Committee[97] was a key factor influencing the introduction of a procedural mechanism for de-listing.[98] Initially this procedure did not allow a listed individual to personally apply for de-listing, instead requiring that they first successfully convince their country of residence or citizenship to apply on their behalf.[99] However, since the creation of this procedure, a 'focal point' has been established to handle direct applications from listed individuals seeking de-listing.[100] Crucially, any such reforms would have been unlikely but for the attempts at domestic judicial review which raised global consciousness of the procedural fairness deficiencies associated with the original absence of a functioning de-listing procedure. In continuance of this theme, domestic

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91 See <http://www.citizen.org/> at 29 July 2009.

92 *Public Citizen v Office of the United States Trade Representative,* 970 F.2d 916 (1992).

93 United States Executive Order of the President No 13141 (1999) s 5.

94 However, interestingly, s 7 of the Order explicitly states that it does not create any procedural responsibility enforceable at law, thereby apparently precluding future judicial challenge grounded in a failure to carry out this procedural requirement: United States Executive Order of the President No 13141 (1999) s 7.

95 See Kingsbury, Krisch and Stewart, above n 2, 33 for examples of this type of legislation being passed.

96 Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?', above n 12; Kingsbury, Krisch and Stewart, above n 2, 36.

97 Details of the 1267 Committee can be found online at United Nations Security Council, *Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities* <http://www.un.org/sc/committees/1267/> at 27 July 2009.

98 Kingsbury, Krisch and Stewart, above n 2, 34. This series of cases is discussed further in Part VII below.

99 Peter Gutherie, 'Security Council Sanctions and the Protection of Individual Rights' (2004) 60 *New York University Annual Survey of American Law* 491, 512-3.

100 *Resolution on General Issues Relating to Sanctions,* SC Res 1730, UN SCOR, sess, 5599th mtg, UN Doc S/Res/1730 (2006).

legal challenges[101] of the procedural fairness of decisions to disqualify or otherwise impose sanctions on athletes testing positive for banned substances in international sporting competitions prompted the development of procedures contained in the World Anti-Doping Code[102] intended to protect the fundamental rights of affected athletes.[103] Again, judicial review under domestic administrative law may be seen to be part of the vanguard in pursuit of procedural reform at the global level shoring up the accountability and legitimacy of transnational regulatory decision-making.[104]

Second, domestic administrative law may play a role in the formation of global administrative law through domestic reforms independent of unsuccessful judicial review actions. While litigation is a primary motivator for legislatures and the executive, in terms of publicity and the like, governments may also develop domestic administrative law that has a real effect on global administrative law, and its role in that country, through reforms of their own.

VI SPECIALISED GLOBAL ADMINISTRATIVE MECHANISMS AND RULES

Since domestic administrative law can only go so far in mitigating the accountability, transparency and accessibility deficiencies of transnational regulatory actors, administrative law type mechanisms, procedural rules and principles are required in the global space. This task is, however, made difficult because of the characteristic lack of uniformity of entities in this space. Therefore the tentative general administrative law principles already discussed must be tailored to the accountability and legitimacy issues particular to each transnational regulatory actor. In response to pressure from governments, private bodies and citizens worldwide, international bodies, both formal and informal, have begun to undertake reforms applying such an approach.[105] This has been described as the 'top down' alternative to the 'bottom up' approach.[106] Implementing administrative law type reforms at the transnational level has a number of advantages over isolated instances of domestic administrative systems extending into the global administrative space. For example, reform at the transnational level allows for harmonisation and convergence in the administrative law principles applicable to the global decision-making to an extent which may not be achievable under independent reforms or developments occurring at the domestic level. This is because each such domestic reform is likely to be coloured by the particular

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101 For commentary of such challenges with an Australian focus see Tony Buti and Saul Fridman, 'Drug Testing in Sport: Legal Challenges and Issues' (1999) 20 *University of Queensland Law Journal* 153.

102 The Code is published online: World Anti-Doping Agency, *World Anti-Doping Code* (2003) <http://www.wada-ama.org/rtecontent/document/code_v3.pdf > at 29 July 2009.

103 A complete legal opinion on the status of the code, and its capacity to protect the fundamental rights of affected athletes may be found online: Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes* (2007) World Anti-Doping Agency <http://www.wada-ama.org/rtecontent/document/Legal_Opinion_Conformity_10_6_complete_document.pdf > at 29 July 2009.

104 It has, nevertheless, been suggested that scrutiny by national courts may also have a potentially 'chilling or disruptive' effect: see Kingsbury, above n 2, 146.

105 Kinney, above n 3, 427; Kingsbury, Krisch and Stewart, above n 2, 34.

106 Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?', above n 12.

jurisdiction and legal tradition from which it emerges. Furthermore, initiatives at the global level ensure that affected persons in all nations have equal access to such mechanisms. In contrast, at the domestic level, only persons in those nations in which domestic administrative law has proactively engaged with the challenges of global governance are able to enjoy the protection or use of such mechanisms.

A Mechanisms for formal international organisations

The World Bank Inspection Panel (Inspection Panel)[107] is perhaps the paradigm of an administrative law type mechanism created under this approach.[108] The creation of the Inspection Panel by the World Bank as an independent mechanism for undertaking internal review of its operations was a response, in part, to external criticism of the World Bank's accountability.[109] This was the result of a perception of the World Bank as a 'renegade' institution, since it enjoyed immunity from national courts, and was only accountable to its constituent member states, thereby depriving communities affected by World Bank projects of any forum or other means by which their interests could be addressed and protected.[110] This might be framed as both an accountability and accessibility deficiency, which was further exacerbated by the World Bank's periodic failures to comply with its own internal environmental and social protection policies.[111] The Inspection Panel, adopted in 1993, addressed these concerns by providing an independent mechanism[112] through which persons affected by a project could enforce the World Bank's compliance with its internal procedures by requesting a full investigation.[113] The Inspection Panel achieves this by first evaluating the response of World Bank Management to a request, and based on this it must make a recommendation to the World Bank's Board of Directors as to whether or not a full investigation is warranted. Since 1999 the Board has approved every recommendation for a full investigation. Once approval is given, the Inspection Panel gains extensive investigatory powers and access to information[114] for the purpose of preparing a report for the Board, which is ultimately responsible for a final decision. Importantly, each stage of the process is made publicly available.[115]

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107 General information regarding the Inspection Panel may be found at World Bank, *The Inspection Panel* <http://www.worldbank.org/inspectionpanel > at 27 July 2009.

108 Kingsbury, Krisch and Stewart, above n 2, 34.

109 Ibrahim Shihata, 'The World Bank Inspection Panel – Its Historical, Legal and Operational Aspects' in Gudmundur Alfredsson and Rolf Ring (eds), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (2001) 7, 9–11.

110 David Hunter, 'Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People' (2003) 4 *Chicago Journal of International Law* 201, 203–4.

111 See, generally, Dana Clark and David Hunter, 'The World Bank Inspection Panel: Amplifying Citizen Voices for Sustainable Development' in Gudmundur Alfredsson and Rolf Ring (eds), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (2001) 167.

112 Details of this mechanism may be found in the Operating Procedure of the Inspection Panel published online at World Bank, *BP 17.55 Inspection Panel* (1999) <http://www.worldbank.org/inspectionpanel > at 27 July 2009.

113 Hunter, above n 110, 205.

114 Ibid 206.

115 See Requests for Inspection: World Bank, *Cases and Reports of the Inspection Panel* <http://www.worldbank.org/inspectionpanel > at 27 July 2009.

This Inspection Panel mechanism represents the voluntary introduction of a mechanism into the decision-making procedure of the World Bank which reflects the tentative global administrative law principles of transparency, participation and access to a review mechanism for affected persons. While it may serve as a model for future institutional reforms at the transnational level,[116] it has been criticized for not having the flexibility to include compliance with general international law principles alongside internal policy in the scope of an inspection,[117] and for being susceptible to having its review process politicised.[118] These are, however, weaknesses applicable to the specific implementation of the Inspection Panel, and are not necessarily evidence of systemic failures inherent to the model or general template which it may be regarded as representing. A recent refinement of the model can be seen in the introduction of the Asian Development Bank's (ADB) Accountability Mechanism to replace the previous inspection function, which was largely an adaptation of the World Bank Inspection Panel.[119] Importantly, the review process under this refined model is bifurcated. Firstly, the Accountability Mechanism provides a consensual Consultation Phase in which the ADB's Special Project Facilitator (SPF) mediates any disputes between stakeholders involved in a project with the goal of reaching a consensus. This process grants persons affected by a project an avenue to seek review and assistance even if there has been no breach of the ADB's operational policies. Furthermore, the process affords the SPF a high degree of flexibility in resolving disputes on terms satisfactory to all affected parties. The second limb of the Accountability Mechanism is a Compliance Review Phase (CRP), more closely related in scope to the World Bank's Inspection Panel, in which the decision-making of the ADB is investigated for any breaches of internal operating procedure. Implementation of the investigatory findings of the CRP follows a similar procedure to that of the World Bank Inspection Panel; they are presented as recommendations to the ADB's Board after consultation with management, and are made publicly available.[120]

These two separate but related limbs of the Accountability Mechanism combine to provide a flexible multi-tiered procedure under which affected persons can seek review of ADB decisions. Importantly, this refined model avoids one of the key criticisms of the Inspection Panel considered above; namely, that the scope of review is too restrictive to be truly effective. The ADB Accountability Mechanism achieves this

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116 In fact, it has already influenced the creation of similar procedures in the decision-making and review procedure of several international banks: see for example, Eugenia McGill, 'The Inspection Policy of the Asian Development Bank' in Gudmundur Alfredsson and Rolf Ring (eds), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (2001) 191.

117 Kingsbury, Krisch and Stewart, above n 2, 34.

118 Clark and Hunter, above n 111, 182-6.

119 The new Accountability Mechanism became effective on 12 December 2003. For information regarding the previous Inspection Policy and the present Accountability Mechanism of the Asian Development Bank see Asian Development Bank, *Accountability Mechanism* <http://www.adb.org/Accountability-Mechanism/default.asp> at 27 July 2009.

120 For a registry containing all requests filed with both the CRP and the SPF see Asian Development Bank, *Compliance Review Panel* <http://lnadbg4.adb.org/dir0035p.nsf?Open at 29 July 2008>. It is perhaps a testament to the efficacy of the more informal dispute resolution process available under the Consultation Phase that only two requests for compliance review have been made to the CRP since 2004, while 12 requests for mediation were filed with the SPF in the same period.

to the extent that it allows the SPF the scope to evaluate ADB decisions against criteria beyond mere compliance with internal policies. This allows the procedure to be accessible to a wider range of affected persons by allowing review of ADB decision-making to contemplate a broader range of complaints and concerns. Further, it suggests that with additional refinements, perhaps directed at improving the independence of the bodies responsible for review from ADB Management and the Board, the general model based originally on the World Bank Inspection Panel may overcome the other limitations considered above.

B The challenge of informal trans-governmental networks

Notwithstanding this, even an improved general model which substantially eliminates these weaknesses and limitations could not solve all the accountability or legitimacy problems arising in the disaggregated and highly differentiated realm of global governance. In part this is because a model based on the Inspection Panel only effectively engages with one dimension of the global administrative space; that of formal international institutions. It assumes a significant degree of legalisation to make possible the required formalised intra-institutional differentiation and structural separation between the administrative arm of an organisation, responsible for making regulatory decisions, and the body charged with reviewing these decisions.[121] Without this, the adjudicative review body could never truly be considered independent, and any procedure would not have the certainty gained through formality, thereby raising crucial doubts as to the efficacy and meaningfulness of its review functions. In the context of informal trans-governmental networks, this crucial characteristic is wholly absent. As a result, a different model of institutional reform is required to address the accountability deficiencies of these networks. Whether informal trans-governmental networks are, considering their peculiar characteristics, actually a desirable means of implementing global governance is a debate which lies beyond the scope of this paper.[122] Instead, it is suggested that notwithstanding any such concerns, the increasing importance and prevalence of such bodies in the global administrative space[123] demands consideration of the accountability issues particular to networks.

The Basel Committee represents an exemplary case study of the challenges involved in seeking accountability, transparency and democratic legitimacy from the decision-making undertaken by informal networks. Yet it also serves to illustrate how administrative law type principles and mechanisms might be applied to these bodies. The primary mode by which the Basel Committee engages in global governance is by developing and promulgating recommendations for banking sector regulations amongst members. Initially these were intended to apply only to the G-10 countries actually represented in the Basel Committee, but it soon became apparent that other countries would have to follow suit in order to participate in crucial financial markets, thereby, according to some, reinforcing the G-10's hegemony over unrepresented states.[124] Reinforcing this and other concerns that the Basel Committee was effectively

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121 Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?', above n 12, 88-90.

122 See, eg, discussion and references in Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy', above n 11.

123 Slaughter, *A New World Order*, above n 51, 12.

124 Barr and Miller, above n 50, 20.

operating as an agency on the loose[125] was the fact that its earliest policy development meetings lacked transparency and were conducted with no invitation for public, NGO or non-member state participation.[126]

However, when the time came to substantially revise the original 1988 Bank Capital Standards Recommendations, the Basel Committee undertook multiple rounds of notice and comment style policy development in which draft proposals, reasoning leading to those proposals and even quantitative impact studies were made available to the public.[127] In addition, the Basel Committee invited comments on its proposals, and as a result of submissions made, reformed some aspects significantly.[128] This process of continuing and meaningful dialogue and interaction between the Basel Committee and market participants and other interested parties beyond its membership increased the degree of participation and transparency associated with the policy formulation of the Basel Committee. It might therefore be seen as an administrative law type mechanism directed at improving the accountability of decision-making undertaken by this transnational regulatory network.

Crucially, however, there are limitations to this view. While these notice and comment procedures resonate with administrative law type values, they are not strictly speaking law. As has already been suggested, the Basel Committee is simply a forum which aims to promote informal networking amongst its members. It is not subject to any formal treaty or agreement and it does not operate under a legalised procedure.[129] Increasing the transparency of, and opportunities for outside participation in, its policy formulation was voluntary and may be wholly departed from in future. Specifically, the Basel Committee had not incorporated, by way of amendment or resolution, any obligation to undertake this process into its legalised decision-making procedure, since for the Basel Committee such a formal procedure does not exist. Related to this, it must be observed that what the Basel Committee produces also cannot be regarded as law. The recommendations as to bank regulatory policy, which the Basel Committee promulgates amongst its members, are expressly non-binding; instead their functionality and efficacy relies on members reaching common ground and consensus with one another.[130] Again, this characteristic informality means that while the Basel Committee's recommendations effectively have normative traction and pull in terms of banking regulations globally, they are not, strictly speaking, substantive administrative law.

How then might law play a role in relation to the Basel Committee's operations and regulatory harmonisation agenda? The answer to this question lies in focussing on the consequences which flow from the extent to which informal transnational networks like the Basel Committee transcend the traditional distinction between the national and the global. When the regulatory process of the Basel Committee is approached holistically, it becomes clear that it is a site of both transnational and domestic regulation;[131] recommended regulatory policies developed at the transnational level

125 Slaughter, 'The Accountability of Government Networks', above n 46, 359.
126 Barr and Miller, above n 50, 24.
127 For an excellent account of this process, see ibid, 24–28.
128 Ibid 26-27.
129 Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations', above n 24, 288.
130 Ibid.
131 Barr and Miller, above n 50, 45–46.

must be implemented into law at the domestic level under the relevant national administrative rule-making procedure. Consequently, it is at the level of domestic implementation that the policy making of the Basel Committee is formally subjected to the control of law through established national administrative mechanisms and procedures. The efficacy of these controls is evident in that there is significant variance in the ways that different countries around the world have chosen to approach implementation of these most recent Basel Committee recommendations.[132] This is perhaps the result of the increased ability for smaller and less well resourced interested parties to participate meaningfully in domestic notice and comment processes compared to those offered by the Basel Committee internationally, alongside a shift in the focus of the regulators from the creation of a general global recommended policy to tailoring specific domestic and regional solutions reflecting local concerns and market conditions.

Therefore, to labour an important point, the correct approach to understanding the Basel Committee's operation is to see its domestic and international existence as being fused together and thus becoming truly transnational; as an interconnected web of sub-state regulatory officials seamlessly operating within the boundaries of their respective state and beyond them. Matching this, there is similar interconnectedness in relation to the procedural rules and requirements of domestic administrative law applicable to these decision-makers, and also the notice and comment practices they have voluntarily adopted in the international plane. The transparency and accessibility created at the international level flows on to the domestic context to the extent that parties interested in influencing the domestic implementation of the Basel Committee's recommendations may access information, including dissenting views, expressed during the international negotiation phase of the Basel Committee's deliberations.[133] Conversely, the constraints operating on the domestic implementation of the recommendations derived from domestic administrative law also flow back into the international context to the extent that the members of the Basel Committee must always remember they perform a dual role. Since domestic implementation of the Basel Committee recommendations is made easier and more informed as a result of increased transparency and accessibility at the international level, Basel Committee members have an incentive to implement practices such as the notice and comment procedure because they are also national regulators.

What the Basel Committee demonstrates is that 'top down' incorporation of administrative law principles is complemented by 'bottom up' extension of domestic administrative law, even where this extension does not involve explicit judicial review of transnational governance decisions. In global governance, though perhaps most particularly in the case of entities like the Basel Committee, there is such a close relationship between the international and the domestic that the two can be regarded as conceptually fused within the one transnational system. With this in mind, the key sites of interest for the study of global administrative law are the internal points of intersection within global governance regimes where the domestic and the international interact.[134]

132 Barr and Miller, above n 50, 31.
133 See, generally, Barr and Miller, above n 50.
134 See, generally, ibid 45.

VII RAMIFICATIONS FOR DOMESTIC ADMINISTRATIVE LAW

As it has been seen, there is a role to play for domestic administrative law projected 'upwards' into the global administrative space. First, it may function as a direct source of constraints on, and review of, global regulatory decision-making. Second, domestic administrative mechanisms may operate as a pillar to support and augment the efficacy of specialised administrative law type mechanisms at the global level.[135] Third, domestic administrative law, and more particularly judicial review, may serve as a catalyst for reform of international organisations and bodies by pressuring them to adopt administrative law type accountability mechanisms. Thus, domestic administrative law may inform and shape global administrative law, though as already seen, there are practical and conceptual barriers hampering its effectiveness in this regard and whether these may be effectively overcome remains to be seen.[136]

However, a second issue, perhaps of greater relevance to domestic administrative law practitioners, is how the expansion of global governance and transnational administration has affected the substantive content and operation of domestic administrative law. In the domestic sphere, global administrative law may bypass national administrative mechanisms, or directly modify the substantive content of domestic administrative law. This is the result of the nature of the global governance model within which the 'domestic' and the 'international' cannot be regarded as separate levels.[137] Rather, there is pervasive integration of the two flowing from the incorporation of international regulation into domestic law, the participation of domestic regulators in global regimes and the increasing interconnectedness of sub-state regulatory actors worldwide. These are the means by which global administrative law is not limited to interactions in the international space between states, but is in fact reaching across national borders. Such incursions inevitably have consequences for the affected domestic legal systems.

Domestic administrative law is bypassed or 'short circuited' where transnational regimes make regulatory decisions in relation to individual persons or firms, without requiring domestic administrators to play any role in implementing or overseeing such schemes.[138] The Clean Development Mechanism (CDM)[139] established under the Kyoto Protocol does precisely this. Under the CDM, emission-reduction projects in the developing world may earn Certified Emission Reduction (CER) credits, which can then be freely traded to developed countries, to offset their emissions, in exchange for cash. In order to earn these CER credits, projects must first be certified under a process supervised by the CDM Executive Board. In effect, certification of a project under the CDM has a direct effect on the legal rights of individual firms in developing countries,

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135 See discussion above regarding Basel Committee adoption of transparency procedures and notice comment mechanisms which improve the efficacy of domestic administrative mechanisms.

136 For more discussion of these and related issues see Sabino Cassese, 'Administrative Law Without the State? The Challenge of Global Regulation' (2006) 37 *New York University Journal of International Law and Politics* 663.

137 For more discussion of these and related issues see ibid 684.

138 Kingsbury, Krisch and Stewart, above n 2, 24.

139 Information regarding the CDM and the Executive Board which oversees it can be found online at United Nations Framework Convention on Climate Change, *Clean Development Mechanism*<http://cdm.unfccc.int/index.html> at 27 July 2009.

yet the decision is handled entirely at the transnational level. The CDM does not require any domestic legal implementation, and national governments are not involved in the certification process. Consequently, this is an example of transnational regulatory decision-making, which wholly avoids domestic administrative law mechanisms, but still reaches across national borders to affect individuals. As global administration continues to shift away from national governments to alternative governance models, regulatory regimes such as this are likely to become more common, thereby posing the difficult question as to whether there is any conceivable role for domestic administrative law to play in relation to such regimes.[140]

Domestic administrative law may also be altered where sources of global administrative law provide conflicting procedural requirements, or substantive principles. This need not involve direct interference by global regimes in domestic legal systems; it is enough for a requirement to exist at the global level alone where its satisfaction imposes domestic obligations. For example, in a decision considering a United States import restriction on shrimp and certain shrimp related products,[141] hereafter the 'Shrimp/Turtle' decision, the WTO Appellate Body found that the ban violated the entitlement of affected countries to some form of due process[142] and was consequently unprotected by Article XX of the GATT.[143] Countries were exempted from the ban where they were 'certified' under a process which involved arbitrary and unjustifiable discrimination, according to the Appellate Body, because it did not comply with the fundamental requirements of due process.[144] Consequently, in order to satisfy its obligations to the WTO at the level of international law, the United States domestic administrative procedure needed to be adjusted so as to provide the requisite degree of procedural fairness to foreign states and affected producers.[145] Therefore, despite the lack of any direct interference from global administrative law, domestic administrative law was in effect altered; requirements imposed at the level of global administrative law triggered a change of domestic administrative procedure.

Related to this capacity of global administrative law to effect change upon domestic administrative law is the presently unresolved question as to how conflict between the two bodies of administrative ought to be resolved. This may most commonly be where there is a conflict between, on the one hand, the undertakings which the national executive has agreed to implement under a treaty or other international agreement and, on the other hand, the 'fairness' principles or other procedural requirements embodied in domestic administrative law.[146]

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140 See, generally, discussion in Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?', above n 12.

141 *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WTO Doc WT/DS58/AB/R, AB-1998-4 (1998) (Report of the Appellate Body) ('*US – Shrimp*').

142 See Kingsbury, Krisch and Stewart, above n 2, 36.

143 For more detailed discussion of the Shrimp/Turtle decision, and its connection with 'due process' as a principle of WTO law see Andrew Mitchell, *Legal Principles in WTO Disputes* (2008) 173-5.

144 WTO Report of the Appellate Body, *US – Shrimp,* above n 141 at [182].

145 Kingsbury, Krisch and Stewart, above n 2, 36. For more on the WTO's contribution to global administrative law see Andrew D Mitchell and Elizabeth Sheargold, 'Global Governance: The WTO's Contribution' (2009) 46(3) *Alberta Law Review* (forthcoming).

146 See, generally, Kingsbury, above n 2, 145.

A conflict of this sort loomed when courts in Europe and Canada[147] were faced with the task of reviewing domestic implementation of United Nations Security Council sanctions imposed on persons included in the Consolidated List[148] maintained by the 1267 Committee. These individuals, whose listing had resulted in their assets being frozen because of suspected links to terrorism, argued that the sanctions imposed on them by domestic regulations substantively mirroring the Security Council resolutions were illegal since they effectively amounted to a legislative or administrative deeming of guilt[149] without due process.[150] The courts in question were therefore faced with the choice of either striking down the domestic regulations imposing the sanctions, thus bringing about non-compliance with a binding Security Council resolution, or alternatively, upholding them despite any inconsistencies with the procedural fairness requirements of domestic administrative law.[151] Before this tension could be judicially resolved, the substantive disputes were effectively disposed of by removal of the affected individuals from the 1267 Committee's list and the creation of a general procedure for de-listing.[152] However, given that no cases have provided adequate guidance on the issue, it is still unresolved.[153]

VIII CONCLUSION

As the worldwide movement towards global interdependence across a broad spectrum of economic and social activities and issues continues, global governance regimes and transnational regulation are likely to increase in number. Paralleling this growth, global administrative law ought to be developed so as to provide the necessary checks and balances on transnational regulatory actors to ensure accountability, legitimacy and the promotion of a sense of democratic participation and transparency in the development of global norms and regulations. As has been seen, this development likely requires simultaneous 'bottom up' and 'top down' measures. Specifically, domestic administrative law may be extended 'upward' into the global administrative space. Its core principles ought to provide a sound foundation for the development of global administrative law type mechanisms, procedure and rules. Further, despite numerous difficulties, national administrative law mechanisms, such as domestic judicial review, may play a limited role as a direct check on global administrative

147 For detail of the litigation see David Dyzenhaus, 'The Rule of (Administrative) Law in International Law' (2005) 68 *Law and Contemporary Problems* 127, 144–6; Kingsbury, Krisch and Stewart, above n 2, 32. Also, for discussion of the consequences of this litigation (specifically in relation to institutional reform) see Peter Gutherie, 'Security Council Sanctions and the Protection of Individual Rights' (2005) 60 *New York University Annual Survey of American Law* 491, 519.

148 The Consolidated List is publicly available online at United Nations Security Council, *Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities* <http://www.un.org /sc/committees/1267/consolist.shtml> at 27 July 2009.

149 Dyzenhaus, 'The Rule of (Administrative) Law in International Law' above n 147, 145.

150 Kingsbury, Krisch and Stewart, above n 2, 32.

151 See Kingsbury, above n 2, 145; for a more detailed explanation of the procedural fairness issues involved, see Dyzenhaus, 'The Rule of (Administrative) Law in International Law' above n 147, 141–51.

152 Dyzenhaus, 'The Rule of (Administrative) Law in International Law' above n 147, 144–6.

153 See Gutherie, above n 147, 521 for discussion of the availability of review.

activity. However, perhaps more importantly, domestic administrative review is likely to play a more effective role as a catalyst for institutional reform at the transnational level. There is a wide scope for such 'top down' reforms particularly for international institutions which are facing growing criticism for their opaque and inaccessible decision-making. Looking to the future, the most important growth area for global administrative law, in relation to these global regimes, is likely to be the creation of specialised administrative law type mechanisms operating at the global level and directed towards improving the transparency, opportunities for public participation, accountability and thereby legitimacy of transnational regulatory decision-making.

The growth of global administrative law will also have an impact on domestic administrative law. Both the substantive content and effective operation of domestic administrative law may be affected since global governance, and the administrative principles attaching to it, have largely broken down the traditional distinction between the national and international levels of regulation. The role and function of domestic administrative law may need to be reconceptualised to deal with the incursion of global administrative law which threatens to both bypass and alter domestic administrative law. Perhaps the greatest and most immediate challenge, however, is in reconciling the conflict between legal orders resulting from inconsistencies between global and domestic administrative law. This area is particularly lacking in instruction and requires much further development.