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GLOBAL REGULATORY ADMINISTRATION AND THE RULE OF LAW: GLOBAL ADMINISTRATIVE LAW

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I. Introduction

Global regulation beyond the state, through many disparate and fragmented regulatory regimes addressing such matters as trade, investment, environmental health and safety protection, security, , development, international investment and human rights. Global regulatory regimes have arisen due to the interdependencies created through globalization and the circumstance that states can no longer adequately secure welfare citizens values on the own. These schemes are often aimed, directly or indirectly, at regulating the conduct of private actors. Moreover, non-state actors including business firms and NGOs play vital and in some cases dominant role in many of these global regulatory schemes, which are fundamentally administrative in character. Domestic administrative authorities often implement or enforce regulatory decisions, rules, and standards adopted by global bodies, becoming "distributed administration" components in global regulatory regimes. Increasingly, global authorities enforce or implement their decisions directly against private actors. Or, the norms that they generate are adopted by private actors or other global bodies without any intervening implementation and enforcement mechanism because the norms provide focal points for beneficial coordination.

The various global regulatory administrative regimes can do much to advance human welfare and secure rights. But the power that they exercise is in many cases not effectively disciplined by either domestic political and legal mechanisms of control and accountability or by traditional forms state-centered international law. They pose significant risks that power will be exercised arbitrarily or in the interest of well-organized economic and political actor and powerful states.

A critical challenge of global governance is that of securing the rule of law in global regulation, broadly conceived as including not only regulation of market activities but also regimes in the fields of security, development, and human rights. A closely related challenge is to ensure the accountability of global administrative decision makers to those significantly impacted by their decisions. Domestic systems of public law often cannot deal effectively with these twin challenges because much global regulatory decision making is done by extra-statal bodies that

cannot be effectively be structured or disciplined by domestic law.¹ Traditional state-centered international law is also inadequate. Even in the case of regulatory regimes established by treaty, much decisionmaking authority is delegated to various bureaucracies, committees, expert groups and the like under arrangements which stretch beyond the limits of plausibility the notion of state consent to their regulatory output. Moreover, much global regulation is developed and implemented through multilateral networks of domestic government officials and by private or hybrid-private public bodies that are largely beyond the province of international law.

Global administrative law (GAL) responds to the gaps in the rule of law and the shortfalls in accountability created by the rise of global regulatory governance. GAL is a rapidly emerging field of theory and practice whose core consists of norms of transparency, participation, reason giving and review that seek to promote the rule of law in decisionmaking by the many varied global regulatory bodies and their domestic distributed components.² These norms and the methods for their deployment in institutional practices are drawn principally from Anglo-American and (to a lesser extent) continental administrative law in domestic legal systems and, more recently, the emerging administrative law of the European governance system.

GAL is one of three new movements to adapt and develop new forms of legal understandings and arrangements in order to respond to the challenges of global governance for the rule of law and for accountability. The others are global constitutionalism,³ and an international institutional law based on the concept of international public authority ruled by law.⁴ These conceptions, like global administrative law, are derived primarily from North Atlantic legal practices and traditions. They face at least four fundamental obstacles. One is that much global law does not emanate from an authoritative lawmaking source and lacks an accepted positive law pedigree. A second and related difficulty is that global law must operate without the foundation of the democratic institutions, including elected governments and legislatures and a standing system of courts. As a result, it faces serious problems of efficacy and legitimacy. A third obstacle is the radical institutional fragmentation of global governance, with myriad different regulatory and other regimes addressed to different specialized issues, sectors, and objectives without any effective overarching institutional machinery. A fourth challenge is how legal conceptions and practices originating in prosperous North Atlantic liberal democracies can claim a legitimate pedigree in a world that includes so many poor countries, and quite a few address we countries with more or less totalitarian governments. A fifth problem is that all three movements are derived from public law conceptions and practices, while much important global regulation and governance is carried out by a variety of private and hybrid public-private bodies. Any evaluation of the three new global law movements, as well as of the ability of public international law to adapt to the circumstances of contemporary global governance must consider

¹ See Richard B. Stewart, *Accountability, Responsiveness, and the Problem of Disregard in Global Regulatory Governance*, *supra.* (forthcoming).

² See Kingsbury, Krisch and Stewart, *The Emergence of Global Administrative Law*, 68 *Law & Contemp. Prob.* 15 (2005)

³ E.g., Matthias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, in *Ruling the World: International Law, Global Governance, Constitutionalism* (Dunoff and Trachtman, ed., CUP, 2009).

⁴ See A. v. Bogdandy, P. Dann & M. Goldmann, "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities", 9 *German Law Journal* (2008) 1375; A. v. Bogdandy *et al.*, *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (2010),

how successfully they cope with these challenges.⁵

This essay addresses the contributions of GAL to securing the rule of law in global regulatory governance. Section II provides an overview of the premises and development of GAL. Next, Section III outlines a conception of the rule of law, drawing substantially on recent work by Jeremy Waldron, which provides a frame for examining the normative functions and claims of global administrative law. Section IV provides examples of GAL's development and application in four recurring modes of regulatory governance: decisions by global authorities that impose sanctions or liabilities or otherwise determine the legal rights of specific individuals; global regimes for the systematic implementation and elaboration of general regulatory norms; procedures for the adoption of global regulatory norms decisions by global bodies; and the governance of international development assistance and investment that supports activities in developing countries that adversely affect relatively powerless groups of individuals, such as communities displaced by development projects. Section V assesses the normative status and contributions of GAL. It examines whether GAL and its procedural components can be regarded as law, rather than just good or expedient administrative practice, whether they can be regarded as constituting a distinct field of law, and their potential to advance the rule of law in global governance, secure greater accountability on the part of global regulatory bodies, and promote greater consideration of disregarded interests. Section VI examines the inherent difficulties and fundamental challenges that GAL faces and how they might be addressed.

II. Global Administrative Regulation and GAL

Power is increasingly exercised beyond the state, in dynamic forms of regulation, broadly understood, that can be loosely labeled as global governance. This phenomenon also has considerable implications for the exercise of regulatory power by and within each state. These shifts in the nature and possibilities of the holders of power, and in the conditions under which such power is used, call for distinctive analytic methods to understand them, and for distinct normative arguments to evaluate and shape them.

The GAL Project being carried out by NYU Law School and partners in other countries⁶ builds from two basic observations about these phenomena. First, much global governance can be understood as regulatory administration. Effective decision making authority is exercised by large bureaucracies in many international organizations and in domestic administrations, and by committees, expert groups, and networks of domestic officials and private business or NGO actors. Second, such regulatory administration is being (or can be) organized and shaped by principles of an administrative law character. This is already evident in the decisions of EU courts in reviewing Security Council sanctions against individuals; in the Inspection Panel set up by the World Bank to ensure its own compliance with its internal policies; in notice-and-comment procedures adopted by international standard-setters such as the Basel Committee or the OECD; in rules about foreign participation in domestic administrative procedures as set out in the Aarhus Convention; in the review of domestic administrative procedures and decisions by international panels in the WTO context; and in the work of international administrative tribunals and other mechanisms of accountability in international organizations. The picture is highly

⁵ Horatia Muir-Watt and colleagues in the Sciences Po PILAGG group are fielding still another candidate, *Private International Law Applied to Global Government*. Horatia Muir-Watt, *Private International Law: Beyond the Schism, from Closet to Planet* (forthcoming).

⁶ See www.iilj.org

uneven, but broadly we see widespread, and growing, commitment to some principles of transparency, participation, reasoned decision and review in global governance.

Building on these twin ideas, my colleagues in the NYU Global Administrative Law Project and I have argued that a body of global administrative law (GAL) has emerged.⁷ By global administrative law we mean the mechanisms, norms, principles, practices, and supporting social understandings that promote transparency, participation, reason-giving, accountability, and review of bodies exercising power in global governance. (How much of this can properly be characterized as "law," and the implications of a conclusion one way or another, will be addressed below.) This GAL approach thus represents a distinctive theoretical lens to understand, and potentially influence, the activities in global regulatory governance of various international or transnational legal actors.

A. The Global Administrative Space and the Varieties of Global Regulatory Bodies.

The growing density of international and transnational regulation, which in part reflects the inadequacies of uncoordinated national systems of regulation as means to address global interdependencies in fields that include market activities and their spillovers, security, and human rights, has created a multifaceted "global administrative space" populated by several distinct types of regulatory administrative bodies together with various types of entities that are the subject of regulation, including not only states but firms, NGOs and individuals. For our legal-analytic purposes, these regulatory bodies operating beyond the state can be divided into four basic types based on their composition:

Formal intergovernmental organizations, established by states (or and in some cases other international organizations), typically through treaties that impose obligations on states parties but whose ultimate aim is often regulation of private actors (e.g., Kyoto Protocol) and include a variety of administrative bodies operating under treaty aegis but often exercising very significant lawmaking and discretionary and administrative powers, including lawmaking powers.

Intergovernmental networks of national regulatory officials responsible for specific areas of domestic regulation (banking, money laundering, etc.) who may agree to common regulatory standards and practices which they then implement domestically. These bodies are increasingly becoming strongly institutionalized with significant administrative components.

Hybrid intergovernmental-private bodies composed of both public and private actors, such as the Global Partnership for HIV/AIDs and the global sports regime complex, a type that is becoming increasingly significant in contemporary governance generally and *Private bodies exercising public governance functions*, such as the Forest Stewardship Council deciding on criteria for products from sustainably managed forests to be certified and labeled, or the International Olympic Committee deciding where the Olympic games should be held and under what conditions.

Domestic administrations forming an integral part of global regulatory regimes represent a fifth

⁷ See <http://www.iilj.org/gal.asp>.

type of body involved in global regulation. These agencies implement global regulatory law through a distributed system of administration, and in so doing (and in other ways) shape it.

For now we understand administration as including both decision-making that affects identifiable legal actors in significant ways (but not episodic voluntary dispute settlement by third parties), and rule-law making (other than treaties or statutes). We believe that recasting global governance as administration, allows us to develop a more rigorous conceptual schema of the various institutional structures and relations involved in the notoriously slippery notion of global governance. We recognize, however, that our working concept of administration raises questions that we must address further.

The overall institutional pattern of global regulatory administration is highly fragmented. Separate regimes are organized along sectoral lines in specific fields of regulation, often with several organizations in a given sector that may compete. There is no overall higher authority or constitutional structure. Hence, the metaphor of a global administrative space. Global regulation functions through a web of interactions and influences, horizontal, vertical, and diagonal, among a diverse regulatory institutions, national and international courts and tribunals that review (directly or indirectly) their decisions and norms, subjects, and other actors. The various regulatory bodies are linked by ongoing informal communication and negotiation, and by more established ties through inter-organization representation, participation and consultation procedures.

We believe it is essential to study these phenomena at the global level in tandem with work on the national administrative spaces, particularly the legal implications of the impact of global regulatory authorities and procedural and institutional practices and norms on domestic systems of decision making, including domestic administrative law and the role of courts and other tribunals; and conversely, the impact of these national practices on extra-national governance and GAL. Bringing together the global and national administrative spaces (without of course merging them into one) reflects the view that the strict dichotomy between domestic and international has broken down, that administrative functions are performed in complex relations between officials and institutions not organized in a single hierarchy, and that regulation using non-binding forms often proves highly effective in practice. All of this has important implications not just for global and national regulatory governance, but also for state institutions and state law and policy-making, including especially in developing countries, which are deeply impacted by global regulation but have widely varying capacities to deal effectively with it. National systems of administration and law become porous; global norms flow into them, often circumventing the national legislature. Reciprocally, global regimes absorb norms of dominant states and influential societies.⁸

B. The Rise of Global Administrative Law

The second foundation of our framework is the premise that the diverse forms of global regulatory administration and their interactions are (or can be) organized and shaped by principles of an administrative law character. A growing body of global administrative law, based on largely procedural principles of transparency, participation, reasoned decision, review, is emerging in global regulatory administration to promote greater accountability and

⁸ Sabino Cassese, Administrative Law without the State? The Challenge of Global Regulation, 37 JI Intl L. & Politics 663(2005)

responsiveness to affected actors and interests, including developing countries and civil society interests.⁹

GAL procedures can serve a variety of objectives and interests, but a key factor in the rise of GAL has been the need to discipline and channel the growing powers of global regulatory bodies in response to increasingly voiced concerns about their exercise. The traditional rationale that international regimes are legitimated through mechanisms of state consent to treaties is often insufficient (or inapplicable to many institutions), and is usually unrealistic in terms of accountability or other GAL-type conditions. Even in some of the institutions created by interstate treaties, much norm creation and implementation is carried out by subsidiary bodies of an administrative character that operate informally with a considerable degree of autonomy. Other global regulatory bodies – including networks of domestic officials and private and hybrid bodies – operate wholly outside the traditional international law conception. At the same time, the various forms of global regulatory administrative decisionmaking are either not subject to domestic political and legal accountability mechanisms at all, or only to a very limited degree. These circumstances result in serious gaps in the rule of law and in the legal and political accountability of global administrative decisionmakers to those significantly affected by their decisions. A further critique, often linked with accountability gaps, is that global regulation has been captured by the wealthy and powerful, to the detriment of developing countries and environmental, consumer, labor, and other social interests (the "problem of disregard"), leading in turn to circumvention of domestic political and legal checks and weakening of domestic regulatory protections.¹⁰ The problems of legitimacy raised by the shift of power and authority to extra-state processes and norms are serious and unresolved.

National experience shows that administrative law can channel and check the exercise of government power and in doing so enhance its efficacy. This is accomplished by protecting individuals against unauthorized or arbitrary exercises of official power, and by promoting administrative responsiveness to broader public interests. The ambition of global administrative law is to use comparable techniques to promote the rule of law, secure accountability, and promote greater consideration of disregarded interests by structuring the decision-making of global regulatory bodies through transparent procedures that provide opportunities for wider participation and decision on the basis of public reason in place of fiat, insider bargains, or administrative expediency. As is the case of domestic administrative law, this ambition cannot be completely realized, nor should it be without generating serious legalization pathologies. Moreover, because of the very significant differences in institutional and political conditions between the domestic and spheres, including the lack of a global government or a strong system of independent courts beyond the state, domestic public law (and certainly the precise systems of administrative law) cannot simply be transposed to global administration. Nonetheless, accumulating experience shows that administrative law mechanisms for transparency, participation, reasoned decision and review, in appropriately modified form, can in many cases serve to promote the rule of law and secure greater accountability and greater responsiveness by global regulatory bodies to a wider range of the interests and groups impacted by their decisions.

⁹ See ; Sabino Cassese et al., *Global Administrative Law: Cases, Materials, Issues* (2d ed. 2008), <http://www.iilj.org/GAL/GALCasebook.asp>.

¹⁰ Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 *Jl Intl L. & Politics* 695(2005)

C. Who Creates GAL, Who Adopts It and for What Reasons?

The various different global regulatory bodies operating in different sectors and fields of regulation are increasingly subject to GAL norms developed and applied by international tribunals, by domestic courts, and by other global regulatory bodies and domestic authorities on whose cooperation they depend. Domestic administrations that function as the distributed element of global regulatory regimes are subject to GAL norms applied by the global regulatory bodies of which they are a part, by international tribunals and arbitral bodies, and by their own domestic courts. GAL procedures are also adopted by global regulatory bodies at their own initiative in order to meet internal management objectives or respond to external demands by governments, NGOs, firms, and the public. GAL is practiced at multiple sites, with some hierarchy of norms and authority, and some inter-site precedent and borrowing of principles, but with considerable contextual variation. It is influenced by treaties and fundamental customary international law rules, but it goes much beyond these sources and sometimes moves away from them. Its shared sets of norms and practices are in some cases regarded as obligatory. But they are also meshed with other sources of obligation applicable to that site sources which may include the national law of the place, the constituent instrument and regulations of the norm - applying institution, contracts establishing private rights, or general norms that are recognized as law, including those of GAL.

The development and spread of GAL practices and norms has been accomplished by many different types of institutional actors, motivated by a variety of objectives. There has been no overall plan or system. Rather GAL has accreted through the accumulation of discrete decisions by the different generative actors responding to the need to discipline the exercise of administrative power occurring in certain recurring structural modes, as discussed in Section IV. These actors include not only domestic and international courts and tribunals but also other global regulatory bodies, domestic regulatory authorities, business firms, NGOs, and private and public/private networks of actors. Some of these actors, such as courts and tribunals and international investment arbitral bodies, review the legality of global administrative decisions and norms (including those of their distributed domestic components) as a condition of their validity and enforcement. In other cases, a domestic agency or another global regulatory body, in deciding whether or not to recognize or validate a global regulator's decisions or norms may give weight to whether or not it followed GAL practices in decisionmaking. . As discussed below, these decisions are instinct with the need to channel and regularize the exercise of authority through law. In still other cases, private actors are deciding whether to conform to the decision or norm in order to enhance their reputations, become credible partners in business or other transactions or ventures, or otherwise further their interests. In all of these contexts, the extent to which the global regulator has followed GAL practices of transparency, participation, reason giving, and opportunity for review in making decisions is often a substantial and in some cases a controlling factor in the decision of the validating or recipient authority or actor in deciding whether or not to validate, recognize, or conform to the decision or norm in question.

The institutional method for the development of GAL is thus decentralized, incremental, cumulative, and continually open to adjustment and revision, a common law sort of approach, albeit one involving many different types of jurisgenerative bodies throughout the global administrative space, rather than the hierarchical approach found in continental systems of administrative law. The development of GAL also bears some resemblances to the very recent emergence of a European administrative law.

The various global regulators adopt GAL practices, and gradually internalize GAL norms, for a variety of reasons. These include, most obviously, the desire to obtain validation, recognition, and acceptance of their decisions and norms by relevant validating or recipient authorities or actors. Or, global regulatory organizations may adopt GAL practices to address internal management objectives. Thus, the Board of the World Bank initially created the World Bank Inspection Panel review mechanism to deal with internal principal/agent problems and ensure that its administrative staff adhered to Bank environmental and social guidelines in development assistance decisions (the guidelines had been adopted to meet criticisms from NGOs and the U.S. Congress). The Inspection Panel mechanism subsequently morphed into a system to secure transparency, participation, reasons-giving and review of Bank administrative decision-making for the benefit of citizens of developing countries.¹¹ Alternatively, global regulators may adopt some version of GAL practices to respond to NGO and general public demands for greater openness and access and thereby enhance their perceived legitimacy and general public acceptance.

As a result, the various different global regulatory bodies operating in different sectors and fields of regulation are increasingly subject to GAL norms developed and applied by international tribunals, by domestic courts, and by other global regulatory bodies and domestic authorities on whose cooperation they depend. Or they may adopt such practices to win the custom of norm "consumers" such as businesses or consumers concerned to follow or support socially and environmentally responsible practices and products, or to meet criticism and enhance their public reputation. Domestic administrations that function as the distributed element of global regulatory regimes are subject to GAL norms applied by the global regulatory bodies of which they are a part, by international tribunals and arbitral bodies, and by their own domestic courts. GAL procedures are also adopted by global regulatory bodies at their own initiative in order to meet internal management objectives or respond to external demands by governments, NGOs, firms, and the public.

In order to understand the current and future state and pattern of GAL's development, there is much work to be done in developing a satisfactory account of the political economy of GAL. The challenge is to develop a robust but suitably nuanced framework for examining the relevant actors, their interests and incentives, and the institutional structures and other variables that shape and mediate these incentives so as to lead to (or hinder) the adoption of particular administrative law mechanisms in specific areas of global regulation and condition their performance. The relevant actors include states ranging widely in their level of development and power; specialized domestic regulatory agencies and officials; the different global regulatory bodies; national and international courts/tribunals and judges/members; firms and other organized economic interests; and the wide range of NGOs.

¹¹ The system of UN administrative justice, adopted to provide an orderly process for addressing employee grievances, may undergo an analogous evolution into a system for providing justice for their parties harmed by the acts of UN employees Benedict Kingsbury and Richard B. Stewart, *Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations*, Spyrodin Flogaitis, Ed. *International Administrative Tribunals in a Changing World* (2009).

Research and analysis must also consider how the practical operation and effects of the GAL procedural mechanisms depend on the type of global body in question, its functions and power structure, its organizational strategy, and the external actors whose cooperation or support it requires as well as the broader "legitimacy audiences" that it must take into account. These variables defeat any universal GAL prescriptions, including the notion of a global administrative procedure code. Ascertaining the impacts of the GAL mechanisms on organizational performance and the distribution of regulatory benefits and burdens and evaluating the desirability of their adoption in various forms requires highly contextualized assessments, although we hope that it proves possible to develop some general hypotheses for further exploration. These assessments must consider the pathologies of excessive legalization – in terms of resource costs, inefficiency, and institutional and policy deformations that compromise or misdirect regulatory performance – as well as the danger that formal procedures will be dominated by well-organized and financed interests and serve to entrench their power.

The patterns of GAL development and practice that emerge in the global administrative space as a result of these processes and interactions are highly uneven and untidy; at first sight they resemble nothing so much as a Jackson Pollock painting. Further study, however reveals regularities and commonalities. There are vertical, horizontal, and diagonal borrowings of GAL practices and norms among different global regulatory bodies. Lawyer entrepreneurs, including those working with NGOs, advocate the adoption of GAL practices in specific fields, drawing on experience in others. Generated by various institutional means and adopted for these various reasons, GAL practices and the norms that inform them are coalescing into recurring patterns in specific modes of administrative decisionmaking through a form of jurisgenerative evolution, differentiation, and crystallization. These modes, discussed in Section IV, include adjudication in individual cases, the institutional systems for the consistent implementation of regulatory norms, methods for adoption of general regulatory norms, and social and environmental regulation of international investment and development assistance in developing countries. The associated arrangements for transparency, participation, reason giving and review in these different contexts are somewhat different from a recognizable family of practices. They are, linked by functional and normative commonalities that enable us to discern GAL as a distinct field that cuts across different substantive sectors of global regulation, such as climate change, anticorruption, refugees, development aid, global pandemics, banking or sport. We can accordingly expect the development of global administrative law as a distinct field of practice for legal professionals, analogous to domestic administrative law, as well as a subject for academic study.

III. The Rule of Law

The rule of law is, of course, a highly complex and deeply contested concept. For purposes of this essay, I sketch a particular conception of the rule of law, drawing heavily on recent work by my colleague Jeremy Waldron that provides an analytical framework to illumine and assess the functions and normative underpinnings of GAL practices.

As Waldron observes:

The rule of law is a multi-faceted ideal, but most conceptions give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences, interests, or ideology. Beyond this, many conceptions of the rule of law place great

emphasis on legal certainty, predictability, and settlement.¹²

This aspect of the rule of law calls for the exercise of authority in accordance with regulative norms – rule or standards – that are public, prospective, reasonably determinate, and reasonably stable. Call this formal, structural value transparency and regularity in norms. The goal is to restrain and channel the exercise of public authority in accordance with public norms, and to secure and promote private ordering and liberty.

In order to secure these goals, the rule of law further requires that officials adhere to these norms in exercising regulatory authority to implement and enforce the relevant norms. Call this regularity of norm application. Norms must be applied in specific instances through procedures that ensure accurate and impartial administration, ensuring that official respects the limits on their authority that those norms establish, and protect the correlative rights and the security of persons subject to their exercise of authority. Regularity of application requires procedural and institutional arrangements to ensure impartial decisions in specific instances in accordance with relevant regulatory norms that are accurately and consistently applied. In the core situation, where officials enforce sanctions, impose liabilities, or make other decisions that impact the rights and obligations of specific persons in ways that have serious consequences, domestic administrative law typically requires adjudicatory hearings in which the affected person has a right to participate and present evidence and argument to an impartial decisionmakers to why norm does or does not apply in his case, a reasoned decision based on evidence of record, followed by opportunity for review of the decision by an independent authority.

On some views, the rule of law consists solely of regularity of norms to decisions and regularity in their application. As Waldron observes:

A conception of the Rule of Law like the one [outlined above] emphasizes the virtues that Lon Fuller talked about in his book *The Morality of Law*: the prominence of general norms as a basis of governance, the clarity, publicity, stability, consistency, and prospectively of those norms, and congruence between law on the books and the way in which public order is actually administered. On Fuller's account the Rule of Law does not directly require anything substantive: for example, it does not require that we have any particular liberty. All it requires is that the state should do whatever it wants to do in an orderly predictable way, giving us plenty of advance notice by publicizing the general norms on which its actions will be based, and that it should then stick to those norms and not arbitrarily depart from them even if it seems politically advantageous to do so. Requirements of this sort are described sometimes as procedural, but I think that is a misdescription. They are formal and structural in their character: they emphasize the forms of governance and the formal qualities (like generality, clarity, and prospectivity) that are supposed to characterize the norms on which state action is based.

Waldron, however, asserts that the rule law requires something more: the norms regulating official conduct towards citizens must be public regarding, in substance and the procedures for their adoption and application must promote their public-regarding character. As Waldron puts it:

¹² Jeremy Waldron, *The Concept and the Rule of Law* (forthcoming)

... [T]he norms must be not only general but public. They must be promulgated to the public to those whose conduct will be assessed by them and to those whose interests are affected ... The publicity of these norms is also not just a matter of pragmatic administrative convenience along the lines of its being easier to govern people if they know what is expected of them. It embodies a fundamental point about the way in which the systems we call legal systems operate. They operate by using, rather than short-circuiting, the responsible agency of ordinary human individuals. ... We recognize as law not just any commands that happen to be issued by the powerful, but norms that purport to stand in the name of the whole society and to address matters of concern to the society as such.

GAL promotes “publicness” in global administrative decisionmaking through open processes with opportunity for participation by those affected by decisions, a requirement that administrators furnish public-regarding justifications for their decisions, and often, opportunity for review by a less parochial body. GAL is thus concerned not only with the regular application of established norms, but the adoption of new norms or potential modification of existing ones through procedures that promote the public-regarding character of the norms.

Thus, adjudicatory hearings enable the affected private party not only to argue, based on the law and the facts, that existing norms are not applicable in his circumstances, but also, potentially, to invoke public regarding grounds to argue that they should be modified or revised. This revisionary element becomes even more pronounced when adjudicatory procedures provide for participation in hearings and review by representatives of affected interests other than the actor being regulated, for example by consumers or environmental groups in administrative proceedings to license new power plants or set rates and other terms for electricity service. Procedures for NGO intervention in such proceedings was developed in the U.S. 40 years ago, and has become a feature of regulation of privatized supply of water and power in developing countries such as India. This double-sided character of procedures – to ensure accurate application of existing norms but also to allow for norm contestation and modification based on broader social and environmental values and interests that might otherwise be neglected by regulators -gives rise to endogeneities in the decision making procedures for norm application and content of the norm applied, potentially destabilizing the regularity of the norms in question.

While an adjudicatory hearing is the paradigmatic procedure to ensure regularity of norm application to specific persons, there are many different possible procedures and institutional arrangements for ensuring input from affected and concerned interests and groups and the public generally in the adoption of regulatory norms. Domestic legal and political systems have adopted a variety arrangements to govern decision making by such procedures have been developed when legislatures confer authority on administrative bodies exercising authority delegated from the legislature to adopt rules and regulations having the force of law. Domestic practices provide a reference point for development of procedures for adoption of general norms by global regulators.¹³ 14 In some instances, domestic systems of governance provide no legally specified procedures at all for administrative adoption of general norms; they may be content to rely on administrators' supervision by and accountability to the legislature and the ability of affected groups to make their views known through informal processes to ensure consideration of relevant societal interests and values. Justice Holmes observed in refusing to uphold a

¹³ Adoption of regulatory norms by a democratically elected legislature is of course not an available option in the global context

constitutional right for affected individuals to some form of hearing in administrative rulemaking:

Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.¹⁴

In cases where regulatory norms involve complex technical matters requiring specialized knowledge and judgment, it has often been presumed that they should be resolved by experts untrammelled by legal procedures. But these assumptions are losing persuasiveness within many democratic societies, in recognition that dominant, well organized political and economic interests often enjoy deprotonate powers of influencing over administrative decisions, and that many regulatory decisions of a technical or specialized character, such as the setting of environmental regulatory standards, involve important value choices and distributional consequences that cannot be entirely left to administrators without more. In such cases, the U.S., has required federal administrative agencies to adopt substantive general rules through notice and comment procedures through which I any member of the public can submit evidence, analysis and argument, agencies must base their decisions on the administrative record thus generated, and must give reasons for the norms adopted and for rejecting alternatives, all subject to judicial review. Other jurisdictions have adopted different, often less formal and elaborate methods for promoting the public regarding character of administrative rules and standards.

In administrative processes for rules, regulations, and other general regulatory norms, the focus is directly on the content of the regulatory norms. Many domestic systems of administrative law provide that such processes are transparent and provide for and participation of representatives of public interests. The precise means adopted vary The U.S. makes wide use of notice and comment procedures and access by commenters to fairly demanding judicial review of the public-regarding justifications offered by agencies for the norms adopted. These arrangements have been developed primarily by the courts through the advocacy of lawyers representing NGOs (environmental, consumer, etc.) and economic interests. These procedures are designed to promote administrative adoption of regulatory norms and decisions that give greater consideration to a broad range of societal interests and values, including those that are slighted in informal political bureaucratic processes in specialized regulatory regimes. Procedures for administrative decision that provide a structured method for public input and consideration have begun to be developed by a number of other countries, including developing countries. The governance arrangements in European systems often follow a more structured or quasi-corporatist approach to participation by outsider actors and interests.

The extent to which the various components of the rule of law can be realized in regulatory practice depends on many circumstances, including the need to tailor norms to different specific context and circumstances, the ideal of individualized justice, the need to reconsider, adapt and

¹⁴ Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915).

modify norms in light of changing conditions and societal interests, limitations in administrative and legal resources, and other factors. The rule of law "comprises multiple demands and some of them may be satisfied but not others; a particular norm or directive may be more or less clear, more or less stable, more or less well-publicized, and enforced through more or less scrupulous procedures."¹⁵ Significantly, as Waldron emphasizes, there is an inherent internal tension between the different values embedded in the rule of law ideal. Administrative regularity and stability is threatened by public-regarding procedures that provide for contestation, reconsideration and change in the governing norms.

IV. Structures of Global Administrative Regulatory Decisionmaking and GAL

This section of the essay examines the development of GAL procedures for transparency, participation, reason giving and review in the context of four different characteristic modes of administrative decisionmaking and regulation by different types of global regulatory bodies in different regulatory fields.

- Administrative imposition of sanctions and liabilities or determinations of legal status in individual cases (regulator due process at "retail" in individual adjudication)
- Administrative systems to ensure the rule of law throughout a field of regulation (regulatory due process at "wholesale")
- Arrangements to protect the interests of groups especially impacted by administrative decisions, with the specific example of development projects.
- Procedures to promote public regardingness in the adoption of regulatory norms (rulemaking due process)

A. Exercises of Administrative Authority Targeted at Specific Persons

A striking development in the past two decades has been steps taken to promote the rule of law in administrative decisions that affect the property, liberty, or status of specific persons. As indicated by the examples below, which could be multiplied many times, the administrative decisionmaking bodies subject to these initiatives and the different types of bodies responsible for imposing GAL procedures or creating incentives for their adoption vary quite widely.

UN Security Council Regulation of Terrorist Financing

UN Security Council provides established a regulatory system under which the 1267 committee – an administrative body – lists persons suspected of financing terrorism. UN member states are obliged to freeze the assets of persons listed. The system made no provision for a hearing for listed individuals at the time of listing or after, or for judicial or any other form of independent review. Sweden transposed the asset freeze system into its municipal law, thereby becoming a distributed component in the global UN system of administrative regulation. The committee listed Yassin Abdullah Kadi, a Saudi national. His Swedish bank account was thereupon frozen. The European Court of Justice annulled this action, held that European law respecting fundamental individual rights requires some form of hearing and review for such a property deprivation. The committee has made certain changes in its procedures for listing and delisting, including the creation of an ombudsman, but this far has not provided for hearing and review for listed individuals.

¹⁵ Waldron, *supra*.

Anti-doping regulation by global sports authorities.

International sports federations and the International Olympic Committee have adopted and implement regulations determining the eligibility of athletes to compete in sporting events including the Olympics. This governance system has a hybrid public-private character. It includes an anti-doping code with specified testing methods and administrative authorities that disqualify athletes that they find to have violated the code. Disqualified athletes challenged the disqualifications in their domestic courts, resulting in decisions, most notably in Germany, holding that the arrangements violated the fundamental rights of disqualified athletes because they were not provided with adequate notice or an adequate opportunity to contest disqualification decision through a hearing and independent review .. In response the global sports authorities then strengthened the Anti-Doping Code system and established a World Court for Arbitration Sport to review administrative disqualifications (what sort of hearing?). The Court for Sport is sited in Switzerland and is subject to supervision and review by the Swiss Federal Court.

Refugee determinations by states and UNHCR

Under the United Nations Convention Relating to the Status of Refugees convention, states parties to the Convention are to determine refugee status of persons claiming to be refugees protected by it. Refugee advocacy groups and some developed country governments have pressed, with considerable success, for affording claimants some form of adjudicatory hearing before an impartial hearing office and independent review to meet basic rule of law norms. The United Nations Convention Relating to the Status of Refugees Office of the United Nations High Commissioner for Refugees (UNHCR) embraced this objective, seeking to foster adoption by states of such procedures. But many states, especially developing countries with very limited capacities and resources, have struggled to implement such procedures in the face of a huge influx of refugee claims. They may also be reluctant to grant refugee status to individuals because of the attendant obligations. Some domestic court, for example in Australia, have invoked human rights norm to require domestic governments to afford greater procedural safeguards. In many countries, UNHCR has had to assume part or all of the responsibility for job of processing refugee status determinations. Here GAL has been developed and applied both at level of UNHCR and domestic administrations, pursuant to norms adopted by UNHCR and in some cases domestic cuts. In both contexts, administrative bodies face the challenge of devising workable ways of enduring accuracy and regularity in refugees status determinations in a mass justice context. Further, the need to develop administrative arrangements to deal with many tens of thousands of claims exposes the regulatory character of the UNHCR system for refugees.

International investment arbitration

Bilateral investment treaties prohibit expropriation by host states of investors' property or denial of fair and equitable treatment, and provide or arbitral bodies to decide claims by investors that regulatory actions by host states -often, administrative actions --have violated these requirements, requiring payment of compensation. A number of arbitration panels have held that domestic administrative decisions have disregarded the rule of law and denied investors fair and equitable treatment because the basis for regulatory action --denial or revocation of necessary authorizations --was ad hoc, ex post, or otherwise arbitrary and/or the domestic authorities failed to provide fair procedures for making regulatory determinations. Some states, in Latin America are beginning to react to the resulting threat of liability by reviewing the adequacy of their regulatory standards and procedures in order to avoid such claims in future. Here the development of GAL procedures for administrative decisionmaking is the inverse of that in

global sports law: global tribunals are driving the adoption of rule of law norms as the domestic level. At the same time, NGOs in developing countries representing social and environmental interests-are seeking to intervene in the proceedings at both the global and domestic levels in order to promote a greater degree of public regardness in the decisionmaking processes. Further, international investment arbitration is itself evolving from ad hoc dispute settlement to a functionally integrated system of norms to regulate host government decisionmaking.

Regulation of essential services in developing countries

Another example of GAL adjudicatory procedures for business regulation has occurred in the context of developing countries and privatization of the supply of essential services such as water, electricity, telecoms and gas in. Two decades ago the World Bank required developing countries receiving structural development funding to privatize provisions of these services and follow an Anglo-American model of independent regulators and judicial review. Developing country researchers participating in the NYU GAL Project partnership network are studying the ways in which these arrangements are actually playing out in different service sectors and developing countries. Among other questions, they are asking whether a distinctive Regulatory State of the South approach is emerging. In some sectors and jurisdictions, GAL procedures initially adopted primarily for the benefit of the regulated private firms are being used by NGOs and courts to ensure participation by and regard for other economic and social actors and interests with a stake in the terms on which the services are provided, This development opens the way for more intense regulatory, legal, and political contestation of governing policies and exposes the complexity emphasized by Waldron in the rule of law ideal," from the viewpoint of the regulated firms It represents a potentially "dangerous supplement. To arrangements initially adopted for their protection, and could produce decision unfavorable to their interests. If so, the firms might then invoke bilateral investment treaty arbitral protection against unfavorable regulatory decisions and in doing so challenge the procedures that produced them. This scenario illustrates how different GAL regimes in the same field can become intertwined.

B. Systematicity in Global Regulatory Systems

In discussing the Rule of Law, Waldron states that it has the characteristic of "systematicity." While he does not elaborate, it is apparent that regularity of norms and regulatory of their application can only be assured through more or less extensive and complex institutional arrangements that provide procedures for the adoption of norms, for publicizing them, and for implementing them through means that promote accuracy, consistency and predictability. The adjudicatory decisional procedures discussed in subsection A are only one component in such a system, and cannot by themselves ensure the rule of law if the other components of such a system are absent or defective. And, the various components of the rule of law system must fit and operate together harmoniously and effectively. The GAL tools of transparency, participation; reason giving and review can, to varying degrees in different specific contexts, make important contributions to this enterprise

These requirements for systematicity are highly congruent with the institutional demands of effective regulatory systems, especially those that must steer and coordinate the conduct of many different actors in order to secure collective goods. Many global regulatory regimes have this character. This is especially true of many regimes regulate the c0nduct of states, and of firms and other market actors in fields such as trade, finance, anti-corruption, and environmental health and safety. But it is also true of regimes in the security field such as the Financial Action Task

Force scheme against money-laundering and the UN Security Council sanctions regimes.¹⁶ In global regulatory regimes, the need for systematicity is typically greater than in comparable domestic regulatory programs because of the need to coordinate, on a more or less uniform basis, the conduct of public and private actors across different jurisdictions. The GAL tools of transparency, participation, reason giving and review, applied to the many different administrative components of global regulatory regimes in different specific contexts can, make important contributions to effective regulation, and for that reason are increasingly adopted by such regimes for purely functional reasons. At the same time help to secure the rule of law and help realize its “systematicity.”

WTO Trade Regulation

Many of the WTO agreements, including the GATT, SPS, TBT, GATS and TRIPS agreements, require members to conform to GAL disciplines of transparency, participation and review to ensure that domestic administrators adopt, implementing and enforcing regulations that impact international trade are public, predictable, non-discriminatory, and impartiality applied.

Members’ implementation of these GAL disciplines is reviewed and facilitated by WTO administrative bodies. WTO dispute settlement panels and the Appellate Body have further elaborated and strengthened these GAL disciplines.¹⁷ The objective is to promote not only regularity of norms and their application, but to ensure that they are globally public-regarding, in the sense that they treat foreign firms equally and fairly with domestic firms.¹⁸

China provides a striking illustration of the penetration into domestic administration and administrative law of GAL norms adopted at the global level. In preparation for WTO accession, China embarked on a series of in-depth administrative law reforms.¹⁹ Since China’s accession, there is appreciable evidence that WTO GAL norms are being translated into concrete if uneven administrative and judicial practice.²⁰ Moreover, there are indications that Chinese courts are themselves starting to apply the GAL procedural norms more broadly, outside the trade area, potentially benefitting Chinese citizens generally.²¹

¹⁶ In the field of human rights, global regimes to ensure uniform and consistent protection of human rights may be desired for intrinsic rather than instrumental reasons; such rights are regarded as universal and accordingly ought as to be secured equally for all individuals..

¹⁷ Richard B. Stewart and Michelle Ratton Sanchez, *The World Trade Organization: Multiple Dimensions of Global Administrative Law* (with M. Sanchez Baden), 9 *International Journal of Constitutional Law* (2011)

¹⁸ WTO Appellate Body, *US Shrimp*.

¹⁹ L. Biukovic, "Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan", II *J. Int'l Eco. L.* 803 (2008); C-H. Wu, "How Does TRIPS Transform Chinese Administrative Law?", 8 *Global Jurist* Article 6 (2008).

²⁰ C-H Wu, at 17-19; J.Y. Qin, “Trade, Investment and Beyond: The Impact of WTO Accession on China's Legal System”, 191 *The China Quarterly* 720 (2007), at 735; L. Biukovic, at 819-824.

²¹ C-H. Wu, , at 21-23; J.Y. Qin. One commenter has concluded as follows: “During the years leading up to and following the accession, the government and academia engaged in an unprecedented scale of public education on the WTO, portraying the WTO as mostly a progressive force for China. As a result, WTO principles and concepts, such as nondiscrimination, transparency, due process and judicial review, have gained wide acceptance in China as the norms for good governance in a modern society”: J.Y. Qin, note 59 above, at 737. Bukovic (note 58 above) finds that the WTO administrative law disciplines have had a positive general effect on administration in Japan as well as in China. See also A. Green, “Trade Rules and Climate Change Subsidies,” 5 *World Trade Rev.* 377 (2006), at 411

[Other examples to be developed: Biosafety Protocol Regime; Financial Action Task Force; pharmaceutical testing networks. Also Anti-Doping regime for global sport, supra]

C. Procedures for Adoption of Regulatory Norms

For a variety of reasons, many - -but by no means all -- global regulatory bodies have adopted various GAL procedures and related institutional arrangements for the adoption of regulatory norms that are designed to provide for greater transparency, broader public input, and provision of reasons for decisions. A sample of different approaches follows:

The Basel Committee: Global Banking Standards.

The Basel Committee, a network of domestic bank regulators in the major developed countries, adopted its initial (Basel I) capital adequacy requirements for banks through informal processes within the club, largely behind closed doors. This process received sharp criticism from a number of quarters. In its subsequent adoption of Basil II and Basil III standards, the Committee developed fairly elaborate GAL procedures, on the US APA model including a web site that provides notice of proposed standards with explanatory rationales, copies of reports generated by its internal committees and by expert groups, opportunity for public comment on proposed standards, a record of all comments received, and publication of rationales for and explanations of the final standards adopted. The reasons for these steps appear to include enhancement of the network's perceived legitimacy, improving the quality of the standards by obtaining more extensive information and evaluation of proposals than could be achieved by an entirely internal process, and obtaining greater confidence in and acceptance of the standards produced by the process.

Assessments of the performance of these procedures have varied widely. An initial review of Basel II was generally quite positive, finding that it had enhanced the quality of the standards produced.²² But other assessments, done later and no doubt influenced by the global financial crisis beginning in 2008, found that the notice and comment process had been dominated by the large banks in developed countries, who had the resources to participate effectively in the process and address the highly complex and technical issues involved, and the resulting standards favored their interests over those of smaller banks including those in developing countries.²³

Global Food Safety Standards: The Codex Alimentarius

The Codex Alimentarius, an international organization established by the WHO and FAO to adopt standards for food safety. Its standards, adopted by representative of Codex member countries, are voluntary, but have been widely adopted by states and other relevant international organizations. Initially Codex followed a relatively closed decisionmaking process involving a member country representatives and occasional outside experts. Over time, however, Codex allowed CSOs representing industry and consumer and environmental groups to play a role in the dceisionmaking process, in recognition of the social and economic dimensions of food safety

(discussing local benefits of WTO procedural requirements such as notice and comment and reasoned decision making).

²² Michael S. Barr and Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EJIL 15 (2006).

²³ [Citations]

determinations. CSO representatives may attend meetings where standards are discussed and voted, may speak, and receive copies of internal reports on proposed standards and drafts. Overall, the assessment of these steps towards greater openness has been positive. At the same time, however, the adoption of the SPS agreement, which gives countries that adopt Codex standards a presumptive safe harbor against WTO challenges, escalated the standard setting stakes and triggered sharp divisions and controversies among members on some issues, undermining the former consensus-based approach to decisionmaking.²⁴

Global Standards for Sustainable Forestry: The Forest Stewardship Council

[A private body, FSC uses a complex governance system where representatives of industry, NGO, and public “stakeholder” interests share decision making authority and makes extensive use of GAL tools. It competes for recognition and use of its standard, certification, and labels with several other organizations that are primarily industry-based and operate in a more closed process. This situation presents an interesting example of the extent to which GAL tools maybe helpful to such organizations in winning “customers” for their regulator norms in a competitive context]

The International Standards Organization

[A hybrid public-private organization composed of national standard-setting organizations, ISO sets a wide variety of standards for internationally traded products and services. It largely shuns GAL procedures, relying on an elaborate internal system of decisionmaking and quality control involving its members and their ISO representatives; users of its standards must pay for their use, and its standards are generally not publicly available. This is a case study of a global regulatory regime that largely eschews GAL and accordingly provides rich ground for comparative analysis.]

D. Environmental and Social Regulation of International Development Assistance, International Investments in Developing Countries, and Global Commodity Supply Chains

There are systemic gaps in the regulation of the social and environmental consequences of development investment and industrial activity in many developing countries. Economic development is often a higher priority, and governments lack the resources, the legal and administrative infrastructure and, often, political accountability and responsiveness. When developed countries make investments in the form of development assistance, either bilateral or multilateral, they or their multilateral development agencies often impose environmental and social condition on the projects funded. Such conditions are also imposed on private investments that are supported (for example through risk mitigation instruments) by developed country agencies or multilateral bodies such as the International Finance Corporation. In the case of purely private investments in developing countries, including investments and production activities created through global supply chains, a regulatory gap persists. The developed countries where such investments and supply chain arrangements originate have been unwilling, because of collective action problems and other factors, to impose environmental and social regulation for the benefit of developing country citizens. Here, private and hybrid public-private regulatory arrangements have emerged to partially fill the gap.

²⁴ Michael A. Livermore, Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius, 81. NYU L. Rev 766 (2006).

GAL has come to occupy a significant role in both the global y arrangements that have been developed to regulate the environmental and social consequences of both public and private investments in developing countries. GAL has served to enhance the effectiveness of the regulatory programs. It has also created opportunities for voice and participation by the developing country citizen beneficiaries in the regulatory regimes and ensured, through arrangements for transparency, reason giving, and review, greater responsiveness to their interests.

World Bank Social and Environmental Guidelines and Inspection Panel

A striking GAL innovation is the World Bank's creation of an Inspection Panel and the Panel's subsequent development of procedures that provides tights of transparency, participation, reason-giving and review for the benefit of citizens and NGOs in developing countries to ensure effective attention to and regulation of the social and environmental consequences of development projects funded by the Bank in developing countries. Under pressure from NGOs -often Northern NGOs—and the U.S. Congress, the Bank's Board of Governors t adopted social and environmental guidelines for Bank-funded projects. When the Bank staff continued to approve projects favored by developing country host governments that did not meet the guidelines, NGO pressure through Congress led the Board to establish an independent Inspection Panel to investigate and report to the Board on compliance. Originally designed as a mechanism of internal control over staff, the Panel transformed the arrangement through procedural that enable host country citizens NGOs to obtain information about projects and their impacts, lodge criticisms and compliance challenges, require developing countries and Bank staff to respond to these challenges, and use these GAL tools to gain substantive leverage over the project design.

Many other international financial institutions have adopted similar regulatory/GAL: mechanisms for public development assistance or private investments which they help underwrite. The United Nations Framework Convention Climate Convection `REDD+ program, which will channel public and private investments into preservation of forests in developing countries and generate carbon offset credits is developing similar regulatory/GAL arrangements to protect environmental and social values and interests in host developing countries.

Global commodity supply chain regulation.

Multinationals based in developed countries establish and manage global supply chains for apparel, toys, foods, pharmaceuticals, and other products produced in developing countries. NGOs and consumers in developed countries concerned about the adverse environmental and social impacts (including poor labor conditions) of the developing country production activities produced as a result of these supply chains arrangements have instituted a variety of private and hybrid public/private regulatory programs to address these impacts, relying on techniques to mobilize consumers tin developed countries to demand and but op4ridycts produced through socially responsible methods.²⁵ Examples include Better Factories Cambodia and the Forest Stewardship Council (discussed above). These regimes adopt regulatory environmental and social regulatory norms and implement them through monitoring, certification, and consumer labeling measures that reach throughout the supply chain. GAL tools play a key role in securing the effectiveness of these regimes. In some regimes, the GAL procedures have evolved in a way

²⁵ See generally Terry Macdonald and Kate Macdonald, Non-Electoral Accountability in Global Politics; Strengthening Democratic Control within the Global Garment Industry, 17 EJIL 89 (2006).

quite similar to the World Bank Inspection Panel procedures, to provide the developing country citizens and NGOs and effective voice in the regulatory norms and their implementation, rather than having the programs driven entirely by NGOs and consumers in developed countries adopting

V. GAL's Normativities and Contributions to Global Governance

The examples given in Section IV of the roles played by GAL procedures in a variety of different global regulatory sectors could be multiplied many times over. Cumulatively, experience shows that GAL makes important contributions to the efficacy of global regulation and regulatory protections in many different sectors, and thereby advances the welfare of individuals and communities around the world. This conclusion is consistent with the experience under domestic administrative law, which shows that channeling the exercise of government power through law tends to increase its efficacy in achieving public ends.

If this were all, however, transparency, participation, reason giving and review would have only instrumental value, lacking any intrinsic normativity. They could appropriately be regarded as prudential practices, tools of good administration and governance.

Likewise the emergence of similar GAL practices in different regulatory sectors and regimes may not reflect any common recognition of and adherence to their normative claims as a distinct and obligatory form of law. It may simply reflect the circumstances that GAL practices prove useful and functional in many different global regulatory regimes and sectors because they serve similar, recurring institutional needs. This GAL practices may be adopted by many different regimes because they help secure consistent and coordinated conduct by state and non-state actors and thereby further whatever regulatory objectives the regimes may have.

The claim of GAL, however, is that its practices have deeper normative foundations that qualify their recognition as law. In making this claim, GAL faces the difficulty – in common with the other emerging law and global governance movements – that it lacks an authoritative normative source and pedigree in positive law or in legal and political theory. Although some particular GAL procedures in particular sectors and settings have been established or authorized by domestic legislatures or courts, or by international courts or organizations with lawmaking making authority conferred by treaty, many GAL practices have not. Yet, GAL claims to be a distinct field of law that transcends and unites these many separate practices, including those not authorized by traditional sources of positive law. Further, the field as whole cannot claim any authoritative pedigree.

The legal normativity and unity of GAL is based on the foundational premise, rooted in political theory and western democratic history and practice, that the exercise of public powers, and more specifically regulatory power exercised by unelected administrative officials, must be structured and disciplined by the rule of law. The requisites of the rule of law, discussed in Section III following Waldron's analysis, are embodied in and secured by GAL. As exemplified in the various applications of GAL discussed in Section IV, these include not only the elements of adjudicatory due process in individual cases, but general "systematicity" requisites for the publicity and regularity of norms and their implementation throughout the regulatory regimes and appropriate procedures for the adoption and application of norms that are public regarding.

A related aspect normative foundation for GAL, also derived from western democratic history and practice, is the principle that power holders must be accountable to those on whose behalf they act and those who are significantly affected by their decisions. Legal accountability is an important but by no means the sole mode of securing such accountability. The other modes include electoral, hierarchical, supervisory and fiscal accountability. GAL can secure legal accountability, for example when administrative decisions are subject to review by a court or other reviewing body. But transparency, participation, reasons giving and review, even when they operate independently of legal mechanisms of accountability, can support and strengthen the other modes of accountability. And, whether or not embodied in mechanisms of accountability, GAL procedures can promote greater responsiveness by global regulators to the interests of those affected by their decisions, even when they are not able to invoke or use accountability mechanism. In these various ways, GAL procedures can help secure greater regard and consideration by those wielding power for otherwise marginalized interests and values.²⁶

In its normative aspect, GAL fills gaps in the rule of law and accountability created by the rise of global regulatory governance and the inadequacies of domestic and international law. The many disparate global regulatory bodies are more and more often confronted with demands for transparency, consultation, participation, reasoned decisions and review mechanisms because they secure the rule of law and greater accountability and responsiveness by decision makers to affected publics. These demands, and responses to them, are increasingly framed in terms that have a common normative character, specifically an administrative law character. The constructivist sense that there is some unity of proper principles and practices, principle and practices of a specifically legal character, across these areas is of growing importance to the strengthening, or eroding, of legitimacy and effectiveness in these different governance regimes in accordance with their embrace or rejection of GAL procedures.

As Benedict Kingsbury observes, there remains from the standpoint of legal theory the fundamental issue whether global administrative law has any real claim to the epithet “law.”²⁷ How, if at all, might it be possible to separate out from among the myriad of rules, norms, standards and practices that constitute global regulatory governance those that can be viewed as being legal (and binding) as opposed to a merely prudential in character? International law has long challenged classical positivist understandings of law, in particular through its use of the notion of “soft law,” under which norms or guidelines, initially non-binding, can “harden” over time into genuine legal obligations, either through incorporation into national regulations, through application by external judicial bodies, or simply through their development into custom having generated legitimate expectations through long and unchallenged practice. We argue for a “social fact” conception of law, emphasizing sources and recognition criteria, but it extends this Hartian positivism to incorporate requirements of ‘publicans’ in regulatory law. “Publicness” is immanent in public law in national democratic jurisprudence, and increasingly in global governance, where it applies to entities and regimes that exercise public power rather than to identifiable global publics.

²⁶ Richard B. Stewart, Accountability, Responsiveness, and the Problem of Disregard in Global Regulatory Governance, *supra*.

²⁷ Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EJIL 23 (2009)

Jurisprudential practices in modern democratic states do not accept that emanation from an agreed source of law is sufficient for law, even in environments where the prevailing concepts of law hold emanation from an accepted source, and a unifying rule of recognition, to be necessary. More than this is now required of law. “Publicness” is a necessary element in the concept of law under modern democratic conditions. The claim is that the quality of publicness, and the related qualities of generality, regularity, and public regardingness, is necessary to the concept of law in an era of democratic jurisprudence. As Waldron emphasizes, by publicness is meant the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such. This quality of aspiration to publicness is, as Jeremy Waldron has observed, what Weber misses in his means-oriented definition of the state (as the monopolist of legitimate violence), and what analytical jurisprudence misses in its formal analysis of legal systems. The idea of law being wrought by, and for, the whole society overlaps with an approach to administrative law in many national systems that emphasize public service and an objective of the public good, an approach increasingly projected also into administration extending beyond the state. GAL embodies and, increasingly in practice, furthers realization of this ideal. For this reason, it is increasingly viewed as “law” that global governance regimes must respect and adhere to.

What can be said about the normative contributions of GAL to global governance?

Generalizations are hazardous. The uptake of GAL norms and practices is uneven. The practical operation and effects of GAL depend on the type of global body in question, its functions and power structure, its organizational strategy, and the external actors whose cooperation or support it requires as well as the broader “legitimacy audiences” that it must take into account. These variables also defeat any universal GAL prescriptions, including the notion of a global administrative procedure code. Ascertaining the impacts of the GAL mechanisms on organizational performance and the distribution of regulatory benefits and burdens and evaluating the desirability of their adoption in various forms requires highly contextualized assessments, although the GAL project seeks to develop general hypotheses for further exploration. These assessments must consider the pathologies of excessive legalization -- in terms of resource costs, inefficiency, and institutional and policy deformations that compromise or misdirect regulatory performance -- as well as the danger that formal procedures will be dominated by well-organized and financed interests, as the Basel II experience suggests.

Indeed, the benign view that GAL requirements of transparency, participation, reason giving and review promote accountability and the rule of law has been sharply contested. Prominent developing country students of law and global governance such as B.S. Chimni have argued, for example, that administrative law itself is a “Western” construct, developed in a particular setting and inherently structurally biased towards certain interests.²⁸ When operationalized in the trade regulatory context, any such structural biases could, he asserts, serve to entrench the dominant position of Western corporations. In the end, as Professor Chimni acknowledges, the solution to this problem is not to dispense wholesale with GAL (although the use of specific types of procedures in specific contexts can properly be questioned) but to enhance the capacity of developing country governments and their NGOs and firms to participate more effectively in

²⁸ See B.S. Chimni, Co-Option and Resistance: Two Faces of Global Administrative Law, 37 *Jl Intl L. & Politics* 799 (2005)

C. Harlow, “Global Administrative Law: The Quest for Principles and Values”, 17 *Eur. J. Int'l L* 187 (2006) at 207.

global regulatory governance generally and in the deployment and operation of GAL in particular. The NYU GAL Project is promoting research on the distinctive legal and institutional issues and challenges facing developing countries with regard to global regulatory governance and development of their legal capacity and those of their citizens to address them; it is doing so through GAL partnerships with leading developing country law schools and research centers.

VI. Fundamental Challenges

Notwithstanding its progress GAL, faces a number of endemic difficulties and fundamental challenges. Several of these difficulties are inherent in any attempt to develop a legal order in global governance, and accordingly also represent challenges for global constitutionalism and the extension of public law to global public authority: Others are particular to GAL

Each of the three law and global governance movements seeks to theorize and build a functioning law for global governance, based on legal concepts, structures, and practices in liberal democratic states. They seek to transpose them to radically different institutional and political context of regulation and governance beyond the state. Globally, there is no constitution and unified legal order, no elected legislature that can create administrative bodies and hold them accountable, no politically accountable executive to supervise such bodies, and no standing system of courts to review their decisions at the behest of affected persons. Further, many of the countries of the world are deeply authoritarian, including powerful states such as China and Russia, and do not share the liberal democratic norms and traditions on which these movements are based.

The significant and growing importance of private and hybrid public/private regulation is another challenge for GAL, for global constitutionalism, and for building a global public law for global public authority. These movements are all rooted in domestic public law conceptions and practices. Domestic experience highlights serious conceptual and practical problems in transposing public law norms and disciplines to exercises of private regulatory power while at the same time respecting a wide sphere for private ordering. The challenges at the global level are even greater because the dividing line between public and private regulations is even more blurred than at the domestic level, especially with the rise of hybrid public-private global regulatory regimes and the wide adoption of “soft” regulatory norms.²⁹

GAL, however, faces other, distinctive difficulties and challenges because it is piecemeal in its approach and primarily procedural in its elements. GAL takes the existing structure of fragmented global governance largely as it finds it, without positing or seeking to promote any overarching legal order. GAL seeks to deploy the tools of administrative law, separate from the constitutional and other elements of public law of which administrative law forms a part in domestic legal orders and also the European legal order. This can be regarded as a weakness, because on its own, administrative law cannot realize the larger objectives of constitutional/public law. Further, reliance on procedures alone, even when they include procedures for the adoption and application of regulatory norms that promote public regardness in the content of the norms, can not assure that the full range of constitutional and public law values, such as proportionality,

²⁹ These developments are also occurring at the domestic level, and are creating serious perplexities for traditional public law/private law distinctions and methodologies.

subsidiary, non-domination, and human rights, are secured. Nor can it secure legal and normative coherence among the different components of global governance.

Yet, the limitations of Gal can be understood as strengths in the global governance context. Precisely because the democratic political and institutional foundations for a global constitutional and/or public law order do not exist, efforts to build such an order faces huge obstacles. GAL's more modest agenda and methods are much better adapted to the current and foreseeable circumstances of global governance. Even in its fragmented state, the global administrative space provides fertile ground for global administrative law. The various global regulatory regimes often have incentives to adopt GAL procedures because they contribute to regulatory efficacy or promote the perceived legitimacy and public acceptance of their enterprises. By adopting GAL practices, they may also further validation and acceptance of their regulatory norms by domestic and international courts and administrative authorities and by private norm "consumers." Domestic and international courts can readily recognize and invoke GAL procedures and apply them in reviewing the decisions of global regulators and deciding what recognition or weight to give them. Experience in domestic administrative law, at least in the Anglo-American tradition, shows that courts are often more willing to impose procedural disciplines on administrative authorities than to second guess their substantive decisions when a court cannot point to any warrant in positive law for doing so. For these and other reasons, the GAL principles and procedures have won increasingly broad acceptance and recognition as "law," as requisite modes for decisionmaking in many fields of global governance.

Even as applied at "retail," at the level of individual regulatory regimes, as GAL becomes adopted and practiced in a large number of regimes it will have a significant cumulative and global effect in securing the rule of law and promoting accountability and public regardingness. Moreover, the impact of GAL is not limited to individual regulatory regimes. GAL principles and practices help to coordinate and knit together decision-making between global and domestic regulatory authorities and between different global authorities through processes of borrowing and mutual recognition. Further, domestic law teaches us that procedure is the handmaiden of substance, and some commenters already discern the emergence of common substantive principles, such as proportionality, for review of global regulatory decisions arising out of application and development by domestic and international courts of GAL. In these and other ways, it may well be that the further spread and interpenetration of GAL practices and norms will provide the foundations for the emergence of an international institutional law or global constitutional order.