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**Might Global Administrative Law Reduce Problems of Omnilateralism and Help Build International Community?**

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In this presentation I propose to argue:

- 1) that a body of global administrative law is under construction
- 2) this may help build legitimate and useful *partial* international communities with omnilateral competence in specialist areas of global governance, and
- 3) it may help to ensure these partial communities do not overreach and claim omnilateral competences they do not have.

I will begin Part I by delineating features of the scope and sources of global administrative law, with particular attention to international environmental law examples, consonant with the theme of this Panel. I will conclude Part I by arguing that the emergence of global administrative law is one element of what I call the ‘return of the jus gentium’ as a method of international law. I will argue in Part II that global administrative law plays different roles in building partial international communities in specialist areas, depending whether the dominant dynamic in a particular area is inter-state pluralism, inter-state solidarity, or transnational cosmopolitanism. I am using the term ‘community’ in a very specific way, transposing to international law the distinction Immanuel Kant drew in discussing original acquisition in *The Science of Right*:

‘Anything external is acquired by a certain free exercise of will that is either unilateral, as the act of a single will (facto); or bilateral [or multilateral], as the act of two [or several] wills (pacto); or omnilateral, as the act of all the wills of a community together (lege).’

The current problems are not simply the much-discussed tensions between unilateralism and multilateralism, vitally important though these are. I suggest that an equally pressing need is to face the problems of international community, to better utilize the possibilities, and better minimize the hazards, of omnilateralism, the act of all the wills of a community together. I will argue that global administrative law helps us to do that.

I am honoured to present these ideas to the JSIL, and I warmly invite comments, even of the most critical kind! Along with my colleague Professor Richard B. Stewart, who is a leading figure in environmental and administrative law in the US, and other collaborators such as Nico Krisch, the NYU Law School Institute for International Law and Justice has recently launched a research project on global administrative law. Many of the papers will be available on our website, reached through [www.nyuiilj.org](http://www.nyuiilj.org). If the research agenda is of interest to any participants here, I encourage you to join in and carry it forward.

## **Part I. What is Global Administrative Law?**

Global administrative law refers broadly to the rules, institutions and practices that help assure participation, accountability, and legality in transnational and international governance. It is clear to international lawyers that this includes rules of treaty law, perhaps some rules of customary international law, and authoritative decisions of intergovernmental organizations. In my view, it also includes practices in many different forms that exert a normative pull in the operation of intergovernmental and transnational governance. But whose practices count for this purpose?

### **A. Control Mechanisms**

National administrative lawyers tend to look for analogues to national models, in which there is a strong institutional differentiation between the general rulemakers (the legislature), the administrative agencies, and independent review mechanisms. They thus tend to regard global administrative law mainly as the normative practices of:

- 1) national courts** engaged in administrative law review of decisions relating to transnational or international governance, such as recent challenges in Canadian courts (the *Liban Hussein* case) and in the European Court of Justice (relating to Sweden) to national implementation of UN Security Council Resolutions 1267 and 1373 listing suspects in terrorist financing whose assets must be frozen;
- 2) control mechanisms within international organizations**, such as the World Bank Inspection Panel; and
- 3) control mechanisms operated by private parties**, such as the International Court of Arbitration for Sport which hears complaints by athletes that they have been unfairly banned from competition as a result of actions by the World Anti-Doping Agency under the International Olympic Committee's drugs code. (I note that arbitral decisions of this body are generally enforceable in national law, in similar fashion to international commercial arbitration awards; and national courts tend to accord a lot of deference to these specialist arbitral bodies provided the procedures they apply are fair.)

### **B. International Governance Beyond Reach of National Administrative Law**

International lawyers are less concerned with replicating national models, and more accustomed to the peculiar institutional patterns of international governance. One standard view is that implementation of rules is done by states. So national administrative law rather than any international law of administration should generally be controlling, except for recalcitrant matters such as the rights of staff of international organizations who can appeal to the United Nations Administrative Tribunal. But nowadays the situation is not so simple. Let me give three examples where national administrative law does not reach, and international law is required:

- 1. Internationally-Created Property and Markets.** The effort to mobilize markets to make international environmental protection more cost-effective is resulting in the direct intergovernmental creation of regulated property rights held by private persons. An example is the Clean Development Mechanism (CDM), set up under the Kyoto Protocol.

Under the CDM Modalities and Procedures, the 10-member Executive Board has the tasks of deciding on registration of particular projects by private parties under the CDM, and on the issuance of Certified Emission Reductions (CERs). For example, a Dutch corporation undertaking a Greenhouse Gas emissions reduction project in Botswana may find that the Executive Board refuses to accept the project, and thus does not issue internationally-tradable CERs. Such a decision has major financial consequences for the corporation and perhaps for Botswana, but review proceedings in national courts are most unlikely to be effective because they cannot compel the Executive Board to issue CERs.

**2. International Certification and Warnings.** These actions by intergovernmental bodies can have tremendous economic consequences. For example, travel advisory warnings by the World Health Organization concerning SARS, in say Toronto, are highly relevant to insurance and liability issues for employers and conference organizers. But these people have no formal input into the WHO's decision, nor any compensatory remedy if the WHO makes a negligent mistake..

**3. International Standards.** The International Standards Organization (ISO), which consists of one national standard-setting body from each of country, has set over 13,000 standards, including many with important environmental implications. This work is done mainly through 180 technical committees, 550 sub-committees, and 2000 working groups, which altogether involve over 40,000 people. While each country is in theory free to apply or not apply a particular ISO standard, the effect of WTO law is to insulate from challenge those national standards that are based on ISO standards, and to place considerable burdens of justification on countries that choose to set their own standards instead. In addition, corporations often find it cheaper to pay the cost of changing their production to the ISO standard rather than hold out (because they are exporters, and because they need complementarity with other products), even if their national government is willing to resist the ISO. Recent research shows that European standard-setting organizations are better adapted to the ISO process than US ones, so more US than European corporations have to pay the costs of changing when a new ISO standard is produced.

I have highlighted three examples of international governance which are beyond national reach, and call for direct international administrative law. International law increasingly requires particular principles and procedures in national administrative law. Conversely, there are some signs of national courts seeking to control elements of international or transnational governance, either directly, or through controlling the forum state's actions.

### **C. Emerging Principles of Global Administrative Law**

Some general principles of practice are emerging in this agglomeration. There is too little scholarly research to say what exactly the principles are. Three well developed sources of possible principles are:

#### **1. Principles drawn from national administrative law, such as.**

When administrative agencies make **general rules**, they must:

- notify potentially interested persons and invite their comments;
- consider any comments received; and
- provide reasoned responses.

When agencies take **decisions** affecting particular persons, they must:

- provide an opportunity to comment and in some cases a hearing;
- issue decisions without undue delay;
- state the reasons on which decisions are based; and
- provide a structure for review or appeal.

**2. Principles of the WTO agreements**, such as requirements that a member state setting standards for product safety or plant health that might affect international trade must:

- ensure the standards are transparent;
- establish national enquiry points to provide information to other states and to private parties;
- base national standards on ‘international standards’, which may themselves be set by private or mixed bodies such as the Codex Alimentarius or the International Standards Organization;
- recognize other states’ standards as equivalent where so proven, and accept products conforming to these equivalent standards;
- follow a notice and comment procedure in setting standards; and
- conform to requirements of reasonableness, proportionality, confidentiality, and fair process in certification and control proceedings for foreign products.

**3. Principles in international environmental treaties** and in the practice of agencies such as the World Bank, for matters such as:

- environmental impact assessment;
- prior informed consent in hazardous waste shipment;
- notification of dangers; and
- access to environmental information.

In the future, it may be expected or hoped that principles will be developed in:

**4. Intergovernmental agencies whose actions affect private parties directly.** Legal and policy development is urgently needed, for example:

- to provide control and redress where UNHCR staff abuse a refugee in a camp, and the local courts cannot or will not act;
- to provide review and accountability where a local village is detrimentally affected by a Kyoto Protocol CDM project.

**5. Non-governmental agencies whose actions affect private parties directly.** I have mentioned that the IOC has an impressive administrative code of practice for anti-doping cases. But most NGOs providing certification services, for example certifying or refusing to certify ‘fair trade’ coffee or ‘sustainably managed’ timber, do not have robust procedures or accountability mechanisms. Codes of practice and fairer procedures are needed.

## E. Return of the Jus Gentium?

Some might reasonably ask: “What does much of this material about private parties, NGO practice, and national law principles have to do with *international law*?” It is true that a lot of this is not the *jus inter gentes*, the law made by agreement between states. What we are seeing in global governance, I believe, is the return of the *jus gentium*, common sets of legal norms and practices applied in many different settings because it is felt necessary, perhaps obligatory to apply them. Global administrative law is a leading example of this trend. This might be classified under the rubric of ‘general principles of law’ in the ICJ Statute, but the sources of global administrative law are more diverse, and its scope much more comprehensive and specific, than anything the ICJ has applied in its very limited jurisprudence of ‘general principles of law.’

The *jus gentium* that is growing so quickly in response to globalization does not consist so much of norms on substantive issues. There is too much controversy about key values, too many different approaches among nations and interest groups, for a community embodying the wills of all really to decide on substantive views and bind the dissenters. Substantive norms are limited mainly to narrow fields in which a partial global community exists, or to groupings like the European Union. In the absence of agreement on substance, the new *jus gentium* is primarily procedural.

The WTO Appellate Body’s decisions in the *Shrimp-Turtle* case illustrate this *jus gentium* in operation. In the first decision (October 1998), the Appellate Body held that shrimp from India, Thailand etc had been improperly excluded from US markets. The administrative procedures followed by the US, in applying its turtle-protecting legislation, constituted “arbitrary and unjustifiable discrimination between Members,” and hence the US was precluded from defending its turtle-protecting measures under the GATT Article XX exceptions. The Appellate Body pointed out that the US procedure for certifying the shrimp industries of particular states as meeting turtle-protecting standards provided:

- “- no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it...
- no formal written, reasoned decision, whether of acceptance or rejection...
- [no notification of such decisions, and]
- no procedure for review of, or appeal from, a denial.”

After reading this adverse decision, the US amended its administrative procedures, and the measures were held WTO-compliant in the second Appellate Body ruling. Three points about this case are of importance to my topic:

1. The administrative principles articulated by the Appellate Body are only to a limited extent written in WTO treaties. The Appellate Body borrowed these administrative principles from a combination of national administrative law (especially US law!), European Union law, and many different treaties.
2. The effect of this decision is to press WTO member states to amend their national administrative law to conform to international law requirements, providing procedural rights both to foreign states and to affected private actors in the market.

3. The Appellate Body tried in its first decision to avoid deciding the trade-environment values conflict on substantive grounds, and instead shifted the focus to procedural fairness. This technique was partly an acknowledgement of value pluralism, and partly an effort to bolster the WTO's own legitimacy among various influential constituencies whose substantive interests conflict.

## **Part II. Partial International Communities and Roles of Global Administrative Law under Conditions of Pluralism, Solidarism, or Cosmopolitanism**

The rising global demands for what Kant calls omnilateral action by a community -- action going beyond unilateralism and bilateralism or multilateralism -- comes at a time when there is **no general 'international community'** unifying the wills of all. Instead, we see a **proliferation of partial international communities**. The members of these communities accept that on a special topic, and within specific limits, the partial community can act for the wills of them all. This multiplicity of partial communities can play a valuable role in governance. But it also involves dangers and problems, including:

- overreaching, by trying to do more than the members have accepted, or trying to act in ways that affect the interests of non-members who may not have been consulted and may have no ability to call the community to account; and
- underachieving, because important governance needs cannot be met by communities whose membership or competence is too narrow or who lack wider legitimacy.

Global administrative law is potentially a resource, to overcome some problems associated with omnilateralism in these partial 'international communities', and to help further to build these strands of governance and knit them together.

We see partial international communities acting in very different ways depending whether the legal and political dynamics of international governance of a particular issue are predominantly: inter-state pluralism; inter-state solidarism; or transnational cosmopolitanism. (Of course, these are not simply objective descriptions of the state of affairs: they are characterizations that reflect the basic orientations of the participants and of those who happen to be writing about the issues.) The role that can usefully be played by global administrative law varies correspondingly.

### **A. Inter-State Pluralism**

Traditional international law, with the concept of opposability which has been explored extensively by Professor Murase and his colleagues, is pluralistic. For example, Japan's argument that resolutions of the International Whaling Commission defining restrictions on scientific research whaling are not in themselves opposable to Japan, is an argument that international law can not resolve the impasse on whaling unless there is some underlying agreement in a treaty or other legally effective action. (See Professor Kanehara's recent summary of Japanese government statements on whaling over the past 25 years, in the Japanese Digest of International Law.) Inter-state pluralism faces challenges, as in the IWC, but it continues to be the preponderant mode in many areas of

international law. The contribution of global administrative law to pluralistic areas of law is primarily at the level of institutions. Where joint management is required, as with whales, or where gains could be captured by inter-state cooperation, global administrative law can play useful roles. It can help ensure that full information is available, that all interests are heard, that scientific committees and advisory bodies give reasons for decisions, that states adversely affected by a particular decision have opportunities to seek review. One important administrative device for balancing pluralism with market interdependence is mutual recognition of different national regulatory standards meeting agreed criteria. An effective ‘partial international community’ can be very useful where the international collective action problem is not simply one of co-ordination (where an agreement is virtually self-enforcing), but is one of collaboration (in which individual actors have incentives to defect from an established set of norms, but can be dissuaded from doing so by sanctions or the operation of social norms and expectations). In such collective action cases, a ‘partial international community’, in which members have confidence because of fair procedures, can be a useful heuristic in which to embed the agreed decision.

## **B. Inter-State Solidarism**

In a deeper solidarist conception of international legal order, the ‘international community’ is an inter-state community committed to a far-reaching set of globally accepted values. Almost all agree that international law does now encompass rules in subject areas in which truly-universal omnilateralism is possible because of consensus on core values, as in norms against genocide, torture, etc. But consensus is seldom attainable on strong institutions which may in practice be essential to the speedy operationalization of these norms. Thus Judge Guillaume’s critique in the *Yerodia* case of universal jurisdiction in national courts for crimes against humanity, that this would ‘encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined “international community”.’ In the absence of strong institutions with agreed decision powers, international governance is increasingly accomplished by informal networks. The Habermasian idea that a ‘public’ can be constituted by any group participating in a common discourse seems actually to operate in subject areas of international law in which expertise is so specialized, and the shared identity of these specialists is so strong transnationally, that the specialists come to think of themselves as ‘the international community’ acting omnilaterally for their technocratic purposes. These technocratic ‘publics’ function successfully so long as the technocrats can avoid wider politics or being called to account by outside critics. The OECD Mutual Acceptance of Data system for cross-recognition of laboratory test results for chemicals works in this way - they face the politically volatile issue of animal rights and animal welfare in product testing, but these NGOs support the OECD process because it cuts down needless repetition of tests in different countries. However, these networks are always at risk of overreaching, or of challenges to their legitimacy.

In practice, the solidarist approach is often extended beyond true universal agreement, to subject areas in which non-compliance by a minority with norms favored by a majority imposes costs (externalities) on the majority that are too great to permit the minority

position to continue. ‘Majority’ here sometimes means a numerical majority. Other times it means the holders of the majority of power. In either case the ‘majority’ may try to act through international institutions and frame its demand in omnilateral terms, provided the distribution of power makes this possible. Such purported omnilateralism may reduce the external and internal cost of ‘coercing’ or ‘buying off’ the minority. The EU’s ‘multilateralism’ is often framed as the voice of ‘the international community’ for this reason, e.g. in relation to the Kyoto Protocol or the Landmines Convention. Some arguments for the existence of a particular rule of customary international law have a similar quality when the proponents, echoing Grotius, base themselves on a survey of the practice and views not of ‘all’ states but of the ‘better’ states. Arguments for special privileges for a community of democratic states (for example, a privilege to have weapons of mass destruction prohibited to other states) may also have this character.

Deciding whether a particular issue is better addressed through the lens of pluralism or solidarity involves very hard analysis. Each has normative justifications, each has costs and benefits. Global administrative law is not going to resolve a basic values conflict, for example the question whether killing whales is or is not a legitimate activity. But it might help with procedures for more manageable questions, such as whether an Antarctic Whale Sanctuary or an ecosystem approach is better having regard to the criteria, reasons, and interests involved. In helping with procedures it may make the outcome more legitimate and more widely accepted.

Put more conceptually, global administrative law can contribute in helping to control the uncertain borders, where an effective institution that is a partial international community is tempted to extend its competence, or is struggling with defining its approach to issues that are partly within its competence and partly outside. For example, on some narrow trade issues, we might say that the WTO really is a partial community – in certain areas the Appellate Body really does unite the wills of all states, including even the losers in these decisions. But problems arise where it purports to *extend* its reach to non-state interests who are not adequately represented, or to a minority of small but specially affected states who cannot block an adverse ruling imposing an interpretation they never consented to. In the Shrimp-Turtle cases, the Appellate Body tried to use administrative law to help with these problems. The Appellate Body recognized that structures protecting the participation of affected interests, including third-party participation, could increase support for, and the reach of, the process. I believe that a better developed body of global administrative law offers a potentially important way forward in the vexed trade-environment debate, and indeed in “trade-and” debates more generally.

### **C. Transnational Cosmopolitanism**

The third and most far-reaching of the three categories of issues and approaches are those which are not dominated by states, but are in some way cosmopolitan. I have in mind issues which are not reducible to the decisions of states alone (what Jürgen Habermas calls the post-national constellation), and issues in which the involvement of individuals and groups goes beyond any national identity and interests, where they perhaps feel part

of a global public (Andrew Linklater for example advocates a political theory of transnational citizenship).

Global markets are one form of cosmopolitanism. They create a demand for forms of community other than state and local community, in order to enhance participation and accountability, and hence increase the legitimacy of the legal structures of market governance that already exist or are rapidly emerging. Globalization has generated considerable wealth, but has corresponded with increased inequality in many societies, reduced or static social welfare provision and labour protection as states compete with each other to reduce costs, and higher exposure of people to job loss and destabilizing volatility. Without a base in social bargains, no set of substantive norms on globalization reflecting the wills of all can be forthcoming. But this lack of support is troubling to global corporations, and to some leading corporations in developing countries, whose future profits are threatened by sick or under-educated workforces, consumer boycotts, and risks of state re-regulation following social protests. An example is the rapidly growing privatization of formerly state-run urban water supplies. The main foreign investors in this sector around the world (a handful of British and French companies) have increasingly tried to establish community service offices, consumer disputes tribunals, and local stakeholder partnerships, to reduce social protest and thus increase willingness of consumers to pay charges. That is, domestically they have been using administrative law techniques to widen participation and accountability, in order to make their own positions more legitimate and durable. But transnationally, the interests of consumers and local communities are not yet well represented: for example, the ICSID arbitral tribunal in the ongoing *Agua de Tunari v. Bolivia* case under the Netherlands-Bolivia Bilateral Investment Treaty refused to accept amicus briefs or any other involvement of NGOs and people from the city of Cochibamba where the water services privatization, riots, and subsequent renationalization had occurred. The water companies involved in this case (including Bechtel from the US, and a British consortium), who seem to have objected to NGO and public involvement in the proceedings, are not the main global water companies; the main global companies might well be better off with an operational global administrative law that generates and involves a partial global community, in order to buttress rather than undermine the legitimacy of international arbitral settlements in this sector.

## **Conclusion**

International governance lacks a democratic community capable of resolving core distributional and values conflicts. It often lacks a highly institutionalized structure. Global administrative law thus lacks crucial foundations on which national administrative law is built in strong states. Global administrative law must perform first-order functions – helping to make community, not simply helping an existing community to operate its administration. This may well be asking too much. The effort may result merely in adding legitimacy and longevity to unjust distributions and ill-functioning institutions. But these limitations are unavoidable in the world of the possible rather than the ideal. It is suggested that, on balance, global administrative law may potentially provide a valuable way forward in helping meet some of the justified demands for international

community and overcoming some of the severe problems currently associated with omnilateralism.

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