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DANIEL C. ESTY

## Good Governance at the Supranational Scale: Globalizing Administrative Law

**ABSTRACT.** This Article examines the tension between the demonstrable need for structured international cooperation in a world of interdependence and the political strain that arises whenever policymaking authority is lodged in global institutions. It argues that the tools of administrative law, which have been used to legitimate regulatory decisionmaking in the domestic context, should be deployed more systematically when policymaking is undertaken at the international level. While acknowledging the inevitable lack of democratic underpinnings for supranational governance, this Article highlights a series of other bases for legitimacy: expertise and the ability to promote social welfare; the order and stability provided by the rule of law; checks and balances; structured deliberation; and, most notably, the institutional design of the policymaking process as structured by principles and practices of administrative law. In developing the logic for procedural legitimacy as a foundation for good governance at the supranational scale, this Article advances a taxonomy of possible global administrative law tools. It then evaluates against this template of good governance procedures some existing decisionmaking procedures in the international trade, public health, and environmental policy regimes. The core conclusion is this: Even if supranational governance is limited and hampered by divergent traditions, cultures, and political preferences, developing a baseline set of administrative law tools and practices will strengthen whatever supranational policymaking is undertaken.

**AUTHOR.** Hillhouse Professor of Environmental Law and Policy, Yale University. Thanks to Andrea Gelatt, Kaitlin Gregg, Hannah Jacobs, and Christine Kim for research assistance – and to Marge Camera for administrative support. This Article emerged from the Gilbert and Sarah Kerlin Distinguished Professor of Environmental Law Lecture at Pace Law School. Thanks for helpful comments are due to the participants in the Yale Law School faculty workshop, the Pace Law School Kerlin Lecture, the Harvard Law School International Public Governance seminar, Professor Benedict Kingsbury and the NYU Law School Global Administrative Law Conference, and Professor Sabino Cassese and the international law seminar at the University of Rome “La Sapienza.”



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## INTRODUCTION

From the 9/11 tragedy to the global panic engendered by the 2003 outbreak of SARS to the bird flu in 2005, the interdependence of our globalized world has become painfully evident in recent years. National governments alone cannot address a range of critical issues, including terrorism, trade liberalization, economic integration, infectious diseases, and worldwide environmental issues such as climate change. Scholars have highlighted the need for international policymaking for years,<sup>1</sup> and the theoretical logic of organizing collective action on a scale proportional to these threats is well understood.<sup>2</sup>

Yet the nation-state remains the dominant structure in international relations, and skepticism about “global governance” runs deep, particularly in the United States.<sup>3</sup> Distrust of international institutions is a hallmark of neoconservative and sovereigntist thinking,<sup>4</sup> and a parallel degree of skepticism

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1. See, e.g., KARL W. DEUTSCH, MASS. INST. OF TECH., *POLITICAL COMMUNITY AT THE INTERNATIONAL LEVEL* (1954); ERNST B. HAAS, *BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION* (1964); PAUL TAYLOR, *THE LIMITS OF EUROPEAN INTEGRATION* (1983); Karl W. Deutsch & J. David Singer, *Multipolar Power Systems and International Stability*, 16 *WORLD POL.* 390 (1964); Ernst B. Haas, *International Integration: The European and the Universal Process*, 15 *INT’L ORG.* 366 (1961); Alec Stone Sweet & Wayne Sandholtz, *Integration, Supranational Governance, and the Institutionalization of the European Polity*, in *EUROPEAN INTEGRATION AND SUPRANATIONAL GOVERNANCE 1* (Wayne Sandholtz & Alec Stone Sweet eds., 1998); Joseph Weiler, *The Community System: The Dual Character of Supranationalism*, 1 *Y.B. EUROPEAN L.* 268 (F.G. Jacobs ed., 1981); J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403 (1991).
  2. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965); ORAN R. YOUNG, *THE INSTITUTIONAL DIMENSIONS OF ENVIRONMENTAL CHANGE: FIT, INTERPLAY, AND SCALE* (2002); Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 *YALE L. & POL’Y REV.* 23 (1996).
  3. In March 2005, for instance, the United States withdrew from the Protocol to the Vienna Convention on Consular Relations. Adam Liptak, *U.S. Says It Has Withdrawn from World Judicial Body*, *N.Y. TIMES*, Mar. 10, 2005, at A16. The United States has also declined to ratify treaties implementing the global landmine ban and the International Criminal Court and obstructed the World Health Organization’s public health campaign aimed at smoking. See J. Antonio Ohe, *Are Landmines Still Needed To Defend South Korea?*, in *LANDMINES AND HUMAN SECURITY* 225, 226 (Richard A. Matthew et al. eds., 2004).
  4. See Jack Snyder, *One World, Rival Theories*, *FOREIGN POL’Y*, Nov./Dec. 2004, at 52; Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, *FOREIGN AFF.*, Nov./Dec. 2000, at 9, 9-10. “Neocon” Undersecretary of State John Bolton declared: “[I]t is a big mistake for us to grant any validity to international law even when it may seem in our short-term interest to do so . . . .” Robert W. Tucker & David C. Hendrickson, *The Sources of American Legitimacy*, *FOREIGN AFF.*, Nov./Dec. 2004, at 18, 23. Bolton also

about global-scale policymaking can also be found on the political Left.<sup>5</sup> Many consumer advocates, environmentalists, and antiglobalization activists decry the “faceless bureaucrats” at the World Trade Organization (WTO) in Geneva, whom they see as undermining American democracy, sovereignty, and regulatory autonomy.<sup>6</sup>

How does one square the demonstrable need for structured international cooperation in a world of interdependence with the political strain that arises whenever policymaking authority is lodged in global institutions? In this Article, I look at this puzzle through the lens of administrative law. I trace the doubts of American political leaders and the broader public about the value of international policymaking back to the suspicions that accompanied the founding of the American administrative state in the 1930s: the perceived lack of democratic legitimacy, concerns about lost national sovereignty, unhappiness about the delegation of important policy choices to distant and unaccountable officials, and dissatisfaction with decisionmaking processes.<sup>7</sup> I argue that just as domestic policymakers and administrative law scholars have devised rules and procedures to bolster the legitimacy of administrative agencies, global policymakers might look to the first principles of administrative law to remedy the democratic deficit and legitimacy concerns at the transnational level.

While I stress the growing reality of global-scale interdependence<sup>8</sup> and the resulting need for functioning mechanisms of international cooperation, my central goal in this Article is not to make the normative case for more

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suggested: “If the U.N. Secretariat building in New York lost 10 stories, it wouldn’t make a bit of difference.” Jane Pertez, *Arms Control Nominee Defends Shifting Views*, N.Y. TIMES, Mar. 30, 2001, at A10.

5. Giulio M. Gallarotti, *The Limits of International Organization: Systematic Failure in the Management of International Relations*, in *THE POLITICS OF GLOBAL GOVERNANCE* 375, 379 (Paul F. Diehl ed., 1997) (noting that international organization “has been attacked both from the right and the left and both in theoretical and nontheoretical treatises”).
6. See DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 35 (1994) (reviewing environmentalists’ hostility to the WTO); LORI WALLACH & PATRICK WOODALL, *PUBLIC CITIZEN, WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY* (1999) (condemning the WTO).
7. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985) (offering a “presidentialism” model of accountability); Peter H. Schuck, *The Politics of Regulation*, 90 YALE L.J. 702 (1981) (book review) (examining legitimacy issues in the modern administrative state); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (discussing the accountability issue and other concerns in the domestic context).
8. This trend was spotted long ago. See, e.g., ERNST B. HAAS, *THE WEB OF INTERDEPENDENCE: THE UNITED STATES AND INTERNATIONAL ORGANIZATIONS* (1970).

supranational governance.<sup>9</sup> More modestly, I argue that, whether the decisionmaking role assigned to international bodies is narrow or broad—supporting mere intergovernmental exchange or full-scale supranational decisionmaking<sup>10</sup>—these institutions must adopt basic administrative law procedures to achieve better results and bolster public confidence in the choices they make and the policies they advance. This argument has both an empirical element, drawn from a close review of the performance of existing international institutions, and a normative logic, derived from political theory and the functioning of administrative law on the national level.

My argument for globalizing administrative law unfolds in several stages. Part I examines the logic of global governance and the controversies that surround international policymaking. As a purely descriptive matter, I note that supranational governance is expanding.<sup>11</sup> Governments are increasingly working together to address the thinning of the ozone layer and other environmental issues, confront public health threats, reduce trade barriers, and promote economic growth. What is contested is how much reliance should be placed on international officials and entities, particularly when exercising political judgment as autonomous decisionmakers. In addressing this issue, this Part both spells out the potential benefits of global governance and catalogues the risks and costs of delegating decisionmaking to international officials. I conclude that the procedural rigor of administrative law is a critical tool for refining international governance and legitimizing the exercise of supranational authority.

In Part II, I develop a taxonomy of legitimacy, drawing on several established bases for the acceptance of governing authority, including (1) elections and majority will, building on Rousseau's democratic theory; (2) expertise and the ability to generate "right answers," drawing on the logic of Weber's writings on bureaucratic decisionmaking; (3) order and the stability

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9. I use the term "supranational" to encompass both global governance (involving all countries) and international governance (involving two or more nations working together) when the decisionmaking authority is lodged above the level of the nation-state. I refer to "intergovernmental activities" when the key decisionmakers are national officials.
  10. See Stone Sweet & Sandholtz, *supra* note 1, at 8 (establishing a spectrum of international governance activities from mere support for coordination among nation-state officials to autonomous action by international officials); see also Andrew Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, 31 J. COMMON MARKET STUD. 473 (1993) (describing various institutional structures).
  11. See David Held, *The Transformation of Political Community: Rethinking Democracy in the Context of Globalization*, in DEMOCRACY'S EDGES 84, 84 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999) (citing "growing interconnectedness, and intensification of relations, among states and societies").

and predictability of the rule of law, building on Hobbes's political theory and extending Lon Fuller's more recent writing; (4) systemic legitimacy of the sort Madison advocated, in which a particular decisionmaker's authority derives from being part of an overarching governance structure with checks and balances; (5) dialogue and deliberation which, as Habermas has made clear, fundamentally shape how readily people accept the decisions and policies that emerge; and (6) the institutional design of the policymaking process itself. To conform to this last "good governance" principle, a global decisionmaking body must adhere to a set of rules and procedures of the sort that are embodied in administrative law.

In the realm of supranational governance, where the democratic underpinnings for rulemaking are particularly weak, the legitimacy-enhancing potential of procedural safeguards takes on special significance. Although administrative law cannot completely compensate for the absence of an electoral connection between the governed and their officials, a refined system of procedures can promote decisionmaking based on the rule of law, participation, rationality, clarity, stability, neutrality, fairness, efficacy, deliberation, efficiency, and accountability. If properly developed and implemented, administrative procedures promote careful rulemaking, efficient delivery of public goods, and fair treatment of both individuals and economic entities.

In Part III, I discuss the concept of good governance as it applies in the international realm, advancing a list of goals that might be desirable and showing how these elements connect to the theories of legitimacy identified in Part II. I also propose a set of global administrative law tools that can be clustered around four core elements of good governance: (1) controls on corruption, self-dealing, and special interest influence; (2) systematic and sound decisionmaking; (3) transparency and public participation; and (4) checks and balances.

In Part IV, I use the template of good governance developed in Part III to assess the existing decisionmaking procedures in the international trade, public health, and environmental policy regimes. In each of these realms, some of the administrative law procedures and mechanisms that are essential to good governance have been adopted, and, as my theoretical framework would suggest, I find that the regime of administrative law has advanced most where the governance is supranational, formal, and addresses normative issues. This raises an interesting question of causation: Do international organizations get authority and gain legitimacy because they have adopted good governance practices? Or do they adopt administrative law as a way to seek legitimacy or protect their authority? Either way, each of the international organizations

reviewed falls short of a fully appropriate structure of procedural safeguards and administrative law.

Finally, I offer some tentative conclusions about the challenge of globalizing administrative law. I explain that a Global Administrative Procedure Act with requirements that apply across all international organizations makes little sense. Appropriate governance rules and procedures, however, drawing on the menu of concepts and tools developed in Part III and tailored to the needs of particular global policymaking bodies, promise to facilitate international cooperation in response to shared challenges and to put the world community on the path toward good governance.

## I. THE SUPRANATIONAL GOVERNANCE PROBLEM

### A. Defining Governance

Governance means different things in different contexts, but the concept generally relates to group decisionmaking to address shared problems.<sup>12</sup> Supranational governance might therefore refer to any number of policymaking processes and institutions that help to manage international interdependence, including (1) negotiation by nation-states leading to a treaty; (2) dispute settlement within an international organization;<sup>13</sup> (3) rulemaking by international bodies in support of treaty implementation;<sup>14</sup> (4) development of government-backed codes of conduct, guidelines, and norms;<sup>15</sup> (5) pre-

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12. See COMM'N ON GLOBAL GOVERNANCE, *OUR GLOBAL NEIGHBOURHOOD: THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE 2* (1995) ("Governance is the sum of the many ways individuals and institutions . . . manage their common affairs."); ORAN R. YOUNG, *INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY 26* (1994) ("A governance system is an institution that specializes in making collective choices on matters of common concern . . ."); Oran R. Young, *Rights, Rules, and Resources in World Affairs*, in *GLOBAL GOVERNANCE: DRAWING INSIGHTS FROM THE ENVIRONMENTAL EXPERIENCE 1, 3* (Oran R. Young ed., 1997).
  13. See JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2005).
  14. See, for example, the work done under the auspices of the Convention on Climate Change to spell out how to account for greenhouse gas emissions. United Nations Framework Convention on Climate Change, *Feeling the Heat*, [http://unfccc.int/essential\\_background/feeling\\_the\\_heat/items/2914.php](http://unfccc.int/essential_background/feeling_the_heat/items/2914.php) (last visited Feb. 21, 2006).
  15. The work of the Organization for Economic Cooperation and Development (OECD) to develop the Guidelines for Multinational Corporations is a good example of this type of governance. See ORG. FOR ECON. COOPERATION & DEV., *THE OECD GUIDELINES ON MULTINATIONAL ENTERPRISES* (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

negotiation agenda-setting and issue analysis in support of treaty-making;<sup>16</sup> (5) technical standard-setting to facilitate trade;<sup>17</sup> (6) networking and policy coordination by regulators;<sup>18</sup> (7) structured public-private efforts at norm creation;<sup>19</sup> (8) informal workshops at which policymakers, NGOs, business leaders, and academics exchange ideas;<sup>20</sup> and (8) private sector policymaking activities.<sup>21</sup>

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16. The work of the Organization of American States (OAS) in support of the Free Trade Area of the Americas provides a classic example of this type of activity. See Org. of Am. States, Dep't of Pub. Info., Key OAS Issues: Free Trade in the Hemisphere (Sept. 2001), <http://www.oas.org/assembly2001/assembly/gaassembly2000/gatrade.htm>.
  17. The standards developed by the International Organization for Standardization (ISO) are the paradigmatic example. See Int'l Org. for Standardization, Overview of the ISO System, <http://www.iso.org/iso/en/aboutiso/introduction/index.html> (last visited Feb. 21, 2006).
  18. An example of this sort of regular networking is the sharing of information on regulatory approaches and best practices at OECD-sponsored meetings that bring together energy ministers, trade ministers, or environment ministers. See, e.g., Org. for Econ. Cooperation & Dev. [OECD], Outcomes of the Meeting of the Environment Policy Committee at Ministerial Level (Apr. 20, 2004), [http://www.oecd.org/document/61/0,2340,en\\_21571361\\_27379763\\_31601405\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/61/0,2340,en_21571361_27379763_31601405_1_1_1_1,00.html); see also Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041, 1042-43 (2003) (discussing intergovernmental regulatory networks).
  19. The U.N. Global Compact setting standards for corporate conduct is one example of this type of norm setting. See John Gerard Ruggie, *The Theory and Practice of Learning Networks: Corporate Social Responsibility and the Global Compact*, in LEARNING TO TALK: CORPORATE CITIZENSHIP AND THE DEVELOPMENT OF THE UN GLOBAL COMPACT 32 (Malcolm McIntosh et al. eds., 2004). The work of the World Commission on Dams offers a second example. See Klaus Dingwerth, *The Democratic Legitimacy of Public-Private Rule-Making: What Can We Learn from the World Commission on Dams?*, 11 GLOBAL GOVERNANCE 65, 66 (2005) (explaining the Commission's "trisectional network that included members of governments, civil society, and business" and how a set of norms and guidelines for dam building were developed).
  20. The World Conservation Union organized by the International Union for Conservation of Nature and Natural Resources (IUCN), is a good example of this type of governance. See The World Conservation Union—About IUCN, <http://www.iucn.org/en/about> (last visited Feb. 20, 2006) (providing information on IUCN's policy coordination efforts); see also Benjamin Cashore, *Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NMSD) Governance Systems Gain Rule-Making Authority*, 15 GOVERNANCE 503 (2002) (discussing forest certification); Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1 (1992) (explaining the governance role of epistemic communities or knowledge-based networks).
  21. These private efforts may shape future public policy processes or regulations. For example, the work of the former Mexico-U.S. Business Council (now called the North American Business Committee) helped to lay the foundation for the North American Free Trade Agreement (NAFTA). See Council of the Americas, North American Business Committee, <http://www.counciloftheamericas.org/coa/events/2006events/2005/August/Mexus/NABC%20Background.pdf> (last visited Dec. 13, 2005).

International policymaking can be carried out through government-to-government negotiations and the contractual exchange of specific commitments in treaties. Alternatively, governments can coordinate policies by mutual recognition of each others' national rules.<sup>22</sup> But when nation-states agree not on specific substantive outcomes but rather on decision-processes, they create mechanisms of global policymaking or supranational governance. This Article is centered on this realm of supranational rulemaking.

As an empirical matter, international institutions have been shown to exert influence over the behavior of nation-states, economic actors, and individuals.<sup>23</sup> The emergence of a global market economy, as well as a series of international regulatory regimes, means that some degree of supranational governance now exists.<sup>24</sup> The list of international governance activities with significant impact includes, among others, the trade liberalization work of the WTO,<sup>25</sup> the global health policymaking of the World Health Organization (WHO),<sup>26</sup> the standard-setting undertaken by the International Organization for Standardization (ISO),<sup>27</sup> and testing protocols and risk assessment methodologies developed by the Organization for Economic Cooperation and Development's (OECD) Chemicals Group.<sup>28</sup>

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22. See Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, 68 LAW & CONTEMP. PROBS. 263 (2005) (describing mutual recognition regimes as a component of global governance).
  23. See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AM. J. INT'L L. 596, 597 (1999) (describing international institutions as "gain[ing] greater authority"); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 18 (2005).
  24. See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 1-7 (2004); Kingsbury et al., *supra* note 23, at 18; Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 63-73 (2005).
  25. See Bob Reinalda & Bertjan Verbeek, *The Issue of Decision Making Within International Organizations*, in DECISION MAKING WITHIN INTERNATIONAL ORGANIZATIONS 9, 10 (Bob Reinalda & Bertjan Verbeek eds., 2004) (arguing that it is difficult for states to "ignore" the force of organizations such as the WTO).
  26. See, e.g., Ilona Kickbusch, *The Development of International Health Policies—Accountability Intact?*, 51 SOC. SCI. & MED. 979, 981, 983 (2000) (discussing the WHO's mandate of leadership in international health policy).
  27. See Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 ECOLOGY L.Q. 479 (1995) (explaining the ISO's standard-setting role).
  28. See OECD Guidelines for Testing of Chemicals, <http://www.oecd.org/dataoecd/9/11/33663321.pdf> (last visited Feb. 20, 2006); see also ESTY, *supra* note 6, at 178 (discussing the impact of the work of the OECD Chemicals Group).

### B. *The Logic of Supranational Governance*

If every country were an island, or perhaps its own planet, there would be no need for supranational policymaking. Each jurisdiction could manage its own affairs and no externalities or interconnections would require attention. The logic of global governance arises from the presence of issues that spill across national borders and the need to manage the interdependence generated by this intertwining of fates.<sup>29</sup>

National governments partially surrender sovereignty when they see it as in their best interest to do so. Trade liberalization—and the economic and political gains it promises<sup>30</sup>—requires nation-states to cooperate in establishing the terms of engagement for international commerce and in settling disputes that arise. To reap the benefits of economic integration, countries must invest in supranational governance and submit to some circumscription of national sovereignty.<sup>31</sup> Other points of interconnection arise as unintended consequences of policy choices. For example, the open borders implied by free trade and free travel create an exposure to the spread of disease, requiring a commitment to coordinated policy response.

Some international externalities are best understood as a function of the workings of the natural world rather than policy choices. Certain environmental problems, such as climate change, are inescapably global. Absent policy cooperation at the international scale, these “super-externalities” will result in market failures, economic inefficiency, and social welfare loss, not to mention environmental degradation.<sup>32</sup> Similarly, without international policy cooperation, shared resources such as the oceans and their fisheries will

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29. See OLSON, *supra* note 2 (providing the theoretical logic underneath the collective action problem); see also Joseph S. Nye, Jr., *Soft Power*, FOREIGN POL'Y, Fall 1990, at 153, 163 (noting that “issues of transnational interdependence will require collective action and international cooperation”).

30. See ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS 171-230 (1987) (reviewing the political gains from trade); JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (2d ed. 1997) (reviewing the logic of international trade).

31. See MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE (1995) (discussing the structure and logic of the international trading system).

32. See ANDRÉ DUA & DANIEL C. ESTY, SUSTAINING THE ASIA PACIFIC MIRACLE: ENVIRONMENTAL PROTECTION AND ECONOMIC INTEGRATION 59-60 (1997) (explaining the concept of transboundary spillovers or “super-externalities”).

be overexploited and global public goods (such as public health and environmental protection programs) will be underproduced.<sup>33</sup>

In short, the argument for supranational governance is an extension of the logic of international law. Without a commitment to structured cooperation, international relations remain in a Hobbesian state of nature. While a power-dominated world may seem attractive to a hegemon, like the United States in the early twenty-first century, a lawless international realm is ultimately costly and potentially unstable. In such a world, order must be imposed on an ad hoc and issue-by-issue basis and will therefore be of limited effectiveness. Thus, even those most committed to a world order based on realism find some value in having structures in place to facilitate international policymaking.<sup>34</sup>

Supranational policymaking might be advisable for other reasons as well.<sup>35</sup> Many policy problems have multiple dimensions, making response strategies that draw on both decentralized and centralized information optimal.<sup>36</sup> Multi-tier governance may also promote welfare-enhancing regulatory competition between levels of government.<sup>37</sup> By generating competing policy perspectives, assumptions, analyses, options, and assessments, global governance

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33. See OLSON, *supra* note 2, at 170-71; Albert Breton, *A Theory of Government Grants*, 31 CAN. J. ECON. & POL. SCI. 175, 184-85 (1965); Inge Kaul et al., *How To Improve the Provision of Global Public Goods*, in PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION 21, 28 (Inge Kaul et al. eds., 2003).
34. See, e.g., HENRY A. KISSINGER, *AMERICAN FOREIGN POLICY 77-78* (expanded ed. 1974) (noting that “[a]ll modern states face problems of bureaucratization, pollution, environmental control, and urban growth” that “know no national considerations,” and that international approaches are required for a successful response); Snyder, *supra* note 4, at 53 (discussing realist foreign policy and the need for collective action at the global scale).
35. See, e.g., Daniel A. Farber, *Environmental Federalism in a Global Economy*, 83 VA. L. REV. 1283, 1316-17 (1997); Ronald McKinnon & Thomas Nechyba, *Competition in Federal Systems: The Role of Political and Financial Constraints*, in THE NEW FEDERALISM: CAN THE STATES BE TRUSTED? 3, 47-52 (John A. Ferejohn & Barry R. Weingast eds., 1997) (discussing the value of a policymaking division of labor); Sabino Cassese, *Global Administrative Law: An Introduction* 18 (Apr. 22, 2005) (unpublished manuscript, on file with author) (giving additional reasons for supranational governance including “allocation of scarce resources,” “harmonization,” and “standardization”).
36. Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495 (1999) (explaining the potential for efficiency gains from multitier governance).
37. See, e.g., Daniel C. Esty & Damien Geradin, *Regulatory Co-Opetition*, 3 J. INT’L ECON. L. 235 (2000) (discussing the value of regulatory competition as well as intergovernmental cooperation—not only along a Tieboutian horizontal plane, but also along a vertical dimension); see also Jonathan B. Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27 ECOLOGY L.Q. 1295 (2001) (tracing the use of national legal ideas and structures in international law).

institutions provide a supplemental set of policymaking laboratories.<sup>38</sup> Supranational governance also strengthens national rulemaking and provides a safety net to guard against the possibility of policy failure at the national level.<sup>39</sup>

Finally, when normative disputes are deep and policy choices highly contested, the presence of a degree of global-scale policymaking can reduce the all-or-nothing nature of national politics. By promoting careful consideration of policy choices, providing a mechanism for benchmarking national policy results,<sup>40</sup> and forcing decisionmakers to justify their actions,<sup>41</sup> a functional global governance structure adds depth to the system of checks and balances, thereby limiting national governmental mistakes and improving social welfare.<sup>42</sup>

### C. *Distance Matters: Why Supranational Governance Is Problematic*

Despite the logic of international collective action in our interdependent world, shifting policymaking responsibilities to supranational authorities

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38. See, e.g., DAVID OSBORNE, *LABORATORIES OF DEMOCRACY* (1988) (explaining that much real innovation in U.S. politics and policy is taking place at the state level under the direction of creative governors).
39. See, e.g., Frank Biermann & Steffen Bauer, *Managers of Global Governance: Assessing and Explaining the Influence of International Bureaucracies* 1, 24 (Vrije Universiteit Amsterdam, Inst. for Env'tl. Studies, Global Governance Working Paper No. 15, May 2005) (discussing how international bureaucracies improve domestic administrative capacity); J.P. Ruger, *Democracy and Health*, 98 Q.J. MED. 299, 301 (2005) (discussing China's mishandling of SARS and how the WHO stepped in).
40. The power of performance benchmarking at the global level has been demonstrated by the Environmental Sustainability Index. DANIEL C. ESTY ET AL., 2005 ENVIRONMENTAL SUSTAINABILITY INDEX: BENCHMARKING NATIONAL ENVIRONMENTAL STEWARDSHIP (2005), available at <http://www.yale.edu/esi>.
41. See Sol Picciotto, *North Atlantic Cooperation and Democratizing Globalism*, in *TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 495, 507 (George A. Bermann et al. eds., 2000) (discussing supranational checks and balances); Bruce Stokes, *Public Diplomacy: America Is Job No. 1*, 2005 NAT'L J. 1402, 1403 (noting problems created by "Americans' factual misunderstanding of current events").
42. See JACKSON, *supra* note 30, at 13 (arguing that the international trade regime helps to discipline national governments that might otherwise be prone to welfare-reducing protectionism). Trade rules can tie the hands of national governments to the proverbial mast, enabling them to ignore the siren call of protectionist special interests and domestic politics. See Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94, 101 (2002).

presents significant problems.<sup>43</sup> In particular, the increased distance from the public to supranational decisionmakers and the lack of democratic foundations for international bodies create serious legitimacy issues. Adding to these concerns are reduced policy control at the national (or local) scale and worries that international bodies will be unaccountable, prone to mistakes, subject to manipulation by special interests, or guided by voting provisions that do not reflect the realities of power. Some of these issues parallel the principal-agent problems that arise in the context of delegated decisionmaking at the national level,<sup>44</sup> and others are exacerbated by the absence in the international realm of the same density of rules, institutions, and processes that guide and constrain domestic administrative decisionmaking.<sup>45</sup>

### 1. *Delegated Decisionmaking*

While delegated decisionmaking promises certain efficiencies and access to greater expertise, shifting the locus of policymaking out of the hands of elected officials creates well-documented risks.<sup>46</sup> Appointed officials do not face the same structure of accountability constraints and sanctions for self-dealing or

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43. There exists a substantial literature on the difficulties of policymaking at the global scale. See, e.g., *LOCAL COMMONS AND GLOBAL INTERDEPENDENCE* (Robert O. Keohane & Elinor Ostrom eds., 1995); Andrew Hurrell & Benedict Kingsbury, *Introduction to THE INTERNATIONAL POLITICS OF THE ENVIRONMENT 1* (Andrew Hurrell & Benedict Kingsbury eds., 1992) (explaining that international cooperation to resolve environmental issues requires overcoming collective action problems, dealing with a new realm of uncertainties, increased conflict, and power struggles); John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139 (1996) (describing the treaty-making process as an iterative, repeat-player game with many opportunities for both cooperation and defection).
44. See, e.g., Sanford J. Grossman & Oliver D. Hart, *An Analysis of the Principal-Agent Problem*, 51 ECONOMETRICA 7 (1983).
45. See, e.g., JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 130 (1997) (explaining how the "complex and continuous" U.S. administrative state has emerged and how it responds to various potential sources of public choice failure); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 30 (2005) (observing that in the international context "even the minimal types of constraints [on power] found in domestic governments are absent").
46. See, e.g., DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993); Daniel A. Farber, *Democracy and Disgust: Reflections on Public Choice*, 65 CHI.-KENT L. REV. 161 (1989); Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271 (1986) (reviewing the costs and benefits of delegated decisionmaking).

poor choices.<sup>47</sup> Their incentives to stay in touch with the concerns and interests of the public on whose behalf they are making decisions may be blunted. Although, in the domestic context, appointed officials generally serve at the pleasure of elected officials who can remove them for any number of reasons—including subpar results, corruption, inefficiency, or inattentiveness to the needs of the public—this threat of dismissal is less pronounced internationally.

Delegation in the domestic context exists within a broad-based system of checks and balances. The accountability regime in the international realm, however, is much thinner. There is no judiciary to cross-check the legality and rationality of decisions made by appointed officials.<sup>48</sup> Perhaps as a result, the representativeness of international officials may be inadequately tested and their focus on the public will be insufficiently disciplined.<sup>49</sup> Simultaneously, the scope of authority lodged with unelected international officials might inappropriately diminish the authority of those democratically elected at the national level who would otherwise exercise this power.

## 2. *Community Spirit*

Democratic legitimacy depends on decisionmakers being seen as acting on behalf of a community. The prospect of successful delegated decisionmaking thus turns on the presence of social trust and a degree of community identity and civic engagement.<sup>50</sup> Whether these underpinnings are sufficiently robust at the global scale to make governance possible is an important question. In the domestic context, tradition, culture, and geography all contribute to the requisite sense of connectedness and community.<sup>51</sup> A shared sense of common

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47. See Grant & Keohane, *supra* note 45, at 31.

48. Many international institutions have some mechanism for dispute settlement. See ALVAREZ, *supra* note 13, at 415-620. The global judiciary, centered on a limited-jurisdiction World Court, almost never serves as a check on the exercise of power by international officials.

49. See Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2020-22 (2004) (raising doubts about how democratic international decisionmaking can be).

50. See Francesca Bignami, *The Challenge of Cooperative Regulatory Relations After Enlargement*, in LAW AND GOVERNANCE IN AN ENLARGED EUROPEAN UNION 97, 114-15 (George A. Bermann & Katharina Pistor eds., 2004) (discussing trust as the critical issue for international cooperation within Europe); see also Jens Steffek, *The Legitimation of International Governance: A Discourse Approach*, 9 EUR. J. INT'L REL. 249, 256 (2003) (emphasizing that the legitimacy of governance depends on shared values).

51. See ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993) (highlighting connections between a sense of community and successful governance); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 341-51 (1996) (emphasizing the importance of a sense of belonging to a

destiny and trust can emerge in other ways as well. Who “we” are can be shaped by economic ties, ecological links, or efforts to work together on shared problems.<sup>52</sup> Identification with a political jurisdiction is the most obvious route to acceptance of the authority of officials in that jurisdiction.<sup>53</sup> As a general matter, the legitimacy of decisionmaking becomes more strained as the sense of community thins and the distance between those exercising authority and the public grows. This problem is especially acute in the international setting, as the distance is not just physical but may also reflect deep differences in perspectives, assumptions, and values.<sup>54</sup> Thus, as the scale of governance expands and a sense of community becomes harder to establish, legitimacy issues become increasingly problematic.

### 3. *Federalism and Subsidiarity*

Any movement toward global governance also runs up hard against a presumption in favor of decentralized decisionmaking that exists both in the United States (in the structure of federalism) and in the European Union (in the commitment to subsidiarity).<sup>55</sup> The logic of decentralized decisionmaking is powerful insofar as the world is diverse and officials at a national scale are more likely to be aware of local circumstances, citizens’ preferences, and other factors that should be reflected in governmental actions.<sup>56</sup> Establishing primary

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civic community); *see also* Bodansky, *supra* note 23, at 615-16; M. Stephen Weatherford, *Measuring Political Legitimacy*, 86 AM. POL. SCI. REV. 149, 151 (1992).

52. *See* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 639 (1996) (emphasizing ecological connectedness as one way that “we” gets defined); Stone Sweet & Sandholtz, *supra* note 1, at 6-7 (discussing broader identities emerging within the EU).
53. *See* J.H.H. Weiler et al., *European Democracy and Its Critique*, 18 W. EUR. POL. 4, 11 (1995) (discussing self-identity as key to legitimacy).
54. *See* Robert Howse, *Transatlantic Regulatory Cooperation and the Problem of Democracy*, in TRANSATLANTIC REGULATORY COOPERATION, *supra* note 41, at 469, 473-74.
55. *See, e.g.*, ANTONIO ESTELLA, *THE EU PRINCIPLE OF SUBSIDIARITY AND ITS CRITIQUE* (2002) (discussing the principle of subsidiarity in the EU context); FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION (Kalypso Nicolaidis & Robert Howse eds., 2001).
56. As I discuss in Part III, it is the absence of common values and the lack of convergence around normative judgments that makes delegation to supranational officials unworkable in some situations. Thus, substantive use of subsidiarity as a nondelegation doctrine makes sense. *See, e.g.*, Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 721-22 (1999) (arguing that this nondelegation principle retains member-states’ decisionmaking power, which renders decisions more responsive to political will); Jens Steffek, *Sources of Legitimacy Beyond the State: A View from International Relations*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 81, 94-98 (Christian Joerges et al. eds., 2004)

decisionmaking authority at the most decentralized level possible also tends to align cost-bearers and beneficiaries from governmental interventions, which minimizes externalities and internalities, improves accountability, and preserves legitimacy.<sup>57</sup>

#### 4. *Efficacy*

Concerns as to whether international cooperation can actually be achieved and effective global governance established create additional skepticism about supranational decisionmaking. As a theoretical matter, transaction costs rise as the number of people or entities to be coordinated grows,<sup>58</sup> and at some point the costs of coordination outweigh the benefits.<sup>59</sup> As a result, many national officials and citizens worry about the practical implications of turning over responsibility for important domains of policy to an ineffectual United Nations and about the efficacy of international policy initiatives generally.<sup>60</sup> As decisionmaking powers are increasingly delegated to administrative or other unelected organizations, questions about the technical and practical efficacy of delegated decisions may also multiply.

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(arguing that the EU has achieved legitimacy despite a democratic deficit by protecting values rightly addressed at the supranational level and establishing procedural rules to reach rational outcomes).

57. See E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985) (making the case for aligning cost bearers and beneficiaries); Mancur Olson, Jr., *Strategic Theory and Its Applications—The Principle of “Fiscal Equivalence”: The Division of Responsibilities Among Different Levels of Government*, 59 AM. ECON. REV. 479, 482 (1969) (developing the theory of “internalities”).
58. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).
59. See Daniel C. Esty & Robert Mendelsohn, *Moving from National to International Environmental Policy*, 31 POL’Y SCI. 225 (1998) (laying out a cost-benefit theory of international-scale policymaking).
60. See Paul F. Diehl, *Introduction to THE POLITICS OF GLOBAL GOVERNANCE: INTERNATIONAL ORGANIZATIONS IN AN INTERDEPENDENT WORLD* 1, 3, 5 (Paul F. Diehl ed., 1997) (casting doubt on the efficacy of international organizations); see also James Bohman, *International Regimes and Democratic Governance: Political Equality and Influence in Global Institutions*, 75 INT’L AFF. 499, 499 (1999); Tanja Brühl & Volker Rittberger, *From International to Global Governance: Actors, Collective Decision-Making, and the United Nations in the World of the Twenty-First Century*, in *GLOBAL GOVERNANCE AND THE UNITED NATIONS SYSTEM* 1, 21-22 (Volker Rittberger ed., 2001).

5. *Accountability*

The core criticism of global governance can be traced to the lack of electoral underpinnings for decisionmaking at the international level.<sup>61</sup> Democracy is seen in the modern day as fundamental to legitimate governance.<sup>62</sup> Elections not only justify the exercise of power, they also provide a critical mechanism for accountability: electoral defeat. They create incentives for officials to be representative and to stay connected to the interests of their constituents. When power is wielded without electoral accountability, the theory goes, all sorts of mischief are possible. Specifically, officials may pursue policy outcomes that advance their own interests rather than those of the public. This might entail an expanded bureaucracy, outright corruption, or accepting inducements to steer decisions in certain directions. The absence of public-mindedness or neutrality might also lead to public choice failures and special interest capture of the policy process.<sup>63</sup>

There is, however, no representative global public to hold power-wielders in the international domain accountable.<sup>64</sup> Globalization and the emergence of worldwide norms in some realms, such as human rights, may be creating a limited global community,<sup>65</sup> but without an acknowledged public there

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61. See Robert A. Dahl, *Can International Organizations Be Democratic? A Skeptic's View*, in *DEMOCRACY'S EDGES*, *supra* note 11, at 19; Johan Galtung, *Global Governance for and by Global Democracy*, in *ISSUES IN GLOBAL GOVERNANCE* 195, 197 (1995) (emphasizing that "the world is not a global democracy"); Pippa Norris, *Representation and the Democratic Deficit*, 32 *EUR. J. POL. RES.* 273 (1997) (focusing on representational problems in the EU).
62. See Bodansky, *supra* note 23, at 599 (noting that democracy has become "the touchstone of legitimacy"). *But see* Edward L. Rubin, *Getting Past Democracy*, 149 *U. PA. L. REV.* 711, 773-83 (2001) (arguing that the legitimizing role of elections is overstated and that the modern administrative state offers many other more important elements of government-citizen interaction).
63. See, e.g., David A. Dana, *Overcoming the Political Tragedy of the Commons: Lessons Learned from the Reauthorization of the Magnuson Act*, 24 *ECOLOGY L.Q.* 833, 835-37 (1997) (explaining how special interests may capture government apparatuses); Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 *ENVTL. L.* 1, 9 (1994) (noting that intensely interested groups may come to dominate regulation).
64. See Grant & Keohane, *supra* note 45, at 33. *But see* Steve Charnovitz, *Accountability of Nongovernmental Organizations (NGOs) in Global Governance* 1, 9 (George Washington Univ. Law Sch., Pub. Law & Legal Theory Research Paper Series, Paper No. 145, 2005), available at <http://ssrn.com/abstract=716381> (arguing that the absence of a representative public is not unique to international governance given the vagueness of the public at any governance level).
65. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935, 2005 (2002) (arguing that human rights treaties have an "expressive function" that supports worldwide norms); see also RODGER A. PAYNE & NAYEF H. SAMHAT, *DEMOCRATIZING GLOBAL*

remains an important question about whom international officials have in mind when they pursue “the public interest.”<sup>66</sup>

### 6. *Lost National Sovereignty*

If limited accountability stands as the most prominent complaint about supranational governance, the related issue of lost national sovereignty comes in a close second. The concept of sovereignty itself has come under intense scholarly scrutiny in recent years.<sup>67</sup> If nation-states exercise total sovereign power, we must anticipate a world of noncooperation, free-riding, and inadequate provision of global public goods. But excessive central power can lead to suboptimal results for all the reasons outlined above. Thus, some compromise must be reached between strong nation-state sovereignty and centralized supranational control.<sup>68</sup>

An enduring commitment to the principle of national sovereignty is most strongly visible among national political leaders whose power would be constrained by the presence of a layer of governance above them. Many political communities, particularly nation-states, wish to retain control over policymaking, at least with regard to certain aspects of their destiny.<sup>69</sup> Those in strong states are most likely to object to any regime of global governance that limits their control. Processes that rely upon a one-nation, one-vote decision mechanism that could result in a majority of weak nation-states imposing its will on the strong are particularly suspect.<sup>70</sup> One might therefore anticipate that hegemonic nations, such as the United States in the present day, would

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POLITICS: DISCOURSE NORMS, INTERNATIONAL REGIMES, AND POLITICAL COMMUNITY 28-33 (2004) (arguing that there exist some global-scale political communities).

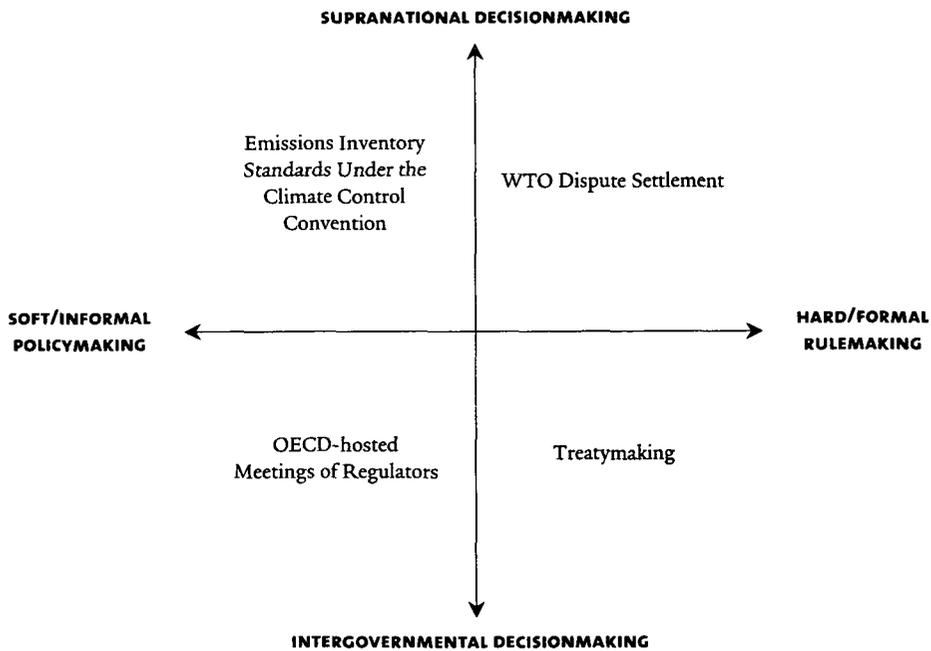
66. Some scholars suggest that accountability might be provided by an “imagined community.” BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (2d ed. 1991).
67. Stephen Krasner has described the term as “organized hypocrisy.” STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999); see also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* (1995); John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT’L L. 782 (2003); Marc A. Levy et al., *Improving the Effectiveness of International Environmental Institutions*, in *INSTITUTIONS FOR THE EARTH* 397, 415-17 (Peter M. Haas et al. eds., 1993).
68. See Rui J.P. de Figueiredo, Jr. & Barry R. Weingast, *Self-Enforcing Federalism*, 21 J.L. ECON. & ORG. 103 (2005).
69. See, e.g., Spiro, *supra* note 4, at 9-10.
70. See Michael Lind, *One Nation, One Vote? That’s Not Fair*, N.Y. TIMES, Nov. 23, 1994, at A23 (explaining why majoritarian voting makes no sense in the international context).

strongly prefer an international regime with little structure in which the realities of power dictate outcomes.<sup>71</sup>

*D. Legitimacy in Question*

It is striking that some supranational governance activities go virtually unnoticed, while others generate great controversy and consternation about limited accountability and lost national sovereignty. Although adherence to principles of good governance is important whenever international authorities play a role, legitimacy questions—and a special need for procedural rigor—arise in only a subset of cases. Two institutional issues related to the depth or “thickness” of supranational governance emerge as important: (1) who holds the decisionmaking authority and (2) how formal and binding the results of the international decision-process are. These issues (along with illustrative governance activities) can be arrayed on intersecting spectrums to form Matrix 1 below.

**Matrix 1.**  
DEPTH OF SUPRANATIONAL GOVERNANCE



71. See Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 319, 325-26 (2005).

At the purely intergovernmental end of the vertical axis, the governance activities could amount to little more than an international organization providing a forum for negotiations among officials from nation-states. At the supranational end of the axis, international institutions may exercise substantial policymaking autonomy.<sup>72</sup> Supranational governance does not, of course, emerge spontaneously. National governments must contract for decisionmaking authority to be lodged at the supranational level. Nation-states will tend to engage in such delegation when they believe that it is in their best interest to do so, based on potential gains (e.g., lower transaction costs, a capacity for burden-sharing, reduced uncertainty) in responding to collective action problems.

Rulemaking in the international realm also varies by its degree of formality, which can be described by a spectrum from hard to soft law. On this horizontal axis, the binding obligations produced through treaties stand at the formal or hard law end of the spectrum.<sup>73</sup> As one moves toward the more informal or soft law end of the spectrum, one finds a range of international dialogues that generate rules, norms, and lower-order guidelines. Even further along the spectrum are discussions that lead to agreements on procedures or that simply result in the exchange of information or performance evaluations. At this informal end of this spectrum, policy influence exists only to the extent that national officials adopt model rules or regulatory practices, minimizing the danger of lost sovereignty and diminished accountability.<sup>74</sup>

In the lower-left quadrant of this matrix, the decisionmaking is largely carried out by national officials and the results are generally informal in nature. This translates into thin global governance and limited legitimacy concerns. As one moves toward the upper-right quadrant, both the degree of formality and the autonomy of international officials rise, and legitimacy questions emerge with more force. In this zone, the need for an administrative law regime intensifies because the authority exercised by supranational institutions can significantly limit the actions of domestic governments.

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72. See Stone Sweet & Sandholtz, *supra* note 1, at 1, 10.

73. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421-22 (2000) (contrasting hard law—"legally binding obligations"—with soft law—"weakened" legal arrangements); R.R. Baxter, *International Law in Her "Infinite Variety"*, 29 INT'L & COMP. L.Q. 549, 554 (1980) (describing soft law as legal obligations that are not susceptible to enforcement); Nye, *supra* note 29, at 167 (describing "[s]oft co-optive power").

74. Note that even "soft" global governance may provoke a sovereignty-based backlash. The furor over the citation of international legal precedents in U.S. Supreme Court opinions provides a recent example. See Jeffrey Toobin, *Swing Shift*, NEW YORKER, Sept. 12, 2005, at 42, 43 (discussing the backlash against Justice Kennedy's invocation of foreign law).

It is important to note that legitimacy will not be a major issue in the lower-right quadrant, where treaty-making occurs, because the decision-making authority lies largely with national officials with high levels of democratic legitimacy. In the upper-left quadrant, however, attention will need to be paid to legitimacy given the potential exercise of judgment by international officials. But the informality of the output in the upper-left quadrant blunts this pressure to some degree.

In sum, more formality and greater delegation to supranational authorities brings the legitimacy of the governance process into question. This dynamic creates pressure for a system of administrative law as a means of legitimating certain kinds of policymaking. Note, for example, that as the European Union's (EU) rulemaking has expanded, skepticism about the legitimacy of actions taken in Brussels has grown as well.<sup>75</sup> In turn, the EU has moved toward a more robust regime of administrative law—perhaps to defend its expanded authority or to justify further expansion of its governance role.<sup>76</sup>

As many scholars have suggested, the process of defining and organizing rules is central to institutionalizing any supranational governance process.<sup>77</sup> Thus, the growth of activities that fall into the upper-right quadrant is a particular driver for globalized administrative law. International organizations with greater legitimacy, undergirded by appropriate rulemaking procedures, are likely to be given more authority. These forces combine in an iterative process in which institutional design and administrative law evolve alongside authority and legitimacy.

Refined decision-making rules and procedures are nonetheless useful across the full matrix as they help to ensure that standards of good governance are met, no matter how thick the international policymaking role becomes. In brief, Matrix 1 helps to predict, in a positive sense, where we might expect to find a demand for global administrative law emerging.

#### *E. Balancing the Costs and Benefits of Supranational Governance*

Legitimacy is also a function of the type of issue under consideration by the decision-making body. When a matter is largely scientific or technical, having designated supranational experts address the problem may be uncontroversial.

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75. See, e.g., Heinz Hauser & Alexia Müller, *Legitimacy: The Missing Link for Explaining EU-Institution Building*, 50 *AUSSENWIRTSCHAFT* 17, 28-29 (1995); see also Joel P. Trachtman, *L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 *HARV. INT'L L.J.* 459 (1992) (examining EU legitimacy issues).

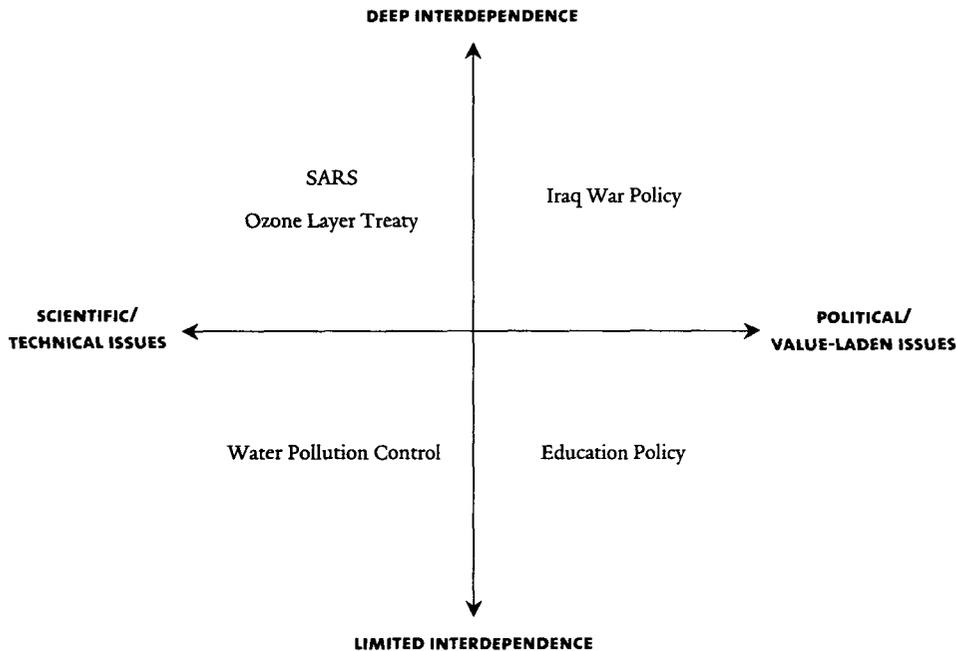
76. See JÜRGEN SCHWARZE, *EUROPEAN ADMINISTRATIVE LAW* (1992).

77. See Stone Sweet & Sandholtz, *supra* note 1, at 16-17.

As an issue becomes more political or normatively charged, however, delegation to those lacking electoral legitimacy becomes increasingly problematic. The more sharply values diverge, the more intense will be the stress on the decisionmaking process. At the same time, issues implicating deeper international interdependence promise higher payoffs to collective action, thus increasing the value of global governance.

**Matrix 2.**

**COSTS AND BENEFITS OF SUPRANATIONAL GOVERNANCE**



In Matrix 2, the benefits of supranational collaboration are played off against the costs of shifting the locus on governance to the supranational level. The vertical axis represents a scale from deep interdependence (where the benefits of supranational policy coordination are highest) to limited interdependence (where the payoff of internationalized decisionmaking will be smaller). The horizontal axis offers a spectrum from purely scientific or technical policy choices to deeply political ones with the potential for significant normative divergence across countries, reflecting the rising cost of supranational governance.

In the upper-left quadrant, where interdependence is substantial but the issues are relatively narrow and technical, delegation to international bodies is least problematic.<sup>78</sup> The SARS crisis, in which the WHO played a leading role, and the effort to phase out chlorofluorocarbons (CFCs) that damage the Earth's protective ozone layer, in which the United Nations Environment Program (UNEP) organized the global response, are examples of activities in this quadrant. The trade liberalizing work of the Global Agreement on Tariffs and Trade (GATT) in its early years also fell largely into this zone. Recently, however, trade policy has become much more political, so the work of the WTO is edging toward (and in some cases is in) the upper-right quadrant.

For issues in the highly political upper-right quadrant, questions about the degree of delegation to supranational officials and entities are likely to emerge despite the fact that a high degree of interdependence promises significant returns to international cooperation.<sup>79</sup> Operating in this zone of greater political sensitivity requires more fully developed procedures to establish the legitimacy of policymaking.<sup>80</sup>

Supranational authorities operating in the lower-left quadrant would be expected to have narrow authority to act given limited interdependence. Activities with a scientific or technical focus, such as data exchange or policy benchmarking, however, may offer some benefits at low cost, meaning an international body working in this zone will not face too much hostility.

In the lower-right quadrant, delegation to international bodies will be most resisted and the legitimacy of global-scale governance hardest to establish given the combination of high political sensitivity and low interdependence. International bodies exercising authority in this zone must tread lightly and have firmly established procedures for deferring to national governments. In fact, almost no international organizations seek to operate in this space.<sup>81</sup>

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78. See Peter L. Lindseth, *The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration Since the 1950s*, 37 *LOY. L.A. L. REV.* 363, 364-65 (2003).

79. See Devesh Kapur, *The Changing Anatomy of Governance of the World Bank*, in *REINVENTING THE WORLD BANK* 54, 68 (Jonathan R. Pincus & Jeffrey A. Winters eds., 2002) (discussing the increased politicization of the World Bank).

80. Mechanisms to dodge issues that are "too political" may also be needed. See *infra* Subsection III.A.4.c (discussing the principles of "derogation" and "declination").

81. One minor exception is the OECD, which does provide a forum for information-exchange among national officials, even on low interdependence, highly political issues such as education policy. In this domain, however, the OECD confines itself to a narrow convener role and does not seek to establish rules or even soft guidelines. See James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 *LAW & CONTEMP. PROBS.* 189, 217-20 (2005).

Taken together, Matrices 1 and 2 demonstrate the interplay between institutions and issues in determining the legitimacy of supranational governance. When interdependence is significant, we can expect some movement toward supranational policymaking, but only if the decisionmaking body has developed an institutional design that provides a foundation of legitimacy commensurate with the highly political nature of the issues to be addressed. Given the centrality of procedural legitimacy, investments in global administrative law should be made when the logic supporting supranational decisionmaking is strong but the existing governance structure lacks a sufficient set of rules and procedures to legitimate policymaking.

Whatever supranational activities are to be undertaken must promise benefits that exceed the costs from the perspective of the participating nation-states.<sup>82</sup> This is where global administrative law comes into play. Delegating decisionmaking always invites legitimacy questions,<sup>83</sup> but a regime of carefully established rulemaking procedures promises to contribute directly to the perceived legitimacy of supranational policymaking and to provide a critical tool for indirectly maximizing the benefits of global governance. This potential will be spelled out in greater detail in Parts II and III below.

The interplay of the matrices highlights the fact that good governance helps to legitimate authority and that organizations with supranational authority tend to come under pressure to adopt better governance practices. For example, as the international trade agenda has become increasingly politicized, the WTO's institutional design has been critiqued as inadequate to the governance task it has been asked to take up. In response, the WTO has moved to address its legitimacy crisis.<sup>84</sup> Whether the organization's administrative structure and capacity to deliver good governance has kept pace with the increased legitimacy-supporting weight it must bear is a matter of ongoing debate.

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82. See, e.g., Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999) (spelling out a theory of international law based on what serves state interests); Oona Hathaway, *The Cost of Commitment*, 55 STAN L. REV. 1821, 1825 (2003) (noting that compliance with treaties depends on how countries view these costs and benefits).

83. See, e.g., JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* (1978) (discussing the history of U.S. administrative law as an extended crisis over legitimacy); Ernest Gellhorn, *Administrative Law in Transition*, 38 ADMIN. L. REV. 107 (1986).

84. See Daniel C. Esty, *The World Trade Organization's Legitimacy Crisis*, 1 WORLD TRADE REV. 7 (2002); Carrie Wofford, *A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT*, 24 HARV. ENVTL. L. REV. 563 (2000) (observing the professionalization of WTO adjudication).

## II. FOUNDATIONS FOR SUPRANATIONAL GOOD GOVERNANCE

In this Part, I explore six types of legitimacy: democratic, results-based, order-derived, systemic, deliberative, and procedural. Each provides a logic for the acceptance of political authority, including supranational policymaking. In some cases, they may reinforce each other. In other circumstances, they may be in tension.

### A. Democratic Legitimacy

In the modern democratic tradition going back to Rousseau, the right to exercise power has been connected to the expression of majority will, making legitimacy a function of electoral success.<sup>85</sup> Many scholars thus see democratic foundations for the exercise of power as the sine qua non of legitimacy.<sup>86</sup> To the extent that this is true, global governance is doomed to illegitimacy.<sup>87</sup> Indeed, Dahl and others steeped in the Rousseauian electoral tradition cast doubt on whether global governance can ever be legitimate.<sup>88</sup> The EU's democratic deficit, for example, has become a major topic of scholarly discussion and similar concerns have been focused on other supranational governance efforts.<sup>89</sup>

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85. See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Maurice Cranston trans., 1968) (1762); see also Hauser & Müller, *supra* note 75, at 29 (discussing the EU's lack of electoral legitimacy).
86. See DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER* 17-18 (1995); Bodansky, *supra* note 23, at 599 (stating that democracy is the "touchstone of legitimacy in the modern world").
87. See Rubinfeld, *supra* note 49, at 2020-22 (concluding that international law and global governance are "antidemocratic" but acknowledging that democracy is not the only value to be desired).
88. See Dahl, *supra* note 61; James Tobin, *A Comment on Dahl's Skepticism, in DEMOCRACY'S EDGES*, *supra* note 11, at 37, 38 (agreeing with Dahl from an economist's perspective).
89. See, e.g., FRITZ W. SCHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* 14-16 (1999) (discussing sources of legitimacy in the European context); Lindseth, *supra* note 56 (arguing that neither the EU nor other supranational bodies can become fully constitutional organizations as they lack a demos); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 490 (2001) (discussing the "democracy-legitimacy" deficit); J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT'L L. & BUS. 354 (1996). In the face of a perceived democratic imperative for international governance legitimacy, David Held has called for global-scale elections and an "assembly of democratic peoples." HELD, *supra* note 86, at 273. Richard Falk and Andrew Strauss have similarly called for the creation of a global parliament. Richard Falk & Andrew Strauss, *Toward Global Parliament*, FOREIGN AFF., Jan./Feb. 2001, at 212, 213.

Direct election of international officials seems unlikely any time soon. But this fact does not end the discussion about the legitimacy of global-scale policymaking.<sup>90</sup> While democratic legitimacy based on majority voting is useful as a foundation for governing authority, direct electoral underpinnings are not necessary for good governance.<sup>91</sup> International policymaking can have authority even without direct elections.<sup>92</sup> Surrogate politics and a degree of quasi-democratic legitimacy can be established through mechanisms that force supranational authorities to be more attentive to their representativeness and accountable to the public(s) they serve.<sup>93</sup>

Moreover, identity with the decisionmaker (rather than electoral democracy) may be essential for public acceptance of political authority. People today may feel connected to political processes at various levels, giving each level a degree of legitimacy.<sup>94</sup> For instance, residents of Barcelona might simultaneously feel themselves to be Catalán, Spanish, and European, making legitimate governance at each of these levels possible. Thus, decisionmaking procedures that connect the public to policymakers and engage citizens in a political dialogue can be used to create the sense of identity needed to establish a degree of democratic legitimacy.<sup>95</sup>

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90. Elections, of course, do not guarantee legitimacy. They may yield leaders who become undemocratic, or the elections themselves might not be fair or representative. More subtle challenges to the representativeness of elected officials might also be raised with regard to their positions on matters that were not debated during the campaign, issues of secondary importance on which the winner's position may not reflect the majority will, or voting system anomalies of the sort that Arrow has identified. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951).

91. See Samuel Brittan, *Democracy Alone Is Simply Not Enough*, *FIN. TIMES*, May 13, 2005, at 15 (arguing that majority rule is an inadequate basis for governing authority).

92. See Thomas M. Franck, *Legitimacy in the International System*, 82 *AM. J. INT'L L.* 705, 751-59 (1988) (describing various mechanisms by which international institutions can have authority); Joseph S. Nye, Jr., *Globalization's Democratic Deficit: How To Make International Institutions More Accountable*, *FOREIGN AFF.*, July/Aug. 2001, at 2, 3.

93. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *AM. J. INT'L L.* 46, 51 (1992) (stressing that legitimacy is always a matter of degree).

94. In the EU context, many people have adopted multiple layers of "citizenship." See J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 *EUR. L.J.* 219 (1995) (developing the concept of critical citizenship).

95. See, e.g., Steffek, *supra* note 56, at 94-98.

*B. Results-Based Legitimacy*

Legitimacy may derive from the expertise of the policymaker and the governing institution's ability to generate social welfare gains.<sup>96</sup> In this neo-Weberian conception, a governance process that produces rational analysis within legal boundaries yielding good outcomes is what matters.<sup>97</sup> Much of Weber's writing focuses on the virtues of bureaucratic governance processes that delegate some policy choices to experts whose knowledge, focus, neutrality, and insulation from politics promise systematically superior decisionmaking outcomes.<sup>98</sup>

The modern American administrative state arising out of the New Deal largely reflects this expertise- and results-based orientation to policymaking legitimacy.<sup>99</sup> Weberian legitimacy is especially important in the international realm: A demonstrated capacity to deliver good outcomes has been the main attraction to nation-states of delegating elements of policymaking to supranational bodies.<sup>100</sup>

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96. The definition of "good" may extend beyond simple utilitarian welfare maximization. Some commentators, for example, argue that results are best judged by whether policy outcomes comport with notions of social justice, which might be a distinct basis for legitimacy. See BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 19-22 (1980). As it is not central to my argument about procedure and administrative law, I treat justice as an element of neo-Weberian ends-based legitimacy as well as Madisonian balance.
97. Cf. 1 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 223 (Guenther Roth & Claus Wittich eds., 1968) (1914) (emphasizing the value of technical decisionmaking); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 *INT'L ORG.* 379, 388 (1999) (discussing the Weberian efficacy standard as one of the key components of legitimacy); Rubin, *supra* note 62, at 720 (suggesting that Weber's technocratic, results-based view shows that democracy has evolved beyond the concept of representative government to a system in which decisionmakers are individuals who are "appointed" and "specially trained," not representative of general public attitudes).
98. See 1 WEBER, *supra* note 97, at 217-26; Lindseth, *supra* note 56, at 632, 633-34 (explaining the national "political and institutional triumph" of the "depoliticized" technocrat and the shortcomings of democratic legitimacy drawn solely from technocratic expertise).
99. See MASHAW, *supra* note 45, at 7-8 (discussing the New Deal's emphasis on "good government" and its suspicion of popular democracy).
100. See Esty, *supra* note 84, at 10 (noting that the legitimacy of the international trading system has long been based on its reputation for delivering social welfare gains). Steffek has taken the Weberian logic one step further and argued that international organizations may be the "perfect bureaucracy." He has argued that there is a high potential for rational-legal legitimacy because the neutrality of international civil servants, who are detached from their local backgrounds and prejudices, heightens their ability to bring expertise and rigorous analysis to bear. Steffek, *supra* note 50, at 261.

### C. Order-Based Legitimacy

Absent mechanisms of governance and collective action, we face a Hobbesian state of nature in which power determines outcomes, making stable and cooperative social relations hard to establish.<sup>101</sup> Questions about how to overcome chaos and promote collective action emerge as central to legitimacy in the governance context and to a growing emphasis on the rule of law.<sup>102</sup>

In his seminal volume, *The Morality of Law*, Lon Fuller stressed that order, particularly as established by the clarity and stability of rules, was a core element of good governance and fundamental to the internal logic of the rule of law.<sup>103</sup> Through his parable of Lex, the lawgiver, he demonstrated that legitimacy turns on having rules and decision-processes that are public and publicized, understandable, stable, and predictable. Fuller's conceptualization highlights the fact that the legitimacy of a governance system derives, at least in part, from its capacity to clarify the rules of the game and thus provide order.<sup>104</sup>

Certain political theorists,<sup>105</sup> common law traditionalists,<sup>106</sup> sociological scholars,<sup>107</sup> and international relations scholars<sup>108</sup> have emphasized the

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101. See THOMAS HOBBS, *LEVIATHAN* 59 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).
102. The focus on order is central in the international realm, particularly for realists and neorealists. See, e.g., KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979); *NEOREALISM AND ITS CRITICS* (Robert O. Keohane ed., 1986); see also THOMAS CAROTHERS, *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* (2006); Thomas Carothers, *The Rule of Law Revival*, *FOREIGN AFF.*, Mar./Apr. 1998, at 95, 95 (discussing the established relationship between the global economy and the rule of law).
103. LON L. FULLER, *THE MORALITY OF LAW* (1964).
104. Gunther Teubner has stressed the similar concept of coherence. Gunther Teubner, *Juridification—Concepts, Aspects, Limits, Solutions*, in *JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST, AND SOCIAL WELFARE LAW* 3 (Gunther Teubner ed., 1987).
105. See, e.g., EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (Frank M. Turner ed., 2003) (1790).
106. See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) (arguing for common law traditionalism); Michael Oakeshott, *Rationalism in Politics*, 1 *CAMBRIDGE J.* 145 (1947) (rejecting rational politics in favor of authority, based on tradition and custom).
107. See, e.g., Steffek, *supra* note 56, at 84-85 (discussing the sociological and empirical evidence on legitimacy); Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 *ACAD. MGMT. REV.* 571, 582-83 (1995) (emphasizing traditional views and norms (or "taken-for-grantedness") as a foundation of legitimacy).
108. Hedley Bull and scholars in the English School of international relations, in particular, make order and security against violence central to their vision of appropriate international

importance of order. Governmental authority may therefore be seen as legitimate, even absent democratic underpinnings or particularly good results, if it is exercised in a fashion that builds on tradition and provides order and stability.

#### D. Systemic Legitimacy

The overarching governance structure also shapes the legitimacy of the policy choices that emerge from the decisionmaking process. Madisonian or systemic legitimacy relies on the dispersion of policymaking responsibilities among contending institutions as a way to protect individual liberty, limit the potential abuses of power, promote fairness and balance, and ensure effective decisionmaking.<sup>109</sup> In the United States, the separation of powers provides legislative, executive, and judicial authorities with certain primary responsibilities and oversight roles.<sup>110</sup> This structure generates a set of checks and balances that extends to unelected decisionmakers' derivative democratic legitimacy through links to those whose authority is founded on electoral success. For instance, the actions of the U.S. Supreme Court are seen as legitimate although the Justices are not elected. They are, however, appointed by the elected President and subject to confirmation by the elected Senate as well as to possible impeachment by the elected Congress. By promoting a robust political dialogue and institutionalizing cross-checks on the exercise of authority, the system as a whole produces pragmatic governance that advances accountability, draws in expertise, equitably distributes the benefits of collective action, and systematically catches errors or anomalies in policymaking.<sup>111</sup>

This sort of Madisonian power-sharing could be especially important supranationally as a substitute for democratic legitimacy and a mechanism for preventing overreaching by international officials.<sup>112</sup> Systemic legitimacy might

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regime. HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 58-68 (2d ed. 1997); Steven Bernstein, *The Elusive Basis of Legitimacy in Global Governance: Three Conceptions* 1, 17, (Inst. on Globalization & the Human Condition, Working Paper Series, Paper No. 04/2, 2004), available at <http://www.humanities.mcmaster.ca/~global/wps/Bernstein.pdf> (discussing Bull and the English School).

109. See *THE FEDERALIST NO. 10* (James Madison); see also MASHAW, *supra* note 45, at 4-6.
110. See Bruce Ackerman, *The New Separation of Powers*, 113 *HARV. L. REV.* 633 (2000) (spelling out how power-sharing works).
111. See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 *GEO. L.J.* 523 (1992) (explaining the interplay between legislative, executive, and judicial authority).
112. See DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* 293 (1987) (arguing that the authority of the international legal order comes from its "overall systemic image").

take the form of a network model of governance that spreads governance responsibilities across several international bodies, leading to a multilayered system of simultaneous cooperation and competition among international organizations and national authorities.<sup>113</sup> Building checks and balances into the global governance system might also provide a way to promote the rule of law, determine whether international officials are acting within the scope of their delegated authority, ensure triangulation on difficult policy choices (which is especially important under conditions of factual uncertainty or normative disagreement), and help to guarantee fair treatment of all nations, economic entities, and individuals.

### *E. Deliberative Legitimacy*

The legitimacy of governance also turns on the dialogue that accompanies rulemaking. As Habermas observed, debate and deliberation promote rationality and improve outcomes.<sup>114</sup> A robust political dialogue that engages multiple perspectives on the issues at hand also creates a sense of ownership of the result, even among those on the losing end of a particular debate. Habermas contended that a structured dialogue, involving competing claims that are thoughtfully debated, tends to lead to more carefully constructed outcomes based on the authority of logic and reason.<sup>115</sup>

In the international policy arena, a transparent decisionmaking process that provides opportunities for debate and political dialogue, with participation by those representing a broad range of views, is a key to legitimacy, substituting for the missing democratic legitimacy and accountability that elections provide.<sup>116</sup> At the same time, constraints on special interest manipulation of the

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113. See Esty & Geradin, *supra* note 37 (discussing a model of co-opetition that combines cooperation and competition among governing entities).

114. See 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* 287 (Thomas McCarthy trans., 1981) (explaining the critical role of deliberation); Steffek, *supra* note 50, at 263 (explaining the discursive foundation for legitimacy that Habermas develops); see also TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 91-92, 98-101, 175-76 (1990) (providing empirical data to support the value of dialogue, authorities' attention to participants' concerns, and procedural fairness of outcomes).

115. See 1 HABERMAS, *supra* note 114, at 286-87 (discussing the dialogic path to rational policy); see also PAYNE & SAMHAT, *supra* note 65, at 20 (discussing Habermas's focus on deliberation as an "inclusive and public discussion of common concerns").

116. See Franck, *supra* note 93, at 51; A. Michael Froomkin, *Habermas@Discourse.Net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749 (2003) (examining the international Internet Standards process as an example of Habermasian discourse); Lindseth, *supra* note 56, at 646-47 (discussing participation and transparency as substitutes for hierarchical authority); Thomas Risse, "Let's Argue!:" *Communicative Action in World Politics*, 54 INT'L

process must be adopted, particularly as a safeguard against a vocal minority dominating a silent or passive majority. And mechanisms for participation must be thoughtfully designed to avoid bogging down the policy process.<sup>117</sup> Simply put, deliberation must be structured carefully so that the gains from the participation in policymaking of business entities, NGOs, and individuals are optimized without losing the capacity to make decisions in a representative and efficient fashion.<sup>118</sup>

#### F. Procedural Legitimacy

Legitimate policymaking also depends on decisionmakers following the right process.<sup>119</sup> A thoughtfully structured rulemaking process will clarify underlying issues, bring facts to bear, promote careful analysis of policy options, and engage interested parties in a political dialogue. When good governance procedures are employed the decisions that emerge will enjoy a degree of inherent legitimacy.

Administrative law both improves the functioning and outcomes of governmental processes and constrains the authority of overreaching officials.<sup>120</sup> In the international domain, where international institutions are relatively weak, the power-directing and efficacy-enhancing role of administrative law takes on even greater significance.<sup>121</sup> A carefully designed

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ORG. 1, 15 (2000) (supporting the theory that robust debate enhances decisionmaking legitimacy).

117. Mashaw has worried that proceduralization may lead to policymaking breakdown by giving power to special interests. See MASHAW, *supra* note 45, at 72.
118. The push for efficiency in a pluralistic context underlay the positive political theory of the 1970s and 1980s, which sought to improve efficiency by cutting back some of the participatory measures of the 1960s. See *id.* at 23. More recent efforts at regulatory reform push this agenda even further. See, e.g., Daniel A. Farber, *Revitalizing Regulation*, 91 MICH. L. REV. 1278 (1993) (book review); Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405 (1996) (highlighting reasons for a new regulatory process); Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689 (2000).
119. See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); Daniel Bodansky, *Legitimacy*, in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (forthcoming 2006) (manuscript at 7-8, on file with author) (discussing how procedures can legitimate authority).
120. See Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 457 (2003) (discussing affirmative and negative administrative law functions).
121. Jerry Mashaw has observed that the early federal government in the United States was rather weak and benefited from a range of creative institutional design innovations to

rulemaking process supported by the tools of administrative law can therefore both directly bring legitimacy and indirectly compensate for and enhance other foundations of legitimacy.<sup>122</sup> Specifically, policymaking that reflects principles of good governance lodged in a regime of administrative law can substitute, in part, for the lack of elections; facilitate access to expertise and thus maximize the chances of welfare-enhancing results; provide a structure and order to policymaking; delimit the exercise of power and advance accountability; and promote dialogue and debate.

Procedural rigor plays a special role in legitimizing governance and the exercise of power because it reinforces and enhances each of the other five sources of legitimacy. In fact, while the other foundations of legitimacy interact to some degree, they may pull in opposite directions as often as they support each other. Decisions that emerge from a Weberian expert bureaucracy, for example, may be prized for their results, but they are likely to be seen as lacking in democratic legitimacy. Procedural legitimacy, and the architecture of administrative law on which it is built, almost always supports the other foundations of legitimacy.

Procedural rigor is especially important in the international policy domain, where the lack of democratic underpinnings and political accountability requires special focus. Rulemaking structures that require decisionmakers to engage in an open policymaking process that draws on a range of views and mandates an explanation for the choices made can go some distance toward addressing issues of representation and accountability.<sup>123</sup> A process that forces decisionmakers to justify their analytic frameworks, assumptions, and policy answers against competing viewpoints, demonstrate that their choices are legal and rational, and subject their results to review and oversight will further enhance the legitimacy of policy outcomes as well as the prospect of social welfare gains.

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solidify its capacity for good governance. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256 (2006).

122. Administrative law can also serve as a shield against sources of illegitimacy such as bias, illegality, secrecy, or disregard of scientific evidence and rational arguments. See Bodansky, *supra* note 119 (manuscript at 21).
123. See Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123 (1998) (arguing that WTO decisionmaking would be enhanced by links to NGOs); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 675-77 (1998) (discussing how actors are empowered to participate in the transnational legal process and the need to expand the participation of various actors); Kal Raustiala, Note, *The "Participatory Revolution" in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537, 567, 571 (1997) (describing NGOs' representation of stakeholder interests).

The following Part proposes a slate of procedural tools, drawn from administrative law, to apply to supranational governance. As the discussion above indicates, a regime of basic global administrative law can help to legitimate supranational policymaking and provide a degree of political accountability, even when the link to elections is remote.

### III. BUILDING GLOBAL ADMINISTRATIVE LAW

There is much talk in both policy and academic circles about good governance, although only recently have scholars begun to define this term in a rigorous way.<sup>124</sup> In this Part, I specify a series of administrative law tools and strategies that could be used to promote good governance and legitimize policymaking in the international domain. To be clear, I do not seek to specify in any absolute sense what constitutes good governance. Rather, I simply wish to demonstrate a theoretically coherent connection between the deployment of a set of administrative-law-derived tools and the potential to enhance policymaking legitimacy at the global scale.

Ultimately, just as legitimacy depends in some circumstances more on one foundation than another, the most critical elements of good governance will vary depending on the policy setting. And just as the sources of legitimacy interact in complex ways—reinforcing and substituting for each other and sometimes working at cross purposes—the elements of good governance will at times be mutually supporting and at other times be in tension.<sup>125</sup> Despite this caveat, cataloguing the various attributes of good governance clarifies how the decisionmaking process and the structure of administrative law that undergirds it can enhance legitimacy and promote effective and efficient policymaking.

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124. See, e.g., Carlos Santiso, *International Co-Operation for Democracy and Good Governance: Moving Towards a Second Generation?*, 13 EUR. J. DEV. RES. 154 (2001) (reviewing the evolution of the good governance issue in relation to democracy assistance); John Williamson, *Democracy and the "Washington Consensus,"* 21 WORLD DEV. 1329 (1993) (looking at good governance in the development context). Most academic analyses have focused on defining governance legitimacy, not on good governance per se. See, e.g., FREEDMAN, *supra* note 83, at 261-62 (focusing on justice and effective government); Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 19, 21-22 (2001) (discussing reason as a component of legitimacy and introducing bases for defining adjudicative legitimacy).

125. As Mashaw has noted, "our aspirations for governance are multiple and conflicting." Jerry L. Mashaw, *Structuring a "Dense Complexity": Accountability and the Project of Administrative Law*, ISSUES IN LEGAL SCHOLARSHIP, Mar. 2005, at 1, 12, <http://www.bepress.com/ils/iss6/art4>.

### A. A Global Administrative Law Toolbox

A number of administrative law strategies, approaches, and tools may prove to be useful to advance good supranational governance.<sup>126</sup> Some of these tools can be drawn directly from the domestic administrative law context;<sup>127</sup> others will need to be modified for international application. Building on governance practices in the United States, EU, and elsewhere, I provide below a basic global administrative law toolbox arrayed in four functional clusters: (1) controls on self-dealing, corruption, and special interest influence; (2) systematic and sound rulemaking; (3) transparency and public participation; and (4) power-sharing.<sup>128</sup>

#### 1. Controls on Corruption, Self-Dealing, and Special Interest Influence

A number of administrative law tools help to ensure that delegated decisionmaking does not suffer from agency problems, including corruption or bias based on self-interest.<sup>129</sup> The need for neutral and public-minded officials applies across the full spectrum of global governance institutions and activities, without regard to whether the role of these officials is mere coordination of

126. See Kingsbury et al., *supra* note 23, at 25-27 (discussing a need for global administrative law to provide principles and mechanisms of accountability in the “global administrative space”). Interest is growing in global administrative law “tools.” See, e.g., Stewart, *supra* note 24, at 88-107; Benedict Kingsbury et al., *Administrative Law and Global Governance: Research Project Outline 7* (June 2003) (unpublished manuscript, on file with author). The present Article is the first attempt to connect the potential tools to decisionmaking legitimacy and good governance in a theoretically rigorous manner.

127. See Stewart, *supra* note 24 (examining the potential applications of American administrative law to the global context).

128. See ADMINISTRATIVE LAW OF THE EUROPEAN UNION, ITS MEMBER STATES, AND THE UNITED STATES: A COMPARATIVE ANALYSIS (René Seerden & Frits Stroink eds., 2002) [hereinafter ADMINISTRATIVE LAW OF THE EU]; JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM (5th ed. 2003); Tom Ginsburg, *Dismantling the “Developmental State”? Administrative Procedure Reform in Japan and Korea*, 49 AM. J. COMP. L. 585 (2001); Joon-Hyung Hong, *Administrative Law in the Institutionalized Administrative State*, in RECENT TRANSFORMATIONS IN KOREAN LAW & SOCIETY 47 (Dae-Kyu Yoon ed., 2000); Jun-Gen Oh, *The Characteristics and Results of Korea’s Administrative Regulations Reform*, in RECENT TRANSFORMATIONS IN KOREAN LAW & SOCIETY, *supra*, at 73; Stewart, *supra* note 24, at 73 (describing U.S. administrative law as a “common set of principles and procedures that cut horizontally” across “substantive fields of administration and regulation”).

129. See Grossman & Hart, *supra* note 44; Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

national officials or full-blown supranational decisionmaking. The prevention of self-dealing is fundamental to good governance and legitimacy.

*a. Conflict of Interest Rules*

Nothing is more corrosive to governmental legitimacy than corrupt decisionmaking.<sup>130</sup> Preventing those who are participating in international decisionmaking processes from benefiting personally from the choices they make is an important starting point in ensuring unbiased decisionmaking.<sup>131</sup> Conflict of interest rules should therefore require disclosure of personal (including family) financial interests, limits on financial holdings that would be affected by one's official actions, and recusal from participation in decisions in which one's own interests are more than nominally involved. Antinepotism principles for hiring and contracting, funding of research or other governance activities, and limitations on gifts further support transparency, promote objectivity, and limit special interest manipulation.<sup>132</sup>

*b. Inspections and Audits*

Inspection and audit mechanisms are well established in many governance contexts, including the corporate world and governments at all levels. In the context of global governance, increased use of auditing would check

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130. See SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM*, at xi (1999) (pointing out the need to confront corruption when addressing international development issues); TRANSPARENCY INT'L, *GLOBAL CORRUPTION REPORT 2005* (2005), available at <http://www.globalcorruptionreport.org>; WORLD BANK, *REFORMING PUBLIC INSTITUTIONS AND STRENGTHENING GOVERNANCE 22* (2000), available at <http://www1.worldbank.org/publicsector/Reforming.pdf>.

131. Meinhard Schröder, *Administrative Law in Germany*, in *ADMINISTRATIVE LAW OF THE EU*, *supra* note 128, at 91, 121 (noting that section 22 of Germany's Law of Administrative Procedure excludes some individuals from the administrative process to ensure impartiality and provides for voiding of decisions made by individuals with conflicts of interest).

132. Some international bodies have such rules. See, e.g., COMM'N FOR ENVTL. COOPERATION, N. AM. AGREEMENT ON ENVTL. COOPERATION, *JOINT PUBLIC ADVISORY COMMITTEE RULES OF PROCEDURE*, annex A (2002) [hereinafter CEC R. COMM. P.], available at [http://www.cec.org/files/PDF/JPAC/JPA-dec-2002\\_en.pdf](http://www.cec.org/files/PDF/JPAC/JPA-dec-2002_en.pdf) (preventing members from soliciting or accepting gifts from "any source that would compromise their independence"); STAFF REGULATIONS OF THE WORLD HEALTH ORG. R. 1.7 (2006) (on file with author) [hereinafter WHO STAFF REGS.] (preventing staff from accepting gifts, favors, honors, and other benefits "if such acceptance is incompatible with [their] status as an international civil servant").

corruption, promote efficacy, and enhance accountability.<sup>133</sup> Regularly scheduled policy reviews, audits, or inspections of decisionmaking procedures and outcomes by independent third parties would help to ensure that good governance tools and procedures are actually being practiced by international bodies. Audit results should be reported openly and promptly, to applicable officials, institutions, and the public at large. Those whose activities or choices are challenged should be obligated to respond formally to the issues raised. Negative findings (of waste, corruption, mismanagement, or special interest manipulation) might, in the short run, weaken legitimacy.<sup>134</sup> In the long run, however, inspections and audits will enhance the credibility of supranational decisionmaking by helping to guarantee neutrality and public-mindedness.

*c. Lobbying Disclosure*

One of the most important aspects of good governance is the ability to understand who has shaped the outcome of the policymaking process—and whether the results have been distorted by special interests. Public choice failures of this sort can be controlled in part by a requirement that nongovernmental officials (lobbyists) who participate directly in policymaking activities be registered and required to disclose their contacts with decisionmakers. Lobbying disclosure rules are increasingly recognized as fundamental to neutrality, transparency, and the capacity to control special interest manipulation of the decisionmaking process.<sup>135</sup> It would not be hard to establish a principle that mandates reporting on who has contacted decisionmakers and that requires disclosure in a public docket of any information they imparted.<sup>136</sup> To preserve neutrality, *ex parte* contacts or other special access by some participants in the decision-process should be forbidden or, at least, disclosed.

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133. A good example of global auditing is the U.N.'s Office of Internal Oversight Services, which audits the U.N.'s internal operations. See United Nations Office of Internal Oversight, <http://www.un.org/Depts/oios> (last visited Feb. 26, 2006).

134. Indeed, the legitimacy of the U.N. has been badly undermined by the "Oil for Food" scandal. See *The United Nations: A Nasty Smell*, *ECONOMIST*, Aug. 13, 2005, at 26, 26-27.

135. See, e.g., Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601-1616 (2000).

136. The influence of lobbyists could be put into context if lobbyists were required to report on (1) who they represent, (2) who funds their activities, (3) who they have contacted, and (4) what they have said to their contacts.

## 2. *Systematic and Sound Rulemaking*

Administrative law can contribute to thorough policy analysis, robust political review, and good rulemaking in a number of ways. The requirements outlined below promote good governance by bringing neo-Weberian expertise to bear in the policy context and by providing clarity, order, stability, and predictability of the sort Fuller stressed as essential to rulemaking legitimacy. A carefully structured decision-process is also essential to power-sharing and systemic legitimacy. Finally, a procedurally sophisticated rulemaking process promotes political debate and decisionmaking based on reasoned analysis and, thus, enhances deliberative legitimacy. The notion that such give-and-take is a path to truth or, at least, systematically superior results over time can be traced not only to Habermas's political theory but also to the scientific method. Global institutions should prize procedures that promote the testing of theories, scrutiny of assumptions, and refinement of thinking based on experience.

The administrative law tools discussed below are likely to have application across a broad spectrum of global governance activities. They will be less useful in emergency circumstances and less necessary at the soft end of the international rulemaking spectrum defined in Matrix 1. They will, however, take on greater importance as more authority and political judgment is exercised supranationally.

### a. *Published Drafts with Notice and Comment*

Clarifying the issues under consideration is a simple but essential starting point for good governance that can be accomplished by framing policy choices through published proposals. In many contexts, it will be useful to have proposals disseminated broadly for review and comment with adequate time for consideration by the full spectrum of parties with an interest in the issue.<sup>137</sup> Such a process tends to ensure that critical issues are identified and fully explored, a wide range of options are considered, all potential affected parties are notified, and a reasoned decision emerges.

Decision-processes that invite interested parties to produce useful data and analysis, test divergent hypotheses and assumptions, and engage a broad set of participants reflecting a range of views, are likely to produce systematically better results over time. Beyond Habermasian deliberation, notice and

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137. See Administrative Procedure Act, 5 U.S.C. § 553 (2000); Ginsburg, *supra* note 128, at 618 (discussing the importance of notice-and-comment procedures in Korea).

comment provide a structured opportunity to gauge rationality, efficacy, clarity, legality, fairness, and efficiency. By putting critical information in the public domain, notice-and-comment processes force decisionmakers to both justify their policy choices and empower a range of stakeholders including opposition political leaders, the media, NGOs, businesses, communities, and academics to question the official wisdom. Thus, notice of a pending policymaking exercise and an opportunity to comment is now a widely accepted aspect of good governance.<sup>138</sup> While there is some risk that such procedures will invite special interest intervention and potentially give greater voice to those with more resources to devote to the policy process,<sup>139</sup> the prospect of distorted outcomes can be addressed through a number of other mechanisms.<sup>140</sup>

*b. Clearly Identified Decisionmaker and Process*

Fullerian legitimacy depends on the identity of the decisionmaker(s) being known and the flow of the decisionmaking process being clear.<sup>141</sup> Knowing who is wielding power is essential to holding decisionmakers accountable. In contrast, black-box processes—in which the decisionmaker and decision-process are obscured—conjure up images of magic or manipulation and the appearance of illegitimacy. In an official WTO dispute resolution, for example, a panel of three publicly identified experts is named to hear the case.<sup>142</sup> While the panelists' identity is known, the taking of evidence occurs behind closed doors, making the process not fully transparent and potentially obscuring the influences that shape WTO panel decisions. In other circumstances, even the

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138. See, e.g., Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art. 6, § 2, June 25, 1998, 2161 U.N.T.S. 447 (“The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner . . . .”); see also Anne-Marie Slaughter, *Agencies on the Loose? Holding Government Networks Accountable*, in TRANSATLANTIC REGULATORY COOPERATION, *supra* note 41, at 521, 529 (arguing that notice-and-comment procedures similar to those required in U.S. administrative law are important when participants in government networks are engaged in policymaking).

139. See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1565-66 (1992) (discussing the capture of the deliberative process by those with superior organization and funding).

140. See the provisions discussed *supra* Subsection III.A.1 and *infra* Subsections III.A.3-4.

141. See Administrative Procedure Act, 5 U.S.C. § 552 (2000) (stating that “each agency shall separately state and currently publish” its substantive rules).

142. See Understanding the WTO: The Panel Process, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm) (last visited Feb. 26, 2006).

identity of the decisionmakers may not be revealed. For instance, when a Climate Change Convention working group develops technical standards for greenhouse gas emissions inventories, international civil servants operating behind the scenes may drive the process.<sup>143</sup> Although these processes are not inherently illegitimate, those playing a role in global governance should be publicly named and the deliberative process they intend to follow should be clearly spelled out.

*c. Documented Decisions*

The rationality of a policy choice can best be evaluated when it is written down, explained, and published.<sup>144</sup> Because delegated decisionmaking is always circumscribed, publication provides a check against the inappropriate and unaccountable exercise of authority. By building understanding, published decisions also advance predictability and reduce future governance costs, thereby promoting clarity, stability, and compliance. Finally, requiring that decisions be documented creates incentives for decisionmakers to observe fairness, due process, and legality.

These legitimacy-enhancing elements of good governance are especially important in the supranational realm. All global-scale policymaking should include written decisions that (1) clearly delineate the legal basis for the policymaking activity and the scope of authority delegated to the decisionmaking body; (2) provide a statement of the public interest that highlights the designated policy ends and presents any critical normative assumptions; (3) outline the rationale for the outcome settled upon, providing a basis for judging whether the choices made were arbitrary or capricious;<sup>145</sup> (4) build on an established administrative record or docket (which also

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<sup>143</sup>. INT'L PANEL ON CLIMATE CHANGE, REVISED 1996 IPCC GUIDELINES FOR NATIONAL GREENHOUSE GAS INVENTORIES REPORTING INSTRUCTIONS 2 (1997), available at <http://www.ipcc-nggip.iges.or.jp/public/gl/guidelin/prefri.pdf>.

<sup>144</sup>. See, e.g., René Seerden & Frits Stroink, *Administrative Law in the Netherlands*, in ADMINISTRATIVE LAW OF THE EU, *supra* note 128, at 145, 169 (noting that, under the Netherlands' General Administrative Law Act, decisions must be based on valid reasons stated at the time a decision is disclosed).

<sup>145</sup>. See Steffek, *supra* note 50, at 250 (discussing the need for justification to legitimize international governance). Avoiding arbitrary and capricious policy choices stands at the heart of American administrative law. See MASHAW ET AL., *supra* note 128, at 509-10; see also SCHWARZE, *supra* note 76, at 584 (stating that "just" treatment requires that government action be "not arbitrary").

facilitates review); (5) respond to criticisms advanced through the notice-and-comment process; and (6) address relevant policy alternatives.<sup>146</sup>

### 3. *Transparency and Public Participation*

Transparency is a core good governance attribute: Open procedures contribute to virtually all of the foundations of legitimacy discussed above.<sup>147</sup> Seeing the decisionmaker in action and observing who has influenced the process is essential to a sense of decisionmaking fairness, rationality, and neutrality, as well as to public understanding of the policy results. In addition to enhancing democratic legitimacy, being able to observe the policy process and contribute to it is fundamental to Habermasian deliberation. Those affected by policymaking processes are much more likely to accept outcomes if they feel that the procedures were fair and due process was provided. While an argument can be made for a degree of secrecy in government-to-government negotiations, the logic of transparency applies in almost all supranational policymaking contexts.

Openness and some opportunity for public participation have thus emerged as nearly universal principles of good governance.<sup>148</sup> As at the domestic level, narrow exceptions should be recognized for confidential business information and material with security sensitivity. Unlike some other administrative law tools, those that relate to transparency are likely to have as

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<sup>146</sup>. See Administrative Procedure Act, 5 U.S.C. § 553(c) (2000) (stating that, following notice, comment, and consideration, an agency shall “incorporate in the rules adopted a concise general statement of their basis and purpose”); *id.* § 556(e) (describing the requirement of an exclusive record for decision); Ginsburg, *supra* note 128, at 610 (explaining the differences in the reforms of Korean and Japanese administrative laws requiring documentation of administrative public matters); Sabien Lust, *Administrative Law in Belgium*, in ADMINISTRATIVE LAW OF THE EU, *supra* note 128, at 30 (discussing a Belgian law on the “formal motivation of individual decisions” that requires administrative authorities to state in their decisions all the “applied legal norms” and facts pertinent to the case); Rob Widdershoven, *European Administrative Law*, in ADMINISTRATIVE LAW OF THE EU, *supra* note 128, at 259, 286 (noting that article 253 of the EC Treaty requires that “regulations, directives and decisions shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to the Treaty”).

<sup>147</sup>. A broad literature on the value of transparency has emerged. See, e.g., FRANCIS FUKUYAMA, STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY (2004); Slaughter, *supra* note 138, at §24.

<sup>148</sup>. See CHAYES & CHAYES, *supra* note 67, at 22; Eva Poluha & Mona Rosendahl, *Introduction: People, Power and Public Spaces*, in CONTESTING ‘GOOD’ GOVERNANCE: CROSSCULTURAL PERSPECTIVES ON REPRESENTATION, ACCOUNTABILITY AND PUBLIC SPACE 1, 1-3 (Eva Poluha & Mona Rosendahl eds., 2002) (arguing that transparency is central to good governance, but that there are different notions of what constitutes transparency across countries).

much value at the technical end of the global governance issue set as they do at the political end. They will also apply with equal vigor at the soft as well as the hard end of the Matrix 1 formality spectrum.

*a. Hearings and Other Opportunities for Public Participation*

Individuals and interest groups should be provided with opportunities to both observe and contribute to policymaking.<sup>149</sup> A public hearing requirement for proposed supranational policies should therefore be considered as a way to promote many elements of good governance. Oversight hearings on existing policies and programs, perhaps conducted by elected national officials, are another useful tool, particularly as a way to maintain accountability. As the links to elected officials stretch, alternative mechanisms to ensure that decisionmakers are aware of the concerns, views, and circumstances of the public become critical. To the extent that officials must explain their policies in open forums in advance of final determinations as well as at oversight hearings afterwards, their incentives to think hard about the choices they are making and whose interests they are advancing are sharpened. Moreover, giving all who have relevant information and positions a chance to advance their ideas in the policymaking process helps to bring expertise to bear, test the prevailing wisdom, and ensure neutrality within the decisionmaking framework.<sup>150</sup>

But participation has a potential downside that must be addressed squarely: the risk that special interests will take advantage of open decisionmaking processes to distort policy outcomes.<sup>151</sup> In this regard,

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149. See Administrative Procedure Act, 5 U.S.C. § 552(b) (2000) (detailing open meeting procedures); Hong, *supra* note 128, at 50-52 (outlining detailed hearing procedures under South Korea's Administrative Procedures Act to fulfill requirements for openness and appropriateness of hearings); Schröder, *supra* note 131, at 120 (noting that Germany's Law of Administrative Procedure includes the right to be heard); Kyu Ho Youm, *Freedom of Expression and the Law: Rights and Responsibilities in South Korea*, 38 STAN. J. INT'L L. 123, 146 (2002).
150. The EU is often criticized for not having sufficient public participation. See Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT'L L.J. 451, 462 (1999) (describing the comitology process as "shrouded in secrecy"); Lindseth, *supra* note 56, at 655 (describing the lack of public participation in the EU). The corporatist model of regulation that the EU employs may mitigate against a need for broad-based participation mechanisms. See Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1293 (1994).
151. See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 202-03 (1997); Martin Shapiro, *Administrative Law*

comitology—the European style of consultative rulemaking with structured roles for business and NGO interests—has been criticized as corporatism that gives undue sway to those with strong views, perhaps ignoring the public interest.<sup>152</sup> The U.S. interest group governance model could be faulted for the same reason. In the supranational governance context, the ability to participate in a meaningful way in policymaking is not evenly distributed across countries or even across interests within nations. Special attention will be required at the global scale to ensure that those whose access to opportunities for participation is limited, particularly in the developing world, are able to exercise their participation rights.<sup>153</sup>

*b. Public Docket, Structured Factfinding, and Option Evaluation*

Having a formal place where comments on policy options are recorded structures public participation and provides a foundation for the decisions that follow.<sup>154</sup> The transparency of publicly docketing comments also clarifies critical issues and encourages deliberation and debate. The existence of a written record, which can later be reviewed to see whether it supports the decision taken, also protects against illegality, overreaching, and self-dealing by

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*Unbounded: Reflections on Government and Governance*, 8 *IND. J. GLOBAL LEGAL STUD.* 369, 372 (2001) (discussing how “outside” interest group participation may undermine democracy).

152. See SUSAN ROSE-ACKERMAN, *FROM ELECTIONS TO DEMOCRACY: BUILDING ACCOUNTABLE GOVERNMENT IN HUNGARY AND POLAND* 6-7, 136-37 (2005) (criticizing power imbalances and uneven representation of interest groups under European corporatism); John R. Bolton, *Should We Take Global Governance Seriously?* 1 *CHI. J. INT’L L.* 205, 218 (2000); Howse, *supra* note 54, at 477-78 (discussing “representativity and inclusiveness difficulties” in the corporatist model); Peter L. Lindseth, *‘Weak’ Constitutionalism? Reflections on Comitology and Transnational Governance in the European Union*, 21 *OXFORD J. LEGAL STUD.* 145, 150-51 (2001) (highlighting the potential for improved transparency in the EU’s system of comitology, but admitting that participation may be limited to interest groups with ample resources).
153. Information technologies make it ever easier and cheaper to be part of a dialogue electronically, even from a great distance. See *GOVERNANCE.COM: DEMOCRACY IN THE INFORMATION AGE* (Elaine Ciulla Kamarck & Joseph S. Nye Jr. eds., 2002); Daniel C. Esty, *Environmental Protection in the Information Age*, 79 *N.Y.U. L. REV.* 115, 160-61, 167-70 (2004); Slaughter, *supra* note 138, at 529 (discussing online discussion procedures).
154. See Administrative Procedure Act, 5 U.S.C. § 556(e) (2000) (describing the requirement for an exclusive record for decision, which includes testimony, exhibits, and all papers and requests from hearings); *id.* § 557 (requiring agencies to publish rulings and decisions in the record and to include findings, conclusions, and reasons or bases for such findings); Lust, *supra* note 146, at 31 (noting that under the principle of legal security in Belgium, all regulations must be published officially); Schröder, *supra* note 131, at 124 (discussing a German citizen’s right to inspect all records that are important for a decision).

decisionmakers. In addition, structured factfinding that sharpens the focus on key issues, highlights assumptions, spells out uncertainties, facilitates debate, and explores alternatives helps to promote clear, efficient, and effective policy results. Finally, the presence of a public docket provides the foundation for an institutionalized cross-check mechanism through which policies are reviewed and mistakes identified.

Transparency plays an especially important role in the international policy context insofar as mechanisms for information-exchange provide decisionmakers with a connection to the public that might otherwise be lacking—advancing representativeness, accountability, fairness, and participation. Thus, a structured factfinding and option-evaluation process is at least partial compensation for the lack of direct electoral ties to the public.

### *c. Access to Information*

Global administrative law should encourage not just transparency but also access to information so as to ensure that those who are interested in an issue have adequate data and analysis to assess the decisions that are being advanced.<sup>155</sup> To make participation in the policy process meaningful, basic information on what is being decided and how it is being decided needs to be made available to all. Thus, a core element of global administrative law needs to be access to information. This commitment might involve a variation on the concept of a Freedom of Information Act (FOIA),<sup>156</sup> and might entail greater use of the Internet to share data and materials.

### *d. Metrics and Measurement*

Data that permits the benchmarking of an organization's performance against other entities carrying out similar functions is one of the best available tools for keeping transaction costs low, minimizing administrative burdens on

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155. See, e.g., Administrative Procedure Act, 5 U.S.C. § 552 (2000) (requiring publication in the *Federal Register* for many agency documents); Schröder, *supra* note 131, at 124 (noting that section 29 of Germany's Law of Administrative Procedure grants participants in hearings the right to inspect records to the extent that information is needed for the participant to defend her legal interests).

156. For a global survey of FOIAs covering over fifty countries, see DAVID BANISAR, *THE FREEDOMINFO.ORG GLOBAL SURVEY* (2004), <http://www.freedominfo.org/survey.htm>.

the regulated community, and promoting rulemaking efficiency.<sup>157</sup> A dynamic of comparative evaluation and regulatory competition across jurisdictions can be triggered by transparency in general, and by publication of quantitative metrics on governmental performance in particular.<sup>158</sup> Publication of indicators tracking the outputs of governance (e.g., pollution levels, disease rates, trade balances) should therefore be encouraged. Institutions involved in international decisionmaking should be required to develop indicators and metrics that track issues of concern, and to collect data on a basis that is comparable across jurisdictions. A data-driven policy evaluation structure that gauges institutional performance can trigger competitive pressures and support a more empirical approach to decisionmaking, thereby contributing to policymaking effectiveness.<sup>159</sup>

#### 4. *Power-Sharing*

Dispersion of authority both vertically (across levels of government) and horizontally (over multiple institutions, agencies, or decisionmakers) is a core element of Madisonian legitimacy. Separation of powers promotes careful decisionmaking, disciplines abuses of power, and institutionalizes a system of policymaking cross-checks.

##### a. *Divided Authority*

Power-sharing and overlapping rulemaking authority soften the edge of all-or-nothing politics by creating multiple decisionmaking spaces in which issues are considered. As a mechanism for obtaining second opinions in rulemaking and review of policy outcomes, shared control of governance also works as a check on self-dealing, analytical errors, and special interest manipulation of the policy process. Multiple nodes of policymaking authority may also produce regulatory competition, promoting efficiency and facilitating

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157. See Daniel C. Esty, *Why Measurement Matters*, in ENVIRONMENTAL PERFORMANCE MEASUREMENT: THE GLOBAL REPORT 2001-2002, at 2-3 (Daniel C. Esty & Peter K. Cornelius eds., 2002).

158. See Daniel C. Esty & Damien Geradin, *Introduction to REGULATORY COMPETITION AND ECONOMIC INTEGRATION*, at xix, xxv (Daniel C. Esty & Damien Geradin eds., 2001) (discussing when and how regulatory competition works best); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (explaining the logic of regulatory competition).

159. See Esty, *supra* note 157, at 2 (explaining the policy value of quantitative measures).

a division of policymaking labor.<sup>160</sup> To the extent that power-sharing promotes political dialogue and policymaking give-and-take, it enhances democratic accountability, reinforces neo-Weberian expertise-based legitimacy, and strengthens Habermasian deliberation.<sup>161</sup>

Administrative law tools that provide checks and balances are especially important in the supranational domain, where one of the fundamental checks on delegated decisionmaking in the domestic context, judicial review, is largely unavailable.<sup>162</sup> The power-sharing arrangements within the United States and other nation-states known for good governance are complex systems that have evolved over many years. No such finely tuned regime of checks and balances presently exists in the international realm. Checks and balances will be most critical in institutional settings in which real authority is being exercised supranationally. Full-blown power-sharing makes sense in institutions with normative rulemaking powers, as political sensitivity will be heightened. The logic of cross-checking applies, however, with equal validity whether governance processes are designed to yield soft or hard outcomes and regardless of whether the issues in question are technical or political.

As supranational governance moves toward the upper-right quadrant of Matrix 1 (supranational/hard law) and Matrix 2 (interdependence/political issues), the web of procedural rigor must be strengthened. For instance, the WTO has come under sharp criticism for its trade and environmental policymaking. When trade officials make decisions outside their recognized zone of competence and authority—e.g., shaping environmental policy—their legitimacy comes under attack.<sup>163</sup> Shared decisionmaking on matters that span trade and environmental policy would make more sense. UNEP, or another

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160. See Esty & Geradin, *supra* note 37, at 238 (discussing horizontal and vertical vectors of regulatory competition and cooperation).

161. See, e.g., Fritz W. Scharpf, *Problem-Solving Effectiveness and Democratic Accountability in the EU* 3-4 (Max Planck Inst. for the Study of Societies, Working Paper No. 03/1, 2003), available at <http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp03-1/wp03-1.html> (discussing the need for “veto positions and complex interdependencies between political actors” and other systems of checks and balances to ensure democratic legitimacy).

162. The EU has emerged as something of an exception to this rule, with both fifty years of experience with the European Court of Justice and an emergent structure of related administrative rules. See J.H.H. WEILER, *THE CONSTITUTION OF EUROPE* 26-29 (1999) (discussing judicial review at the community and member-state levels); Jean-Bernard Auby, *Administrative Law in France*, in *ADMINISTRATIVE LAW OF THE EU*, *supra* note 128, at 59, 83-84 (discussing judicial review in France); Lust, *supra* note 146, at 39-42 (Belgium); Schröder, *supra* note 131, at 126-40 (Germany).

163. See Esty, *supra* note 84 (highlighting the tensions over the environmental policy impacts of WTO policies).

body with technical capacity, might be called upon to advise the WTO on issues such as whether the EU's beef hormone ban is scientifically justified.

*b. Review Mechanisms*

Another fundamental tool of good governance is the second opinion. Administrative law deployed at the global scale should therefore routinely provide a review mechanism or appeal process. Absent a fully functioning judicial system in the international realm, other approaches for ensuring accountability and legality and promoting power-sharing will need to be provided. A commitment to second opinions is essential at the supranational scale, whether the ultimate process involves spreading decisionmaking responsibilities across more than one institution, a broadly defined right to review (perhaps for affected private sector parties and NGOs as well as government officials), or some other reconsideration mechanism.

*c. Principles of Derogation and Declination*

Power-sharing must be undertaken vertically as well as horizontally. Supranational decisionmaking in contested political zones invites legitimacy challenges and may lead to political crises for international organizations. Global administrative law should therefore include flexibility mechanisms to accommodate intense national political pressures. A provision that permits national governments to derogate from supranational policy prescriptions under certain confined circumstances and at a defined cost would be one approach. Such a derogation provision would promote good governance by transferring politically sensitive decisions to national officials with greater accountability. Such safety valves already exist in some international institutions.<sup>164</sup> In the WTO, for instance, national governments can decline to follow dispute settlement decisions and pay compensation (in the form of other trade concessions) instead.<sup>165</sup>

Another useful mechanism would be a principle of declination—i.e., allowing international bodies to refuse to engage in policymaking on issues for which national politics and divergent values are highly salient, thus leaving the matter to negotiation between nation-states. Such a rule, akin to the U.S.

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164. Lindseth has suggested that the EU's "variable geometry" in regulation is one such "opt-out" provision. Lindseth, *supra* note 56, at 671.

165. See Understanding the WTO: Settling Disputes: A Unique Contribution, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) (last visited Feb. 26, 2006).

political question doctrine, would help keep international bodies, particularly those that have not established the requisite legitimacy and capacity to address highly contested issues, out of the legitimacy-threatening zones identified in Matrix 2.

### *B. Special Challenges for Global Administrative Law*

A number of distinct challenges that arise in the international context make a body of global administrative law hard to develop and domestic models of administrative law potentially inapt. Kingsbury, Krisch, and Stewart have noted several of these challenges: supranational policy processes are often diffuse, with authority shared across different institutions; the informality of the decision-processes may detract from the application of administrative law; private actors play a larger role in some of the decisionmaking mechanisms; the mix of government and governance can complicate the application of administrative law; and the existing domestic models may be perceived as Western or imperialistic and designed to enhance the power of developed nations.<sup>166</sup> Similarly, Grant and Keohane have suggested that the global institutional design challenge is greater because the risk of abuse of power is more serious internationally, the existing global governance structure lacks even minimal constraints on power-wielders, and there is no global-scale public to check abuses or hold officials accountable.<sup>167</sup>

While these concerns cannot be brushed aside, the issues identified are not insuperable, particularly if one sees the global administrative law project as aimed not at full-fledged democratic legitimacy but, more modestly, at better functioning supranational global governance bodies with improved legitimacy. The following Subsections describe and respond to the challenges raised by the application of administrative law in the international context.

#### *1. Divided Responsibility*

The fact that decisionmaking authority is divided across several levels, making precise responsibility for outcomes hard to trace, does not distinguish international policymaking from that undertaken at the national scale. Clarifying responsibilities and arranging linkages across institutions and between levels of government is an important part of the domestic administrative law structure. In the United States, for example, both the

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<sup>166</sup>. See Kingsbury et al., *supra* note 23, at 53-55; Kingsbury et al., *supra* note 126.

<sup>167</sup>. See Grant & Keohane, *supra* note 45, at 34.

Environmental Protection Agency and the Department of Energy are responsible for climate change policy, and a half dozen other departments and agencies have secondary roles. Far from being problematic, such overlapping decisionmaking authority is an important way to ensure careful deliberation among government officials. When disagreements arise at the global scale over which body has competency, principles of priority will have to be established, and procedures for setting jurisdictional disputes will have to be developed.<sup>168</sup> The need for such principles and procedures, however, is by no means fatal to the global administrative law project.

## 2. *Informality*

The informality of global-scale policymaking may be an issue in some circumstances, particularly when it obscures the decision-process. In this regard, however, two separate issues must be disentangled. To the extent that informality translates into opaqueness, it can be addressed by greater transparency and more clearly defined procedural rules. If, however, the issue is that more informal governance often yields soft law with limited bite, this tendency may be a virtue when it comes to governance legitimacy at the global scale. As Matrix 1 demonstrates, informality lowers the legitimacy threshold. When supranational governance is necessary to manage interdependence, more formality in governance may be required; but to the extent this raises the legitimacy bar, as Matrix 1 suggests, greater emphasis on procedural rigor and administrative law may generate public confidence in and acceptance of the collective action undertaken.

## 3. *Role of Private Actors*

The presence of private actors in decisionmaking mechanisms at the global scale does not distinguish this level of policymaking from that of the nation-state. In the United States (and most other nations), business and NGO lobbying is ubiquitous. The presence of interested parties in supranational decision-processes should therefore come as no surprise, although the lack of institutional constraints on special interest lobbying in the existing global governance context is an issue for concern. The solution, as suggested above, is not to abandon the attempt to apply administrative law principles in the

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<sup>168</sup> The WTO, for instance, looks to the International Monetary Fund for guidance when judgments about a nation's fiscal or monetary policy are needed as an underpinning for trade policy decisions. See General Agreement on Tariffs and Trade, art. XV, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

supranational context, but rather to design disciplines on special interest participation in the international policymaking process so as to avoid distorted outcomes.

#### 4. *Governments and Governance*

Kingsbury, Krisch, and Stewart's claim that the mix of governments and governance complicates the application of administrative law in the international domain is certainly true.<sup>169</sup> Every international organization operates as a point of interface between national and supranational officials. Defining the roles for each set of officials and finding a way to blend national and supranational authority stands out as a major institutional design challenge. A more fully developed regime of administrative law might, however, address this challenge. Some issues, for example, should be handled through national government-to-government negotiations. Other matters should be delegated to supranational authorities, leaving international organizations to do the actual policymaking within a defined mandate. There is, moreover, a need to clarify and accommodate national government interests in the realm of global governance. The roles and rules will need to be tailored to each particular international institution, reflecting the specific policymaking circumstances as well as the depth and nature of the governance structure.

#### 5. *Institutional Weakness*

Perhaps the greatest problem in translating the national experience with administrative law to the global context arises from the lack of institutional depth that exists domestically to constrain the exercise of power and ensure the accountability of decisionmakers.<sup>170</sup> Most notably, the global administrative law structure must somehow play the role courts normally do in protecting the rights of individuals and economic entities against overreaching governmental authorities. In some institutions, dispute resolution mechanisms may provide the needed check.<sup>171</sup> In other cases, mechanisms such as oversight powers lodged with national authorities will need to be found.<sup>172</sup>

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169. See Kingsbury et al., *supra* note 23, at 54; Kingsbury et al., *supra* note 126, at 4-5.

170. See Mashaw, *supra* note 125, at 11 (stating that the "accountability project of administrative law seems threatened" in the context of global-scale collective action).

171. See ALVAREZ, *supra* note 13, at 403-13 (explaining how these mechanisms work).

172. Stewart has emphasized the potential for domestic checks on global governance. Stewart, *supra* note 24, at 76-88; see also Esty, *supra* note 84, at 17 (calling for WTO oversight

Beyond the lack of a judicial check lies a deeper problem of unclear lines of political accountability.<sup>173</sup> In the domestic context, elections ensure a high degree of accountability: Those who do not meet the public's standards and expectations can be defeated at the ballot box and stripped of power. In administrative agencies, the link to the public is somewhat more tenuous, but in most systems those who fail to follow the prime minister or president's policies can be fired.<sup>174</sup> At the global scale, however, the lines of accountability may be even more attenuated.

Nevertheless, market pressures, aggressive watchdogs (whether elected or appointed), NGOs, and the media can force power-wielders to explain their actions and justify their policy choices. Grant and Keohane have identified seven alternative accountability mechanisms that might discipline supranational policymaking: hierarchical lines of responsibility, national government supervision, budget and fiscal oversight, legal constraints, market incentives, peer pressures, and reputational risks.<sup>175</sup> A carefully crafted set of global administrative rules and procedures—and the scrutiny of decisionmaking they generate—should be added to this list.

#### 6. *What Is the Public Interest?*

A deeper question emerges at the supranational level about the definition of the public interest to which a neutral decisionmaker should be devoted. Although similar issues arise in the domestic context, at the global scale the number of people whose views must be considered is greater, and the range of perspectives on some issues may be wider. Furthermore, the decisionmaker's connection to the interests and values of the public may be more tenuous in the supranational context.

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hearings conducted by national legislators); Kingsbury et al., *supra* note 23, at 55-57 (describing the participation of national administrators in global governance).

173. Grant and Keohane have argued that the essence of accountability lies in *ex post* opportunities for the public to hold decisionmakers "to a set of standards . . . and to impose sanctions if they determine that these responsibilities have not been met." Grant & Keohane, *supra* note 45, at 29; *see also* Slaughter, *supra* note 138, at 523 (defining accountability as "responsiveness to the people").
174. This is the essence of the "presidential administration" model of accountability. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).
175. *See* Grant & Keohane, *supra* note 45, at 35-41. *But see* Charnovitz, *supra* note 64, at 5-10 (rejecting Grant and Keohane's narrow view of accountability and suggesting that international accountability might be based on the responsibility of power-wielders to those affected by their decisions).

In the end, however, the problem of ordering preferences and making social choices is similar whether authority is delegated nationally or supranationally.<sup>176</sup> While there are no easy answers, there are ways to reduce the potential confusion over the aims that international officials are pursuing. As suggested above, supranational policymakers might be required to issue with each exercise of their authority a statement of the public interest, so that their assumptions about policy ends are explicit.

### 7. *A Western Bias?*

The potential for global administrative law to be seen as Western, liberal, or imperialistic, will be hard to overcome in some quarters. Much of the developing world views administrative law as wielded mainly by the powerful in defense of their own interests.<sup>177</sup> But the principles are more universal than this. Indeed, the weak will benefit most by having functioning international institutions. While the rules of administrative law may seem to support U.S. or European values, they are designed to allow the powerless to engage the powerful – and sometimes prevail.

More importantly, while the administrative law architecture advanced in this Article builds largely on the American tradition, the regulatory systems in many nations share some of these procedural elements.<sup>178</sup> As nations develop domestic systems of administrative law, the rules and procedures proposed here will seem even less foreign. Although it would be a stretch to say that all of the elements discussed below will have (or should have) universal application or appeal, a basic set of administrative law elements has begun to emerge across a wide range of countries, particularly liberal democracies. Regardless of a country's degree of familiarity with the model of global administrative law advanced here, the tools put forward should appeal to nation-states in a variety of circumstances on a pragmatic basis.

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176. See generally ARROW, *supra* note 90 (reviewing the challenge of ordering social preferences).

177. See B.S. Chimni, *Global Administrative Law: Winners and Losers* 2 (Apr. 21, 2005) (unpublished manuscript, on file with author).

178. See M.P. JAIN, *ADMINISTRATIVE LAW OF MALAYSIA AND SINGAPORE* 152, 157, 164 (3d ed. 1997) (describing India's strict requirement for publication of delegated legislation, Malaysia's participation mechanisms, and the publishing of subordinate legislation in Singapore's *Gazette*, to name a few examples); Giacinto della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law*, 9 EUR. PUB. L. 563 (2003) (discussing nearly universal procedural requirements such as due process, consultation, and transparency); Hong, *supra* note 128; Kingsbury et al., *supra* note 126, at 6; Rose-Ackerman, *supra* note 150.

### 8. *Political Objections*

Global administrative law should likewise appeal to the most powerful nations. As John Ikenberry has observed, a sophisticated hegemon should take a nuanced view of the use of power and thus the optimal international order.<sup>179</sup> A benevolent hegemon that exercises strategic restraint, uses power only when necessary, and builds an international order based on institutions is far more likely to succeed over time.<sup>180</sup> The wise hegemon does not insist on victory over every matter in dispute, but rather seeks to establish an international order based on its long-term interests and principles. Thus, a far-sighted United States would use its position of strength to structure the rules of international relations with an eye toward the day when its dominance has passed.<sup>181</sup>

Similarly, nonhegemonic democracies, such as those in Europe today, might also favor an international order shaped by administrative law. Such a structure provides a way to limit the hegemon's domination and promote cooperative global-scale decisionmaking. For similar reasons, emerging democracies, especially those in the developing world, stand to benefit from globalized administrative law and a world of dialogue and constrained power. Finally, even autocracies could support an international regime grounded in administrative law as a way to ensure order and provide rules of the game that are clear and predictable.<sup>182</sup> From a sophisticated autocrat's perspective, the idea of participation and policymaking give-and-take at the international level might deflect pressures for power-sharing and other aspects of good governance domestically.

## IV. CURRENT PRACTICE IN GLOBAL ADMINISTRATIVE LAW

In this Part, I briefly examine the policymaking practices of organizations working in three supranational realms: international trade, global public health, and environmental protection. While none of the international organizations that I review has a fully developed structure of administrative law, each has adopted some of the good governance elements and administrative tools I described above. For each organization, I highlight areas

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179. See G. JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS* 12 (2001).

180. *Id.* at 28.

181. See ROBERT GILPIN, *WAR AND CHANGE IN WORLD POLITICS* (1981) (arguing that the leading state's predominance based on power will eventually diminish).

182. See generally FULLER, *supra* note 103, at 39 (describing the value of stable, predictable laws).

in which the use of administrative law tools has enhanced the organization's legitimacy, and other areas in which shortcomings in the administrative law regime have made it less effective in supranational governance.

### *A. International Trade*

Managing economic interdependence has emerged as a core global governance challenge. Open markets and trade liberalization promise higher social welfare for all nations,<sup>183</sup> but the deepening of economic integration creates externalities and sharpens concerns about the costs of globalization in the economic sphere. Deeper economic integration requires institutional support, which in turn requires an expanded structure of administrative rules and procedures. Although the EU's expanding administrative institutions stand at the forefront of supranational governance,<sup>184</sup> because much has already been written about the EU,<sup>185</sup> I focus on two other international bodies with trade missions: the WTO and the OECD.

#### *1. The World Trade Organization*

The WTO engages in a variety of activities that range from supporting intergovernmental negotiations to carrying out supranational decisionmaking, and from quite informal to highly structured activities.<sup>186</sup> Successive rounds of multilateral trade negotiations have dropped tariff rates to quite low levels,<sup>187</sup> which has shifted the focus of trade policymakers to nontariff barriers.<sup>188</sup> This evolution has three important implications. First, it moves market access and disciplines on national regulatory programs, including environmental and

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183. See JACKSON, *supra* note 30, at 12 (discussing worldwide increases in standards of living resulting from free trade).

184. See WEILER, *supra* note 162 (reviewing the EU's evolution); Stone Sweet & Sandholtz, *supra* note 1, at 6-7 (discussing EU governance).

185. See, e.g., Klaus Armingeon, Comment, *The Democratic Deficit of the European Union*, 50 *AUSSENWIRTSCHAFT* 67 (1995); Bignami, *supra* note 50.

186. See BHAGIRATH LAL DAS, *WTO: THE DOHA AGENDA* 58 (2003); RICHARD SENTI & PATRICIA CONLAN, *WTO: REGULATION OF WORLD TRADE AFTER THE URUGUAY ROUND* 18-19 (1998); Jayati Srivastava, *NGOs at the World Trade Organisation: The Democratic Dimension*, 40 *ECON. & POL. WKLY.* 1952 (2005).

187. See TREBILCOCK & HOWSE, *supra* note 31, at 25, 79-80 (discussing the provisions for negotiations to reduce tariffs, and the "linear-cuts" and sector-by-sector methods of tariff cuts during the Kennedy and Tokyo Rounds).

188. See *id.* at 27-29 (discussing nontariff codes negotiated during the Tokyo Round).

consumer protection policies, to center stage in trade policymaking.<sup>189</sup> This emphasis translates into greater global-scale oversight of domestic policies that were once considered to be the exclusive preserve of national governments. It also heightens sensitivity about lost national sovereignty, making the trade policy agenda much more political.<sup>190</sup> Second, the focus on nontariff barriers means that negotiations no longer turn on tit-for-tat tariff reductions. At least as much emphasis is now placed on establishing the terms of competition in the international marketplace, again adding to the normative content of trade policymaking. Third, these trends have, at least in part, redirected the locus of rulemaking in the trading system from trade agreements established through intergovernmental negotiations to the supranational adjudication of trade disputes.<sup>191</sup>

The highly respected professional staff and leadership of the WTO has a degree of expertise that gives it a substantial base of Weberian legitimacy for the work it does in the domain of negotiations.<sup>192</sup> Because its efforts are largely behind the scenes and informal, the legitimacy of this governance role has not historically been questioned. The efficacy of the trade system in delivering good results is widely appreciated,<sup>193</sup> but as the WTO's profile has grown and economic integration has become more contentious, the lack of democratic legitimacy has emerged as an issue.<sup>194</sup> The WTO staff's work to facilitate negotiations has drawn criticism for its secrecy, as well as its clubiness and the privileged access given to some entities (especially the business community) as opposed to others (notably developing countries and NGOs).

This mode of operation falls short of the requirements of good governance highlighted earlier. It lacks mechanisms for participation to ensure

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189. WTO examples demonstrating this point abound. See, e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) (finding that, although sympathetic to the United States' attempts to protect species under the Endangered Species Act, the United States had implemented discriminatory trade measures against WTO members).

190. See Esty, *supra* note 84, at 12–14 (reviewing the WTO's evolution).

191. See ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 3–9 (1993); Alec Stone Sweet, *The New GATT: Dispute Resolution and the Judicialization of the Trade Regime*, in LAW ABOVE NATIONS: SUPRANATIONAL COURTS AND THE LEGALIZATION OF POLITICS 118 (Mary L. Volcansek ed., 1997).

192. See, e.g., JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 46 (2004) (describing the reluctance of U.S. NGOs to criticize WTO decisions).

193. See Jeffrey J. Schott, *The World Trade Organization: Progress to Date and the Road Ahead*, in LAUNCHING NEW GLOBAL TRADE TALKS: AN ACTION AGENDA 3 (Jeffrey J. Schott ed., 1998).

194. See Esty, *supra* note 84 (explaining why the WTO faces legitimacy questions).

representativeness and accountability, and for deliberation in support of surrogate politics to overcome the lack of democratic underpinnings.<sup>195</sup> While the WTO has established conflict of interest rules, controls on lobbying and on ex parte contacts are not well entrenched. Questions about the lack of transparency could be answered with a suggestion that the WTO is simply doing the bidding of its member-states who wish their negotiations to remain secret,<sup>196</sup> but as the WTO Secretariat's independent and substantive role in negotiations expands, this argument becomes harder to sustain.<sup>197</sup>

As globalization concerns have made trade liberalization more controversial, the organization's Weberian legitimacy, derived from its recognized expertise and the technical nature of the work undertaken, has come under attack.<sup>198</sup> In response, the WTO has moved to broaden its base of legitimacy through a series of good-governance initiatives. It has made a major commitment to transparency and launched a website that provides access to most WTO documents.<sup>199</sup> The WTO leadership has also launched a trade journal, *World Trade Review*, through which it encourages debate over trade policy.<sup>200</sup> In addition, the WTO has begun to host a series of workshops at which NGOs, business leaders, and officials from national governments exchange views.<sup>201</sup>

This new element of openness, and the resulting opportunity for participation in the trade policy dialogue, has helped to blunt criticism of the organization and to enhance the organization's democratic legitimacy. Nevertheless, the WTO remains far from the democratic ideal, and a more fully developed system of administrative law would strengthen the institution's legitimacy and capacity to manage economic interdependence.

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195. See Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 RUTGERS L. REV. 927 (2004) (reviewing the WTO's participation rules and procedures).

196. Some suggest that democratic accountability is a matter for national legislatures, not the WTO. See, e.g., MARTIN WOLF, WHY GLOBALIZATION WORKS 209 (2004).

197. See Esty, *supra* note 84, at 13-15 (discussing the WTO's evolving global governance role).

198. See *id. passim* (spelling out what the WTO might do to overcome the loss of expertise-based legitimacy); Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303 (2004) (explaining why the WTO needs to broaden its governance role).

199. WTO: Official Documents and Legal Texts, [http://www.wto.org/english/docs\\_e/docs\\_e.htm](http://www.wto.org/english/docs_e/docs_e.htm) (last visited Feb. 25, 2006).

200. See Press Release, World Trade Org., Launch of New Journal (Apr. 9, 2002), available at [http://www.wto.org/english/news\\_e/preso2\\_e/pr284\\_e.htm](http://www.wto.org/english/news_e/preso2_e/pr284_e.htm).

201. Records of these meetings are available on the WTO website. Relations with Non-governmental Organizations/Civil Society, [http://www.wto.org/english/forums\\_e/ngo\\_e/intro\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/intro_e.htm) (last visited Feb. 25, 2006). Wolf has argued that this outreach should be expanded. WOLF, *supra* note 196, at 211.

The WTO has developed an advanced dispute settlement system.<sup>202</sup> This judicialization can be traced to a number of factors: the politicization of trade, an embrace of legalism, and the shift toward seeing the GATT as a system of rules.<sup>203</sup> This shift further reflects the need to legitimize harder rulemaking in the supranational context, supporting the evolution in WTO activities from the upper-left to the upper-right quadrant of Matrix 1.<sup>204</sup> WTO rules establish formal procedures for the dispute-settlement process, codify mechanisms for eliciting expert advice to panels, mandate new rigor in the selection of panelists, set strict time limits for bringing disputes to closure, prevent the decisions of dispute panels from being held up by national objections (unless the General Council votes to do so), require publication of the panel decisions, and create a mechanism for appeal.<sup>205</sup> These provisions advance the accountability, rationality, clarity, and stability of the decisions that emerge, putting the WTO in a leadership position in terms of supranational good governance.

The WTO Appellate Body, in particular, has strengthened the adjudicatory process and broadened the base of WTO administrative law. It has adopted detailed procedural rules for notices of appeal, specific methods of submitting timely evidence, measures to avoid conflicts of interest for those hearing cases, and has even welcomed amicus briefs, giving a new avenue for participation in this critical dimension of WTO rulemaking.<sup>206</sup> Although the proceedings of the Appellate Body remain confidential, the members of the Appellate Body have taken the need for explanation of their decisions to heart, carefully laying out the logic for each decision, highlighting precedents, and building a base of WTO jurisprudence. The Appellate Body's formalization of its procedures has helped to build understanding about the rules of international trade, provide a

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202. See David Palmetier & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398 (1998) (providing an overview of the WTO's judicial role); see also ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* (1997); Robert Howse, *The Legitimacy of the World Trade Organization*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 355, 357-59 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001); Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333 (1999).

203. See Stone Sweet, *supra* note 191, at 124-31.

204. See Benvenisti, *supra* note 71 (discussing the WTO's adjudication structure); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (2004) (reviewing WTO dispute resolution and its sources of legitimacy).

205. See Wofford, *supra* note 84, at 567-72 (discussing the WTO's refined dispute settlement procedures).

206. See *id.* at 567-73 (demonstrating how the Appellate Body has helped to professionalize WTO jurisprudence); see also Charnovitz, *supra* note 195, at 939-40.

check on WTO policymaking, and promote real policy dialogue. These changes, which are part of the broader shift toward a more formal and rules-based institution, have given the WTO a new foundation of order-based authority as well as enhanced Madisonian and Habermasian legitimacy.<sup>207</sup> The dispute settlement rules and procedures have provided the organization with a reputation for fairness and rigor in upholding due process, and thus greater procedural legitimacy.

## 2. *The Organization for Economic Cooperation and Development*

The Paris-based OECD, an intergovernmental organization with membership representing thirty of the world's most developed economies, supports government-to-government dialogues on a range of policy issues.<sup>208</sup> It plays a supranational role in some important areas, particularly related to managing international economic interdependence. Most of its work, however, is intergovernmental. The OECD's great strength has been its technical capacity, creating a substantial store of neo-Weberian legitimacy.<sup>209</sup> In effect, the OECD provides a bridge between the politicized decisionmaking of the WTO and the need for rigorous technical work to underpin trade liberalization efforts. Much of the OECD's work focuses on bringing together officials from national governments to review policy results, exchange data and information, and benchmark performance.<sup>210</sup> These activities provide an informal policy cross-check, a mechanism to identify international best practices, and a way for governments to evaluate their own results. By enhancing national governance practices, the OECD makes vivid its added value and builds its legitimacy.

The OECD also hosts regular meetings of ministers of environment, energy, transportation, development, and trade. Lower-level officials meet in the run-up to these ministerial sessions, and technical groups are often established to deal with particular issues. In a small number of cases, these convocations have yielded formal agreements in areas such as the conduct of multinational corporations,<sup>211</sup> bribery,<sup>212</sup> limits on the use of export credits,<sup>213</sup>

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207. See Guzman, *supra* note 198, at 330-48.

208. See Salzman, *supra* note 81, at 190-95.

209. See James Salzman, *Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L L. 769, 778-79 (2000) (illustrating the OECD's provision of "authoritative" information).

210. See Salzman, *supra* note 81, at 191-94; Slaughter, *supra* note 18 (discussing governance issues related to transgovernmental networks, including the OECD).

211. See, e.g., TREBILCOCK & HOWSE, *supra* note 31, at 297 (discussing the guidelines for multinational enterprises).

and capital movements.<sup>214</sup> In other cases, OECD officials have worked with national regulators to adopt guidelines, develop model policies, and distill overarching norms.

As a forum for national officials, the OECD has had substantial, if informal, influence over how regulators perceive the ends and means of governance. OECD dialogues, noted for their substance and analytic rigor, have generated critical policy principles and technical standards that have come to shape regulatory practices and international cooperation.<sup>215</sup> For example, the OECD led the effort to establish the polluter pays principle of cost internalization as a central regulatory norm in the environmental realm.<sup>216</sup>

Despite its generally informal style and intergovernmental mode of decisionmaking, which produce little pressure for formalized administrative law, the OECD has adopted a number of operating principles and practices that represent movement toward good governance.<sup>217</sup> It has placed increased emphasis on transparency and participation.<sup>218</sup> Although their participation is limited in government-to-government meetings, private sector representatives and NGO officials attend many informal workshops.<sup>219</sup> Draft policy statements are often published in advance.<sup>220</sup> Great emphasis is also placed on promoting dialogue on policy analysis, options, results, and potential future

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212. See OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, available at [http://www.oilis.oecd.org/oilis/1997doc.nsf/LinkTo/daffe-ime-br\(97\)20](http://www.oilis.oecd.org/oilis/1997doc.nsf/LinkTo/daffe-ime-br(97)20).
213. See OECD, Arrangement on Officially Supported Export Credits, Jan. 27, 2005, available at [http://webdomino1.oecd.org/oilis/2005doc.nsf/Linkto/td-pg\(2005\)38-final](http://webdomino1.oecd.org/oilis/2005doc.nsf/Linkto/td-pg(2005)38-final); OECD, Recommendation on Common Approaches on Environment and Officially Supported Export Credits, Dec. 19, 2003, available at <http://www.oecd.org/dataoecd/26/33/21684464.pdf>; Salzman, *supra* note 81, at 206-12.
214. See TREBILCOCK & HOWSE, *supra* note 31, at 298.
215. See Salzman, *supra* note 81, at 191-94 (reviewing the OECD's policymaking role).
216. See ORG. ECON. COOPERATION & DEV., THE POLLUTER PAYS PRINCIPLE: DEFINITION, ANALYSIS, IMPLEMENTATION (1975).
217. More effective and efficient policymaking is the organization's *raison d'être*. The OECD describes itself as playing "a prominent role in fostering good governance." About OECD, [http://www.oecd.org/about/o,2337,en\\_2649\\_201185.html](http://www.oecd.org/about/o,2337,en_2649_201185.html) (last visited Feb. 26, 2006).
218. See, e.g., OECD, Recommendation of the Council on Environmental Information, April 3, 1998, available at <http://www.rec.org/e-aarhus/files/legal1998.pdf>.
219. See OECD Co-operative Activities with Civil Society, [http://www.oecd.org/document/1/o,2340,fr\\_2649\\_201185\\_3230081\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/1/o,2340,fr_2649_201185_3230081_1_1_1_1,00.html) (last visited Feb. 26, 2006).
220. See, e.g., OECD Instructions for Commenting on Draft Test Guidelines, <http://www.oecd.org/dataoecd/38/19/30719654.doc> (last visited Feb. 26, 2006).

refinements.<sup>221</sup> As a result of these efforts—and with the help of a top-notch and technically capable staff—the OECD has a reputation for deliberative substance.

The OECD's most serious policy stumble in the past decade came when it ventured into the highly contested realm of foreign investment.<sup>222</sup> OECD officials led an effort to conclude a Multilateral Agreement on Investment (MAI), but failed to appreciate fully the political sensitivity of this arena.<sup>223</sup> This initiative, an upper-right quadrant issue in Matrix 2 (with a high degree of interdependence and high political salience with normative divergence), became a target for antiglobalization activists and eventually collapsed.<sup>224</sup> The OECD's lack of broader legitimacy, particularly democratic underpinnings, made this project untenable. The fact that the MAI negotiations were carried out by the OECD Finance Directorate in secret and with limited input from those representing other perspectives (such as OECD staff from the Environment or Development Directorates), not to mention the absence of officials from developing countries, created doubts about the representativeness of those drafting the agreement, and their exercise of political judgment in this contested policy space was rejected. The lack of shared drafts, opportunities for interested parties to comment, hearings, open debate, and clarity about the influence being played by multinational corporations and other business lobbies meant that the OECD had no backup system in place to compensate for its lack of democratic legitimacy and to give credence to its governance role.

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221. For example, the OECD conducts “peer reviews” of each member-country’s environmental performance and publishes the results with recommendations for improved policies. See Peter M. Haas, *Global Environmental Governance*, in *ISSUES IN GLOBAL GOVERNANCE*, *supra* note 61, at 345; Interview with Donald Johnston, Sec’y-Gen., OECD, in Paris, Fr. (Apr. 1, 2005).

222. See William D. Coleman & Tony Porter, *International Institutions, Globalisation and Democracy: Assessing the Challenges*, 14 *GLOBAL SOC’Y* 377, 393 (2000).

223. See Salzman, *supra* note 81, at 196–200 (discussing the MAI collapse); John Wickham, *Toward a Green Multilateral Investment Framework: NAFTA and the Search for Models*, 12 *GEO. INT’L ENVTL. L. REV.* 617, 618 (2000) (discussing the opposition of environmental groups, NGOs, and non-OECD countries to procedural and substantive aspects of negotiations surrounding the MAI).

224. See *ORG. ECON. COOPERATION & DEV., GETTING TO GRIPS WITH GLOBALISATION: THE OECD IN A CHANGING WORLD* 20 (2004); Salzman, *supra* note 81, at 196–200.

### B. Global Public Health: The World Health Organization

The spread of AIDS, as well as other diseases, reveals the substantial international spillovers in public health.<sup>225</sup> The nature of contagion makes international interaction a source of risk—and creates a need for cooperation among countries.<sup>226</sup> While the benefits of coordinated supranational action in global health are clear, the costs of global-scale policymaking may be high insofar as health issues connect to societal interests and behavioral practices in complex, intimate, and potentially politically charged ways. Thus, while some public health issues have a high degree of scientific or technical content, others are highly value-laden.<sup>227</sup>

Like the WTO, the WHO plays a range of roles, from supervising nation-to-nation negotiations to a much more substantive role in addressing international health crises.<sup>228</sup> In the legislative context, the WHO staff supports negotiators from national governments, who meet annually as the World Health Assembly (WHA), to adopt sanitary conventions and other agreements. Recognized for their expertise and global perspective, the WHO staff also plays a significant role in agenda-setting and consensus-building across a spectrum of global public health issues. Most notably, WHO staff substantially shaped the 2003 Framework Convention on Tobacco Control.<sup>229</sup>

The WHO also operates as a supranational regulatory agency with rulemaking powers delegated to it by national governments.<sup>230</sup> The WHO Constitution grants the organization the power to enact regulations including

225. See KELLEY LEE, *GLOBALIZATION AND HEALTH: AN INTRODUCTION* 17-22 (2003).

226. It took many decades, however, for the logic of public health cooperation across countries to be understood. Richard N. Cooper, *International Cooperation in Public Health as a Prologue to Macroeconomic Cooperation*, in *CAN NATIONS AGREE?* 178 (Richard N. Cooper et al. eds., 1989); Lawrence O. Gostin, *World Health Law: Toward a New Conception of Global Health Governance for the 21st Century*, 5 *YALE J. HEALTH POL'Y L. & ETHICS* 413 (2005) (considering a new conception for global health based on the rule of international law).

227. See, e.g., Jennifer Prah Ruger, *Health and Social Justice*, 364 *LANCET* 1075, 1075-76 (2004) (discussing the moral and ethical import of health issues).

228. Michael McCarthy, *A Brief History of the World Health Organization*, 360 *LANCET* 1111 (2002).

229. See Derek Yach et al., *The World Health Organization's Framework Convention on Tobacco Control: Implications for Global Epidemics of Food-Related Deaths and Disease*, 24 *J. PUB. HEALTH POL'Y* 274 (2004); World Health Org. [WHO], WHO Framework Convention on Tobacco Control, *opened for signature* June 16, 2003 (entered into force Feb. 27, 2005), available at <http://www.who.int/tobacco/framework/en>.

230. See HENRIK KARL NIELSEN, *THE WORLD HEALTH ORGANIZATION: IMPLEMENTING THE RIGHT TO HEALTH* 12-13 (1999); KATARINA TOMASEVSKI, *Health*, in 2 *UNITED NATIONS LEGAL ORDER* 859 (Oscar Schachter & Christopher C. Joyner eds., 1995).

“sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease.”<sup>231</sup> But the organization rarely uses its full authority, generally preferring to advance the global public health agenda through nonbinding resolutions.<sup>232</sup> This choice of a soft law approach reflects concerns among WHO staff about the difficulty of mandating specific actions and, more broadly, the legitimacy of an aggressive global governance role for the WHO.

Health policy issues, particularly when infectious diseases are at issue, involve deep interdependence. In other cases, such as common efforts to understand and respond to noncommunicable diseases, the problems are more national or local in scope. Similarly, the global public health agenda ranges widely along the scientific-political spectrum. Although the WHO is involved in all quadrants of the issue matrix, it faces concerns that are increasingly political and international in scope. Given the technical training of many officials operating in the global health arena and the urgency with which some issues must be addressed, administrative niceties have not been a central focus in global health governance. As I discuss below, however, the shift toward supranational action and formal rulemaking has created pressure to strengthen the administrative law structure in the global public health domain.

In some cases, the WHO has used its expertise-based authority to act. Governments ceded a leadership role to the WHO in the SARS crisis due to the organization’s scientific and technical capacity.<sup>233</sup> The WHO issued safety guidelines and recommendations, alerts, research advisories, risk assessments, preparedness frameworks, epidemiological guidelines, and guidance for laboratory testing, immigration, and mass gatherings.<sup>234</sup> When efficacy mattered and a crisis was at hand, governments relied upon the WHO to guide the response, even though its administrative law structure is not highly developed. Perhaps, with the SARS threat unfolding, the costs of inaction loomed large. But broader legitimacy may be needed for an expanded governance role for the WHO in other circumstances.

When an organization like the WHO is operating under crisis conditions, when delay may cause great harm, a number of otherwise reasonable

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231. Constitution of the World Health Organization, art. 21, para. A, July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185.

232. See NIELSEN, *supra* note 230, at 48-49.

233. See Lawrence K. Altman, *An Era Ends, Many Missions Accomplished*, N.Y. TIMES, July 15, 2003, at F6; David Brown, *The SARS Triumph, and What It Promises*, WASH. POST, July 20, 2003, at B1.

234. See World Health Org., *Severe Acute Respiratory Syndrome (SARS)*, <http://www.who.int/csr/sars/guidelines/en> (last visited Feb. 26, 2006).

administrative law tools and norms may be inapplicable.<sup>235</sup> For example, with an epidemic spreading, posting draft proposed action plans and sitting back for a thirty-day comment period makes little sense. On the other hand, more emphasis on connectedness to the public would be advisable, even in (or, perhaps, especially in) a crisis. The WHO has little tradition of public hearings or other outreach, despite the importance of public understanding and acceptance of its work.<sup>236</sup>

The WHO team that led the recent effort to conclude a treaty on marketing and trade in tobacco recognized the need to expand the legitimacy of their governance activities.<sup>237</sup> As they moved to legislate limits on tobacco globally, the WHO staff developed draft provisions, posted these on the WHO website, held public hearings, convened open dialogues with NGOs and private sector representatives, accepted policy papers and other inputs from external sources, and encouraged debate by posting these materials on the Internet.<sup>238</sup> In fashioning its policy proposals, the WHO drew on experts both within and outside the organization, including from sister bodies such as the World Bank and the WTO. The ambitious tobacco policymaking initiative was led by a clearly designated official, with outreach across the world directed by regional bureau chiefs selected by the countries in the region. A WHA resolution highlighted potential conflict of interest issues and asked governments to take note of these issues.<sup>239</sup> As an exercise in global supranational governance, the WHO's work on the Tobacco Treaty stands out for its emphasis on good governance and the deployment of the tools of administrative law.<sup>240</sup>

In general, however, the WHO has been hampered by a lack of effective decisionmaking rules and structure. Special interest influence has been of

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235. See David P. Fidler, *Revision of the World Health Organisation's International Health Regulations* (Am. Soc'y of Int'l Law, ASIL Insights, Apr. 2004), available at <http://www.asil.org/insights/insigh132.htm> (discussing the WHO's incorporation of increased flexibility into the new International Health Regulations (IHRs) in response to SARS).

236. See Ilona Kickbusch, *The Contribution of the World Health Organization to a New Public Health and Health Promotion*, 93 AM. J. PUB. HEALTH 383, 385-86 (2003) (discussing public participation in WHO activities and the need to engage active citizens).

237. See Gregory F. Jacob, *Without Reservation*, 5 CHI. J. INT'L L. 287, 289 (2004) (describing the long and formal, although flawed, WHO negotiation process for the Tobacco Convention).

238. Interview with Derek Yach in New Haven, Conn. (Mar. 24, 2005); see also Conference of the Parties to the WHO Framework Convention on Tobacco Control, <http://www.who.int/gb/fctc> (last visited Mar. 20, 2006).

239. See World Health Assembly, WHO Framework Convention on Tobacco Control, WHA Doc. 56.1 (May 21, 2003).

240. See R. Beaglehole & D. Yach, *Globalisation and the Prevention and Control of Non-Communicable Disease: The Neglected Chronic Diseases of Adults*, 362 LANCET 903, 906 (2003).

particular concern. The WHO's governance structure provides for extensive involvement of advisory groups under Articles 18(e) and 38 of the WHO Constitution, including expert advisory panels that gather technical information and other expert groups that review this technical information to make recommendations to the WHO.<sup>241</sup> While these provisions might be seen as building a base of expertise, they have in some cases undermined the global public health policymaking process. For instance, WHO's work to regulate tobacco was long seen as lacking in neutrality and fairness because cigarette companies placed individuals in temporary advisory positions within the WHO, shaped the conversations in expert advisory committees, and even harassed journalists at international conferences. The efforts of the tobacco industry were so pervasive that in 2000 the WHO staff produced a 250-page report documenting the interference and policy manipulations by this lobby.<sup>242</sup>

The WHO now has provisions in place to limit the influence of special interests.<sup>243</sup> The WHO regulations prevent staff from accepting gifts, favors, honors, and other benefits "if such acceptance is incompatible with [their] status as an international civil servant."<sup>244</sup> The "incompatible with" language creates a major loophole however. Some special interests evade these rules simply by promising staff funding for their projects rather than giving them gifts.<sup>245</sup>

The WHO does not, moreover, consistently create or provide meeting records (neither its own nor those of its committees), so there remains a lack of transparency about who is saying what to decisionmakers. When a public record is provided, the document is often incomplete or opaque. A provision in the WHO's *Rules of Procedure for Expert Committees* even goes so far as to state that "meetings of expert committees shall normally be of a private character. They cannot become public except by the express decision of the committee with the full agreement of the Director-General."<sup>246</sup> Partially buffering this lack

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241. See Dir. Gen., WHO, *Reports of Advisory Bodies and Related Issues: WHO Policy Concerning Expert Committees*, para. 11, WHO Doc. EB102/10 (May 6, 1998), available at [http://ftp.who.int/gb/pdf\\_files/EB102/ee10.pdf](http://ftp.who.int/gb/pdf_files/EB102/ee10.pdf).

242. See COMM. OF EXPERTS ON TOBACCO INDUS. DOCUMENTS, WORLD HEALTH ORG., TOBACCO COMPANY STRATEGIES TO UNDERMINE TOBACCO CONTROL ACTIVITIES AT THE WORLD HEALTH ORGANIZATION (2000), available at <http://repositories.cdlib.org/context/tc/article/1107/type/pdf/viewcontent>.

243. See WHO STAFF REGS., *supra* note 132.

244. *Id.* R. 1.7.

245. Interview with Derek Yach in New Haven, Conn. (Oct. 25, 2004).

246. See WORLD HEALTH ORG., RULES OF PROCEDURE FOR EXPERT COMMS. R. 1 (2006) (on file with author).

of transparency is a requirement that copies of all WHA reports be sent to members and participating intergovernmental and nongovernmental organizations.<sup>247</sup> This provision fails, however, to cover reporting from expert committee meetings. In addition, the organization has been criticized for its weak information management systems and limited capacity to share critical data and information.<sup>248</sup>

In sum, while the WHO has taken steps to upgrade its administrative law and procedures, particularly in the context of the organization's supranational rulemaking efforts in connection with the politically charged Tobacco Convention, it still has some distance to go in developing a good governance structure. Perhaps most critically, the organization needs to move toward a greater focus on data-driven policymaking and the publication of relevant metrics and indicators.<sup>249</sup>

### C. *Supranational Environmental Governance*

Environmental issues were long thought to be largely local. But in recent decades a series of inescapably international problems have emerged, including climate change, thinning of the Earth's protective ozone layer, loss of biodiversity, and depletion of fisheries in the world's oceans. While an increased recognition of ecological interdependence now exists, supranational decisionmaking in the environmental realm remains fraught with difficulties.<sup>250</sup> The response strategies that might be adopted often have substantial economic costs, which are often not distributed equally across countries. In some circumstances, harms flow back and forth, giving all countries a stake in controls. In other cases, however, there is no strong reciprocity. Furthermore, environmental problems are almost always marked by a degree of uncertainty that can lead to disagreements among people and countries over the seriousness of an issue. Such divergences are exacerbated in

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247. See RULES OF PROCEDURE OF THE WORLD HEALTH ASSEMBLY R. 14 (2006) (on file with author).

248. See Clare Kapp, *UN Inspectorate Gives WHO Administration a Mixed Review*, 359 LANCET 329 (2002).

249. See Anthony B. Zwi & Derek Yach, *International Health in the 21st Century: Trends and Challenges*, 54 SOC. SCI. & MED. 1615, 1618-19 (2002).

250. See Lorraine Elliot, *The United Nations' Record on Environmental Governance: An Assessment, in A WORLD ENVIRONMENT ORGANIZATION: SOLUTION OR THREAT FOR EFFECTIVE INTERNATIONAL ENVIRONMENTAL GOVERNANCE?* 27-28 (Frank Biermann & Stephen Bauer eds., 2005); Toru Iwama, *Multilateral Environmental Institutions and Coordinating Mechanisms, in EMERGING FORCES IN ENVIRONMENTAL GOVERNANCE* 15-16 (Norichika Kanie & Peter M. Haas eds., 2004) (highlighting global environmental governance challenges).

the international realm, in which policymakers will approach problems with divergent perspectives based on their countries' level of development, policy priorities, economic conditions, climatic and geographic circumstances, attitudes toward nature, and tolerances for risk.

High degrees of both interdependence and political salience make supranational governance a particular challenge. UNEP lies at the center of the international environmental regime.<sup>251</sup> While UNEP has adopted a number of good governance practices, it has not moved far along the spectrum from intergovernmental to supranational, and its work is almost entirely at the informal end of the Matrix 1 spectrum. The greater success of the North American Commission for Environmental Cooperation (CEC) in this regard may reflect the fact that it has less political space to cover as it encompasses only three countries, but also reveals its more advanced structure of administrative law.

### 1. *The United Nations Environment Program*

At a few points in the past several decades, UNEP has played an important role in bringing countries together to respond to shared problems. Most notably, in the 1980s and early 1990s UNEP's Executive Director, Mostafa Tolba, led the charge to protect the ozone layer.<sup>252</sup> His efforts translated into a framework convention followed by a series of protocols phasing out chlorofluorocarbons and related chemicals. Beyond facilitating country-to-country negotiations, UNEP has achieved a measure of success in information-gathering and scientific assessments<sup>253</sup> and its regional seas program is highly regarded.<sup>254</sup>

But in recent years, UNEP's governance activities have diminished, and it has not established itself as an independent or autonomous force in global-

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251. See MARIA IVANOVA, *CAN THE ANCHOR HOLD? RETHINKING THE UNITED NATIONS ENVIRONMENT PROGRAMME FOR THE 21ST CENTURY* (2005).

252. See RICHARD ELLIOT BENEDICK, *OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET 6* (1991).

253. Peter M. Haas, *Addressing the Global Governance Deficit*, 4 *GLOB. ENV'T'L POL.* 1, 9 (2004) (assessing UNEP's environmental monitoring and data assessment role).

254. See Mark Allan Gray, *The United Nations Environment Programme: An Assessment*, 20 *ENVTL. L.* 291, 297-301 (1990); Mark Imber, *Too Many Cooks? The Post-Rio Reform of the United Nations*, 69 *INT'L AFF.* 55, 57 (1993); Konrad von Moltke, *Why UNEP Matters*, in *GREEN GLOBE YEARBOOK OF INTERNATIONAL CO-OPERATION ON ENVIRONMENT AND DEVELOPMENT* 55, 58 (Helge Ole Bergesen & Georg Parmann eds., 1996) (describing the Program as an "essential step towards action" despite its failure to halt several negative marine environmental trends).

scale policymaking.<sup>255</sup> Despite its mandate to coordinate multilateral environmental policymaking, UNEP has not been effective in setting the international environmental agenda or addressing a number of critical challenges, including climate change.<sup>256</sup> Not only has UNEP failed to move toward a broader role in supranational policymaking, but its intergovernmental coordination role has also shrunk.<sup>257</sup>

UNEP's weak position could be a function of the highly political atmosphere surrounding global environmental issues,<sup>258</sup> in combination with its weak legitimacy foundations. Unlike the WTO and the WHO, UNEP's staff is not highly regarded. The organization has been hampered in its ability to recruit top-notch technical experts by its location in Nairobi and its weak analytical reputation.<sup>259</sup> Lacking neo-Weberian expertise and knowledge, UNEP has been further stymied in its quest for legitimacy by its uneven reputation with regard to procedural rigor.

UNEP has been, however, a relatively transparent organization with a strong tradition of inviting participation by NGOs and business.<sup>260</sup> When policy proposals are advanced prior to UNEP Governing Council meetings, the UNEP Secretariat, the Governing Council, and the Committee of Permanent Representatives engage in extensive communication over the issues involved.<sup>261</sup> Decisions are published in a timely and comprehensive manner. Rules 10 and

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255. See Daniel C. Esty & Maria H. Ivanova, *Revitalizing Global Environmental Governance: A Function-Driven Approach*, in *GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS & OPPORTUNITIES* 181, 184 (Daniel C. Esty & Maria H. Ivanova eds., 2002).
256. See DAVID G. VICTOR, *THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING* (2001); Steinar Andresen, *Global Environmental Governance: UN Fragmentation and Co-ordination*, in *YEARBOOK OF INTERNATIONAL CO-OPERATION ON ENVIRONMENT AND DEVELOPMENT* 19, 22-23 (Olav Schram Stokke and Øystein B. Thommessen eds., 2001).
257. See BHARAT H. DESAI, *INSTITUTIONALIZING INTERNATIONAL ENVIRONMENTAL LAW* 179-81 (2004) (discussing UNEP's failings); Elliott, *supra* note 250, at 32-33 (discussing turf battles, political struggles, and the increasingly "directionless" nature of UNEP); Jodie Hierlmeier, *UNEP: Retrospect and Prospect—Options for Reforming the Global Environmental Governance Regime*, 14 *GEO. INT'L ENVTL. L. REV.* 767, 780-81 (describing the fragmentation of UNEP's structure leading to undermined legitimacy); Ivanova, *supra* note 251, at 11-12 (reviewing UNEP's shortcomings).
258. See Esty, *supra* note 36.
259. See IVANOVA, *supra* note 251, at 31-38.
260. See U.N. ENV'T PROGRAM, *CIVIL SOCIETY CONSULTATIONS ON INTERNATIONAL ENVIRONMENTAL GOVERNANCE* (2001), available at [http://www.unep.org/dpdl/civil\\_society/PDF\\_docs/CS\\_Consultations\\_IEG\\_2001.pdf](http://www.unep.org/dpdl/civil_society/PDF_docs/CS_Consultations_IEG_2001.pdf); Haas, *supra* note 221, at 345.
261. Interview with Brennan Van Dyke, Reg'l Dir. & Representative, UNEP Reg'l Office for N. Am., in Washington, D.C. (Nov. 17, 2004).

11 of the UNEP Rules of Procedure of the Governing Council also require opportunities for comment on proposed Governing Council agendas and the procedures designed to structure debates.<sup>262</sup> UNEP has furthermore been a leader in bringing outside scientific and technical expertise into its policy dialogues.<sup>263</sup>

While these elements of good governance position UNEP relatively favorably with regard to participation and transparency, UNEP has suffered from deficient internal administrative controls—such as lack of oversight of staff and limited enforcement of conflict of interest rules—leading to a perceived high degree of inefficiency and financial mismanagement.<sup>264</sup> Ultimately, the lack of a solid foundation of operating rules and procedures has undermined UNEP's supranational governance role.

In the analytical framework of this Article, UNEP offers high potential gains from global governance given the deep interdependence imposed by issues such as climate change. But the political nature of these issues creates a demand for advanced administrative rules and procedures to draw in expertise, encourage careful policy analysis, promote deliberation, and advance workable policy solutions. UNEP has failed across this spectrum. As a result, it has limited zones of competence, and it remains mired in a narrow intergovernmental mode of operation. UNEP would benefit from a major administrative law initiative bringing the full spectrum of tools identified in Part III to its day-to-day workings.

## 2. *The North American Commission for Environmental Cooperation*

The CEC has emerged as an important international environmental organization,<sup>265</sup> with a degree of autonomy beyond that found in UNEP, and a stronger foundation of administrative law based on principles of good

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262. U.N. ENV'T PROGRAM, RULES OF PROCEDURE OF THE GOVERNING COUNCIL R. 10, 11 (1988), available at [http://www.unep.org/download\\_file.multilingual.asp?FileID=11](http://www.unep.org/download_file.multilingual.asp?FileID=11).

263. See Haas, *supra* note 221, at 356.

264. See IVANOVA, *supra* note 251, at 31-38.

265. See GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA REVISITED 157-62 (2005) (reviewing the work of the CEC); Carolyn L. Deere & Daniel C. Esty, *Trade and the Environment in the Americas: Overview of Key Issues*, in GREENING THE AMERICAS: NAFTA'S LESSONS FOR HEMISPHERIC TRADE 1, 2, 15 (Carolyn L. Deere & Daniel C. Esty eds., 2002) (reviewing the role of the CEC and describing its continuing role in the trade and environmental realms).

governance.<sup>266</sup> Although only regional in scale, the CEC demonstrates the success that can be realized from increasing the strength and depth of network-based decisionmaking.<sup>267</sup>

The CEC grew out of a side agreement to the North American Free Trade Agreement (NAFTA) in which the United States, Canada, and Mexico sought to “address regional environmental concerns, to help prevent potential trade and environmental conflicts and to promote the effective enforcement of environmental law.”<sup>268</sup> The CEC’s work ranges across a spectrum from completely nonbinding activities to formal legal instruments. Much of its work is intergovernmental, but some is truly supranational.

Some CEC projects simply explore NAFTA countries’ views and positions on particular topics.<sup>269</sup> The CEC also works to “identify common positions in the hopes of proposing joint or coordinated action.”<sup>270</sup> For example, the CEC has sponsored training and capacity-building programs for the enforcement branches of the NAFTA countries to reduce illegal trade in wildlife and improve the tracking of transboundary shipments of hazardous waste. The organization has also set up an information-sharing network to stem the illegal trafficking in chlorofluorocarbons and, on the more formal side of the activity spectrum, worked to establish a binding agreement on transboundary environmental impact assessments.<sup>271</sup>

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266. See Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501, 505 (2003) (calling for stronger regional environmental governance based on the CEC model); David L. Markell, *The North American Commission for Environmental Cooperation After Ten Years: Lessons About Institutional Structure and Public Participation in Governance*, 26 LOY. L.A. INT’L & COMP. L. REV. 341 (2004).

267. See SLAUGHTER, *supra* note 24, at 190 (noting the CEC’s policy tools).

268. Comm’n for Env’tl Cooperation, *Who We Are*, [http://www.cec.org/who\\_we\\_are/index.cfm?varlan=English](http://www.cec.org/who_we_are/index.cfm?varlan=English) (last visited Feb. 26, 2006); see also John H. Knox & David L. Markell, *The Innovative North American Commission for Environmental Cooperation*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 9, 9-12 (David L. Markell & John H. Knox eds., 2003) (discussing the development of the CEC from NAFTA).

269. 2 COMM. FOR ENVTL. COOPERATION, NORTH AMERICAN ENVIRONMENTAL LAW AND POLICY, at xi (1998).

270. *Id.* at xi-xii

271. See Angela Z. Cassar & Carl E. Bruch, *Transboundary Environmental Impact Assessment in International Watercourse Management*, 12 N.Y.U. ENVTL. L.J. 169, 206; Transboundary Env’tl Impact Assessment Council, Res. 97-03, CEC Doc. C/97-00/RES/01/Rev.3 (June 12, 1997), available at <http://www.cec.org/files/pdf/council/res97-03e.pdf> (outlining the CEC’s draft agreement on TEIA).

CEC rules and procedures contain several measures to support participation, neutrality, clarity, transparency, and robust policy dialogues.<sup>272</sup> Most notably, Articles 14 and 15 of the NAFTA Environmental Side Agreement provide for citizen submissions to the CEC, brought by NGOs or individuals, against any of the three governments for “failing to effectively enforce its environmental law.”<sup>273</sup> The CEC is empowered to investigate (if certain submission requirements are met) and develop a factual record. While the evaluations produced are nonbinding, they nevertheless operate as a supranational check on national environmental performance. In fact, in several cases the results have changed government policies.<sup>274</sup>

The CEC Joint Public Advisory Committee (JPAC) provides a further cross-check on NAFTA-related activities. Its public hearings are an important additional avenue for participation, permitting private parties to trigger an alarm if they believe that treaty obligations are not being met.<sup>275</sup> This yields broad benefits for effectiveness and efficiency as well as citizen engagement. The JPAC Rules of Procedure also prevent JPAC members from soliciting or accepting gifts from “any source that would compromise their independence.”<sup>276</sup> The CEC Council Rules of Procedure further prohibit the Executive Director and staff from receiving instructions from their individual governments, thus requiring them to act in a strictly supranational manner.<sup>277</sup> Finally, CEC procedures require that summaries of all public CEC Council meetings be provided to members and the public. Public speakers as well as government officials have the right to submit corrections to the summary record before it is finalized, but records of public meetings must be made available to the public “promptly.”<sup>278</sup>

These procedures and a highly regarded staff have successfully positioned the CEC to act both to support intergovernmental cooperation and to engage

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272. See KEVIN P. GALLAGHER, *FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND* 67 (2004) (describing the governance mechanisms of the CEC).

273. See North American Agreement on Environmental Cooperation, U.S.-Mex.-Can, art. 14, Sept. 14, 1993, 32 I.L.M. 1480.

274. Mexico created an underwater park off the island of Cozumel in response to a CEC complaint that its approval of a cruise ship dock violated Mexican law, and Canadian authorities refined their timber harvesting procedures in response to the *BC Logging* case. See HUFBAUER & SCHOTT, *supra* note 265, at 161-62.

275. See Kal Raustiala, *Police Patrols and Fire Alarms in the NAAEC*, 26 *LOY. L.A. INT'L & COMP. L. REV.* 389, 390, 404 (2004).

276. See CEC R. COMM. P., *supra* note 132, R. 1.

277. See *id.* R. 5.5.

278. *Id.* R. 11.

in limited supranational governance of its own. The CEC's independent role in determining whether NAFTA member-states are adequately enforcing their environmental laws, based on complaints that can be brought by the public,<sup>279</sup> is a particularly important cross-check on national environmental performance. And although the CEC has been hamstrung on some occasions in trying to carry out this role, the mere existence of this power is significant.<sup>280</sup>

Operating as it does in controversial political space, the CEC's relatively significant authority is, in part, a testament to its carefully assembled structure of administrative rules and procedures. These procedures directly contribute to the legitimacy of the CEC and the democratization of international governance.<sup>281</sup> By improving the CEC's expertise, accountability, and connectedness to the publics in the United States, Mexico, and Canada, these process elements indirectly help to compensate for the body's lack of electoral underpinnings.<sup>282</sup>

If the CEC's governance role is to grow, its institutional design will also have to evolve. In this regard, it has the advantage of relatively close proximity to the highly developed procedural regimes of its three nation-state sponsors, so the translation of rules and procedures from the national to the supranational scale may be easier for the CEC than for global bodies. Even so, the traditions of governance vary among the United States, Canada, and Mexico. In addition, unlike organizations operating globally, the CEC does not have a broad set of other institutions with which to work, making the establishment of a regime of power-sharing, institutional cross checks, and systemic legitimacy harder to establish. Perhaps, however, this setting can be turned to an advantage, with the CEC developing review mechanisms that lean more heavily on an interface with national officials.

## CONCLUSION

In an interdependent world, a degree of supranational governance is inevitable. Success in combating transboundary harms from terrorism to global

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279. See SLAUGHTER, *supra* note 24, at 190-91; David L. Markell, *The Commission for Environmental Cooperation's Citizen Submission Process*, 12 GEO. INT'L ENVTL. L. REV. 545, 571 (2000).

280. See Blanca Torres, *The North American Agreement on Environmental Cooperation: Rowing Upstream*, in GREENING THE AMERICAS, *supra* note 265, at 201 (highlighting the strengths and limitations of the CEC); see also North American Agreement on Environmental Cooperation, *supra* note 273, arts. 7-10 (delimiting the role of the CEC).

281. See Raustiala, *supra* note 275, at 409.

282. *Id.*

warming, and in producing global public goods, including liberalized trade and public health programs, will be easier to achieve if global policymaking institutions function effectively.

Movement toward good governance at the supranational scale would be enhanced by broader adoption of basic administrative law tools and procedures. The administrative practices that have emerged in the United States, Europe, Japan, South Korea, and elsewhere in recent decades cannot be transferred wholesale to the global realm. The differences in the context of governance at the national and supranational levels are significant. Policymaking at the international scale can, however, be improved and endowed with greater legitimacy through adoption of a set of rules and procedures that are associated with good governance.

This Article does not argue for adoption of a Global Administrative Procedure Act. The diversity of global governance circumstances and the range of views across countries make such a vision both unwise and unworkable. Nor does it seek to spell out definitively which administrative law tools should apply in every circumstance. Instead, it offers the theoretical logic for, and some first steps toward, globalizing administrative law. The core conclusion is this: Even if supranational governance is limited and hampered by divergent traditions, cultures, and political preferences, developing a baseline set of administrative law tools and practices promises to strengthen whatever supranational policymaking is undertaken.

As supranational bodies expand their governance role, move toward formal rulemaking, and take up more politically charged issues, their legitimacy becomes a matter of greater concern. Without elections, the democratic legitimacy of international organizations will always be in question, and their performance will be inhibited by the fact that their top officials do not face the incentives for accountability created by the discipline of having to win elections. Legitimacy, however, can also be grounded in an institution's delivery of good results, its capacity to carry out rulemaking in ways that provide clarity and stability, its systemic strength and structure of checks and balances, its ability to promote political dialogue, and its commitment to procedural rigor.

Administrative law, I have argued, lies at the heart of efforts to establish these lines of legitimacy. Adoption of a more robust regime of administrative rules and procedures by international policymaking bodies would directly contribute to their capacity for good governance through the mechanism of procedural rigor, and would indirectly enhance their democratic, results-based, order-derived, systemic, and deliberative legitimacy.

Much work remains to be done in fleshing out appropriate rules and procedures on an institution-by-institution (and even issue-by-issue) basis.

Given the array of procedural questions to be addressed and tradeoffs to be resolved, as well as the dynamic state of supranational governance, the globalization of administrative law is likely to emerge slowly. But the need for collective action at the global scale and growing emphasis on good governance creates an imperative for continued efforts in this regard.



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