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Global Administrative Law (Working Paper for the S.T. Lee Project on Global Governance)

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GLOBAL ADMINISTRATIVE LAW

Simon Chesterman*

Efforts to address global governance deficits approach the problem at a strategic or tactical level. Strategic efforts would reshape the politics or institutions of global order; tactical efforts focus on the processes of governance, either seeking to utilize informal networks for improved outcomes, or to formalize the processes themselves for greater accountability. This paper considers the last approach and the claims that “global administrative law” could remedy at least some accountability deficits at the global level. Recent challenges to the UN Security Council in the area of targeted financial sanctions are discussed, before sketching out what global administrative law might offer the governance challenges posed in the areas of energy, public health, and finance.

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I. The Governance Deficit: Politics or Institutions, Networks or Norms?

The question of how the globe should be governed depends, crucially, on one's diagnosis of its challenges. The S.T. Lee Project on Global Governance builds on two insights that have now become commonplaces. The first is that the liberal order constructed in large part by the United States after the Second World War is losing its claim to legitimacy. The second is that globalization has revealed governance gaps suggesting that the present order is in any case no longer effective. The first may be understood as a political challenge to the top-down hierarchy that dominates this order; the second as a bottom-up practical challenge to the relevance of existing institutions.

Though these crises of legitimacy and effectiveness are of course related, different prescriptions emphasize one or the other. To the crisis of legitimacy, political solutions are sometimes proposed: a reallocation of seats on the various institutions of global governance such as the UN Security Council, the World Bank, the International Monetary Fund, the G8 and so on.¹ For the crisis of effectiveness, new institutions are frequently mooted and sometimes created: recent modest examples include the Group of Twenty (G-20) Finance Ministers and Central Bank Governors that first met in 1999,² the Leaders-20 (L20) established in 2003,³ and the UN Peacebuilding Commission created in 2005.⁴

¹ See, e.g., Kishore Mahbubani, *The New Asian Hemisphere: The Irresistible Shift of Global Power to the East* (New York: Public Affairs, 2008), pp. 103-104; Bill Emmott, *Rivals: How the Power Struggle Between China, India and Japan Will Shape Our Next Decade* (London: Allen Lane, 2008), pp. 262-264.

² Randall D. Germain, "Global Financial Governance and the Problem of Inclusion," *Global Governance* 7 (2001): 411.

³ See, e.g., Johannes F. Linn and Colin I. Jr. Bradford, Pragmatic Reform of Global Governance: Creating an L20 Summit Forum (Washington, DC: Brookings Institution, Policy Brief No. 152, April 2006), available at <http://www.brookings.edu/papers/2006/04globalgovernance_linn.aspx>; XUE Lan, "Breaking Deadlocks in Global Governance: How to Make the L-20 Work," *Global Governance* 13 (2007): 320.

⁴ See, e.g., Simon Chesterman, "From State Failure to State Building: Problems and Prospects of a United Nations Peacebuilding Commission," *Journal of International Law and International Relations* 2, no. 1 (2005): 155.

Yet the viability of any system-wide prescriptive approach depends on political will that, historically, has been available only in times of crisis. It took the First World War to bring about the establishment of the League of Nations, and a Second to see the creation of the United Nations and the Bretton Woods Institutions. The only amendments to the UN Charter took place during the Organization's expansion in the wake of decolonization. It is possible that current crises — of climate change, public health, financial markets — will be sufficient to bring about similar tectonic shifts, but overcoming the underlying collective action problems requires a level of enlightened self-interest that is rare in international affairs, even if one assumes that political or institutional solutions to these crises exist.⁵

Other accounts therefore eschew major political or institutional change and focus on processes; often they are more descriptive than prescriptive, advocating a change in perspective rather than a wholesale change in political reality — evolution rather than revolution. Anne-Marie Slaughter, for example, has argued compellingly that government networks are an underutilized tool of global governance that operate in parallel to traditional institutions.⁶ Advocacy of greater reliance on such networks can loosely be termed the *deformalization* of global processes and could lay the foundation for greater legitimacy in decision-making in so far as the various participating officials can be linked back to traditional domestic accountability structures.⁷ The limitations of such an approach are that it remains subject to the power disparities of the political order and cannot easily overcome the collective action problems identified earlier.⁸ An alternative (though not mutually exclusive) approach thus emphasizes instead the *formalization* of global processes. It is this account, largely descriptive of developments already occurring, that is the subject of the present paper.

⁵ Cf. Strobe Talbott, *The Great Experiment: The Story of Ancient Empires, Modern States, and the Quest for a Global Nation* (New York: Simon & Schuster, 2008), pp. 393-401; Fareed Zakaria, *The Post-American World* (London: Allen Lane, 2008), pp. 231-232.

⁶ Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

⁷ Ibid, pp. 230-244. Cf. Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca, NY: Cornell University Press, 2004); Sanjeev Khagram, "Possible Future Architectures of Global Governance: A Transnational Perspective/Prospective," *Global Governance* 12 (2006): 97.

⁸ Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, "The Emergence of Global Administrative Law," *Law and Contemporary Problems* 68 (2005): 15, p. 50.

II. The Emergence of Global Administrative Law

The intentionally unexciting name given to this formalization of certain global processes is “global administrative law”.⁹ Blandness can be a virtue if it is equated with harmlessness, and indeed there is little to fear from global administrative law. The emerging set of rules to which it refers encompasses procedures and normative standards for regulatory decision-making that falls outside domestic legal structures and yet is not properly covered by public international law. The standards that are being imported into this new sphere of regulatory activity draw upon administrative law principles common in many jurisdictions, such as transparency, participation, and review.¹⁰ As a response to the demand for accountability in globalization, then, this is distinct from demands that globalization be made more *democratic*; instead, these developments aim to make it more *reasoned*.¹¹ Nevertheless, though most of the discussion here is descriptive of existing phenomena, consolidation of this emerging body of norms would improve both the quality of decision-making and the ability of those affected by decisions to protect their legitimate rights and interests.

The fragmented nature of activity in this area to date is easily seen. The forums in which regulatory decisions are being made range from treaty-based organizations such as the United Nations and the World Trade Organization (WTO) to networks of government officials such as the Basel Committee of national bank regulators. In addition to government representatives, the actors include experts such as the technical committees of the International Organization for Standardization (ISO) and the non-profit Internet Corporation for Assigned Names and Numbers (ICANN). And, increasingly, less formal networks of interested parties play a role in developing standards in areas as diverse as “fair trade” coffee and “dolphin-friendly” tuna. Participation in these disparate decision-making processes varies

⁹ See generally the materials available at the Global Administrative Law website <<http://www.iilj.org/GAL>>.

¹⁰ Kingsbury, Krisch, and Stewart, “Global Administrative Law,” pp. 15-18.

¹¹ Daniel C. Esty, “Good Governance at the Supranational Scale: Globalizing Administrative Law,” *Yale Law Journal* 115 (2006): 1490.

widely, but there is rarely a general right for affected parties to challenge a decision; frequently it is not possible even to seek reasons as to why a particular decision was made.

The disparate regimes may overlap — sometimes quite intentionally, as the market comes to be regulated by a market of regulation. In some areas, competing standards may be adopted on a “voluntary” basis, though the global marketplace quickly leads to standards becoming mandatory as a commercial reality if not a legal requirement. Mechanisms that have sought to regulate these activities tend to come from traditional governance institutions operating at the limits of or beyond their traditional boundaries. At the national level, courts and legislatures have increasingly asserted a capacity to review domestic implementation of global standards and national officials’ participation in global administrative decisions. At the international level, accountability may depend on specific mechanisms established for a particular regime, such as the WTO’s inspections panels and Appellate Body,¹² or reactive ad hoc bodies such as the Independent Inquiry Committee into the United Nations Oil-for-Food Program. For many regimes, there is no formal review procedure at all and no means of calling for one.¹³

Though such activities are far from uniform, they mark a paradigm shift in the governance activities of bodies that do not fit neatly into historic categories of national or international law. The former typically controls activities within the jurisdiction of one state; the latter the relations between states. This schema was never particularly neat — a separate body of law deals just with conflicts of jurisdiction — but the activities considered here frequently operate in the interstices *between* jurisdictions, while encompassing activities that would normally be undertaken by domestic governance authorities.¹⁴ Seeing such activity as “global administration” reflects those qualities and pointedly raises the legitimacy issues that

¹² See, e.g., Dana L. Clark, Jonathan Fox, and Kay Treakle (eds), *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel* (Lanham, MD: Rowman and Littlefield, 2003); David Hunter, “Using the World Bank Inspection Panel to Defend the Interests of Project-affected People,” *Chicago Journal of International Law* 4 (2003): 201.

¹³ Kingsbury, Krisch, and Stewart, “Global Administrative Law,” pp. 33-34.

¹⁴ Joshua Cohen and Charles F. Sabel, “Global Democracy?” *New York University Journal of International Law and Politics* 37 (2005): 763.

would follow from a government asserting such powers. A government that runs a trading regime for pollution credits, determines capital adequacy requirements for banks, or freezes the assets of suspected terrorist financiers, for example, would typically be subject to some form of administrative law process, perhaps requiring varying degrees of transparency, rights of participation, and review of decisions. These procedural remedies are not available against the Kyoto Protocol's Clean Development Mechanism, the Basel Committee, or the UN Security Council's 1267 Al Qaeda Sanctions Committee respectively.¹⁵

Whether it makes sense for these activities to be thought of as a coherent whole is an open question. Similarly, analogies between national legal regimes, such as administrative law, and international or transnational law must be drawn carefully. Nevertheless, the increasing demands for accountability are suggestive of the manner in which administrative activity by governments came to be subject to review.¹⁶

A more basic difficulty in applying administrative law principles to global administration is the structure of authority.¹⁷ National institutions of governance tend to be organized hierarchically with power distributed in accordance with a constitution or basic law. Global institutions of governance, such as they are, frequently operate in a less structured environment driven by negotiation; formally, much authority comes from the states whose consent gives them legitimacy. This is reflective of larger problems with any conception of an international "rule of law": in a domestic legal order, the sovereign stands in a vertical hierarchy with other subjects of law; at the international level, sovereignty tends to

¹⁵ On the Basel Committee in particular, see Michael S. Barr and Geoffrey P. Miller, *Global Administrative Law: The View From Basel* (New York: New York University, 2005), available at <<http://www.law.nyu.edu/kingsburyb/fall05/globalization/Miller%20Paper.pdf>>.

¹⁶ See Richard B. Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88 (1975): 1669; Richard B. Stewart, "US Administrative Law: A Model for Global Administrative Law?" *Law and Contemporary Problems* 68 (2005): 63.

¹⁷ See Sabino Cassese, "Administrative Law Without the State? The Challenge of Global Regulation," *New York University Journal of International Law and Politics* 37 (2005): 663; David Dyzenhaus, *Accountability and the Concept of (Global) Administrative Law* (New York: New York University School of Law, IILJ Working Paper 2008/7, September 2008), available at <<http://www.iilj.org/papers>>.

be conceived of as remaining with states, at least nominally operating in a horizontal plane of sovereign equality.¹⁸

III. Accountability Deficits

Is it possible, then, to have meaningful accountability in this area? (This is separate from the question of whether accountability is always *desirable* — a point that is considered below.)

There are many ways of holding power to account. Mechanisms are available at the global level, but they tend to be responsive in nature and ad hoc in structure. Accountability should not simply be a reaction to scandal, however. To be effective it should normally exist as of right, which requires the creation of institutions, the elaboration of standards, and the potential for sanctions.¹⁹

This is not, of course, the only way to constrain power. Other means include negotiation constraints, checks and balances, the threat of unilateral action, and so on. Such constraints fall outside “accountability” as it is used here, but point to an important distinction between legal and political accountability. *Legal* accountability typically requires that a decision-maker has a convincing reason for a decision or act. Compliance with a rule will normally be a sufficient reason, though some administrative agencies may be established with a requirement to provide substantive reasons on the merits of a particular decision. *Political* accountability, by contrast, can be entirely arbitrary. In an election, for example, voters are not required to have reasons for their decision — indeed, the secrecy of the ballot implies the exact opposite: it is generally unlawful even to ask a voter why he or she voted

¹⁸ See further Simon Chesterman, “An International Rule of Law?” *American Journal of Comparative Law* 56 (2008): 331.

¹⁹ Benedict Kingsbury, “The Rules and Institutions of Accountability” (UN Headquarters, New York: paper presented at A Rules-Based International Order, seminar convened by the Institute for International Law and Justice and the Permanent Mission of Austria to the United Nations, 5 May 2005). See also The UN Security Council and the Rule of Law, UN Doc A/63/69-S/2008/270 (2008), available at <<http://documents.un.org>>.

one way or another.²⁰ These forms of accountability may be seen as lying on a spectrum, with other variations possible. In a legislature individual legislators may have specific reasons for voting in favour of or against a piece of legislation, sometimes demonstrated through speeches made before or after it was adopted. But if such reasons are inconsistent, it may be unclear what significance is to be attributed to them.²¹

In the absence of political or what we might loosely term “democratic” accountability, is it desirable to provide for legal accountability mechanisms? Two concerns immediately present themselves. First, it is unclear that the objective implementation of standards implied by legal accountability can adequately substitute for a democratic deficit: such an approach presumes that holding power to specified standards is a sufficient form of accountability, while ignoring that the standards themselves are contestable — it loses the essentially arbitrary character of democratic accountability.²² Secondly, the relationship between those making decisions and those affected by them is different in the global administrative sphere than it is in national institutions. In a democracy, power is delegated through elections by the same population that is typically affected by decisions; in global administration there is no corresponding link between those affected and those delegating power. As a result, those with the most leverage to demand and enforce accountability may be those with least interest in doing so.²³

It is necessary, therefore, to look more closely at different structures of accountability across the spectrum of legal and political remedies. Ruth W. Grant and Robert O. Keohane have identified seven such structures, reflecting different relationships between those who delegate power, those who make decisions, and those who bear the consequences: (i)

²⁰ See John Ferejohn, “Accountability and Authority: Toward a Theory of Political Accountability”, in Adam Przeworski, S.C. Stokes, and B. Manin (eds), *Democracy, Accountability, and Representation* (Cambridge: Cambridge University Press, 1999), 131.

²¹ Kingsbury, “The Rules and Institutions of Accountability”.

²² Cf. John Ferejohn, “The Law of Politics: Judicializing Politics, Politicizing Law,” *Law and Contemporary Problems* 65 (2002): 41.

hierarchical accountability within a bureaucracy, such as the UN Secretariat; (ii) *supervisory* accountability, such as the government representatives on the executive boards of the World Bank and IMF; (iii) *fiscal* accountability, such as through the Advisory Committee on Administrative and Budgetary Questions (ACABQ) of the UN General Assembly or the unilateral withholding of UN dues; (iv) *legal* accountability, where a disinterested independent third party, such as a court, is vested with decision-making powers, for example arbitral tribunals set up under the International Centre for Settlement of Investment Disputes (ICSID) or the International Criminal Court; (v) *market* accountability, where decisions are left to the operation of the market, such as pressure on developing economies to adopt standards attractive to global capital markets or consumer pressure against inadequate labour standards on running shoes; (vi) *peer* accountability, such as the desire of diplomats to maintain credibility and influence among their colleagues; and (vii) *public reputational* accountability, which applies to all the preceding categories but also embraces “soft power” connected with the prestige and esteem of a given state.²⁴

Such broader conceptions of accountability may provide tools for shaping and improving global administrative decisions, even if they are unlikely to offer the revolution that may be called for in response to specific problems.

IV. Reviewing the UN Security Council

A prominent example of the demand for administrative law-type reforms in recent years can be seen at the United Nations. Though earlier examples of this include the mismanagement of the Oil-for-Food Program and sexual exploitation in peace operations,²⁵ the most radical

²³ Ruth W. Grant and Robert O. Keohane, “Accountability and Abuses of Power in World Politics,” *American Political Science Review* 99, no. 1 (2005): 1. Cf. Nico Krisch, “The Pluralism of Global Administrative Law,” *European Journal of International Law* 17 (2006): 247.

²⁴ Grant and Keohane, “Accountability and Abuses”.

²⁵ See Chesterman, “Globalization Rules,” pp. 42-43.

challenge has come in the area of targeted financial sanctions. And it came not from tax havens and failed states, but from the courts of the European Union in the form of a call for traditional “legal accountability” as understood in Grant and Keohane’s list.

First used in the 1990s to limit the collateral impact of economic sanctions — notably the humanitarian consequences of the embargo on trade with Iraq through that decade — targeted financial sanctions were intended to put pressure on specific individuals or limit their ability to undermine international peace and security, such as through the financing of terrorism. The regimes successfully reduced humanitarian concerns but came to be criticized for the manner in which individuals are selected for such measures without either transparency or the possibility of formal review: utilitarian anxiety was replaced by questions of natural justice.

Challenges arose in a number of forums, most prominently the European Courts. In *Yusuf, Kadi*, and other cases, plaintiffs claimed that the freezing of their financial assets by a regulation of the European Community pursuant to a decision made by the Council’s Sanctions Committee violated their rights. The Court of First Instance decided in 2005 it could review decisions of the Security Council only within the narrow parameters of peremptory norms of international law known as *jus cogens*.²⁶ Beyond that, the judges noted that there was no international review mechanism available to the applicants. As the alleged violation did not reach the high threshold of violating a peremptory norm, the challenge failed.²⁷ In September 2008 the European Court of Justice (ECJ) held that, while it did not purport to review the Council’s resolutions as a matter of international law even with respect to these peremptory norms, it could nevertheless review the lawfulness of the Community act

²⁶ The content of these norms is disputed, but generally accepted norms of *jus cogens* include the prohibitions on genocide, slavery, and torture.

²⁷ *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (Court of First Instance of the European Communities, Case T-306/01, 21 September 2005); *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* (Court of First Instance of the European Communities, Case T-315/01, 21 September 2005); *Faraj Hassan v. Council of the European Union and Commission of the European Communities* (Court of First Instance of the European Communities, Case T 49/04, 12 July 2006); *Chafiq Ayadi v. Council of the European Union* (Court of First Instance of the European Communities, Case T-253/02, 12 July 2006). Cases available at <http://curia.eu.int>.

intended to give effect to those resolutions.²⁸ As the European regulation in question violated fundamental rights (effective judicial protection and respect for property) it was struck down.²⁹ Nevertheless, as annulment with immediate effect “would be capable of seriously and irreversibly prejudicing the effectiveness” of the measures imposed by the Council, the effects of the regulation would be maintained for three months — that is, until 3 December 2008.³⁰ This somewhat understated the potential consequences of contradictory obligations owed by member states to the European Union and the United Nations, which the ECJ’s Advocate General had earlier noted might “inconvenience the Community and its Member States in their dealings on the international stage”.³¹

The Court’s decision can be seen as an attempt to offer some leverage over the Security Council to improve its procedures.³² At the 2005 World Summit, states had called upon the Council to ensure that “fair and clear” procedures exist for the listing and delisting of individuals and entities on targeted sanctions lists.³³ In 2006, Secretary-General Kofi Annan cautioned that such sanctions will only remain useful to the extent that they are effective and seen to be legitimate; that legitimacy depends on procedural fairness and the availability of a remedy to persons wrongly harmed by such lists. He noted four basic elements that should serve as minimum standards for such a regime: the right to be informed of the case against a targeted individual, the right of that individual to be heard in response to

²⁸ *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (European Court of Justice, Cases C-402/05 P and C-415/05, 3 September 2008), available at <http://curia.eu.int>, paras. 286-288.

²⁹ *Ibid.*, paras. 358, 370.

³⁰ *Ibid.*, paras. 373-376.

³¹ *Opinion of Advocate General Poiares Maduro regarding the case of Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities (Case C-402/05 P)* (European Court of Justice, 16 January 2008), available at <http://curia.eu.int>, para. 39.

³² See Craig Whitlock, “Terrorism Financing Blacklists at Risk; Global System Faces Multiple Challenges”, *Washington Post*, 2 November 2008.

³³ GA Res. 60/1 (2005), para. 109.

that case, the right to review by an effective mechanism, and a requirement of periodic review of all such sanctions.³⁴

Subsequent Council resolutions marked modest progress. Resolutions adopted in 2006 established a focal point to receive delisting requests and required a person to be informed of their designation on a list and outlining criteria to be considered in a request to be removed.³⁵ None of these moves addressed the foundational concern that individuals were having their assets frozen without any formal process for review of how that decision was made, or the circumstances in which it could be revoked.

Following the ECJ decision, there is now pressure on the Council to adopt such a process.³⁶ The alternative is that sanctions will become ineffective and not be applied rigorously; indeed, the fact that some states are hesitant to submit new names to be included on sanctions lists and others are not seeking formal humanitarian exemptions may be evidence that this is happening already.³⁷

These difficulties are suggestive of problems that go well beyond the specific question of targeted financial sanctions. In the absence of political institutions with coercive powers comparable to the centralization of legal authority in the modern state, global challenges have fallen to the imperfect institutions that exist, most notably the Security Council. This is true not merely with respect to the security threats posed by terrorism and

³⁴ The unpublished letter by the Secretary-General dated 15 June 2006 was referred to in the Security Council debate on 22 June 2006: UN Doc. S/PV.5474 (2006), p. 5.

³⁵ SC Res 1730 (2006); SC Res 1732 (2006); SC Res 1735 (2006).

³⁶ Past practice of the Council offers a variety of possible forms the process might take. It could include a full appeal to a specially constituted tribunal (comparable to the various international criminal tribunals established by the Council), a form of administrative review (comparable to the UN Compensation Commission), a confidential review process (comparable to the Detention Review Commission created by the UN Mission in Kosovo in 2001), or an ombudsman institution (comparable to those established in Kosovo and East Timor). Cf., *Strengthening UN Targeted Sanctions Through Fair and Clear Procedures* (Watson Institute for International Studies, Providence, RI, 30 March 2006), at <http://www.watsoninstitute.org/TFS>.

³⁷ See, e.g., UN Doc. S/2007/677 (2007), para. 26; UN Doc. S/2006/154 (2006), Annex, para. 57.

proliferation of weapons of mass destruction but also, somewhat ambiguously, in the case of climate change.³⁸

The attractiveness of using the Council — at least to those states with permanent seats and veto powers — is obvious. Years of negotiation over treaty regimes can be contrasted with the swift adoption of mandatory resolutions; the International Criminal Court, for example, took half a century of negotiations while the tribunals for the former Yugoslavia and Rwanda were established in months. Nevertheless, as the challenges to the sanctions regime and the Council’s use of “legislative” resolutions with general rather than specific applications show,³⁹ the power of the Council to enforce the law is being undermined by a reluctance to submit to it.

V. Conclusion

Global administrative law is appropriately described as an “emerging” phenomenon.⁴⁰ The global decision-making processes that are subject to administrative law type remedies are limited and it is unlikely that such remedies will be extended to cover every such decision.

Nor should they. As indicated earlier, the formalization of certain decision-making processes is supplementary to other efforts to address global governance deficits. The argument here is that such procedures will improve the quality of decision-making and responsiveness to those affected by decisions. But not all of these problems are technical questions to be resolved by lawyers. Objective implementation of standards is not neutral

³⁸ Edith M. Lederer, “Security Council Tackles Climate Change”, *Washington Post*, 18 April 2007; Francesco Sindico, “Climate Change: A Security (Council) Issue?” *Carbon and Climate Law Review* 1 (2007): 26. This is not as new as has sometimes been suggested — even in 1992 the Council noted that “non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.” UN Doc S/23500 (1992).

³⁹ Stefan A. Talmon, “The Security Council as World Legislature,” *American Journal of International Law* 99 (2005): 175.

⁴⁰ Kingsbury, Krisch, and Stewart, “Global Administrative Law,” p. 50.

unless the standards themselves are legitimate. For this reason, purely legal forms of accountability will never be sufficient to address underlying political and institutional deficits.

A second criticism of global administrative law is that formalization of existing processes may entrench the interests of powerful. It probably will. Nevertheless, law's capacity to restrain power and prevent the co-optation of norms to serve the ends of the powerful has always been questionable. Writing on the development of the rule of law in eighteenth century England, the historian E.P. Thompson endorsed the Marxist view that law systematized and reified inequality between the classes. Even so, he argued, law also mediated those class relations through legal forms, constraining the actions of the ruling class. For this reason, unusually for a Marxist, he termed the rule of law an "unqualified human good."⁴¹ Global administrative law will not bring about a New International Economic Order, but it might enable those most affected by globalization to hold those with influence to their rhetoric.

The goals of a global administrative law go beyond constraining decision-makers, however. In addition to providing "input legitimacy" to decision-making processes, broadening participation, shining light on deliberations, and providing the possibility of revisiting bad or unfair choices should improve the decisions themselves. This may be thought of as "output legitimacy".⁴²

What, then, does this mean for the issues considered in this Project?

In the area of *energy*, global administrative law is unlikely to answer the high political questions of who pollutes and who pays. But it could improve, among other things, environmental impact assessments or the workings of a cap-and-trade system and other

⁴¹ E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Harmondsworth: Penguin, 1977), p. 264.

⁴² Martín Böhmer, "Who Benefits From Administrative Remedies? Mobilization and Access to Justice in Impoverished Areas" (New York University School of Law: paper presented at Global Administrative Law Conference, 22-23 April 2005), available at <http://www.iilj.org/global_adlaw>.

mechanisms, enhancing both substantive decisions and the legitimacy accorded to those decisions.⁴³

In the area of *public health*, such an approach will not resolve the problems of resources or how intellectual property rights held by the rich should be balanced against the medical needs of the poor. Yet it can offer concrete improvements to the work of the World Health Organization (WHO) as well as insights into effective reporting systems for epidemics and the rational allocation of scarce resources.⁴⁴

And in the area of *finance*, global administrative law will not address the basic structure of global capitalism or conjure regulatory tools to prevent speculative bubbles. Nevertheless it may improve the accountability of institutions such as the WTO, the IMF and the World Bank, as well as the procedures of credit-rating agencies and other actors that can affect national economies.⁴⁵

⁴³ See, e.g., Sverker Jagers and Johannes Stripple, "Climate Governance Beyond the State," *Global Governance* 9 (2003): 385; Neil Craik, "Deliberation and Legitimacy in Transnational Environmental Governance: The Case of Environmental Impact Assessment," *Victoria University Wellington Law Review* 38 (2007): 381; David B. Hunter, "Civil Society Networks and the Development of Environmental Standards at International Financial Institutions," *Chicago Journal of International Law* 8 (2008): 437; Euan MacDonald, GAL and the Intergovernmental Panel on Climate Change (New York: Institute for International Law and Justice, 29 April 2008), available at <<http://globaladminlaw.blogspot.com/2008/04/gal-and-intergovernmental-panel-on.html>>; Michael Wara, "Measuring the Clean Development Mechanism's Performance and Potential," *UCLA Law Review* 55 (2008): 1759.

⁴⁴ See, e.g., Nico Krisch, *Imperial International Law* (New York: New York University School of Law, Global Law Working Paper 01/04, 2004), available at <<http://www.nyulawglobal.org>>, p. 38; Esty, "Good Governance," pp. 1550-1554; Joseph E. Stiglitz, *Making Globalization Work* (New York: W.W. Norton, 2006), p. 21; Kathleen J. Choi, "A Journey of a Thousand Leagues: From Quarantine to International Health Regulations and Beyond," *University of Pennsylvania Journal of International Law* 29 (2008): 989.

⁴⁵ See, e.g., Antony Anghie, "Time Present and Time Past: Globalization, International Financial Institutions and the Third World," *New York University Journal of International Law and Politics* 32 (2000): 243; Tony Porter, "The Democratic Deficit in the Institutional Arrangements for Regulating Global Finance," *Global Governance* 7 (2001): 427; Timothy Sinclair, "The Infrastructure of Global Governance: Quasi-Regulatory Mechanisms and the New Global Finance," *Global Governance* 7 (2001): 441; Graham Saoul, "Transparency and Accountability in International Financial Institutions", in Richard Calland and Alison Tilley (eds), *The Right to Know, the Right to Live: Access to Information & Socio-Economic Justice* (Cape Town: Open Democracy and Advice Centre, 2002); Natalie L. Bridgeman and David B. Hunter, "Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism," *Georgetown International Environmental Law Review* 20 (2008): 187; Stavros Gadinis, "The Politics of Competition in International Financial Regulation," *Harvard International Law Journal* 49 (2008): 447; Robert Howse, "The End of the Globalization Debate: A Review Essay," *Harvard Law Review* 121 (2008): 1528; D. Daniel Sokol, "Order Without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements," *Chicago-Kent Law Review* 83 (2008): 231.

These are all, evidently, partial answers to the governance and accountability deficits identified earlier. Even if present crises make possible more ambitious political and institutional transformations, however, and even if networked governments supplement those transformations with informal relationships, those seem inadequate safeguards for the exercise of powers that, in a domestic environment, would naturally be regarded as “public” and thus subjected to public law limitations. The clearest evidence in recent times has been the effort to subject the UN Security Council to the rule of law, but as global regimes are granted greater powers to address global problems, similar challenges are likely to arise to ensure that such powers are subjected to as well as enforced by law.