The Interplay Between Actors as A Determinant of the Evolution of Administrative Law in International Institutions

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I. Introduction

Delegating authority to administrative agencies makes up for the generality of the law. The legislature cannot address every contingency, or wishes to stay clear of issues that are politically or socially sensitive, and for these purposes it delegates authority to its agents. But such a delegation of authority endows administrative agents with wide discretion, and discretion breeds its own concerns: unaccountability,

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recklessness, corruption. Administrative law is designed to address such concerns by curbing agents’ discretion through the structuring of the decision-making process, the provision of transparency and voice to affected groups, and the setting up of review mechanisms, including judicial review. Such attempts, however, produce new discretionary powers, and new rules are designed to control these secondary discretionary powers, and so on. This “cat and mouse” game between principal and agents continues indefinitely. As Martin Shapiro says, administrative law is “an endless game of catch-up in which previously granted discretions are brought under rules, even as new discretions are granted, and no discretion granted is ever completely and finally reduced to rules.”

Who authors those norms that attempt to constrain administrative discretion? This depends on the balance of power between the different actors in the domestic body politic. A legislature that seeks to shape the outcome of executive decision-making will use administrative law for that purpose, and hence we should expect to find elaborate statutory provisions that constrain administrative discretion. In contrast, a disinterested or captured legislature that surrenders policy-making to the executive will tend to produce relatively ineffective administrative law. But other actors may step in and influence the evolution of the law. The executive itself may wish to restrain at least some of its agencies by rules that the public can enforce. The court is quite an important actor as well, and one that has a will and means of its own to impose constraints on administrative agencies. Indeed, when lawmakers defer to the executive with no strings attached, it is often the case that courts fill the gap with judicially invented rules. Such judicial activism depends in turn on the level of court involvement that the legislature and executive will tolerate. Thus, it is administrative

law, perhaps more than any other area of law, which reflects most accurately in each country the balance of power between the various branches of government.

In recent years, more and more legislative discretion is being delegated not to domestic agents but to international – regional or global – institutions. Often the same domestic groups that influence legislators to delegate authority to the domestic executive use their weight to induce their government to join an international institution that enjoys decision-making powers vis-à-vis its member states. Thus, inevitably, international institutions constitute another arena for the evolution of administrative law. But since such institutions do not have the paradigmatic division of powers that characterizes democracies with their legislative, executive and judicial branches, the characteristics of this type of administrative law may differ from the domestic type. Hence, certain principles of domestic administrative and constitutional law will not necessarily apply to international bodies. For example, the requirement that courts must be established by primary legislation, a requirement found in many domestic constitutions that reflects important democratic guarantees that the legislative process provides, may be irrelevant in the context of an international body, whose constitution and procedures rely to a lesser extent on a legislative body. But to the extent that treaties assign responsibilities to treaty bodies and delegate decision-making powers to them, issues of administrative law similar to those of domestic law may arise. As in domestic administrative law, the administrative law of an international institution will result from enactments of the state parties (in the treaty establishing the institution), from various kinds of inputs from their executive organs,
and from decisions of their adjudicative bodies. The principal-agent tensions that exist between the lawmaker and the executive in the domestic scene can also be found in the international scene, between the state parties and the different treaty-bodies and within each of the treaty-bodies. Hence, like domestic administrative law which reflects the domestic political balance of power, the law constraining the discretion of the various actors within the international institution will reflect the specific balance of powers between the state parties and within the institution.

As more and more institutions engage in administrative lawmaking for themselves, and interact with other institutions, it is possible that cross-institutional pressures will create a pull towards conformity with general rules of administrative law. This pull may result from relatively powerful institutions that condition deference to other institutions’ acts on those other institutions’ respect to administrative norms, or from an emerging culture of shared administrative norms that actors may find difficult to bargain away. Moreover, the International Court of Justice (ICJ) has the opportunity to impose procedural obligations upon states, whether through the restatement of customary international law or the interpretation of treaties. As such, the ICJ is in a unique position to change the default rules for state parties who negotiate treaties that establish institutions. At the same time, those actors that dread being subjected to administrative law within international institutions will certainly learn from the experience gained in other institutions in which administrative law developed quite unexpectedly. They may, for example, limit the role of the institution’s adjudicative bodies, which as this Article demonstrates have proven to be quite active promoters of administrative norms. Indeed, because the dynamics of international institutions are a relatively recent phenomenon, even

seasoned negotiators fail to realize the consequences of their bargains. There is ample evidence that the parties who sought to establish the Appellate Body of the World Trade Organization (WTO) did not anticipate the significant role this body would have beyond the settlement of trade disputes. From the perspective of this Article, these cross-institutional influences and pressures are taken into consideration as factors among those that influence the positions of the state parties and the internal organs of the institution.

This Article reflects on the interaction between actors within international institutions as a determinant of the evolution of administrative law in those institutions. To that end, the Article first outlines the different motivations for the development of domestic administrative law (Part II). This analysis provides the background for an attempt to identify the factors that shape the evolution of administrative law in international institutions (Part III). Part IV tests whether the practice concerning the evolution of international administrative law in the European Union (EU), the World Trade Organization (WTO) and the United Nations (UN) confirms the theoretical expectations. Finally, Part V addresses the role of the International Court of Justice (ICJ) in developing international administrative law in general. Part VI concludes.

4 I thank Benedict Kingsbury for this suggestion.
5 J. H. H. Weiler, The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement, p. 9 (Jean Monnet Working Paper No. 9/00), at http://www.jeanmonnetprogram.org/papers/00/000901. ("From interviews with many delegations I have conducted it is clear that, as mentioned above, they saw the logic of the Appellate Body as a kind of Super-Panel to give a losing party another bite at the cherry, given that the losing party could not longer block adoption of the Panel. It is equally clear to me that they did not fully understand the judicial let alone constitutional nature of the Appellate Body."); Richard H. Steinberg, Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints 98 A.J.I.L. 247, 251, n. 27 (2004) ("A few WTO DSU negotiators contemplated the possibility that in interpreting WTO agreements, the Appellate Body would engage in expansive lawmaking. However, most trade ministers consistently underestimated or dismissed that possibility, focusing instead on the virtues of its function of applying the rules... After the Uruguay Round agreements were signed, some members of the U.S. Congress expressed serious concern about the potential for judicial lawmaking. Senator Robert Dole going so far as to propose the establishment of a special U.S. commission to review certain Appellate..."
II. The Theory on the Evolution of Administrative Law

In their seminal paper, McNollgast argue that the US Federal Administrative Procedure Act of 1946 reflects the interest of Congress to reign in the administration. The idea is simple: members of the Congress wished to have an impact on the policies adopted by the administration. To compensate for their relative institutional deficiencies, which precluded active monitoring of the executive, they invented procedural rules that made it easier for individual citizens to enforce these rules through litigation. In other words, the lawmakers used the citizens as their agents in their competition with the executive. The McNollgast theory of the evolution of administrative law describes a joint venture of constraining the powerful administration through the combined action of the legislature (that produces the rules), the public (that invokes them), and the courts (that interpret and enforce them).

The McNollgast theory assumes a legislature and a judiciary that are both independent of the executive branch. But despite the formal independence that legislatures and courts enjoy in all democracies, the political reality is often different. Lawmakers may be dependent on the executive through party discipline, and judges through the executive’s power of appointment and promotion. In such circumstances, the executive reigns supreme. While the US Congress is indeed independent of the President, legislatures in many other countries are not. In parliamentary democracies, of the kind we encounter in Europe and elsewhere, the legislature may be quite...
deferential to the executive. The reason often is that the political parties straddle the divide between the executive and the legislative branches. Whoever controls the party controls its members both in the executive and in the legislature. The members of the executive body – usually the seniors of the political party – have the power to influence the reelection chances of their less powerful party members who serve as legislators. Internal party politics is the glue that binds individual legislators to their bigger brothers and sisters in the executive and undermines much of the formal law on checks and balances.

The McNollgast theory does not offer any prediction as to the evolution of administrative law in the political environment of parliamentary systems where the legislature is often dependent on the executive. In many parliamentary democracies, however, we do encounter surprisingly vigorous systems of administrative law. What may partly explain the evolution of these norms is the desire of the ruling executive to have formal or real review of its own exercise of authority. Politicians have several good reasons to prescribe administrative law and provide for judicial review of their own actions. Administrative law and adjudication provide legitimacy to the institutions. Law and litigation may provide politicians with control over bureaucracies which they cannot obtain through party discipline (for example, when the bureaucrats are professionals and not party members), or over political subcomponents such as provinces, regional authorities and municipalities.

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9 Eyal Benvenisti, Party Primaries as Collective Action with Constitutional Ramifications: Israel as a Case Study 4 THEORETICAL INQUIRIES IN LAW 175 (2002) (describing the impact of the introduction of party primaries in Israel on the power relations between the executive and the legislature).
Politicians use the delegation of authority to indirectly empower the courts to impose, through judicial review of administrative action, unpopular policies that the politicians themselves are not strong enough to endorse. When political power tends to fluctuate between coalitions, administrative rules that constrain future decision-makers can offer enacted policies a longer life-span. Finally, politicians often realize that the enforcement of international law leaves much to be desired, and that defaulting it will on many occasions yield no adverse consequences to them. And if the courts bite too hard, the politicians can always try, and are often able, to influence the legislature to undo their decisions.

But there are instances where administrative case-law develops in ways that the executive finds excessively restricting, and yet the executive faces difficulties in overcoming those restraints. This phenomenon suggests that a fuller account of the evolution of administrative law necessitates taking into account the motivations of the courts. Indeed, courts are also agents with their own set of incentives. Such an explanation is also called for in light of the fact, unnoticed by McNollgast, that although the Administrative Procedure Act (APA) is the creation of Congress, the US courts have actually transformed the meaning of crucial parts of the APA through their interpretation of it. Indeed, courts that are dependent on the executive will develop administrative law to the extent that the executive wishes them to do so. But independent courts are likely to revel in the gaps left by the legislature and constrain politicians even against their will. Their motivation to do so may stem from a variety

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13 Ginsburg, *supra* note 10, at 613-614 (“Parties that govern for an extended period have less need to rely on independent courts as monitors because they will be able to manipulate bureaucrats’ careers and develop other alternative means of control.”) McNollgast (1999), *supra* note 6.  
14 See Shapiro, *supra* note 1, at 11.
of reasons: the judges may perceive their role as being to correct the deficiencies of
the political process, they may seek outcomes which they perceive as beneficial to the
specific litigants or to society at large, or they may be seeking to strengthen their own
institutional and even personal reputations. But why would an executive that controls
a legislature and seeks only marginal judicial activism tolerate judicial independence
with its concomitant constraints on administrative discretion?

One explanation focuses on the possibility that the political branches are internally
divided, and hence the transaction costs of adopting and modifying judge-made
administrative norms are high. Often such a “legislative impasse” precludes
legislation in the sphere of administrative law. When lawmakers cannot agree on the
adoption of specific rules, such as transparency or voice to NGOs in administrative
procedures, this means that by default such rules are not enacted. But this very
inability to form a majority to enact such norms may similarly constrain lawmakers in
undoing such norms after the courts have adopted them. The legislative impasse
empowers the courts. Judges are often sensitive to this inertia and exploit it. Hence,
judges may actually be emboldened to change the legal status quo, knowing that they
will not be overruled. The more power is diffused among lawmakers, the more room
there is for an active judiciary,\textsuperscript{16} and the more administrative lawmaking is done by
the courts. This logic, as I argue below, is a central explanation for the contemporary
evolution of international administrative law.

\textsuperscript{15} See Ramseyer & Nakazato, supra note 11, Chapter 8 (analyzing the evolution of Japanese
administrative law in a system where judges are controlled by politicians).
\textsuperscript{16} John Ferejohn, The Law of Politics: Judicializing Politics, Politicizing Law 65 LAW & CONTEMP.
PROB. 41, 55-60 (2002) (“fragmentation of power” within the political branches encourages judicial
activism); Nicos C. Alivizatos, Judges as Veto Players, in PARLIAMENTS AND MAJORITY RULE IN
WESTERN EUROPE 566 (Herbert Doering ed., 1995) (statistical findings suggesting same).
III. The Evolution of Administrative Law in International Institutions: Theoretical Expectations

The same factors that explain the evolution of administrative law within democracies can explain the evolution of most of international administrative law. Given the observation that administrative law is a method for restraining actors, and hence a reflection of the balance of power among actors within political institutions, we should expect to find the law on decision-making within an international institution to reflect an interplay between the actors that participate in the decision-making process within that institution. In international institutions there are three main actors: first, the governments that represent the state parties to the treaties establishing the institutions; second, domestic interest groups, such as domestic institutions that compete with their governments domestically (independent legislatures or courts, opposition parties, or NGOs representing civil society), who wish to voice their views independently of their governments in the international arena; and third, officials of the institution itself (bureaucrats and judges) who enjoy discretionary powers under the rules of the institution.

A. Inter-State Competition

Generally speaking, it can be said that constraints on the decision-making process tend to reduce power disparities between strong and weak actors. Hence, disparity in

17 All states play a “two-level game”; Robert D. Putnam, Diplomacy and Domestic Politics: The Logic of Two-Level Games, 42 INT’L ORG. 427 (1988). On the interaction between domestic interests groups across political boundaries see Benvenisti, supra note 2.
power relations among state parties to an international institution is a key factor influencing the parties’ inclination to adopt administrative norms that constrain collective decision-making. Whereas stronger parties may wish to use their muscle to impose their will at the bargaining table, accountability and transparency might hamper their efforts. Sheer power can never be a valid justification for decisions. Hence an obligation to give reasons for a decision has a certain – if only marginal – effect on reasoned decisions. Power does not translate itself easily into law.

Powerful states that wish to control the outcome of collective decisions face several options. One is to resist any florescence of administrative law. This may be the case when their most basic interests are at stake, and they want to control the outcome. For example, the Permanent Five veto holders at the Security Council strongly oppose a more transparent decision-making process at the UN Security Council. Another option is to construct the process in ways that privilege their interests. If stronger states can set up reliable treaty bodies that can be expected to conform with their interests, it would make sense to delegate authority to the treaty body and constrain it through administrative law. Through the legalization of the decision-making process, not only will the powerful secure the desired outcome; but the outcome will also have the benefit of being legitimized by the process.

Yet another option is to agree on a formal decision-making process, but at the same time to try to manipulate the outcome by threatening to disregard the outcomes or even to exit the institution. At the same time, the relatively weaker states will have, all other things being equal, exactly the opposite interests. Trying to minimize disparities in power, they may demand strong administrative provisions that constrain outcomes, or extract side payments for their support of the stronger.

19 David M. Malone, *The Security Council in the Post-Cold War Era: A Study in the Creative...
In many institutions we can expect to find a variegated approach which reflects the interest of the state parties to delegate much authority in some matters, but retain control over decision-making in other matters, and as a result we may expect to find a stronger interest in sophisticated administrative law in those areas of delegated authority but not in the other areas. The UN comes to mind as an institution whose bureaucracy would enjoy extensive delegated authority in the context of, say, employees’ discipline, but would have little authority in the context of the discretionary powers of the Security Council acting under Chapter 7 to determine whether a threat to international peace and security exists and how to accommodate it. In the former case, we should expect quite elaborate rules on the employees’ rights and obligations, and an effective judicial review body. In the latter case, we can expect that the Permanent Five will object to the evolution of any formal rules constraining their discretion and to any judicial review functions.

B. Domestic Competition

Competition between domestic interest groups as well as between organs of government yields, as we saw, rather robust systems of domestic administrative law. Competitors of the executive who wish to control it are those who design this law. When it acts in the international sphere, mainly through negotiations with other governments, the executive enjoys more opportunities to overcome its domestic interpretation of the U.N. Charter, 35 N.Y.U. J. INT’L L. & POL. 487, 503-504 (2003). See also infra Part IV.C (on the evolution of administrative law within the UN).

It is noteworthy that the United Nations Administrative Tribunal (UNAT) was established by the General Assembly (Resolution 351 A(IV) of 24 November 1949). In fact, several international institutions (including the World Bank, the IMF and the League of Arab States) have created tribunals to deal with internal labor disputes, and the ILO’s Administrative Tribunal is also authorized to hear disputes arising from other institutions: JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 269-273 (2002). On the law of employment relations in international institutions see CHITTHARANJAN F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS, 323-367 (1996).

See the discussion below (Part IV.C) on the role of the ICJ as the judicial organ of the UN.
restraints, because such negotiations behind closed doors are traditionally shielded from public scrutiny. When the product – a treaty, an informal agreement – is brought before the domestic organs for ratification, it is presented as a “take it or leave it” option, with little information about the feasibility of alternatives. Opaque inter-state bargaining privileges the participating governments to the disadvantage of their competing domestic actors. These competing domestic actors will therefore be wary of the opportunities granted to the government to influence, or even preempt, outcomes that have domestic effects through decisions taken at the level of an international institution. Hence these competing domestic actors will insist on a more elaborate administrative law within the institution to provide sufficient control of the outcomes at the institution, unless they can rely on improving the existing domestic system of administrative control. Hence, all other things being equal, democratic states with effective domestic checks and balances will have a stronger interest than non-democratic states, or states with weaker domestic political competition, in elaborate administrative norms constraining the decision-making processes within the international institution.

An alternative would be for the competing domestic actors to opt for more effective domestic means of controlling the activities of the international institution. One possibility is direct participation in the international bargaining process. The involvement of the US Congress in treaty negotiations in the so-called “fast track” procedure is an example in this direction. Another possibility would be for domestic

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22 Benvenisti, Exit and Voice, supra note 2, 177-189.
23 Under this procedure, the President agrees to involve Congress in the negotiation phase of trade agreements in return for a bicameral congressional commitment to vote the agreement up or down without amendment. Congress’s involvement at the negotiation phase limits the discretion of government negotiators in the international bargaining process and provides more voice to groups that are less influential with the Executive, although the President continues to control the agenda. See Benvenisti, Exit and Voice, supra note 2 at 186-187; Harold H. Koh, The Fast Track and United States Trade Policy, 18 BROOK. J. INT’L L. 143 (1992).
courts to review decisions of the international organization. Indeed, as Richard Stewart suggests, “In the absence of any effective remedy at the level of the international regime, domestic courts may seek to directly review the legality of the international regulatory decisions that directly impact specific persons in the United States and elsewhere.” These expectations, however, must take into account several impediments. First, surveys so far indicate that domestic courts tend to exercise their authority very cautiously when examining the performance of their governments in the international political arena. Second, such interference will have limited effect if the institution and other states refuse to recognize the outcome of the litigation in the domestic court, and insist on compliance from the government. Third, such interference is likely to entail adverse effects for the economy of the state whose court starts intervening in the decisions of international institutions. Such interventions may have spillover effects to the operation of many other international institutions acting within the jurisdiction of the court. These institutions will view this judicial assertiveness as a significant drawback to doing business within the jurisdiction, and may consider moving to or investing in more amenable environments. This seems to be the reason why domestic courts hesitate before venturing to interfere with the activities of international institutions. From the decision of the London courts not to entertain the suit against the bankrupt International Tin Council, to the decision of the Dutch court in The Hague not to review the legality of the Security Council’s decisions.

26 In the wake of the collapse of the London-based International Tin Council, claims of individual debtors were rejected owing to the immunity enjoyed by the organization. See J.H. Rayner Ltd. v. Dep’t of Trade & Indus., [1989] 3 W.L.R. 969, 81 I.L.R. 670 (H.L.).
Resolution setting up the International Criminal Tribunal on Yugoslavia (ICTY), domestic courts often signal – also to each other – that they will hesitate before cooperating by providing this public good. The contrast between this domestic court hesitancy on the one hand, and the assertiveness of international tribunals (discussed above) on the other hand, suggests that the better strategy for the domestic opposition is to devote considerable resources to influencing international tribunals rather than domestic ones.

C. Internal Competition

The first two factors are responsible for shaping the design of the decision-making process within the institution. But once the institution has been created, it has a life of its own. The allocation of authority within the institution is a significant factor shaping the development of the institution. The more divergence of interests exist among the state parties to the institution, the more decision-making is relegated to the treaty bodies, and the more there are checks and balances between competing bodies within the institution, the more elaborate the administrative law which develops. At one end of the range of possible institutions, we find those institutions with a strong bureaucracy to which much discretion has been assigned. The EU immediately comes to mind as an example, often criticized for that very reason. At the opposite end we find institutions whose bureaucracy has mainly fact-finding functions and very few discretionary powers, due to the desire of some or all parties to retain tight control over decisions.

While there is a wide array of international institutions, with varying degrees of delegated authority to internal bureaucracies, there is a common denominator to many

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27 Milosevic v. The State of The Netherlands, The Hague District Court Civil Law Division, Judgment
of them, namely, the relatively high bargaining costs of enacting administrative rules. States that negotiate a treaty establishing an international institution will often have different interests, different domestic constraints and, as a result, different expectations from the institution and from the functioning of its bureaucracy. This often leads to a legislative impasse, where the lawmakers cannot overcome the default rules of international law that so far offer only very limited administrative law.28 While such differences may be glossed over in the establishing treaty, they resurface in the institution’s routine work. Usually, members of the judicial organs of such institutions are not career judges like their domestic counterparts, and hence are relatively more independent executive. As a result, one can expect that judicial organs in such institutions, where such organs exist, will contribute significantly to the evolution of administrative law. Although powerful states may try to influence such outcomes by controlling the appointment of judges, or by threats of cutting funds or exit, the effectiveness and cost of doing so may at times be prohibitive.

The relative independence of such international adjudicators may prompt them to seize the opportunity to affect policy outcomes that are at variance with governmental interests. Here it is important to note that the evolution of administrative law – through, for example, voice given to politically disenfranchised groups – may have distributional and other substantive implications. And whereas governments may aspire to reduce restrictions on international trade, adjudicators may be concerned with distributional or environmental implications of laissez-faire and hence develop procedural rules that give more voice to such concerns. As noted by Judith Goldstein and Lisa Martin, a more structured decision-making process within the WTO “enhances the mobilization of anti-trade forces relative to the already well-organized..."
pro-trade groups.” Hence, “legalization could undermine liberalization.”

Procedural guarantees are, of course, extremely important to the delicate balancing of security and freedom. In this context it should be noted that the internal processes of the Counter Terrorism Committee (CTC) established pursuant to Resolution 1373 of the UN Security Council has come under serious criticism for not providing for basic procedural guarantees.

D. The Interaction Between the Different Factors

The three clusters of factors identified above shape the evolution of administrative law within each international institution in different ways. Of course, for most states some factors work in favor of stricter rules and some against. For some states, the preference for or against administrative rules will depend on the issue at hand. Developing countries will be interested, for example, in more transparency in the internal proceedings of the UN Security Council, but at the same time resist efforts to open up the WTO processes to third parties and NGOs.

This analysis suggests that because international institutions vary, the administrative law that develops within each of them will reflect the specific political dynamics surrounding each of them. “Like minded” states without significant power disparities will allow for little legislative impasse. The more diverse the composition of an institution, the more discord about procedure will be found, and hence the more legislative impasse that will be created to preclude agreement on administrative law within the institution. Given diversity among state parties, internal treaty bodies of the
international institution are expected to exploit the legislative impasse to develop 
administrative law endogenously. This is true in particular of the judicial organs of 
such institutions that are expected to draw on the silence of the lawmakers and the 
divergence of opinion among state parties to develop strong administrative judge-
made law. This insight suggests that state parties to an international institution, who 
have a strong interest in establishing administrative norms to control or subdue a 
runaway bureaucracy, can certainly expect the cooperation of the judicial organs of 
the institution, if such are created, in the evolution of such norms. Parties who dread 
such constraints should resist the establishment of adjudicative functions or maintain 
tight controls over their appointment and limit judges’ terms in office.

Hence, the comparative study of administrative law in international institutions 
must be undertaken with great sensitivity to the factors influencing the balance of 
powers within the institution, and also within the parties to the institution. An attempt 
to develop a unified international administrative law must remain very much attuned 
to the specific constraints within each institution.

IV. Theory and Actual Practice: The examples of the EU, the WTO, and the UN

This Part briefly examines the evolution of administrative law in three 
international institutions: the EU, the WTO and the UN.

A. The EU

The story of the evolution of administrative law within the EU is well documented. The lack of administrative law in the establishing treaties has been complemented by case-law of the ECJ and especially the Court of First Instance. The motivation for this evolution can be traced to the national governments’ potentially divergent attitudes towards the exercise of discretion by a powerful EU bureaucracy. Governments that have a limited interest in domestic administrative law because they feel they control the outcome of domestic processes have a much stronger interest in EU administrative law, because they feel they do not control the outcome of the processes within the EU. But not all governments have similar interests, and so few rules have been enacted in the treaties. Instead, it is the court that enters the legal void created by the silent treaties and divergent governmental interests, using the legislative impasse to maintain its role in strengthening the rule of law within the organization.

In the EU context, administrative rules also gradually reflect a strong interest from within the member states to constrain the Union’s decision-making process. This interest derives from the realization of domestic actors that the domestic processes do not adequately offer voice and do not provide sufficient control against government discretion at the level of the EU. Constituencies seek to open up channels of communication as one of the ways to substitute for elections. This was the basis for the German Constitutional Court’s approval of Germany’s ratification of the

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33 Shapiro notes that “judicial activism in administrative review comes fairly easily to courts that are active in constitutional review.” (supra note 1 at p. 18).
Maastricht Treaty. In an integrated European Union, reasoned the Court, the demand for democracy would be satisfied if the union provided an “ongoing free interaction of social forces, interests, and ideas, in the course of which political objectives are also clarified and modified, and as a result of which public opinion moulds political policy.” To preserve democracy, in the Court’s view, “it is essential that both the decision-making process amongst those institutions which implement sovereign power and the political objectives in each case should be clear and comprehensible to all, and also that the enfranchised citizen should be able to use its own language in communicating with the sovereign power to which it is subject.” Governments seeking domestic approval of an ever-closer union, through treaties that in some countries are subject to referenda, find it necessary to address such concerns. Where they do not, domestic actors can resort to judicial proceedings to promote this interest.

B. The WTO

The debate within the WTO about administrative law reflects a strong North-South division. As a result, there is a legislative impasse which has enabled the organization’s main adjudicative body, the Appellate Body (AB), to develop administrative law through its decisions. This section provides an account of the debate and the development of the law by the AB.

Since the creation of the WTO, there has been growing NGO demand for more transparency in its decision-making. The norm-setting process within the WTO

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36 Id., id.
37 Id. id.
38 For recent analyses of the AB’s lawmaking capacities and their constitutional implications see Weiler, supra note 5; Weisberg, supra note 5.
involves all member states. This is mainly an informal, behind-the-scenes process of
negotiation and consultation. Article 6 of the 1996 WTO General Council’s
Guidelines for Arrangements on Relations with Non-Governmental Organizations
emphasizes “the special character of the WTO, which is both a legally binding
intergovernmental treaty of rights and obligations among its Members and a forum for
negotiations,” and points out the “broadly held view that it would not be possible for
NGOs to be directly involved in the work of the WTO or its meetings.” 39 This
informal prescriptive process remains largely opaque to civil society. Indeed, NGOs
representing diverse interests can sometimes use this opacity to present their views
and gather information, 40 but their influence remains a matter of discretion for states
who find it opportune to support NGOs in a selective, ad-hoc manner. 41

Improved transparency in WTO decision-making processes has become a North-
South issue. Canada, Norway and the United States have suggested inter alia that
observers be allowed to attend General Council and other committee meetings,
including the Trade Policy Review meetings, where members’ policies are reviewed
for conformity with WTO rules. 42 Other suggestions included the establishment of
fora to enable open dialogue between WTO bodies and NGOs, the inclusion of advice
of legislators from member states and of experts in specialized areas, and the creation
of ad-hoc advisory boards to provide non-binding NGO advice on a variety of

39 WORLD TRADE Doc No. WT/L/162.
INT’L. ECON. LAW 433. For an appraisal of the debate see Eric Stein, International Integration and
41 See Eyal Benvenisti and George W. Downs, “DISTRIBUTIVE POLITICS AND
INTERNATIONAL INSTITUTIONS: THE CASE OF DRUGS” (forthcoming, Case Western J. Int’l
L. [2005]), Tel Aviv University Legal Working Paper Series. Tel Aviv University Law Faculty Papers.
42 See General Council Informal Consultations on External Transparency, October 2000, Submission
from the United States, 10 October 2000, WT/GC/W/413; WTO External Transparency, Informal
Paper by Canada, 17 October 2000, WT/GC/W/415; External Transparency, Communication from
Norway, 2 November 2000, WT/GC/W/419.
issues. Southern states demur, however, and insist on restricting public participation to the passive role of receiving information from WTO bodies rather than communicating it to the WTO.  

As might have been predicted by the insights elaborated above, the impasse at the political institutions of the WTO creates a power vacuum which the institution’s adjudicative body, the AB, can exploit by formalizing the decision-making processes. The main area of attention in this respect has so far been the procedures within the judicial organs themselves. In contrast to most other international adjudication procedures, those of the WTO remain shrouded in secrecy. Litigation before the Panels and the AB is closed both to WTO members that are not parties to the litigation, and to the general public. Calls for transparency therefore focus on making all parties’ submissions available to the public and on enabling the general public to observe the proceedings using various tools, including webcasting. Moreover, suggestions for enabling the flow of communication from the public to the adjudicators concentrate on the possibility of submitting amicus briefs to the panel and the appellate bodies.

Here again one can trace a North-South tension, with Northern members strongly supporting open and accessible proceedings to the dismay of Southern states. The United States is the most ardent supporter of transparency and communication in the dispute settlement process. In fact, it was the first and so far the only state that presented NGO briefs as an integral part of its brief while defending its environment-

43 See in particular the Canadian paper, *supra* note 42.
44 See e.g. the position of Hong-Kong, China on this matter, elaborating on the distinction between external transparency and direct participation (“we are not convinced of the desirability of adopting proposals which seek to make provisions for direct participation of the civil society in the Organization in this exercise. Such proposals go against the inter-governmental nature of the WTO, risk politicising the operations of the Organization due to sectoral and electoral interests, and undermine the rights and obligations of individual WTO Members.”) See *WTO: External Transparency*, Communication from Hong Kong, China, 31 October 2000, WT/GC/W/418.
45 See its proposals in the submission, *supra* note 42.
friendly unilateral restrictions on trade against the complaint of India, Malaysia, Pakistan and Thailand.\textsuperscript{46}

The AB has shown a clear inclination to consider amicus briefs.\textsuperscript{47} In 1998 it decided it had the authority to accept NGO briefs in the Shrimp/Turtles dispute, briefs which one litigant at least – the United States – incorporated into its briefs.\textsuperscript{48} In a later case, it explained its authority to do so, unabashedly reveling in the lawmakers’ silence:

“In considering this matter [of amicus briefs], we first note that nothing in the DSU or the Working Procedures specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal. On the other hand, neither the DSU nor the Working Procedures explicitly prohibit[s] acceptance or consideration of such briefs. … [Article 17.9 of the DSU] makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements. Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.”\textsuperscript{49}

In the following case the AB went even further.\textsuperscript{50} In the midst of hearings, it invited “any person” to file applications for leave to file briefs concerning the dispute at hand. The invitation, setting highly rigorous conditions for eligibility to file briefs, was posted on the WTO website on 8 November 2000. The AB received 11 applications for leave to file a written brief within the time limits specified. It “carefully reviewed

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\textsuperscript{48} See supra note 44.


\textsuperscript{50} \textit{European Communities – Measures Affecting Asbestos and Asbestos-Containing Products},
and considered each of these applications in accordance with the Additional
Procedure and, in each case, decided to deny leave to file a written brief.”

What the AB does not recount in its report is that its invitation had sparked angry
protests by a number of member states that questioned its authority to do so. A few
members – reportedly Pakistan and Egypt, supported by India and Malaysia –
immediately reacted by requesting the Chair of the General Council to convene a
special meeting to discuss this issue. At the meeting, which took place on 22
November 2000, only a few days after the AB’s invitation to NGOs, several members
expressed strong criticism, arguing that the AB had exceeded its authority. But no
final decision could be reached at the meeting. The AB’s ultimately unexplained
decision to deny the requests to file briefs may very well reflect the furious reactions
to its invitation. Note, however, that despite the strong political reaction to its
invitation, the AB did not retract its principled approach, left the door open for future
requests for third-party intervention, and actually enabled them in a subsequent case.

Another significant contribution of the AB in the context of administrative
procedure is the recognition of a right of hearing during national legislation
proceedings for potentially affected foreign interest groups. In the report in the case of
United States – Import Prohibition of Certain Shrimp and Shrimp Products, the AB
elaborated, inter alia, on the meaning of the reference in Article XX to "arbitrary
discrimination." It insisted that the United States, in prescribing laws that have effects
on foreign traders, had to provide administrative procedures pursuant to which foreign

51 European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, AB-
53 See e.g. Statement by Uruguay at the General Council on 22 November 2000, WT/GC/38.
153-160 (Para. 160: “We find that we have the authority to accept the brief filed by a private
individual, and to consider it. We also find that the brief submitted by a private individual does not
assist us in this appeal.”).
governments and traders would be able to comment on and challenge the application of such laws before U.S. institutions, either administrative bodies or courts. The AB held that a law enforcement process that is not "transparent" or "predictable" is "arbitrary" because it does not provide any "formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it"; it also noted that the U.S. implementing agency issues "no formal written, reasoned decision, whether of acceptance or rejection," and that there is no "procedure for review of, or appeal from, a denial of an application." The AB also cited Article X of GATT 1994 as requiring the United States to grant foreign traders and countries their "due process" rights. Following the report, the US announced it would revise its procedures and offer foreign governments greater "due process" rights, including the right to challenge "preliminary" findings before they become definitive.

What remains to be seen is whether the AB will constrain the political organs of the WTO themselves by imposing procedural requirements on them. After developing procedural norms concerning its own decision-making procedures and individual states, the next step cannot be ruled out as impossible.

C. The UN

Article 92 of the UN Charter provides that the International Court of Justice shall be the principal judicial organ of the United Nations. As such it theoretically has the opportunity to develop administrative law for the operation of the institution’s various internal organs, and in particular, to provide for judicial review of decisions taken by the Security Council. In theory, the ICJ might have settled several questions related to

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55 See the decision, supra note 46, at paras. 175-182.
the functioning of the various organs of the UN. It could have stated whether the abstention of a Permanent Member at the Security Council amounted to a “no” vote, and whether and under what conditions the General Assembly may issue “Uniting for Peace” Resolutions; it could have required more transparency at the Security Council; it could even have subjected Resolutions of the Security Council to scrutiny under general international law. The ICJ approached this role with nuanced sensitivity to the concerns of the member states, in particular those of the Permanent Five who have little interest in such an active role, which almost certainly would have destroyed the delicate balance between power and legality within this institution.

Initially the ICJ agreed to examine the decision of the General Assembly to set up the UN Administrative Tribunal in great detail. The ICJ extolled the merits of the tribunal and approved its creation, finding implicit authority in the UN Charter. But later it signaled its disinclination to serve as the judicial review organ of the UN. When Security Council Resolutions aimed at restoring “international peace and security” under Chapter 7 came to the fore, the ICJ backed down. Despite much scholarly criticism, the ICJ did not accept the invitation to second-guess the legality.

of the Security Council’s Resolution to impose sanctions on Libya.\(^{60}\) It did accept the request of the General Assembly to give an advisory opinion on the “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,”\(^{61}\) despite the fact that the Security Council had made an earlier resolution on “the situation in the Middle East, including the Palestinian question,” and had decided to “remain seized of this matter.”\(^{62}\) But it went out of its way to emphasize the extraordinary circumstances of the singular situation, so that it would not be viewed as a challenge to the Security Council’s authority and set a precedent for future intervention.\(^{63}\)

Note that the same judicial hesitation to review the legality of Security Council Resolutions is shared by other domestic and international courts. These courts have had the opportunity to address such questions indirectly, as when examining the obligation of their governments to comply with a Security Council Resolution or their own competence to adjudicate a matter. For example, the ICTY, a creation of the Security Council acting under Chapter 7, had to decide on its own competence.\(^{64}\) It accepted its own authority to decide upon this matter, but given the wide discretion of the Security Council under the Charter and the incidental type of its jurisdiction, it asserted a rather lenient basis for review – “cases where there might be a manifest

\(^{60}\) Case Concerning Questions of Interpretation And Application Of The 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya V. United States of America), Request For The Indication Of Provisional Measures, 14 April 1992.

\(^{61}\) The General Assembly’s Resolution is Resolution ES-10/16 (3 December 2003). For the Advisory Opinion see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, ICJ Reports 2004, 136 (9 July 2004).


\(^{63}\) Legal Consequences, supra note 61, at paras. 49-50 (“The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine (…). This responsibility has been described by the General Assembly as ‘a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy’ […] The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations.”)
contradiction [between the Resolution and] the Principles and Purposes of the Charter” – and rejected the challenges against its legality using language concerning the wide discretion of the SC, which the Permanent Five were certainly pleased to read. The Dutch court, faced with a similar challenge, refused to deliver an independent ruling on these matters and deferred to the ICTY’s decision.

V. The ICJ and the Evolution of International Administrative Law

The ICJ’s other role is the settlement of inter-state disputes. As such, the ICJ is in a unique position to enhance the procedural legal aspects of international institutions, when disputes concerning the operation of such institutions are brought before it. In its role as a body for inter-state dispute settlement, the ICJ has the opportunity to impose procedural obligations upon states, whether through the restatement of customary international law or the interpretation of treaties. As such, the ICJ is in a unique position to change the default rules for state parties who negotiate treaties that establish institutions. It can enhance the procedural legal aspects of such institutions while interpreting the treaties that set them up.

In this context I would like to draw attention to the ICJ’s decision in the dispute between Hungary and Slovakia concerning the implementation of a treaty between the two countries on the utilization of the Danube River. I refer to the 1997 decision in the Gabcikovo-Nagymaros case. That decision transformed international law on transboundary resources through its emphasis on the bilateral duty of parties to cooperate in the management of transboundary resources.

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64 Tadic case, supra note 3. For criticism of the decision see Jose E. Alvarez, Nuremberg Revisited: The Tadic Case 7 EJIL 245 (1996).
65 Tadic case, id., at para. 21.
66 Milosevic case, supra note 27.
The decision reflects the ICJ’s awareness of the literature analyzing the question as one that calls for collective action. Its opinion clearly is an attempt to force the two litigant states into cooperation:

“It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses…”

Such cooperation through a joint regime, the court reasons, “will also reflect in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the [bilateral Treaty], in concordance with Article 5, paragraph 2, of the [1997 Watercourses Convention].”

Debates in recent years concerning institutional design do not revolve so much around the recognition of these participatory rights. There is wide scholarly agreement that participatory rights are necessary, especially in the context of environmental institutions. A more structured and transparent treaty negotiation and decision-making process can significantly limit the opportunities of domestic interest groups, bureaucrats, and politicians to pursue short-term sectarian goals to the detriment of society at large and future generations. At the same time, it is quite difficult to achieve global consensus on the need to develop international law to provide for such procedural rules. Similarly situated developed democracies readily adopt strong procedural rules. The member states of the Economic Commission for Europe (ECE) demonstrated their interest in such rules in the context of regional cooperation over environmental protection. But the framers of the 1997 Watercourses Convention

68 Id. para. 141.
69 Id. para. 147.
70 The preamble to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted in Aarhus, Denmark on June 25, 1998 by member states of the Economic Commission for Europe and other European states, emphasizes these
failed to offer such rules despite the urgings of the various ILC rapporteurs and strong academic criticism. It may be assumed that the ICJ was aware of this debate and of the legislative impasse. It is likely that the same motivation – to enhance regional cooperation and provide for sustainable use of shared resources – will in due course lead the court to elaborate further on procedural norms, which are so important for the effective management of such institutions.

Just like the ECJ and the WTO Appellate Body, the ICJ has the opportunity to “exploit” the power vacuum that results from disagreement among the state parties, and hence their difficulties – when such disagreement exists – in annulling its decisions. Therefore it constitutes an effective mechanism for legislating – through treaty interpretation, and through the evolution of the elusive concept of customary international law – new international administrative law obligations that states would have had great difficulty agreeing upon through multilateral bargaining. The ICJ should explore this opportunity cautiously: procedures must be carefully attuned to the existing balance of powers within each institution, and take into consideration the possible reaction of state parties whose interests are compromised as a result.

VI. Conclusion

Both the contents of administrative norms and their authorship reflect the balance of power within international institutions in much the same way that they reflect the domestic balance of power. Hence the contents of administrative law will vary

points: “Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns, aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment, …” (The text appears in http://www.un.org/Depts/Treaty/collection/notpubl/27-13eng.htm).
according to the specific relations between the different actors in each institution. In fact, we should anticipate different administrative norms even within a single institution, depending on the issue being regulated. Therefore, the comparative study of the evolution of administrative law in international institutions should not assume facile comparisons and generalities. Much sensitivity must be exercised towards the specific political constraints and the factors influencing the balance of power within the institution, and also within the state parties to the institution. Any attempt to develop a unified administrative international law must remain very much attuned to the specific constraints within each institution. At the same time, however, one must take into account the possibility of cross-institutional influences and pressures that may create a pull towards either conformity with general rules of administrative law or divergence, as well as administrative lawmaking by the ICJ that could serve as general default rules.

A lack of administrative norms in the legal instruments establishing an international institution need not signify that the institution will have none. The adjudicative bodies surveyed demonstrate an ability to exploit the “legislative impasse” at the institutions they operate in, for the purpose of imposing constraints on the legislators’ control of the outcomes of the decision-making process. Disagreements among the state parties to international organizations open the door for the judicial organs to exercise judicial activism. Such activism may have distributional implications, although they will be couched in seemingly neutral procedural rules. Governments that abhor constraints on their discretion should consider, when setting up such institutions, the elimination or at least considerable weakening of the judicial functions.

71 See Eyal Benvenisti, Customary International Law as a Judicial Tool for Promoting Efficiency, in