

# 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. Because the legislature cannot address every contingency, or simply wishes to stay clear of issues that are politically or socially sensitive, it delegates authority to its administrative agents. However, such delegation of authority endows administrative agents with wide discretion, discretion that breeds concerns of unaccountability, recklessness, and corruption. Administrative law is designed to address such concerns by curbing agents' discretion through the structuring of the decisionmaking process, by providing procedural transparency and voice to affected groups, and by setting up review mechanisms, including judicial review. Inevitably, such attempts produce new discretionary powers which new rules are then designed to control and curb. These new rules in turn create new discretionary powers, and so on, creating a "cat and mouse" game between principal and agents that can continue indefinitely. As Martin Shapiro explains, 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."<sup>1</sup>

Who authors those norms that attempt to constrain administrative discretion? Authorship depends on the balance of power between the different actors in the domestic body politic. For example, a legislature that seeks to shape the outcome of executive decisionmaking will use administrative law for that purpose, thereby creating elaborate statutory provisions that constrain administrative discretion. In contrast, a disinterested or captured legislature that sur-

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1. Martin Shapiro, *The Institutionalization of European Administrative Space* (Center for Culture, Org. & Pol., Working Paper No. 2000-09, 2000) (on file with Law & Contemp. Probs.), at <http://ist-socrates.berkeley.edu/~iir/culture/abstracts/Shapiro.html> (last visited Feb. 18, 2005).

renders policymaking to the executive will tend to produce relatively ineffective administrative law. But, in this case, 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 judiciary, which has a will and means of its own to impose constraints on administrative agencies, is also an important actor. Indeed, when lawmakers defer to the executive with no strings attached, courts often fill the gaps with judicially invented rules. This judicial activism depends in turn on the level of court involvement that the legislature and executive will tolerate. Thus, administrative law, perhaps more than any other area of law, reflects most accurately each country's balance of power between the various branches of government.

International institutions constitute another arena for the evolution of administrative law. In recent years, more and more legislative discretion has been delegated not to domestic agents but to international—both 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 governments to join an international institution that enjoys decisionmaking powers vis-à-vis its member states.<sup>2</sup> However, since such institutions do not have the paradigmatic division of powers that characterizes democracies—legislative, executive, and judicial branches—the characteristics of international administrative law differ from domestic administrative law. As a result, 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 provided by the legislative process, is often irrelevant in the context of an international body, whose constitution and procedures rely to a lesser extent on a legislative body.<sup>3</sup> Nonetheless, to the extent that treaties assign responsibilities and delegate decisionmaking powers to treaty bodies, issues of international administrative law similar to issues of domestic administrative law will 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 of 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 arena are also found in the international arena between the state parties and the different treaty-bodies and between the parties within each of the treaty-bodies. Hence, like domestic administrative law, which reflects the domestic political balance of power, the law

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2. Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167 (1999).

3. In explaining the legality of the Security Council's establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), the tribunal noted that "the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions." Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72, at ¶ 43 (Int'l Crim. Trib. Former Yugoslavia 1995) (on file with Law & Contemp. Probs.), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm> (last visited Feb. 18, 2005).

constraining the discretion of the various actors within the international institution will reflect the specific balance of powers between the state parties and the balance of power within each international institution.

As more institutions engage in administrative lawmaking for themselves, and as they interact with other institutions, it is likely that cross-institutional pressures will create a pull towards conformity with general rules of administrative law.<sup>4</sup> This pull will result either from relatively powerful institutions, ones that condition deference to the acts of other institutions on those other institutions' respect to general 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, actors who dread being subjected to administrative law within international institutions will certainly learn from the experience gained in other institutions in which administrative law has developed unexpectedly. Because the dynamics of international institutions are a relatively recent phenomenon, even seasoned negotiators failed to realize the consequences of their bargains. There is ample evidence, for example, that the parties who sought to establish the Appellate Body of the World Trade Organization (WTO) did not anticipate the significant role that body would have beyond the settlement of trade disputes.<sup>5</sup> Consequently, actors concerned with the scope of international administrative law could, for example, limit the role of the institution's adjudicative bodies, which as this article demonstrates, have proven to be active promoters of administrative norms. 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.

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4. I thank Benedict Kingsbury for this suggestion.

5. See J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, Jean Monnet Working Paper No. 9 (2000) ("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 no longer block adoption of the Panel. It is equally clear to me that they did not fully understand the judicial let alone [the] constitutional nature of the Appellate Body."), at [http://www.jeanmonnetprogram.org/papers/00/000901-04.html#P158\\_56413](http://www.jeanmonnetprogram.org/papers/00/000901-04.html#P158_56413); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L 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 Body decisions.").

This article identifies and discusses the interaction between actors within international institutions as a determinant of the evolution of administrative law in those institutions. To that end, this 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 evolution of international administrative law in the European Union (E.U.), the WTO, and the United Nations (U.N.) confirms theoretical expectations. Finally, Part V addresses the role of the ICJ in developing international administrative law in general. Part VI concludes by asserting that the comparative study of the evolution of administrative law in international institutions should not assume facile comparisons and generalities, but must be sensitive to the specific political constraints, to the factors influencing the balance of power within each institution, and to the balance of power amongst state parties to the institution. Any attempt to develop a unified administrative international law must remain acutely attuned to the specific constraints within each institution.

## II

### THE THEORY ON THE EVOLUTION OF ADMINISTRATIVE LAW

In their seminal paper,<sup>6</sup> McCubbins, Noll, and Weingast (McNollgast) argue that the U.S. Federal Administrative Procedure Act of 1946<sup>7</sup> reflected the interest of Congress to rein in the administration. The central idea of the McNollgast theory is simple: members of Congress wished to have an impact on the policies adopted by the administration.<sup>8</sup> To compensate for the relative institutional deficiencies that precluded active monitoring of the executive, Congress invented procedural rules that made it easier for individual citizens to enforce these rules through litigation. In other words, lawmakers used the citizens as agents in their competition with the executive.<sup>9</sup> 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 the rules, and the courts that interpret and enforce those rules.

The McNollgast theory, however, assumes a legislature and a judiciary that are both independent of the executive branch. Although in the U.S. Congress is indeed independent of the President, legislatures in many other countries are not. Particularly in parliamentary democracies, such as those in Europe and

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6. Matthew D. McCubbins, Roger C. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); see also McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999).

7. 5 U.S.C. § 551.

8. McCubbins et al., *supra* note 6, at 244.

9. *Id.* at 255.

elsewhere, the legislature is often quite deferential to the executive.<sup>10</sup> In parliamentary democracies political parties often straddle the divide between the executive and the legislative branches. Thus, 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. Although internal party politics is the glue that binds individual legislators to their bigger brothers and sisters in the executive, it also serves to undermine much of the formal law on checks and balances.<sup>11</sup> As a result, 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.<sup>12</sup> This fundamental assumption of an independent legislature and judiciary undermines the ability of the McNollgast theory to offer predictions as to the evolution of administrative law in the political environment of parliamentary systems. Nonetheless, surprisingly vigorous systems of administrative law operate in many parliamentary democracies.

The evolution of vigorous administrative law in parliamentary democracies is in part due to the desire of the ruling executive to have formal or real review of its own exercise of authority. Indeed, politicians have several good reasons to prescribe administrative law and to provide for judicial review of their own actions. Administrative law and adjudication provide legitimacy to the institutions.<sup>13</sup> Law and litigation may provide politicians with control over bureaucracies that 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.<sup>14</sup> Politicians use the delegation of authority to indirectly empower the courts to impose, through judicial review of administrative action, unpopular policies that

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10. MURRAY J. HORN, *THE POLITICAL ECONOMY OF PUBLIC ADMINISTRATION* 9 (1995) (describing the dependency of the legislator on the executive in a Westminster parliamentary system).

11. Eyal Benvenisti, *Party Primaries as Collective Action with Constitutional Ramifications: Israel as a Case Study*, 3 *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).

12. See Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 *J. LEGIS. STUD.* 721 (1994).

13. ROGER COTTERRELL, *THE SOCIOLOGY OF LAW* 169-171 (2d ed. 1992); Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 *HARV. L. REV.* 1276, 1334 (1984). See also Tom Ginsburg, *Dismantling the "Developmental State"? Administrative Procedure Reform in Japan and Korea*, 49 *AM. J. COMP. L.* 585, 597 (2001) (suggesting that the motivation for the enactment of the Korean Administrative Appeals Act of 1984 was President Chun Doo Hwan's attempt to gain legitimacy for his government).

14. See, e.g., J. MARK RAMSEYER & MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* 217-18 (1999) (describing how politicians of the ruling LDP party sought control over local bureaucracy through judicial review of local government).

the politicians themselves are not strong enough to endorse.<sup>15</sup> When political power tends to fluctuate between coalitions, administrative rules that constrain future decisionmakers can offer enacted policies a longer life span.<sup>16</sup> Finally, politicians often realize that the enforcement of administrative law leaves much to be desired, and that failing to enforce it will on many occasions yield no adverse consequences to them. Moreover, if the courts do bite too hard, the politicians can always try, and are often able, to influence the legislature to undo their decisions.

At times, administrative case law develops in ways that the executive finds excessively restricting, and yet the executive faces difficulties in overcoming those restraints. Therefore, a complete account of the evolution of administrative law requires analysis into courts' motivations. Indeed, courts are also agents with their own set of incentives. For example, although the Administrative Procedure Act (APA)<sup>17</sup> is the creation of Congress, the U.S. courts have actually transformed the meaning of crucial parts of the APA through their interpretation of it,<sup>18</sup> a fact that went unnoticed by McNollgast. Courts that are dependent on the executive will develop administrative law to the extent that the executive wishes them to do so,<sup>19</sup> but independent courts are likely to revel in the gaps left by the legislature and to constrain politicians even against their will. Their motivations to do so may stem from a variety of reasons: judges may perceive their role as that of correcting the deficiencies of the political process; they may seek outcomes that they perceive as beneficial to the specific litigants or to society at large; or they may seek 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?

Perhaps the political branches are internally divided, and therefore the transaction costs of adapting 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 non-governmental organizations (NGOs) in administrative procedures, by default such rules are not enacted. This inability to form a majority to enact such norms may similarly constrain lawmakers in *undoing* such norms after they have been adopted by the court. Legislative impasse empowers the courts, and judges are often sensitive to, and strive to exploit, this inertia. Moreover, judges are often emboldened to change

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15. Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 INT'L REV. L. & ECON. 349, 361-62 (1993).

16. Cf. Ginsburg, *supra* note 13, at 613-14 ("Parties that govern for an extended period have less need to rely on independent courts as monitors because they will be able to manipulate bureaucrat[s'] careers and develop other alternative means of control."); *see also* McCubbins et. al., *supra* note 6.

17. *See supra* note 7.

18. Shapiro, *supra* note 1, at 11.

19. *See generally* RAMSEYER & NAKAZOTO, *supra* note 14, at 191-219 (analyzing the evolution of Japanese administrative law in a system in which judges are controlled by politicians).

the legal status quo, knowing that they will not be overruled. The more diffused the power is among lawmakers, the more room there is for an active judiciary,<sup>20</sup> and the more the courts will engage in administrative lawmaking. Though derived from the evolution of domestic administrative law, this logic, as argued below, is also a central explanation for the contemporary evolution of *international* administrative law.

### III

#### THE EVOLUTION OF ADMINISTRATIVE LAW IN INTERNATIONAL INSTITUTIONS: THEORETICAL EXPECTATIONS

The factors that explain the evolution of administrative law within democracies also explain the evolution of international administrative law. Because administrative law is a method for restraining actors, and therefore a reflection of the balance of power among actors within political institutions, the law on decisionmaking within an international institution should reflect the interplay between the actors that participate in the decisionmaking process within that institution. In such 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;<sup>21</sup> 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, constraints on the decisionmaking process tend to reduce power disparities between strong and weak actors.<sup>22</sup> Hence, disparity in power relations among state parties to an international institution is a key fac-

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20. See John Ferejohn, *The Law of Politics: Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 55-60 (2002) (explaining that the “fragmentation of power” within the political branches has led to increased judicial activism); see also Nicos C. Alivizatos, *Judges as Veto Players*, in PARLIAMENTS AND MAJORITY RULE IN WESTERN EUROPE 566 (Herbert Doering ed., 1995) (documenting statistically the legislative impasse).

21. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988) (All states play a “two-level game.”). On the interaction between domestic interests groups across political boundaries, see Benvenisti, *supra* note 2.

22. J. H. H. Weiler, *supra* note 5. A recent example of this in the area of trade can be seen in the WTO panel ruling in favor of Antigua and against the U.S. *WTO Panel Rules in Favour of Antigua, Barbuda in Gambling Dispute*, BRIDGES: WEEKLY TRADE NEWS DIGEST, Nov. 17, 2004 (on file with Law & Contemp. Probs.), at <http://www.ictsd.org/weekly/04-11-17/story5.htm> (last visited Feb. 15, 2005); Christina L. Davis, *Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam*, Paper Presented at the Annual Meeting of the American Political Science Association (2003) (describing instances in which the WTO dispute resolution rules helped to level the playing field for developing countries) (on file with Law & Contemp. Probs.), at [http://www.princeton.edu/~cldavis/files/davis\\_WTO\\_and\\_developing\\_countries.pdf](http://www.princeton.edu/~cldavis/files/davis_WTO_and_developing_countries.pdf) (last visited Feb. 15, 2005).

tor influencing the parties' inclination to adopt administrative norms that constrain collective decisionmaking. Whereas stronger parties may wish to use their muscle to impose their will at the bargaining table, accountability and transparency might hamper their efforts. Because sheer power can never be a valid justification for decisions, an obligation to give reasons for a decision has certain—if only marginal—effects on reasoned decisions. Power does not translate itself easily into law.

Nonetheless, powerful states that wish to control the outcome of collective decisions still have several options. One is to resist any florescence of administrative law. This is often the case when the most basic interests of these powerful states 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 decisionmaking process at the U.N. Security Council.<sup>23</sup> 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 to their interests, it makes sense to delegate authority to such bodies and to subsequently constrain them through administrative law. Through this legalization of the decisionmaking process, not only will the powerful states secure the desired outcome, but the outcome itself will have the benefit of being legitimized by the process. Yet another option is to agree on a formal decisionmaking process, while manipulating the outcome by threatening to disregard the outcomes or even to exit the institution. On the other hand, the relatively weaker states will have, all other things being equal, exactly the opposite interests. Trying to minimize disparities in power, they will demand strong administrative provisions that constrain outcomes, or extract side payments for their support of stronger states.

In many institutions one finds a variegated approach that reflects the interest of the state parties to delegate authority in some matters but retain control over decisionmaking in other matters. Consequently, stronger interests in sophisticated administrative law are often found in those areas of delegated authority but not in other areas. The U.N., for example, is an institution whose bureaucracy enjoys extensive delegated authority in the context of employee discipline but has little authority in the context of the discretionary powers of the Security Council acting under Chapter VII to determine whether a threat to international peace and security exists and how to accommodate it. In the former case, one finds elaborate rules on employees' rights and obligations and an effective judicial review body,<sup>24</sup> while in the latter case, the Permanent Five will

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23. See David M. Malone, *The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the U.N. Charter*, 35 N.Y.U. J. INT'L L. & POL. 487, 503-04 (2003) (describing the adoption by the Permanent Five of private deliberations closed to other members of the Security Council); see also *infra* Part IV.C (on the evolution of administrative law within the U.N.).

24. The U.N. Administrative Tribunal (UNAT) was established by the General Assembly Resolution 351 of 9 December 1949 as an independent organ to pass judgments relating to the governance of U.N. staff members. G.A. Res. 351, U.N. GAOR, 4th Sess., U.N. Doc.A/RES/351(IV) (1949). In fact, several international institutions (including the World Bank, the IMF, and the League of Arab States)



likely object to the evolution of any formal rules constraining their discretion as well as to any judicial review functions.<sup>25</sup>

## B. Domestic Competition

Competition between domestic interest groups, as well as between the organs of government, produces robust systems of domestic administrative law, and competitors of the executive intent to control it are those who design it. However, the executive enjoys more opportunities to overcome domestic restraints when it acts in the international sphere, largely through closed-door negotiations with other governments that are traditionally shielded from public scrutiny. When the product—a treaty or 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.<sup>26</sup> As a result, these competing domestic actors will 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. Unless they can otherwise rely on improving the existing domestic systems of administrative control, domestic actors will insist on a more elaborate administrative law within the international institution to provide sufficient control of the outcomes at that level. All else 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 decisionmaking processes within the international institution.

Alternatively, competing domestic actors could 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 U.S. Congress in treaty negotiations in the so-called “fast track” procedure is an example of this.<sup>27</sup> Another possibility would be for domestic courts to review decisions of the international organization. Indeed, as

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have created tribunals to deal with internal labor disputes, and the International Labour Organization’s Administrative Tribunal is also authorized to hear disputes arising from other institutions. JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 269-73 (2002); *see also* CHITTHARANJAN F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 323-67 (1996) (discussing the law of employment relations in international institutions).

25. *See, e.g., infra* Part IV. C (on the role of the ICJ as the judicial organ of the U.N.).

26. Benvenisti, *supra* note 2, at 177-89.

27. 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. Benvenisti, *supra* note 2, at 186-87; *see also* Harold H. Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT’L L. 143 (1992) (describing the “Fast Track” procedure, its role in NAFTA trade talks, and its future viability).

Richard Stewart suggests, “[i]n 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.”<sup>28</sup> These expectations, however, must take into account several impediments. First, research so far indicates that domestic courts tend to exercise their authority very cautiously when examining the performance of their governments in the international political arena.<sup>29</sup> 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 on 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 appears to be the primary reason 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,<sup>30</sup> to the decision of the Dutch court in *The Hague* not to review the legality of the Security Council’s Resolution setting up the International Criminal Tribunal on Yugoslavia (ICTY),<sup>31</sup> domestic courts often signal—including to each other—that they will hesitate before cooperating to provide this public good. The contrast between domestic court hesitancy on the one hand and the assertiveness of international tribunals (discussed below) on the other, suggests that the better strategy for the domestic opposition is to devote considerable resources to influencing international tribunals rather than domestic ones.

### C. Intra-Institutional Competition

Interstate competition and domestic competition are responsible for shaping the design of the decisionmaking process within the institution. But once the institution has been created, it has a life of its own, with the internal allocation

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28. Richard B. Stewart, *U.S. Administrative Law: A Resource for Global Administrative Law* 24 (Jan. 17, 2004) (discussion draft) (on file with Law & Contemp. Probs.), at [http://www.law.nyu.edu/kingsburyb/spring04/globalization/stewart\\_012604.pdf](http://www.law.nyu.edu/kingsburyb/spring04/globalization/stewart_012604.pdf) (last visited Feb. 15, 2005).

29. Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT’L L. 159 (1993); Mattias Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 VA. J. INT’L L. 19 (2003).

30. 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.*, [1990] 2 A. C. 418 (H.L. 1990).

31. *Slobodan Milosevic v. The State of The Netherlands*, 41 I.L.R. 86 (Dist. Ct. Civ. L. Div. 2001) (*The Hague*).

of authority a significant factor in shaping the development of the institution. The more divergent the interests among state parties to the institution, the more decisionmaking is relegated to the treaty bodies; and the more checks and balances there are between competing bodies within the institution, the more elaborate is the administrative law that 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 E.U., for example, is often criticized for that very reason. At the opposite end are 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, many of them share a common denominator—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, in which the lawmakers cannot overcome the default rules of international law that so far offer only very limited administrative law.<sup>32</sup> 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 of the executive. As a result, one can expect that judicial organs in such institutions, when 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 of doing so may at times be limited and the costs prohibitive.

The relative independence of such international adjudicators can prompt them to seize the opportunity to affect policy outcomes at variance with governmental interests. 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 policies and hence develop procedural rules that give more voice to such concerns. A more structured decisionmaking process within the WTO “enhances the mobilization of antitrade forces relative to the already well-organized pro-trade groups.”<sup>33</sup> Hence, “legalization could undermine liberalization.”<sup>34</sup> Procedural guarantees are, of course, extremely important to the delicate balancing of security and freedom, and it is in this context that the internal

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32. On the possible development of such rules, see *infra* Part V.

33. Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603, 606 (2000).

34. *Id.*

processes of the Counter Terrorism Committee (CTC), established pursuant to Resolution 1373 of the U.N. Security Council, has come under serious criticism for not providing these basic procedural guarantees.<sup>35</sup>

#### D. The Interaction Among Inter-state Competition, Domestic Competition, and Intra-Institutional Competition

These three clusters of factors—inter-state, domestic, and inter-institutional competition—shape the evolution of administrative law within each international institution in different ways. For most states participating in an international institution, some factors work in favor of stricter rules and some against. For other states, the preference for or against administrative rules will depend on the issue at hand. Developing countries will be interested, for example, in greater transparency in the internal proceedings of the U.N. 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 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 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 can be expected to exploit the legislative impasse to develop administrative law endogenously. This is true in particular of the judicial organs of such institutions that draw on the silence of the lawmakers and the divergence of opinion among state parties to develop strong administrative judge-made law. This 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 administrative constraints will 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 as well as 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.

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35. For criticism of these opaque procedures, see Jose E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873, 874-78 (2003).

## IV

THEORY AND ACTUAL PRACTICE:  
THE EXAMPLES OF THE E.U., THE WTO, AND THE U.N.

## A. The E.U.

The evolution of administrative law within the E.U. is well documented.<sup>36</sup> The lack of administrative law in the establishing treaties has been complemented by the case-law of the European Court of Justice (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 E.U. 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 E.U. administrative law because they feel they do not control the outcome of the processes within the E.U. However, not all governments have similar interests, and thus 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.<sup>37</sup>

In the E.U. context, administrative rules also gradually reflect a strong interest from within the member states to constrain the Union's decisionmaking 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 E.U. Constituencies seek to open up channels of communication as one of the ways to substitute for elections,<sup>38</sup> which, for example, was the basis for the German Constitutional Court's approval of Germany's ratification of the Maastricht Treaty.<sup>39</sup> In an integrated E.U., 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."<sup>40</sup> To

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36. Giacinto della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law*, 9 EUR. PUB. L. 563 (2003); Francesca Bignami, *Three Generations of Participation Rights in European Administrative Proceedings*, Jean Monnet Working Papers No. 11 (2003), at <http://www.jeanmonnetprogram.org/papers/03/031101.pdf>; see also Francesca Bignami, *The Administrative State in a Separation of Powers Constitution: Lessons for European Community Rulemaking from the United States* (Jean Monnet Working Papers No. 5, 1999), at <http://www.jeanmonnetprogram.org/papers/99/990501.html>.

37. Shapiro notes that "judicial activism in administrative review comes fairly easily to courts that are active in constitutional review." Shapiro, *supra* note 1, at 18.

38. On this trade-off see Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, Inst. Int'l L. Jus. Working Paper 2004/7 (on file with Law & Contemp. Probs.), at <http://www.iilj.org/papers/2004/2004.7%20Grant%20Keohane.pdf> (last visited Feb. 16, 2005).

39. Federal Constitutional Court's Decision Concerning the Maastricht Treaty, of October 12, 1993, 2BvR 92, 2134 (F.R.G.), translated in 33 I.L.M. 388, 420 (1994).

40. *Id.*

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."<sup>41</sup> 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. When 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. A legislative impasse has resulted that has enabled the organization's main adjudicative body, the Appellate Body (AB), to develop administrative law through its decisions.<sup>42</sup>

Since the creation of the WTO, NGO demand for more transparency in its decisionmaking has been growing. The norm-setting process within the WTO involves all member states and 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."<sup>43</sup> 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,<sup>44</sup> but their influence remains a matter of discretion for states who find it opportune to support NGOs in a selective, ad-hoc manner.<sup>45</sup>

Improved transparency in WTO decisionmaking 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

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41. *Id.*

42. For recent analyses of the AB's lawmaking capacities and their constitutional implications, see Weiler, *supra* note 5; Steinberg, *supra* note 5.

43. WTO General Council, *Guidelines for Arrangements on Relations with Non-Governmental Organizations, Decision adopted by the General Council on 18 July 1996*, WT/L/162 (July 23, 1996) (on file with Law & Contemp. Probs), available at [http://docsonline.wto.org/gen\\_home.asp?language=1&\\_1](http://docsonline.wto.org/gen_home.asp?language=1&_1).

44. See Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO*, 1 J. INT'L ECON. LAW 433 (1998). For an appraisal of the debate see Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L. L. 489, 504-09 (2001).

45. Eyal Benvenisti & George W. Downs, *Distributive Politics and International Institutions: The Case of Drugs* 13-15 (Tel Aviv University Law Faculty Working Paper No. 6, 2005) (on file with Law & Contemp. Probs.), at <http://law.bepress.com/cgi/viewcontent.cgi?article=1005&context=taulwps> (last visited Feb. 16, 2005).

meetings, including the Trade Policy Review meetings, in which members' policies are reviewed for conformity with WTO rules.<sup>46</sup> Other suggestions included the establishment of forums 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 issues.<sup>47</sup> 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.<sup>48</sup>

As might have been predicted by the insights elaborated above, the impasse at the political institutions of the WTO creates a power vacuum that the institution's adjudicative body, the AB, can exploit by formalizing the decisionmaking 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 thus focus on making all parties' submissions available to the public and on enabling the general public to observe the proceedings using various tools, including web-casting. 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.<sup>49</sup> In fact, it was the first—and so far the only—state that presented NGO briefs as an integral part of its brief

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46. WTO General Council, *General Council Informal Consultations on External Transparency, Submission from the United States*, WT/GC/W/413 (Oct. 10, 2000), available at [http://docsonline.wto.org/gen\\_home.asp?language=1&\\_=1](http://docsonline.wto.org/gen_home.asp?language=1&_=1) (on file with Law & Contemp. Probs.); WTO General Council, *WTO External Transparency, Informal Paper by Canada*, WT/GC/W/415 (Oct. 17, 2000) (on file with Law & Contemp. Probs.), available at [http://docsonline.wto.org/gen\\_home.asp?language=1&\\_=1](http://docsonline.wto.org/gen_home.asp?language=1&_=1); WTO General Council, *External Transparency, Communication from Norway*, WT/GC/W/419 (Nov. 2, 2000) (on file with Law & Contemp. Probs.), available at [http://docsonline.wto.org/gen\\_home.asp?language=1&\\_=1](http://docsonline.wto.org/gen_home.asp?language=1&_=1).

47. See in particular the Canadian paper, *supra* note 46.

48. See, e.g., WTO General Council, *WTO: External Transparency, Communication from Hong Kong, China*, WT/GC/W/418 (Oct. 31, 2000) (describing the position of Hong-Kong, China on this matter and elaborating on the distinction between external transparency and direct participation) (on file with Law & Contemp. Probs.), available at [http://docsonline.wto.org/gen\\_home.asp?language=1&\\_=1](http://docsonline.wto.org/gen_home.asp?language=1&_=1). In particular, the Hong Kong communication states, "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 politicizing the operations of the Organization due to sectoral and electoral interests, and undermine the rights and obligations of individual WTO Members." *Id.*

49. See *General Council Informal Consultations on External Transparency, Submission from the United States*, *supra* note 46.

while defending its environment-friendly, unilateral restrictions on trade against the complaint of India, Malaysia, Pakistan, and Thailand.<sup>50</sup>

The AB has shown a clear inclination to consider amicus briefs.<sup>51</sup> In 1998 it decided it had the authority to accept NGO briefs in the *Shrimp–Turtle* dispute, briefs that at least one litigant—the United States—incorporated into its own briefs.<sup>52</sup> 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 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.<sup>53</sup>

In a subsequent case the AB went even further. 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 November 8, 2000.<sup>54</sup> The AB received eleven applications for leave to file a written brief within the time limits specified. It “carefully reviewed 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.”<sup>55</sup>

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

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50. Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp–Turtle*] (concerning the U.S. prohibition on the importation of certain shrimp and shrimp products that were caught using methods considered by the US to adversely affect the population of sea turtles) (on file with Law & Contemp. Probs.), available at [http://docsonline.wto.org/gen\\_home.asp?language=1&\\_=1](http://docsonline.wto.org/gen_home.asp?language=1&_=1).

51. For analyses of the Panels’ and Appellate Body’s authority to consult amicus briefs, see Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in *THE EU, THE WTO, AND THE NAFTA* (COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW) 35, 48-51 (Joseph H.H. Weiler ed., 2000); Petros C. Mavroidis, *Amicus Curiae Briefs Before The WTO: Much Ado About Nothing*, Jean Monnet Papers No. 2 (2001), at <http://www.jeanmonnetprogram.org/papers/01/010201.html>.

52. See *supra* note 50.

53. Report of the Appellate Body, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, at 14 (June 10, 2000) (emphasis added) (on file with Law & Contemp. Probs.), available at [http://docsonline.wto.org/gen\\_home.asp?language=1&\\_=1](http://docsonline.wto.org/gen_home.asp?language=1&_=1).

54. Appellate Body Communication, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/9 (Nov. 8, 2000) (on file with Law & Contemp. Probs.), available at [http://docsonline.wto.org/gen\\_home.asp?language=1&\\_=1](http://docsonline.wto.org/gen_home.asp?language=1&_=1).

55. Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) (on file with Law & Contemp. Probs.), available at [http://docsonline.wto.org/gen\\_home.asp?language=1&\\_=1](http://docsonline.wto.org/gen_home.asp?language=1&_=1).



so. A few members—reportedly Pakistan and Egypt, supported by India and Malaysia<sup>56</sup>—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 November 22, 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.<sup>57</sup> Although 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 those strong political reactions, 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.<sup>58</sup>

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 its *Shrimp-Turtle* report, the AB elaborated, *inter alia*, on the meaning of the reference in Article XX of the 1994 General Agreement on Tariffs and Trade (GATT)<sup>59</sup> 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 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<sup>60</sup> as requiring the United States to grant foreign traders and countries their “due process” rights.<sup>61</sup> Following the report, the United States announced it would revise its procedures and offer foreign governments greater

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56. *US in Murky Waters Over Shrimp-Turtle*, BRIDGES WEEKLY TRADE NEWS DIGEST, Nov. 21, 2000 (on file with Law & Contemp. Probs.), at [http://www.newsbulletin.org/getbulletin.cfm?bulletin\\_ID=14&issue\\_ID=1685&browse=1&SID=](http://www.newsbulletin.org/getbulletin.cfm?bulletin_ID=14&issue_ID=1685&browse=1&SID=) (last visited Feb. 18, 2005).

57. See, e.g., Decision by the Appellate Body, *Statement by Uruguay at the General Council on 22 November 2000*, WT/GC/38 (Dec. 4, 2000) (on file with Law & Contemp. Probs.), available at [http://docsonline.wto.org/gen\\_home.asp?language=1&\\_=1](http://docsonline.wto.org/gen_home.asp?language=1&_=1).

58. Report of the Appellate Body, *European Communities—Trade Description of Sardines*, WT/DS231/AB/R, at 35-38 (Sept. 26, 2002) (on file with Law & Contemp. Probs.), available at [http://docsonline.wto.org/gen\\_home.asp?language=1&\\_=1](http://docsonline.wto.org/gen_home.asp?language=1&_=1). “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.” *Id.*

59. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994).

60. *Id.* at 1149.

61. See *Shrimp-Turtle*, *supra* note 50, at 72-75.

“due process” rights, including the right to challenge “preliminary” findings before they become definitive.<sup>62</sup>

It remains to be seen 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 decisionmaking procedures and individual states, the next step cannot be ruled out as impossible.

### C. The United Nations

Article 92 of the U.N. Charter provides that the ICJ 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 the functioning of the various organs of the U.N. 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 U.N. Administrative Tribunal in great detail.<sup>63</sup> The ICJ extolled the merits of the tribunal and approved its creation, finding implicit authority in the U.N. Charter.<sup>64</sup> However, it later signaled its disinclination to serve as the judicial review organ of the U.N.<sup>65</sup> 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,<sup>66</sup> the ICJ did not accept the

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62. Gregory Shaffer, *International Trade—WTO—Quantitative Restrictions—Environmental Protection—Endangered Species—U.S. Import Ban on Shrimp*, 93 AM. J. INT'L L. 507, 513 (1999).

63. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 I.C.J. 47 (July 13).

64. *Id.* at 57.

65. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, at 45 (June 21) (“Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned.”).

66. A sample of this rich debate includes Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1 (1996); Ken Roberts, *Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review*, 7 PACE INT'L L. R. 281 (1995); Vera Gowlland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in Light of the Lockerbie Case*, 88 AM. J. INT'L L. 643 (1994); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993); Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L L.J. 1 (1993); Thomas M. Franck, *The “Powers of Appreciation”: Who Is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519 (1992); Edward McWhinney, *The Inter-*

invitation to second-guess the legality of the Security Council's Resolution to impose sanctions on Libya.<sup>67</sup> It did accept the request of the General Assembly<sup>68</sup> to give an advisory opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,"<sup>69</sup> despite the Security Council's earlier resolution on "the situation in the Middle East, including the Palestinian question," to "remain seized of this matter."<sup>70</sup> But the ICJ went out of its way to emphasize the extraordinary circumstances of this singular situation so that its opinion would not be viewed as a challenge to the Security Council's authority and so set a precedent for future intervention.<sup>71</sup>

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 VII, had to decide on its own competence.<sup>72</sup> 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 contradiction [between the Resolution and] the Principles and Purposes of the Charter"<sup>73</sup>—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.<sup>74</sup>

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*national Court as Emerging Constitutional Court and the Co-ordinate UN Institutions (Especially the Security Council): Implications of the Aerial Incident at Lockerbie*, 1992 CAN. Y.B. INT'L L. 261.

67. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), 1992 I.C.J. 2, at 15 (Apr. 14) (Request For The Indication Of Provisional Measures, 14 April 1992).

68. G.A. Res. ES-10/L.16, U.N. GAOR, 10th Emerg. Spec. Sess., U.N. Doc. A/ ES-10/L.16 (2003).

69. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136 (2004).

70. S.C. Res. 1515, SCOR, 58th Sess., 4862d mtg., U.N. Doc. S/RES/1515 (2003).

71. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra note 69, at ¶¶ 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. . . .").

72. See, e.g., Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72, at ¶ 43 (Int'l Crim. Trib. Former Yugoslavia 1995) (on file with Law & Contemp. Probs.), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>. For criticism of the decision, see Jose E. Alvarez, *Nuremberg Revisited: The Tadic Case*, 7 EUR. J. INT'L L. 245 (1996).

73. *Dusko Tadic*, at ¶ 21.

74. *Slobodan Milosevic v. The State of The Netherlands*, 41 I.L.R. 86 (Dist. Ct. Civ. L. Div. 2001) (The Hague).

## V

## THE ICJ AND THE EVOLUTION OF INTERNATIONAL ADMINISTRATIVE LAW

The ICJ's other role is the settlement of interstate disputes. Operating in this role, 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.

Take for example the ICJ's 1997 decision in the *Gabcikovo-Nagymaros* case<sup>75</sup> between Hungary and Slovakia concerning the implementation of a treaty between the two countries on the utilization of the Danube River. That decision transformed international law on trans-boundary resources through its emphasis on the bilateral duty of parties to cooperate in the management of these resources. The decision reflects the ICJ's awareness of the literature analyzing the question involved in the case as one calling for the use of collective action, and its opinion is clearly 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.<sup>76</sup>

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]."<sup>77</sup>

Debates in recent years concerning institutional design reflect wide scholarly agreement that joint regimes for the management of trans-boundary natural resources could provide more structured and transparent treaty negotiation and decisionmaking processes.<sup>78</sup> Structured processes 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. Accordingly, 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 re-

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75. *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), 1997 I.C.J. 7.

76. *Id.* at 78.

77. *Id.* at 80.

78. See EYAL BENVENISTI, *SHARING TRANSBOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE* 131-55 (2002) (discussing the structure and procedure of institutions for trans-boundary ecosystem management).

gional cooperation over environmental protection.<sup>79</sup> At the same time, however, it is difficult to achieve global consensus on the need to develop international law to provide for such procedural rules. Thus, the framers of the 1997 Watercourses Convention failed to offer such rules despite the urgings of the various ILC rapporteurs and strong academic criticism.<sup>80</sup> It may be assumed that the ICJ was aware of this scholarly debate and of the global legislative impasse, and tried in its decision to move governments toward more structured management of their shared resources.<sup>81</sup> It is likely that the same motivation—to enhance regional cooperation and to 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, 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.<sup>82</sup> The ICJ should explore this opportunity cautiously: procedures must be carefully attuned to the existing balance of powers within each institution and must 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 these norms reflect the domestic balance of power. Similarly, the contents of administrative law will vary according to the specific relations between the dif-

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79. 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 points: “Recognizing that, in the field of the environment, improved access to information and public participation in decisionmaking 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 decisionmaking and to strengthen public support for decisions on the environment. . . .” *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, June 25, 1998, 38 I.L.M. 571.

80. Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT’L L. 384, 412-14 (1996).

81. BENVENISTI, *supra* note 78, at 185-86.

82. Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION* 85 (Eyal Benvenisti & Moshe Hirsch eds., 2004).

ferent 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. One must be sensitive to the specific political constraints and the factors influencing the balance of power within the institution and the balance of power among state parties to the institution. Any attempt to develop a unified administrative international law must remain acutely 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 here demonstrate an ability to exploit the "legislative impasse" experienced by the institutions in which they operate so as to impose constraints on the legislators' control of the decisionmaking process. Disagreements among the state parties of international organizations open the door for the judicial organs to exercise judicial activism. Such activism may have distributional implications, although these 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.