JAMES GALLAGHER

**GLOBAL ADMINISTRATIVE LAW: THE BASEL
COMMITTEE REVISTED**

LLM RESEARCH PAPER

LAWS 540: GLOBAL GOVERNANCE

FACULTY OF LAW

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI

2015

Table of Contents

I.	Introduction.....	3
II.	Global Administrative Law - Guiding Principles for International Organisations.....	3
III.	A POSTCARD FROM BASEL: BARR AND MILLERS VIEW.....	5
IV.	FROM BASEL I TO III.....	6
V.	GLOBAL ADMINISTRATIVE LAW RULE MAKING.....	7
VI.	BASEL COMMITTEE'S ADHERENCE TO GLOBAL ADMINISTRATIVE LAW.....	7
	A. ADMINISTRATIVE STRUCTURES.....	8
	B. TRANSPARENCY.....	9
	C. PARTICIPATORY ELEMENTS IN THE PROCEDURAL PROCESS.....	10
	D. PRINCIPLES OF REASONED DECISION-MAKING.....	11
	E. MECHANISMS OF REVIEW.....	12
VII.	THE BASEL COMMITTEE – ENHANCING ACCOUNTABILITY AND THE DEMOCRATIC PROCESS.....	14
VIII.	GLOBAL ADMINISTRATIVE LAW – WHERE TO NOW?.....	14
IX.	DO WE REALLY NEED GLOBAL ADMINISTRATIVE LAW?.....	15
X.	CONCLUSION.....	18

Abstract

Global Administrative Law is the branch of Global Governance that seeks to provide guidance and structures for decision-making bodies and international organisations that rely on co-operation between a range of international actors to achieve various objectives or implement policy agendas. In 2006, Michael S. Barr and Geoffrey P. Miller critically analysed the Basel Committee on Banking Supervision. Their article Global Administrative Law: The View from Basel sought to dispel the critiques that international-law making processes lacked democratic accountability and oversight by offering the Basel Committee's own processes as a model for international law-making with greater accountability and legitimacy.

This article examines the Basel Committee since Barr and Miller's 2006 article, in light of the global financial crisis and the development of 'Basel III'. It will seek to determine whether the processes described by Barr and Miller proved to be effective, and if Global Administrative Legal theory is appropriately applied to the Basel Committee. Finally, the article will ask whether the Basel Committee still serves as a model for international law-making with greater accountability and legitimacy, or if more work is needed to fulfil this model.

Word Count

The total word count of this paper (excluding abstract and footnotes) is approximately 7250 words.

Subject and Topics

Global Governance
Global Administrative Law
International Law

I. INTRODUCTION

With the growth of globalisation, an increasing number of organisations and networks have been established to regulate and control activity on a global scale. Whatever view is held about the place of globalisation, whether it widens or narrows the gap between the developed and developing world, a central question remains. As the world becomes increasingly connected, “[t]he role of law in development has become a key focus[.]”¹ One way that has been put forward to manage this development is through Global Administrative Law.

Global Administrative Law helps to describe the principles that could apply to a number of organisations operating in the international legal environment. Specifically, for this article’s purpose, it relates to “the structures, procedures, and normative standards of regulatory decision-making ... that are applicable to formal intergovernmental regulatory bodies [and] informal intergovernmental regulatory networks[.]”²

Barr and Miller, in “Global Administrative Law: The View from Basel” pointed out the perception that “the Basel Committee is perhaps the most important example of a transgovernmental regulatory network that exercises vast powers, seemingly without any form of democratic accountability.”³ Barr and Miller suggested that this view is not strictly true. They suggest that, upon closer examination, “a structure of global administrative law inherent in the Basel process ... could be a model for international rule-making with greater accountability and legitimacy.”⁴ This paper will pick up where Barr and Miller left off. It will examine whether the structures and processes described as representing a model of global administrative law could reasonably be described as such. Furthermore, it will examine how global administrative legal processes have affected the implementation and development of Basel III. Finally, it will ask what more could the Basel Committee do to implement the principles of global administrative law.

II. GLOBAL ADMINISTRATIVE LAW – GUIDING PRINCIPLES FOR INTERNATIONAL ORGANISATIONS

To understand the ways that the Basel Committee represents global administrative law in action, it is necessary to describe what constitutes global administrative law and why it is of vital importance for an organisation that exercises governance responsibilities on the international stage. Kingsbury et alia succinctly describe the core concepts of global administrative law. Kingsbury states that “[t]he concept of Global Administrative Law begins from the twin ideas that much global governance can be understood as

¹ Michael Barr & Reuven Avi-Yonah “Globalization, Law & Development: Introduction and Overview” (2004-05) Mich. J. Int’l L. 26 1 at 2.

² Benedict Kingsbury et alia “The Emergence of Global Administrative Law” (2005) 68 Law and Contemporary Problems 15 at

³ Michael Barr & Geoffrey Miller “Global Administrative Law: The View from Basel” (2006) EJIL 17 1 at 17.

⁴ Ibid.

administration, and that such administration is often organized and shaped by principles of an administrative law character.”⁵ Governance at the international level is rapidly changing and evolving as a result of the increase in the variety of networks that exercise governance, leadership, and agenda setting responsibilities at the international level. The variety of organisations and networks include regulation-by-non-regulation, formal self-regulation, private-public regulation, governance networks led by state officials, and official inter-governmental networks with direct governance powers.

Global Governance, and Global Administrative Law particularly are required to not only ensure uniform application of policy decisions by international actors, but also that decisions are reached in fair and transparent way. Kingsbury et alia acknowledge that as global regulators gained increasing power with significant impact upon a range of other actors, questions of legitimacy and democratic accountability surfaced. Global Administrative Law seeks to address these questions by encompassing:

“legal mechanisms, principles, and practices ... that promote or otherwise affect the accountability of global administrative bodies ... by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make.”⁶

An important distinction to make is that Global Governance includes actors, processes, and legal norms that are not simply confined to the traditional understanding of international law. Global governance encompasses actors at both international and domestic level, and this is why neither traditional international or domestic legal mechanisms provide effective regulatory and administrative processes.

Domestic administrative law is a well-established concept regulating the exercise of executive power by government officials. Put simply, global governance “is the very same has national governance, but it has to work on global level”⁷ On this interpretation, reasoning by analogy, domestic administrative legal processes of advance democracies arguably provides the model to applied to international rule-making bodies. With the increase in international organisations exercising regulatory activities, “the traditionally bright line distinctions between public/private and national/international in the global administrative space”⁸ have been blurred. To counter this blurring effect to maintain a sense of order, core principles of global administrative law emerge.

Core principles of global administrative law include “both classical administrative law conceptions of fair and legal decision-making and review procedures, and also more substantive ... ‘public law’ or ‘good governance’

⁵ Benedict Kingsbury et alia “Forward: Global Governance as Administration: National and Transnational Approaches to Global Administrative Law” (2005) *Law and Contemporary Problems* 68 3/4 at 2.

⁶ Ibid at 5.

⁷ János Hoós *Global Governance - Global Governance and Global Political Stability - Need for Global Governance and chance of its Development* (ed, Akadémiai Kiadó, Budapest, 2006) at 112.

⁸ Andrew Mitchell & John Farnik “Global Administrative Law: Can it bring Global Governance to account?” (2009) *Federal Law Review* 37 237, at 244.

values.”⁹ Throughout this paper, the working conception and standard that will be applied is that set out by Kingsbury, Krisch and Stewart. Global administrative law “covers all the rules and procedures that help ensure the accountability of global administration, and it focuses in particular on administrative structures, on transparency, on participatory elements in the administrative procedure, on principles of reasoned decision-making and on mechanisms of review.”¹⁰ These factors of (1) administrative structures, (2) transparency, (3) participatory elements in the procedural process, (4) principles of reasoned decision-making and (5) mechanisms of review form the basis of the papers analysis into how effective the Basel Committee incorporates and utilises global administrative law in its own governing and regulatory processes.

III. A POSTCARD FROM BASEL: BARR AND MILLERS VIEW

Global Administrative Law: The View from Basel analyses the ways that the Basel Committee provides a model for international law making with greater accountability and legitimacy while attempting to dispel the commonly-held perception that international decision-making bodies such as the Basel Committee lack democratic accountability and legitimacy. The Basel Committee provides an effective example of global administrative law in action because both critics and supporters of its processes can point to instances of either open and transparent processes, or closed-door secrecy.

Barr and Miller point to the ways that run counter to the claims of legitimacy and accountability of the Basel Committee, before highlighting why these concerns are overstated. Their article goes through the criticisms including the claim that the Basel Committee is a Central Bankers’ Club, “small, homogeneous, and insular.”¹¹ Specifically, that it insulated from any true form of political accountability for the decisions that it makes. A major critique of the Basel Committee is that because it “operates in many respects as an informal club, [its] activities ... may be opaque and difficult to explain ... [and this] informality ... serves to diminish transparency and may increase the potential for capture by special interests[.]”¹² However, Barr and Miller work to highlight the ways that the Basel process promotes accountability and legitimacy. This paper’s purpose is to pick up where Barr and Miller left off. Almost 10 years have passed since *The View from Basel* was published. Many developments, including the Global Financial Crisis served as crucial tests for the Basel Committee. With the development of the next Basel accord (known as Basel III) - it is time to revisit the Basel Committee to question whether it still remains a model for the global administrative legal processes, or whether necessity for efficient decision-making processes meant some of the crucial aspects of global administrative law have been neglected.

⁹ Ibid at 245.

¹⁰ Benedict Kingsbury, Nico Krisch & Richard Stewart “The Emergence of Global Administrative Law” (2005) *Law and Contemporary Problems* 68 3/4 at 28.

¹¹ Above, n 3 at 18.

¹² Above, n 3 at 19.

IV. FROM BASEL I TO III.

As more countries deregulated banking and financial services, the Basel Committee on Banking Supervision was formed in 1975 to appropriately advise national financial regulators on common capital requirements for internationally active banks. The Committee was established by the central bank governors of the G10 countries, (now G20) with its aim “to enhance financial stability by improving supervisory knowhow and the quality of banking supervision worldwide.”¹³ Crucially, any decision of the Committee has no legal force upon its members. Despite the lack of binding legal authority, the supervisory standards and guidelines that it does recommend are done so in the expectation that individual national authorities will implement them, which then become binding.

The Basel Committee implemented Basel I in response to the common practice of banks lending significantly more than their deposit bases. Regulation was determined necessary to lessen the impact of any losses that may be sustained by banks when “the precariousness of the mismatch [between lending and deposits] is exacerbated by defaulting borrowers or sharp declines in the quality of asset portfolios.”¹⁴ Basel I was comprised of three main parts. Firstly, the Committee standardised the minimum regulatory ratio for banks that were internationally active. Secondly, the Committee defined regulatory capital. Regulatory capital was divided into two tiers. “Tier 1 capital generally represents the highest quality of capital, such as common equity and some types of preferred stock.”¹⁵ Tier 2 was made up of lower-quality instruments, including “subordinated term debt and hybrid instruments.”¹⁶ Finally the Committee put in place a process for banks to calculate their regulatory capital ratios.

Since implementation, Basel I faced criticism and debate by commentators, which led the introduction of Basel II. Basel II’s development was “driven by the ongoing explosive growth in the financial market activities of banks and exciting developments in risk management practices.”¹⁷ In his article, Kevin Davis argues that Basel II should be viewed as a way to help improve the risk management practices of the banking sector. To improve on Basel I, Basel II was ‘built’ around what have been described as pillars. These three pillars were “minimum capital requirements, the supervisory review process, and market discipline.”¹⁸ The emphasis of both Basel I and Basel II was to enhance risk management by Banks to insulate them should a crisis emerge. The global financial crisis highlighted the deficiencies in Basel II, but emphasised the continued need for the Basel Committee and its processes.

¹³ Basel Committee on Banking Supervision “A brief history of the Basel Committee” (October 2014) < <http://www.bis.org/bcbs/history.pdf> > at 1.

¹⁴ Peter King and Heath Tarbert “Basel III: An Overview” (2011) Banking & Financial Services Policy Report, 30 5 at 1.

¹⁵ Ibid at 2.

¹⁶ Ibid.

¹⁷ Kevin Davis “Basel III” (2005) Banking and Financial Services, at 8.

¹⁸ Above n 14 at 2.

The next iteration of the Basel regulatory standards brings about key changes to the regulation of banking activities. These main changes impose a series of new requirements on banks and include the following: change in the definition of the assets that can be counted as regulatory capital; increased capital requirements that cover a wider range of risk types; a new leverage ratio restricting the amount of money banks are able to borrow; new rules on bank liquidity; new rules on risk management and governance - intended to improve the ways in which banks assess, monitor and control their risks; and enhanced disclosure requirements relating to the securitisation of assets. While the reforms proposed by the Basel Committee and put forward in the form of Basel III are of central importance to the banks and financial institutions that will be bound by them, it is the development and implementation process that this paper will consider, in light of global administrative legal principles.

V. *GLOBAL ADMINISTRATIVE LAW RULE MAKING*

The Basel Committee exercises power in a separate and distinct manner from other international organisations. Despite lacking binding legal authority, its decisions carry significant weight and influence. Global governance and Global Administrative Law are distinct from a traditional understanding of international law. From the brief description of Basel I and II, it should begin to be clear that the Basel Committee deals with highly technical and specific areas that require specialist knowledge to implement policy. The specialist knowledge and expertise required consequently means that the decisions made by the Basel Committee are, in the majority, only understood by those parties that have direct interest in their application.

In particular for the Basel Committee, global administrative law looks behind the technical aspects of its decisions and assesses the processes used to reach conclusions. One of the key criticisms levelled at the Basel Committee is that it lacks accountability and transparency. Despite having no binding force, the decisions taken by the Basel Committee arguably constitutes 'law'. Furthermore, because of the wide-ranging impact Basel Committee policies have, it should be obvious of the need for global administrative law to ensure that decisions are made in an open, transparent, and accountable way.

As global governance marks a departure from traditional international law, there is disagreement about what law is. Benedict Kingsbury seeks to clarify the concept of global administrative law, by proposing that "an extended positivist concept of law should be adopted."¹⁹ A positivist approach towards Global Administrative Law seeks to establish a clear basis of rules that would allow institutions such as the Basel Committee to set as fundamental procedural rules.

VI. *BASEL COMMITTEE'S ADHERENCE TO GLOBAL ADMINISTRATIVE LAW*

¹⁹ Benedict Kingsbury, "The Concept of 'Law' In Global Administrative Law" (2009) EJIL 20, at 29.

Barr and Miller highlighted what they saw as administrative law mechanisms utilised by the Basel Committee. They refer specifically to notice and comment rule-making by the Basel Committee as a key way it promotes accountability and legitimacy, and reduce criticisms of any perceived democratic deficit. As Barr and Miller acknowledge, the Basel Committee “has become more accountable over time.”²⁰ The question is, has this increased accountability continued or was it neglected in favour of speed and efficiency in the face of crisis? The Basel Committee states that in order for the global banking system to gain greater resilience, a consistent approach in the adoption and implementation of Basel standards is critical.

Benvenisti argues that transnational institutions, such as the Basel Committee “would be capable of responding to a great number of global collective action problems in ways that ... promote efficiency ... democracy and social justice.”²¹ Through the global administrative legal standards put forward by Kingsbury et alia, we can determine whether the Basel Committee has the ability to respond to global problems in ways that not only promote efficiency but also enhance democracy and social justice.

A. ADMINISTRATIVE STRUCTURES

The first standard to be considered will be that of the administrative structures that are in place to provide proper oversight and governance of the policy and regulatory decisions made by the committee. At the domestic level, administrative structures and division of powers are clearly set out, often by constitutional convention, to ensure proper processes are followed to reach a democratically acceptable outcome. Benvenisti proposes that to provide for a structured decision making process in transnational institutions, that also enhances the accountability of domestic institutions that implement decisions, requires three essential democratic tools. Firstly, to counterbalance the lack of democratic oversight at the Basel level, international organisations must have improved processes to provide national organisations with relevant information, so voters have the ability to scrutinise. Secondly, Benvenisti argues that if transnational institutions provide open access to their procedures, this “gives domestic populations an opportunity to influence regional and global policies that affect their interests ... provid[ing] a voice without a vote.”²² Finally, the third democratic tool to enhance administrative structures in a democratic way recognises the necessity to insulate transnational organisations from politics.

The Basel Committee is presently governed by its Charter of 2013²³ that sets out the administrative and governance structure of the greater organisation. It is comprised of four main groups. These are (1) the Committee, (2) Working

²⁰ Above, n 3 at 24.

²¹ Eyal Benvenisti “Exit and Voice in the Age of Globalization (1999) 98 Michigan Law Review 167 at 202.

²² Ibid at 208.

²³ Bank for International Settlements, Basel Committee on Banking Supervision Charter, January 2013.

groups, (3) the Chairman, and (4) the Secretariat. The Charter clearly sets out the responsibilities of each group that comprises the Basel Committee.

Importantly, the Charter provides for a number of key administrative tasks, including the functions of the Committee, the number of meetings that must be held, and who may be represented at meetings. Clause 8.5 provides that “decisions of public interest shall be communicated through the BCBS website.”²⁴ A further example of a clear administrative structure is found in the Charter where the standards, guidelines and sound practices are defined, so that expectations upon members is clear. What the Charter demonstrates is that the range of bodies affected by decisions of the Committee, states, individuals, firms, private organisations, all have the ability and opportunity to partake in the decision-making stages.

The Committee is also supported by the Secretariat of the Bank for International Settlements. This is staffed by professional staff who provide support the Committee in range of ways including the effective flow of information, support inter-institutional cooperation and maintain records. To a significant extent, the advanced administrative structures in place shows a high degree of commitment by the Committee to demonstrating an open and transparent regulatory process. Procedural transparency such as this is unusual amongst international and intergovernmental networks, Kingsbury et alia acknowledge that this type of openness is “a striking development for regulatory networks whose informality is often their main advantage.”²⁵

B. TRANSPARENCY

Lack of transparency of the Committee’s processes was one of the main criticisms during Basel I. Through the development of Basel II, and now Basel III, the Committee has actively worked to increase transparency of the regulatory processes. With increased accessibility to information thanks to growing use of the internet, the Basel Committee’s processes are more transparent than ever. The Basel Committee acknowledges that “[c]onsistency in the adoption and implementation of Basel standards is critical to improving the resilience of the global banking system, promoting public confidence ... and encourage a predictable and transparent regulatory environment for internationally active banks.”²⁶ There has been an effort by the Basel Committee to demonstrate an open and transparent process throughout the various regulatory stages. A further requirement on the Committee is that it must provide regular updates to G20 members on the implementation process.

To ensure an open and transparent approach is maintained, the Basel Committee adopted the Basel III Regulatory Consistency Assessment Programme (RCAP)²⁷.

²⁴ Ibid, at 4.

²⁵ Above, n 10 at 35.

²⁶ Bank for International Settlements, Implementation of Basel standards – Regulatory Consistency Assessment Programme (RCAP) <www.bis.org/bcbs/implementatation.htm?m=3%7C14%7C587>.

²⁷ Banking Committee on Banking Supervision, Basel III Regulatory Consistency Assessment Programme, October 2013.

The RCAP has two primary goals. The first is to monitor the adoption of Basel III standards, and the second is to assess the consistency and completeness of the adopted standards. As a result of the highly specialised nature of the work, “the RCAP assessments are designed as ‘peer reviews’ undertaken by technical experts from member jurisdictions.”²⁸ During the assessment process, member states are graded on a compliance scale. The compliance scale of domestic regulatory frameworks ranges from compliant, largely compliant, materially non-compliant, or non-compliant. These standards are applied to all member states, and this guarantees a standardised approach to the implementation of Basel standards.

When considering the steps the Basel Committee has taken to increase transparency of its own processes, this needs to be considered in light of global administrative legal norms. It is especially important to consider whether these steps go far enough to provide for adequate transparency of processes. Despite obvious efforts from the Basel Committee to move towards greater transparency, there are trade-offs that must be taken into account. For example, it is suggested that, “transparency can mean populism triumphs over justice.”²⁹ This demonstrates the distinction that must be drawn between situations of closed-door negotiations and complete openness where the technical requirements of regulations are watered down by interest groups.

Arguably, the decision-making stages of the Basel Committee provide an excellent example of public law being adapted for the global transgovernmental space. It is of an advantage to the Basel Committee that it is not formally constituted, or bound by international treaties. This provides greater flexibility for it to meet the requirements of the member states.

C. PARTICIPATORY ELEMENTS IN THE PROCEDURAL PROCESS

Participation is central to democracy. While participation is not, and arguably cannot, be universal for organisations such as the Basel Committee, it is vital for those who are most impacted by its decisions to have appropriate opportunities to participate in the procedural process. The Charter provides a starting point for how the Committee ensures that participation is a central aspect of the procedural process. Clause 2 of the Charter states that in order for the Basel Committee to achieve its mandate of strengthening the regulation, supervision and practices of banks worldwide, it will undertake a number of specific activities. Specific to participation, the Basel Committee requires the “exchanging information on developments in the banking sector and financial markets[,] and shares “supervisory issues, approaches and techniques to promote common understanding and to improve cross-border cooperation[.]”³⁰ Clause 5(d) of the Charter also requires that members of the Committee “actively contribute to the development of [Basel] standards, guidelines and sound practices[.]” Importantly, participation and involvement of non-Committee

²⁸ Ibid at 3.

²⁹ Nico Krisch & Benedict Kingsbury “Introduction: Global Governance and Global Administrative Law in the International Legal Order” (2006) 17 EJIL at 4.

³⁰ Above, n 23.

members is encouraged. The participation of non-members is also a key aspect of the 2013 Charter. Non-member authorities are consulted widely on the Basel Committee's activities. There are five methods that encourage and foster greater participation amongst global regulators of countries that are not members. The Basel Consultative Group is a forum that deepens the Basel Committee's engagement with supervisors around the world by facilitating dialogue with non-members on Committee initiatives. A biennial meeting, known as the International Conferences of Banking Supervisors, is held to provide a venue for supervisors to discuss issues of importance and interest. Participation in Committee activities is also encouraged by allowing non-member authorities to act as observers in the Basel Committee's various groups aides in policy development undertaken by the Committee.

Another form of participation in the Basel Committee process is through the Financial Stability Institute. This body works to assist supervisors around the world with the implementation of sound prudential standards. It also keeps participants updated on the work of the Basel Committee by sharing supervisory practices and concerns, and by establishing and maintaining strong professional relationships. The final method of participation under the Charter is through the Committee supporting regional groups of banking supervisors. These regional groups are supported by the Bank of International Settlements secretariat and provide another forum for groups to exchange ideas and obtain feedback on the Basel Committee's work.

Under domestic law administrative law recognises the rights of individuals to have their views heard and have any information considered before decision makers reach a conclusion. While still limited in use, there is increasing opportunity for participation to occur in relation to administrative actions taken by intergovernmental bodies. For comparison, the International Olympic Committee's World Anti-Doping code applies normative principles of administrative law "to constrain administrative decision-making in a private institutional setting."³¹ Such normative principles exist within the Basel Committee's participatory processes and demonstrate how it is a very open and comparatively democratic un-elected transgovernmental institution.

D. PRINCIPLES OF REASONED DECISION-MAKING

Critically for the Basel Committee, because of the complex nature of its work, in order to meet global administrative legal standards, it must adhere to principles of reasoned decision-making. This ensures some degree of certainty behind decisions and provides assurances to interested countries about how and why decisions have been reached.

Kingsbury et alia state that the practice of providing reasons for administrative decisions in international law is "relatively thin."³² However, the practice of providing decisions is slowly growing. Kingsbury points to the World Trade

³¹ Above, n 10 at 38.

³² Above, n 10 at 39.

Organization (WTO) decision in the *Shrimp-Turtle* case as providing a starting point for establishing principles of reasoned decision making in global administrative law. The *Shrimp-Turtle*³³ case was a dispute between the United States and India, Malaysia, Pakistan, and Thailand about the United States' import prohibition of certain shrimp and shrimp products. The WTO Panel was convened to examine a prohibition on the importation of certain shrimp and shrimp products could be justified. The relevant regulation prohibited the importation of shrimp that were harvested using commercial fishing techniques that had the potential to adversely affect sea turtles.

Of concern was that the United States appeared to favour certain states in providing exceptions to the prohibition. The application of the policy, "through the implementing guidelines together with administrative practice ... resulted in other differential treatment among various countries desiring certification [to export shrimp to the United States]."³⁴ The WTO Appellate body found that the certification processes followed by the United States appeared to be "singularly informal and casual, and ... conducted in a manner such that these processes could result in the negation of rights of Members [of the WTO]."³⁵ It also held that the way that the United States enforced its policy provided no certainty that it was being applied in a fair and just manner, essentially denying "basic fairness ... due process ... and [Members] are discriminated against ... those Members which are granted certification."³⁶ In conclusion, the WTO held that if basic processes that were inconsistent with minimum standards for transparency and procedural fairness would be in breach of treaty obligations.

Taking the *Shrimp-Turtle* case as a benchmark, there are fundamental elements necessary for reasoned decision-making as understood by administrative law to be properly implemented. The Basel Committee arguably meets the standard of providing reasoned decisions for the implementation of Basel III. Where new capital adequacy standards are proposed, they are posted on the Committee's website. Feedback and comments are invited from the public and interested parties. Following opportunities for comment by the public, the Committee will provide reasons for any subsequent revised drafts.

E. MECHANISMS OF REVIEW

An important aspect of administrative law is for decision-making organisations to provide the appropriate mechanisms and processes in place for review of decisions to take place after decisions have been made.

This paper has already briefly described the main changes to be brought in under the changes from Basel III. These are to be phased in progressively from 2011 until 2019. As with any significant change in regulation, there are concerns about how the impact these reforms will have. Of interest is what

³³ United States – Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, World Trade Organization Appellate Body.

³⁴ Ibid at 20.

³⁵ Above, n 33 at 22.

³⁶ Ibid.

mechanisms are in place for members of the Committee and related parties to ask for review of the changes already made, and whether there has been any changes as a result of review, if any.

The Basel Committee maintains a large internet forum where its proposals are published and provides anyone who wishes to the opportunity to comment. Following initial publication and redrafting the Committee offers reasons for changes in each subsequent draft. As a result of the extensive pre implementation of regulation stages that the Basel Committee conducts, review mechanisms are to some extent, less obvious. Of importance is again, how the Basel Committee responded to the Global Financial Crisis. This demonstrated the need to review the Basel Standards, and began the review process. A number of faults were identified in Basel II. Basel II's failures during the Global Financial Crisis arguably served as a necessary mechanism of review, because of the obvious need for better protections for the global financial institutions.

Helpfully to support the idea that there is some form of review mechanism, it is acknowledged that "[u]nfortunately, financial regulation is far from a scientific enterprise. New regulations often respond to the last crisis rather than forestalling the next one."³⁷ Adoption of Basel II norms resulted in several mistakes being made by regulators across the globe. This included placing heavy emphasis on capital levels to the exclusion of other financial concerns. Therefore, banks were required to hold higher levels of capital. The recent Global Financial Crisis also showed that banks lacked sufficient liquidity, meaning banks could not meet immediate cash needs. Levinson points out that one of the main reasons why stronger liquidity rules were not in place was "because Basel II did not mandate them."³⁸ Another failure of Basel II was instructing national regulators to determine the amount of capital individuals banks were required to hold was based on the level of risk associated with the business that it conducted.

These examples provide only some insight into the range of issues faced by Basel II during the Global Financial Crisis. It is how the Basel Committee responded to these failures to begin an appropriate review of its procedures is what is important under a Global Administrative Law approach. The failures exposed in Basel II directly resulted in Basel III. Although writing before Basel III was formalised, Levinson states that various proposals were discussed including "requiring banks to maintain additional capital, limiting bankers' pay, supervising big transnational insurance groups, and recommending ... subprime mortgage securities [be held by banks] rather than selling them all to investors."³⁹ He acknowledges that while these proposals, had they been in place, may have avoided the last financial crisis. Due to the uncertain nature of international financial regulation, it must be remembered that "[n]o one can say with certainty what the best rules are."⁴⁰ However, as the Basel Committee has

³⁷ Marc Levinson "Faulty Basel, Why More Diplomacy Won't Keep the Financial System Safe" (2010) 89 Foreign Affairs 3 at 81.

³⁸ Ibid.

³⁹ Above, n 37 at 86.

⁴⁰ Ibid.

shown, when required, it is able to respond and adapt to the changing needs of the financial sector.

Additionally, the Basel Committee issues regular progress reports on the adoption of the Basel regulatory framework by Basel Members. These progress reports provide a high-level snapshot of the progress in adopting all of the Committee's regulatory standards. For example, the eighth progress report was published and reflects on progress as at the end of March 2015. The progress reports allow the Committee to monitor implementation in individual member states. This process provides a consistent and timely internal review mechanism to ensure regulatory policies are being implemented in line with the Committee's expectations.

VI. THE BASEL COMMITTEE – ENHANCING ACCOUNTABILITY AND THE DEMOCRATIC PROCESS

Criticism of bodies such as the Basel Committee centre around the lack of democratic accountability. The methods described above seek to dispel the myth that unelected international governing bodies bear no resemblance to comparable organisations at the domestic level. Accountability is central for both reputation, and the Basel Committee's ability to fulfil its mandate. The Basel Committee, as one of many international regulatory institutions on the global level is highly accountable to its own constituents. It is recognised that despite the acknowledgement that such institutions are in fact accountable.

As Krisch points out international governance organisations do not have “an absolute accountability ‘deficit’, to be overcome by improving accountability mechanisms, [r]ather, the problem is that these institutions are often accountability in the wrong way ... [and to] the wrong constituencies.”⁴¹ Institutions such as the World Bank represent a powerful global body that is tasked with important governing responsibilities that have direct effect on states, organisations, and individuals alike. The requirement for accountability of international organisations leaves the question of to whom institutions should be accountable to. This problem is demonstrated by looking at the existing power structure of the World Bank, with a focus on western developed states exercising the majority of control functions. Should a change in the power structures change, and “[i]f [it] allowed for stronger representation and participation of developing countries and their citizens, the funders that so far dominate the Bank would lose influence.”⁴² A similar problem exists for the Basel Committee, because influence sits predominately with its members, the G-20. However, this is mitigated by the openness of the Committee to include non-members in its regulatory process.

As demonstrated in the previous section, the Basel Committee has taken a number of steps to enhance accountability and its own democratic processes.

⁴¹ Nico Krisch “The Pluralism of Global Administrative Law” (2006) 17 EJIL 1 At 250.

⁴² Ibid at 251.

While it may still be some way off becoming a truly democratic institution, the steps that it takes to ensure opinions and views are heard and considered is an important step towards greater democratisation.

VII. *GLOBAL ADMINISTRATIVE LAW – WHERE TO NOW?*

In theory, the processes followed by the Basel Committee have created an institution that is arguably one of the best models of global administrative law in action. It represents the normative dimensions of global administrative law. Importantly, institutions such as the Basel Committee helps to focus the democratisation of global administration by focusing on “Controlling the periphery to ensure [that regimes are] building meaningful and effective mechanisms to control abuses of power and secure rule of law values.”⁴³ The on going development of Global Administrative Law depends on the question of “what we consider democracy to be, what sort of concept we think it is, and what function we see it performing.”⁴⁴

Susan Marks questions the very role of democracy as an integral part of global administrative law. Marks argues that “[o]nly by moving to the level of principles can we adequately explain and evaluate democratic claims [of global governing institutions].”⁴⁵ The development of global governance needs to be considered in light of the development of democracy in general. For national democracies to succeed in today's increasingly globalised world, nation-states “depend inescapably on the prospects of global democracy.”⁴⁶ For enhanced democracy to succeed on the global stage, recognition of the possibilities for global administrative law take the place of strict needs for enhanced democracy. Global administrative law provides a powerful tool to contribute to the democratisation of global governance in general.

VIII. *DO WE REALLY NEED GLOBAL ADMINISTRATIVE LAW?*

Anne-Marie Slaughter helpfully highlights some of the main concerns that have been raised in relation to accountability issues faced by transgovernmental institutions and organisations. Slaughter highlights the traditional understanding of international organisations based on the idea that “if they are duly established by treaty, with the attendant national ratification procedures, they exercise only delegated powers ... and do not raise any formal accountability concerns.”⁴⁷ On this traditional model of international organisations, institutions had clearly defined areas of responsibility and a clear mandate about what was to be achieved. Furthermore, Slaughter states that “[t]ransgovernmental networks within the framework of executive agreements are often less visible than transgovernmental networks within established

⁴³ Above, n 2 at 51.

⁴⁴ Susan Marks, “Naming Global Administrative Law” (2004-5) 37 N.Y.U Journal of International Law and Politics 995, at 1000.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Anne-Marie Slaughter “Global Government Networks, Global Information Agencies, and Disaggregated Democracy” 24 Michigan Journal of International Law 1041, at 1054.

institutions.”⁴⁸ The problem that Slaughter is referring to refers to the fact that institutions like Basel, that are created by governments, outside usual treaty regimes are often subject to far less requirements around accountability than comparable institutions.

Armin von Bogdandy argues that a greater understanding of global administrative law helps to understand the phenomenon that is global governance more generally. As domestic public principles inform international administrative law, a comparative approach is desirable. Von Bogdandy recognises that while “the principles of international public authority cannot be simple copies of domestic principles because international institutions are different: the domestic analogy, based on the assumption that an exercise of international authority parallels an exercise of domestic authority in all essential elements, [is not convincing].”⁴⁹ The European Union, (EU) for von Bogdandy provides “the most important application of public law principles beyond the nation state.”⁵⁰ However, he reasons that the EU, as an example of integrated domestic and international public law mechanisms, is unique and not transferrable.

This reasoning is based on the quasi-federal makeup of the EU. The EU has developed public law powers as a result of the universally binding Treaty on European Union, as implemented by the Lisbon Treaty. The EU, he argues, is not a body where the global doctrine of principles around administrative law can apply. This is because the EU “is rooted in its territory and citizens, on a judiciary endowed with strong competences, and on a largely parliamentary legislature.”⁵¹ He reinforces the uniqueness of the EU in the international legal order by citing the role of the European Court of Justice, and the basis of the EU’s integrated legal order, as contained under the EU’s founding treaties.

Perhaps in one of von Bogdandy’s most decisive statements on the status of global administrative law, he acknowledges that at times global administrative law “is in some respects too broad [it is also] too narrow in others [and] of little use; useful only to investigate principles which deal exclusively with administrative activity.”⁵² However, he does recognise the importance of many international normative features, and acknowledges the role that international principles play in administrative procedures. In completing his assessment of global administrative law, he supports the general idea that there should be both a theoretical and doctrinal framework for global administrative law to provide linkages between international, supranational and national public law principles.

A unified set of principles under the global administrative law banner, as argued by von Bogdandy, will not succeed at this point because there is a “lack of an

⁴⁸ Ibid at 1055.

⁴⁹ Armin von Bogdandy “General Principles of International Public Authority: Sketching a Research Field” (2010) 9 German Law Journal 1909-1938 at 1919-1920.

⁵⁰ Ibid at 1920.

⁵¹ Ibid.

⁵² Ibid.

elaborate doctrine of sources as well as the lack of a doctrine of direct effect.”⁵³ In this he refers to the EU legal principle of direct effect of Union legislation upon member states, and how this is then enforceable by both national and Union level judiciaries. As there is no comparable application and enforcement power for global administrative law demonstrates the difficulty advocates of the theory pose in its development. This critique by von Bogdandy is specific to the global administrative legal theory, but as already stated; there are concerns that global governance generally suffers from legitimacy problems that cannot effectively be overcome.

Critics of global governance and the international institutions operating with quasi-law making powers attack these institutions from both a normative and descriptive perspective. Normatively, the questions arise around the validity of decisions made by such international institutions, and descriptively, around how society in general accepts decisions and orders dictated by unelected organisations. Critically for the Basel Committee, the democratic deficit argument is difficult to completely remove. International economic institutions, such as the Basel Committee are necessary because they help to facilitate growth and promote better integration of the global economy. Due to the success of liberalism, rapid growth occurred throughout developed western nations. However, the “paradox of post-war liberalism is ... that it has ruined its own shock-absorbers [and limited the] capacity of an individual nation-state to intervene into market processes in order to cushion the undesired effects [of international economic policy decisions].”⁵⁴ While the Basel Committee does address many of the issues about the impact market forces have on individual states, through its banking regulations, the fact remains is that once decisions have been made, member states are bound by these, and as Basel I and II demonstrated, problems do emerge that individual states can do little to mitigate.

As more international institutions are formed, and as these institutions produce more regulations, the need for democratic decision-making processes cannot be ignored. The traditional model of nation-states as the main and most important international decision makers is being eroded. The increased intrusion into the decision-making field has also resulted in the undeniable fact that “new international institutions ... are answerable to a few governments, but not to all the societies into which they intrude, and certainly not to a transnational society.”⁵⁵ The Basel Committee has taken significant steps in addressing and mitigating these concerns through its more open consultation process. However, it is still only answerable to a select group, while ‘intruding’ upon a great many other states, organisations, and individuals.

The Basel Committee has taken significant steps since the global financial crisis and the implementation of Basel III began to increase its accountability mechanisms and processes but fails to take into account the views of developing

⁵³ Above, n 49 at 1921.

⁵⁴ Michael Zürn, “Global Governance and Legitimacy Problems” (2004) 39 *Government and Opposition* 2, at 266.

⁵⁵ *Ibid* at 275.

countries. Despite all its openness, when it comes to key decisions the Basel Committee meetings are attended by the central bank Governors of G-20 member states, to the exclusion of states to which these decisions relate. Such meetings “are increasingly focused on emerging-market developments [but] the perspective is that of the impact on G-10 economies.”⁵⁶ Developing states are expected to adhere and implement these decisions without any meaningful input.

There are some concerns that implementation of Basel III will be difficult for non G-20 countries to implement. The reforms put forward under Basel III have been targeted at large banks in Europe and the United States. For banks outside of the developed states it is envisaged that “[s]ome of these things are going to have unintended consequences ... for parts of the world where the financial system is less developed.”⁵⁷

IX. CONCLUSION

Global Governance seeks to shift the focus of international law away from the traditional understanding of international law. It is a space occupied by not only states but also a wide-variety of actors across a range of policy areas. Global administrative law is the branch of global governance that seeks to apply standards of regulatory structures that will enhance the democratic nature of these international institutions.

The Basel Committee has undergone almost constant development since Basel I came into force. Comparatively, the Basel Committee provides an example of an unelected institution that is exercising quite significant regulatory powers without any real democratic oversight. Barr and Miller, writing in 2006 acknowledged that “[i]nternational administrative law cannot replace domestic measures of accountability [but it] can act to enhance domestic administrative law and help to strengthen the hand of reformers seeking to improve transparency.”⁵⁸ In the nearly ten years since publication, the Basel Committee has developed clear processes and opportunities for those not involved in the decision-making process to contribute, notably the notice and comment procedure.

Despite advances in its processes and its increased openness and monitoring of the implementation of Basel III, it still lacks true democratic accountability. However, as this paper has shown, global administrative law helps to explain the advances that the Committee has made in reducing the democratic deficit of the organisation to a point where clear process are identifiable that contribute to the enhancing of the Basel Committee’s democratic processes.

⁵⁶ Roman Grynberg and Sacha Silva “Harmonization without Representation: Small States, the Basel Committee, and the WTO” (2006) 34 World Development 7 at 1225.

⁵⁷ Brooke Masters “Basel III will ‘damage developing countries’” (June 14, 2012) The Financial Times.

⁵⁸ Above, n 3 at 46.

Bibliography

Articles Journal Articles

Barr, Michael & Avi-Yonah, Reuven "Globalization, Law & Development: Introduction and Overview" (2004-05) Mich. J. Int'l L. 26 1.

Barr, Michael & Miller, Geoffrey "Global Administrative Law: The View from Basel" (2006) EJIL 17 1 at 17.

Benvenisti, Eyal "Exit and Voice in the Age of Globalization (1999) 98 Michigan Law Review 167 at 202.

Davis, Kevin "Basel III" (2005) Banking and Financial Services.

Grynberg Roman and Silva Sacha "Harmonization without Representation: Small States, the Basel Committee, and the WTO" (2006) 34 World Development 7.

Kingsbury, Benedict "The Concept of 'Law' In Global Administrative Law" (2009) EJIL 20.

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

Kingsbury, Benedict, Krisch, Nico, Stewart, Richard B, and Wiener, Jonathan B. "Forward: Global Governance as Administration: National and Transnational Approaches to Global Administrative Law" (2005) Law and Contemporary Problems 68 3/4.

Kingsbury, Benedict, Krisch, Nico & Stewart Richard "The Emergence of Global Administrative Law" (2005) Law and Contemporary Problems 68 3/4.

Krisch, Nico "The Pluralism of Global Administrative Law" (2006) 17 EJIL 1.

Krisch, Nico & Kingsbury, Benedict "Introduction: Global Governance and Global Administrative Law in the International Legal Order" (2006) 17 EJIL.

Hoós, János *Global Governance - Global Governance and Global Political Stability - Need for Global Governance and chance of its Development* (ed, Akadémiai Kiadó, Budapest, 2006).

Levinson, Marc "Faulty Basel, Why More Diplomacy Won't Keep the Financial System Safe" (2010) 89 Foreign Affairs 3.

Masters, Brooke "Basel III will 'damage developing countries'" (June 14, 2012) The Financial Times.

Marks, Susan "Naming Global Administrative Law" (2004-5) 37 N.Y.U Journal of International Law and Politics 995.

Mitchell, Andrew & Farnik, John "Global Administrative Law: Can it bring Global Governance to account?" (2009) *Federal Law Review* 37 237.

Slaughter, Anne-Marie "Global Government Networks, Global Information Agencies, and Disaggregated Democracy" 24 *Michigan Journal of International Law* 1041.

von Bogdandy, Armin "General Principles of International Public Authority: Sketching a Research Field" (2010) 9 *German Law Journal* 1909-1938.

Zürn, Michael "Global Governance and Legitimacy Problems" (2004) 39 *Government and Opposition* 2.

Other sources

Bank for International Settlements, Basel Committee on Banking Supervision Charter, January 2013.

Banking Committee on Banking Supervision, Basel III Regulatory Consistency Assessment Programme, October 2013.

Basel Committee on Banking Supervision "A brief history of the Basel Committee" (October 2014) < <http://www.bis.org/bcbs/history.pdf>>.

Bank for International Settlements, Implementation of Basel standards – Regulatory Consistency Assessment Programme (RCAP) <www.bis.org/bcbs/implementation.htm?m=3%7C14%7C587>.

King Peter and Tarbert Heath "Basel III: An Overview" (2011) *Banking & Financial Services Policy Report*, 30 5.

United States – Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, World Trade Organization Appellate Body.